



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2003

25 June 2003

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MEMBERS OF THE COMMITTEE

Senator T Crossin (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator D Johnston
Senator J McLucas
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 2003

The Committee presents its Sixth Report of 2003 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Customs Amendment Bill (No. 1) 2003

Private Health Insurance (Reinsurance Trust Fund Levy) Bill 2003

Customs Amendment Bill (No. 1) 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2003*, in which it made various comments. The Minister for Justice and Customs responded to those comments in a letter dated 24 June 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 6 of 2003

This bill was introduced into the House of Representatives on 15 May 2003 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

Introduced with the Customs Tariff Amendment Bill (No. 1) 2003, the bill proposes to amend the *Customs Act 1901* to:

- introduce rules of origin for goods that are the produce or manufacture of a Least Developed Country (LDC) or East Timor, which will enable such goods to have duty-free access to Australia; and
- introduce new rules of origin for goods that are the produce or manufacture of Singapore, to give effect to the Singapore-Australia Free Trade Agreement, and enable such goods to have duty-free access to Australia.

Merits review

Schedule 2, item 3

Proposed new subsections 153VC(1) and (2) of the *Customs Act 1901*, to be inserted by item 3 of Schedule 2 to this bill, grant to the Chief Executive Officer of Customs what appears to be an administrative discretion to vary the application of proposed new subsections 153VB(2) and (5) of the same Act. However, there does not appear to be any provision subjecting the exercise of this discretion to merits review under the *Administrative Appeals Tribunal Act 1975*. The Committee therefore **seeks the Minister's advice** as to the reasons for this omission.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Proposed new subsections 153VC(1) and (2) of the *Customs Act 1901* (Customs Act) are designed to implement Article 3.2 of the Singapore-Australia Free Trade Agreement. The proposed new subsections are a restatement of provisions currently in the Customs Act for New Zealand (section 153K) and for Papua New Guinea and for the Forum Island Countries (section 153LA).

The proposed new subsections 153VC(1) and (2) of the Customs Act recognise that difficulties may arise when unforeseen circumstances (such as adverse movements in exchange rates) result in a shipment failing to meet the local content requirement, of 30% or 50% respectively. The 2% 'tolerance' is designed to cater for unforeseen circumstances.

The Committee has sought advice as to the reasons for omitting the exercise of this discretion from merits review under the *Administrative Appeals Tribunal Act 1975*.

I am advised by the Australian Customs Service that the discretion is reviewable by the Administrative Appeals Tribunal (AAT) via sections 167 and 273GA of the Customs Act. The exercise of the discretion in proposed new subsections 153VC(1) and (2) is taken as part of the process of assessing the duty payable in respect of a particular shipment of imported goods. An unfavourable exercise of the discretion would result in an importer having to pay duty for those goods at the general rate of customs duty, as opposed to the preferential (Free) rate of customs duty.

An unfavourable exercise of the discretion under proposed new subsection 153VC(1) or (2) can, therefore, be challenged in the AAT by simply paying the additional duty under protest in accordance with section 167 and then applying for review under section 273GA. The same rationale applies to any decision taken as part of the assessment of the duty payable on imported goods, including tariff classification and valuation decisions.

The Committee thanks the Minister for this response.

Delegation of legislative power

Parliamentary scrutiny

Schedule 2, item 3

Proposed new subsection 153VD(1) of the *Customs Act 1901*, to be inserted by item 3 of Schedule 2 to this bill, would permit the Chief Executive Officer of Customs to make a determination which would amend the percentage figures specified in proposed new subsections 153VB(2) and (5) of the same Act. However, the exercise of this legislative function is not subject to any form of Parliamentary scrutiny, its only form of publicity being a *Gazette* notice. Proposed new subsection 153VD(3) would permit the Chief Executive Officer to revoke such a determination, the revocation also being simply by *Gazette* notice. The Committee therefore **seeks the Minister's advice** as to the reasons for this legislative power being entrusted to an officer of the Australian Public Service, and for its exercise not being subject to Parliamentary scrutiny.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference and may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee notes that the exercise of proposed new subsection 153VD(1) of the Customs Act, permitting the Chief Executive Officer of Customs to make a determination which would amend the percentage figures specified in proposed new subsections 153VB(2) and (5) of the same Act, is not subject to any form of Parliamentary scrutiny, with the only form of publicity being a *Gazette* notice. It also notes that proposed new subsection 153VD(3) would permit the Chief Executive Officer to revoke such a determination, with the revocation also being simply by *Gazette* notice.

It should be noted that Parliament has considered the substance of proposed new subsection 153VD(1) previously, and has passed such a provision into law. Proposed new subsection 153VD(1) is similar to a provision currently in sections 153J and 153L of the Customs Act.

Paragraph 153J(3)(b) of the Customs Act provides that the Chief Executive Officer of Customs may determine, by *Gazette* notice, that another percentage of the total factory cost is appropriate for specified goods imported from New Zealand. Similarly, paragraph 153L(4)(b) applies to goods imported from Papua New Guinea or the Forum Island Countries.

The mechanism was first introduced into the Customs Act in relation to New Zealand in 1974 by Act No. 120 of 1974. It was recognised that the move to a 50% area content could cause problems in a number of instances. That realisation led to the inclusion of a power to determine an alternative level of area content than 50%. It was also intended that this would occur only upon the agreement of both countries.

I am advised by Customs that the local content percentage required under the Australia New Zealand Closer Economic Relations Trade Agreement has never been reduced.

A similar mechanism was inserted in respect of Papua New Guinea in 1976 and the Forum Island Countries in 1980 for the same reasons. I am advised by Customs that the local content percentage required under the South Pacific Regional Trade and Economic Cooperation Agreement has been reduced on only two occasions in some twenty years.

The first occasion involved certain apparel from Fiji and the second involved certain automotive products from Samoa. On each occasion, the reduction in the required local content percentage followed a request by the Government of the country concerned, rather than by an individual importer or exporter, and was aimed at forestalling economic disaster. In each case, the local content requirement was reduced to no less than 40% for no more than two years.

Proposed new subsections 153VD(1) and (3) give effect to Article 3.3 of the Singapore-Australia Free Trade Agreement. Proposed new subsection 153VD(1) recognises that, in exceptional circumstances, Singapore may experience serious difficulties in achieving the required local content percentage. Exceptional circumstances would cover events such as force majeure or natural or economic disaster.

By stipulating that the CEO can exercise his discretion to reduce the local content percentage only in exceptional circumstances, this provision is more restrictive than that for any other preference country.

In accordance with Article 3.3 of the Singapore-Australia Free Trade Agreement, a reduction in the required local content percentage for a specific period in relation to particular good, or goods of a specific class or kind, would be in accordance with procedures agreed between the Singapore and Australia. Such procedures are yet to be formulated.

As the decisions under new subsections 153VD(1) and (3) would be taken in accordance with the procedures agreed between Singapore and Australia, rather than as part of the process of assessing the duty payable on particular shipments of goods, I am advised by Customs that any person adversely affected by such a decision could seek review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*. I understand that the *Administrative Decisions (Judicial Review) Act 1977* has never been invoked in relation to a decision under a similar provision for any other preference country.

I trust the above information will assist the Committee in its consideration of the proposed amendments.

The Committee thanks the Minister for this response.

Private Health Insurance (Reinsurance Trust Fund Levy) Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2002*, in which it made various comments. The Minister for Health and Ageing has responded to those comments in letters dated 17 June 2003 and 24 June 2003. Copies of the letters are attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's responses are discussed below.

Extract from Alert Digest No. 5 of 2003

This bill was introduced into the House of Representatives on 26 March 2003 by the Parliamentary Secretary to the Minister for Health and Ageing. [Portfolio responsibility: Health and Ageing]

Part of a package of five bills relating to private health insurance industry levies, the bill proposes to re-impose the Reinsurance Trust Fund levy on registered health benefits organizations, having regard to section 55 of the Constitution, and validate the previous imposition of the levy.

Inadequate parliamentary scrutiny **Clause 7**

The purpose of this bill is to impose a levy on registered health benefits organizations in order to provide for cross-subsidisation among such organizations for high cost contributors thereto. Clause 7 permits the Private Health Insurance Administration Council to determine the rate of that levy, and the Minister to determine the rate of a supplementary levy, but that clause does not set a maximum figure for either of those levies. The Explanatory Memorandum seeks to justify this untrammelled delegation of legislative power by observing that "in determining rates, the Council and the Minister must follow the Ministerial principles made under subsection 73BC(5B) of the *National Health Act 1953*." However, those principles do not appear to be subject to any Parliamentary scrutiny, as they are not described, in section 73BC of that Act, as being disallowable instruments, but are merely required to be published in the *Gazette*.

It would also seem appropriate for the determination of the rate of these levies to be a disallowable instrument, if this is not the case, in the same way as related levy determinations. The Committee therefore **seeks the Minister's advice** as to whether there should not be more Parliamentary oversight of the rates of these levies.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister dated 17 June 2003

I appreciate the opportunity to provide the Committee with advice in relation to the proposed changes to the Reinsurance Trust Fund.

The Senate Standing Committee for the Scrutiny of Bills has identified a concern in relation to a perceived lack of parliamentary scrutiny regarding the setting of the rate of the Reinsurance Trust Fund levy or supplementary Reinsurance Trust Fund levy, by the Private Health Insurance Administration Council (PHIAC) or the Minister respectively.

Clause 7 of the Bill enables the PHIAC to determine the rate of the Reinsurance Trust Fund levy, or the Minister to determine the rate of the supplementary Reinsurance Trust Fund levy. In setting either rate the PHIAC or the Minister must follow the Ministerial principles determined via section 73BC(5B) of the *National Health Act 1953* (the Act).

The Committee is correct in noting that the Ministerial principles made under section 73BC(5B) of the Act are not disallowable. The principles have not been made disallowable so that the Council and/or the Minister have the necessary level of flexibility given the timeframes in which the calculations in respect of the Fund are made.

I should clarify that the Bill forms part of a package of legislation aimed at addressing concerns originally identified by the Australian National Audit Office in its Report entitled *Management of Commonwealth Non-Primary Industry Levies* (No. 32 1999 - 2000). The Bill does not effect a significant change in the operation of the Reinsurance Trust Fund but corrects an identified technical defect.

The Reinsurance Trust Fund provides for the internal subsidisation of aged, chronic and long-term acute care patients within the industry. Participation in the Reinsurance Trust Fund is a condition of registration for registered health benefits organisations. The Reinsurance Trust Fund supports community rating by subsidising high cost, and therefore very ill, contributors.

The Reinsurance Trust Fund operates as a zero sum equation. The amount of money paid by industry into the Fund is the amount that is redistributed to the industry, to spread the burden of high cost contributors equitably, across the industry.

I trust this information is of assistance.

Relevant extract from the response from the Minister dated 24 June 2003

I am aware of concerns raised by you, as Chair of the Scrutiny of Bills Committee, in relation to the proposed reimposition of the Reinsurance Trust Fund levy through the Private Health Insurance (Reinsurance Trust Fund Levy) Bill 2003. In particular, you have highlighted a concern that a maximum amount has not been set in relation to the Reinsurance Trust Fund levy.

In my earlier response to you on this matter dated 16 June 2003, I explained that the Reinsurance Trust Fund levy effects internal cross-subsidisation within the private health insurance industry, and protects health funds and contributors from high cost chronic or acute patients. All money that comes in under the Fund is returned to the industry - this is a zero sum equation.

For these reasons I do not share the Scrutiny of Bills Committee's concerns.

Nevertheless, I am prepared to provide an undertaking to the Senate that if payments to the Reinsurance Trust Fund exceed 5% of the total hospital benefits paid by health funds in a financial year, I will report back to the Senate with an explanatory statement.

The Committee thanks the Minister for these responses, and notes the Minister's intention to provide an undertaking to the Senate on the maximum amount to be set in relation to the reinsurance trust fund levy. Nevertheless, given the sums involved, the Committee expresses its concern that the maximum amount of levy extracted by this measure is not limited by the proposed legislation.

Trish Crossin
Chair



SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia

Ministerial No. 82254

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24 JUN 2003

Senate Standing Committee
for the Scrutiny of Bills

Senator T Crossin
Chair
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

I am writing in response to the Scrutiny of Bills Alert Digest No. 6 of 2003, of 18 June 2003, which contained comments on the Customs Amendment Bill (No. 1) 2003. I offer the following information in relation to each of the Committee's concerns for its consideration of the proposed amendments.

**Merits review
Schedule 2, item 3**

Proposed new subsections 153VC(1) and (2) of the *Customs Act 1901* (Customs Act) are designed to implement Article 3.2 of the Singapore-Australia Free Trade Agreement. The proposed new subsections are a restatement of provisions currently in the Customs Act for New Zealand (section 153K) and for Papua New Guinea and for the Forum Island Countries (section 153LA).

The proposed new subsections 153VC(1) and (2) of the Customs Act recognise that difficulties may arise when unforeseen circumstances (such as adverse movements in exchange rates) result in a shipment failing to meet the local content requirement, of 30% or 50% respectively. The 2% 'tolerance' is designed to cater for unforeseen circumstances.

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Parliamentary scrutiny
Schedule 2, item 3

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economic disaster. In each case, the local content requirement was reduced to no less than 40% for no more than two years.

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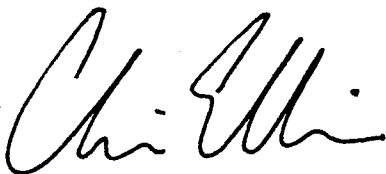
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I trust the above information will assist the Committee in its consideration of the proposed amendments.

Yours sincerely



CHRIS ELLISON
Senator for Western Australia

24 JUN 2003



SENATOR THE HON KAY PATTERSON
Minister for Health and Ageing

Senator Jan McLucas
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

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18 JUN 2003

Senate Standing C'ttee
for the Scrutiny of Bills

Dear Senator McLucas,

Thank you for your letter of 15 May 2003 concerning the Private Health Insurance (Reinsurance Trust Fund) Bill 2003 (the Bill). I appreciate the opportunity to provide the Committee with advice in relation to the proposed changes to the Reinsurance Trust Fund.

The Senate Standing Committee for the Scrutiny of Bills has identified a concern in relation to a perceived lack of parliamentary scrutiny regarding the setting of the rate of the Reinsurance Trust Fund levy or supplementary Reinsurance Trust Fund levy, by the Private Health Insurance Administration Council (PHIAC) or the Minister respectively.

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I should clarify that the Bill forms part of a package of legislation aimed at addressing concerns originally identified by the Australian National Audit Office in its Report entitled *Management of Commonwealth Non-Primary Industry Levies* (No. 32 1999 – 2000). The Bill does not effect a significant change in the operation of the Reinsurance Trust Fund but corrects an identified technical defect.

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The Reinsurance Trust Fund operates as a zero sum equation. The amount of money paid by industry into the Fund is the amount that is redistributed to the industry, to spread the burden of high cost contributors equitably, across the industry.

If the Committee wishes to discuss this matter further, they can contact Mr Charles Maskell-Knight, Assistant Secretary of the Private Health Insurance Branch, in my Department on (02) 6289 9490.

I trust this information is of assistance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kay Patterson', with a stylized flourish at the end.

Senator Kay Patterson

17 JUN 2003



SENATOR THE HON KAY PATTERSON
Minister for Health and Ageing

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24 JUN 2003

Senate Standing C'ttee
for the Scrutiny of Bills

Senator Trish Crossin
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin,

I am aware of concerns raised by you, as Chair of the Scrutiny of Bills Committee, in relation to the proposed reimposition of the Reinsurance Trust Fund levy through the Private Health Insurance (Reinsurance Trust Fund Levy) Bill 2003. In particular, you have highlighted a concern that a maximum amount has not been set in relation to the Reinsurance Trust Fund levy.

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For these reasons I do not share the Scrutiny of Bills Committee's concerns.

Nevertheless, I am prepared to provide an undertaking to the Senate that if payments to the Reinsurance Trust Fund exceed 5% of the total hospital benefits paid by health funds in a financial year, I will report back to the Senate with an explanatory statement.

Yours sincerely,

Senator Kay Patterson

24 JUN 2003

