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SYDNEY

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 17 July 2007

Members: Senator Barnett *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Ludwig, Parry, Payne and Trood

Participating members: Senators Allison, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Fielding, Fierravanti-Wells, Fifield, Heffernan, Hogg, Humphries, Hurley, Joyce, Kemp, Lightfoot, Lundy, Ian Macdonald, Sandy Macdonald, McGauran, McLucas, Milne, Murray, Nettle, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

Senators in attendance: Senators Barnett, Ludwig, Parry and Trood

Terms of reference for the inquiry:

To inquire into and report on: International Trade Integrity Bill 2007

WITNESSES

Committee met at 4.10 pm

CHAIR (Senator Barnett)—This is a hearing of the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the provisions of the International Trade Integrity Bill 2007. The inquiry was referred to the committee by the Senate on 21 June 2007 for report by 1 August 2007. The bill amends the Charter of the United Nations Act 1945, the Customs Act 1901, the Criminal Code Act 1995 and the Income Tax Assessment Act 1997. The bill implements the Australian government's response to recommendations 1 to 3 of the *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme* by Commissioner Terence Cole QC. The committee has received three submissions to this inquiry. All submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

[4.12 pm]

RIVIERE, Mr Craig, Principal Legal Officer, Transnational Crime (Domestic) Policy Section, Criminal Justice Division, Attorney-General's Department

WALTER, Mr Andrew, Acting Assistant Secretary, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

PITMAN, Ms Sue, National Director of Trade Division, Australian Customs Service

STEWART, Mr Jim, Director, Community Protection, Trade Policy and Regulation Branch, Australian Customs Service

SCOTT, Mr Peter Guinn, Director, Sanctions and Transnational Crime Section, Department of Foreign Affairs and Trade

CHAIR—I welcome all the representatives from the Attorney-General's Department, the Department of Foreign Affairs and Trade and the Australian Customs Service. The departments and the Australian Customs Service have not lodged submissions with the committee. At this stage I would like to remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of the states shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis of the claim. I invite you to make a short opening statement, at the conclusion of which senators will ask questions.

Mr Riviere—The purpose of the International Trade Integrity Bill 2007 is to improve Australia's ability to administer United Nations sanctions regimes and combat the bribery of foreign public officials. The amendments will create new offences and penalties for those who seek to avoid UN sanctions and will further restrict the bribery of foreign officials.

The amendments arise from the first three recommendations made in the *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*—the Cole inquiry report. However, the Cole inquiry focused on the conduct of certain companies in relation to the Iraq sanctions regime, and Commissioner Cole's findings and recommendations were limited to this particular sanction regime. The government considers that Commissioner Cole's recommendations can be applied more broadly to improve Australian law as it relates to all UN sanctions regimes. Hence, the government has tabled the International Trade Integrity Bill 2007 to obtain the greatest benefit from these recommendations and improve Australia's capacity to implement and enforce all UN sanctions regimes.

The principal features of the bill are outlined in the explanatory memorandum. The rationale for these features is set out in the explanatory memorandum, in the second reading

speech and, more generally, in the government's response to the report dated 3 May 2007. We would be pleased to assist the committee by providing answers to any questions on the bill.

CHAIR—Thank you. If there are no more opening statements we will move to questions.

Senator LUDWIG—More broadly, what form has the consultative process taken? Who have you consulted with, for example?

Mr Scott—The Department of Foreign Affairs and Trade and its sister agency Austrade remain in regular dialogue with Australian industry and business on the application of UN sanctions generally. With respect to financial sanctions, we retain a particular database for correspondence with banks and other financial institutions on the operation of particular sanctions that affect them.

In relation to the operation of this particular bill, the form that the consultation is going to take will be in terms of how the implementing regulations for the features of this bill are going to be drafted. 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 the Government and those companies. That consultation process will begin at the end of this month and carry on into September and October. Once that consultation process is concluded and we have the 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.

Senator LUDWIG—So you have not consulted with anybody about this bill?

Mr Scott—No, Senator, that is not true. As you would be aware—

Senator LUDWIG—I did try to give you an opportunity to tell me who you consulted with, and you did not say anybody.

Mr Scott—We have consulted, primarily, since the tabling of the government's response, 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.

Senator LUDWIG—All right. So you have not consulted with anybody in respect of the bill. That is right.

Mr Scott—In respect of the bill, no. The Department of Foreign Affairs and Trade has not. We have consulted internally within government but not with the private sector.

Senator LUDWIG—Have you consulted with the Australian Taxation Office?

Mr Riviere—The Australian Taxation Office have been involved in the development. They were consulted in the development of the bill. They have not been actively consulted by the Attorney-General's Department since the bill has been introduced.

Senator LUDWIG—I am not sure that was my question. Have they been consulted about the bill?

Mr Riviere—No, Senator, not by the Attorney-General's Department.

Senator LUDWIG—What about the Department of Foreign Affairs and Trade? Were they consulted about the bill? My language is specific. You may have spoken to them early, you may have received proposals and you may have talked to them. I would expect AGD would do all of those things in respect of foreign bribery offences. I have no doubt about that, but in terms of this bill, have you consulted? I am trying to be as precise as I can because I want to know who has had any—

Mr Riviere—We have consulted with the Treasury, as they have also been involved in the process, but there are obviously changes to the Tax Act, so we have consulted with the tax division of the Treasury.

Senator LUDWIG—For what purpose? Is it to work out how much revenue it might cost?

Mr Riviere—No. We have not gone into those specifics.

Senator LUDWIG—What was the purpose of consulting with Treasury?

Mr Walter—Obviously the act amends the Income Tax Assessment Act, which falls within the Treasurer's portfolios, so Treasury were consulted in the development of those amendments.

Senator LUDWIG—Was any assessment made as to whether it has an effect on revenue?

Mr Walter—We can take that on notice, but not that we are aware of.

Senator LUDWIG—Sorry, that is a way out. Maybe if you are new to the committee process and you are unsure, you are quite welcome to say that you will take it on notice and get back to the committee. I am sure Ms Pitman knows that only too well.

Mr Scott—In response to your question, I just want to make clear that the Department of Foreign Affairs and Trade was itself consulted on the bill and was involved in the preparation of drafting instructions with respect to amendments to the Charter of the United Nations Act, which is administered by the Department of Foreign Affairs and Trade.

CHAIR—The explanatory memorandum, under Financial Impact, states:

The Government will provide $4.6 million over four years to address the first three recommendations of the Cole Inquiry Report.

Senator LUDWIG—That is a different question, though. It is helpful but a different question to the one I asked. The other, broader matter was that the *Alert Digest* of the Scrutiny of Bills Committee raised a concern about absolute criminal liability. I will not go to it in any detail; I am sure you are aware of their report. Have you responded to their report?

Mr Walter—Yes, the Attorney-General has.

Senator LUDWIG—I am not sure if they published their response. If that has not been published in the *Alert Digest* and the committee cannot find it, can you make that available to this committee as well?

Mr Walter—We will look at that. Unfortunately we did not have a signed copy of the letter to make available to the committee, but we are trying to get a copy and we will make it available to the committee.

Senator LUDWIG—I thought that might have been the process, so I am happy to accommodate that. In addition, three matters were raised by Dr Ben Saul. On the first matter he made two short points, which I am sure you are familiar with. He stated:

First, there is a risk that the automatic incorporation via regulation of persons or entities proscribed by the Security Council ... may give rise to procedural fairness concerns.

I am happy for you to take that on notice. I wonder if you can address that.

Mr Scott—I can address that. 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.

Senator LUDWIG—The second matter he raises—which I am sure you have focused on—in his letter is:

... largely on the conduct of individuals or companies rather than on the specific responsibilities of the Australian government in upholding sanctions.

What he is going to here, of course, is the wider requirement for ministers and the like to be held accountable for their actions. That is not part of this bill, is it?

Mr Scott—It is not. In relation to Dr Saul's letter, there are two points. One is the question of who is responsible for a breach in international law of Australia's sanctions obligation. 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. His point about offences applying to individual officers of departments is more a matter for the Attorney-General's Department to respond to.

Mr Riviere—I assume you are looking at the last paragraph of Dr Saul's letter.

Senator LUDWIG—Yes. I have run them together for the purposes of time. There are really three matters he raised: the first matter you have dealt with and the second two matters relate to the broader duty in international legal questions and to applying it to ministers.

Mr Riviere—I want to comment on Dr Saul's suggestion to apply a specific offence to Australian officials or ministers. With regard to ministers, 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, part 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 be open to prosecution. Commonwealth officials are also subject to the disciplinary regime under the Public Service Act.

Senator LUDWIG—Thank you. Are the matters that go to penalties for executors of companies addressed in the bill? If we look at a company as an entity, it has a corporate veil which gets lifted on occasions. In this instance you do not seek to lift that veil and pursue individual executives.

Mr Riviere—For which offence?

Senator LUDWIG—Penalties for executors of companies, more broadly. It seems to be that you take a role where in some instances you do and in some instances you do not.

Mr Walter—There are basically two tiers of offences that are either created or amended by the bill: there are offences that are directed at individuals, which in some circumstances could pick up a company official—

Senator LUDWIG—That is what I was trying to clarify: whether it would pick up a company official as an individual and whether you were trying to separate out those who were partners, individuals acting on their own, or company executives—in other words, in control of the company. I was trying to clarify whether or not—I am sure you can imagine it—there might be a company where individuals or managers might be working independently of the company but still acting effectively for their own pecuniary benefit. Then you have corporate executives who are operating within the frame of a company and more broadly for their own benefit but not for the good of the company per se.

Mr Walter—In terms of officers acting within their ostensible authority and perhaps the role that they play, clearly corporate liability is going to be the more appropriate course, and obviously the offences apply there. But if you 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.

Senator LUDWIG—So they are the two, but there is a third category which occasionally the Commonwealth chooses to implement legislation for—that is, where executives, even working within their ostensible authority, are still taken individually as persons who are held accountable for their actions. It does not seem to account for those. For example, in the case

of a managing director of a company, you take the company but not the managing director as an individual.

Mr Walter—The general principle when applying these kinds of offences to individual officers in companies is when it is possible to identify someone who has some peculiar responsibility in a particular area. So if you can identify a particular corporate officer within certain types of organisations that we would expect to be held to a higher standard in terms of complying with the law, in those circumstances we tend to try and address that specific third group. But beyond that, as a general principle, we do not do that.

Senator LUDWIG—So in this instance you chose not to address individual company executives.

Mr Riviere—Are you talking about the breach of the United Nations sanctions offence or the false and misleading information offence? The reason I ask the question is that there is a form of personal liability under the false and misleading information—

Senator LUDWIG—That would be for a company executive who would then be personally liable, but what about for the sanctions breaches?

Mr Riviere—We have not addressed it in the sanctions breaches.

Senator LUDWIG—Why not? It seems to me we have examples of that.

Mr Riviere—We have maintained consistency with the general policy and we have also maintained consistency with Commissioner Cole's recommendation.

Senator LUDWIG—But you have gone broader in this bill than Commissioner Cole's recommendations. That is right, isn't it? You were not limited to it?

Mr Riviere—No. We have gone broader to the extent that Commissioner Cole focused on the Iraq sanctions regimes and now we focus on all United Nations sanctions regimes.

Senator LUDWIG—Has the government provided a response to the Australia: phase 2 OECD report entitled *Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*?

Mr Riviere—I have something on that if I can just refer to the paperwork.

Senator LUDWIG—I thought you might. While you are finding your piece of paper, in broad terms it seems that, where the government says it has gone further than Commissioner Cole's recommendations, it has gone further in responding to the OECD report which was done in January 2006. Are there any matters which fall outside that through this legislation? There are two sets or subgroups, or subsets if we want to talk to it that way. There are Commissioner Cole's recommendations, some of which encompass the OECD matters, and then there are the additional matters that the Attorney-General tagged onto this bill, which he said went in excess of Commissioner Cole's recommendations, but my general reading is they are within the OECD recommendations. Are there any that are outside or in addition to those two areas—both Commissioner Cole's recommendations and the OECD findings and recommendations?

Mr Riviere—No.

Senator LUDWIG—So the matters where the Attorney-General said that he went further than Commissioner Cole are, in fact, meeting the requirement or the recommendations of the OECD report, phase 2.

Mr Riviere—They address recommendations of the OECD—

Senator LUDWIG—If we then turn to those recommendations. Sorry, I interrupted you.

Mr Riviere—I have not answered the first question, which was on what response the government has made. In January this year Australia provided what is called a follow-up oral statement under the OECD guidelines. The oral statement to the OECD working group described Australian government efforts to raise awareness about the foreign bribery offence. It described measures undertaken by the Australian Taxation Office and the AFP to increase the priority attached to suspected foreign bribery, and in its response Australia also advised of the Australian government's initiatives, at that time—in January of this year—with regard to the Cole inquiry report.

Senator LUDWIG—Let us then look at the recommendations. There has been nothing other than a verbal follow-up in respect of that OECD phase 2 report?

Mr Riviere—Not at this stage, no.

Senator LUDWIG—Is there an intention to provide a formal response to the OECD?

Mr Riviere—There is an intention to provide a formal response later this year.

Senator LUDWIG—Is that part of the usual process?

Mr Riviere—That is part of the usual process. Usually one year after the OECD makes its report, you have an oral report on your progress of responding to the recommendations, and another year after that you have a written report to the OECD working group on foreign bribery.

Senator LUDWIG—And so for the follow-up, it is stated in the report:

The Working Group will follow-up the following issues once there has been sufficient practice: (a) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code; (Convention, Art. 1; Commentary 9)

Has that been addressed in this bill?

Mr Riviere—Sorry, could you repeat that question?

Senator LUDWIG—I am sorry. I thought you might have had the OECD report with you.

Mr Riviere—I do not.

Senator LUDWIG—It would be unfair for me to read it out without giving you the opportunity to read it.

Mr Riviere—Thank you.

Senator LUDWIG—I was going to take you through each of those.

CHAIR—Senator, would it be useful to run off copies and come back to that shortly, or do you think we can deal with that while the officer is reading it?

Senator LUDWIG—It is a long document. I was going to go to other places in it as well.

CHAIR—Perhaps if we copied it and came back to it.

Senator LUDWIG—I do not mind, if we have time.

CHAIR—Mr Riviere, we will photocopy it and come back to that question shortly.

Senator PARRY—I want to refer to what Senator Ludwig referred to earlier—that is, the email on 12 July from Dr Ben Saul. Senator Ludwig quoted extensively from it. Dr Saul indicates:

The Bill makes a vital contribution to strengthening the domestic legal framework ...

He also commends the government for so fully responding to the recommendations. In light of that and that we have received only three submissions after advertising, have you received any other comments at all from any other agency, internally, that we may not be aware of, either criticising or commending the bill?

Senator LUDWIG—They did not consult on the bill.

Senator PARRY—There has been no volunteered criticism of the bill that you are aware of?

Mr Riviere—Nothing has been volunteered to the Attorney-General's Department.

CHAIR—In response to Senator Ludwig and to Senator Parry's question, I note that the bill was introduced on 14 June, so I think it is a legitimate question as to whether, either before or after 14 June, you have had any feedback to the bill. The answer is no?

Mr Riviere—No.

CHAIR—The point Senator Parry is making is that we have had three submissions.

Senator TROOD—The bill substitutes the term 'an individual' for 'a person'. I am just wondering what the import of that is.

Mr Scott—In the context of the Charter of the United Nations Act, in the original provision where that substitution took place, 'a person' was understood to refer to both a natural person and a legal person and therefore the penalties applying were as drafted, with the necessary multiplication principle in relation to corporate liability. Because of the requirement for us to apply a strict liability offence in the context of body corporates and to have that operate consistently, that provision within the Charter of the United Nations Act needed to be split up between the offences that relate to an individual and the offences that relate to a body corporate. So the dual nature of the original provision within the Charter of the United Nations Act was no longer appropriate. It was important to ensure consistency in the operation of the offences throughout the Charter of the United Nations Act.

Mr Walter—If 'a person' has that meaning under Commonwealth law, it means both a natural person and a body corporate.

Senator TROOD—My sense was that that was probably the case. I am grateful to you for clarifying that.

CHAIR—Senator Ludwig has asked quite a few questions that I think have assisted and which I wanted to cover as well, but I notice you are going to table your response to the

Scrutiny of Bills Committee concerns and questions, which we appreciate. As a member of the Scrutiny of Bills Committee, it would appear to me that this issue of strict liability seems—the way it is framed under section 233BABAB(8) and BABAC(8)—to be inconsistent with the *Guide to framing Commonwealth offences, civil penalties and enforcement powers*. You have actually applied a strict liability to a body corporate which commits an offence under those subsections. We can wait for your written response, but do you want to alert us to why you considered it appropriate it to draft the bill in such a way?

Mr Walter—Is your concern particularly around the offences for bodies corporate and why they are strict liability offences?

CHAIR—That is my main concern. The other one relates to the absolute liability concern that applies to individuals, but the main one is the strict liability issue.

Mr Walter—In terms of the corporate offences, this is a specific recommendation coming out of the Cole commission. 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 body corporates. For the offences that apply to individuals strict liability is not applied to critical culpability elements.

CHAIR—But I think that under absolute liability it is jail for not more than 10 years and a fine not exceeding the amount worked out under subsection (5). That is for the absolute liability.

Mr Walter—The important thing to note there is 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.

The two critical first elements of 233BABAB state:

(a) the individual intentionally imported goods; and

(b) the goods were UN-sanctioned goods and the individual was reckless as to that fact;

We have fault elements in both of those, which means that it is not an absolute liability offence as such. Only those two small elements are confined to absolute liability and, to give a more fulsome answer to the query that has been raised by the Scrutiny of Bills Committee in this regard, normally in those circumstances you would look at either strict liability or absolute liability for that type of element. 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.

CHAIR—So the absolute liability is consistent with the Customs Act.

Mr Walter—That is correct.

CHAIR—What about the strict liability? That is consistent with the Cole commission recommendations, but is it consistent with any other provision of Australian law?

Mr Walter—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.

CHAIR—I would like to clarify the commencement date that you were referring to earlier. The act commences on the day on which it receives royal assent, but were you referring to the commencement of the regulations under the act?

Mr Scott—I was referring to the commencement date for the amendments to the Charter of the United Nations Act. You will note that they commence on a date to be named following the royal assent, but not to be longer than six months after that date. As I explained, that was to enable us to have consultation with affected industry on the operative provisions of the amendments—that is, the implementing regulations that will be put in place.

CHAIR—Will six months be long enough to do that?

Mr Scott—Yes. We are talking about amendments to a series of regulations that will not be radical. They will be deliberately designed to reflect the new provisions that are contained within the act itself and form part of an ongoing outreach program that we have with business and industry from time to time on the operation of sanctions generally.

Senator LUDWIG—In terms of the follow-up matters, has number 183(a) been undertaken—that is:

application of the defence of facilitation payments, in particular to determine whether Australian companies—

CHAIR—Are we tabling this?

Senator LUDWIG—Yes.

CHAIR—Is it being tabled with consent?

Senator LUDWIG—It does not need to be tabled in the sense that it is a public report and is available on the internet.

CHAIR—We will just note it.

Senator LUDWIG—It mentions the application of the defence, which I have drawn to your attention. I am happy for you to take it on notice.

Mr Walter—Is your question whether the bill addresses these particular things?

Senator LUDWIG—Yes. We know two things: Commissioner Cole's recommendations—

Mr Riviere—The answer to the first question is no.

Senator LUDWIG—That is what I thought. When do you intend to address that?

Mr Riviere—The government's written response will be provided later this year. I would not like to prejudge that response.

Senator LUDWIG—Perhaps you could take it on notice, then, and explain the following in passing. It seems to me that you indicated that this was a foreshortened process because you had Commissioner Cole's recommendations and you wanted to respond quickly. You have had this report since January 2006 and have not responded in any legislative sense. You then tacked those recommendations on to Commissioner Cole's recommendations and brought forward a bill. Under the umbrella, it appears that urgent action is required, but you have not addressed all of the matters in the January 2006 OECD report; you have only cherry-picked some of those. How did you determine which ones you would cherry-pick to be tacked on to Commissioner Cole's recommendations and to then encompass in all of that a requirement to bring it forward urgently so that no consultation occurred about the bill itself? You may or may not be able to answer some of those questions, but they do raise a curious turn of events.

Mr Riviere—I cannot answer that question.

Mr Walter—These kinds of concerns in relation to the particular changes made by the bill came about ancillary to the Cole inquiry. So they would have been considered at the same time as the Cole inquiry with other things that the department was thinking about at that time. I think that is probably the critical element. But we can take that on notice and give you a fuller answer.

Senator LUDWIG—It also goes to:

(b) the application of the tax deduction for facilitation payments.

That was the 1996 recommendation of the council. Has that been dealt with in this bill?

Mr Riviere—We have aligned the definition of 'facilitation payments'. I would need to take the question on notice, though, because I am not quite sure, just by reading it in isolation, what 'the application of the tax deduction for facilitation payments' means. For example, was it a recommendation that the facilitation payments should not be tax deductible?

Senator LUDWIG—I am happy for you to take it on notice. I do not want you to guess.

Mr Riviere—Yes. That is why I will need to take that on notice.

Senator LUDWIG—And the same applies for (c), (d), (e) and (f) under the heading 'Follow-Up by the Working Group'. If you have picked them up then how have you expressed them in the bill and which provision are they under? Have you picked them up completely or only partially? If you have not picked them up in the bill, why was the decision made to not pick them up in that instance but to pick up others and defer them for a more fulsome report? Was a decision made to not pick them up at all? I think that covers all of the possible scenarios. If there are any more, I am sure you could tell me.

CHAIR—They are on notice.

Senator LUDWIG—Point No. 86, on page 28 of the report—and, given the time, I will not take you there in great detail—explains how the operation of 70.4 of the Commonwealth Criminal Code, with three factors, aligns with the Income Tax Assessment Act. That is addressed in this bill, but point No. 87 states:

87. The ITA does not expressly require the keeping of a record in compliance with section 70.4(3) of the Criminal Code to be eligible for a tax deduction for a facilitation payment. However, the ATO is of the

view that the normal record-keeping requirement under section 262A of the Income Tax Assessment Act 1936 (ITA) is satisfactory for this purpose.

It then goes on to argue why. I am curious as to whether you have consulted with the Australian Taxation Office about the need for that or whether you have accepted the view expressed there—that there is no need to keep those documents because section 262A of the Income Tax Assessment Act is sufficient. But if you then look at 88, it says:

The lead examiners consider that the potential to claim payments other than those of a minor nature as facilitation payments for the purpose of claiming an expense for tax purposes as well as the absence under the ITA of a record-keeping requirement in accordance with the Criminal Code may provide scope for abuse. The lead examiners are also concerned that the inconsistency between the Criminal Code and the ITA will further contribute to confusion on the part of the private sector as to the operation of the defence of facilitation payments ...

I know these are highly technical areas, but could you provide an explanation as to why you picked up half and not all in respect of that issue.

Mr Riviere—We would need to take that on notice.

Senator LUDWIG—The broader area, of course, is: have you set up a working group to disseminate information on the convention implementation in Australian law in the area of foreign bribery and how it should be addressed?

Mr Riviere—Broadly speaking, Senator: is there are foreign bribery working group?

Senator LUDWIG—Yes.

Mr Riviere—Amongst Commonwealth agencies?

Senator LUDWIG—In the Auditor-General's Department.

Mr Riviere—There is a working group on Australia's response to the OECD recommendations on foreign bribery. That is a multi-agency working group.

Senator LUDWIG—In response to the OECD phase 2 report in respect of the dissemination of information about the convention, Australia advised the working group that it has 'established a working group to develop an anti-corruption campaign'. Do you have an anti-corruption campaign in train or near completion, and how much money have you put to it? That is what you have advised the OECD phase 2 examiners.

Mr Riviere—There already has been an awareness campaign with regard to foreign bribery. Senator, are you still focusing on foreign bribery or—

Senator LUDWIG—I have not shifted from the OECD report.

Mr Riviere—Not anti-corruption more broadly?

Senator LUDWIG—No, I have not shifted from the response by the AGD to the lead examiners in the OECD report. I am happy for you to take it on notice. I want to know what material was produced out of that working group—and I would appreciate it if you can make a copy available to the committee—how it was disseminated, who it was disseminated to and how much money it cost more broadly; and, if it was not done, why did you say that it was going to be done.

Mr Riviere—We will take it on notice.

Senator LUDWIG—Thank you. The OECD report also went on to talk about the incidence of bribes in the Australian context—I will paraphrase here, but I am happy for you to read it, take it on notice and come back to me—and the treatment of bribe payments by the Australian Taxation Office. It said that in the phase 2 responses the Australian authorities stated that the ATO's current view was that the payment of foreign bribes was not a significant occurrence in Australia and therefore the ATO did not identify deductions for such payments as a risk worthy of specific targeting in its compliance program during 2004-05. It said that the ATO's view was that industries and businesses in Australia were already highly regulated by other regulatory regimes. Have you consulted with the Taxation Office as to whether they still hold that view, given the circumstances that have occurred since then, and have you sought to work with the ATO on raising awareness of foreign bribery offences and on compliance or targeting programs of foreign bribery offences or, in this instance, identifying deductions, facilitation payments and the like. I ask AGD because you are the lead on this. I am happy for you to take that on notice.

Mr Walter—We are not aware of any specific consultation on those particular elements but we will follow up and see whether there has been consultation. We can talk to the ATO as well.

Senator LUDWIG—Because the OECD working group then commented that they were not entirely convinced by this statement, I am not surprised now. They state:

... because there is no formal requirement for auditors to specifically look for instances of foreign bribery or report indications of foreign bribery to the law enforcement authorities. In addition, they are only obligated to report suspicions of foreign bribery to the ASIC if the contravention of the Corporations Act is "significant" or inadequately redressed.

Did you want to comment on that? Do you talk to ASIC about looking at instances of foreign bribery? I am happy for you to take that on notice.

Mr Riviere—We will take that on notice.

Senator LUDWIG—I see that the report states:

Section 70.3 provides a defence where the conduct of the foreign public official that is sought by the briber is lawful in the foreign public official's country.

It was argued, I assume by AGD but you could clarify that at the time, that the examiners—that is, the working group—considered:

This defence exceeds the limits in Commentary 8 on the Convention for the following reasons ...

I will not go to those reasons; they are in the report and I am sure you are familiar with them.

Commentary 8 on the Convention states that it is not an offence "if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

It went on:

However, the Australian exception applies even where pursuant to the law of the foreign public official's country the person would not be guilty of an offence. Thus in effect section 70.3 provides a rule of dual criminality, which applies even where the act of bribing a foreign public official takes place in Australia.

Curiously though, at that point which is only January 2006, it states:

The Australian authorities do not believe that a matter such as an expired statute of limitations in the foreign public official's country could be a consideration because the table in section 70.3 expressly provides that the defendant "would not" have been guilty of an offence against a law in force in the foreign public official's country. The Australian authorities believe that because this is a past tense expression that requires consideration of the law at the time the offence was committed, prosecution of the foreign bribery offence would not be restricted by foreign statutes of limitation. The AGD views section 70.3 as a valid interpretation by Australia of Commentary 8.

Have you changed your mind about that? If you look at the current bill, it seems that you have. Could you explain why you then changed your view about the bill and when you changed it?

Mr Riviere—We will take that on notice too, simply because I do not know the reason behind the 2006 position that you have just expressed.

Senator LUDWIG—That was in the OECD report. Are you familiar with the OECD report?

Mr Riviere—I am familiar, yes.

Senator LUDWIG—But not that familiar with it?

Mr Riviere—Not that familiar with it, no.

Senator LUDWIG—Because the Commonwealth Director of Public Prosecutions views section 70.3 as virtually synonymous with commentary 8. Everyone seemed to think that you met commentary 8. Now it appears, under the bill, that you do not. Perhaps you could explain to the committee how that came about? You hold one view in response to the OECD and another view now. Have you advised the OECD that you have changed your position in respect of that? That is if I am right about this. I am happy to be corrected if I am wrong or I have interpreted that erroneously. You then go on to say in the report in response, this is obviously the examiners' view of what you have told them:

Nevertheless, the Australian authorities agree that the test set out under this defence may, in some circumstances, operate more broadly than is contemplated by Commentary 8 ...

And in that instance, you undertake to amend this defence. So you amended that there. I do not have any more questions.

CHAIR—I thank the officers for their evidence today.

Committee adjourned at 5.05 pm