
THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL TRADE INTEGRITY BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the Honourable Philip Ruddock MP)
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General Outline


The Cole Inquiry Report focussed on the Iraq sanctions regime but the Government considers the findings and recommendations can be applied more broadly to the administration of all United Nations (UN) Security Council sanctions. The Government response has in fact gone further than Commissioner Cole’s recommendations to improve Australian laws to strengthen enforcement of all UN sanctions and combat foreign bribery. The Bill contains information gathering and handling provisions to improve agencies’ ability to administer UN sanctions. It also introduces new offences for individuals or companies that provide false or misleading information in connection with the administration of UN sanctions, including in relation to issuance of permits or authorisations. It also creates a new entity-sanctioned goods regime (UN sanction), import or export goods prohibited by UN sanctions or otherwise act in contravention with a Commonwealth law that enforces a UN sanction in Australia.

The principal features of the Bill are:

Amendments to the Charter of the United Nations Act 1945 to:

- create a new offence for people who, or corporations which, engage in conduct that contravenes a UN sanction in force in Australia with increased penalties for breaches
- introduce strict liability for corporations which engage in conduct that contravenes a UN sanction in force in Australia, including in relation to UN counter-terrorism financing sanctions
- create a new offence for people who, or corporations which, knowingly or recklessly provide false or misleading information in connection with the administration of UN sanctions, including in relation to the issuance of permits or authorisations
- 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.

Amendments to the Customs Act 1901 to:

- introduce new criminal offences for importing or exporting goods sanctioned by the United Nations (UN-sanctioned goods) without valid permission, and
• introduce a new criminal offence for 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.

Amendments to the \textit{Criminal Code Act 1995} to:

• ensure the defence under section 70.3 to a charge of bribing a foreign public official is only available where the advantage paid to a foreign official is expressly permitted or required by written law, regardless of the results of payment or the alleged necessity of payment, and

Amendments to the \textit{Income Tax Assessment Act 1997} to:

• 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 facilitation payment with that in the \textit{Criminal Code Act 1995}.

The amendments to the \textit{Charter of the United Nations Act 1945} and the \textit{Customs Act 1901} will commence on a day to be fixed by Proclamation. However, if they do not commence within six months of the day on which the Bill receives the Royal Assent, they commence on the first day after that six month period. The time before commencement will enable the Government to conduct appropriate consultation with the business community about the amendments and their implementation.

\textbf{Financial Impact}

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

The funding will enable the Department of Foreign Affairs and Trade to coordinate the implementation of United Nations’ and bilateral sanction regimes and contribute to whole-of-government efforts to monitor and ensure compliance with Australian law on sanctions.

\textbf{Regulation Impact Statement}

No Regulatory Impact Statement is required for the measures contained in this Bill.
NOTES ON CLAUSES

Clause 1 Short title
This is a formal clause which provides the citation of the Bill.

Clause 2 Commencement
This clause sets out when the various parts of the Bill commence.

Clause 3 Schedule(s)
This clause makes it clear that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.
Schedule 1  Enforcing UN sanctions

Charter of the United Nations Act 1945

Item 1
1. Repeals existing section 2 and substitutes proposed section 2 with definitions of terms relevant to the Act.

Item 2
2. 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 United Nations (UN) sanctions. The Department of Foreign Affairs and Trade and the Department of Defence, which have permit-issuing functions, will be specified as ‘designated Commonwealth entities’.

Item 3
3. Inserts proposed subsection 6(1) with the text of the existing section 6.

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

Item 5
5. Adds subsection 6(2), providing a general regulation making power to give effect to decisions of the UN Security Council. Subsection 6(3) provides for incorporation by reference to capture UN Security Council decisions as they exist from time to time. 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.

Item 6
6. This item adds 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 7
7. Provides that proposed section 13A applies only to applications that are made on or after the commencement of this section.

Item 8

Item 9
9. Repeals the definition of asset contained in section 14.

**Item 10**

10. Omits the term ‘a person’ from subsection 20(1) and substitutes ‘an individual’.

**Item 11**

11. Omits the term ‘person’ from paragraphs 20(1)(a) and (b) and substitutes ‘individual’.

**Item 12**

12. Repeals the penalty specified in subsection 20(1).

**Item 13**

13. Adds a note regarding strict liability to subsection 20(2).

**Item 14**

14. Omits the term ‘person’ from subsection 20(3) and substitutes ‘individual’.

**Item 15**

15. Adds a note to subsection 20(3) regarding the legal burden on an individual in relation to that subsection.

**Item 16**

16. Inserts proposed subsections to section 20 that provide penalties for individuals convicted of an offence under subsection 20(1) and also provide an offence and new penalty for bodies corporate.

17. The penalty for an individual is 2,500 penalty units or, if the offence relates to transactions the value of which can be determined, 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 can be determined, 10,000 penalty units or three times the value of the transactions, whichever is the greater amount.

18. The penalty accords with the recommendation made in the Cole Inquiry Report that penalties for acting in contravention of UN sanctions should be severe and linked to the value of the offending transaction.

19. Strict liability applies to the offence for bodies corporate, in accordance with Recommendation 2 in the Cole Inquiry Report. Fault elements will be retained for individuals.

**Item 17**

20. Inserts reference to subsection 20(3C) in subsection 20(4), to provide that extended geographical jurisdiction category A applies to offences under subsection 20(3C).

**Item 18**

21. Omits the term ‘a person’ from subsection 21(1) and substitutes ‘an individual’.

**Item 19**

22. Omits first occurring reference to ‘person’ in paragraph 21(1)(a) and substitutes ‘individual’.

**Item 20**
23. Repeals the penalty in subsection 21(1) for the offence of giving an asset to a proscribed person or entity.

**Item 21**

24. Inserts a note about strict liability at the end of subsection 21(2).

**Item 22**

25. 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 and that provide a similar offence and new penalty for bodies corporate.

26. The penalty for an individual is 2,500 penalty units or, if the offence relates to transactions the value of which can be determined, 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 can be determined, 10,000 penalty units or three times the value of the transactions, whichever is the greater amount.

27. Similar to the offences detailed under item 16, these penalties accord with Cole Inquiry Recommendation 2. Strict liability will apply to bodies corporate. Fault elements will apply for individuals.

**Item 23**

28. Inserts reference to subsection 21(2C) to subsection 21(3), providing that extended geographical jurisdiction category A applies to offences under subsection 21(2C).

**Item 24**

29. Inserts proposed section 22B, providing that any authorisation issued under section 22 to deal with a freezeable 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 25**

30. Provides that proposed section 22B applies only to applications made after that section commences.

**Item 26**

31. Inserts several new Parts to the Charter of the United Nations Act.

**Part 5**

32. Proposed section 27 provides an offence for engaging in conduct that contravenes a Commonwealth law that enforces UN sanctions. Proposed section 28 provides 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.

33. For an individual, the offence under proposed section 27 carries a penalty of 10 years imprisonment and/or a fine of 2,500 penalty units or, if the offence relates to transactions the value of which can be determined, three times the value of the transactions or 2,500 penalty units, whichever is the greater amount. The penalty for an individual under proposed section 28 is 2,500 penalty units.

34. The penalty for a body corporate under proposed section 27 is 10,000 penalty units or, if the offence relates to transactions the value of which can be determined, three times the value of the transactions or 10,000 penalty units, whichever is the
greater amount. The penalty for a body corporate under proposed section 28 is five times the penalty for an individual, or 12,500 penalty units.

35. Similar to other offences for breaching UN sanctions or providing false or misleading information, these penalties accord with Cole Inquiry Recommendations and reflect the Government’s determination to encourage ethical behaviour and compliance with laws relating to the administration of UN sanctions.

36. The offence under proposed section 27 will apply strict liability to bodies corporate but retain fault elements for individuals. The consistent application of strict liability to these offences does not reflect a change in general Government policy to the framing of offences but does reflect 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 sanction regimes.

Part 6

37. Proposed section 29 provides that the 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.

38. 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.

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

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

41. Proposed section 33 provides that a person served with a notice under proposed section 29 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.

42. 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, Australian Securities and Investments Commission Act 2001) and the Australian Competition and Consumer Commission (section 155, Trade Practices Act 1974). The section does not seek to override legal professional privilege.

43. Proposed section 34 provides the CEO of a designated Commonwealth entity may take copies of information provided under a notice to produce issued under proposed section 30.

44. Proposed section 35 provides the circumstances in which, and parties to whom, an officer of a designated Commonwealth agency may disclose information.

45. Proposed section 36 provides to a person who gives or makes use of information or documents under proposed sections 29, 30, 34 or 35, a protection from liability in any proceeding for contravening a law that might arise from that conduct or in any civil proceedings for loss or damage of any kind.

46. 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. This section 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.

47. Proposed section 38 provides the CEO of a designated Commonwealth entity
may delegate to an SES employee any or all functions under the Charter of the UN
Act.

Part 7

48. Proposed section 39 provides the Governor-General a general regulation making
power to prescribe matters under the Act.

Customs Act 1901

Item 27

49. Inserts to subsection 4(1) a definition of ‘Charter of the United Nations’
consistent with the definition included in the Charter of the United Nations Act 1945.

Item 28

50. Inserts to subsection 4(1) a definition of ‘UN-sanctioned goods’.

Item 29

51. Adds 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.

52. 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.

Item 30

53. Specifies that proposed section 52 of the Customs Act applies only in relation to a
licence, permission, consent or approval granted in respect of an application made on
or after the item commences.

Item 31

54. Adds proposed section 112B, which deems any licence, permission, consent or
approval to export UN-sanctioned goods to never have been granted where
application for it was made in an approved form and the application contained
information that is false or misleading in a material particular or omits information,
without which the application is misleading in a material particular.

55. This means that a person who exports goods under a licence, permission, consent
or approval taken never to have been granted may be liable under proposed section
233BABAC for exporting UN-sanctioned goods without the necessary approval, in
addition to any liability for providing false or misleading information under proposed
section 233C.

Item 32

56. Provides that proposed section 112B applies only in relation to a licence,
permission, consent or approval granted in respect of an application made on or after
the item commences.
Item 33

57. Amends paragraph 210(1)(b) to extend the arrest powers exercisable by an officer of Customs or police to the new offences of importing and exporting UN-sanctioned goods.

Item 34

58. Inserts new sections 233BABAA, 233BABAB and 233BABAC.

59. Proposed section 233BABAA provides that the regulations may prescribe specified goods as UN-sanctioned goods. The regulations must not specify an item is a UN-sanctioned goods unless the item meets certain requirements. First, the importation or exportation of the item must be prohibited by the *Customs (Prohibited Imports) Regulations 1956* or the *Customs (Prohibited Exports) Regulations 1958*. Secondly, the regulation prohibiting the importation or exportation must give effect to a decision the Security Council made under Chapter VII of the Charter of the United Nations that Article 25 of the Charter requires Australia to carry out, in so far as that decision requires Australia to apply measures not involving the use of armed force.

60. 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 their importation 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.

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

62. For an individual, the offences in sections 233BABAB and 233BABAC carry a penalty of 10 years imprisonment 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 three times the value of the goods to which the offence relates, whichever is the greater amount.

63. 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.

64. 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 law is not a prerequisite to this offence. However, strict liability will attach to the element that the approval had not been obtained. This approach is consistent with the existing criminal offences in the Customs Act of importing and exporting Tier 1 and Tier 2 goods.

Item 35

65. Amends subsection 233BAC(1) to extend the operation of this section to the new offences of importing or exporting UN-sanctioned goods. Subsection 233BAC(1) provides that a certificate of an authorised officer to the effect that an approval to
import or export goods had not been obtained is admissible as prima facie evidence that it had not been obtained.

**Item 36**

66. Amends subsection 233BA(2) to extend the operation of this section to the new offences of importing or exporting UN-sanctioned goods. Subsection 233BA(2) provides that the certificate of an analyst in respect of the matters therein is prima facie evidence of these matters.

**Item 37**

67. Inserts proposed section 233C which contains offences for giving false or misleading information in relation to UN-sanctioned goods.

68. 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 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. The offence carries a penalty of 10 years imprisonment or 2,500 penalty units, reflecting the serious nature of the offence.

69. A body corporate commits an offence if an application is made on its behalf 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 is false or misleading in a material particular. The offence carries a penalty of 12,500 penalty units.

**Schedule 2  Bribery of foreign officials**

*Criminal Code Act 1995*

**Item 1**

70. Inserts subsection 70.2(1A) clarifying that a charge of bribing a foreign public official does not rely on the outcome of the payment. A benefit paid to a foreign public official may still be a bribe notwithstanding that it failed to secure the business advantage desired.

**Item 2**

71. 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 Australian Government considers 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.

**Item 3**

72. Amends subsection 70.3(1) to clarify that the defence in this subsection to a charge of bribing a foreign public official is only available when the benefit paid is required or permitted by the written law of the country or place that governs the behaviour of the foreign public official.

73. The written law of a country or place is limited to the written legislation or regulation of that country or place.
Item 4

74. Inserts reference to the ‘written’ law in a place or country each time there is a reference in subsection 70.3(1) to the ‘law in’ a place or country.

*Income Tax Assessment Act 1997*

Item 5

75. Inserts subsection 26-52(2A) to clarify that a benefit paid to a foreign public official may be a bribe regardless of whether the business advantage sought was obtained or retained.

Item 6

76. Repeals and replaces subsection 26-52(3) to clarify that an amount is not a bribe to a foreign public official if it was required or permitted by the written law of the foreign public official’s country.

Item 7

77. Repeals and substitutes subsection 26-52(4) to align the definition of facilitation payment with that in the Criminal Code Act 1995. 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. Currently this subsection has no requirement that the value of a benefit be of a minor nature.

Item 8

78. Amends paragraph 26-52(6)(a) to clarify that, when considering whether a benefit paid to a foreign public official was not legitimately due to that official, one may disregard the fact that the benefit is, or is perceived to be, customary, necessary or required in the circumstances. The Australian Government considers 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, regardless of any other reason the payment is purported to be necessary.

Item 9

79. Provides that the amendments to the *Income Tax Assessment Act 1997* in this Schedule apply to a loss or outgoing incurred on or after the commencement of the Schedule.