



International Trade Integrity Bill 2007

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Law and Bills Digest Section

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International Trade Integrity Bill 2007

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House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1-3 commence on the date of Royal Assent. Schedule 1 commences on proclamation, or six months after Royal Assent, whichever is earlier. Schedule 2 commences on the day after Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

See also the Senate [inquiry](#) into the Bill tabled 1 August 2007.

Purpose

The purpose of the International Trade Integrity Bill 2007 (the Bill) is to enhance the operation of Australian laws 'to strengthen enforcement of all United Nations (UN) sanctions and combat foreign bribery'.¹ Amongst other things, the Bill implements the Australian Government's response² to recommendations 1-3 made in the [Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme](#) (Cole Inquiry Report).³

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1. *Explanatory Memorandum*, p. 1.
 2. 'Australian Government response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme' May 2007, at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetotheReportoftheInquiryintoCertainAustralianCompaniesinrelationtotheUNOil-for-FoodProgramme (accessed 14 June 2007).
 3. Commissioner The Hon Terence RH Cole AO RFD QC, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, November 2006, at <http://www.offi.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report> (accessed 14 June 2007).

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Background

Economic sanctions against Iraq

On the 2 August 1990, Iraq's military forces invaded Kuwait. On the same day, the United Nations Security Council (UNSC) adopted [Resolution 660](#), condemning the Iraqi invasion of Kuwait and demanding an 'immediate and unconditional' withdrawal of Iraqi forces from Kuwait. On 6 August 1990, the UNSC adopted [Resolution 661](#) placing economic sanctions on Iraq.⁴ Resolution 661 notably placed an international legal obligation on UN member states to ensure that their nationals did not provide funds or resources to any persons or bodies within Iraq.

Following the defeat of Iraqi forces in the 1991 Gulf war, the UNSC did not remove the economic sanctions – retaining them pursuant to [Resolution 687](#) as leverage to press for proof of Iraqi disarmament and other goals. Resolution 687 permitted certain commercial sales of food to Iraq and other 'materials and supplies for essential civilian needs' (paragraph 20).

Australia's response to the UNSC's economic sanctions against Iraq

Via the Customs (Prohibited Exports) Regulations 1958, regulation 13CA was introduced on 8 August 1990 to implement trade sanctions against Iraq and Kuwait in accordance with UN Security Council Resolution 661. To enable commercial sales permitted under Resolution 687, a new subregulation 13CA(2) was introduced to provide a more flexible formula, enabling the Minister to grant a permission for an exportation if the Minister was satisfied that permitting the exportation would not infringe the international obligations of Australia. A number of other customs and financial regulations were introduced alongside the Customs (Prohibited Exports) Regulations 1958, but they are not relevant to the Bill.⁵

Economic sanctions against Iraq and the UN Oil-for-Food Programme

It was not long before it became evident that the economic sanctions were causing enormous suffering for the people of Iraq. The UN Security Council responded by passing [Resolution 986](#) in April 1995, establishing the Oil-For-Food-Programme. Basically, the Oil-For-Food-Programme enabled the Iraqi government to raise revenue through the sale of its major export, oil. With this revenue, the Iraqi government was able to purchase humanitarian goods including basic food stuffs that were not embargoed under the

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4. The economic sanctions provided for a rather comprehensive trade embargo excluding 'supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs...' These were to be implemented and monitored by the Security Council sanctions committee.
 5. [Cole Inquiry Report, Volume 1, p.62.](#)

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economic sanctions. This program commenced in December 1996. At the time, Australia had been a supplier of wheat to Iraq for over four decades and was understandably motivated to maintain one of its traditional export markets. From 1999, while it was still a statutory authority, the AWB was winning contracts under the Oil-For-Food Programme.⁶ Contracts had also to be approved by the UN. The primary UN administrative unit for assessing contracts in terms of compliance with UNSC resolutions was the New York-based Contracts Processing and Management Division (CPMD) of the Oil-For-Food Programme.

Following the defeat of Iraq by the US-led coalition in the second Gulf War, the UNSC adopted [Resolution 1483](#) on 22 May 2003 ending all prohibitions relating to trade with Iraq established by UNSC Resolution 661 and subsequent resolutions, with the exception of prohibitions related to the sale or supply to Iraq of arms and related material. Thus, regulation 4QA of the Customs (Prohibited Imports) Regulations 1956 and regulation 13CA of the Customs (Prohibited Exports) Regulations 1958 were repealed on 29 May 2003.

Manipulation of the Oil-for-Food Programme by the Iraqi Regime – the Volcker Report

Soon after establishment of the Coalition Provision Authority in April 2003, evidence started to come to light suggesting that the Saddam Hussein regime had been operating a transactions kickbacks scheme effectively circumventing the impact of the economic sanctions.

In April 2004, United Nations Secretary General Kofi Annan appointed an independent, high-level inquiry to investigate the administration and management of the Oil-for-Food Programme in Iraq. The appointed Independent Inquiry Committee (IIC) was chaired by Paul Volcker, former Chairman of the United States Federal Reserve.

The [Manipulation of the Oil-for-Food Programme by the Iraqi Regime – the Volcker Report](#), released on 27 October 2005, found *inter alia* that the Australian Wheat Board (AWB) later AWB Limited,⁷ was the world's largest participant in the Iraqi Oil-For-Food Programme and the biggest single contributor of kickbacks. In exchange for trouble-free disembarkation of wheat purchased under the Oil-for-Food Programme, the AWB paid approximately \$US224 million in inland transportation fees and after-sales services fees to Alia. Alia is a Jordanian trucking company, which Australian intelligence services were

6. Stephen Bartos, *Against the Grain: the AWB Scandal and Why it Happened*, UNSW Press, New South Wales, 2006, pp.16–19.

7. In July 1999, the Australian Wheat Board Limited became the privatized version of the former Australian Wheat Board, a statutory marketing authority which enjoyed monopoly rights over Australian wheat exports.

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alleged to have discovered in 1999 was partly owned by the Iraqi government.⁸ However, Alia actually provided no transportation or distribution services for Australian wheat in Iraq. For its role as an intermediary, Alia received a small percentage of the 'transportation fees', and channelled the rest to Saddam Hussein's government. The 'transportation fees' paid by AWB were offset by increases in the price received for its wheat sales. Payments by the AWB for 'transportation fees' were approved by the the UN Security Council Sanctions Committee. Following receipt of these approvals, the AWB sought permission from the delegate of the Minister for Foreign Affairs as was required under regulation 13CA. The delegate relied on the UN approval for assurance that the shipments were in accordance with the terms of the UN sanctions.

Based on the evidence it received, the Volcker Report concluded that the AWB did not possess actual knowledge of Iraq's partial ownership of Alia, and it did not know that Alia never provided transportation services, or that so-called transportation fees were being remitted to Iraq.⁹ However, the Volcker Report did note that there were a sufficient number of circumstantial irregular signals, that should have alerted the AWB to the fact that Iraq would have been in a position to be unjustly benefitting from the way in which commercial operations were being transacted.

As a result of the findings of the Volcker Report, extensive reforms of UN practices were instituted:

including broader and more rigorous financial disclosure requirements, a stronger policy to protect whistleblowers, and a review of all oversight and audit arrangements. [The UN Secretary-General signalled his intention] to pursue these and other reforms with even greater vigour [...] and [looked] to member states for their support.¹⁰

The Cole Inquiry

The Cole Inquiry (formally the *Inquiry into Certain Australian Companies in relation to the UN Oil-For-Food Programme*) was a Royal Commission set up by the Australian Government in November 2005. The Cole Inquiry was initiated in response to the findings

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8. Kevin Rudd, 'Questions Without Notice', House of Representatives, *Debates*, 27 March 2006; Kevin Rudd, 'Second Reading: Royal Commissions Amendment Bill 2006', House of Representatives, *Debates*, 30 May 2006; 'AWB Scandal', *Sydney Morning Herald*, 28 November 2006, p. 10.
 9. The Volcker Report, 27 October 2005, pp. 251, 255-7, 325 and 395-99.
 10. Statement attributable to the Spokesman for the Secretary-General on the Volcker Report, New York, 27 October 2005, at <http://www.un.org/apps/sg/sgstats.asp?nid=1760> (accessed 27 June 2007).

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of the Volcker Report. The release of the Volcker Report was accompanied by a strong statement by UN Secretary-General Kofi Anan. The Secretary-General noted:

that a vast network of kickbacks and surcharges has been exposed, involving companies registered in a wide range of Member States, and certified by them as competent to conduct business under the programme. He [hoped] national authorities will take steps to prevent the recurrence of such practices in the future, and that they will take action, where appropriate, against companies falling within their jurisdiction.¹¹

Cole Inquiry Terms of Reference

- (a) whether any decision, action, conduct, payment or writing of any of the three Australian companies mentioned in the Final Report ([*Manipulation of the Oil-for-Food Programme by the Iraqi Regime – the Volcker Report*](#)) of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme, 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
- (b) if so, whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency.

On 27 November 2006 Commissioner Cole's report was tabled in Parliament. While the Cole Report focused on the Iraq sanctions, its findings and recommendations clearly had application to the Australian administration of UN Security Council sanctions generally.

Recommendations flowing from the Cole Inquiry

Recommendation one

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

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

11. *ibid.*

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

Recommendation two

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

Recommendation three

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

Recommendation four

[...] that consideration be given to amending the Royal Commissions Act 1902 to permit the Governor General in Council by Letters Patent to determine that in relation to the whole or a particular aspect of matters the subject of inquiry, legal professional privilege should not apply.

On 2 December 2006 the *Australian Financial Review* pointed out that:

Terence Cole never set out to investigate legal professional privilege, but its reform may be a legacy of his inquiry.¹²

The article noted that Commissioner Cole was 'deeply unimpressed' with the way in which AWB and its lawyers used legal professional privilege when deciding to make document available to the Inquiry. Commissioner Cole was quoted as saying that:

AWB's response to this inquiry was one of non-cooperation, lack of frankness and resort to litigation to endeavour to keep from disclosure documents and material relevant to this inquiry. I do not doubt that the decision to keep secret the damaging

12. Marcus Priest, 'United Against Privilege', *Australian Financial Review*, 2 December 2006, p. 22.

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material was taken by AWB and its directors because of the awkwardness of AWB's position.¹³

The article also pointed out that Commissioner Cole was not the first to complain about the 'use and abuse of claims of privilege' during Royal Commissions. Commissioner Cole's reportedly 'savage' assessment of the conduct of the AWB in relation to the shield of legal professional privilege makes it unsurprising that one of the recommendations of the Cole Inquiry called for a re-think of the contextual use of legal professional privilege.¹⁴

Recommendation five

[...] that there be a review of the powers, functions and responsibilities of the body charged with controlling and monitoring any Australian monopoly wheat exporter. A strong and vigorous monitor is required to ensure that proper standards of commercial conduct are adhered to.

Basis of policy commitment

On 8 May 2007, the Australian Government tabled its [response to the Cole Inquiry](#). The proposed amendments contained in this Bill address recommendations one to three. Regarding recommendation 4, the Government stated:

Recommendation 4 related to the application of legal professional privilege in royal commission proceedings.

On 30 November 2006 the Australian Government announced an inquiry by the Australian Law Reform Commission (ALRC) into legal professional privilege as it relates to the activities of Commonwealth investigatory agencies.

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

Recommendation 5 related to wheat export marketing arrangements.

On 12 January 2007, the Australian Government announced the appointment of a Wheat Export Marketing Consultation Committee to undertake extensive consultation

13. *ibid.*

14. See further, Moira Coombs, 'Royal Commissions Amendment (Records) Bill 2006', [Bills Digest](#), no. 61, 2006–07 Parliamentary Library, Canberra, 2006.

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with the Australian wheat industry, particularly growers, about their wheat export marketing needs. The Committee reported to the government on 29 March 2007. This report will be used by the government to inform the decision on future wheat export marketing arrangements.¹⁵

The Government has also sought to address Recommendation 5 in its recent amendment to *Wheat Marketing Act 1989*. The *Wheat Marketing Amendment Act 2007* had as one of its central aims an expansion of the scope of the Wheat Export Authority's information gathering powers in order to allow it 'to request information from parties other than the AWB, where it believes the request relates to the performance of its functions'.¹⁶

In addition to the five specific recommendations, Commissioner Cole also recommended a Task Force be established to consider possible prosecutions in consultation with the Commonwealth and Victorian Directors of Public Prosecutions. On 20 December 2006 the Australian Government announced the establishment of the Task Force. The Task Force is led by a senior former Australian Federal Police (AFP) officer Peter Donaldson. Mr Donaldson and a team of AFP officers, Australian Securities and Investments Commission staff and a member of the Victorian Police are working on Commissioner Cole's findings of possible criminal conduct.¹⁷

On 19 January 2007, it was reported that 4 of the 11 former senior executives facing possible criminal charges over the affair have received more than \$65 million in golden handshakes.¹⁸

On 14 March 2007, the *Australian* reported that the AWB taskforce was looking into unsourced allegations arising out of the Cole Inquiry as to whether agents of AWB may have made payments to officials in Pakistan and Indonesia.¹⁹

15. '[Australian Government response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme](#)' op. cit..

16. Peter Hicks and Angus Martyn, 'Wheat Marketing Amendment Bill 2007', *Bills Digest*, no.186, 2006-07, Parliamentary Library, Canberra, 19 June 2007.

17. '[Australian Government response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme](#)' op. cit.

18. 'AWB payouts a rort', *Courier Mail*, 19 January 2007, p. 20.

19. Caroline Overington, 'Claims AWB cash funded terrorists', *The Australian*, 14 March 2007, p. 3.

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Bribery of Foreign Officials

Australia has signed up to international anti-corruption standards, in recognition of the cost and ongoing harm caused by this sort of activity.²⁰ Australia is a signatory to both the UN *Convention Against Corruption* (2005) and the Organisation for Economic Cooperation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1999).

When the Volcker report was released, there was some speculation whether AWB officers might have committed a foreign bribery offence under the *Criminal Code 1995*. Whilst the Cole Commission found that this did not appear to be the case, the evidence unearthed in the Commission's hearings did generate public and political debate on the issue. For example, On 22 December 2006 the *Australian Financial Review* reported that:

The Labor Party called on the government to tighten tax laws and the way they related to bribery after AWB was allowed to claim deductions for trucking fees paid to Saddam Hussein's regime.²¹

The Labor spokesman on justice and customs, Senator Joseph Ludwig, said the government should examine the inconsistencies between the *Income Tax Assessment Act 1997* and the Criminal Code, which would help close the loophole.²²

Federal Treasurer Peter Costello was reported as responding that:

Labor's proposed amendments would not have changed the fact there was insufficient evidence to find that AWB had paid bribes under the Criminal Code, a pre-requisite to disallowing it as a tax deduction.²³

Also, in January 2006, a [report](#) of the OECD working party on Bribery in International Business Transactions regarding Australia's implementation of the [OECD Bribery Convention](#) was released. As a result of the working party's report, the Commonwealth undertook to narrow the scope of a defence available in the Criminal Code relating to an

20. For a summary of the problems caused by corruption, see Martijn Wilder and Michael Ahrens '[Australia's Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#)', *Melbourne Journal of International Law*, 2001.

21. Mark Davis, 'Labor calls for urgent review of tax deductions', *Sydney Morning Herald*, 28 November 2006, p.12.

22. Tracy Lee, 'Untested law threatens kickback victory', *The Australian Financial Review*, 22 December 2006, p. 4.

23. *ibid.*

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alleged foreign bribery offence. See discussion of **item 3** in **Schedule 2** in the Main Provisions part of the Digest.

The Bill addresses both of these matters through amendments in Schedule 2.

Position of significant interest groups/press commentary

In a Media Release outlining the amendments contained in the Bill, Attorney-General Philip Ruddock stated that:

Australia led the world in conducting the public, transparent and independent Cole Inquiry. These changes continue Australia's tough stance.

He stated further that:

the Government's response has exceeded Commissioner Cole's recommendations.²⁴

The Cole Inquiry has attracted significantly wide-ranging and sustained public interest.

A notable and enduring theme in some press commentary has been dissatisfaction with the scope of the Cole Inquiry's terms of reference set out by Prime Minister John Howard. Opposition parties and a range of commentators have argued that the less than satisfactory scope²⁵ of the Cole Inquiry had hamstrung Commissioner Cole from looking at the relevant behaviour and competence of ministers in terms ensuring the enforcement of UN sanctions against Iraq.²⁶ The terms of reference given to the Cole Inquiry have also been perceived as precluding it from addressing the behaviour of the AWB board²⁷ and even more apparent fundamental governance issues.²⁸

24. Philip Ruddock (Attorney-General), [*Government Goes Further than Cole Report*](#), media release, 3 May 2007.

25. Letters section, 'Cole must have power to probe ministers legal liability', *The Australian*, 13 April 2006, p. 11.

26. Commentary by Kevin Rudd (Opposition Foreign Affairs Spokesman) in an interview with Michael Brissenden, 'Cole Inquiry clears Govt of any wrongdoing', *ABC 7:30 Report*, 27 November 2006.

27. Bartos, op. cit., p. 26.

28. Editorial, 'Government fails test on governance', *The Australian*, 30 November 2006, p. 11; Kenneth Davidson, 'An indictment of politicised bureaucrats', *The Age*, 30 November 2006, p. 15; Dimity Kingsford Smith, 'Corporate culture overrides ethics', *Australian Financial Review*, 30 November 2006, p. 55.

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In early 2006, 21 of Australia's top lawyers and legal scholars wrote an open letter to the government urging that the terms of reference of the Cole Inquiry be expanded.²⁹ The Government responded by stating that that inquiry had adequate powers to determine whether there had been any wrongdoing, and that it would not extend the terms of inquiry without a request from Commissioner Cole.³⁰

It is therefore not surprising that most of the commentary surrounding the Bill seems to be largely centred on arguing that the Bill and the Government should be addressing more than just the recommendations flowing from the terms of reference of the Cole Inquiry.

Governance reform

In his book *Against the Grain: the AWB Scandal and Why it Happened*, Stephen Bartos, a Professor of governance at the University of Canberra argued that:

The board of a company is – or should be – responsible for how a company is run and for the culture within the company.

...

Culture is not within the Cole inquiry's terms of reference, but it is at the heart of why the alleged kickbacks occurred.³¹

Bartos points out that the Stock Exchange does promulgate [*Principles of Good Corporate Governance and Best Practice Recommendations*](#), which have been developed by its Corporate Governance Council. However, Bartos suggests that most of those principles do not appear to have been followed by the AWB Board, and acknowledges that a written code is a necessary but not sufficient condition for good corporate governance. It is the responsibility of a board and in turn the CEO and senior management to ensure that an organisation behaves ethically.³² At the time of writing his book, Bartos states that:

Commissioner Cole had been shown no evidence that the AWB board ever deliberated over ethical issues raised by alleged kickbacks – in fact, the clearest

29. Letters section, 'Cole must have power to probe minister's legal liability', *The Australian*, 13 April 2006, p. 11.

30. Michael Pelly, 'Left up to Cole to set his own jurisdiction', *Sydney Morning Herald*, 14 April 2006, p. 4.

31. Bartos, op. cit., pp. 26–27.

32. *ibid*, p. 31.

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evidence that they did not consider the matter is that the kickbacks appear to have continued for so long.³³

While Commissioner Cole did conclude that there had been ‘a failure of corporate culture’,³⁴ the Inquiry was not explicitly directed at interrogating the very structures and culture of action and inaction which generated systemic failure.³⁵ Writing along these lines, in an article titled ‘The real scandal’ published in *The Australian* on 29 November 2006, Paul Kelly offers the following observations on where he believes the failures of AWB lie and thus sheds light on the areas in need of reform:

Understand the failure of governance here. The Howard cabinet engineered a flawed privatisation of AWB by converting a public monopoly into a even more dangerous private monopoly able to operate without proper transparency [...] monitored by a toothless Wheat Export Authority, clueless about AWB’s frauds and powerless to investigate its monopoly operations’.

...

Cole was not asked to examine AWB’s monopoly power. Yet, he gets to the issue on page 2 of his report. [...] He recommends a review of powers to ensure there is proper monitoring of any monopoly wheat exporter.

In a revealing view of DFAT, Cole outlines the reasons why the department failed to investigate such warnings, thereby touching on governance failure. DFAT regarded AWB as a company of “utmost integrity” and this belief was “reasonably held”. DFAT saw its role as being to support Australia’s economic interests against allegations from competitors.

Critically, 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 judgements and it did not try...

In short, responsibility for compliance with UN sanctions lay with the exporting nation yet there was no adequate mechanism within the Australian Government to ensure sanctions were being upheld.

This is a governance and policy failure.³⁶

33. *ibid*, pp. 31–32.

34. [Cole Inquiry Report, Volume 1, p.xii](#).

35. However, Australian corporations may be held criminally responsible for committing offences, including by failing to create a ‘culture’ of compliance. See [sections 12.1-12.3, Criminal Code Act 1995](#).

36. Paul Kelly, ‘The real scandal’, *The Australian*, 29 November 2006, p. 16.

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Australia's international legal obligations

According to Jürgen Kurtz, Director of the International Economic Law Program at the University of Melbourne, under international law Australia has an obligation to institute relevant measures to give effect to UN Security Council Resolutions. In this context, Australia was under a duty to provide effective measures to ensure that Government entities and Australian companies were not breaching the sanctions regime against Iraq.³⁷

In a submission to the Senate Inquiry into the International Trade and Integrity Bill 2007, Dr Ben Saul (Director of the University of Sydney's Centre for International and Global Law) has raised what he considers to be the outstanding

international legal questions as to whether Australia had a duty to ensure (as a matter of strict liability) that its companies were not in breach of sanctions, and whether that duty could be discharged by relying on the United Nations vetting of commercial contracts.³⁸

A legal opinion commissioned by Mr. Kevin Rudd (the then Shadow Minister for Foreign Affairs) and prepared by Bret Walker SC argued that:

[regulation] 13CA of the Customs (Prohibited Exports) Regulations imposed on the Minister (or his authorised delegate) an obligation not to approve the export of wheat unless, on the material available to the decision maker, he was satisfied that granting such export permission would not breach Australia's obligations under the UN sanctions imposed by Resolution 661 and Article 25 of the UN Charter.³⁹

While Commissioner Cole stated that this argument had 'some respectability' he thought that there was an alternative construction of regulation 13CA which was also had merit:

Since the only possible source of breach of Australia's international obligations was breach of the UN resolutions restricting trade with Iraq, UN acceptance that a contract, having been examined by UN experts, was consistent with, and not contrary

37. Kurtz, Jürgen, '[A look beyond the Cole inquiry: AWB Ltd, bribery and Australia's obligations under international law](#)' *Discussion Paper 18/06* Democratic Audit of Australia, Australian National University, Canberra, 2006.

38. *Submission No.2*, p. 1. Senate Inquiry into the International Trade and Integrity Bill 2007.

39. This [legal opinion was submitted on behalf of Kevin Rudd, MP](#) to the *Inquiry into Certain Australian Companies in relation to the UN Oil-For-Food Programme* (the Cole Inquiry) and considered by Commissioner Cole. See Volume 1 pp. 63–66.

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to, the resolutions that permitted limited trade with Iraq provided a sound basis for the Minister or his delegate to grant approval for export.⁴⁰

Nonetheless, Dr Saul has suggested that:

At a minimum, the Bill should include a specific provision creating a strict liability offence for any Australian official or minister to (intentionally or recklessly) authorise or permit the export or import of UN-sanctioned goods (additional to the proposed offences of actually importing or exporting such goods). Such an offence would make it clear to Australian officials that a proper inquiry must be made into whether proposed trade may violate sanctions – and that negligence is not a sufficient defence.⁴¹

Financial implications

The Explanatory Memorandum states that the Government will commit \$4.6 million over four years to tackle the first three recommendations of the Cole Inquiry Report. The funding is targeted at enhanced implementation, monitoring and compliance of bilateral sanction regimes through the use of a whole-of-government approach.

Main provisions

Schedule 1— Enforcing UN sanctions

Charter of the United Nations Act 1945

The object and purpose of the *Charter of the United Nations Act 1945* (UNC Act) is ‘to enable Australia to apply sanctions giving effect to certain decisions of the Security Council’.

Item 2

This defines two new terms proposed to be inserted in the UNC Act. Notably, it includes the term ‘UN sanction enforcement law’. This is a law so specified by the portfolio Minister via legislative instrument. Laws can only be so designated to the extent they give effect to decision of the UNSC that member States carry out certain measures, not involving the use of force, as a required to maintain or restore international peace and

40. *ibid.*

41. *Submission No.2*, p. 1. Senate Inquiry into the International Trade and Integrity Bill 2007.

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security. An example would be a Commonwealth law implementing an economic sanctions order by the UNSC.

The other term is ‘Commonwealth designated entity’, which is also to be specified by legislative instrument. Such entities will have the role of administering UN sanctions through powers conferred by provisions in the Bill covered later in this Digest.

Item 5

Proposes the insertion of **subsections 6(2) and 6(3)** providing for a general regulation making power so as to give effect to decisions of the UNSC as they exist from time to time.

Of possible concern is the operation of **proposed paragraph 6(2)(a)**. This provides for the automatic incorporation via regulation of ‘persons or entities’ proscribed by the UNSC. At least within the terrorism context, the UNSC’s proscription powers have raised human rights concerns, specifically relating to procedural fairness. Proscription (or listing) refers to the public identification and official condemnation of certain persons and or organisations, based on their activities or behaviour which have been criminalised by the state, thus preventing or seriously limiting those activities or behaviour. The criminalisation of certain activities which may harm, endanger or detract from the safety and wellbeing of human beings, does not in and of itself raise human rights issues. Rather, it is the basis upon which the proscription of individuals and or organisations occurs that may raise human rights issues. Proscription powers have been characterised by a range of commentators as being typically based on rather weak standards of proof, untested evidence and lack of opportunity for affected persons to respond.⁴² The impact of proscription may have a discriminatory impact, serving to limit an individual’s or organisation’s freedoms or opportunities.

However in the Senate Inquiry into the International Trade Integrity Bill 2007 a representative from DFAT offered the following explanation as to why the element of procedural fairness could not be accommodated in the Bill:

The automatic incorporation by reference provision would apply to the broad financial sanctions imposed by the Security Council as they relate to the nomination by the Security Council of specific individuals and entities. These are binding obligations imposed by the Security Council which do not allow for the member states to make any kind of allowances in terms of the question of procedural fairness. In other words, we do not have either the opportunity or the right, under the operation

42. See for example Sarah Joseph, ‘Australian Counter-Terrorism Legislation and the International Human Rights Framework’ *UNSW Law Journal*, Volume 27(2), 2004, pp. 436–440; Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006, pp. 231–233.

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of the Charter of the United Nations, to provide for any deferral of the registration, under the Australian law, of individuals named by the Security Council as being individuals to whom sanctions ought to be applied. Bearing this in mind, we are not able to build in a procedural fairness element because that would not be consistent with our obligations under the UN charter.⁴³

Notwithstanding the response and reasoning provided by the DFAT representative to the Senate Inquiry, it may also be noted that the 2003 UNSC [Resolution 1456](#) calling on all States to:

[...] take urgent action to prevent and suppress all active and passive support to terrorism [...]

also stressed that:

States must also ensure that any measure taken to combat terrorism complies with all of their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.

Thus, Australia's obligations to assist in combating terrorism may reach a point where their operationalisation must be appropriately balanced⁴⁴ with other intersecting international legal obligations, thereby necessitating accommodation of the element of procedural fairness.

Item 6

Proposes the insertion of **subsection 13A** which has the effect of invalidating a licence, permission, consent, approval or authorisation granted under regulations, if that grant was made on the basis of an application that was false or misleading in a material particular. **Item 7** provides that this amendment only applies to applications that were made on or after the commencement of this section.

While there is a well-understood presumption against retrospectivity, the prospective operation of this section potentially removes a number of possible offenders from its

43. Senate Inquiry into the International Trade and Integrity Bill 2007, p. 14.

44. See for example, [Human Rights Resolution 2005/80. 'Protection of human rights and fundamental freedoms while countering terrorism'](#). See generally the [Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism, 2003](#). The Digest, provides valuable analysis and commentary on balancing human rights obligations with counter terrorism measures. It also attends to the core principles of necessity and proportionality, which are central considerations in relation to lawful counter-terrorism measures.

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capture. Indeed, it is curious that there would not have already existed at least a strong tacit or obvious requirement as to the integrity of the information contained in an application which was an important factor in deciding its success.

Item 16

Existing subsection 20(1) of the current UNC Act makes it an offence for a person to deal with *freezable assets*.⁴⁵ **Item 16** proposes new penalties for individuals convicted of an offence under **new subsection 20(1)** and proposes offences and new penalties for bodies corporate.

In the case of *an individual*, **proposed subsection 20(3A)** increases the maximum prison sentence from 5 to 10 years, and also introduces option of a fine instead of, or in addition to, the prison sentence. **Proposed subsection 20(3B)** provides that for the purposes of **proposed subsection 20(3A)** the maximum fine is 2,500 penalty units (\$275 000), or, if the offence relates to a transaction or transactions the value of which the court can determine, then: 3 times the value of the transactions or 2,500 penalty units, whichever is the greater. The fault element in **subsection 20(3)** of the current UNC Act is retained.

Proposed subsections 20(3C) and 20(3D) mirror **subsections 20(1) and 20(2)** of the current UNC Act, creating the same offence for *bodies corporate* and making that offence a strict liability one in keeping with the recommendation of Cole Inquiry Report. **Proposed subsection 20(3E)** provides a defence to an offence dealing with a *freezable asset* if the body corporate is able to prove that the use or dealing was solely for the purpose of preserving the value of the asset, or the body corporate took reasonable precautions, and exercised due diligence, to avoid contravening **subsection 20(3C)**.

Proposed subsection 20(3F) provides that the penalty for a body corporate is 10,000 penalty points (\$1 100 000), or where the offence relates to transactions the value of which can be determined, 10,000 penalty units or three times the value of the transactions, whichever is the greater amount.

Item 17

Proposed subsection 20(3C) provides that in the case of a *freezable asset*, it is an offence for a body corporate to hold an asset and use or deal with the asset; or allow the asset to be used or dealt with; or to facilitate the use of the asset or dealing with the asset (where it is not in accordance with a notice under section 22).

45. *freezable asset* means an asset that:

- (a) is owned or controlled by a proscribed person or entity; or
- (b) is a listed asset; or
- (c) is derived or generated from assets mentioned in paragraph (a) or (b)

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This item proposes the insertion of **subsection 20(4)** which provides that extended geographical jurisdiction category A applies to offences under **proposed subsection 20(3C)** thus by extending the scope of the geographical jurisdiction of the offence, this proposed amendment strengthens Australia's ability to taken action against bodies corporate who commit such an offence.

Item 22

This item proposes new subsections that provide a new penalty for individuals convicted under the existing subsection 21(1) of an offence of giving an asset to a proscribed person or entity, and **proposed subsection 21(2C)** provides for a similar offence and new penalty to apply to bodies corporate. The penalties are the same as those applying to the offences under section 20 discussed above

Item 23

The amendment contained in this item proposes that extended geographical jurisdiction category A applies to offences under **proposed subsection 21(2C)**. Thus by extending the scope of the geographical jurisdiction of the offence, this proposed amendment strengthens Australia's ability to taken action against bodies corporate who commit such an offence.

Item 24

Proposed section 22B has the effect of invalidating any authorisation granted under section 22 to deal with a *freezable asset*, if that authorisation was made on the basis of an application that was false or misleading in a material particular. **Item 25** provides that this amendment only applies to applications that were made on or after the commencement of this section. The commentary made under **item 6** applies equally here.

Item 26 – Part 5 Offences relating to UN sanctions

Proposed section 27 provides an offence for individuals or bodies corporate that engage in conduct that contravenes a UN sanction enforcement law (see **item 2**). In connection with a UN sanction enforcement law, **proposed section 28** provides an offence for providing 'false or misleading information, or omitting any matter or thing without which the information or document is misleading'.

The same penalties are provided for conviction of offences under **proposed sections 27 and 28** as those applying to the offences under section 20 discussed above. The Explanatory Memorandum states that severity of these penalties are in keeping with Cole Inquiry Recommendations and 'reflect the Government's determination to encourage

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ethical behaviour and compliance with laws relating to the administration of UN sanctions'.⁴⁶

Part 6 – Information relating to UN sanctions

The Explanatory Memorandum points out that the power to require the production of documents so as to assist with the administration of regulatory functions and enforcement of sanctions is not new; it has precedent in the production orders issued by other Commonwealth bodies such as the Australian and Investments Securities Commission and the Australian Competition and Consumer Commission.⁴⁷

Proposed section 29 provides that the CEO of a Commonwealth entity (such as a Commonwealth department or statutory agency) may give any information or document to the CEO of a designated Commonwealth entity (see item 2) for a purpose in connection with the administration of a UN sanction enforcement law.

Proposed section 30 gives the CEO of a designated Commonwealth entity the power to require a person to provide documents for the purpose of determining whether UN sanction enforcement law has been complied with. **Proposed section 32** makes it an offence (carrying a maximum penalty of 12 months imprisonment) to fail to comply with such a request for information under **proposed section 30**. **Proposed section 31** enables the CEO to require that the information provided be verified by oath or affirmation.

Safeguards

Self incrimination is not an excuse for failing to provide information requested under **proposed section 30**. However, **proposed section 33** provides that information received under **proposed section 30** is not admissible evidence against the person in any criminal proceedings or other proceedings that would expose the person to a penalty, other than for an offence under **proposed sections 28** or **32**.

Proposed section 36 provides that a person who in good faith, provides or makes use of information or a document under **proposed sections 28, 30, 34** or **35** is protected from liability 'in any proceedings for contravening a law that may arise from that conduct or in any civil proceedings for loss or damage of any kind'.

Given that there is protection when the Government is the active seeker of this information, it is not clear why similar explicit protection from 'penalty' or retribution is not necessarily afforded when a whistleblower discloses such information. These whistleblowers can of course be persons in the private sector and it maybe difficult to craft

46. *Explanatory Memorandum*, p. 7.

47. *ibid*

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such a protection. Consideration of a uniform approach to stronger whistleblower protection would be in line with reforms of UN practices, and would respond to the call by former UN Secretary-General Kofi Annan – mentioned earlier in this Digest - for member states to follow suit. It is noteworthy that in its July 2007 Progress Report on [Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials](#), Transparency International expressed the view that Australia had unsatisfactory whistleblower protection both in the public and private sectors.⁴⁸ In its submission to the Senate Inquiry into the International Trade Integrity Bill 2007, Transparency International Australia emphasized this point stating that they:

[...] consider it is urgent that special legislative protection be also afforded to whistleblowers in this context.⁴⁹

Proposed section 37 places an obligation on any person who applies for a licence, or authorisation under a UN sanction enforcement law, to retain any records or documents relating to that application for the period of 5 years. The same obligations are introduced for a person who is granted a licence or authorisation.

Proposed section 38 enables the CEO of a designated Commonwealth entity to delegate to an SES employee any or all of the functions under the UNC Act.

Customs Act 1901

Item 28

This item proposes a definition of ‘UN-sanctioned goods’ to subsection 4(1) of the Customs Act.

Item 29

Proposed section 52 invalidates a licence, permission, consent or approval granted in respect of importation of UN-sanctioned goods, where the information upon which application on which the approval was based was ‘false or misleading in a material particular, or omitted any matter or thing without which the information or document is misleading in a material particular’. **Item 30** states that proposed section 52 only applies to a licence, permission, consent or approval granted in respect of an application made on or after the commencement of proposed section 52.

48. p. 19.

49. Transparency International Australia, [Submission to the Senate Legal and Constitutional Committee Inquiry](#), 26 July 2007, p. 2.

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Items 31 and 32 mirror **items 29 and 30** respectively, though deal with licence, permission, consent or approval granted to *export UN-sanctioned goods*.

Item 34

Proposed section 233BABAA enables regulations to be made which prescribe specified goods as UN-sanctioned goods. However, certain requirements must be met. Firstly, the import or export of the putative prescribed goods must be prohibited under the Customs (Prohibited Imports) Regulations 1956 or the Customs (Prohibited Exports) Regulations 1958. Secondly, that the regulation under which the import or export of that good is prohibited, gives effect to decision of the UNSC that member States carry out certain measures, not involving the use of force, as a required to maintain or restore international peace and security.

Proposed sections 233BABAB and **233BABAC** makes it an offence to import or export UN-sanctioned goods respectively, where the import or export of that good was prohibited absolutely, or prohibited unless the approval of a particular person had been obtained and, at the time of the importation or exportation it had not been obtained. In the case of importation or exportation of a good which is prohibited absolutely, the absolute liability attaches to the offence. However, in the case where there was a failure to obtain approval from a particular person, strict liability attaches to the offence.

For an individual, offences under **proposed sections 233BABAB** and **233BABAC** are punishable either by imprisonment for not more than 10 years, and/or a fine of 2,500 penalty units or three times the value of the goods to which the offence relates, whichever is the greater amount. The penalty for bodies corporate is 10,000 penalty units or 3 times the value of the goods to which the offence relates, whichever is the greater amount.

The Explanatory Memorandum states that:

These offences will be strict liability offences for bodies corporate. The Government considers that all offences relating to behaviour in breach of UN sanctions should carry equal penalties to encourage companies and individual directors to ensure high ethical standards in all dealings in relation to UN sanctions.⁵⁰

Item 37

Under **proposed section 233C**, it is an offence to make and sign an application in an approved form, under the Customs (Prohibited Imports) Regulations 1956 or the Customs (Prohibited Exports) Regulations 1958 in relation to the importation or exportation of UN-sanctioned goods, and the application contains information that is false or misleading in a material particular or omits information, without which the application is misleading in a

50. *ibid*, p. 9.

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material particular. For an individual, the offence carries a maximum penalty of 10 years imprisonment and/or 2,500 penalty units. For a body corporate, the offence carries a maximum penalty of 12,500 penalty units.

Schedule 2—Bribery of foreign officials

In their submission to the Senate Inquiry into the International Trade Integrity Bill 2007, Transparency International Australia provided the following comment on Schedule 2:

The amendments proposed to both Part 70 of the Criminal Code Act and to the Income Tax Assessment Act are welcome.

They will, when enacted, strengthen the provisions creating the offence of bribery abroad. They serve to implement key points made in the Phase 2 report on Australia's application of its obligations under the OECD Convention and the 1997 OECD Recommendation on combating bribery in international business transactions.

It must be accepted that there are formidable difficulties in successfully mounting a prosecution and imposing sanctions under Part 70 of the Criminal Code due in large part to the fact that the criminal conduct takes place outside Australia. The planned amendments to Section 70 of the Criminal Code will, to a degree, reduce some of the difficulties and make the legislative intent plainer.

However, we have some concern, as a technical drafting matter, that the amendment proposed to the tabulation provision, Subsection 70.3(1), could be enhanced somewhat and made clearer.⁵¹

Criminal Code Act 1995

The relevant Commonwealth law dealing with bribery of foreign officials is contained in the *Criminal Code Act 1995*, as inserted by the *Criminal Code (Bribery of Foreign Public Officials) Act 1999*, which implements Australia's obligations under the [OECD Anti-Bribery Convention](#).⁵²

Item 1

Proposed subsection 70.2(1A) provides that a benefit paid to a foreign public official may still be unlawful even if it failed to gain the business advantage desired.

51. Transparency International Australia, [Submission to the Senate Legal and Constitutional Committee Inquiry](#), 26 July 2007, pp. 1–2.

52. For a useful background on the 1999 Act, refer to Jennifer Norberry, 'Criminal Code (Bribery of Foreign Public Officials) Bill 1999', [Bills Digest](#), no. 176, 1998–99 Parliamentary Library, Canberra, 11 May 1999.

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Item 2

One of the factors that must be proven under a section 70.2 offence is that the benefit given to the foreign official was not legitimately due to them. Currently, paragraph 70.2(2)(a) requires the court to disregard the fact that the benefit might have been perceived to be customary in determining whether the benefit was legitimately due to the official. **Item 2** enlarges the scope of **paragraph 70.2(2)(a)** by requiring that the court also disregard the fact that the benefit might be perceived to be ‘necessary or required’ This amendment works in conjunction with item 3 below.

Item 3

This item proposes an amendment to subsection **70.3(1)** clarifying that the defence under this subsection to bribing a foreign official, is only available when the benefit given ‘is required or permitted by *written law* of the country or place that governs the behaviour of a foreign public official’. Currently, the defence is made out, when amongst other situations, the benefit was *not against the law* of the relevant place. The effect of the amendment is to limit the scope of the defence.

Income Tax Assessment Act 1997

Item 5

Proposed subsection 26-52(2A) clarifies that a benefit paid to a foreign public official may be a bribe even if the business advantage that was sought was actually obtained or retained.

Item 6

The **proposed** amendment to **subsection 26-52(3)** clarifies that an amount is not a bribe to a foreign public official if it was required or permitted by written law of the foreign public official’s country. The Explanatory Memorandum states that this is to be the case, ‘regardless of the results of payment or the alleged necessity of payment’.⁵³

Item 7

Proposed subsection 26-52(4) is designed to achieve consistency with the definition of facilitation payment in the Criminal Code Act. Thus, ‘an amount paid to a foreign public official is not a bribe only if the value of the benefit is minor in nature and incurred for the sole or dominant purpose of securing or expediting the performance of a routine government action of a minor nature’.

53. *Explanatory Memorandum*, p. 2.

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Based on the commentary relating to the operation of the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* published by the American Society of International, this amendment seems to be consistent with the understanding of Article 1(1) of the OECD Convention. According to Geoffrey Watson:

The Commentary to Article 1(1) asserts that the provision does not cover small "facilitation" payments to foreign officials to induce them to perform their functions. Even if such payments are illegal under the foreign country's law, they apparently do not constitute payments made "to obtain or retain business or other improper advantage." The Commentary acknowledges that this type of petty corruption is a "corrosive phenomenon" but argues that it should be addressed by "support for programmes of good governance" rather than criminal sanctions, which do not seem a "practical or effective" alternative. Again, the Foreign Corrupt Practices Act contains an analogous provision: it permits a "facilitating or expediting payment" designed to "expedite or to secure the performance of a routine governmental action" by a foreign official.⁵⁴

Item 8

This mirrors the amendment to the *Criminal Code Act 1995* proposed by **item 2 in Schedule 1**.

Conclusion

The amendments proposed in this Bill endeavour to make an important contribution to strengthening Australia's legal framework so as to provide for relatively more effective implementation of United Nations sanctions regimes, in greater conformity with Australia's obligations under the UN Charter. While the proposed amendments have generally received a positive response,⁵⁵ concerns have been raised regarding the comprehensiveness of the amendments and the possible undesirable human rights consequences flowing from the amendment proposed by item 5 in schedule 1.

54. Geoffrey R Watson, 'The OECD Convention on Bribery' *American Society of International Law Insights*, March 1998. <http://www.asil.org/insights/insigh14.htm#author> Accessed 9 July 2007.

55. Leonie Wood, 'Law expert hails key to Cole recommendation as essential', *Age*, 29 November 2006, p.8. The Senate Inquiry into the International Trade Integrity Bill 2007, recommended that the Bill be passed without amendment.

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