SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TWELFTH REPORT

OF

2004

8 December 2004

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator G Marshall
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

TWELFTH REPORT OF 2004

The Committee presents its Twelfth Report of 2004 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:

> Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 2004
>
> Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004
>
> Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 2004

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2004*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 7 December 2004. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 11 of 2004

[Introduced in the House of Representatives on 17 November 2004. Portfolio: Attorney-General]

The bill is intended to ensure that prosecutions, including prosecutions for child pornography related offences under Commonwealth, state or territory legislation, do not fail on technical grounds related to applications for classification of material.

The bill amends the *Classification (Publications, Films and Computer Games) Act 1995*. According to the explanatory memorandum, the bill makes 'minor technical amendments' which are 'designed to remove any doubt as to the validity of classification decisions made … in response to deficient or defective applications for classification.'

The bill also removes any doubt as to the validity of decisions made or any later action taken by the Board, the Review Board or the Director in respect of the decisions validated by the amendments.

Retrospectivity
Schedule 1, items 1 and 2

Proposed new sections 22C and 44B of the *Classification (Publications, Films and Computer Games) Act 1995*, to be inserted by items 1 and 2 of Schedule 1 to this bill, would retrospectively validate decisions of the Classification Board and the Classification Review Board that are based on applications made by or on behalf of law enforcement agencies, even though the application did not satisfy the requirements of the Act.

The purpose of the bill is described in the explanatory memorandum as being 'to ensure that prosecutions for child pornography and related offences do not fail for technical reasons related to applications for classifications.' However, the wording of the proposed new sections goes further than that, and would validate a decision, whatever the reason – whether technical or substantive – for the application not satisfying the requirements of the Act.

The Committee **seeks the Attorney-General's advice** as to whether there is a need to amend the legislation to ensure it operates only to validate minor or technical deficiencies.

Furthermore, although the proposed amendments would operate retrospectively, neither the explanatory memorandum nor the second reading speech give any indication of the extent of any deficiencies in applications which have been discovered. All that the Attorney-General says, in his second reading speech, is that 'this retrospectivity is appropriate and justified and will not lead to any substantive injustice.' The Attorney-General continues by stating that 'Any errors that may have been made in the application process were purely technical and cast no doubt whatever on the correctness of the classification decision.'

The Committee also **seeks the Attorney-General's advice** as to what injustice the Attorney considers may result from the provisions (if not 'substantive injustice') and whether this retrospectivity might be regarded as trespassing unduly on the rights of persons who might be charged with offences under this legislation.

Pending the Attorney-General's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Attorney-General

1. Is there a need to amend the legislation to ensure it operates only to validate minor or technical deficiencies?

I do not believe there is any need to amend the Bill. In its current form the Bill only operates to validate decisions made following applications that had minor or technical deficiencies.

The application requirements are minor and technical. For example, section 22A of the *Classification (Publications, Films and Computer Games) Act 1995* requires that the application be:

- in writing; and
- made in a form approved by the Director in writing; and
- signed by or on behalf of the applicant; and
- accompanied by a copy of the publication, film or computer game.

For section 14 and 17 applications there are additional requirements, including the provision of an adequate written synopsis of the film or other information about the computer game. Also, in some instances, any "contentious material" needs to be identified and information provided as to the means by which access to that material may be gained.

In practice, a copy of the publication, film or computer game as required by subsection 22A(1) must have been provided for classification to occur.

If any of these application requirements are overlooked then, provided that the Board has classified the material properly according to the criteria in the Classification Act, National Classification Code and the classification guidelines, the Board's decision should be valid - despite a minor deficiency in the application which has no bearing on the classification decision.

There is no legitimate reason why a person should be able to escape prosecution, conviction and punishment for a serious child pornography offence in those circumstances.

I have advice from the Commonwealth's Chief General Counsel that the Bill only validates decisions that might otherwise be invalid because the application did not satisfy the requirements of the Act for the making of applications. In these circumstances the decision is taken only to be as valid as it would have been if the application satisfied those requirements.

Such errors in the application cast no doubt whatsoever on the correctness of the classification decision, which rests on the examination of the relevant product not the formalities of the application. The provision would catch, for example, applications referring to the wrong section of the Act.

The amendments will not prevent a challenge to any classification decision on any other grounds. A challenge based on some defect in the decision making process such as improper application of the code or guidelines could still be made.

2. Extent of any deficiencies in applications that have been discovered

I note that the Committee has commented on the lack of information about the extent of any deficiencies in applications which have been discovered. This information was not provided because I am concerned that should the detail of the deficiencies

become public, such information may provide unnecessary encouragement or assistance to legal challenges to prosecutions or convictions.

I will be happy to provide a confidential briefing to the Committee on the reasons why the Government believes the Bill is necessary. I can assure the Committee that the Bill only validates decisions where the application was arguably made under the wrong section, or where some of the required information was not included in the application. It does not affect the actual consideration of the material by the Classification Board.

3. What injustice may result from the provisions, and whether the retrospectivity might be regarded as trespassing unduly on the rights of person who might be charged?

I do not believe that there will be any injustice, substantive or otherwise, to persons who might be charged.

The Bill does not operate unjustly. In every case it remains the responsibility of the prosecution to prove beyond reasonable doubt that the defendant is guilty of an offence. The classification that the Board has given to material submitted by police informs the court about the nature of that material. For example, a classification under paragraph 1(b) of the RC section of the films, publications or computer games table of the National Classification Code mirrors the definition of "child pornography" in some jurisdictions. A classification under paragraph 1(b) of the RC section would be evidence before a court that the material is likely to be child pornography. If there is any doubt about whether the material classified is the same as the material that was seized, this is a matter for the prosecution to prove beyond reasonable doubt in Court.

The amendments contained in the Bill will apply to classification decisions made before the commencement of these amendments, and are in that sense retrospective in their operation. However, this retrospectivity is appropriate and justified and will not lead to any injustice. As specifically stated in the Explanatory Memorandum:

> The amendments will apply only to remedy technical errors that might be made in the application process. Such technical errors would cast no doubt whatsoever on the correctness of the classification decision, which rested on the examination of the relevant product not the formalities of the application.

The amendments do not deprive a person who was in possession of alleged child pornography material of any existing rights to seek review of or appeal against the classification of the material determined by the Classification Board or Review Board.

Given the fact that the classification decisions themselves are sound, there is no injustice to the persons charged and no legitimate reason why a person should be able to escape prosecution, conviction and punishment for such offences.

The Government is concerned to ensure that there is no scope for persons to escape conviction purely on the basis of an error related to their application for classification.

I trust that this response satisfactorily addresses the Committee's concerns.

The Committee thanks the Attorney-General for this response, which meets the Committee's concerns.

The Committee notes the assurance that the bill 'only validates decisions where the application was arguably made under the wrong section, or where some of the required information was not included in the application', and further notes the existence of legal advice to this effect. The Committee also thanks the Attorney-General for the explanation of the practical operation of classification provisions in relation to criminal proceedings and for his assurance that the bill 'does not operate unjustly'.

In the circumstances, the Committee makes no further comment on these provisions.

Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

Introduction

The Committee dealt with these bills in *Alert Digest No. 11 of 2004*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 7 December 2004. 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. 11 of 2004

Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

[Introduced in the House of Representatives on 11 August 2004 and reintroduced on 17 November 2004; this bill was passed by the Senate on 18 November 2004. Portfolio: Justice and Customs]

Introduced with the Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004, the bill amends the *Customs Act 1901* to give effect to Australia's obligations under the Thailand-Australia Free Trade Agreement by:

- introducing new rules of origin for goods that are the produce of Thailand and enabling goods that satisfy these rules of origin to enter Australia at preferential rates of customs duty; and
- imposing certain obligations on Australian exporters and Australian producers of goods who claim preferential tariff treatment in Thailand.

Uncertainty of commencement
Schedule 1, parts 1 and 2

By virtue of item 2 in the table to subclause 2(1) in this bill, Parts 1 and 2 of Schedule 1 are to commence on the later of 1 January 2005 or the day on which the Thailand-Australia Free Trade Agreement comes into force for Australia. The item goes on to provide that the provisions do not commence at all if the Agreement does not come into force, but does not provide any fixed date by which it can be finally determined that the agreement will not come into force.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee is wary, for instance, of provisions which enable legislation to commence on a date 'to be proclaimed' rather than on a determinable date and seeks an explanation for any significant delay in commencement.

The Committee is equally wary of provisions which link commencement to an 'uncertain event' and would generally expect to see a fixed date (or period of time) by which that event must occur to trigger either commencement or repeal. The Committee would also expect the explanatory memorandum accompanying a bill to explain the reasons for including uncertain commencement provisions, as outlined in Drafting Direction No. 3 of 2003. In this case, the memorandum makes no reference to the reasons for uncertainty.

The Committee endorses the formulation at paragraph 83 of that Drafting Direction:

> 83 In some situations, there may be a need to build a time limit into the wording that states that the relevant items do not commence if an uncertain event does not occur. For example, "However, the items do not commence at all if the event mentioned in paragraph (b) does not occur before 1 July 2004" (where the event might, eg, be Australia entering into an international agreement).

Although the bill has now passed both Houses, the Committee **seeks the Minister's advice** as to whether the commencement provision might not also have provided a means of determining when (if ever) the Agreement is to be regarded as not coming into force.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

[The Committee made similar comments in relation to the Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004]

Relevant extract from the response from the Minister

In proposing the formulation for the commencement set out in section 2 of the *Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Act 2004* and the *Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Act 2004*, the Government was acting on advice from the Office of Parliamentary Counsel. I understand that this formulation was also used in the customs legislation that implemented the Australia-Singapore Free Trade Agreement and the Australia-United States Free Trade Agreement, and has been used more broadly when translating international treaty obligations into domestic legislation.

The Government has endeavoured to provide additional clarity by including the target date agreed with the Government of Thailand for entry into force of the Agreement (1 January 2005) and by including a requirement that the Minister for Justice and Customs must announce by notice in the *Gazette* the day on which the Agreement comes into force for Australia.

It would not be appropriate for the legislation to deal with the entry into force of the Agreement as the Agreement itself deals with this issue at Article 1910.

The Committee thanks the Minister for this response, but will continue to draw the attention of Senators to commencement provisions of this nature.

The Committee takes the view that the Parliament is responsible for determining when laws are to come into force and has consistently opposed the inclusion in legislation of open-ended proclamation provisions. The commencement provisions in these bills have all the hallmarks of open-ended proclamation provisions. They provide for commencement on the date of an 'uncertain event' without providing the means for determining conclusively that the event has not occurred or will not occur. The choice of the date of commencement is delegated by the Parliament to the Executive, without limitation.

The Committee notes the admonition in paragraph 13 of Drafting Direction No. 3 of 2003 from the Office of Parliamentary Counsel that 'Providing for commencement to be fixed by another official (eg the Minister by notice in the Gazette) is generally unacceptable as a matter of policy,' yet that is effectively the mechanism that is created in these provisions should the target date not be met.

The statement in the Minister's response that 'It would not be appropriate for the legislation to deal with the entry into force of the Agreement …' is perplexing. The Committee's contention is not that the legislation deal with the date and circumstances of the entry into force of the Agreement, rather that there be an appropriate limit placed on the date on which the implementing legislation would automatically commence should the target date for entry into force not prove attainable.

As noted in respect of the legislation implementing the US-Australia Free Trade Agreement (see *Eleventh Report of 2004*), the Committee does not see why legislation implementing international treaty obligations should be treated differently from any other legislation susceptible to delay, namely, by including a date (or period) after which the legislation must commence or be taken to be repealed and providing an explanation where a particular date (or period) represents a significant delay in commencement.

The Committee again recommends the use of the formulation at paragraph 83 of that Drafting Direction in commencement provisions for legislation implementing treaty obligations where the date the agreement enters into force for Australia is uncertain at the time the legislation is drafted.

The Committee continues to draw 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.

Robert Ray
Chair

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

04/9235

7 DEC 2004

Senator R Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to the Senate Standing Committee for the Scrutiny of Bills *Alert Digest No 11 of 2004* (the Digest) which seeks my views on a number of issues about the Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 2004 (the Bill).

1. Is there a need to amend the legislation to ensure it operates only to validate minor or technical deficiencies?

I do not believe there is any need to amend the Bill. In its current form the Bill only operates to validate decisions made following applications that had minor or technical deficiencies.

The application requirements are minor and technical. For example, section 22A of the *Classification (Publications, Films and Computer Games) Act 1995* requires that the application be:

- in writing; and
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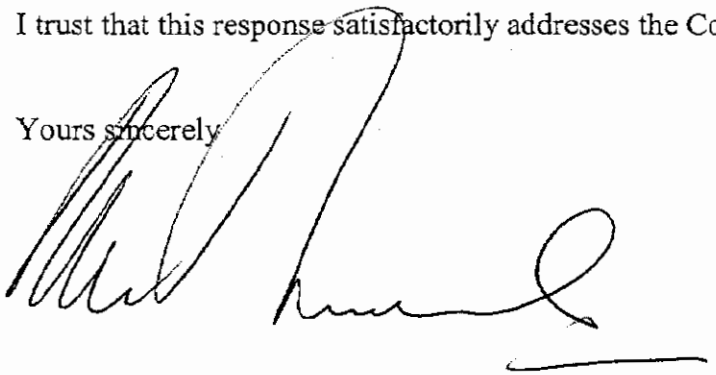
The Government is concerned to ensure that there is no scope for persons to escape conviction purely on the basis of an error related to their application for classification.

I trust that this response satisfactorily addresses the Committee's concerns.

Yours sincerely



Philip Ruddock

SENATOR THE HON. CHRISTOPHER ELLISON
Minister for Justice and Customs
Senator for Western Australia

Ministerial No. 85558/15448

- 7 DEC 2004

Senator R Ray
Chair
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray Robert,

I am writing in response to the Scrutiny of Bills Alert Digest No. 11 of 2004, dated 1 December 2004, which contained comments on the Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004 and the Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004. I offer the following information in relation to the Committee's concerns for its consideration.

In proposing the formulation for the commencement set out in section 2 of the *Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Act 2004* and the *Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Act 2004*, the Government was acting on advice from the Office of Parliamentary Counsel. I understand that this formulation was also used in the customs legislation that implemented the Australia-Singapore Free Trade Agreement and the Australia-United States Free Trade Agreement, and has been used more broadly when translating international treaty obligations into domestic legislation.

The Government has endeavoured to provide additional clarity by including the target date agreed with the Government of Thailand for entry into force of the Agreement (1 January 2005) and by including a requirement that the Minister for Justice and Customs must announce by notice in the *Gazette* the day on which the Agreement comes into force for Australia.

It would not be appropriate for the legislation to deal with the entry into force of the Agreement as the Agreement itself deals with this issue at Article 1910.

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

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

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