

APPENDIX 1

Australian Government response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme

Introduction

On 27 November 2006 the Australian Government tabled the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food programme by Commissioner Terence Cole QC (the Report).

The Australian Government is pleased to respond to the Report. The first three of Commissioner Cole's recommendations have been accepted.

The Government has in fact gone further than Commissioner Cole's recommendations with proposed changes to Australian laws to strengthen enforcement of UN sanctions and fight foreign bribery.

Again, the Australian Government thanks Commissioner Cole and those assisting him for their excellent work on the Report.

In regard to recommendations 4 and 5, public inquiries have already commenced. 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 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.

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.

Recommendations 1 – 3 in relation to enforcing UN sanctions

Commissioner Cole's first three recommendations are designed to strengthen Australian law and administration of the domestic enforcement of UN sanctions.

In considering the implementation of Commissioner Cole's recommendations, it is important to note that the Report was focussed on the administration of a specific export trading sanctions regime which relied upon the operation of the *Customs (Prohibited Exports) Regulations 1958*. The Report properly did not consider other UN sanctions implemented by regulations made under the *Charter of the United Nations Act 1945* (Charter of the UN Act) such as import trading sanctions, financial services sanctions, freezing of assets and travel restrictions.

The Australian Government has considered these other sanction regimes and has sought to apply Commissioner Cole's recommendations in a way that improves all current and future UN sanctions regimes in Australia. The Government has in fact gone further than Commissioner Cole's recommendations with proposed changes to Australian laws to strengthen enforcement of UN sanctions and fight foreign bribery.

Recommendation one

"I recommend 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.

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."

Response

The Government accepts Commissioner Cole's recommendation that Australian law should require complete and accurate information in support of any permission to export goods which are subject to UN sanctions and impose significant consequences for any breach of that obligation. The Government will also implement this recommendation for other Australian UN sanction regimes. Accordingly, the Government will introduce legislation to:

- amend the *Customs (Prohibited Exports) Regulations 1958* and the *Customs (Prohibited Imports) Regulations 1956* to require applications for permission to export or import goods subject to a United Nations sanctions regime to be made on an approved application form which requires a declaration and certification by a senior executive of the applicant company as to the accuracy and completeness of the information
- amend the *Customs Act 1901* to deem a permission to export or import UN sanction goods not to have been granted if it was granted on the basis of false and misleading information
- revise and increase financial penalties for importing and exporting goods in breach of UN sanctions
- declare UN sanction goods to be prohibited imports or exports with penalties of 10 years imprisonment for importing or exporting prohibited goods without a valid permit, and
- amend the *Customs Act* and the *Charter of the UN Act* to introduce criminal offences for providing false or misleading information in connection with the administration of UN sanction regimes. Penalties of 10 years imprisonment apply with appropriate financial penalties for corporations. Offences can be laid against the company providing the information, any officer who signed any approved application form and any other officer or employee of the company complicit in the provision of the false or misleading information.

Recommendation two

"I recommend 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."

Response

The Government accepts recommendation two and will ensure Australian law properly criminalises conduct which breaches UN sanction regimes. Rather than

inserting a new offence in the Criminal Code as recommended by Commissioner Cole, the Government will insert a new offence into the Charter of the UN Act.

The Government will impose strict liability on corporations but not on individuals, as recommended by Commissioner Cole. The Government considers that it is neither fair, nor useful, to subject individuals to 10 years imprisonment for unintended actions or unforeseen consequences unless these resulted from an unjustifiable risk, that is, recklessness. Accordingly, the offence for conduct that breaches a UN sanction will require proof of fault where individuals are concerned.

Recommendation three

"I recommend 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."

Response

In his findings Commissioner Cole notes that "no power exists for any Commonwealth entity to obtain evidence and information for the purpose of securing compliance with" UN sanctions. The Australian Government will address this by introducing legislation to give Government agencies responsible for granting permits in relation to UN sanctions appropriate powers to:

- undertake due diligence before any permission is granted
- monitor, effectively, continuing compliance with any conditions or requirements of the permission, and
- identify any possible breaches of the law for referral to relevant law enforcement agencies.

There will also be appropriate penalties for any failure to comply with a requirement to provide required information or documents. Rather than giving these powers to one body, the Government will give these powers to various agencies responsible for granting permits in relation to UN sanctions. Agencies will make appropriate administrative changes to give effect to these new powers.

Further changes relating to foreign bribery and tax deductions

The Government will also be addressing two issues that do not flow directly from Commissioner Cole's recommendations, but which Commissioner Cole commented on in his report. These relate to foreign bribery and tax deductions. The Government will:

- amend the *Income Tax Assessment Act 1997* (ITAA) to align the definition of facilitation payments to the definition in the Criminal Code to allow deductibility only for minor facilitation payments, and
- amend Division 70 (Foreign Bribery) of the Criminal Code to clarify that the defence in section 70.3 applies only where the law of the foreign country

states that the advantage in question is permitted or required and that the offence can be made out regardless of the results of the payment or the alleged necessity of the payment, and amend the corresponding provision of the ITAA.

