

# FOCUS

## CORPORATE RESPONSIBILITY



August 2007

## LEGISLATION TO CURE THE 'CANCER OF CORRUPTION' IN INTERNATIONAL TRADE

In the wake of the Cole Report on the UN Oil-for-Food Programme, the Commonwealth Government introduced the International Trade Integrity Bill 2007, which seeks to strengthen Australia's response to breaches of UN sanctions and bribery of foreign officials by Australian companies and individuals. On 1 August 2007, the Senate Legal and Constitutional Affairs Committee released a report recommending that the Bill be passed. Partner Malcolm Stephens and Lawyer Sarah Hine report on what impact this legislation, if passed, will have on Australian companies.

New federal legislation is aimed at strengthening Australia's response to breaches of UN sanctions

### HOW DOES THIS AFFECT YOU?

- The Bill introduces new offences and severe penalties that are relevant to all Australian companies and individuals who trade or do business with countries, organisations or individuals that may be subject to UN sanctions, including counter-terrorism financing sanctions.
- An appropriate compliance programme is essential for anyone involved in international trade or business.

### BACKGROUND

The Commonwealth Government has responded to a number of recommendations made by Terence Cole QC in the Report of the Oil-for-Food Inquiry (the **Cole Report**)<sup>1</sup> by introducing the International Trade Integrity Bill 2007 (the **Bill**). The Bill, which has been approved by the Senate Legal and Constitutional Affairs Committee (and is therefore likely to be passed in its current form), is a strong response to the recommendations and proposes several new criminal offences and severe penalties for breaching UN sanctions. If passed in its current form, the Bill will:

1. Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme.



- greatly increase penalties for contraventions of Australian laws that give effect to UN sanctions, particularly for corporations;
- provide that any contravention of such laws by corporations is a strict liability offence;
- introduce a new criminal offence of providing false or misleading information relating to sanctions;
- invalidate any permission granted on information that is false or misleading;
- require the retention of documentation related to permit applications and compliance with permit conditions for five years; and
- provide new information-gathering powers for agencies that administer sanctions.

The Bill will also clarify the circumstances in which a payment to a foreign public official will be a bribe (and therefore an offence) or a 'facilitation payment' (and therefore tax deductible).

## UN SANCTION ENFORCEMENT LAWS

The Bill will amend the *Charter of the United Nations Act 1945* (the **Act**) to provide much harsher penalties for corporations and individuals that contravene Australian laws which give effect to the decisions of the UN Security Council. Currently, the Act allows the Governor-General to make regulations giving effect to UN sanctions that may prescribe penalties of no more than 50 penalty units (\$5500) for offences. There are currently 13 such regulations in force imposing sanctions against countries including North Korea, Iran, Somalia and Lebanon. The Bill will allow the government to specify such laws as 'UN sanction enforcement laws'. Contravention of a UN sanction enforcement law will attract penalties for individuals of 10 years' imprisonment and/or a fine of three times the value of the relevant transaction or 2500 penalty units (\$275,000), whichever is greater. Corporations will be liable to a fine of three times the value of the relevant transaction or 10,000 penalty units (\$1.1 million).

Contravention of a UN sanction enforcement law by a corporation will be an offence of strict liability<sup>2</sup>. That is, subject to any available defences, the corporation will be guilty of an offence simply by engaging in the contravening conduct, regardless of its intention. The Bill provides a defence for a corporation to prove that it 'took reasonable precautions, and

exercised due diligence', to avoid contravening the relevant law<sup>3</sup>. It is likely that these defences would be interpreted narrowly in any prosecutions, given that the consistent application of strict liability is said to reflect the Government's 'determination to encourage high ethical standards in the dealings of Australians and Australian companies with sanction regimes'.<sup>4</sup> It should also be noted that ignorance or mistake of law are not defences. Simply being unaware that a particular country was subject to sanctions will not allow corporations to avoid liability.

The Bill will also amend the *Customs Act 1901* (Cth) to allow certain goods to be designated as UN-sanctioned goods. Importing or exporting UN-sanctioned goods without approval will subject individuals and corporations to the same severe penalties as those set out above.

## COUNTER-TERRORISM FINANCING SANCTIONS

The existing part 4 of the Act gives effect to Resolution 1373 of the UN Security Council, which requires states to freeze the financial assets of individuals involved in the commission of terrorist acts. The Act provides that it is an offence to hold assets that are owned or controlled by terrorist organisations or individuals, as prescribed by the Minister, or to make assets available to them. Offences under this part of the Act are currently punishable by five years' imprisonment. The Bill will introduce penalties for individuals of 10 years' imprisonment and/or a fine of three times the value of the relevant transaction or 2500 penalty units (\$275,000), whichever is greater. Corporations will be liable to a fine of three times the value of the relevant transaction or 10,000 penalty units (\$1.1 million).

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2. Most of the regulations currently enforcing UN sanctions already provide that a strict liability applies to least some of the offences they prescribe. Accordingly, it is not strictly true to say that the Bill 'introduces' strict liability as claimed by the Explanatory Memorandum. Indeed, the defence of taking reasonable precautions and exercising due diligence is not currently available to offences under the regulations so that the Bill effectively introduces a new defence to some existing offences.

3. *Criminal Code Act 1995* (Cth), s9.2.

4. Explanatory Memorandum, item 36.

Offences under part 4 of the Act are already offences of strict liability.<sup>5</sup> The Bill does not introduce any new offences, but the severity of the new penalties, particularly for corporations, reinforces the need for those who deal with assets on behalf of their clients to know who their clients are. Although the defences described above are also available in relation to offences under this part of the Act, asserting that you did not know that your client was an alleged terrorist is unlikely to be an acceptable defence, in the absence of evidence of reasonable precautions having been taken to avoid contravening the law.

The Department of Foreign Affairs and Trade maintains a consolidated list of individuals and organisations that have been prescribed under the Act, which is available on the Department's website. However, asset holders will need to do more than simply check the name given by their client against the list and assume all is well if there is no match. It will likely be necessary to prove that reasonable steps have been taken to determine the actual identity of the client. The Act does not set out what precautions it is 'reasonable' for a person to take to avoid contravening part 4, and what is reasonable is likely to vary depending on the circumstances (such as the industry in which the accused is involved and the resources available to them). However, some guidance may be gained from part III of the *Financial Transactions Reports Act 1998* (Cth), which requires financial institutions to obtain prescribed documents in order to verify their clients' identity according to a points system or to obtain an identification reference. A similar level of diligence may be required by other sophisticated organisations.

If a person suspects an asset they are holding for a client is owned or controlled by a proscribed entity, they may apply to the Australian Federal Police to help verify this.<sup>6</sup>

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5. Although the Explanatory Memorandum to the Bill states that strict liability will apply only to offences committed by corporations, the Bill in its current form in fact retains strict liability in respect of offences committed by individuals.

6. *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth), section 9.

## INFORMATION RELATING TO UN SANCTIONS

### PROVIDING FALSE OR MISLEADING INFORMATION

In response to recommendation 1 of the Cole Report, the Bill will make it an offence, punishable by 10 years' imprisonment and/or a fine of 2500 penalty units (\$275,000), to provide false or misleading information to a Commonwealth entity in connection with the administration of a UN sanction enforcement law. It will also be an offence to provide information or a document to anyone else if you know, or are reckless as to whether, that person will provide it to a Commonwealth entity in relation to a UN sanction enforcement law.

Furthermore, if a licence or authorisation under the Act has been granted on the basis of false or misleading information, that licence or authorisation will be taken to never have been granted.

Similar offences will be introduced to the Customs Act in relation to providing false or misleading information in an application for approval to deal with UN-sanctioned goods. The penalty for offences by corporations will be 12,500 penalty units (\$1.375 million).

### RETENTION OF RECORDS AND DOCUMENTS

The Bill will introduce a new requirement for those who apply for authorisations under a UN sanction enforcement law to retain all records and documents relating to the application and their compliance, for a period of five years from the date on which they last acted under the authorisation. Failure to provide upon request any documents that are required to be retained under this section may be an offence under the sections relating to the Commonwealth's new information-gathering powers as set out below.

### NEW INFORMATION-GATHERING POWERS

The Bill will allow designated Commonwealth entities to require persons to provide them with information or documents for the purpose of determining whether a UN sanction enforcement law has been or is being complied with. Failure to comply with such a requirement will be an offence punishable by 12 months'

imprisonment.<sup>7</sup> Information obtained under these provisions may be disclosed by the designated Commonwealth entity to certain specified persons including a foreign government entity or a public international organisation.

The privilege against self-incrimination will not apply to information or documents required to be disclosed under the Bill. The Explanatory Memorandum states that this section does not seek to override legal professional privilege.

Although the Bill does not set out which Commonwealth entities will be designated under this section, the Explanatory Memorandum states that the Department of Foreign Affairs and Trade and the Department of Defence will be designated Commonwealth entities. The Minister will have the power to designate other Commonwealth entities.

## 'FACILITATION PAYMENT' OR BRIBE?

The *Criminal Code Act 1995* (Cth) provides that an accused is not guilty of bribery of a foreign public official if the payment was lawful in that official's country.<sup>8</sup> The Bill will amend this defence so that it is only available if the payment was required or permitted by the written law of that country. Currently the defence is available if the accused 'would not

have been guilty of an offence against a law in force in that place'. Arguably, this could allow those accused of bribery to escape conviction on the grounds that, even though bribes are ostensibly illegal in the country to which they have made payments, the custom or 'unwritten law' of that country is to allow, or even require, bribes, so that they would not be found guilty of any offence there.

The Bill will similarly amend the *Income Tax Assessment Act 1997* (Cth) to provide that an amount paid to a foreign public official is not a bribe in circumstances where it was required or permitted by the local written law. Bribes are not tax deductible.<sup>9</sup> The Bill also clarifies that facilitation payments, payments of minor value for the sole or dominant purpose of securing a routine government action of a minor nature, are not bribes and may therefore be claimed as a deduction.

## CONCLUSION

Compliance with UN sanctions and laws relating to bribery should already be on the agenda of entities involved in international trade and business and the significant increases in penalties imposed by the Bill, particularly for corporations, should simply encourage greater focus on these requirements.

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7. The Bill does not currently provide any penalty other than imprisonment for offences under this section. There is no penalty, such as a fine, that is applicable to corporations. This would appear to be an oversight.

8. *Criminal Code Act 1995* (Cth), s20.3.

9. *Income Tax Assessment Act 1997* (Cth) s26-52.

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