

# CHAPTER 2

## OVERVIEW OF THE BILL

2.1 This chapter outlines the main provisions of the Bill.

### **Schedule 1 – Enforcing UN sanctions**

2.2 Schedule 1 of the Bill contains amendments to the *Charter of the United Nations Act 1945* (Charter of the United Nations Act) and the *Customs Act 1901* (Customs Act).

#### *Amendments to the Charter of the United Nations Act 1945*

2.3 In summary, the proposed amendments to the Charter of the United Nations Act will:

- create new offences for individuals and corporations in relation to conduct that contravenes a UN sanction in force in Australia, with increased penalties for breaches;
- create a provision which invalidates any permission granted under information that is false or misleading in a material particular;
- grant agencies responsible for administering UN sanctions the required information-gathering powers to determine whether UN sanctions are being complied with and improve information-sharing among government agencies; and
- require persons to retain, for five years, documentation in connection with permit applications and compliance with permit conditions.<sup>1</sup>

2.4 The proposed amendments to the Charter of the United Nations Act are explained in greater detail below.

#### *Item 2*

2.5 Item 2 of the Bill inserts a definition of 'UN sanction enforcement law' for the purposes of the Charter of the United Nations Act. It provides that the Minister may designate, by legislative instrument, a Commonwealth entity as a 'designated Commonwealth entity', conferring powers on that entity in relation to the administration of UN sanctions. DFAT and the Department of Defence, which have permit-issuing functions, will be specified as 'designated Commonwealth entities'.<sup>2</sup>

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1 EM, p. 1.

2 EM, p. 4.

*Item 4*

2.6 Item 4 omits 'has made' from paragraph 6(a) and substitutes 'makes'. The EM explains that this will enable the Governor-General to promulgate regulations that apply to decisions by the UN Security Council as these are made. Currently, amendments to regulations may be required to incorporate minor changes to sanctions regimes, should the UN Security Council make a new decision, or should sanctions committees designate individuals or entities as being subject to previous decisions.

*Item 5*

2.7 Item 5 inserts proposed subsection 6(2) which provides a general regulation-making power to give effect to decisions of the UN Security Council. Item 5 also inserts proposed subsection 6(3) which provides for incorporation by reference to capture UN Security Council decisions as they exist from time-to-time. The EM explains that decisions to be incorporated may be contained in documents such as UN Security Council Resolutions and decisions published by sanctions committees. The documents would be publicly available. The power to make legislative instruments would facilitate the identification of certain matters in cases where it is not possible, or not appropriate, to identify the matter by reference to UN Security Council materials.<sup>3</sup>

*Item 6*

2.8 Item 6 inserts new subsection 13A which provides that a licence, permission, consent, approval or authorisation granted under the regulations is invalid and taken never to have been granted if it was granted on the basis of an application that was false or misleading.

*Item 16*

2.9 Item 16 inserts new subsections to section 20 that provide penalties for individuals convicted of an offence under subsection 20(1) (proposed subsections 20(3A) and 20(3B)) and also provide an offence (proposed subsection 20(3C)) and new penalty for bodies corporate (proposed subsection 20(3F)).

2.10 The penalty for an individual is imprisonment for not more than 10 years or a fine, or both. The fine for an individual is 2,500 penalty units or, if the offence relates to transactions the value of which the court can determine, 2,500 penalty units or three times the value of the transactions, whichever is the greater amount. The penalty for a body corporate is 10,000 penalty units or, where the offence relates to transactions the value of which the court can determine, 10,000 penalty units or three times the value of the transactions, whichever is the greater amount.

2.11 The EM explains that the penalty accords with Recommendation 2 of the Cole Inquiry Report; that is, penalties for acting in contravention of UN sanctions should be severe and linked to the value of the offending transaction. Strict liability applies to the offence for bodies corporate, also in accordance with Recommendation 2 of the Cole Inquiry Report. Fault elements will be retained for individuals.<sup>4</sup>

*Item 22*

2.12 Item 22 inserts new subsections that provide a new penalty for individuals convicted under subsection 21(1) of an offence of giving an asset to a proscribed person or entity (proposed subsections 21(2A) and 21(2B)) and that provide a similar offence and new penalty for bodies corporate (proposed subsections 21(2C) and (2F)).

2.13 The penalties for individuals and bodies corporate are the same as those proposed by Item 16. Once again, strict liability will apply to bodies corporate and fault elements will apply for individuals.<sup>5</sup>

*Item 24*

2.14 Item 24 inserts proposed section 22B, providing that any authorisation issued under section 22 to deal with a freezable asset is taken never to have been issued if the application for the authorisation contained information that was false or misleading, or omitted information, without which the application was false or misleading.

*Item 26*

2.15 Item 26 inserts several new Parts to the Charter of the United Nations Act.

Part 5

2.16 Proposed section 27 provides an offence for engaging in conduct that contravenes a Commonwealth law which enforces UN sanctions. Proposed section 28 contains an offence for providing false or misleading information, or omitting necessary information, in connection with the administration of a Commonwealth law that enforces a UN sanction.

2.17 The penalties for individuals and bodies corporate under proposed section 27 are the same as those provided for under Item 16. The penalty for an individual under proposed section 28 is 2,500 penalty units; the penalty for a body corporate under proposed section 28 is five times the penalty for an individual, or 12,500 penalty units.

2.18 The offence under proposed section 27 will apply strict liability to bodies corporate but retain fault elements for individuals. The EM explains that the consistent application of strict liability to these offences does not reflect a change in general

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government policy to the framing of offences; rather it reflects the government's acceptance of the recommendations in the Cole Inquiry Report and 'its determination to encourage high ethical standards in the dealings of Australians and Australian companies with (UN) sanction regimes'.<sup>6</sup>

#### Part 6

2.19 Proposed section 29 provides that the Chief Executive Officer (CEO) of a Commonwealth entity may disclose information to the CEO of a designated Commonwealth entity for a purpose in connection with the administration of a UN sanction enforcement law.

2.20 Proposed section 30 introduces a new power for the heads of agencies that administer UN sanctions to require a person to provide documents, for the purposes of determining whether a UN sanction enforcement law is being complied with.

2.21 Proposed section 31 provides that the CEO of a designated Commonwealth entity may require information to be verified or given on oath or affirmation.

2.22 Proposed section 32 introduces an offence for failing to comply with a notice to produce under proposed section 30.

2.23 Proposed section 33 provides that a person served with a notice under proposed section 30 is not excused from providing the information required on the grounds the information required might tend to incriminate the person. However, the information required is not admissible in 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 section 28 or an offence under proposed section 32.

2.24 The EM states that the production power is necessary to ensure the efficacy of sanctions regulatory functions and is consistent with the approach to production orders issued by other Commonwealth bodies such as the Australian Securities and Investments Commission (section 68 of the *Australian Securities and Investments Commission Act 2001*) and the Australian Competition and Consumer Commission (section 155 of the *Trade Practices Act 1974*). Proposed section 33 does not seek to override legal professional privilege.<sup>7</sup>

2.25 Proposed section 37 introduces an obligation for a person who applies for a licence or authorisation under a UN sanction enforcement law to retain any records relating to that application for a period of 5 years. Proposed section 37 also introduces an obligation for a person who is granted a licence or authorisation to retain records relating to the person's compliance with any conditions of that licence or authorisation for a period of five years.

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### *Amendments to the Customs Act 1901*

2.26 The Bill introduces new criminal offences for:

- importing or exporting goods sanctioned by the UN without valid permission; and
- providing information that is false or misleading in a material particular, or omits a material particular, in an application for a permission to import or export UN-sanctioned goods.

#### *Items 29 and 31*

2.27 Item 29 inserts proposed section 52, which deems any licence, permission, consent or approval to *import* UN-sanctioned goods to never have been granted where application for it was made in an approved form and the application is false or misleading in a material particular.

2.28 The EM explains that this means that a person who imports goods under a licence, permission, consent or approval that is taken never to have been granted may be liable under proposed section 233BABAB for importing UN-sanctioned goods without the necessary approval, in addition to any liability for providing false or misleading information under proposed section 233C.<sup>8</sup>

2.29 Item 31 inserts proposed section 112B, which makes equivalent provision in relation to a licence, permission, consent or approval to *export* UN-sanctioned goods.

#### *Item 33*

2.30 Item 33 amends paragraph 210(1)(b) to extend the arrest powers exercisable by a Customs officer or police to the new offences of importing and exporting UN-sanctioned goods.

#### *Item 34*

2.31 Item 34 inserts new sections 233BABAA, 233BABAB and 233BABAC.

2.32 Proposed section 233BABAA provides that the regulations may prescribe specified goods as UN-sanctioned goods. The regulations must not specify that an item is UN-sanctioned goods unless the item meets certain requirements:

- the importation or exportation of the item must be prohibited by the Customs (Prohibited Imports) Regulations 1956 or the Customs (Prohibited Exports) Regulations 1958; and
- the regulation prohibiting the importation or exportation must give effect to a decision made by the Security Council under Chapter VII of the Charter of the

United Nations that Article 25 of the Charter requires Australia to carry out, insofar as that decision requires Australia to apply measures not involving the use of armed force.

2.33 Proposed section 233BABAB contains an offence in relation to the *importation* of UN-sanctioned goods. An individual or a body corporate commits an offence if they import UN-sanctioned goods and importation of the goods was prohibited absolutely, or prohibited unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.

2.34 Proposed section 233BABAC contains an equivalent offence in relation to the *exportation* of UN-sanctioned goods.

2.35 The offences in sections 233BABAB and 233BABAC carry the same penalties as those provided for in Item 16 and outlined above. These offences will be strict liability offences for bodies corporate. The EM explains that the government considers that all offences relating to behaviour in breach of UN sanctions should carry equal penalties. This is to encourage companies and individual directors to ensure high ethical standards in all dealings in relation to UN sanctions.<sup>9</sup>

2.36 The offences under sections 233BABAB and 233BABAC relate only to goods whose importation or exportation is prohibited under the Customs Act either absolutely or on the condition that approval of a particular person be obtained prior to their importation or exportation. Absolute liability attaches to the element that goods were prohibited under the Customs Act to ensure that knowledge of the law is not a prerequisite to the offence (that is, the prosecution does not have to prove that a person had knowledge that the goods were prohibited from import or export). However, strict liability will attach to the element that the approval had not been obtained.<sup>10</sup> The EM explains that this approach is consistent with the existing criminal offences in the Customs Act of importing and exporting Tier 1 and Tier 2 goods.<sup>11</sup>

### *Item 37*

2.37 Item 37 inserts proposed section 233C which contains offences for giving false or misleading information in relation to UN-sanctioned goods.

2.38 An individual commits an offence if they 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

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9 p. 9.

10 A *strict liability* offence is one which does not require guilty intent for its commission, but for which there is a defence if the wrongful action was based on a reasonable mistake of fact. An *absolute liability* offence is one which does not require a guilty intent, but for which there is no defence of a reasonable mistake of fact.

11 p. 9.

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 material particular. Proposed section 233C also establishes an equivalent offence in relation to bodies corporate. Once again, the penalties for these offences are the same as those described in relation to Item 16.

## **Schedule 2 – Bribery of foreign officials**

2.39 Schedule 2 of the Bill contains proposed amendments to the *Criminal Code Act 1995* (Criminal Code Act) and the *Income Tax Assessment Act 1997* (Income Tax Assessment Act).

### ***Amendments to the Criminal Code Act 1995***

#### *Item 1*

2.40 Item 1 inserts subsection 70.2(1A) which clarifies that a charge of bribing a foreign public official does not rely on the outcome of the payment. The EM explains that a benefit paid to a foreign public official may still be a bribe notwithstanding that it failed to secure the business advantage desired.<sup>12</sup>

#### *Item 2*

2.41 Item 2 clarifies that, when considering whether a benefit paid to a foreign public official was not legitimately due to that official, the court may disregard the fact that the benefit is, or is perceived to be, customary, necessary or required. The EM states that the government considers that the only circumstance in which a benefit should be paid to a foreign public official is where that benefit is required or permitted by written law.<sup>13</sup>

#### *Item 3*

2.42 Item 3 amends subsection 70.3(1) to clarify that the defence in that subsection to a charge of bribing a foreign public official is only available when the benefit paid is expressly required or permitted by the written law of the country or place that governs the behaviour of the foreign public official, regardless of the results of payment or the alleged necessity of payment. The written law of a country or place is limited to the written legislation or regulation of that country or place.<sup>14</sup>

### ***Amendments to the Income Tax Assessment Act 1997***

2.43 In summary, the amendments to the Income Tax Assessment Act will:

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12 p. 10.

13 p. 10.

14 EM, pp 2 & 10.

- ensure that payments to foreign public officials are tax deductible only where the benefit paid is expressly required or permitted by written law, regardless of the results of payment or the alleged necessity of payment; and
- align the definition of a facilitation payment ('bribe to a foreign public official') with the definition in the Criminal Code Act.