

Your Ref: Senate Foreign Affairs, Defence and Trade Committee

Quote in reply: International Law and Relations Committee:21000325/70

1 July 2010

Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
Australia

By Email: fadt.sen@aph.gov.au

Dear Sir / Madam

AUTONOMOUS SANCTIONS BILL 2010

Thank you for providing us with the opportunity to make comments on the *Autonomous Sanctions Bill 2010* ("the Bill").

This response has been compiled with the assistance of our International Law and Relations Committee who have a thorough knowledge about the issues affecting this area of law.

1. Clause 16

Clause 16(2) of the Bill states,

- "(2) *An individual commits an offence if:*
- (a) *the individual engages in conduct; and*
 - (b) *the conduct contravenes a condition of an authorisation (however described) under a sanction law."*

The Society has several concerns regarding clause 16. Firstly, clause 16(2)(a) fails to describe what "conduct" is prohibited. Therefore, an individual can not refer to the Bill and simply ascertain what acts or omissions will be caught by the legislation. Instead, the clause purports to criminalise conduct which contravenes a condition of an authorisation under a sanction law. The making of such authorisations is a function of the executive arm of Government. Therefore, by stating that an individual who engages in conduct that contravenes a condition of an authorisation (however described) under a sanction law, is tantamount to the executive having the power to create offences on an ad hoc basis. The making of laws and the creation of offences is a function of the legislature and the delegation of this power to the executive has serious implications for the separation of powers. The Society does not support this clause.

We also consider that clause 16(2)(b) may have unintended and unfair consequences. As stated above, this provision captures those individuals who contravene a condition of an authorisation (however described) under a sanction law. However, this provision does not specify that the individual must be subject to such an authorisation for their conduct to be proscribed. As such, an individual may commit an offence under this clause even if they are not directly subject to an authorisation. Furthermore, we note that there is no “reasonable precautions” defence available to individuals as there is for bodies corporate in clause 16(7).

For the reasons stated above, we consider that the implementation of clause 16 will constitute a violation of the separation of powers and may also create unjust and uncertain outcomes. We therefore recommend that clause 16(2) be amended to read:

“An individual commits an offence if the individual engages in conduct proscribed conduct under a sanction law”

In this regard, we consider that it would be beneficial to replicate the proscribed conduct provisions of other sanctions legislation within this Bill. These provisions should be created into an inclusive (as opposed to exhaustive) definition of what may constitute proscribed conduct. The insertion of an inclusive definition will have a two-fold benefit, that is, to provide guidance to the public and to maintain flexibility within the legislation as to what may be considered proscribed conduct.

Clause 16(10) of the Bill states:

“engage in conduct means:

- (a) do an act; or*
- (b) omit to perform an act.”*

We consider that clause 16(10)(b) of the Bill is extremely broad and may yield inequitable results. It is the opinion of the Society that it is unfair to criminalise the failure to perform an act without providing guidance on what action/omission is required to comply with the Bill. Failure to provide guidance on what is appropriate due diligence will result in many individuals inadvertently breaching the legislation. For example, a lawyer performing due diligence in a transaction may fail to undertake a search which may result in an unintentional breach of the legislation.

The investigation of these breaches will be a costly and resource intensive exercise for various Federal Government Departments which is undesirable. We therefore suggest a front-end compliance model which would not only preserve Commonwealth resources, it would also provide guidance for the public and the legal profession. This front-end compliance model would involve the Department providing guidance documents, hypothetical scenarios, compliance checklists and decision trees (similar to those used by the Queensland Office of State Revenue) on their website which would assist the legal profession and public in complying with this legislation. If the individual or body corporate complies or makes a genuine attempt to comply with these guidance materials, their actions and omissions should not be subject to prosecution under clause 16(10) of the Bill.

2. Clause 17

Clause 17(1) states,

“A person commits an offence if:

- (a) the person gives information or a document to a Commonwealth entity; and*
- (b) the information or document is given in connection with the administration of a sanction law; and*
- (c) the information or document:*
 - (i) is false or misleading; or*
 - (ii) omits any matter or thing without which the information or document is misleading.”*

Clause 17(1) of the Bill relates to information or documents given to a Commonwealth entity “in connection with the administration of a sanction law”. The use of the words “in connection with” implies that even information that has an indirect connection with the administration of a sanction law will be considered relevant information for the purposes of the Bill. This wording appears to contradict clause 3(c) which states that the main purpose of the Bill is to “facilitate the collection, flow and use of information relevant to the administration of autonomous sanctions”. It is recommended that the phrase “in connection with the administration of a sanction law” in clause 17 be replaced with the phrase “directly relevant to the administration of autonomous sanctions”. This is to ensure; that all clauses align with the purposes of the Bill and the scope of the provision is restricted in order to prevent an unjust application of clause 17(1). Therefore, we recommend that clause 17(1) be amended.

As stated in relation to clause 17(2), we consider that in order to be an offence, there should be an element of mens rea. Therefore, unless the first person has knowledge that the information or document is false or misleading or contains omissions, they should not be liable under the Bill.

We recommend that clause 17(1) be amended to read as follows:

“A person (the first person) commits an offence if:

- (a) they know the information or document:*
 - (i) is false or misleading; and/or*
 - (ii) omits any matter or thing without which the information or document is misleading; and*
- (b) the information or document is directly relevant to the administration of a sanction law; and*
- (c) the person gives information or a document to a Commonwealth entity.*

We also recommend that an inclusive definition of what is considered “administration” be included to assist the profession and the public.

Clause 17(2) states,

“A person (the first person) commits an offence if:

- (a) the first person gives information or a document to another person; and*
- (b) the first person is reckless as to whether the other person or someone else will give the information or document to a Commonwealth entity in connection with the administration of a sanction law; and*

- (c) *the information or document:*
 - (i) *is false or misleading; or*
 - (ii) *omits any matter or thing without which the information or document is misleading.”*

It is the view of the Society that unless the first person has knowledge that the information or document is false or misleading or contains omissions, then they should not be liable under the Bill. We also consider that the “reckless giving” of information or documents should not be an offence and that the information or document must be directly relevant to the administration of a sanction law. Therefore, we recommend that clause 17(2) be amended.

We recommend that clause 17(2) be amended to read as follows:

“A person (the first person) commits an offence if:

- (a) *they know the information or document:*
 - (i) *is false or misleading; and/or*
 - (ii) *omits any matter or thing without which the information or document is misleading; and*
- (b) *the first person gives information or a document that is directly relevant to the administration of a sanction law to a Commonwealth entity or another person.*

Clause 22

Clause 22 holds that self-incrimination is not an excuse and,

- “(1) An individual is not excused from giving information or a document under section 19 on the ground that the information, or the giving of the document, might tend to incriminate the individual or otherwise expose the individual to a penalty or other liability*
- (2) However, neither the information given nor the giving of the document is admissible in evidence against the individual in any criminal proceedings, or in any proceedings that would expose the individual to a penalty, other than proceedings for an offence against:*
 - (a) section 17 (false or misleading information given in connection with a sanction law); or*
 - (b) section 21 (failure to comply with requirement to give information or document).”*

The Society does not support clause 22 and the overriding of any inconsistent Commonwealth, State or Territory law with respect to the privilege against self incrimination. We understand that traditionally the privilege against self-incrimination was intended to prevent an abuse of power, and to maintain a proper balance between the powers of the State and the rights and liberties of citizens. More recently the privilege has been argued to be a human right focused on preventing the indignity which occurs in compulsory self-incrimination which, is proposed by this Bill. While we understand that the protection of an individual’s right needs to be balanced against the need for effective and encompassing administration of justice, we do not consider that a blanket abrogation of the privilege is essential in achieving the objectives of the Federal Government. Instead, we consider that it would be appropriate that a public policy test be applied and the State be required to prove that it is in the public’s best interest that the privilege against self-incrimination be overridden in the particular case.

We also note that clause 22(2) may require clarification. We understand that “the information given” and “the giving of the document” are not admissible in evidence against the individual in any criminal proceedings. However, this non-admissibility does not appear to extend to the document itself as stated in clause 22(1). It is recommended that clause 22(2) be amended to include non-admissibility of a document, as well as the giving of the document.

3. Clause 25

Clause 25 of the Bill deals with protection from liability and states,

- “(1) A person who, in good faith, gives, discloses, copies, makes a record of or uses information or a document under section 18, 19, 23 or 24 is not liable:*
- (a) to any proceedings for contravening any other law because of that conduct; or*
 - (b) to civil proceedings for loss, damage or injury of any kind suffered by another person or entity because of that conduct.*
- (2) Subsection (1) does not prevent the person from being liable to a proceeding for conduct of the person that is revealed by the information or document.”*

It is our view that clause 25(2) as it relates to information and documents under clause 19, appears to contradict the protection provided by clause 22(2). In our view, we consider that the interplay between clauses 19, 22 and 25 needs to be revisited.

4. Clause 27

We recommend that the term “SES employee” be defined in clause 4 of this Bill.

Thank you again for the opportunity to contribute to this important law reform issue. We look forward to receiving feedback on our proposals.

If you have any questions regarding the contents of this letter, please do not hesitate to contact or have one of your staff contact Ms Binny De Saram, a Policy Solicitor with our office on (07) 3842 5885 or b.desaram@qls.com.au.

Yours faithfully

Peter Eardley
President