



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

2006

6 December 2006

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MEMBERS OF THE COMMITTEE

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

THIRTEENTH REPORT OF 2006

The Committee presents its Thirteenth Report of 2006 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:

Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

Environment and Heritage Legislation Amendment (No. 1) Bill 2006

Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2006*. In its *Eleventh Report of 2006*, the Committee sought further advice from the Minister in relation to the application of absolute liability. The Minister for Justice and Customs has responded to the Committee's comments in a letter dated 1 December 2006. A copy of the letter is attached to this report.

Extract from Eleventh Report of 2006

Introduced into the House of Representatives on 1 November 2006

Portfolio: Justice and Customs

Background

Introduced with the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006, this bill implements changes to Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) regulatory regime in relation to the identification, management and mitigation of money laundering and terrorism financing. The bill introduces reporting obligations for the financial sector in relation to customer due diligence, reporting of certain matters, development and maintenance of AML/CTF programs and record-keeping. The changes are to be phased in over two years and incorporate a risk based approach to compliance.

The bill expands the regulatory role of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to provide advisory, monitoring and enforcement functions across a range of industry sectors. The bill provides for review of the operation of the provisions, regulations and AML/CTF rules at the end of seven years.

Absolute liability

Subclauses 136(4) and 137(3), 136(1) and 137(1)

Subclauses 136(4) and 137(3) would impose absolute liability for one particular element of the offences created by subclauses 136(1) and 137(1) respectively. The element in respect of which absolute liability is imposed is that information was given, or a document produced, under this Act. The explanatory memorandum correctly observes that the imposition of absolute liability means that the prosecution need not prove fault in relation to that aspect of the offence, and that the defence of mistake of fact is not available. The explanatory memorandum seeks to justify these subclauses (at pages 148 and 149) on the basis that 'it would be difficult for the prosecution to prove this element as the information would be only within the knowledge of the defendant.' However, the Committee notes that Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs in February 2004, states that:

Application of strict or absolute liability to a particular physical element of an offence has generally only been considered appropriate where one of the following considerations is applicable:

- There is demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact in respect of that element.
- The element is a jurisdictional element rather than one going to the essence of the offence.
- Where one provision refers to another, strict liability should attach to that cross reference.

In light of the advice in the Guide, the Committee **seeks the Minister's advice** as to the grounds for these subclauses.

Pending the Minister'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 Minister

Sub-clauses 136(4) (Providing false or misleading information) and 137(3) (Producing false or misleading documents)

These provisions relate to the offences of providing false or misleading information (clause 136) and producing false or misleading documents (clause 137).

The application of absolute liability means that no fault element applies to the physical element for paragraphs 136(1)(c) and 137(1)(c), and that a defence of mistake of fact is unavailable.

The application of absolute liability was included to overcome the 'knowledge of law' issue for these elements.

The Committee thanks the Minister for this response. While the Committee acknowledged in its *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, that the 'knowledge of law' issue may well be a justification for the imposition of strict liability, the Committee did not suggest that the 'knowledge of law' issue was a justification for the imposition of absolute liability. The Committee **seeks the Minister's further advice** as to the particular manner in which the 'knowledge of law' issue arises in these circumstances and the justification for the application of absolute liability in response to this.

Absolute liability

Subclauses 139(2), 140(2) and 141(2), 139(1), 140(1) and 141(1)

Subclauses 139(2), 140(2) and 141(2) would impose absolute liability for one particular element of the offences created by subclauses 139(1), 140(1) and 141(1) respectively. The element in respect of which absolute liability is imposed is that 'at least one provision of Division 2, 3 or 4 of Part 2 applies to the provision of a designated service'. Divisions 2, 3 and 4 of Part 2 deal with identification procedures to be carried out by financial institutions on their customers. The explanatory memorandum correctly observes that the imposition of absolute liability means that the prosecution need not prove fault in relation to that aspect of the offence, and that the defence of mistake of fact is not available.

The explanatory memorandum seeks to justify these subclauses (at pages 151, 152 and 153 respectively) on the basis that their purpose is ‘to avoid the prosecution having to prove that the defendant was reckless’ as to this element of the offence, and that it would be ‘difficult for the prosecution to prove that the defendant was reckless’ as to this element of the offence. However, the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, makes no mention, in Part 4.5, of such a justification for strict liability and absolute liability, and observes that there should be ‘legitimate grounds for penalising a person who made an honest and reasonable mistake of fact’ in relation to the relevant element of the offence. The Committee **seeks the Minister’s advice** whether he could provide further information as to the justification for these subclauses.

Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it 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 Minister

Sub-clauses 139(2) (Providing a designated service using a false customer name or customer anonymity), 140(2) (Receiving a designated service using a false customer name or customer anonymity) and 141(2) (Receiving a designated service without disclosing names by which a person is commonly known)

Sub-clauses 139(2), 140(2), and 141(2), apply absolute liability to an element of the offences in sub-clauses 139(1), 140(1) and 141(1) respectively. Similarly, provisions in sub-clauses 139(4) and 140(4) apply absolute liability to the same element of the respective offences in sub-clauses 139(3) and 140(3).

The application of absolute liability means that no fault element applies to the physical elements in relation to paragraphs 139(1)(d), 140(1)(c) and 141(1)(e) and that a defence of mistake of fact is unavailable.

The application of absolute liability was included to overcome the ‘knowledge of law’ issue in relation to these elements.

The Committee thanks the Minister for this response. While the Committee acknowledged in its *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, that the ‘knowledge of law’ issue may well be a justification for the imposition of strict liability, the Committee did not suggest that the ‘knowledge of law’ issue was a justification for the imposition of absolute liability. The Committee **seeks the Minister’s further advice** as to the particular manner in which the ‘knowledge of law’ issue arises in these circumstances and the justification for the application of absolute liability in response to this.

Relevant extract from the further response from the Minister

I have considered the Committee's comments on the application of absolute liability to elements of offences contained within sub-clauses 136, 137, 139, 140 and 141. I accept that the application of absolute liability in these provisions appears inconsistent with applying strict liability to other provisions in the Bill with knowledge of law issues. I therefore undertake to amend these provisions replacing the application of absolute liability to the relevant elements with strict liability.

The Committee thanks the Minister for this further response and notes the Minister's intention to amend the provisions.

Environment and Heritage Legislation Amendment (No. 1) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2006*. In its *Eleventh Report of 2006*, the Committee sought further advice from the Minister in relation to search without warrant. The Minister for the Environment and Heritage responded to the Committee's comments in a letter dated 5 December 2006. A copy of the letter is attached to this report.

Extract from Eleventh Report of 2006

Introduced into the House of Representatives on 12 October 2006
Portfolio: Environment and Heritage

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC), the *Australian Heritage Council Act 2003*, the *Environment and Heritage Legislation Amendment Act (No. 1) 2003*, the *Environment Protection (Alligator Rivers Region) Act 1978*, the *Environment Protection (Northern Territory Supreme Court) Act 1978*, the *Environment Protection (Sea Dumping) Act 1981* and the *Migration Act 1958* to:

- reduce processing time and costs for development interests;
- allow World Heritage properties to be transferred to the National Heritage List;
- improve cooperation on environmental assessment and approval processes between the Government and state and territory governments;
- clarify responsibilities for proponents and simplify the referral, assessment and approval processes;

- allow the Minister to publish policy statements on the application of the Act to assist in decision-making and inform the community;
- change the approach to the list of heritage places and threatened species and ecological communities;
- continue the Register of the National Estate as a statutory register for a further five years to allow for the transfer of places to other registers;
- establish a List of Overseas Places of Historic Significance to Australia;
- align the EPBC Act and the *Fisheries Management Act 1991* to provide increased scope for the fisheries regulator to manage depleted fisheries to environmental and economic sustainability; and
- clarify and strengthen compliance and enforcement provisions of the Act.

The bill also contains application, saving and transitional provisions and a number of technical provisions designed to reduce duplication and complexity.

Search and seizure

Schedule 1

Item 835 of Schedule 1 to this bill inserts a new Schedule 1 into the *Environment Protection and Biodiversity Conservation Act 1999* which would provide for the detention of suspected non-citizen offenders suspected of committing an offence, searching and screening detainees and carrying out identification tests on detainees. The explanatory memorandum states, on page 95, that the Government's ability to enforce the Act in Australia's maritime jurisdiction and non self-governing Territories and to protect Commonwealth reserves such as Ashmore Reef National Nature Reserve is limited because the *Migration Act 1958* prevents authorised officers from bringing non-citizens suspected of committing offences against the Act into the migration zone. The explanatory memorandum also states that the Schedule mirrors the provisions contained in the *Migration Act 1958* for dealing with the detention of unauthorised non-citizens, and the provisions of the *Fisheries Management Act 1991* providing for detention of foreign fishers suspected of offences against that Act.

The Committee has a long standing concern about the appropriateness of conferring police powers on persons other than police officers and the appropriateness of

applying a power to search persons under arrest to persons under detention. As a minimum, the Committee expects the explanatory memorandum to provide a detailed justification for applying such powers in the proposed circumstances and an assurance that appropriate protocols or safeguards are to be implemented and an explanation of the nature of such protocols or safeguards.

Search without warrant

Clause 17

Proposed Clause 17 of the new Schedule 1 to the Environment Protection Act would allow approved officers to conduct strip searches on detainees in certain circumstances. The Committee notes the statement in the explanatory memorandum that the clause ‘corresponds closely to section 252A of the *Migration Act 1958*’ and notes that clause 18, which sets out the rules for conducting a strip search also closely corresponds to section 252B of the Migration Act. The Committee also notes the assurance on page 98 of the explanatory memorandum that these rules will ‘ensure strip searches are conducted in a way that will protect the dignity of the detainee as much as possible while still allowing strip searches in very limited circumstances to ensure the safety of the detainee and other people.’

However, the Committee notes that no justification or reasons are provided in the explanatory memorandum for the application of strip search provisions in this context. The Committee considers that the power of strip search represents a significant trespass on personal rights and liberties and should only be conferred in exceptional and specific circumstances. Proposals for the inclusion of such powers in legislation should be accompanied by detailed explanation and justification in the explanatory memorandum and appropriate safeguards.

In this context, the Committee notes that it expressed concerns over the terms of what is now section 252A of the Migration Act in its consideration of the Migration Legislation Amendment (Immigration Detainees) Bill 2001 in *Alert Digest No. 6 of 2001* and of the Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001 in *Alert Digest No. 9 of 2001*. The Committee expressed concern about the appropriateness of using powers given to police officers to search people under arrest as precedents for the search of people in immigration detention.

However, the Committee noted that the then Minister for Immigration and Multicultural Affairs and the Attorney-General had developed and agreed a *Draft Protocol for Strip Search of Immigration Detainees* and that this was expected to be incorporated into written directions issued pursuant to section 499 of the Migration Act. The Committee noted that this draft protocol would provide greater safeguards in the authorisation and conduct of strip searches.

The Committee **seeks the Minister's advice** as to justification for the inclusion of the power to conduct strip searches in this context and whether appropriate protocols have been developed for the authorisation and conduct of such searches under the *Environment Protection and Biodiversity Conservation Act 1999*.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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 Minister

The Committee seeks advice as to justification for the inclusion of the power to conduct strip searches of detainees without a warrant in certain circumstances and whether appropriate protocols have been developed for the authorisation and conduct of such searches.

The power to conduct strip searches under clause 17 of the proposed new Schedule 1 is considered to be a measure of last resort and is subject to appropriate authorisation and strict safeguards. High level authorisation for each strip search must be obtained from either the Secretary, one of the Deputy Secretaries, or the Director of National Parks of the Australian Government Department of the Environment and Heritage or a magistrate.

A strip search may only be authorised in circumstances where there are reasonable grounds to suspect that the detainee is hiding a weapon or other thing capable of inflicting bodily injury or being used to escape from detention. In these circumstances, it is essential that the detainee be appropriately searched to ensure both their safety and the safety of other people in the detention facility.

Strip searches are subject to very strict requirements aimed at protecting the welfare and dignity of the detainee. A strip search may only be carried out by a specially authorised officer of the same sex as the detainee.

This Bill does not authorise the search of body cavities and ensures that no more clothing is removed than is necessary to recover hidden items. In practice, this means

that strip searches could involve no more than the removal of a jacket or the detainee's shoes and socks.

These provisions are consistent with the corresponding provisions in the *Migration Act 1958* and the *Fisheries Management Act 1991*. New Schedule 1 will provide a consistent approach in immigration facilities, where people under environment detention and other people under immigration detention may be held in the same location. It is important that environment detainees should be subject to the same level of searching and screening procedures as other detainees that may be housed in the same facility.

My Department will be working closely with the Department of Immigration and Multicultural Affairs to establish the mechanisms and protocols needed to implement the amendments.

It is considered highly unlikely that it would ever be necessary to conduct strip searches of environment detainees. I understand that under the powers in the Migration Act no adult has been strip searched since January 2003 and no minor has ever been strip searched.

The Committee thanks the Minister for this response and notes that the Department of the Environment and Heritage will be working closely with the Department of Immigration and Multicultural Affairs to establish the mechanisms and protocols needed to implement the amendments. The Committee **seeks the Minister's further advice** as to whether provision is to be made for these mechanisms and protocols to be tabled in Parliament, as is the case under the *Migration Act 1958*.

The Committee notes with concern the Minister's statement that it is considered highly unlikely that it would ever be necessary to conduct strip searches of environment detainees. The Committee considers that the lack of a demonstrated need for provisions of this type calls into question the justification offered for the inclusion of such an intrusive power.

The Committee continues to draw Senators' attention to the provision, as it 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 further response from the Minister

I am writing in response to the letter of 30 November 2006 which in particular draws my attention to the comments in relation to search without warrant on page 230 of the Committee's Eleventh Report of 2006.

The Committee referred to my advice in relation to search without warrant, under proposed clause 17 of the new Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), that my Department will be working closely with the Department of Immigration and Multicultural Affairs to establish the mechanisms and protocols needed to implement the amendments. The committee seeks my further advice as to whether provision is to be made for the mechanism and protocols to be tabled in Parliament, as is the case under the *Migration Act 1958*.

I do not intend to include in the EPBC Act an equivalent provision to section 499 of the *Migration Act 1958*, which provides for the Immigration Minister to issue written directions to persons exercising a power or function under the Migration Act, with the written directions to be tabled in Parliament. My Department will be working closely with the Department of Immigration and Multicultural Affairs to develop mechanisms and protocols that are in harmony with those that have been prepared under the Migration Act. When these mechanisms and protocols have been finalised I will provide relevant parts of these documents to the Committee.

Thank you for the opportunity to respond to the comments made by the Committee.

The Committee thanks the Minister for this further response. While the Committee would be interested to see these mechanisms and protocols, its purpose in raising these concerns was to ensure that the Parliament as a whole is appropriately informed as to their content.

Robert Ray
Chair



SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia
Manager of Government Business in the Senate

File No: 06/20426

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4 DEC 2006

Senate Standing C'ttee
for the Scrutiny of Bills

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

- 1 DEC 2006

Dear Chair,

Robert,
I am writing in response to the Scrutiny of Bills Eleventh Report of 2006 regarding the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006.

I have considered the Committee's comments on the application of absolute liability to elements of offences contained within sub-clauses 136, 137, 139, 140 and 141. I accept that the application of absolute liability in these provisions appears inconsistent with applying strict liability to other provisions in the Bill with knowledge of law issues. I therefore undertake to amend these provisions replacing the application of absolute liability to the relevant elements with strict liability.

The action officer for this matter in the Attorney-General's Department is Joanne Blackburn who can be contacted on 6250 6699.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia



SENATOR THE HON IAN CAMPBELL
Minister for the Environment and Heritage
Senator for Western Australia

RECEIVED

5 DEC 2006

Senate Standing C'ttee
for the Scrutiny of Bills

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

- 5 DEC 2006

Dear Senator Ray

I am writing in response to the letter of 30 November 2006 from the Secretary of the Senate Scrutiny of Bills Committee, which in particular draws my attention to the comments in relation to search without warrant on page 230 of the Committee's Eleventh Report of 2006 (29 November 2006) concerning the Environment and Heritage Legislation Amendment Bill (No. 1) 2006.

The Committee referred to my advice in relation to search without warrant, under proposed clause 17 of the new Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), that my Department will be working closely with the Department of Immigration and Multicultural Affairs to establish the mechanisms and protocols needed to implement the amendments. The Committee seeks my further advice as to whether provision is to be made for the mechanism and protocols to be tabled in Parliament, as is the case under the *Migration Act 1958*.

I do not intend to include in the EPBC Act an equivalent provision to section 499 of the *Migration Act 1958*, which provides for the Immigration Minister to issue written directions to persons exercising a power or function under the Migration Act, with the written directions to be tabled in Parliament. My Department will be working closely with the Department of Immigration and Multicultural Affairs to develop mechanisms and protocols that are in harmony with those that have been prepared under the Migration Act. When these mechanisms and protocols have been finalised I will provide relevant parts of these documents to the Committee.

Thank you for the opportunity to respond to the comments made by the Committee.

Yours sincerely

IAN CAMPBELL

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