

The Senate

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Legal and Constitutional Affairs  
References Committee

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Work undertaken by the Australian Federal  
Police's Oil for Food Taskforce

March 2015

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# Majority Report

1.1 The Legal and Constitutional Affairs References Committee (the committee) held one single-day hearing for its inquiry into work undertaken by the Australian Federal Police (AFP) Oil for Food Taskforce in accord with its terms of reference which were to report on:

- the work undertaken by the AFP Oil for Food Taskforce (OFFTF);
- the level of resourcing that was provided and used by the Taskforce; and,
- any other related matter.

## Terms of Reference of the OFFTF

1.2 The former Attorney-General, the Hon Philip Ruddock MP, announced the establishment of the Oil for Food Taskforce (OFFTF) on 20 December 2006. The terms of reference for the OFFTF were:

- 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;
- co-ordinate consultation between agencies and authorities with an interest in the finding;
- undertake investigations into possible offences and other breaches of the law that are referred to in the findings of the Cole Inquiry report;
- 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;
- 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
- 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 Task Force's investigations.

## Background

1.3 The OFFTF commenced work on 22 January 2007.

1.4 The OFFTF was comprised of officers from the Australian Federal Police (AFP), Victoria Police (to advise on potential offences under the *Crime Act 1958* (Vic)) and the Australian Securities and Investments Commission (ASIC), with administrative and legal support comprising of the Commonwealth Director of Public Prosecutions (CDPP), the Attorney-General's Department (AGD) and the Department of Prime Minister and Cabinet (DPM&C).

1.5 In 2006 the government allocated \$20.3 million to the OFFTF for the three years to 2008/09. This quantum of funding covered the anticipated expenditure for the AFP, ASIC, CDPP, AGD and DPM&C for the duration of the OFFTF.

1.6 An additional \$3.1 million was committed in the 2009/10 Budget to continue the OFFTF for a further 12 months to June 2010.

1.7 The AFP gave evidence that it considered that the level of resourcing made available to it through the provision of funding specifically for the OFFTF was sufficient to implement the terms of reference. Although resources fluctuated across the life of the OFFTF, at the height of the investigation, there were 28 people allocated to the OFFTF.

### **Work of the OFFTF**

1.8 The scope of the OFFTF was to investigate all allegations of criminality raised by the Cole Inquiry. The OFFTF conducted wide ranging inquiries including interviewing a large number of witnesses and examining approximately 900,000 pages of documents submitted to the Cole Inquiry together with documents obtained from the United Nations (UN), shipping records, and banking records.

1.9 The OFFTF identified numerous present or former Australia Wheat Board (AWB) employees who may have held information relevant to the investigation. The OFFTF formally corresponded with the individuals identified by Commissioner Cole QC as possibly having committing criminal offences, however all declined to participate in formal records of interview. The OFFTF also interviewed a number of former and current Department of Foreign Affairs and Trade (DFAT) and AUSAID employees.

1.10 The OFFTF directed significant resources towards a financial analysis of all relevant transactions, and in support of this sought evidence from seven foreign jurisdictions via mutual assistance requests through the AGD.

1.11 In July 2007, ASIC determined it would pursue a separate investigation into whether offences had been committed contrary to the Corporations Act 2001 and, in August 2007, withdrew its members from the OFFTF.

1.12 ASIC subsequently charged several people and civil convictions have been recorded in two cases and others are still in progress.

### **Legal and Constitutional Affairs References Committee Inquiry**

1.13 The Senate committee inquiry public hearing was attended by only three committee members for the duration, and by a fourth who was frequently absent.

1.14 It would seem that the Senate inquiry was generated by 'new evidence' in a court document tabled in the Federal Court on the 10th of August 2010 in which the

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AWB is alleged to have admitted that it made payment, contrary to evidence it had previously given.

1.15 Whilst a great deal of reliance was placed on that so called admission, not as much attention was drawn to the balance of that paragraph where the AWB denied that any such payments were illegal, or done without the knowledge of either the UN or DFAT.

1.16 Evidence provided to the committee *in camera* raised a number of 'new' allegations which were also the subject of questioning during the inquiry.

1.17 During the public hearing credible evidence indicated that, in view of senior experienced investigators and of an independent QC, Mr Hastings (who was retained to advise on the likely outcome of any criminal proceedings versus the cost and the possibility of any convictions), the task force should be disbanded and the inquiry stopped. A committee member sought at the public hearing access to a report to this effect by Mr Hastings QC. The advice from Mr Hastings QC was also subsequently sought in writing by the committee.

1.18 The AFP noted that the OFFTF was previously discussed in the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (ACLEI) in August 2012, where a copy of the legal advice provided by Mr Hastings QC was requested.

1.19 The AFP took this request on notice as a potential claim for Public Interest Immunity (PII). The ACLEI Committee was subsequently advised in writing in September 2012 by the then Minister for Home Affairs and Justice that the AFP would claim PII over the legal advice provided by Mr Hastings QC, but also offered a private briefing to the committee on the decision to discontinue the investigation. This detailed private briefing was subsequently conducted on 20 September 2012.

1.20 Experienced investigators advised the committee that there was a significant difference between evidence which was given to the Cole Inquiry, and evidence which they could use to support prosecutions. It was pointed out to the committee that evidence given to the royal commission was obtained by coercion and was not available for use in criminal prosecutions.

1.21 In July 2009, the then AFP Commissioner Mick Keelty engaged Peter Hastings QC to 'undertake a review of the material gathered to date and to consider the likelihood, or otherwise, of a successful conclusion to the matter, including future avenues of enquiry and further evidence to be gathered'.

1.22 Mr Hastings QC advised that the resources required to mount a prosecution would be disproportionate to the prospects of the criminal prosecution succeeding.

1.23 Those committee members who attended the hearing were able to form views on the demeanour of the witnesses before the committee. Most of the committee's

evidence was taken *in camera* to protect the innocent and to guard against unfounded and unsupported allegations being made public.

1.24 Whilst the committee appreciates the commitment and sincerity of the witnesses who expressed some concern at the course of the investigation, the committee was not persuaded that there was any evidence which would support further inquiries into the investigation and the termination of the task force. Often the full facts are not within the knowledge of less senior officers.

1.25 Some of the specific evidence of a witness, as to a certain course of events and actions involving other people, was directly rejected by those involved and it would seem that time and the passage of events may have made recollection of events uncertain.

1.26 The committee notes that already the Food-for-Oil issue has been subjected to:

- The Cole Royal Commission;
- One other parliamentary inquiry which reported in June 2013 and made no recommendations about the work of the OFFTF;
- Substantial investigation with a budget of \$26 million by the AFP and ASIC; and,
- An independent investigation by ASIC which has resulted in civil convictions and the imposition of substantial penalties.

1.27 Throughout the investigation the OFFTF exhaustively canvassed and assessed readily-available evidence, however, the OFFTF faced a number of key challenges in the course of the investigation including:

- Evidence obtained from Cole inquiry witnesses was not in an admissible form for use in criminal proceedings and had to be re-collected in an admissible form using *Crimes Act 1914* (Cth) powers and in accordance with the requirements of the *Evidence Act 1995* (Cth). In addition, the AFP could not force witnesses to provide statements in relation to the matter;
- Much of the material relevant to the investigation was held by international entities, which required time-consuming legal processes and the cooperation of overseas agencies. In particular there were significant delays in obtaining information in an admissible form through MAR's from other jurisdictions, as is the case in many complex fraud offences involving other jurisdictions; and
- When the AFP sought relevant material from ASIC, under section 127 of the *Australian Securities and Investment Commission Act 2001* (Cth), the dissemination of this material was challenged through court action by AWB.

1.28 In tendering this majority report, the majority of the committee congratulate all officers of the AFP and ASIC who have worked diligently and honestly in the

investigation of this matter. The majority of the committee supports the conclusions of senior investigators in this matter.

### **Recommendation 1**

**1.29 Having heard the evidence and read the submissions, the majority of the committee is persuaded that this matter should not further exercise the resources of the Federal Parliament.**

**Senator the Hon Ian Macdonald  
Deputy Chair**

**Senator the Hon Joe Ludwig  
Labor Senator for Queensland**



# Chair's Minority Report

## Chapter 1 – Introduction

### Referral of the inquiry

1.1 On 26 June 2014, the Senate referred the matter of the work undertaken by the Australian Federal Police's Oil for Food Taskforce to the Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 4 September 2014, with particular reference to:

- (a) the work undertaken by the Australian Federal Police's Oil for Food Taskforce;
- (b) the level of resourcing that was provided to and used by the taskforce; and
- (c) any other related matters.<sup>1</sup>

### Structure of the Chair's minority report

1.2 The Chair's minority report is comprised of six chapters.

1.3 Chapter 2 gives a broad outline of the United Nations (UN) Oil for Food program (OFF Program) in the context of the sanctions imposed on Iraq by the United Nations Security Council (UNSC). The chapter looks at the UN Independent Inquiry Committee (IIC) and the findings of the Royal Commission into alleged breaches of UNSC sanctions (Cole inquiry). Chapter 2 also examines the establishment of the Oil for Food Taskforce (Taskforce) and the role of the Australian Federal Police (AFP).

1.4 Chapter 3 examines the conduct of AWB Ltd and its officers in the context of the OFF Program. The chapter also looks at the relationships between AWB Ltd, the Iraqi Grain Board (IGB), the Australian government and other prominent actors.

1.5 Chapter 4 inspects the key issues that affected the work of the Taskforce, including the resources provided to and used by the Taskforce and the challenges faced by the Taskforce.

1.6 Chapter 5 examines the independent investigation into officers of AWB Ltd conducted by the Australian Securities and Investments Commission (ASIC), after it had left the Taskforce. The chapter also looks at the interaction between the ASIC investigation and the Taskforce.

1.7 Chapter 6 outlines the Chair's conclusions and recommendations.

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1 Senate, *Journals of the Senate*, No. 37-26 June 2014, pp 1021-1022.



# 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/RWPC89DEC8DAC097623CA25710E0000E93.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).

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/comitees/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.

## Chapter 3

### AWB Ltd in Iraq

3.1 This chapter describes AWB Ltd's involvement in the Oil-for-Food Programme (OFF program) and outlines the key events that took place between 1999 and 2003.

3.2 The Australian Wheat Board was established in 1939 as a government statutory authority to control the domestic and international marketing of Australian wheat. It was the sole marketer of wheat both domestically and internationally until the Wheat Marketing Act 1989 came into force, deregulating the domestic market. The Australian Wheat Board retained the sole right to export wheat from Australia and by 1 July 1999, when the Australian Wheat Board became AWB Ltd, an unlisted public company, it was the exclusive manager and marketer of all bulk wheat exports from Australia, conducted through a supply-pooling system known as the Single Desk. On 21 August 2001, AWB Ltd was placed on the Australian Stock Exchange, as a listed company limited by shares. The Single Desk was managed and operated by AWB (International) Ltd (AWBI), a wholly owned subsidiary of AWB Ltd.<sup>1</sup>

3.3 Australia has been exporting wheat to Iraq since 1948. Over the life of the OFF program, the Australian Wheat Board, and then AWB Ltd, was the single largest provider of humanitarian goods to Iraq receiving a total of more than US\$2.3 billion in payments from the UN escrow account.<sup>2</sup> Between 1997 and 2005, the Australian Wheat Board's (and AWB Ltd's) wheat sales to Iraq constituted a substantial part of the company's overall annual wheat sales and these sales were highly profitable. The Iraqi market was considered a 'high risk, high return market'.<sup>3</sup>

#### **The contracts between AWB Ltd and the IGB**

3.4 The Australian Wheat Board, and then AWB Ltd, participated in all 13 phases of the OFF program. In a briefing note from AWB Ltd to the Wheat Export Authority, dated 14 November 2005, AWB Ltd stated that over the seven years of the OFF Program, the Australian Wheat Board and AWB Ltd entered into over 41

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1 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. 2, pp 1–2.

2 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. 311.

3 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', paras 1–3, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2012/339.html?stem=0&synonyms=0&query=ingleby> (accessed 30 January 2015).

contracts with the Iraq Grain Board (IGB) to supply nearly 12 million metric tonnes of wheat through 285 shipments.<sup>4</sup>

3.5 As explained by the Cole inquiry report, all contracts made under the OFF program had to be approved by the UN in advance to qualify for payment from the UN escrow account. To get approval for its contracts, the supplier provided copies of short-form and long-form contracts together with a document called 'Notification or request to ship goods to Iraq' to the Department of Foreign Affairs and Trade (DFAT). DFAT verified that the contract was made for the supply of an authorised humanitarian good or service and passed the documents on to the UN for approval. The contracts were then scrutinised for price and value by UN customs experts to ensure that the contracts did not offend the sanctions resolutions. If the contracts were approved by the UN, DFAT issued an export permit under the *Customs (Prohibited Export) Regulations 1958* (Cth) authorising export of the product to Iraq.<sup>5</sup>

3.6 DFAT considered that it was only required to play a 'post box' role with respect to the contracts, that is, DFAT ensured that the contracts were for the provision of approved humanitarian goods or services and that the relevant documents adhered to the correct form, but then DFAT sent the documents on to the UN for scrutiny.<sup>6</sup> As noted by Mr Paul Kelly, in an article in *The Australian*:

DFAT did not see itself as an investigatory agency and it possessed neither the systems nor procedures to investigate alleged breaches of sanctions. It lacked the commercial and price expertise to make such judgments and did not try.<sup>7</sup>

3.7 DFAT explained that if, after vetting a contract, the UN were concerned about a contract it would either block the contract or put the contract on hold, pending further investigations.<sup>8</sup> All the AWB Ltd contracts were approved for payment from the escrow account by the UN.<sup>9</sup>

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4 AWB Ltd, 'Briefing note to the Wheat Export Authority', Exhibit 481 to Commissioner Terence Cole's, *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), [WEA.0001.0059].

5 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 xv–xvi.

6 See Ms Gillian Bird, DFAT, *Senate Foreign Affairs Defence and Trade Committee, Estimates Hansard*, 3 November 2005, p. 6.

7 Mr Paul Kelly, 'The real scandal', *The Australian*, 29 November 2006.

8 Mr Marc Innes-Brown, DFAT, *Senate Foreign Affairs Defence and Trade Committee, Estimates Hansard*, 3 November 2005, p. 12.

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. 4, pp 115–116.

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### *The trucking and service fees*

3.8 As noted in the Independent Inquiry Committee (IIC) report, for the first five phases of the OFF program the Australian Wheat Board's contracts with the IGB required shipment to the point of entry in Iraq. However, in July 1999, the agreement was changed, requiring AWB Ltd to assume the cost of inland transportation to all points in Iraq (the trucking fee).<sup>10</sup>

3.9 The Cole inquiry report highlighted that all the short-form and long-form contracts after July 1999 between AWB Ltd and IGB specified that the price of the wheat would include 'discharge Free into Truck to silos within all Governates of Iraq'. However, only the short-form contracts entered into in the second half of 1999 mentioned that the 'discharge cost will be a maximum of US\$12.00 and shall be paid by the Sellers to the nominated Maritime Agents in Iraq'.<sup>11</sup>

3.10 As noted by the IIC, contracts between AWB Ltd and the IGB after 1999 did not include a reference to a payment to 'Maritime Agents'. The contracts merely stated that 'the cargo will be discharged Free into Truck to all silos within all Governates of Iraq', without attributing an amount for transportation fees.<sup>12</sup>

3.11 The Statement of Agreed Facts and Joint Submission as to Penalty annexed to the case of *Australian Securities & Investments Commission v Ingleby* (Statement of facts in *ASIC v Ingleby*) noted that AWB Ltd paid the trucking fee, in internationally tradable currency, to a company incorporated in Jordan, Alia for Transportation (Alia). Between November 1999 and July 2000, AWB Ltd paid the trucking fee via third parties but after that period the fee was paid directly by AWB Ltd into Alia's Jordanian bank account. From November 2000 the trucking fee was increased and a new payment was included as part of the transportation fee, an after-sales service or handling fee (service fee) at 10% of the contract price. Between 1999 and 2003, under 21 separate contracts, the trucking and service fees were paid at a rate of between US\$12 to €55.40 per metric tonne of wheat, totalling over US\$220 million. The amount of the fee was incorporated into the contract price and therefore AWB Ltd was able to claim it back from the UN escrow account.<sup>13</sup>

3.12 In the Statement of facts in *ASIC v Ingleby* it was accepted that Alia did not provide actual transportation services in Iraq; rather, Alia simply remitted the fees to

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10 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. 311–312.

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. xvi.

12 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. 314 and footnote 527.

13 *Australian Securities & Investments Commission v Ingleby* [2012] VSC 339 Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', paras 11–16.

the government of Iraq, allowing Iraq to obtain internationally-traded currency contrary to the UN sanctions regime.<sup>14</sup> This conclusion reiterated the findings of the Cole inquiry:

After deducting a commission of 0.25 per cent, Alia transferred the funds to the General Maritime Transportation Company, the Iraq Public Ports Company or the [Iraqi State Company for Water Transport (ISCWT)]. From there the funds were distributed to various Iraqi government ministries, with approximately two-thirds being paid to the Ministry of Finance, 18 per cent to 'land' (presumably being for land transportation), approximately 4 per cent to 'ports' and 1 per cent to 'water'.<sup>15</sup>

### ***Investigations and complaints***

#### *The Canadian Complaint*

3.13 According to Ms Felicity Johnston, the Chief Customs Officer with the UN Office of the Iraq Program (OIP) from 1999 to 2003, in late 1999 the Canadian Mission to the UN contacted the OIP. The representative of the mission explained that the Canadian Wheat Board was told by the IGB that if it wanted to supply wheat under a proposed contract it would have to deposit US\$700 000 into a Jordanian bank account to cover transport costs of the wheat within Iraq. Ms Johnston stated that she advised the Canadian Mission that such a payment would be contrary to the sanctions regime, to which they responded that they had been advised by the IGB that some Thai companies and AWB Ltd were already engaged in such an arrangement. Ms Johnston said that she approached Ms Moules, a DFAT official posted to the Australian Mission to the UN, asking her to 'diplomatically' ask AWB Ltd executives whether there was any substance to the Canadian claims.<sup>16</sup>

3.14 The Cole inquiry report noted that AWB Ltd, through Mr McConville, its Government Relations Officer, emphatically denied the allegations, describing them as 'bullshit'. The Australian mission advised the OIP of the denial. However, Ms Johnston continued to harbour suspicions and so checked the AWB Ltd contracts to see if they disclosed any irregularity. She overlooked the clause quantifying the discharge cost but still decided to query Mr Nicholas, of Austrade in New York, about possible irregularities in AWB Ltd contracts or standard terms and conditions. AWB Ltd assured Austrade that there were no irregularities in its dealings with Iraq and, in April 2000, provided OIP with a copy of the standard terms and conditions to its contracts with the IGB. The Cole inquiry report went on to say:

AWB advised that the standard terms and conditions did not apply where they were contrary to 'UN policy to trade with Iraq'. That was the case with

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14 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', para. 11.

15 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. lxii.

16 Ms Felicity Johnston interviewed by Mr Jonathan Holmes, *Four Corners*, ABC, 17 April 2006, <http://www.abc.net.au/4corners/content/2006/s1616143.htm>.

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the 'demurrage/despatch' clause...The United Nations dropped any further consideration of the Canadian complaint. Ms Johnston said that was because she thought that, although contract A4822 contractually required payment of a US dollar 'discharge fee', because payment of such a fee would be contrary to 'UN policy to trade with Iraq' she assumed such payment was not being made. She thought her view was reinforced by AWB's earlier emphatic denial of any irregular payments.<sup>17</sup>

### *The Pacific Rim Shipping Enquiry*

3.15 As noted in the Statement of facts in *ASIC v Ingleby*, on 15 March 2000, Mr Ingleby, the Chief Financial Officer of AWB Ltd, received a letter from Pacific Rim Shipping Pty Ltd, an agent of Atlantic and Orient Shipping Co and one of the third parties used to pay the trucking fee to Alia. The letter notified AWB Ltd that Atlantic and Orient Shipping Co had received an audit enquiry regarding the payment of trucking fees and the amount of trucking fees paid. The letter requested confirmation that all wheat contracts had been approved by the UN and the Australian government. The next day Mr Ingleby signed a letter of response that advised that the relevant contracts had been approved by both the UN and the Australian Government.<sup>18</sup> The Cole inquiry report explained that the audit enquiry was instigated by the Singaporean monetary authorities and related to possible money laundering. The Singaporean enquiry caused the shipping company to withdraw from the arrangement with AWB Ltd and pushed AWB Ltd to approach another company, Ronly Holdings Ltd (Ronly), to act as an intermediary for the payments.<sup>19</sup>

3.16 The Cole inquiry found that the email of approach, sent by Mr Emons of AWB Ltd to Ronly, made clear that AWB Ltd:

- recognised that the payments of the trucking fee were in breach of UN sanctions;
- had agreed to Iraq's demands to pay the trucking fee to it;
- recognised that the trucking fees paid to the 'Jordanian trucking company' were paid in the knowledge that they were being passed to Iraq and were paid for that purpose;
- had sought to distance itself from the payments, to 'disguise' the payments by paying them through ship owners and avoid UN scrutiny of the true contractual terms between AWB [Ltd] and the IGB;
- set up the arrangement with Ronly in order to disguise the fee and the fact that AWB [Ltd] was paying a trucking fee to Iraq; and

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17 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 xxiii–xxiv.

18 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', para. 30.

19 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 xx–xxi.

- Ronly's role was to be limited to being a conduit for the payment of the trucking fees through the Jordanian trucking company to Iraq.<sup>20</sup>

### *Claims of non-payment of trucking fees*

3.17 In October 2000, Mr Stott sent an internal email to Mr Watson of the chartering desk. The email referred to his recent visit to Baghdad where the IGB made a claim that only 90 per cent of the transport fees had been paid. Mr Stott requested confirmation that, if the fees had not been paid, the matter be dealt with.<sup>21</sup> Mr Watson responded by stating that all trucking fees had been paid in full directly to the trucking company nominated by the IGB suggesting that AWB Ltd should 'simply advise IGB of the above and have them check with their trucking company'.<sup>22</sup> In a further email Mr Watson wrote that 'Trucking company has also confirmed they have received 100pct trucking fees and have paid IGB'.<sup>23</sup> The Cole inquiry report stated that such a statement made it plain that:

...AWB knew the inland transportation fees paid by AWB to Alia were in turn being remitted by Alia to the IGB and thus Iraq. It was widely known within AWB that these fees were paid to the IGB.<sup>24</sup>

### *The Arthur Anderson Report*

3.18 As noted in the Cole inquiry report, in April 2000, following the retirement of Mr Rogers, Mr Andrew Lindberg was appointed Chief Executive Officer of AWB Ltd. When he took up the position his main goals were to develop a strategic, commercial and diversified growth agenda for the company and to list it on the Australian Stock Exchange. With this in mind, he initiated a restructure of the

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20 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. 2, p. 319.

21 Charles Stott, 'Email to Michael Watson, Monday 23 October 2000 at 12:57 PM', Exhibit 444 to Commissioner Terence Cole's, *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), [AWB.5009.0381] at <http://www.oilforfoodinquiry.gov.au/exhibits/images%5CAWB.5009.0381.pdf> (accessed 10 February 2015).

22 Michael Watson, 'Email to Charles Stott, Tuesday 24 October 2000 at 10:18 AM', Exhibit 444 to Commissioner Terence Cole's, *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), [AWB.5009.0381].

23 Michael Watson, 'Email to Dominic Hogan, Thursday 26 October 2000 at 10:28 AM', Exhibit 299 to Commissioner Terence Cole's, *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), [AWB.5010.0009] at <http://www.oilforfoodinquiry.gov.au/exhibits/images%5CAWB.5010.0009.pdf> (accessed 10 February 2015).

24 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. 2, p. 385.

management team resulting in a number of redundancies in the international sales and marketing division and the appointment of Mr Charles Stott to the position of General Manager of that division, in June 2000. In late July 2000, Mr Stott ceased the practice of the payment of trucking fees through third parties, authorising the payment directly to Alia. Mr Stott feared that the payments made through third parties could have acted as a vehicle for AWB Ltd employees to misappropriate company funds, and he therefore retained Arthur Andersen to investigate any associated misconduct.<sup>25</sup> An internal email sent within the chartering division from Mr Cowan to Mr Ingleby tried to explain the use of Ronly by stating that:

Mark Emons & Nigel O. wanted to disguise AWB payments into Iraq for trucking fees[.] This was achieved by chartering taking a forwards contract with Ronly to combine the freight and the trucking payments. The new regime has not supported this agreement and Chartering have incurred the cost of buy out of the deal.<sup>26</sup>

3.19 The Cole inquiry report noted that the final report of the Arthur Andersen investigation was discussed at meetings of the Executive Leadership Group (ELG) of AWB Ltd initially in December 2000 and again, in more detail, on 23 February 2001.<sup>27</sup> However, the report itself was not formally disseminated to members of the ELG, as explained by the Cole inquiry report:

The Arthur Andersen report drew senior management's attention to the risks associated with the payment of greatly increased inland trucking fees, and the possibility that some portion of fees may have been siphoned off to Iraq. The matter was left for further investigation by Mr Stott. He made no proper further inquiry regarding the nature or extent of such fees, although he told Mr Goodacre he had done so. AWB management failed properly to address the risks raised in the Arthur Andersen report.<sup>28</sup>

#### *Delays and demurrage*

3.20 The Cole inquiry report noted that, from April 2000, the rate of discharge of wheat shipped into the port of Umm Qasr resulted in significant demurrage costs to AWB Ltd. In early April 2000, AWB Ltd tried to organise a meeting with the IGB to discuss this issue, but the IGB actively avoided a meeting. On 7 April 2000, in order

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25 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. 2, pp 294, 454.

26 Mr David Cowan, 'Email to Paul Ingleby dated 21 September 2000' quoted in *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', para. 35.

27 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. 2, pp 445, 452.

28 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. 2, p. 453.

to force the IGB to agree to a meeting, AWB Ltd wrote to the IGB threatening disclosure of the trucking arrangements to the UN. The letter stated:

We had hoped to discuss at our meeting the issue of the payment of the trucking fee. You will be aware of the restrictions that the UN has placed on such payments and as you are aware this now means that we must halt further payments. We have endeavoured to meet the requirements of the IGB but without direct consultation we are now restricted to the accepted methods of payment to be used. We had hoped that we could discuss personally with your good selves this issue due to the sensitivity however if you would prefer we can discuss with the UN as to the appropriate method of paying for the trucking fee? Please respond by Monday 10th April so an alternative action can be undertaken that does not result in the delay of vessels.<sup>29</sup>

3.21 The Cole inquiry report explained that further correspondence and meetings examined the possibility of withholding the payment of all or part of the trucking fee to ensure expeditious discharge, but this option was strongly rejected by the Iraqi regime. In August 2000, AWB Ltd approached DFAT about the possibility of amending the contractual terms to establish a trust account to which funds would be paid to create an incentive to Iraq in ensuring that discharge of wheat from ships was done more expeditiously. The response of DFAT explained that the trust account proposal would violate the UN sanctions regime, effectively putting AWB Ltd on notice that payment of money to Iraq would violate sanctions.<sup>30</sup>

3.22 Evidence to the Cole inquiry included a letter dated 30 October 2000 from Mr Stott to DFAT which asserted that delays in discharge could be attributed to a lack of trucks available at the port for discharge. The letter went on claim that Jordan-based trucking companies were responsible for arranging trucks at the port and requested permission to enter into discussions with the Jordan-based companies with a view to coming to a commercial arrangement to increase the number of trucks at the port. The response, signed by Ms Drake-Brockman of DFAT and dated 2 November 2000, stated that the proposal would not be in breach of the UN sanctions regime and, from an international legal perspective, there would be no reason for not proceeding with the proposed course of action.<sup>31</sup>

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29 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. xxviii.

30 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 xxix–xxx.

31 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 xxvii, xxxiii–xxxiv.

3.23 The Cole inquiry found that, given that no negotiations were entered into, the principle motive of Mr Stott in writing the letter was to obtain correspondence from DFAT that would justify the trucking-fee mechanism that was already in place.<sup>32</sup>

*The introduction of the service fee and the attempt to introduce a port fee*

3.24 As noted in the Cole inquiry report, on 1 November 2000, Mr Dominic Hogan, of the international sales and marketing division of AWB Ltd received a bid for wheat from the IGB which included a US\$25 per metric tonne trucking fee and a 10 per cent handling fee. This bid was accepted and a contract was finalised on 2 November 2000 incorporating the fees. The contract was approved by the OIP on 2 January 2001.<sup>33</sup> Between 31 January and 2 February 2001 Mr Hogan and Mr Borlase travelled to Iraq to meet with the Director-General of the IGB. Mr Borlase drafted a trip report and attached it to an email which he sent to numerous addresses including the entire international sales and Marketing division of AWB Ltd. The trip report included the statement:

We believe the increase in trucking fee and addition of the service charge is a mechanism of extracting more dollars from the escrow account.<sup>34</sup>

3.25 The Cole inquiry also noted that, in March 2001, the Iraqi State Company for Water Transport (ISCWT) sought to impose a fee of US\$0.50 per metric tonne on AWB Ltd for expenses related to and services provided to vessels. Mr Hogan opined that 'this charge contravenes the UN sanctions on Iraq as nobody is meant to be able to transfer US dollars into or out of Iraq without UN approval' and asked the US office of AWB Ltd to check the legality of the proposed port fee. The US office looked to the Australian mission to the UN for advice. The mission consulted the OIP and then advised AWB Ltd that the best answer it could get was that 'such fees are not inconsistent with the sanctions regime provided they were reasonable in amount and paid in Iraqi dinars, not US dollars'. AWB Ltd refused to pay the port fee on grounds that it was illegal.<sup>35</sup>

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32 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 xxxiv-xxxv.

33 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. 2, pp 431, 433, 436.

34 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. 3, p. 6.

35 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 xlii-xliii.

3.26 In May 2001, after AWB Ltd had refused to pay the port fee, Mr Hogan travelled to Iraq with two colleagues. In a statutory declaration, Mr Hogan noted that he had received an explanation about how wheat was discharged from ships and then transported around Iraq. Mr Hogan stated:

My understanding of the transport arrangements as set out in my diary note was that 75% of the trucks were from the Iraqi Ministry of Trade. My understanding was that the IGB controlled those trucks. I do not know who controlled the other 25% of the trucks but was told that Alia had no influence on the trucks. I had made these enquiries as to how the transport arrangements worked because AWB was concerned about the excessive demurrage costs and delays at the port. I believe that this was the first time that I became aware that Alia had no influence over the trucking arrangements.<sup>36</sup>

*The iron filings complaint and loading contracts to recover the Tigris debt*

3.27 In an article published in *The Sydney Morning Herald*, Mr David Marr and Ms Marian Wilkinson described the reaction of the Iraqi government to a press briefing made in June 2002 by the then Minister for Defence, Senator the Hon Robert Hill, when he announced that Australia would support a pre-emptive strike on Iraq to enforce UN Sanctions. In response, the Iraqi Minister for Trade announced that Iraq would cut its next Australian wheat order by half, from one million tonnes to 500 000 metric tonnes.<sup>37</sup> Then, as noted in the Cole inquiry report, in July 2002, the IGB sent an email to AWB Ltd which asserted that wheat discharged in Iraq had been contaminated by traces of iron powder. A delegation from AWB Ltd travelled to Iraq in August 2002 to investigate the 'iron filings' dispute. The delegation accepted that the previous six shipments had been contaminated and agreed to compensate the IGB by approximately \$2 million.<sup>38</sup>

3.28 As noted by Mr John Agius SC who acted as Counsel assisting the Cole inquiry, AWB Ltd sought advice from DFAT as to how the iron filings debt should be paid and DFAT, after consulting with the UN, suggested that AWB Ltd could either

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36 Mr Dominic Hogan, 'Unsigned Statutory Declaration', para. 128, Exhibit 142 to Commissioner Terence Cole's, *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), [WST.0005.0001]

<http://www.oilforfoodinquiry.gov.au/exhibits/images%5CWST.0005.0001.pdf> (accessed 10 February 2015).

37 David Marr and Marian Wilkinson, 'Deceit by the Truckload' *The Sydney Morning Herald*, 15 April 2006, <http://www.smh.com.au/news/national/deceit-by-the-truckload/2006/04/14/1144521506851.html?page=fullpage#contentSwap1> (accessed 11 February 2015).

38 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. 3, p. 76.

pay the debt into the UN escrow account or give the IGB a discount on future wheat sales.<sup>39</sup>

3.29 Mr Aguis also noted that, in 1996, BHP Ltd had paid for a shipment of wheat to Iraq as a donation, but had assigned to Tigris Petroleum Corporation Limited (Tigris) any rights to payment for the wheat in return for 25% of whatever was recovered from Iraq.<sup>40</sup> This was done even though AWB Ltd received advice from DFAT on 6 November 1995 that:

Proposals whereby Iraq agrees to repay debts against the promise of future oil sales are not acceptable to the Sanctions Committee nor are transactions involving the payment for humanitarian goods by third parties.<sup>41</sup>

3.30 Despite the earlier advice, as explained by Mr Agius, in 2001 and 2002 AWB Ltd assisted Tigris by negotiating with Iraq for the debt to be repaid together with simple interest, calculated to be US\$8.3 million. At about the same time as the iron filings agreement, an agreement was reached between AWB Ltd and the IGB for the future contract price of wheat to be inflated to cover the repayment of the Tigris debt.<sup>42</sup>

3.31 Mr Agius explained that, in late October 2002, concern had been expressed within AWB about how the agreement could be put into effect as it would have been too obvious for the repayment to be concealed within only one contract. It was thought that it was best to spread the loading up over two or more contracts and this proposal was reported widely to senior executives of AWB Ltd.<sup>43</sup>

3.32 The Cole inquiry report indicated that on 12 December 2002, AWB Ltd concluded two contracts (A1670 and A1680) for the sale of a total of one million tonnes of wheat to Iraq. Contrary to the DFAT advice, although not specified in the

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39 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, p. 4, presented at the Corruption Prevention Network, CPN 2011 Annual Forum, <http://www.corruptionprevention.net/assets/Uploads/Documents/Forum-Papers/2011/ABlightOnTheCropTheAustralianWheatBoardCase.pdf> (accessed 10 February 2015).

40 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, p. 3, presented at the Corruption Prevention Network, CPN 2011 Annual Forum.

41 Mr Malcolm Skelly, DFAT, 'Letter to Mr Charles Stott of AWB dated 6 November 1995', Exhibit 0204 to Commissioner Terence Cole's, *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), [AWB.0106.0018] <http://www.oilforfoodinquiry.gov.au/exhibits/images/AWB.0106.0018.pdf> (accessed 11 February 2015).

42 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, p. 3, presented at the Corruption Prevention Network, CPN 2011 Annual Forum.

43 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, pp 3–4, presented at the Corruption Prevention Network, CPN 2011 Annual Forum. See also, 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 li–lii.

contract, AWB Ltd added to the cost of wheat, under the inland transport fee, US\$2.017 per metric tonne to cover the iron filings debt and €8.40 per metric tonne to cover the Tigris debt.<sup>44</sup>

#### *The Invasion and the US Wheat Associates complaint*

3.33 As noted in the Statement of Facts in *ASIC v Ingleby*, in March 2003, a vessel named the *Pearl of Fujairah* was directed away from Iraq as a result of the US-led invasion. As AWB Ltd had pre-paid €2.468 million in trucking and service fees for that ship's cargo, AWB Ltd requested Alia to provide a refund of that payment. In response, Alia advised AWB Ltd that it no longer held the payment, as the money had already been transferred into another bank account, and therefore AWB Ltd should send a letter reserving its rights and requesting the return of the payment. Further correspondence implied that the money had been lodged into the account of the Director General of the IGB.<sup>45</sup>

3.34 The Statement of Facts in *ASIC v Ingleby* also noted that, in June 2003 following the US-led invasion of Iraq, AWB Ltd was informed of a complaint lodged by US Wheat Associates that AWB Ltd had inflated wheat prices under the OFF Program and paid kickbacks to the Hussain Regime in Iraq. This complaint coincided with the release of a *Memorandum of instruction to Ministry advisors* dated 10 June 2003, drafted by Captain Blake Pluckett of the Coalition Provisional Authority (CPA). The memorandum indicated that work was being undertaken to determine which contracts under the OFF Program had included a 'kickback or surcharge (often 10%)'.<sup>46</sup>

3.35 Mr Agius stated that AWB Ltd strenuously denied the complaint lodged by US Wheat Associates, and asked the Australian government to support them in their denials.<sup>47</sup> As Mr David Marr and Ms Marian Wilkinson noted, the Australian government asked its ambassador to Washington, Mr Michael Thawley, to 'raise the matter at a senior level with the US Administration, noting our concern that AWB Ltd's international reputation would be damaged by the unfounded claims'.<sup>48</sup>

#### *Project Rose*

3.36 The Cole inquiry report specified that in response to the US Wheat Associates complaint AWB Ltd established an internal investigation that became known as

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44 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. lv.

45 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', para. 45.

46 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', paras 46, 48.

47 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, p. 5, presented at the Corruption Prevention Network, CPN 2011 Annual Forum.

48 Mr David Marr and Ms Marian Wilkinson, 'Deceit by the Truckload' *The Sydney Morning Herald*, 15 April 2006.

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Project Rose. The investigation was headed by Mr Cooper, AWB's corporate counsel, who engaged the firm Blake Dawson Waldron to conduct the investigation.<sup>49</sup> David Marr and Marian Wilkinson argued that, through the application of legal professional privilege, the outsourcing of the investigation had the effect of shielding the findings of the investigation from external investigation. Furthermore:

Project Rose became the source of all the briefings and talking points senior AWB executives used to maintain their blanket denials of wrong-doing. In turn they supplied this material to the Howard Government. The lawyers of Project Rose were not only fashioning the tactics of AWB but directing Downer's and Vaile's response to the looming scandal.<sup>50</sup>

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49 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. lvx.i

50 Mr David Marr and Ms Marian Wilkinson, 'Deceit by the Truckload' *The Sydney Morning Herald*, 15 April 2006.



# Chapter 4

## The AFP Oil for Food Taskforce

4.1 As noted in Chapter 2, the Taskforce was established in response to the findings of the Cole inquiry that AWB Ltd might have committed offences under Commonwealth and Victorian legislation and its officers may have acted as accessories to those offences. This chapter looks at the work conducted by the Taskforce, the resources allocated to the Taskforce, the challenges faced by the Taskforce and the issues surrounding the shutdown of the Taskforce.

### **The work undertaken by the Taskforce**

4.2 As noted by the Australian Federal Police (AFP), the Taskforce commenced work on 22 January 2007 comprising 10 officers from the AFP, two officers from Victoria Police and nine officers from Australian Securities and Investment Commission (ASIC), with administrative and legal support provided by the Commonwealth Department of Public Prosecutions (CDPP), the Attorney-General's Department (AGD) and the Department of the Prime Minister and Cabinet (PM&C).<sup>1</sup>

### ***The first six months***

4.3 As noted by Mr Chris Savundra of ASIC, during the first six months of the Taskforce's work while ASIC formed part of the Taskforce, a significant portion of that time was spent digesting materials from the Cole inquiry, planning and also scoping the investigation.<sup>2</sup> In an article published in *The Saturday Age*, Leonie Wood quoted Mr Brendan Caridi of ASIC who had told a Victorian court that during the six-month period ASIC was involved in the Taskforce:

...very little investigative activity occurred...No witnesses were interviewed. The material from Prime Minister and Cabinet was not obtained...I think there was some material obtained from the Department of Foreign Affairs and Trade, but I think that was the extent of it...which led to ASIC making the decision in August [2007] to withdraw its operational staff and commence its own investigation.<sup>3</sup>

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1 AFP, *Submission 3*, p. 2. See also Mr Mick Keelty, AFP, *Senate Legal and Constitutional Affairs Committee, Estimates Hansard*, 23 May 2007, p. 68.

2 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 12. See also, Mr Mick Keelty, AFP *Senate Legal and Constitutional Affairs Committee, Estimates Hansard*, 23 May 2007, p. 68.

3 Ms Leonie Wood, 'Scrapped probe of wheat board cost AFP \$6m: letter', *The Saturday Age*, 9 June 2012, <http://www.theage.com.au/action/printArticle?id=3361467> (accessed 16 February 2015).

4.4 Mr David Marr, writing for Fairfax Media, made an argument that 'ASIC's decision to withdraw was based on the deeper worry that the Taskforce was too sluggish'.<sup>4</sup>

4.5 Mr Caridi subsequently explained that:

One often feels frustrated with many investigations but...I never formed the view that [the Taskforce] was inadequately resourced in terms of staffing.<sup>5</sup>

4.6 ASIC stated that it withdrew its staff from the Taskforce in late August 2007 to better concentrate on pursuing civil penalty proceedings under the Corporations Act. As justification for leaving the Taskforce and setting up its own parallel investigation ASIC cited the AFP's lack of power to investigate civil penalty breaches under the Corporations Act and that the statutory time limit for the commencement of civil proceedings on relevant wheat supply contracts had almost expired.<sup>6</sup>

4.7 Mr Savundra noted that there was another related reason for ASIC withdrawing from the Taskforce pertaining to the difficulties associated with the exercise of ASIC's compulsory powers within the confines of an AFP-led Taskforce.<sup>7</sup> ASIC confirmed that legal advice was taken with regard to both the limitation issue and the problems associated with the exercise of compulsory powers, prior to the decision to leave the Taskforce.<sup>8</sup> ASIC admitted that even though there was 'no single report underlying the decision of ASIC to withdraw from the taskforce...memoranda, emails and legal advice...preceded the decision to withdraw'.<sup>9</sup> ASIC stated that it did not raise any concerns or complaints about the running or resourcing of the Taskforce and it did not perceive that the Taskforce was being slowed down, diverted or impeded in doing its job.<sup>10</sup>

4.8 The parallel ASIC investigation is examined in chapter 5.

### ***The ongoing investigation***

4.9 In October 2007, Mr Robert Cornell, Secretary of AGD, stated that AGD held the view that the Taskforce had sufficient resources allocated to it to complete its job

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4 Mr David Marr, 'Calling the shots', *Sydney Morning Herald*, 7 March 2009, <http://www.smh.com.au/national/calling-the-shots-20090306-8rcz.html> (accessed 16 September 2014).

5 Mr Brendan Caridi, ASIC, *Committee Hansard*, 16 October 2014, p. 15.

6 ASIC, *Submission 2*, p. 7.

7 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 10.

8 ASIC, *Answers to questions on notice from public hearing on 16 October 2014*, questions 2 and 3.

9 ASIC, *Answers to questions on notice from public hearing on 16 October 2014*, question 1.

10 ASIC, *Answers to questions on notice from public hearing on 16 October 2014*, questions 9 and 10.

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and the question of whether there was any need for changes to legislation had not arisen.<sup>11</sup>

4.10 In its submission to this inquiry, the AFP summarised the work of the Taskforce after it moved from the scoping stage to the investigation stage submitting that:

The scope of the [Taskforce] was to investigate all allegations of criminality raised by the Cole Inquiry. The [Taskforce] conducted wide ranging inquiries including interviewing a large number of witnesses and examining approximately 900,000 pages of documents submitted to the Cole Inquiry together with documents obtained from the UN, shipping records, and banking records.<sup>12</sup>

4.11 The AFP explained that prior to commencing its investigation, the AFP had sought legal advice about which offences it should focus on in its investigation. Based on this advice, the Taskforce decided to limit its investigation to those suspected crimes raised by the Cole inquiry. The AFP stated that:

No referrals were made to the [Taskforce] pursuant to [section] 6H of the Royal Commissions Act 1902 (false and misleading evidence to a Royal Commission).<sup>13</sup>

4.12 The AFP noted that the Taskforce had formally corresponded with numerous employees of AWB Ltd, but all declined the invitation to participate in formal records of interview. The Taskforce interviewed a number of former and current DFAT and AUSAID employees and 'directed significant resources towards a financial analysis of all relevant transactions', sourcing evidence from seven foreign jurisdictions.<sup>14</sup>

### **The resources provided and used by the Taskforce**

4.13 The AFP explained that the Australian government initially allocated \$20.3 million to the Taskforce for the period between its inception and the 2008–09 financial year. An additional \$3.1 million was subsequently allocated to the Taskforce in the 2009–10 budget to allow the work of the Taskforce to continue until the end of June 2010. The AFP submitted that it considered that the level of funding was sufficient to address the terms of reference.<sup>15</sup>

4.14 In her article in *The Saturday Age*, Ms Leone Wood cited a letter written by the then AFP Commissioner, Mick Keelty, to the CDPP on 25 August 2009 and copied to ASIC and the AGD. The letter mentioned that the AFP had spent only \$5.95 million on the Taskforce. As noted by Ms Wood

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11 Mr Robert Cornall AO, AGD, *Senate Legal and Constitutional Affairs Committee, Estimates Hansard*, 23 May 2007, p. 68.

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

13 AFP, *Answers to written questions on notice (received on 26 February 2015)*, 18 February 2015, Questions 1 and 4.

14 AFP, *Submission 3*, pp 2–3.

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

The sum spent by the AFP, revealed in a letter released to *The Saturday Age*, is a fraction of the \$30 million earmarked for all the investigative work that had to be done by the multi-agency taskforce and any subsequent litigation.<sup>16</sup>

### Challenges faced by the Taskforce

4.15 The AFP submitted that the Taskforce faced a number of challenges during its investigation. These challenges included:

- Evidence from the Cole inquiry from witnesses had to be recollected.
- The AFP did not have a coercive power to compel a witness to give evidence. When the AFP sought relevant material from ASIC, under section 127 of the ASIC Act, the release of that information was challenged through court action by AWB Ltd.
- Much of the material was held by international entities, which resulted in time-consuming legal processes and relied on the cooperation of overseas agencies.<sup>17</sup>

4.16 There were multiple evidentiary problems faced by the Taskforce. Under section 6DD of the *Royal Commissions Act 1902* (Cth), oral evidence given by a natural person to a Royal Commission or evidence in the form of a document received pursuant to a summons, requirement or notice to a Royal Commission is not admissible in evidence against the person in civil or criminal proceedings in any Australian court.<sup>18</sup> Furthermore, as noted by the AFP, section 6 of the *Royal Commissions Act 1902* (Cth) makes it an offence to fail to answer a question relevant to an inquiry which means that oral evidence given during the course of an inquiry might be considered by a court of law to have been obtained under duress or compulsion. This could have affected the admissibility of the oral evidence gathered by the Cole inquiry at a subsequent criminal trial.<sup>19</sup> It follows that, as explained by the AFP, in order to mount a successful prosecution the Taskforce needed to collate sufficient evidence from scratch to prove that the conduct of AWB Ltd or its officers had amounted to an offence.<sup>20</sup>

4.17 Mr Savundra explained that when the Taskforce was being set up the issue of using ASIC's coercive powers was raised with the AGD. The AGD sought advice on

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16 Ms Leonie Wood, 'Scrapped probe of wheat board cost AFP \$6m: letter', *The Saturday Age*, 9 June 2012.

17 AFP, *Submission 3*, p. 3. See also, AFP, 'The AFP responds to questions posed by The Age', *The Age*, 7 June 2012, <http://www.theage.com.au/national/the-afp-responds-to-questions-posed-by-the-age-20120606-1zwhe.html?rand=1338988643281> (accessed 16 February 2015).

18 *Royal Commissions Act 1902* (Cth) s. 6DD.

19 AFP, *Answers to written questions on notice (received on 26 February 2015)*, 18 February 2015., Question 2.

20 AFP, *Submission 3*, p.3.

how to avoid legal issues relating to the use of the coercive powers.<sup>21</sup> In early 2008, the AFP approached ASIC to release information received through its coercive powers. AWB Ltd opposed the release in the Federal Court. The material was never released to the Taskforce.<sup>22</sup> ASIC took the position that the introduction of special purpose enabling legislation could have assisted the Taskforce in being able to use coercive powers of partner agencies to undertake its work more effectively. According to Mr Savundra, no enabling legislation was passed.<sup>23</sup> The issues surrounding the dissemination of information gained through ASIC's use of its coercive powers is further discussed in chapter 5.

4.18 According to the CDPP, Australia is currently a signatory to over 20 bilateral mutual assistance treaties and a number of international conventions which assist the mutual assistance process. The CDPP cooperates with international investigating agencies to take evidence from witnesses, execute search warrants and notices to produce material and to locate, restrain and recover proceeds of crime.<sup>24</sup> As noted by the AFP, the CDPP was a member of the Senior Coordination Group (SCG) of the Taskforce and provided administrative and back office assistance on the Taskforce.<sup>25</sup> However, although the CDPP has coercive powers, as pointed out by the AFP:

The CDPP is not an investigative agency and does not possess investigative powers. There are no means by which the CDPP can require witnesses to attend formal interviews during an investigation. As there was no prosecution, the CDPP was also not in a position to exercise any of its prosecutorial powers in relation to the examination of witnesses in a criminal trial.<sup>26</sup>

### ***Proving an offence***

4.19 Mr John Agius SC, the senior counsel assisting Commissioner Cole during the Cole inquiry, explained that the Cole inquiry found that the principle criminal offences that might have been breached were the former sections 29A, 29B and 29D of the *Crimes Act 1914* (Cth), equating to sections 135.1, 135.4 and 136.1 of the *Criminal Code* (Cth), relating to intentionally acting dishonestly to obtain gain through deceiving a Commonwealth entity.<sup>27</sup> Mr Agius accepted that in order to prove that these offences had taken place it would be necessary to prove both a physical component and a mental component. AWB Ltd would have had to be found to have

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21 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 10.

22 ASIC, *Submission 2*, pp 11–12.

23 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 10.

24 CDPP, 'International work', <http://www.cdpp.gov.au/about-us/international-work/> (accessed 18 February 2015).

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

26 AFP, *Answers to written questions on notice (received on 26 February 2015)*, 18 February 2015, Question 3.

27 Mr John Agius SC, *Committee Hansard*, 16 October 2014, p. 17.

acted dishonestly and its acts would have had to be intentionally designed to deceive the Commonwealth.<sup>28</sup>

4.20 Mr Agius claimed that:

The fact of the transport fee, the fact that the money was being paid secretly and the fact that all of this was being done by a sham contract were never disclosed to the Commonwealth, and therefore that was a prima facie case of various of those sections.<sup>29</sup>

4.21 Mr Agius stated that, if the Commonwealth had actual knowledge of the intention to deceive, it would amount to a defence as:

There would not be any deception of the Commonwealth if the Commonwealth were aware that, in effect, it was being deceived. So the offence could not be made up. But there was certainly no credible evidence that the Commonwealth was aware of the true nature of the contracts between AWB and the IGB.<sup>30</sup>

4.22 However, Mr Agius cautioned that his knowledge of the work of the Taskforce was limited, stating:

You should know that neither I nor any of the other counsel, to the best of my knowledge, were ever consulted, so I do not know what the [Taskforce] actually did, what advice they had and which witnesses were available to them. So I am in the dark on some fairly material information.<sup>31</sup>

4.23 Mr Peter Hastings QC, who reviewed the work of the Taskforce, explained that deceit was not the only issue that needed to be reconciled, it was also necessary to prove that a gain could be attributed to the deceit and this would require an examination of whether the OIP would have approved the contracts even if they were aware of the payment of the trucking and service fees. Mr Hastings stated:

...a number of the legal issues that arise from all this include not just the question of deceit but the question of what the consequences were and what the alternatives would have been if the deceit had not taken place. There are a whole series of related issues which needed to be looked at before any decision could be made as to whether there were reasonable prospects of succeeding with a prosecution.<sup>32</sup>

4.24 The AFP explained that:

The Taskforce needed to gather sufficient admissible evidence of the relevant deception and how it may have influenced Commonwealth Officials, together with admissible evidence required to establish the other aspects of the offence(s).

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28 Mr John Agius SC, *Committee Hansard*, 16 October 2014, p. 19.

29 Mr John Agius SC, *Committee Hansard*, 16 October 2014, p. 17.

30 Mr John Agius SC, *Committee Hansard*, 16 October 2014, p. 16.

31 Mr John Agius SC, *Committee Hansard*, 16 October 2014, p. 15.

32 Mr Peter Hastings QC, *Committee Hansard*, 16 October 2014, p. 4.

The Taskforce's work was therefore affected to the extent that arguments were available to AWB that particular conduct did not satisfy applicable legal thresholds, or that particular defences could be made out. This included the potential defence that DFAT adopted a limited approach to scrutinising AWB contracts. The Taskforce was aware that the evidence it gathered needed to be correspondingly cogent in order to overcome any such arguments in any prosecution.<sup>33</sup>

4.25 The Chair accepts AFP's evidence given that, after the Taskforce had been shut down, in AWB Ltd's outline of opening submissions to the case of *Watson and Watson v AWB Ltd*, a civil class action that was eventually settled out of court, AWB Ltd admitted having paid trucking fees to Alia in full knowledge that the fees were being remitted to the ISCWT. However, AWB Ltd disputed that:

...payment of the Fees was contrary to the UN Sanctions; that AWB knew, believed or was aware of this; that the UN and DFAT did not know AWB was paying the Fees and could not and/or would not have permitted it if they did know...<sup>34</sup>

4.26 ASIC informed the committee that the civil class action was settled out of court for \$39.5 million.<sup>35</sup>

4.27 On 7 June 2012, Mr Nick McKenzie of Fairfax Media compiled a report examining the conduct of the Taskforce and the circumstances surrounding its shutdown. This report formed the basis of an article in *The Age* co-written by Mr Richard Baker (2012 article) and a segment on ABC's 7.30. In the transcript of the segment on 7.30, former Acting-Coordinator of the Taskforce, Mr Ross Fusca, in response to a question from Mr McKenzie said that the information gathered by the Taskforce was:

...broadly...saying that senior [government] officials were aware of what was happening, what had happened in as much as that they were aware of the kickbacks.<sup>36</sup>

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33 AFP, *Answers to written questions on notice (received on 26 February 2015)*, 18 February 2015, Question 5.

34 *Respondent's outline of Opening Submissions in Watson and Watson v AWB Ltd [2007] FCA 1367* at para. 25, tabled by Senator Penny Wright at public hearing on 16 October 2014, at <http://www.aph.gov.au/DocumentStore.ashx?id=6a6003bc-bb25-465a-85d0-0825e188c071> (accessed 17 February 2015).

35 ASIC, *Answers to questions on notice from public hearing on 16 October 2014*, Question 12.

36 Mr Rosario Fusca, interviewed by Mr Nick McKenzie on 'Former investigator claims AWB kickbacks case mishandled', 7.30 hosted by Ms Leigh Sales, Australian Broadcasting Corporation, 7 June 2012, <http://www.abc.net.au/7.30/content/2012/s3520724.htm> (accessed 19 February 2015).

4.28 The AFP, in response to a question on notice asking whether the Taskforce received any evidence to suggest that political figures or public officials were aware of the payments made by AWB Ltd for the transport costs of grain in Iraq, limited its response to:

The Task Force did not receive any evidence that political figures had knowledge of payments made by AWB Ltd for the transport costs of grain in Iraq.<sup>37</sup>

4.29 Mr Agius commented on the transportation fees and DFAT's awareness of those fees by saying:

DFAT may well have known—and I believe it probably did know—that there was a transportation fee. What they did not know was that the transportation fee was a sham. It was a device to permit AWB to increase the price of the wheat and to pay an intermediary for transport.<sup>38</sup>

4.30 Whether or not there was knowledge of the transportation fees, AWB Ltd noted that it was open to the UN to take the view that the payment of fees by AWB Ltd was not contrary to the UN sanctions. AWB Ltd argued that it was possible that the UN could have come to this conclusion given the concerns expressed about the high level of holds on humanitarian contracts and the fact that the UN took a pragmatic approach to payments by suppliers to the Iraqi government, as shown by the lack of action taken over allegations that the Iraqi government were demanding kickbacks and illegal commissions on contracts for humanitarian supplies.<sup>39</sup>

### **Shutting down the Taskforce**

4.31 In July 2009, the then AFP Commissioner, Mr Mick Keelty engaged Mr Peter Hastings QC to undertake a review of the Taskforce and provide advice on the likelihood of any successful prosecutions (the Hastings advice). The AFP submitted that:

Mr Hastings QC advised the resources that would be required to mount a prosecution, and the consequential costs, would be disproportionate to the prospects of the criminal prosecution succeeding.<sup>40</sup>

4.32 Mr Hastings stated that he based his advice on a number of sources including the findings of the Cole inquiry, the instructions provided in the brief of evidence and oral communications with those involved in the Taskforce.<sup>41</sup>

4.33 Based on the Hastings advice, on 28 August 2009, former Commissioner Keelty announced that the Taskforce would be disbanded.<sup>42</sup> The Hastings advice has

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37 AFP, *Answers to written questions on notice (received on 26 February 2015)*, 18 February 2015, Question 6.

38 Mr John Agius SC, *Committee Hansard*, 16 October 2014, p. 21.

39 *Respondent's outline of Opening Submissions in Watson and Watson v AWB Ltd [2007] FCA 1367* at paras 124-128, tabled by Senator Penny Wright at public hearing on 16 October 2014.

40 AFP, *Submission 3*, p. 3.

41 Mr Peter Hastings QC, *Committee Hansard*, 16 October 2014, p. 7.

never been made public. As outlined in chapter 2, the work of the Taskforce was previously examined by the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity during its inquiry into the integrity of overseas Commonwealth law enforcement operations. The AFP noted that the Joint Committee had requested a copy of the Hastings advice, but, through the then Minister for Home Affairs and Justice, the Hon Jason Clare MP, the AFP made a claim of public interest immunity over the Hastings advice.<sup>43</sup> The AFP did provide a private briefing on the advice to the Joint Committee on 20 September 2012 and the Parliamentary Joint Committee report did not include any recommendations on the work of the Taskforce.<sup>44</sup>

### ***Was the Taskforce shut down prematurely?***

4.34 The 2012 article by Mr McKenzie and Mr Baker quoted from an interview with Mr Fusca, who claimed that:

...there were not enough investigators to analyse the millions of documents produced to Terence Cole's commission, let alone begin interviewing witnesses and liaising with overseas agencies.<sup>45</sup>

4.35 Mr Fusca also claimed that members of the Taskforce from ASIC and the Victoria Police raised questions on how seriously the AFP was taking the work of the Taskforce. As noted by Mr McKenzie on 7.30, Mr Fusca said that the Taskforce encountered resistance, as if someone wanted the investigation to fail.<sup>46</sup> This claim was further supported by evidence obtained by *The Age* that two other members of the Taskforce believed that the inquiry could have been better managed.<sup>47</sup>

4.36 Mr McKenzie stated:

...I spoke confidentially to some of [Mr Fusca's] colleagues in the Taskforce. I will not name them, for obvious reasons, but they did express concern that there was a lack of support and backing from up on high for the [Taskforce's] work, and that the [Taskforce] was, perhaps not set up to fail, but certainly did not have the drive that it needed...They held his concerns about the lack of support from up on high for the [Taskforce] and

42 AFP, *Submission 3*, p. 3.

43 AFP, *Submission 3*, pp 3-4.

44 AFP, *Submission 3*, p. 4.

45 Mr Nick McKenzie and Mr Richard Baker, 'Scandal? What Scandal?' *The Age*, 7 June 2012, at <http://www.theage.com.au/national/scandal-what-scandal-20120606-1zwrf.html> (accessed 16 September 2014). See also, Nick McKenzie, 'Former investigator claims AWB kickbacks case mishandled', 7.30 hosted by Ms Leigh Sales, Australian Broadcasting Corporation, 7 June 2012.

46 Mr Nick McKenzie, 'Former investigator claims AWB kickbacks case mishandled', 7.30 hosted by Ms Leigh Sales, Australian Broadcasting Corporation, 7 June 2012.

47 Mr Nick McKenzie and Mr Richard Baker, 'Scandal? What Scandal?', *The Age*, 7 June 2012.

the fact that it was, in their view, wrapped up early. As to why that happened, they could only speculate, and so could I.<sup>48</sup>

4.37 In the 2012 article, Mr McKenzie and Mr Baker noted Mr Fusca's claims that the Hastings advice, which led Mr Keelty to announce the shutdown of the Taskforce, was made prematurely. Mr Fusca claimed that the Taskforce still had 'months and months' of work to complete in order to gather all the relevant evidence. The article implied that the 2009 advice contradicted confidential advice written by Mr Hastings QC in April 2008 which stated 'I agree that there is a proper basis for pursuing a case of fraud to the effect that...[officials were] deceived into granting approval [to AWB] for the export of wheat to Iraq'.<sup>49</sup>

4.38 In order to contradict any suggestion that he may have been externally influenced when drafting his 2009 advice Mr Hastings volunteered that:

I acted for the Commonwealth for 35 years that I was in practice, and on no occasion was I ever asked to advise on the basis of giving a specific response. In every occasion that I was ever briefed by a Commonwealth officer or a Commonwealth agency, I was always given an open opportunity to form my view as to what I thought the position was. Not once in my entire career was I ever asked to give an advice to a particular result or effect.<sup>50</sup>

4.39 Mr McKenzie reported that Mr Fusca believed that he had been offered a promotion by a senior member of the AFP if he 'could somehow close the inquiry'. Mr Fusca also claimed that on the following day he was approached by another senior AFP officer who, citing budgetary concerns, told him that the criminal brief of the Taskforce had to be completed by April 2009 when, in Mr Fusca's opinion, given the resources dedicated to the Taskforce it could not be completed until the end of 2009. Mr Fusca stated:

A number of avenues were never pursued and they were [an] integral part of the investigation. The inquiry was far from complete; far from completed.<sup>51</sup>

4.40 Mr McKenzie tried to summarise the claims that the Taskforce may have been shut down prematurely by stating that:

...it was...inescapable that there were no criminal charges laid flowing from what was a very important royal commission into corporate misconduct. It was also inescapable that the legal advice that Mr Hastings finally gave...was given before the [Taskforce] had completed its duties. In

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48 Mr Nick McKenzie, *Committee Hansard*, 16 October 2014, pp 30-31.

49 Mr Nick McKenzie and Mr Richard Baker, 'Scandal? What Scandal?', *The Age*, 7 June 2012.

50 Mr Peter Hastings QC, *Committee Hansard*, 16 October 2014, p. 6.

51 Mr Rosario Fusca, quoted by Mr Nick McKenzie, 'Former investigator claims AWB kickbacks case mishandled', 7.30 hosted by Ms Leigh Sales, Australian Broadcasting Corporation, 7 June 2012. See also, Mr Nick McKenzie and Mr Richard Baker, 'Scandal? What Scandal?' *The Age*, 7 June 2012.

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our analysis of this, it simply occurred to us that the [Taskforce], had it been left to complete its work, might have had some evidentiary findings that could have changed Mr Hastings's advice. There could have been a range of other offences looked at, things such as false accounting, money laundering and foreign bribery offences, that might have meant that a prosecution could have been forthcoming. It could have been that a reluctant witness, upon being charged with a relatively minor criminal offence, would have agreed to give evidence against others, therefore opening up fresh avenues for the [Taskforce].<sup>52</sup>

4.41 In a more recent article, Mr Baker and Mr McKenzie noted that the AFP had denied the claim that the Taskforce was under-resourced and shut down prematurely. In response, the AFP stated that the Taskforce had comprised more than 20 state and federal officers and had a multimillion dollar budget.<sup>53</sup>

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52 Mr Nick McKenzie, *Committee Hansard*, 16 October 2014, p. 31.

53 Mr Richard Baker and Mr Nick McKenzie, 'Senate inquiry to investigate explosive federal police bribery claims over wheat board oil-for-food scandal', *The Age*, 26 June 2014, at <http://www.theage.com.au/federal-politics/political-news/senate-inquiry-to-investigate-explosive-federal-police-bribery-claims-over-wheat-board-oilforfood-scandal-20140626-zsn4d.html> (accessed 16 September 2014).



## Chapter 5

### The investigation by ASIC

5.1 The Australian Security and Investment Commission (ASIC) submitted that, in January 2006, following the release of the final report of the Independent Inquiry Committee (IIC) and the subsequent announcement of the Cole inquiry, ASIC took the decision not to investigate potential breaches of the Corporations Act, to avoid impinging on the jurisdiction of the Cole inquiry. During this period, 20 of the 27 AWB wheat supply contracts fell outside the relevant statutory time limits regulating the commencement of civil actions. Between February and August 2007, when ASIC had allocated nine of its staff to the Taskforce, two more contracts were affected by the statutory limitation period.<sup>1</sup>

5.2 Mr Nick McKenzie argued that this was not a sound excuse for failing to pursue the earlier contracts. He claimed that by the time that the IIC had tabled its report, ASIC would have known that there was a likelihood of the need for a corporate malfeasance investigation in Australia. Mr McKenzie stated that:

ASIC could have turned its mind to how it could have best investigated corporate offences flowing from this conduct, if they did indeed exist at the time that Mr Volcker tabled his report and then during the life of the royal commission. Indeed, law enforcement agencies can work at the same time that a royal commission is doing its work, as long as they are mindful of stepping on toes and legal practicalities.<sup>2</sup>

#### *Commencement of the parallel investigation*

5.3 As noted in chapter 4, ASIC left the Taskforce in late August 2007 in order to pursue its own parallel investigation. As noted by ASIC, initially, the scope of the investigation was into suspected contraventions of various sections of the Corporations Act, the *Criminal Code* (Cth) and the *Crimes Act 1958* (Vic) arising out of the five contracts that still fell within the statutory limitations period. The scope of the investigation was narrowed in July 2008 to only cover suspected contraventions of the Corporations Act to avoid overlap between the ASIC investigation and that of the Taskforce.<sup>3</sup>

5.4 As explained by Mr Jason Young, a former ASIC officer, the initial stages of the ASIC investigation involved long periods of idleness. The investigatory team 'were not getting much direction of what to do'. However, as described by Mr Young:

...all of a sudden after a number of months, there was a belated awareness from the law component of the [investigation] that we were rapidly approaching a period where the last few contracts were going to expire in

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1 ASIC, *Submission 2*, pp 5-6.

2 Mr Nick McKenzie, *Committee Hansard*, 16 October 2014, p. 27.

3 ASIC, *Submission 2*, p. 7.

relation to the statutory limitations upon filing for litigation. Then it was all hands on deck, and, in the handing out of persons of interest...<sup>4</sup>

5.5 ASIC submitted that as the statutory time limit for the final five AWB Ltd contracts was due to expire on 20 December 2007, it decided to increase the number of staff involved in the investigation so as to more expeditiously determine whether civil proceedings could be pursued. On 19 December 2007, ASIC commenced civil proceedings in the Supreme Court of Victoria against six former AWB Ltd officers, alleging that they had contravened sections 180 and 181 of the Corporations Act as a result of conduct associated with the five remaining contracts.<sup>5</sup>

### *ASIC's coercive powers*

5.6 ASIC explained that, as part of its investigation, it used its compulsory witness examination and document gathering powers contained in section 19 and Division 3 of Part 3 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) respectively.<sup>6</sup> As noted by Ms Leonie Wood of Fairfax Media, ASIC's coercive powers are unique. The AFP does not have the same coercive powers and, as such, suspects could simply decline to answer the AFP's questions until confronted in court.<sup>7</sup> Given the compulsory nature of ASIC's powers, they have been made subject to certain restrictions, as outlined in subsection 127(1) of the ASIC Act. However, subsection 127(4) of the ASIC Act, when read with the decision of the High Court in *Johns v Australian Securities Commission*,<sup>8</sup> would allow for the chairperson of ASIC to release information to other agencies (a subsection 127(4) release), after any party whose interest may be materially adversely affected is offered the opportunity to make a submission on the proposed release.<sup>9</sup>

### *Problems with releasing information to the Taskforce*

5.7 As mentioned in chapter 4, ASIC noted that, in early 2008, in response to a request from the AFP for a subsection 127(4) release, ASIC wrote to various witnesses to provide them with an opportunity to be heard or to make a submission on the proposed release. On 2 September 2008, a delegate of the chairman of ASIC authorised the conditional disclosure of information to the AFP. However, before the information was delivered, on 11 September 2008, AWB Ltd commenced proceedings in the Federal Court to challenge the decision to release information. The court dismissed the application and AWB Ltd appealed this decision. The decision of the Full Court of the Federal Court was reserved until 30 November 2009, after the

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4 Mr Jason Young, *Committee Hansard*, 16 October 2014, p. 23.

5 ASIC, *Submission 2*, pp 7-8, 10.

6 ASIC, *Submission 2*, p. 8.

7 Leonie Wood, 'ASIC to reveal interviews', *The Age*, 1 May 2008, <http://www.theage.com.au/business/asic-to-reveal-interviews-20080430-29tj.html> (accessed 27 February 2014).

8 *Johns v Australian Securities Commission* (1993) 178 CLR 408.

9 ASIC, *Submission 2*, p. 11.

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Taskforce had been disbanded, when the appeal was dismissed by consent. As a result, the Taskforce was not able to access the information gathered by ASIC using its coercive powers.<sup>10</sup>

5.8 Mr Chris Savundra of ASIC listed four legal obstacles to the dissemination of information gathered using ASIC's coercive powers. Mr Savundra noted:

The first is that the use of ASIC's powers for the purposes of obtaining information for another agency or task force is probably beyond legislative power. The second is that while ASIC is authorised in certain circumstances to release information it obtains through an investigation to other agencies, including the AFP, ASIC needs to consider each piece of information on an item by item basis before it exercises that discretion to disclose and release the information to another agency or to a taskforce... The third reason really flows on. It is that, in making a decision to release, ASIC will usually have to afford procedural fairness to persons who are potentially affected by the release...and...the fourth point, which is that section 102(5) of the ASIC Act provides that the exercise of an ASIC power must be done at ASIC's direction. This was an AFP led taskforce under the management and direction of the AFP. So there was another legal impediment there around the use of our powers within the context of a taskforce that was being led by another agency.<sup>11</sup>

5.9 Mr Savundra confirmed that ASIC did not exercise any of its powers under the ASIC Act during the six-month period that its officers were engaged in the Taskforce.<sup>12</sup> Then, when questioned why ASIC joined the Taskforce when ASIC would have known, or should have known, that its powers would be limited and it would be constrained in its ability to successfully pursue civil proceedings, Mr Savundra speculated that one reason could have been that ASIC could provide the Taskforce with its expert knowledge of corporations law.<sup>13</sup>

### ***The court proceedings***

5.10 As stated by ASIC, on 12 November 2008, Justice Robson of the Supreme Court of Victoria ordered a stay of the civil proceedings against five of the six former AWB officers, explaining that it would not be fair or just to make a defendant waste resources on defending a civil action when those resources may be needed to defend a criminal action that might arise from the Taskforce. However, the action against Mr Lindberg, the former Chief Executive of AWB, was not suspended. This action was concluded on 9 August 2012 with Justice Robson ordering the disqualification of Mr Lindberg as a company director for a period of three years and the payment of a pecuniary penalty of \$100,000.<sup>14</sup>

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10 ASIC, *Submission 2*, pp 11-12.

11 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 10-11.

12 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 11.

13 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 11-12.

14 ASIC, *Submission 2*, pp 13 and 18.

5.11 As noted by ASIC, on 2 August 2010, Justice Robson lifted the order staying the civil actions against the other five former officers of AWB Ltd. Only one other action, against Mr Paul Ingleby, the former Chief Financial Officer of AWB Ltd, has been successful. However, there are two ongoing actions that are currently listed in the Supreme Court of Victoria, against Mr Trevor Flugge, the former Chair of AWB Ltd, and Mr Peter Geary, the former General Manager for Trading in AWB Ltd. As noted by ASIC, at a directions hearing on 25 September 2014 the two matters were listed for trial on 5 October 2015 and the expected duration of the trial is 10 weeks.<sup>15</sup>

5.12 On 23 December 2013, by consent of all parties, ASIC discontinued its proceedings against Mr Charles Stott, a former General Manager of International Sales and Marketing for AWB (International) Ltd and Mr Michael Long, Mr Stott's successor, as it was determined by ASIC that it would not be in the public interest to continue with them and the final two actions are ongoing.<sup>16</sup>

### ***Possible criminal actions under the Corporations Act***

5.13 As explained by ASIC, on 26 May 2010, ASIC terminated its investigation into suspected contraventions of criminal provisions of the Corporations Act.<sup>17</sup> ASIC accepted the findings of the Cole inquiry that criminal offences may have occurred. However, ASIC submitted:

Commissions of Inquiry established under letters patent sometimes find that criminal offences may have occurred and refer such matters to investigative agencies, however, in arriving at these findings such Commissions generally do not have to base their findings on evidence admissible in a Court... In the event that ASIC considered that the evidence gathered during its investigation supported a successful criminal prosecution of any person associated with AWB's supply of wheat to Iraq, ASIC would have adopted that course instead of embarking upon—or continuing with—civil penalty proceedings against that person.<sup>18</sup>

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15 ASIC, *Answers to questions on notice from public hearing on 16 October 2014*, Question 5.

16 ASIC, *Submission 2*, pp 14-16 and 24.

17 ASIC, *Submission 2*, p. 24.

18 ASIC, *Submission 2*, p. 17.

5.14 When asked whether ASIC considered the possibility of opening up an investigation into ABW Ltd for misleading the stock exchange, ASIC responded that it had formed the view that it would limit the scope of its investigation to the specific contraventions highlighted in the Cole inquiry report. However, ASIC followed the proceedings of *Watson and Watson v AWB Ltd*<sup>19</sup> and filed a Notice of Motion supported by an affidavit to obtain access to the transcript of the trial. As ASIC explained:

Following the class action settlement which resulted in AWB making a payment of \$39.5 million (inclusive of legal costs) to the plaintiffs, no formal further consideration was given by ASIC to commencing a separate investigation into AWB [Ltd] and possible false or misleading statements that it may have made to the market.<sup>20</sup>

### **Problems faced by ASIC when pursuing large corporate entities**

5.15 Mr John Addis, in his article for Fairfax Media, argued that when trying to effectively pursue matters against large corporate entities ASIC finds itself in 'in an unenviable position'. Mr Addis claims that:

- the institutions that ASIC needs for support often consider white-collar crime to be a lesser offence;
- the maximum penalties are not high enough and the punishments are not strong enough to act as effective deterrents; and
- the high costs of investigating and prosecuting large corporate entities for potential contraventions make it harder for ASIC to justify pursuing these entities, given the parallel imperative to raise funds for the government.<sup>21</sup>

5.16 The Senate Economics References Committee (Economics Committee) which, in its report on the inquiry into the performance of ASIC, commented on penalties by stating:

It is important that the penalties contained in legislation provide both an effective deterrent to misconduct as well as an adequate punishment, particularly if the misconduct can result in widespread harm. Insufficient penalties undermine the regulator's ability to do its job: inadequately low penalties do not encourage compliance and they do not make regulated entities take threats of enforcement action seriously. The committee considers that a compelling case has been made for the penalties currently

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19 *Watson and Watson v AWB Ltd* [2007] FCA 1367.

20 ASIC, *Answers to questions on notice from public hearing on 16 October 2014*, Question 12.

21 Mr John Addis, 'Why ASIC lets the big fish go', *The Sydney Morning Herald*, 25 February 2014, <http://www.smh.com.au/business/intelligent-investor/why-asic-lets-the-big-fish-go-20140225-33diw.html> (accessed 19 February 2015).

available for contraventions of the legislation ASIC administers to be reviewed to ensure they are set at appropriate levels.<sup>22</sup>

5.17 The Economics Committee also acknowledged that financial constraints affect the capacity of ASIC to act as a corporate regulator. The Economics Committee stated that 'ASIC's long list of regulatory tasks and the resources available to ASIC to perform these tasks clearly act as constraints on its ability to meet expectations the public and stakeholders may have'.<sup>23</sup>

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22 Senate Economics References Committee, *Report into the Performance of the Australian Securities and Investments Commission*, June 2014, p. 367, [http://www.aph.gov.au/parliamentary\\_business/committees/senate/economics/asic/final\\_report/~media/committees/senate/committee/economics\\_ctte/asic/final\\_report/report.pdf](http://www.aph.gov.au/parliamentary_business/committees/senate/economics/asic/final_report/~media/committees/senate/committee/economics_ctte/asic/final_report/report.pdf) (accessed 19 February 2015).

23 Senate Economics References Committee, *Report into the Performance of the Australian Securities and Investments Commission*, June 2014, p. 414.

# Chapter 6

## Chair's comments and recommendations

6.1 The Chair notes that a number of issues arose from the work of the Australian Federal Police (AFP) Oil-for-food Taskforce (Taskforce) and the Australian Securities and Investment Commission (ASIC) investigation.

### *Issues arising from the Taskforce*

6.2 The Chair acknowledges that, during the course of the inquiry, the committee received very little public evidence about the operations of the Taskforce. Moreover, the Chair emphasises that very little information was provided on the Hastings advice and the reasons for shutting down the Taskforce. However, as noted in chapter 4, the Taskforce failed to meet any of its terms of reference. Many millions of dollars of public money had been put into the Taskforce with no outcome. The work of the Taskforce did not result in a single prosecution, in fact, not a single charge was laid. This leads the Chair to question why so much money was placed into a process that resulted in no defined outcome and what lessons have been learned from the failures of the Taskforce.

6.3 The Chair accepts that the Taskforce faced a number of challenges, including:

- evidence from the Cole inquiry from witnesses had to be recollected; and
- the AFP did not have a coercive power to compel a witness to give evidence and encountered legal challenges when it attempted to have material released to it by ASIC.<sup>1</sup>

6.4 The first of these challenges leads the Chair to question whether a royal commission is the best means of conducting an initial investigation into alleged criminal activity. The second challenge raises the issue of the use of coercive powers in criminal investigations and what further actions could be taken to improve cooperation between agencies.

### *Issues arising from the ASIC investigation*

6.5 As noted in chapter 5, in May 2010, ASIC decided not to pursue any criminal investigations, preferring to concentrate on possible infringements of civil penalty provisions related to directors' duties. The civil penalty cases were targeted at six former officers of AWB Ltd. Two of these cases were dropped on grounds that it would not have been in the public interest to pursue them. ASIC did not provide a further explanation as to why it would not have been in the public interest to pursue those cases.

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1 AFP, *Submission 3*, p. 3. See also, AFP, 'The AFP responds to questions posed by The Age', *The Age*, 7 June 2012, <http://www.theage.com.au/national/the-afp-responds-to-questions-posed-by-the-age-20120606-1zwhe.html?rand=1338988643281> (accessed 16 February 2015).

6.6 The Chair notes that the two successful cases were achieved with the consent of the defendants. Outside of the statement of agreed facts and the joint submission as to penalty, no evidence was tabled in court and therefore ASIC did not have to publicly make out a case. As the two remaining cases are pending court hearings, the Chair reserves her judgment on the outcomes of the ASIC investigation. However, the Chair notes that better foresight and planning may have resulted in a more wide-ranging and cost-effective investigation by incorporating more of the AWB Ltd contracts and providing better direction to the investigative team, thereby increasing the chance of a successful outcome.

6.7 As with the Taskforce, the Chair accepts that ASIC faced a number of challenges in its attempt to pursue AWB Ltd and its officers, including:

- the institutions that ASIC needs for support often consider white-collar crime to be a lesser offence;
- the maximum penalties are not high enough and the punishments are not strong enough to act as effective deterrents; and
- the high costs of investigating and prosecuting large corporate entities for potential contraventions make it harder for ASIC to justify pursuing these entities, given the parallel imperative to raise funds for the government.<sup>2</sup>

6.8 The Chair takes the view that these challenges lead to the question of how best to investigate and prosecute white-collar crime.

### **Investigating and prosecuting white-collar crime**

6.9 Before determining how to best investigate and prosecute white-collar crime it is first necessary to examine the value of using a royal commission such as the Cole inquiry as an investigatory body.

#### ***The use of a Royal Commission as an investigatory body***

6.10 This inquiry has evinced serious limitations in the use of a royal commission to investigate potential criminal conduct if prosecutions are to proceed. As noted in chapter 4, the AFP explained that one of the biggest challenges faced by the Taskforce was that the oral evidence gathered in the Cole inquiry was not in a form that would have been admissible in a court of law and therefore a great deal of time was spent trying to reconstruct this evidence.<sup>3</sup> ASIC also submitted that the findings of royal commissions are not always based on evidence that is admissible in court.<sup>4</sup>

6.11 As noted by the Australian Law Reform Commission (ALRC), in its review of the Royal Commissions Act 1902, by its very nature, a royal commission is a 'fishing expedition'. The ALRC explained that royal commissions require broad

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2 Mr John Addis, 'Why ASIC lets the big fish go', *The Sydney Morning Herald*, 25 February 2014, <http://www.smh.com.au/business/intelligent-investor/why-asic-lets-the-big-fish-go-20140225-33diw.html> (accessed 19 February 2015).

3 AFP, *Submission 3*, p. 3.

4 ASIC, *Submission 2*, p. 17.

coercive powers to ensure that the issues and facts to be investigated are fully canvassed. Royal commissions are executive inquiries and not judicial in nature and therefore principles such as due process are less relevant.<sup>5</sup> However, this creates a problem when a royal commission recommends that judicial proceedings should be pursued, such as with the Cole inquiry. The Cole inquiry report quoted Justice Owen, who stated that 'a finding that the law has been breached is of no effect until it has been made by a court of competent jurisdiction'.<sup>6</sup> The Chair accepts that the need to reconstruct evidence imposes a heavy burden on investigatory agencies and may even act to skew a subsequent investigation towards specific findings, closing down possibilities of pursuing other avenues of investigation.

6.12 The Chair notes that another problem with using a royal commission as an investigative body is that the scope of a royal commission's inquiry is limited to its terms of reference, as established by the executive of government. As stated by the solicitor to the Cole inquiry (in response to a letter by the then Shadow Minister for Foreign Affairs, Trade and International Security, the Hon Kevin Rudd):

...it is not the function of a commissioner to determine his terms of reference. Seeking amendment to clarify terms of reference, or to address peripheral and anomalous circumstances which arise during the course of an inquiry may be regarded as appropriate conduct by a commissioner. However, it would not be appropriate for a commissioner to seek amendment of the terms of reference to address a matter significantly different to that in the existing terms of reference. The suggestion...that the Commissioner should seek amendments to the terms of reference to enable him to determine whether Australia has breached its international obligations, or a Minister has breached obligations imposed upon him by Australian regulations falls, with respect, within the latter category.<sup>7</sup>

6.13 It follows that although royal commissions provide for a public inquiry, as explained by Dr Scott Prasser of the University of the Sunshine Coast:

...royal commissions...can be established for politically expedient reasons such as to show concern about an issue, give an illusion of action, show responsiveness to a problem, co-opt critics, reduce opposition, delay decision-making, and reassert control over a policy agenda.<sup>8</sup>

6.14 The Chair takes the view that, in investigating possible criminal activity, it is important to remove the potential for political influence in order to give the

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5 ALRC, *Making Inquiries: a new statutory framework*, Report 111, October 2009, pp. 252–253.

6 Justice Owen quoted in 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. 159.

7 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. 164.

8 Dr Scott Prasser, 'Royal Commissions in Australia: When Should Governments Appoint Them?' in *Australian Journal of Public Administration Vol. 65 Issue 3*, 01/09/2006, p. 34.

investigation as broad a scope as possible and the greatest chance of success. This is a relevant consideration when determining the efficacy and appropriateness of a royal commission for such an investigation.

6.15 A final issue associated with using a royal commission as an investigatory body is the cost. The ALRC noted that:

There is no requirement in the *Royal Commissions Act* for the Australian Government, Royal Commission or other public inquiry to produce information or reports on the predicted, ongoing or final cost of an inquiry.<sup>9</sup>

6.16 However, the costs associated with royal commissions can be significant. The cost of the Cole inquiry was approximately \$10 million,<sup>10</sup> but other inquiries, such as the Royal Commission into the Building and Construction Industry, cost as much as \$76.68 million, not including the travel and accommodation costs of the legal team.<sup>11</sup> The Chair takes the view that, in investigating and prosecuting white-collar crime, these resources could be better, and more effectively, spent.

### ***The role of the AFP in investigating international corporate crime***

6.17 In October 2012, the OECD's Working Group on Bribery (working group) published a report that pointed out that of 28 foreign bribery cases that had been referred to the AFP, only the Securrency/Note Printing Australia case had led to prosecutions and 21 cases had been closed down without any charges being laid.<sup>12</sup>

6.18 The working group expressed serious concerns about the extent to which the offence of bribing foreign officials had been enforced, recommending that:

...the AFP take sufficient steps to ensure that foreign bribery allegations are not prematurely closed, and be more proactive in gathering information from diverse sources at the pre-investigative stage. Alternate charges or jurisdictional bases should be considered where appropriate. Co-ordination and case referrals could be improved with clear, written arrangements between the AFP and relevant Commonwealth and State-level government agencies and law enforcement bodies. Concurrent or joint investigations with Australian and foreign authorities should continue to be systematically considered. Corporate liability provisions should be applied where appropriate and coupled with on-going training...ASIC's experience and expertise in investigating corporate economic crimes should be tapped to assist the AFP to prevent, detect and investigate foreign bribery where

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9 ALRC, *Making Inquiries: a new statutory framework*, Report 111, October 2009, p. 33.

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. 197.

11 ALRC, *Making Inquiries: a new statutory framework*, Report 111, October 2009, p. 212.

12 OECD, *Phase 3 report on implementing the OECD anti-bribery convention in Australia*, October 2012, p. 8.

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appropriate. Steps should be taken to ensure that the CDDP has sufficient resources to prosecute foreign bribery cases.<sup>13</sup>

6.19 In 2013, the head of the AFP's fraud and anticorruption unit, Ms Linda Champion, explained that the matters being investigated by the unit have been both complex in nature and have dealt with large corporations and their officers, who are very clever and very litigious. It follows that the AFP is limited in its capacity to bring in alleged suspects before all the facts have been assessed. Ms Champion noted that investigations may be spread across a number of foreign jurisdictions meaning that the evidence-gathering process is both lengthy and expensive, especially given that any evidence would have to meet the relevant standards to be admissible in court proceedings. Finally, Ms Champion pointed to a number of developments that had been put into place since the working group's report, including the establishment of a new framework for foreign co-operation through an anti-corruption taskforce and the introduction of a panel of experts to oversee the decision making process.<sup>14</sup>

6.20 However, the Chair notes that Ms Champion's comments do not address the recommendations of the working group which go towards better coordination between agencies. The Chair agrees with the recommendations that the AFP could better coordinate with other agencies and considers all the recommendations could be extrapolated to cover all white-collar crime, not just foreign bribery offences.

### ***The role of ASIC in investigating corporate crime***

6.21 In its recent report into ASIC, the Senate Economics References Committee (Economics Committee) stated its view that:

...there needs to be a shake-up of how complex fraud, bribery and corruption is addressed in Australia. There has been considerable public discussion about the perceived failure of ASIC and the AFP to address such cases effectively. Instead of having a deterrent effect, the committee is concerned that the current arrangements send the wrong message about the likelihood of these cases being pursued. It is essential that the law enforcement framework promotes confidence in Australia's corporate and financial institutions.<sup>15</sup>

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13 OECD, *Phase 3 report on implementing the OECD anti-bribery convention in Australia*, October 2012, p. 5, <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf> (accessed 23 February 2015).

14 Ms Linda Champion quoted in article by Georgia Wilkins, 'AFP head of fraud unit explains lack of prosecution success', *The Sydney Morning Herald*, 9 November 2013, <http://www.smh.com.au/business/afp-head-of-fraud-unit-explains-lack-of-prosecution-success-20131108-2x73p.html> (accessed 23 February 2015).

15 Senate Economics References Committee, *Report into the Performance of the Australian Securities and Investments Commission*, June 2014, p. 376.

6.22 Mr Nick McKenzie opined that to find the best way of achieving a strong deterrent effect, Australia may have to look to the United States of America or the United Kingdom. Mr McKenzie explained that:

...in the United States, people who blow the whistle on corporate misconduct are given rewards. There are also disincentives for covering up corporate misconduct. It would seem to me that is a far better way to deal with these sorts of cases. Had ASIC or the AFP had the power in the AWB case, it would be to come to some sort of a negotiated outcome with the company where the company accepts liability for its misconduct, be it criminal or civil. It pays a large fine. It acknowledges something to the Stock Exchange, shareholders and the public, and then we all move forward, rather than having investigations that go for years, that cost a lot of money and that are tied up within the courts.<sup>16</sup>

6.23 The Chair accepts that there is some merit to Mr McKenzie's proposal and would encourage an investigation into how Australia could work towards such an outcome. However, the Chair notes that some of the problems faced by ASIC and the AFP stemmed from a lack of communication between the two agencies where one held the corporate expertise and the other was experienced in pursuing criminal prosecutions. The Economics Committee acknowledged that ASIC has entered into a number of memoranda of understanding with domestic and international agencies to provide the legal and practical framework for more cooperative working relationships. However, the Economics Committee explained that to 'ensure the law enforcement framework works, the working relationships between agencies need to be well-functioning and any overlaps in jurisdiction managed effectively'.<sup>17</sup> In the opinion of the Chair, memoranda of understanding are just one step in the process. What is needed is an attitudinal change in the investigating agencies, so that the relevant agencies are absolutely committed to working cooperatively in order to successfully prosecute crimes.

#### ***A specialised agency to investigate and prosecute white-collar crime***

6.24 On 3 October 2013, the Deputy Leader of the Australian Greens, Mr Adam Bandt MP, drafted a press release calling on the government to conduct an inquiry into whether the ASIC and the AFP are properly enforcing Australia's laws dealing with white-collar crime. Mr Bandt argued that:

The inquiry should consider whether Australia needs to establish a separate body akin to the UK Serious Fraud Office or the US Securities and Exchange Commission.<sup>18</sup>

6.25 The Chair sees the merit in this suggestion and takes the view that ASIC could continue to pursue matters in a civil jurisdiction while the investigation and

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16 Mr Nick McKenzie, *Committee Hansard*, 16 October 2014, p. 28.

17 Senate Economics References Committee, *Report into the Performance of the Australian Securities and Investments Commission*, June 2014, p. 368.

18 Mr Adam Bandt MP, *White-collar crime a test for Abbott: Bandt*, Press Release, 3 October 2013, <http://greens.org.au/white-collar-crime-test-abbott-bandt> (accessed 24 February 2015).

prosecution of white-collar crime could be delegated to a specialised agency. A specialised agency could help to overcome any communication and cooperation issues that may result from a multi-agency taskforce.

6.26 As noted in chapter 5, ASIC submitted that, in November 2008, Justice Robson of the Victorian Supreme court ordered a stay of ASIC's civil penalty proceedings against five of the six defendants on grounds that criminal proceedings were imminent and the criminal proceedings would rely on evidence that was substantially the same as in the civil proceedings. In effect, Justice Robson reasoned that it would be unfair to require a defendant to expend resources on defending a civil case when he or she needs those resources to defend a criminal charge of a similar nature.<sup>19</sup> If other courts followed similar reasoning, this would mean that the specialised agency would have to complete its case against perpetrators of white collar crime before a civil action could be commenced, bringing in statutory limitation issues. The Chair takes the view that the proposed inquiry into the need for a specialised agency to investigate and prosecute white-collar crime would need to examine whether section 1317K of the *Corporations Act 2001* (Cth) should be amended to allow ASIC to apply to a court to have the limitations period suspended pending the outcome of a criminal trial.

6.27 In 2008, the Administrative Review Council (ARC) published a report that examined coercive information-gathering and other investigatory powers of various Commonwealth bodies. The ARC noted that such powers were important administrative and regulatory devices for government and many agencies used them to compel the provision of information, the production of documents and the answering of questions. However, the ARC commented on the problems caused by the use of material gathered using coercive powers in subsequent proceedings, concluding that:

Among the matters that should be taken account of in legislation are the taking of evidence on oath or affirmation and the admissibility of the evidence taken at the examination in subsequent proceedings.<sup>20</sup>

6.28 Mr John Watson, in an article in *The Sydney Morning Herald*, explained that although admissions cannot be used directly in court, the use of leads that may result in convictions is a 'grey area'.<sup>21</sup> The Chair notes that this problem associated with the use of coercive powers to obtain evidence is fraught with danger until such time as the *Evidence Act 1995* (Cth) is amended so as to clarify the law. The proposed inquiry into a specialised agency, while examining the value of providing the new agency

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19 ASIC, *Submission 2*, p. 18.

20 Administrative Review Council, *The coercive information-gathering powers of government agencies*, Report number 48, May 2008, p. 43, <http://www.arc.ag.gov.au/Documents/a00Final+Version++Coercive+Information-gathering+Powers+of+Government+Agencies++May+2008.pdf> (accessed 24 February 2015).

21 Mr John Watson, 'More powers, fewer rights', *The Sydney Morning Herald*, 26 February 2013, <http://www.smh.com.au/national/more-powers-fewer-rights-20130225-2f1zj.html> (accessed 24 February 2015).

with coercive powers, could also inquire into clarifying the law pertaining to evidence gathered using coercive powers.

### **Recommendation 1**

**6.29 The Chair recommends the Australian Commission for Law Enforcement Integrity launch a broad inquiry into the structural, recurrent failings of the AFP to properly investigate and prosecute foreign bribery and corruption and the merits of establishing a specialised agency to investigate and prosecute the commission of white-collar crime by Australian individuals or corporate entities regardless of where the alleged crime took place.**

### **Lessons learned**

6.30 In assessing what went wrong with the Oil-for-Food Programme (OFF Program), Mr Michael Costello, in an article in *The Australian*, argued that:

The two possibilities that have emerged are at the heart of the issue. The first possibility is that the government knew what was happening and is covering it up. That may or may not be true; and even if it is true, it may never be proved. But it is the second possibility that is unfortunate for the Government, and that is if it is not guilty of a vast cover-up, then it must be guilty of culpable negligence and incompetence.<sup>22</sup>

6.31 Mr Paul Kelly, also writing for *The Australian*, argued that although the responsibility for compliance with UN sanctions ultimately lay with the government of the exporting nation, Australia did not have adequate mechanisms to ensure sanctions were upheld. AWB Ltd took advantage of this 'governance and policy failure' and 'Australia has paid grievously'.<sup>23</sup> The Cole inquiry also highlighted that AWB Ltd 'has cast a shadow over Australia's reputation in international trade'.<sup>24</sup>

6.32 As noted in chapter 4, Mr Agius believed that DFAT knew about the trucking fees, even if they did not know that they were a sham.<sup>25</sup> However, as noted above, DFAT relied on the argument that it was simply a 'post box' for the contracts and did not have the expertise to investigate individual contracts.<sup>26</sup> The Chair takes the view that this argument does not pass muster. As noted in chapter 2, the sanctions, under UN Resolution 661, placed the onus on individual 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

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22 Mr Michale Costello, 'Cole commission's direction challenges PM's complacency', *The Australian*, 17 February 2006.

23 Mr Paul Kelly, 'The real scandal', *The Australian*, 29 November 2006.

24 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. xi.

25 Mr John Agius SC, *Committee Hansard*, 16 October 2014, p. 21.

26 See Ms Gillian Bird, DFAT, *Senate Foreign Affairs Defence and Trade Committee, Estimates Hansard*, 3 November 2005, p. 6.

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humanitarian purposes and foodstuffs, in humanitarian circumstances.<sup>27</sup> Moreover, in 2002, the *Commonwealth Fraud Control Guidelines* required agencies to refer all instances of potential serious or complex fraud offences to the AFP. A serious and complex matter is, amongst other things, one that could result in:

- significant or potentially significant monetary or property loss to the Commonwealth;
- damage to the security, standing or integrity of the Commonwealth or a Commonwealth agency;
- harm to the economy, resources, assets, environment or well-being of Australia; and
- conflicts of interest and/or politically sensitive matters.<sup>28</sup>

6.33 At the very least, DFAT should have been sufficiently apprised of the UN sanctions and contractual requirements to be alerted by the trucking fees to make proactive inquiries into their legitimacy. More broadly, the Australian government and its officials are vested with governing in the best interests of Australia; they must not themselves engage in misconduct or corruption and, in the view of the Chair, have an inherent duty to report misconduct and possible corruption if they become aware of it. AWB Ltd's abuse of the OFF program demonstrates the impact which even an allegation of misconduct can have on the reputation of a country and the grievous effect it can have on the country's international trade relations.

6.34 The committee did not have access to the records and evidence available to the Taskforce and, as such, it would be imprudent for the Chair to attempt to determine the culpability or otherwise of DFAT or, more generally, the Australian government. In the opinion of the Chair, it is likely that the problems with the OFF program stemmed from a misguided approach to Australia's obligations under the sanctions regime, rather than corruption *per se*. However, the Chair takes the view that executive government and its agencies must be transparent in their dealings with individuals and companies.

6.35 On the responsibility of Commonwealth agencies and Commonwealth public servants to report potential crime and misconduct, the Chair is aware that since the AWB matter, the Australian Public Service (APS) Code of Conduct, enshrined in the *Public Service Act 1999*, requires Commonwealth public officials to 'behave honestly and with integrity in connection with APS employment', 'act with care and diligence'

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27 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).

28 Attorney-General's Department, *Commonwealth Fraud Control Guidelines 2002 issued by the Minister for Justice and Customs as Fraud Control Guidelines under Regulation 19 of the Financial Management and Accountability Regulations 1997*, May 2002, paras 4.19 and 4.20.

and 'comply with all applicable Australian laws'.<sup>29</sup> Further, the *Public Interest Disclosure Act 2013* (Cth) (PID Act) facilitates the 'disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector'.<sup>30</sup> Section 29 of the PID Act defines 'disclosable conduct' as conduct by an agency, public official or contracted service provider that falls under one or more items in the following table:

<b>Disclosable conduct</b>	
<b>Item</b>	<b>Kinds of disclosable conduct</b>
1	Conduct that contravenes a law of the Commonwealth, a State or a Territory.
2	Conduct, in a foreign country, that contravenes a law that: <ul style="list-style-type: none"> <li>(a) is in force in the foreign country; and</li> <li>(b) is applicable to the agency, public official or contracted service provider; and</li> <li>(c) corresponds to a law in force in the Australian Capital Territory.</li> </ul>
3	Conduct that: <ul style="list-style-type: none"> <li>(a) perverts, or is engaged in for the purpose of perverting, or attempting to pervert, the course of justice; or</li> <li>(b) involves, or is engaged in for the purpose of, corruption of any other kind.</li> </ul>
4	Conduct that constitutes maladministration, including conduct that: <ul style="list-style-type: none"> <li>(a) is based, in whole or in part, on improper motives; or</li> <li>(b) is unreasonable, unjust or oppressive; or</li> <li>(c) is negligent.</li> </ul>
5	Conduct that is an abuse of public trust.
6	Conduct that is: <ul style="list-style-type: none"> <li>(a) fabrication, falsification, plagiarism, or deception, in relation to:               <ul style="list-style-type: none"> <li>(i) proposing scientific research; or</li> <li>(ii) carrying out scientific research; or</li> <li>(iii) reporting the results of scientific research; or</li> </ul> </li> <li>(b) misconduct relating to scientific analysis, scientific evaluation or the giving of scientific advice.</li> </ul>
7	Conduct that results in the wastage of: <ul style="list-style-type: none"> <li>(a) relevant money (within the meaning of the <i>Public Governance, Performance and Accountability Act 2013</i>); or</li> <li>(b) relevant property (within the meaning of that Act); or</li> <li>(c) money of a prescribed authority; or</li> <li>(d) property of a prescribed authority.</li> </ul>

<sup>29</sup> *Australian Public Service Act 1999* (Cth), s. 13.

<sup>30</sup> *Public Interest Disclosure Act 2013* (Cth), Long title.

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- 8 Conduct that:
- (a) unreasonably results in a danger to the health or safety of one or more persons; or
  - (b) unreasonably results in, or increases, a risk of danger to the health or safety of one or more persons.
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- 9 Conduct that:
- (a) results in a danger to the environment; or
  - (b) results in, or increases, a risk of danger to the environment.
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- 10 Conduct of a kind prescribed by the PID rules.
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6.36 Whilst AWB Ltd was neither an agency of the Commonwealth nor a contracted service provider, reforms such as these may go some way to reducing the likelihood of Commonwealth agencies and officials proffering the kind of 'post-box' defence given by DFAT at the Cole inquiry and then at Senate Estimates hearings. The Chair takes the view that section 29 of the PID Act could be extended to include any conduct by Australian individuals and corporate entities that would amount to disclosable conduct.

## Recommendation 2

**6.37 The Chair recommends that the Commonwealth government consider amendments to section 29 of the *Public Interest Disclosure Act 2013* (Cth) to expand the definition of 'disclosable conduct' to include conduct by Australian individuals or corporate entities, regardless of where the conduct took place.**

### *Lessons learned from the Taskforce*

6.38 When asked what lessons were learned by the AFP as a result of the Taskforce, the AFP claimed that it could not have achieved a better outcome given the challenges that it faced. The AFP went on to state that it has taken steps to improve the ability to share information with partner agencies to improve coordination and cooperation, citing the purchase of software for enhanced data-mining and analysis of bulk data, the development of a best practice guide to legal professional privilege and the creation of a dedicated AFP-hosted Fraud and Anti-Corruption Centre (FAC Centre). The AFP explained:

The FAC Centre delivers a collaborative Commonwealth multi-agency approach to the Australian Government's law enforcement capability and response to fraud and corruption, and aims to deliver greater protection over Commonwealth revenues and minimise loss of funds. This approach has engendered greater coordination and cooperation between the partner agencies, and in particular has greatly enhanced the sharing of information and resources in order to better target law enforcement priorities across the Commonwealth.<sup>31</sup>

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31 AFP, *Answers to written questions on notice (received on 26 February 2015)*, 18 February 2015, Question 8.

6.39 As noted in Chapter 2, in September 2007, the *International Trade Integrity Act 2007* (Cth) was passed. This 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>32</sup>

6.40 In the opinion of the Chair, these offences would have strengthened the criminal cases against AWB Ltd and its officials.

### ***The need for greater transparency***

6.41 As noted by Ms Georgia Wilkins, writing for *The Sydney Morning Herald*, critics of the AFP's role in corporate matters have argued that the AFP have failed to uphold basic levels of transparency and accountability. Ms Wilkins suggested that, as taskforces are paid for with public money, the public has an interest in knowing that everything that needs to be investigated is investigated. Ms Wilkins went on to quote Dr Kate Hall, an associate professor with the Australian National University School of Law, who said:

We need good reasons for when the AFP fails to take action, and how things are proceeding.<sup>33</sup>

6.42 The Chair agrees with the view that the AFP and other government agencies must accept that they are working 'for the people' and therefore their primary roles are to protect and inform the public. The Chair notes that the AFP failed to properly inform the public as to why it decided to close down the Taskforce. The AFP has not acceded to either formal or informal requests for the release of the Hastings advice, upon which the decision to close down the Taskforce was said to be based. On 11 March 2015, the committee formally requested to see the relevant parts of the Hastings advice *in camera*. The Chair had hoped that any doubts about the motivation behind the closure of the Taskforce, including the concerns voiced by Mr Ross Fusca, could be put to rest. However, the AFP respectfully declined the request 'in the interest of maintaining legal professional privilege and public interest immunity of the document concerned'. As a result, the Chair considers that ongoing doubt will inevitably linger over the motivations of the AFP in closing down the Taskforce, as the Chair cannot find conclusively that the Taskforce was not shut down prematurely, nor conclude that the Taskforce was shut down solely on the basis of valid legal (and not political) grounds. The Chair therefore takes the view that the Senate should

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

33 Georgia Wilkins, 'AFP head of fraud unit explains lack of prosecution success', *The Sydney Morning Herald*, 9 November 2013.

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request the AFP to produce the Hastings advice and, failing that, the committee should reserve the right to insist on the production of the Hastings advice at a future time, potentially as part of a future inquiry.

### **Recommendation 3**

**6.43 The Chair recommends that the Senate order the AFP to produce the legal advice provided by Mr Hastings QC to the AFP, or parts thereof, that show the legal grounds and reasons for the closure of the Taskforce.**

6.44 The Integrity Commissioner, supported by ACLEI, is responsible for preventing, detecting and investigating serious and systemic corruption issues in the Australian Crime Commission, the Australian Customs and Border Protection Service and the AFP.<sup>34</sup> As noted by Mr McKenzie and Mr Baker in an article in *The Age*:

Australia's existing national anti-corruption body, the Australian Commission for Law Enforcement Integrity, can probe misconduct in only certain policing agencies and is unable to investigate impropriety involving public servants or politicians.<sup>35</sup>

6.45 Further, the Chair notes that outside of the estimates and committee inquiries processes, there is a distinct lack of public transparency in relation to the work of ACLEI and the bodies for which it has oversight.

6.46 As noted in chapter 2, the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (Parliamentary Joint Committee) examined the risks of corruption stemming from Australia's law enforcement operations. The Parliamentary Joint Committee report noted that one of the many consequences of corruption is a loss of international reputation and standing, together with other associated negative impacts. The report noted that agencies with a law enforcement function, such as the AFP, have a high public profile and play a central role in developing public confidence in the law enforcement system. However, these 'agencies are at high risk of compromise and infiltration' and therefore, as 'law enforcement agencies play a crucial role in the fight against corruption in society, their own integrity must be beyond reproach'.<sup>36</sup> The Chair believes that there may be a need for a further level of oversight to improve levels of transparency and accountability in the AFP and other government agencies. Mr Bruce Hawker, writing in *The Australian*, argued:

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34 ACLEI, *Integrity in law enforcement*, <http://www.aclei.gov.au/Pages/default.aspx> (accessed 24 February 2015).

35 Mr Nick McKenzie and Mr Richard Baker, 'National ICAC needed to probe federal politicians, says NSW Independent Commission Against Corruption counsel Geoffrey Watson, SC', *The Age*, 5 December 2014, <http://www.theage.com.au/federal-politics/political-news/national-icac-needed-to-probe-federal-politicians-says-nsw-independent-commission-against-corruption-counsel-geoffrey-watson-sc-20141204-12093d.html> (accessed 24 February 2015).

36 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Integrity of Overseas Commonwealth Law Enforcement Operations*, June 2012, p. 32.

One thing to become abundantly clear from the AWB inquiry is that there is a strong and clear case for a federal equivalent of NSW's ICAC or Queensland's CMC, with full royal commission powers. Make no mistake: a federal ICAC would have the necessary powers to get to the truth of the matter...There must be a mechanism to ensure accountability and transparency when serious allegations of impropriety arise.<sup>37</sup>

6.47 The Chair agrees with the reasoning of Mr Hawker. However, the Chair notes that further investigation is needed into the value of establishing a federal ICAC-type body, taking into account potential pitfalls that it may face, such as jurisdictional and legal issues that could arise between the new body and the established state anti-corruption commissions. However, in the opinion of the Chair, it is undeniable that such a federal anti-corruption body, if independent of political interference, could help to ensure that corruption and/or gross negligence does not infiltrate the Commonwealth parliament and federal government agencies.

#### **Recommendation 4**

**6.48 The Chair recommends that a federal anti-corruption body be established to investigate and report on corruption and/or gross negligence within the Commonwealth Parliament and government agencies, including the Australian Federal Police.**

**Senator Penny Wright**  
**Chair**

**Senator Christine Milne**  
**Leader of the Australian Greens**

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37 Mr Bruce Hawker, 'National watchdog is needed', *The Australian*, 31 January 2006.

# Appendix 1

## Public submissions

- 1 Mr Michael Wunderlich
- 2 Australian Securities and Investments Commission
- 3 Australian Federal Police



## **Appendix 2**

### **Public hearings and witnesses**

**Thursday, 16 October 2014—Canberra**

HASTINGS, Mr Peter Selby, QC, Private capacity

BIELECKI, Mr Mark, South Australian Regional Commissioner, Australian Securities and Investments Commission

CARIDI, Mr Brendan Francis, Senior Manager, Enforcement, Australian Securities and Investments Commission

SAVUNDRA, Mr Chris, Senior Executive Leader, Australian Securities and Investments Commission

AGIUS, Mr John Vincent, Private capacity

YOUNG, Mr Jason, Private capacity

McKENZIE, Mr Nick, Private capacity

McTAGGART, Detective Superintendent Nicholas, Coordinator, Criminal Asset Confiscation Taskforce, Australian Federal Police



## **Appendix 3**

### **Tabled documents, answers to questions on notice and additional information**

#### **Additional information and tabled documents**

- 1 Respondent's outline of Opening Submissions in *Watson and Watson v AWB Ltd* [2007] FCA 1367. Tabled by Senator Penny Wright at a public hearing on 16 October 2014

#### **Answers to questions on notice**

##### ***Canberra Thursday 16 October 2014***

- 1 Australian Securities and Investments Commission - response to written questions on notice (received 23 December 2014)
- 2 Australian Federal Police - response to written questions on notice (received 26 February 2015)

