THE COLE INQUIRY INTO CERTAIN AUSTRALIAN COMPANIES AND THE UN OIL FOR FOOD PROGRAMME: LESSONS FOR GOVERNMENT

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In this paper I propose to deal with lessons for public administrators from the Oil for Food Inquiry (the Inquiry), both in terms of the substance of the matters the Inquiry investigated, the Inquiry processes and the utility of such Inquiries for addressing public policy issues.

UN Resolutions

Following Iraq's invasion of Kuwait in 1990, the United Nations Security Council imposed restrictions upon member States trading with Iraq. The object of the sanctions imposed by Security Council Resolution 661, was to secure compliance by Iraq with paragraph 2 of Resolution 660, which required Iraq's immediate withdrawal from Kuwait, and to restore the authority of the legitimate Government of Kuwait.[1]

By Resolution 661 the United Nations required that all states prevent their national making available funds to the government of Iraq or to persons or bodies within Iraq. The resolution also required that states prohibit their nationals from trading with Iraq except for the provision of supplies for medical purposes or in humanitarian circumstances, foodstuffs.

Iraq was deprived of hard currency and its gold reserves ran down. It was unable to purchase foodstuffs. Consequently in 1995 the Security Council adopted Resolution 986 which established the Oil for Food Programme (the Programme). This permitted Iraq to sell oil under UN approved contracts. The proceeds of sale were paid into an escrow account controlled by the UN. Iraq was permitted to purchase humanitarian goods including foodstuffs. Contracts for such purposes if approved by the UN were to be funded from the escrow account. Otherwise the Resolution 661 restrictions remained.

By 1999 the Australian Wheat Board (AWB) was selling about 10% of Australia's annual wheat exports to Iraq. AWB dealt with the Iraqi Grain Board (IGB) an Iraq Government body. Sales of wheat were on terms 'CIF Free out Umm Qasr'. In practice this meant that AWB was responsible for delivering wheat to Umm Qasr but was not responsible for the wheat past the ship's rail. Iraq was responsible for unloading and delivery thereafter.

In June 1999, for phase IV of the Programme the IGB introduced a new term as a condition of tender. This was a requirement that the sales of wheat be on terms 'CIF Free on Truck to the silo at all governates. Cost of discharge at Umm Qasr and land transport will be USD12 per metric tonne. To be paid to the Land Transport Co. for more details contact Iraqi Maritin [i.e. Iraqi Maritime Agency] in Basrah'.

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By agreement with AWB made in Iraq in June 1999 the USD$12 per tonne was to be included in the price quoted by AWB and recouped from the escrow account. The money was to be paid into an Iraqi bank account in Jordan. The fee as understood by AWB executives was to go back to the Iraq Government.

If AWB did not agree to the payment there would be no sales. Following the receipt of the tender for phase IV of the Programme there was wide discussion within AWB regarding the terms of the new tender and how they could be met. The Commissioner found that those discussing these terms within understood that:

- the inland transportation fee or trucking fee was fixed by Iraq;
- it was being paid to Iraq;
- it was being paid for the benefit of Iraqis;
- imposition of the inland transport fee was a method of obtaining US dollars from the UN controlled escrow account;
- AWB did not in fact have to arrange for the discharge or delivery of wheat past the ship's rail;
- the Iraqis would continue to organise the discharge, transportation and distribution of wheat in Iraq, as they had done under earlier phases of the Programme;
- AWB's obligation was limited to making the payment as direct by the IGB;
- the Iraqi's had said that they would obtain or had obtained UN approval for the payment of the fee;
- the method of payment had not been approved by the UN;
- it was up to AWB to find a method of payment that was acceptable to the Iraqis;
- one method was the payment into an Iraqi bank in Amman, Jordan;
- AWB was not prepared to raise with the UN the issue of the transportation fee for fear that it might be prohibited by the UN, thus costing AWB its Iraq market.

Suggestions in the tender or contract that AWB was required to discharge wheat and effect delivery to all governates of Iraq were a sham designed to deceive the UN and extract hard currency from the escrow account for payment to Iraq.

Three contracts were entered in July 1999 and two in October 1999. The short form contracts for the first three contracts contained a term as follows:

> The cargo will be discharged Free into Truck to all silos within all Governates of Iraq at the average rate of 3,000 metric tons per weather working day of 24 consecutive hours. The discharge cost will be a maximum of USD12.00 and shall be paid by Sellers to the nominated Maritime Agents in Iraq. This clause is subject to UN approval of the Iraq distribution plan.

The long-form contract expressed the price as being 'CIF F.O.T to silo at all governate of Iraq via Umm Qasr port'. It made no mention of any discharge cost.

To obtain UN approval to export to Iraq and to receive payment from the escrow account it was necessary for there to be submitted to the United Nations a document called a 'Notification or request to ship goods to Iraq'. Apart from the short-form contracts themselves, the documents submitted for those three contracts made no reference to any 'discharge' or transportation cost. That form and the short- and long- form contracts were forwarded through the Department of Foreign Affairs and Trade (DFAT) and the Australian mission to the United Nations to the Office of Iraq Programme for approval. Approval was obtained from the United Nations, its customs inspectors overlooking the reference in the short-form contract to the provision that the US$12.00 'shall be paid by sellers to the nominated maritime agents in Iraq'. Under the UN procedures, the customs experts were to

check all contracts for 'price and value' and to ensure the contracts did not offend the sanctions resolutions.

Subsequent to the granting of approvals by the United Nations, AWB sought and was granted permission to export wheat under these contracts in various shipments. The permission was granted by the delegate of the Minister for Foreign Affairs and Trade, pursuant to the Customs (Prohibited Exports) Regulations.

None of the documents submitted to DFAT or the United Nations, be they the short-form or long-form contracts, the notifications or request to ship goods to Iraq, or the application for export approval, stated the true contractual arrangements between AWB and the IGB. Shortly stated, the true contractual arrangements between AWB and IGB in relation to these contracts involved the supply of wheat on terms 'CIF Free Out Umm Qasr', with AWB to pay a fee of $12.00 per tonne to an Iraqi entity or account nominated by the IGB and, further, that the US$12.00 fee was to be added to the CIF price and therefore effectively paid out of the escrow account. None of those provisions was disclosed in the documents submitted. Additionally, the short-form contract submitted stated AWB was obliged to pay nominated maritime agents in Iraq the cost of discharging the vessels, capped at US$12.00 per tonne, with that agent performing those services on behalf of AWB. There was no such obligation.

The true arrangement was that the IGB would advise AWB of the account into which the US$12.00 fee was to be paid. Nor was AWB responsible for delivery 'Free into Truck to all silos within all Governorates of Iraq', as the short-form contract stated. AWB did not make any contractual arrangements for the discharge of the wheat at Umm Qasr or for its transportation within Iraq after discharge.

The Commissioner found that it followed that AWB had submitted documents to DFAT and the UN which AWB knew did not reflect the true contractual arrangements between it and the IGB for the 3 July contracts.

Of the 2 October contracts, one (in its short form) was in substantially the same form as the July contracts. The long form contract said nothing about any discharge cost. The other October contract was referable to an earlier phase before the arrangement re inland transport fee was reached with the IGB. The contract price was accordingly USD$12 per metric tonne less than in the July and other October contracts.

Payment of the inland transport fee of approximately USD$ 504,000 was made by AWB to a company nominated by IGB, Alia for Transportation and General Trade (Alia). AWB was in no doubt that these funds were to be paid to another Iraqi entity, The Iraqi State Company for Water Transport (ISCWT). AWB knew that Alia was not receiving the money as trucking fees for services provided by it.

The Canadian complaint

In January 2000 the UN was advised by Canada of a requirement by the Iraqis that the Canadian Wheat Board deposit USD$700,000 in a Jordanian bank account to cover transport costs of USD$14 per tonne for wheat under a proposed contract. Canada refused to make the deposit and was refused the contract. The Canadians alleged in their complaint that they had been told by the Iraqis that 'similar arrangements had been made with the Australian Wheat Board'.

The UN raised the matter with the Australian mission to the UN, which referred the matter to DFAT. DFAT inquired of AWB about the accuracy of the report. AWB peremptorily denied the matter. The UN checked an AWB contract and overlooked a clause which referred to a

discharge costs of 'a maximum of USD$12' to be paid by 'Sellers to the nominated Maritime Agents in Iraq'.

The contract had also referred to undisclosed 'standard terms and conditions'. This took the UN's attention. It obtained a copy of these and then dropped its investigation. The explanation given to the Cole Inquiry was that although the payment of the discharge cost was contrary to UN 'UN policy to trade with Iraq' because it was contrary to the policy it was assumed that it was not being paid!

After sales service fee

In April and May the IGB demanded that AWB pay a 10% after sales service fee in addition to the transportation fee of USD$25. The transportation fee thus became USD$44.50.

Eloquent solution

In November 2000 AWB wrote to DFAT:

> Dear Jill,
>
> The purpose of writing is to ensure that DFAT is comfortable with AWB proceeding with the approach outlined below. As previously discussed we are currently experiencing problems managing our Iraq business. The first problem concerns United Nations procedural issues, which we will document in a separate note.
>
> The second issue is, vessels discharging at Umm Qasr suffer long delays and as a consequence AWB incurs substantial demurrage bills. Our recent mission identified that the slow discharge of vessels is caused by a lack of trucks at discharge port.
>
> For your guidance, Jordan based trucking companies are responsible for arranging trucks at discharge port. To rectify the problem, we propose entering into discussions with the Jordan trucking companies with a view to agreeing a commercial arrangement in order to ensure that there are enough trucks to enable the prompt discharge of Australian wheat cargoes.
>
> We believe the proposed solution will eloquently solve our problem and look forward to receiving your response.
>
> Thank you in anticipation.
>
> Best regards,
>
> Charles Stott
> General Manager
> International Marketing

An unexceptional reply came from DFAT:

> Dear Mr Stott,
>
> Thank you for your communication outlining the manner in which you propose to proceed to deal with problems you have encountered in discharging vessels of your wheat exports to Iraq at Umm Qasr port. As you have explained to us the delays in discharge were causing you to incur substantial demurrage costs and affecting the viability of your trade.
>
> We understand that, on your recent visit to Baghdad, you identified the source of the problem as being a lack of trucks at the discharge point. These trucks are supplied by Jordan-based companies. You therefore propose to enter into discussions with the Jordan trucking companies with a view to agreeing to a commercial arrangement in order to ensure that there are enough trucks available to enable the prompt discharge of Australian wheat cargoes when they arrive.

> We have examined, at your request, this proposed course of action and can see no reason from an international legal perspective why you should not proceed. That is, this would not contravene the current sanctions regime on Iraq.
>
> International Legal Division has been consulted in the preparation of this response.
>
> I trust this is of assistance to you. [2]

The letter from AWB was found to be a charade.

AWB payments to Alia

Between November 199 and March 2003 AWB paid Alia USD$224,128,189.98. That sum comprised USD$146,101,906.59 in transportation fees and USD$78,026,283.39 in after sales service fees which was paid in breach of US sanctions. Alia deducted a commission of 0.25% the balance was transferred to Iraqi entities. Documents uncovered after the fall of Iraq indicate that approximately two-thirds was paid to the Ministry of Finance and one-third split between 'land' (presumably being for land transportation), 4% to 'ports' and 1% to water. The two-thirds which went to the Ministry of Finance was otherwise not accounted for.

Lessons for public administrators from the Inquiry

DFAT was deliberately misled.

It is clear that officers of DFAT regarded DFAT as no more than a post box for the UN. The UN had indicated that it would check all contracts submitted to it for 'price and value'. To this end the UN recruited personnel from around the world. Nevertheless the UN approved AWB/IGB contracts which were clearly on their face outside the sanctions and in breach of resolutions. It turns out that the UN was simply not equipped to undertake the task it had promised to undertake.

The UN has since pointed to the obligation imposed upon member states to ensure that the resolutions were complied with and sanctions were enforced.

Why was DFAT misled and what is the lesson for public administrators?

I believe that DFAT was misled for two reasons:

1. It trusted AWB and its staff. AWB had a long history of trading with Iraq going back to the 1950s. There had been built up a solid trading arrangement. AWB had a lot to lose and it was thought unlikely that AWB would deliberately breach sanctions.
2. DFAT did not have any or at least any adequate system of risk identification or control. By regarding itself as no more than a post box and by checking no more than that wheat, the subject of the contract was a permissible import for Iraq and that the contracts were otherwise on their face compliant in form with the UN regime and by not checking for 'price or value' DFAT denied itself an opportunity to ensure that AWB was acting in breach of sanctions via its trading terms.

I do not believe that DFAT or any officer of DFAT was aware of the breaches being committed by AWB. Indeed all of the evidence is to the contrary. However the risk that this might be the case was not identified by DFAT, nor was there any protection against that risk.

My purpose here is not to criticise DFAT after the event. It is too easy to be an armchair critic and it is impossible to properly appreciate the weight of the trust that had been placed in AWB. My purpose is to highlight the importance of risk identification and control.

The consequences of a serious and pre-meditated breach of sanctions by AWB for Australia's reputation as a fair trading nation and as a responsible member state of the UN were huge.

The temptation for AWB must also have been great. This was perhaps AWB's oldest market. A market which could be relied upon to supply real returns to Australian farmers and to the nation; a market that could be relied upon to absorb 10% of this nation's production; a market where there was little real competition.

The temptation must have been at least as great for the executives whose personal reputations as successful traders were at stake. Could these traders really be expected to risk the sale of 10% of the Australian wheat produce and not comply with the Iraqi ultimatums…after all it was Iraqi money being returned to Iraqis after years of poverty and neglected infrastructure.

The potential for damage and the risks were such that active risk management and the institution of active controls can now be seen as having been necessary.

This is a lesson for all public and indeed private administrators. Appropriate risk management is simply good management. Corporations and government instrumentalities apply risk management practices in dealing with issues of occupational health and safety both as a matter of law and as a matter of good governance these days. Today, as the conduct of AWB has regrettably proved one cannot rely upon another's sense of moral obligation or even common sense when it comes to risk avoidance in the face of temptation, given what we know of human nature.

The tools of risk management are analysis and risk identification and the institution of controls in situations where risks cannot be eliminated.

DFAT and the Australian public were let down by AWB and by the failure by the UN to do that which it had indicated in would through failing to adequately check contracts for price and value. Towards the end of the Programme the cost of inland transport and the 10% after sales service fee was approximately 25% of the value of the wheat or 20% of the contract: wheat at a real value of say $200 a tonne carried an unlawful impost of nearly $50 a tonne. Price and value checking here or at the UN one hopes would have disclosed such an abnormality.

Risk assessment and control will only occur if it is factored in to management as an active component. In other words someone must take responsibility for driving it in the management team. It must always be on the agenda when change is implemented. One cannot rely upon publicised statements of values or singing of the corporation song or the wearing of the instrumentalities logo as an adequate measure of control when corruption is the identified enemy.

The Inquiry's interest in the activities of DFAT extended to identifying the role of DFAT in the contract administration and approval process as it was in fact. It was no part of our scope to investigate the adequacy of the risk controls or risk identification processes within DFAT beyond identifying what DFAT's role was in relation to the relevant AWB contracts.

The Inquiry was also concerned to inquire as to the knowledge of the Commonwealth of the breach of sanctions and UN resolutions by AWB in circumstances where it appeared that deception of the Commonwealth was the offence on the cards and which might best fit AWB's conduct. This was the only reason for calling two Ministers of the Crown and the Prime Minister to give evidence. Some sections of the public and some sections of the

media fail to identify the limitations imposed upon the Inquiry in this regard by its terms of reference. Given that AWB had all along denied any deception, denied that it had taken any Commonwealth officer or Minister (or for that matter the Prime Minister) into any confidence about the true nature of its dealings with Iraq, there was a justifiable view which would have avoided the necessity to call the Minister for Foreign Affairs, the Deputy Prime Minister and Minister for Trade and the Prime Minister to give evidence before the Inquiry.

Nevertheless the calling of those members of the Government served to demonstrate the openness of the Inquiry. Amongst other matters it demonstrated as well the seriousness with which the issues were being treated. The transparency of the Inquiries processes in this regard stood in sharp contrast to the conduct of AWB both during the Programme in and after 1999 and in its approach to the Inquiry itself.

Lessons for public administration in terms of the Inquiry processes

The first such lesson is one of accountability. No one is immune from inquiry or accountability.

This is an important aspect of our democratic system of Government. That official and public scrutiny is the ultimate guarantee of our rights as citizens.
In the AWB Inquiry the attendance of the Prime Minister and the other Ministers exemplified that guarantee.

The second lesson is one of co-operation

AWB was always going to pay a price for its conduct during the Programme. Not just for its contumelious disregard of the sanctions and the risks of damage to Australia's reputation during the Programme but also for its failure to recognise that its continued apparent opposition to the Inquiry and its opposition to its processes. This apparent opposition has probably done AWB much more damage than the exposure of its breach of sanctions.

In contrast DFAT co-operated with the Inquiry at every turn. No doubt it saw the benefits in having the entirety of the conduct of its officers and Minister exposed and judged openly. There is credit to be gained in the public mind for this level of co-operation. Opposition brings with it suspicion and risks adding a multiplier effect to any approbation that might flow from adverse findings.

For public administrators co-operation with the Inquiry processes is a must, not just as a matter of law but as a matter of practical reality. The community demands it of its public administrators and increasingly of private administrators. Staff have as much and more to gain from co-operation as the community. Co-operation minimises harm through fallout. It shortens an Inquiry, permits an early remedy and a speedier return to normalcy and appropriate conduct.

Of course administrators will be aware of the possibility of collateral damage even if there has been co-operation and in the end no fault has been found. This damage can be managed and minimised in situations where the body concerned has been diligent in its record keeping and been at pains to ensure that those with whom it has dealt have put their mark of authority upon anything which that body has placed reliance in the course of its work.

There is no doubt that any perceived damage to DFAT would have been much reduced if not entirely negated had it been prudent and required written confirmation from the Board or CEO of AWB that it had undertaken diligent inquiry and that it was not breaching sanctions at the time of the Canadian complaint.

The utility of public inquiries for addressing public policy issues

It may be inferred from the above and from my own history of association with public inquiries that I am very much in favour of resort to them when there is a need to establish the facts and the issues are of sufficient gravity. They bring with them a reassurance that 'the system' is one worth believing in if they are transparent and conducted according to the rule of law they can be of great benefit.

There are in my view some provisos. Public Inquiries such as the Oil for Food Inquiry cannot take the place of the administration of justice through the courts.

Great care must be taken with the settlement of terms of reference. Not only is there an imperative that terms of reference be clear and concise, in the broad sense it is important that the terms of reference accurately reflect that which has given rise to the matter of concern.

Consistent with issues of public interest immunity and other matters or over-ridding concern for the due administration of justice and good governance, I believe that such Inquiries should be open and transparent.

Whilst I recognise that Inquiries have a specific utility when dealing with single issues such as the conduct of an individual or body they also have utility when dealing with matters in a broader context. The Royal Commission into the NSW Police Service was one such Inquiry which I believed achieved great success, not only in exposing corruption and injustice but in providing a framework for the reform of the Police Service in every respect.

Endnotes

1 This summary draws heavily upon and repeats some passages from the final report of the Cole Inquiry..
2 Ex 650, AWB.0002.0200.