CHAPTER 3

KEY ISSUES

3.1 The committee received four submissions, only two of which made substantive comment on the Bill. Some of the issues raised in submissions, as well as issues explored by the committee at the public hearing, are discussed below.

Consultation

3.2 The committee questioned representatives from the Attorney-General's Department (Department) and the Department of Foreign Affairs and Trade (DFAT) about the form and extent of consultation with respect to development of the Bill. The representatives informed the committee that consultation has occurred internally within government but that consultation has not taken place with industry stakeholders specifically in relation to the Bill.[1]

3.3 As the representative from DFAT explained:

> We have consulted, primarily, since the tabling of the government's response [to the Cole Inquiry Report], with the financial sector, but we have not consulted with industry on the particular terms of this bill. This is because we had made available on 3 May to the exporting-trading sector the terms of the government's response and the intended content of the bill. Between then and the time that we required to get the bill drafted and before the parliament, in order to get the bill effective in the most expedient time, there was not time to discuss further with industry the terms of the government response to the bill. To accommodate for that fact we have made sure that the bill will not commence until we have been able to negotiate with the various sectors that have an interest in the operation of sanctions in Australia the terms of the implementing regulations on those aspects of the bill that will affect industry. These will be given effect to in the form of the regulations.

3.4 The representative from DFAT advised that specific consultation will take place with industry stakeholders in relation to the drafting of the regulations:

> At present all United Nations sanctions are implemented in part through regulations to the Charter of the United Nations Act. As a consequence of the amendments to that act proposed in this bill, we will be seeking to amend a number of those regulations to reflect, in particular, the increased level of penalty provided for in the act and also to provide for the mechanism by which individual companies may apply for permits and other forms of communication between those companies. That consultation process will begin at the end of this month and carry on until September and October. Once that consultation process is concluded and we have the

1 *Committee Hansard*, 17 July 2007, p. 3.

> necessary regulations drafted following that consultation, at that point we will seek for the terms of this bill to commence, and simultaneously with that we will commence the regulations.[2]

3.5 In broad terms, the representative from DFAT noted that DFAT and Austrade 'remain in regular dialogue with Australian industry and business on the application of UN sanctions generally'.[3] DFAT also retains a database for correspondence with banks and other financial institutions on the operation of particular financial sanctions that might affect them.[4]

Automatic incorporation by regulation

3.6 Dr Ben Saul from the Sydney Centre for International and Global Law at the University of Sydney welcomed the Bill but raised two issues. The first issue relates to the risk, in Dr Saul's view, that automatic incorporation via regulation of persons or entities proscribed by the Security Council in Item 5 of the Bill may give rise to procedural fairness and human rights concerns.[5]

3.7 However, a representative from DFAT explained that it is not possible to accommodate a procedural fairness element 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 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.[6]

Responsibilities of the Australian Government

3.8 Dr Ben Saul submitted that the Bill focuses largely on the conduct of individuals or companies rather than on the specific responsibilities of the Australian Government in upholding UN sanctions.[7]

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2 *Committee Hansard*, 17 July 2007, pp 2-3.

3 *Committee Hansard*, 17 July 2007, p. 2.

4 *Committee Hansard*, 17 July 2007, p. 2.

5 *Submission 1*, p. 1.

6 *Committee Hansard*, 17 July 2007, p. 4.

7 *Submission 2*, p. 1.

3.9 Dr Saul noted further that:

> The Cole Inquiry was not empowered, and did not report on, the wider questions of whether Australia breached its *international* obligations in relation to the Iraq sanctions. Specifically, there remain 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 – or could not – be discharged by relying on the United Nations vetting of commercial contracts.[8]

3.10 Dr Saul suggested that the Bill should, at a minimum, include a specific provision creating a strict liability offence where any Australian official or Minister (intentionally or recklessly) authorises or permits the export or import of UN-sanctioned goods (additional to the proposed offences in the Bill of actually importing or exporting such goods). In Dr Saul's view, 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'.[9]

3.11 The representative from DFAT told the committee that, with respect to overarching responsibility for breaches in international law of Australia's sanctions obligations:

> We respectfully disagree with his position that if an Australian company in breach of Australian law acts inconsistently with UN sanctions, that represents a breach by the Australian government of the sanctions obligation. This is a very well understood principle of public international law and so, from that point of view, so long as the Australian government has in place the necessary measures to implement sanctions and to take action against those who would seek to breach those measures, Australia has met its international obligations.[10]

3.12 The representative from the Department commented on Dr Saul's suggestion to apply a specific offence to Australian officials or Ministers as follows:

> …as a matter of policy, the view has consistently been taken that criminal responsibility should not be imposed on the Crown under Commonwealth law. To create a specific offence as proposed by Dr Saul would be a significant departure from this policy, and this is not under consideration. Regarding officials, depending on the facts of any case, (P)art 2.4 of the Criminal Code, which deals with extensions of criminal responsibility, may apply to some officials for breaches of offences in the bill. This would really depend on the facts, but, for example, an official who aids, abets, counsels or procures the commission of an offence by another person may

8 *Submission 2*, p. 1.

9 *Submission 2*, p. 1.

10 *Committee Hansard*, 17 July 2007, p. 4.

> be open to prosecution. Commonwealth officials are also subject to the disciplinary regime under the Public Service Act.[11]

Penalties

3.13 Transparency International Australia (TIA) expressed general support for the Bill but was of the view that it should go further, particularly in relation to penalties and protection for whistleblowers.[12] In particular, TIA submitted that it 'had hoped that the opportunity would finally be taken…to increase the level of maximum monetary penalties applicable to an offence under Part 70'.[13] TIA's view was that the current level of penalties 'are not "effective, proportionate and dissuasive criminal penalties" as required by the [UN] Convention, even when combined with the possibility of confiscation of benefits or the rather remote risk of jail'.[14] TIA argued further that the maximum fine for corporations upon conviction should be increased to $10 million.[15]

3.14 TIA also considered that special legislative protection should be afforded to whistleblowers in the context of bribery of foreign officials:

> U[nited] S[tates] experience over a long period confirms that the willingness of corporate witnesses to come forward will continue to be an important if not an essential ingredient in successful investigation of bribery cases. The well understood reluctance and risk faced by potential witnesses must be offset as far as possible by legislative protection…[16]

3.15 The committee questioned representatives from the Department and DFAT in relation to whether executives of companies are specifically covered by the offence provisions in the Bill.

3.16 A representative from the Department explained that there are two tiers of offences that are either created or amended by the Bill:

- offences directed at individuals, which in some circumstances could cover the actions of company officials; and
- offences directed at bodies corporate.

3.17 The representative explained further that, where an officer of a company is acting within their ostensible authority, 'clearly corporate liability is going to be the more appropriate course, and obviously the offences apply there'.[17] However, 'if you

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11 *Committee Hansard*, 17 July 2007, p. 4.

12 *Submission 4*, p. 2.

13 *Submission 4*, p. 2.

14 *Submission 4*, p. 2.

15 *Submission 4*, p. 2.

16 *Submission 4*, p. 2.

17 *Committee Hansard*, 17 July 2007, p. 5.

have somebody who is acting outside that kind of realm and for their own personal benefit, there are the individual offences that we would have thought would apply in that instance'.[18]

Offences of strict and absolute liability

3.18 The committee questioned the representatives from the Department and DFAT about the rationale for inclusion of strict and absolute liability offences in the Bill and possible inconsistencies with relevant guidelines in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.[19]

3.19 A representative from the Department explained that the inclusion of strict liability offences for bodies corporate was a specific recommendation from the Cole Inquiry Report. He explained further that:

> Consideration was, of course, given to the normal Commonwealth policy that applies, as articulated in the guide. These offences do not fall strictly within the normal exceptions, although I think it is important to note that one of the key elements we try to avoid in Commonwealth policy is strict liability offences that have imprisonment as a form of punishment, and that does not apply in this case, because we are talking about bodies corporate. For the offences that apply to individuals strict liability is not applied to critical culpability elements.[20]

3.20 The representative from the Department also advised that the inclusion of strict liability offences in such circumstances is consistent with other Commonwealth legislation:

> Certainly for these types of provisions where you are trying to establish whether an element of the offence is compliant with some element of law then, yes, it is very common to apply strict liability in those instances. There is no need to form some kind of belief with regard to it or that the standard fault element that would apply would be recklessness. There is no need for recklessness with regard to whether that statute exists or whether the law had been complied with.[21]

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18 *Committee Hansard*, 17 July 2007, p. 5.

19 Issued by authority of the Minister for Justice and Customs, February 2004. The committee notes that the Senate Scrutiny of Bills Committee, in its Alert Digest No. 7 of 2007 (20 June 2007), commented on several proposed provisions of the Bill. That committee accepted the explanation given in the EM for the imposition of strict liability offences in Items 16, 22 and 26 of Schedule 1 of the Bill, and accepted the abrogation of the privilege against self-incrimination in Item 26 of Schedule 1. However, it sought the Attorney-General's advice in relation to the rationale for inclusion of strict and absolute liability offences in Item 34 of Schedule 1.

20 *Committee Hansard*, 17 July 2007, p. 7.

21 *Committee Hansard*, 17 July 2007, p. 8.

3.21 With respect to the inclusion of absolute liability offences in the Bill, the representative noted that absolute liability applies only to very limited elements in the offences in question:

> It does not apply to the entirety of an offence, so we would not call it strictly an absolute liability offence. It is confined to what is traditionally regarded as the knowledge of law problem. It is confined to whether the particular importation was prohibited under an Act or whether it was prohibited subject to some kind of licensing scheme. It focuses only on those two circumstantial elements of the physical elements and not on the entirety of the offence.[22]

3.22 For example, in proposed section 233BABAB, the first two elements of the offence (namely that the individual intentionally imported goods; and the goods were UN-sanctioned goods and the individual was reckless as to that fact) contain fault elements. As such:

> …it is not an absolute liability offence…The choice to go for absolute liability in this case was consistent with the remainder of the Customs Act. There are very similar offences on which these are ostensibly modelled which is absolute liability in exactly the same instances.[23]

3.23 In its response to a question on notice, the Department stated that the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered when framing the absolute liability offences in the Bill but that 'it is appropriate to depart from the general policy set out in the Guide in these circumstances'.[24]

3.24 The Department reiterated that defences are available for the physical element of the new offences:

> …proposed sections 233BABAB and 233BABAC and existing sections 233BAA and 233BAB provide that strict liability applies to the physical element that an approval had not been obtained at the time of the importation or exportation. This means the defence of honest and reasonable mistake of fact would be available for this element of the new offences.[25]

Committee view

3.25 The committee considers that the Bill will effectively strengthen the capacity to implement and enforce UN sanctions regimes in Australia by significantly improving the relevant legal frameworks.

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22 *Committee Hansard*, 17 July 2007, pp 7-8.

23 *Committee Hansard*, 17 July 2007, p. 8.

24 Answers to questions on notice, p. 1.

25 Answers to questions on notice, p. 1.

3.26 The committee notes advice from the Department and DFAT that it will consult with industry in the development of regulations related to the proposed amendments to the Charter of the United Nations Act. The committee encourages comprehensive consultation in that regard.

Recommendation 1

3.27 The committee recommends that the Bill be passed.

Senator Guy Barnett
Chair