

## Chapter 2

### Background

2.1 Following the 1990 Iraqi invasion of Kuwait, the United Nations Security Council (UNSC) imposed sanctions on Iraq. The sanctions, under Resolution 661, required all states to prevent their nationals from trading with, or making funds available to, the government of Iraq or persons or bodies within Iraq, except in relation to the provision of materials for medical or humanitarian purposes and foodstuffs, in humanitarian circumstances.<sup>1</sup>

2.2 As a consequence of Resolution 661, Iraq was deprived of hard currency limiting its capacity to purchase food. By 1995, the Iraqi population were faced with a serious nutritional and health situation. In response, the Security Council passed Resolution 986, establishing the Oil-for-Food Programme (OFF program). The OFF program allowed for the limited importation of petroleum and petroleum products originating from Iraq, at market rates. The resolution required that payment for these products be made into an escrow account, which could then be used to pay for medicine, health supplies, foodstuffs, and other materials and supplies to satisfy essential civilian needs.<sup>2</sup>

2.3 In 2004, in response to concerns about fraud and corruption in the administration and management of the OFF program, the UNSC passed Resolution 1538, welcoming the decision of the UN Secretary-General to establish an independent high-level inquiry chaired by Mr Paul Volcker to investigate the administration and management of the OFF program, the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (IIC).<sup>3</sup>

2.4 The IIC found that humanitarian 'kickbacks' were paid in connection with the contracts of 2253 companies and the Saddam Hussein regime received illicit income of US\$1.55 billion by way of these 'kickbacks' on humanitarian goods.<sup>4</sup> Three Australian companies were mentioned in the IIC's final report—AWB Ltd (formerly

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1 United Nations Security Council (UNSC), *Resolution 661 (1990)* adopted by the Security Council at its 2933rd meeting on 6 August 1990, S/RES/661 (1990), <http://www.refworld.org/docid/3b00f16b24.html> (accessed 3 February 2014).

2 UNSC, *Resolution 986 (1995) on authorization to permit the import of petroleum and petroleum products originating in Iraq, as a temporary measure to provide for humanitarian needs of the Iraqi people*, adopted by the Security Council at its 3519th meeting on 14 April 1995, S/RES/986 (1995), <http://www.refworld.org/docid/3b00f19a18.html> (accessed 3 February 2014).

3 UNSC, *Security Council Resolution 1538 (2004) on investigation of allegations on efforts by individuals and entities dealing with Iraq's funds or other financial assets*, adopted by the Security Council at its 4946th meeting on 21 April 2004, S/RES/1538 (2004), <http://www.refworld.org/docid/41133dd04.html> (accessed 3 February 2014).

4 Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Final Report on Manipulation of the Oil-for-Food Programme by the Iraqi Regime*, 27 October 2005, p. 1.

the Australian Wheat Board),<sup>5</sup> Alkaloids of Australia Pty Ltd and Distall Rhine Ruhr Pty Ltd.<sup>6</sup>

### The Cole inquiry

2.5 In response to the final report of the IIC, on 10 November 2005, the Governor-General, Major General the Hon Michael Jeffery, AC, AO (Mil), CVO, MC (Retd), signed Letters Patent to appoint the Hon Terence Cole AO RFD QC as a commissioner to inquire into matters relating to decisions or actions of Australian companies that were mentioned in the IIC Report (Cole inquiry). The Letters Patent empowered the commissioner to inquire into and report on:

...whether any decision, action, conduct, payment or writing of any of the three Australian companies...or any person associated with one of those companies, might have constituted a breach of any law of the Commonwealth, a State or Territory...and if so, whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency.<sup>7</sup>

2.6 Further Letters Patent extended the scope of the Cole inquiry to two more companies, BHP Ltd and Tigris Petroleum Corporation Ltd, and persons associated with those companies.<sup>8</sup>

### Findings

2.7 On 24 November 2006, Commissioner Cole presented the *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme* (Cole inquiry report) to the Governor-General. The Cole inquiry report found that the Australian Wheat Board and later AWB Ltd accepted the payment of, and then paid, an ongoing fee to the Iraqi Grain Board (IGB) so as to secure contracts in a tender process, and that these payments were made contrary to both the UN sanctions and Australian government policy. The Cole inquiry stated that documents upon which the contracts with the IGB were based were submitted to the Department

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5 AWB Ltd was originally a government body known as the Australian Wheat Board. On 1 July 1999 AWB Ltd was incorporated as a private company, owned by wheat growers. AWB Ltd exported wheat through its subsidiary company, AWB (International) Ltd. In 2010, AWB Ltd was acquired by the Canadian firm Agrium.

6 Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Final Report on Manipulation of the Oil-for-Food Programme by the Iraqi Regime*, 27 October 2005, Table 6: Humanitarian goods purchased by the Government of Iraq, by supplier, pp 17, 26, 54.

7 *Letters Patent for the inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 10 November 2005,  
<http://www.oilforfoodinquiry.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/RWPC89DEC8DAC097623CA25710E00000E93.html> (accessed 12 September 2014).

8 *Letters Patent for the inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 6 February 2006,  
<http://www.oilforfoodinquiry.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/RWPB2287CBF6BA4C569CA25710E00011CDF.html> (accessed 12 September 2014).

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of Foreign Affairs and Trade (DFAT) and to the UN but were deliberately misleading as they did not reflect the true contractual arrangements with the IGB.<sup>9</sup>

2.8 The inquiry found that AWB Limited 'might' have breached:

- sections 29A, 29B and 29D of the *Crimes Act 1914* (Cth);
- sections 135.1(7) and 136.1 of the *Criminal Code* (Cth);
- section 82 of the *Crimes Act 1958* (Vic); and
- section 5 of the *Banking (Foreign Exchange) Regulations 1959* (Cth).<sup>10</sup>

2.9 Further, the acts and conduct of a number of named individuals 'might' have constituted them acting as accessories to those offences.

2.10 Finally, the report listed the names of a number of individuals whose acts and conduct 'might' have constituted a breach of various provisions of the *Corporations Act 2001* (Cth) (Corporations Act).<sup>11</sup>

2.11 These findings concluded with a recommendation that the Commonwealth Attorney-General's Department (AGD) should establish a joint taskforce to investigate each of these suspected breaches. The report recommended that the taskforce should be comprised of the AFP, Victoria Police and ASIC and it should consult with the Commonwealth Director of Public Prosecutions (CDPP) and the Victorian Director of Public Prosecutions (Victorian DPP).<sup>12</sup>

2.12 The conduct of AWB Ltd and its officers with regard to the OFF Program is examined in more detail in Chapter 3.

#### *Recommendations*

2.13 Alongside the recommendation to establish a joint taskforce, the Cole inquiry made five other specific recommendations. The first two recommendations called for amendments to the existing legislation to make it a clear offence:

- (a) to act in such a way that would contravene a UN sanction Australia has agreed to uphold (Recommendation 2); or

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9 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp xiv, xvii, xx, <http://www.oilforfoodinquiry.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report.html> (accessed 30 January 2015).

10 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. lxxxii.

11 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. lxxxii.

12 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. lxxxii.

- (b) to mislead, through act or omission, or provide false information about a material particular when applying for a permission to export (Recommendation 1).

2.14 The Cole inquiry also recommended that the Australian government establish two separate bodies: one which would be empowered to obtain evidence and information about any future suspected breaches or evasions of UN sanctions to help prevent breaches (Recommendation 3); and a second which would be empowered to monitor and control any company that holds a monopoly on the export of wheat (Recommendation 5). Finally, the report recommended that amendments to the *Royal Commissions Act 1902* (Cth) should be considered, to limit the extent to which witnesses could claim legal professional privilege to avoid producing documentary evidence to an inquiry (Recommendation 4).<sup>13</sup>

#### **Australian government response**

2.15 The Australian government accepted the first three recommendations of the Cole inquiry, introducing the International Trade Integrity Act 2007 to formalise those recommendations through legislation.<sup>14</sup>

#### *International Trade Integrity Act 2007 (Cth)*

2.16 The *International Trade Integrity Act 2007* (Cth) (ITI Act) received Royal Assent on 24 September 2007 and amended the *Charter of the United Nations Act 1945* (Cth), the *Customs Act 1901* (Cth), the *Criminal Code Act 1995* (Cth) and the *Income Tax Assessment Act 1997* (Cth). The amendments formalised the first three recommendations of the Cole inquiry and also implemented some recommendations of the Organisation for Economic Co-operation and Development (OECD) Working Group on Foreign Bribery in International Business Transactions Phase 2 report on Australia.<sup>15</sup>

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13 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp lxxxiii-lxxxv.

14 Australian Government, 'Australian Government response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme' reproduced in Appendix 1 to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into International Trade Integrity Bill 2007 [Provisions]*, August 2007, p. 21, [http://www.aph.gov.au/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2004\\_07/international\\_trade/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/international_trade/report/report_pdf.ashx) (accessed 15 September 2014).

15 Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into International Trade Integrity Bill 2007 [Provisions]*, August 2007, pp 1-2, [http://www.aph.gov.au/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2004\\_07/international\\_trade/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/international_trade/report/report_pdf.ashx) (accessed 15 September 2014). See further 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, <http://www.oecd.org/dataoecd/57/42/35937659.pdf> (accessed 15 September 2014).

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2.17 In order to better enforce UN sanctions, the ITI Act introduced new offences for individuals and corporations in relation to:

- omissions to provide material information or the provision of false or misleading information, in connection with a UN sanctions regime;
- the import or export of goods in contravention of UN sanctions without valid permission; and
- acts that are otherwise in contravention of a Commonwealth law enforcing UN sanctions.<sup>16</sup>

2.18 The amendments contained in the ITI Act also had the effect of:

- invalidating a permission granted as a result of false or misleading information;
- providing agencies with requisite powers to investigate possible breaches of UN sanctions and to enable better information-sharing between agencies; and
- requiring the retention of relevant documentation for a period of five years.<sup>17</sup>

2.19 In relation to the laws pertaining to bribery of foreign officials, the ITI Act clarified that:

- a charge of bribing a foreign official is not affected by the outcome of a payment;
- the only circumstance where a benefit may be justified would be where it was required or permitted by the written legislation or regulations of the country that the official represented; and
- a payment to a foreign official would only be tax deductible where the payment was required or permitted by the written legislation or regulations of the relevant country.<sup>18</sup>

#### *Responses to other recommendations*

2.20 In response to the fourth recommendation of the Cole inquiry, the Australian government established an inquiry into legal professional privilege conducted by the Australian Law Reform Commission (ALRC). The ALRC published a report with

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16 Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into International Trade Integrity Bill 2007 [Provisions]*, August 2007, pp 2, 5 and 9.

17 Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into International Trade Integrity Bill 2007 [Provisions]*, August 2007, p. 5.

18 Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into International Trade Integrity Bill 2007 [Provisions]*, August 2007, pp 11-12.

45 separate recommendations.<sup>19</sup> According to the ALRC, the recommendations of ALRC report have not yet been implemented.<sup>20</sup>

2.21 Finally, in response to the fifth recommendation of the Cole inquiry, the Australian government appointed a Wheat Export Marketing Consultation Committee to undertake consultation with the Australian wheat industry to determine the marketing needs of the industry. The Wheat Export Marketing Consultation Committee reported to the government on 29 March 2007.<sup>21</sup>

### The Oil for Food Taskforce

2.22 In response to the findings of the Cole inquiry relating to possible unlawful conduct, on 20 December 2006, the then Attorney-General, the Hon Philip Ruddock, announced the establishment of the Oil for Food Taskforce (Taskforce) which commenced work on 22 January 2007. The terms of reference for the Taskforce were to:

- (a) consider the Commissioner's findings in relation to possible breaches of the law in the context of the report and information obtained by the Cole inquiry;
- (b) co-ordinate consultation between agencies and authorities with an interest in the finding;
- (c) undertake investigations into possible offences and other breaches of the law that are referred to in the findings of the Cole inquiry report;
- (d) consult with prosecuting and other relevant authorities on the question of whether prosecutions, or other legal proceedings, should be instituted against any person in connection with the Commissioner's findings;
- (e) refer briefs of evidence and other relevant material to prosecuting or other authorities to enable the appropriate authority to consider whether prosecutions or other proceedings should be commenced for breach of a law; and
- (f) investigate, or refer to appropriate authorities, matters relating to possible breaches of the law not referred to in Commissioner Cole's findings that are discovered during the Taskforce's investigations.<sup>22</sup>

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19 See ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC Report 107), February 2008, <http://www.alrc.gov.au/report-107> (accessed 15 February 2014, last modified on 22 June 2012).

20 ALRC Report 107, February 2008, <http://www.alrc.gov.au/report-107> (accessed 15 February 2014, last modified on 22 June 2012).

21 Australian Government, 'Australian Government response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme' reproduced in Appendix 1 to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into International Trade Integrity Bill 2007 [Provisions]*, August 2007, p. 21.

22 AFP, *Submission 3*, pp 1-2.

2.23 The Taskforce was comprised of officers from the AFP, Victoria Police and ASIC and received administrative and legal support from CDPP, AGD and the Department of Prime Minister and Cabinet (PM&C). A senior coordination group (SCG) was established to provide strategic oversight to the Taskforce and to report on the work of the Taskforce. The SCG was chaired by the Secretary of AGD and included senior executive officers of PM&C, the Department of Finance and Deregulation and CDPP, as well as Deputy Commissioners of the AFP and Victoria Police, and the Chairman of ASIC. The SCG met quarterly and did not have a role in the conduct of investigations or operational decision-making.<sup>23</sup> The key issues that affected the work of the Taskforce, including the resources provided to and used by the Taskforce, are examined in Chapter 4.

2.24 In late August 2007, ASIC withdrew its staff from the Taskforce to better concentrate on pursuing civil penalty proceedings under the Corporations Act. The ASIC investigation is discussed further in Chapter 5.<sup>24</sup>

### **Previous parliamentary inquiry**

2.25 On 27 June 2012, the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (Parliamentary Joint Committee) tabled its report on the inquiry into the Integrity of Overseas Commonwealth Law Enforcement Operations.<sup>25</sup> During the inquiry, DFAT and the AFP were respectively asked about the OFF program and the Taskforce.<sup>26</sup>

2.26 The Parliamentary Joint Committee report acknowledged the introduction of a Fraud and Anti-Corruption Plan by the AFP. The AFP plan identified nine strategic risks, many of which are considered to be inherent to all AFP operations, and required AFP employees to report any suspected incidents of concern to AFP appointees, whose conduct was contrary to the AFP code of conduct, regardless of where such conduct took place.<sup>27</sup>

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23 AFP, *Submission 3*, p. 2.

24 ASIC, *Submission 2*, pp 6-7.

25 *Journals of the Senate*, No. 154—27 June 2013, p. 4265.

26 See AFP, *Submission 5 Supplementary Submission* to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity's inquiry into the Integrity of Overseas Commonwealth Law Enforcement Operations at <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=a5821bd0-b4b7-4ed0-b170-e7a98f7609aa> (accessed 16 September 2014); DFAT, 'Answers to Questions on Notice from a public hearing on 11 May 2012', received 30 May 2012, cited in Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Integrity of Overseas Commonwealth Law Enforcement Operations*, June 2012, pp 27-28, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Australian\\_Commission\\_for\\_Law\\_Enforcement\\_Integrity/Completed\\_inquiries/2010-13/integrity\\_inter\\_op/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Completed_inquiries/2010-13/integrity_inter_op/report/index) (accessed 16 September 2014).

27 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Integrity of Overseas Commonwealth Law Enforcement Operations*, June 2012, p. 107.

2.27 During the inquiry, in response to questions on notice relating to the capacity of agencies to share information on specific businesses with other agencies, DFAT acknowledged that, although additional information could be obtained from other agencies, there remained significant constraints on the capacity of agencies to share information on individual companies, including confidentiality agreements and other legal restrictions. DFAT stated that:

Government agencies have limited capacity or authority to investigate Australian business to an extent that would make them fully aware of the propriety of all the activities undertaken by any one business.<sup>28</sup>

2.28 The Parliamentary Joint Committee report went on to acknowledge that DFAT has established a fraud control plan as both a specific response to the Cole inquiry and to manage the risk of corrupt practices.<sup>29</sup>

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28 DFAT, *Answers to Questions on Notice from a public hearing on 11 May 2012*, received 30 May 2012, cited in Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Integrity of Overseas Commonwealth Law Enforcement Operations*, June 2012, pp 27-28.

29 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Integrity of Overseas Commonwealth Law Enforcement Operations*, June 2012, p. 109.