# A look beyond the Cole inquiry: AWB Ltd, bribery and Australia's obligations under international law

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## Introduction[*]

Much of the media discussion in the on-going Cole inquiry has focussed on discerning the facts of AWB Ltd's alleged use of bribes as part of the United Nation's 'oil-for-food' program. There is also the secondary concern of the level of knowledge within the Australian government of AWB Ltd's activities within Iraq.

This discussion paper examines a hidden dimension of the public debate surrounding the Cole inquiry. It will evaluate the various claims made by AWB Ltd and members of the Australian government (revealed publicly during the Cole inquiry) largely against Australia's general international legal obligations. To aid in this analysis, one might paraphrase the main public claims in the following—albeit broad and descriptive—manner:

*Claim 1:* Australia had no obligation to supervise the conduct of Australian companies like AWB Ltd participating in the 'oil-for-food' program in Iraq as the United Nations was exclusively responsible for the administration of that program.

*Claim 2:* AWB Ltd has historically operated to benefit Australian wheat farmers and therefore there was no objective basis for the Australian government to be concerned about its activities in Iraq.

*Claim 3:* AWB Ltd – like any foreign investor or trader operating in a weakly governed state – was forced to pay bribes as a cost of doing business in Iraq. In other words, even if bribes were paid, AWB Ltd was a passive rather than active participant in the payment of those bribes.

*Claim 4:* Australia has done everything it possibly can to meet its international legal obligations to combat bribery of foreign public officials.

The first and last of these blunt claims are in fact contrary to Australia's obligations under international law. This is an important point as these claims represent implicit

[*] I would like to thank Professor Marian Sawer and Dr Phil Larkin of the Australian National University for their encouragement of this paper. All errors remain, of course, my own.

assignations of responsibility away from the Government (to, in part, the United Nations). The remaining claims are not strictly legal propositions but are the sort of typically undefended factual assumptions of the causal factors that lead market participants to engage in corrupt behaviour. Claim 2 for instance, reflects an overly optimistic view of the *bona fides* of a monopolist like AWB Ltd. Claim 3 rests on an even weaker factual assumption that the bribery is *always* a necessary ‘cost of doing business’ in transition economies.

This paper will tease out the tenuous legal and factual assumptions that underlie each of these claims. This, it is hoped, might form one small part of the important process of public deliberation and accountability that should accompany any official program like the Cole inquiry.

**Claim 1: Supervision of AWB Ltd’s ‘Oil for Food’ contracts: ‘It was the UN’s job, not ours’**

The United Nations was charged with administration of the ‘oil-for-food’ program on 14 April 1995 under Security Council Resolution 986. This program was designed to allow Iraq to sell oil to finance the purchase of humanitarian goods. It exists as an exception to the larger program to impose comprehensive sanctions on Iraq following its invasion of Kuwait in August 1990. Those sanctions were authorised under Security Council Resolution 661 passed on 6 August 1990. The precise terms of that earlier resolution are particularly important as they indicate an on-going obligation on all UN member states (including Australia) to prevent:

> the sale or supply by their nationals or from their territories…of any commodities or products…but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products.[1]

[1] SC Res 661. para 3, UN Doc S/Res/661 (1990).

There is also notably a direct obligation on UN member states under this Resolution 661 to ensure that their nationals do not provide funds or resources to any persons or bodies within Iraq.[2]

The sanctions regime imposed by Security Council Resolution 661 reflect the general intention by the framers of the United Nations that all non-forcible measures be exhausted before the use of force is authorised by the Security Council.[3] Indeed, the sanctions imposed against Iraq under Security Council Resolution 661 act as a fundamental predicate to the eventual authorisation of use of force in the later Security Council Resolution 678.[4]

This then is the important factual background to Claim 1 which suggests that the United Nations is the body *exclusively* responsible for monitoring the trading activities of nationals of UN member states in Iraq. That claim is implicitly based on a temporal argument. That is, as the UN 'oil-for-food' program was formed under the later Security Council resolution in operation (being the 1995 Security Council Resolution 986), it necessarily extinguishes the earlier obligation on UN member states to guard against trading activities in Iraq under the 1990 Security Council Resolution 661.

Claim 1 is problematic on two fronts. First, it represents a misreading of the plain text of Security Council Resolution 661. There is nothing in that resolution (or indeed later resolutions) to suggest that the important responsibility of a member state to monitor the activities of its nationals in commercial dealings with Iraq somehow lapses on the

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[2] "Decides that all States should not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs". SC Res. 661 para 4, UN Doc S/Res/661 (1990).

[3] UN Charter, art. 41 (authorising the Security Council to decide what non-forceful measures including sanctions may be used as a means to give effect to its decisions) and art 42 (allowing the Security Council to authorise use of force whether it considers non-forceful measures in Article 41 "would be inadequate or have proved to be inadequate").

[4] The pertinent component of that resolution authorising use of force provides: "Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991, fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area". SC Res. 678, para 2, UN Doc S/Res/678 (1990).

later formation of the 'oil-for-food' program. Second, claim 1 is particularly disingenuous as it ignores the manner in which Australia and the United Kingdom (as coalition partners with the United States) have actively relied on the various Security Council resolutions passed in the lead up to the first Iraq war in 1991 (including Security Council Resolution 661) as the fundamental basis to argue for the legality of intervention in the second Iraq War in 2003.[5] Australia and the United Kingdom have consistently argued that the authority to use force in relation to Iraq had never lapsed and that such authority was revived when the Hussein regime failed to comply with the terms of various later resolutions particularly those imposing obligations to destroy weapons of mass destruction.[6]

**Claim 2: AWB Ltd, monopolisation and objective bases for concern?**

AWB Ltd operates a statutory monopoly on the export of wheat to third countries. There is nothing inherently illegal at international law on the operation of such a monopoly. Indeed, the treaty provisions of the World Trade Organization (WTO) expressly allow member states like Australia to grant such monopoly rights to state trading enterprises.[7] At the same time, the grant of monopoly rights (particularly the grant of monopoly trading rights) is a typically exceptional arrangement in most states. Even within Australia, there is no equivalent of the single desk in other agricultural sectors such as sugar, dairy and lamb exports. This then raises the issue of the substantive basis for granting AWB Ltd monopoly rights in the particular area of wheat exports.

The use of monopoly arrangements is most commonly recognized as a legitimate policy tool to deal with situations of market failure such as the provision of public goods. Public goods are those we consume together rather than individually and as

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[5] See, eg, Commonwealth of Australia Attorney-General's Department and the Department of Foreign Affairs and Trade, 2003, *Memorandum of Advice on the Use of Force Against Iraq*, 18 March, http://www.smh.com.au/articles/2003/03/19/1047749818043.html; Attorney General of the United Kingdom, 2003, *Parliamentary Written Answer on the Use of Force in Iraq*, 17 March, http://news.bbc.co.uk/1/hi/uk_politics/2857347.stm

[6] See generally ibid. The later Security Council resolutions particularly relied on by Australia and the United Kingdom in resuscitating the authorisation to use force are SC Res. 687, UN Doc S/Res/687 (1991) (imposing on obligation to destroy weapons of mass destruction) and SC Res. 1441, UN Soc S/Res/1441 (2002) (finding that Iraq has been in material breach of Security Council Resolution 687).

[7] General Agreement on Tariffs and Trade 1994 (incorporating General Agreement on Tariffs and Trade 1947), Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, 33 ILM 1144 (1994), Art. XVII of the General Agreement on Tariffs and Trade 1947.

such, government involvement in the provision of such goods can ensure adequate supply at a level often beyond what private markets would foster. Defence, policing, environmental protection and public health care are some of the sectors that have reflected this logical qualification to the market mechanism.

The export monopoly on wheat exports provided to AWB Ltd does not in any way fall within this convincing qualification to the utility of the market mechanism. Instead, the idea of a 'single desk' for wheat exports is usually presented (both by members of the Howard Government and executives of AWB Ltd) as a necessary means to allow wheat farmers to pool bargaining power in the face of strong buyers internationally and more generally due to the distorted nature of international trade in agriculture. This broader claim to justification of the grant of monopoly rights on wheat exports remains somewhat of an unexamined article of faith among members of the Howard Government.[8] It is notable for instance, that the various defences provided for the maintenance of this monopoly arrangement since the beginning of the Cole inquiry generally verge on the rhetorical without providing a principled and empirical basis for substantiating the alleged claims of benefits to Australian wheat farmers.

Leaving aside the legitimate question of the utility of the statutory monopoly operated by AWB Ltd, there is little doubt that the manner in which its monopoly protections could reasonably have been predicted to have shaped its business activities abroad. Most foreign firms that conduct business in weakly governed states like Iraq have important extra-legal constraints on their behaviour. These include reputational concerns such that, should they engage in corrupt behaviour, the proportion of their customers that find this practice morally objectionably, can simply 'take their business elsewhere'. This sort of reputational discipline is entirely absent in the case of AWB Ltd. Australian wheat farmers have no choice but to deal with AWB Ltd in order to have their wheat sold abroad. The idea of reputational discipline is not presented as a stand-alone answer to the problem of bribery. It is, however, one potential limiter on the ever-present temptation to engage in corruption that, due to grant of monopoly rights, is missing in the case of AWB Ltd.

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[8] For a similar analysis (but one which characterises AWB Ltd as a 'National Party trophy'), see Richard McEncroe, 2006, 'Wheat Export An Unusual Monopoly', *The Age*, 19 May

One might still object that the absence of this discipline on AWB Ltd is a commercial consideration and as such, somehow outside the remit and concern of government. This objection however treats AWB Ltd as if it were simply some minor commercial player that is not already a sensitive factor at play in the formulation and defence of Australia's international trade policy. Australia has historically presented itself as a 'cleanskin' in agricultural negotiations at the WTO; that is, as a country that generally does not distort its agricultural production through domestic and export subsidies. This very principled position has allowed Australia to put itself forward as a leader in global agricultural trade negotiations often in alliance with developing countries. Agriculture is without doubt the most important and sensitive negotiation item in the current Doha round of WTO negotiations. Australia's only weakness in this otherwise principled position has been the suggestion largely by the United States that the export monopoly provided to AWB Ltd should be dismantled before requiring Australia's trading partners to liberalize their own farming sectors. Put simply, AWB Ltd is an important factor in the current and sensitive negotiations on agriculture in the WTO. With this background in mind, the idea that the Australian government would have little continuing interest in the activities of AWB Ltd beggars belief.

**Claim 3: Bribery as a 'cost of doing business'?**

Claim 3 represents a variant on the usual and pervasive hypothesis that bribery is in fact an accepted 'cost of doing business' in transition economies. It is important to note that this claim implicitly assumes that market participants like AWB Ltd in Iraq are passive victims of predatory and corrupt governmental officials.

The causes of corruption are multi-faceted. The 'cost of doing business' claim reflects one of those generally accepted causes being the institutionalisation of corruption in certain countries. At the same time, this is not the only cause for corruption particularly where foreign investors and traders are operating in transition economies. Important empirical research conducted under the auspices of the World Bank indicates that foreign participants are not particularly singled out in weakly governed states but in fact use bribery in a highly strategic fashion to seek greater market

opportunities.[9] Indeed, it seems to be the case that foreign participants are significantly more likely than their domestic counterparts to engage in corrupt forms of political influence in transition economies.[10] These findings contest the idea that foreign firms like AWB Ltd are necessarily 'sitting ducks' for rapacious politicians to extract rents. Corruption may instead represent more than simply a symptom of governance failure. At times, corruption will form part of deliberate corporate strategy particularly when seeking market access in transition economies.

The implications of these empirical findings go beyond contesting the usual hypothesis of bribery as a necessary 'cost of doing business'. They also suggest that the legal responsibility to prevent such behaviour extends beyond the home state of the official (Iraq in the current case) to include the home state of the commercial party involved in the bribery allegation (Australia in the case of AWB Ltd). In other words, part of the answer to the problem of corrupt behaviour by Australian entities operating abroad lies in developing legal rules and enforcement mechanisms to criminalize such behaviour as a matter of Australian law.

This process has in fact begun in the Australian context, in part, prompted by Australia's signing and ratification of an OECD treaty to combat bribery of foreign public officials. As the next section will consider however, there remain real questions as to the sufficiency of Australia's implementation efforts to date.

**Claim 4: Australia's international obligations to combat bribery**

Aside from the direct obligation in international law to police the activities of Australian nationals and companies in Iraq under Security Council Resolution 661, Australia is also subject to a general obligation under international law to combat bribery of foreign public officials. Australia has signed and ratified the OECD *Convention on Combating Bribery of Foreign Public Officials* 1997. The

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[9] Joel Hellman, Geraint Jones and Daniel Kaufmann, 2002, *Far From Home: Do Foreign Investors Import Higher Standards of Governance in Transition Economies?* World Bank Policy Research Working Paper, August. See also Anwar Shah, 2006, *Corruption and Decentralized Public Governance*, World Bank Policy Research Working Paper 3824;January; Joel Hellman, Geraint Jones, Daniel Kaufmann and Mark Schankerman, 2000, *Measuring Governance, Corruption and State Capture: How Firms and Bureaucrats Shape the Business Environment in Transition Economies*, World Bank Policy Research Working Paper 2312, April.

[10] Hellman et al *Far From Home*, p.4.

Commonwealth Parliament has in turn passed the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act* 1999 (Cth) to implement Australia's obligation under the OECD Convention to criminalize bribery of foreign public officials. That Act entered into force on 17 December 1999.

As a matter of law reform, there is a clear difference between (i) signing a treaty and passing the formal domestic laws to comply with the terms of that treaty (which can be done largely on the "stroke of the pen") and (ii) the much more difficult process of substantively implementing and enforcing those laws. It is in this difficult second stage that Australia's efforts have been found wanting by the OECD. The OECD generally undertakes two forms of review of member state implementation of commitments under this Convention. Phase 1 (which took place in Australia's case in December 1999) simply examined whether legal texts passed by a member state comply with the Convention. Phase 2 is much more germane to the AWB case as it examines structures in place to enforce the laws passed by an OECD member state.

The OECD's phase 2 review on 4 January 2006 contains some sharp criticisms of Australia's implementation efforts to date under the Bribery Convention.[11] Despite being in operation for almost six years, no company or individual has been charged with bribery of a foreign public official under the new Commonwealth legislation.[12] There is also no specialised office that has been set up to investigate the new offence of bribing a foreign public official.[13] Investigations in turn will generally be opened by the Australian Federal Police only on the basis of formal referrals. In particular, media reports will not be a sufficient basis to trigger investigations of foreign bribery.[14] This rigid approach could be particularly problematic in cases where a whistleblower seeks confidentiality as a condition of assisting prosecuting authorities in a bribery case.

Law reform requires more than simply the transplant of legal norms. It is better understood as a cognitive process which requires a state to cultivate a shared

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[11] OECD, 2006, *Australia: Phase 2 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, 4 January
[12] Ibid 9.
[13] Ibid 16.
[14] Ibid 17-18.

understanding of the values and utility of those norms by the users and enforcers of the legal regime. The OECD assessment of Australia's limited efforts to date seem to suggest a stark lack of concern for this sensitive, second stage of the law reform process.

**Conclusion**

The blunt claims examined in this discussion paper remain pervasive undertones in the public defence of both AWB Ltd and to some extent, the Howard Government. They are also implicitly assignations of responsibility and perhaps unsurprisingly, rest on tenuous legal and factual assumptions.

To sum up, Australia clearly had an on-going obligation under the corpus of Security Council Resolutions to monitor the trading activities of its nationals (like AWB Ltd) in Iraq. This obligation did not – as suggested by Claim 1 – lapse on the formation of the UN's 'oil for food' program. Moreover, there was ample basis for the Howard Government to be particularly concerned about the activities of AWB Ltd. Claim 2 fails to take into account the impact of the statutory monopoly on wheat exports granted to AWB Ltd. As a monopolist, AWB Ltd is not subject to certain extra-legal constraints on corruption (like reputational disciplines). The causes of corruption are also multi-faceted contrary to the simple characterization of bribery as a necessary 'cost of doing business' in Claim 3. Bribery will often be used in a highly strategic fashion by foreign participants seeking market opportunities in transition economies. It is for this precise reason that the OECD has attempted to oblige the home states of foreign investors and traders to pass domestic laws to criminalize the bribery of foreign public officials. Contrary to the optimistic account presented in Claim 4, the glass is somewhat half-empty in the case of Australia's efforts under the OECD Bribery Convention. The laws formally stand on the statute books but there remain serious questions of the sufficiency of Australia's implementation of those new legal norms.