SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2006

11 October 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

EIGHTH REPORT OF 2006

The Committee presents its Eighth 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:

Corporations (Aboriginal and Torres Strait Islander) Bill 2005 *****

Migration Amendment (Visa Integrity) Bill 2006

***** Although this bill has not yet been introduced into the Senate, the Committee may report on its proceedings in relation to the bills, under standing order 24(9).

Corporations (Aboriginal and Torres Strait Islander) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digests Nos. 8 and 9 of 2005*. The Minister for Families, Community Services and Indigenous Affairs responded to the Committee's comments in a letter received on 10 October 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2005

Introduced into the House of Representatives on 23 June 2005
Portfolio: Immigration and Multicultural and Indigenous Affairs

Background

According to the explanatory memorandum, this bill 'replaces the *Aboriginal Councils and Associations Act 1976* (the ACA Act) to improve governance and capacity in the Indigenous corporate sector.'

The bill has been developed following the report of a review of the ACA Act presented in December 2002. According to the explanatory memorandum, the bill 'implements the key recommendation by retaining a special incorporation statute to meet the needs of Indigenous people.' It aligns with the Corporations Act where practicable, but provides sufficient flexibility for corporations to accommodate specific cultural practices and tailoring to reflect the particular needs and circumstances of individual groups.

Abrogation of the privilege against self-incrimination
Clause 566-20

Clause 566-20 would abrogate the privilege against self-incrimination for a body corporate which is required to provide information or produce a document in judicial proceedings in respect of a criminal matter arising under this measure. As noted above, at common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Although this provision operates to compel a body corporate (rather than an individual) to provide information, it may be that the provision also affects personal rights.

It is difficult for the Committee to determine whether its terms of reference are attracted by the provision, as the only justification given in the explanatory memorandum is that it 'is based on section 1317 of the *Corporations Act 2001*.' Accordingly, the Committee **seeks from the Minister** a fuller explanation of this provision.

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

I am writing in response to the request made by the Senate Scrutiny of Bills Committee for a fuller explanation of clause 566-20 of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (CATSI Bill) [see Alert Digest No. 9 of 2005, at p.6 and Alert Digest No. 8 of 2005, at p.14].

Clause 566-20 would abrogate the privilege against self-incrimination for a body corporate which is required to provide information or produce a document in judicial proceedings in respect of a criminal matter arising under the CATSI Act (once enacted). As mentioned in the explanatory memorandum, this provision is based on section 1316A of the *Corporations Act 2001*. The insertion of this provision reflects the broad objective of the CATSI Bill to align, where appropriate, with the Corporations Act to provide improved corporate governance standards for Aboriginal and Torres Strait Islander corporations.

More specifically, clause 566-20, like section 1316A of the Corporation Act, confirms the common law position that a corporation is not entitled to the privilege against self-incrimination (see *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, *Trade Practices Commission v Abbco Ice Works Pty Limited* (1994) 52 FCR 96, V Waye, 'The Corporation and Legal Professional Privilege' (1997) 8 *Aust Jnl of Corp Law* 25 and *Ford's Principles of Corporation Law* (11th ed, 2003) at [4.120]). The common law reflects the accepted position that the privilege against self-incrimination developed historically to protect individuals from oppressive methods of obtaining evidence and that its extension to corporations, whose prosecution usually relies on documents in the corporation's possession, may often make the liability of corporations to criminal sanction unenforceable.

Similar limitations on self-incrimination immunities have also been accepted as appropriate for legislation governing the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority and the Australian Competition and Consumer Commission in the exercise of their corporate regulation responsibilities following a number of enquiries and empirical

research (see the 'Use Immunity Provisions in the Corporations Law and the Australian Securities Commission law', Joint Statutory Committee on Corporations and Securities (1991) and the 'Review of the Derivative Use Immunity Reforms' by John Kluver (1997)).

It should also be noted that clause 566-20 has no effect on the privilege against self-incrimination for natural persons.

In light of the above, the Government is of the view that clause 566-20 of the CATSI Bill does not trespass unduly on personal rights and liberties.

The Committee thanks the Minister for this response.

Migration Amendment (Visa Integrity) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2006*. The Minister for Immigration and Multicultural Affairs responded to the Committee's comments in a letter received on 10 October 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 7 of 2006

Introduced into the Senate on 21 June 2006
Portfolio: Immigration and Multicultural Affairs

Background

This bill is an omnibus bill that amends the *Migration Act 1958* to:

- clarify the immigration clearance and immigration status of non-citizen children born in Australia;
- harmonise certain offence provisions with the Criminal Code;
- clarify the power of an authorised officer to require and take security in relation to an application for a visa to address the uncertainty raised in *Tutugri v Minister for Immigration and Multicultural Affairs* [1999] FCA 1785; and
- clarify the application of certain provisions in relation to the operation of bridging visas.

The bill also contains a number of application provisions.

Retrospective application
Schedule 1, items 1 and 5

The Committee notes that items 2 and 6 of Schedule 1 to this bill provide for the amendments proposed to be made by items 1 and 5 respectively of that Schedule to apply to a non-citizen child who has been born in Australia on or after 1 September 1994.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The explanatory memorandum describes the effect of each of these items and notes that the date in question corresponds with the introduction of the concept of 'immigration clearance' and the relevant provisions into the Act by the *Migration Reform Act 1992*. However, the explanatory memorandum does not indicate whether this retrospective application would adversely affect any non-citizen child. The Committee **seeks the Minister's advice** as to why such a long period of retrospectivity is necessary in each case and whether it would result in a detrimental effect on people.

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

Items 1 and 2

Item 1 inserts new paragraph (ba) into subsection 172(1) of the *Migration Act 1958* (the Act).

Subsection 172(1) sets out when a non-citizen is immigration cleared. Immigration clearance is the process which regulates the entry of people to Australia to ensure that those who enter have authority to do so, that they are who they claim to be and that they provide other information if required to do so.

It is important to be immigration cleared because this status entitles non-citizens to certain benefits under the Act. For example, bridging visas are generally available only to persons who have been immigration cleared.

The Act currently provides that a child born in Australia to parents who are not citizens is taken to hold the same visa as the parents. Further, the child is taken to have entered Australia when he or she is born. However, it is unclear whether the child is also "immigration cleared" at birth.

The insertion of paragraph 172(1)(ba) clarifies that a child born in Australia to non-citizen parents, where at least one parent is immigration cleared, is taken to have been immigration cleared.

Item 2 provides that the amendment made by item 1 applies to a non-citizen child born in Australia on or after 1 September 1994. It therefore describes the children to whom the amendment applies.

Whilst the amendment does have retrospective application - i.e. it is clearly intended to affect the immigration status of non-citizen children who were born in Australia in the past, the amendment is entirely beneficial to the non-citizens to whom it applies. The purpose of these amendments will put beyond doubt the immigration clearance status of non-citizen children born in Australia on or after 1 September 1994 and ensure that such persons will be entitled to the benefits of being immigration cleared.

The period of retrospectivity back to 1 September 1994 relates to when the relevant provisions came into operation.

Items 5 and 6

New subsection 173(2) is intended to put beyond doubt that a non-citizen child born in Australia who, is taken to have been granted a visa or visas at the time of his or her birth, is not to be taken to have entered Australia in a way that contravenes section 43 of the Act causing the visa or visas to cease to be in effect at the same time.

On a literal interpretation of section 173, a non-citizen child's visa would *appear* to cease when the child enters Australia by birth under section 10 in a way that "contravenes" section 43. That is, by not entering through a port or on a pre-cleared flight.

The proposed amendment to section 173 is therefore entirely beneficial in its application, by clarifying that the visa/s granted to a non-citizen child born in Australia does/do not also cease at the moment the child is born.

Item 6 provides that the amendment made applies to a non-citizen child born in Australia on or after 1 September 1994 who is taken to have been granted a visa or visas under section 78 of the Act.

Whilst the provision is retrospective it is again entirely beneficial in its application. The effect is to ensure that non-citizen children born on or after 1 September 1994 are not to be taken to have entered Australia in contravention of section 43.

The period of retrospectivity back to 1 September 1994 relates to when the relevant provisions came into operation.

The Committee thanks the Minister for this detailed response and notes that it would have been helpful if some of this explanation had been included in the explanatory memorandum.

Robert Ray
Chair

The Hon Mal Brough MP
Minister for Families, Community Services and Indigenous Affairs
Minister Assisting the Prime Minister for Indigenous Affairs

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Senator Robert Ray
Chair
Senate Scrutiny of Bills Committee
Department of the Senate
PO Box 6100
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Canberra ACT 2600

Dear Senator Ray

I am writing in response to the request made by the Senate Scrutiny of Bills Committee for a fuller explanation of clause 566-20 of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (CATSI Bill) [see Alert Digest No. 9 of 2005, at p.6 and Alert Digest No. 8 of 2005, at p.14].

Clause 566-20 would abrogate the privilege against self-incrimination for a body corporate which is required to provide information or produce a document in judicial proceedings in respect of a criminal matter arising under the CATSI Act (once enacted). As mentioned in the explanatory memorandum, this provision is based on section 1316A of the *Corporations Act 2001*. The insertion of this provision reflects the broad objective of the CATSI Bill to align, where appropriate, with the Corporations Act to provide improved corporate governance standards for Aboriginal and Torres Strait Islander corporations.

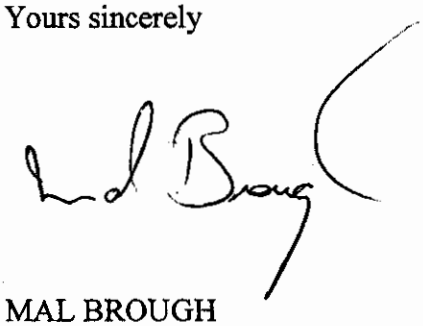
More specifically, clause 566-20, like section 1316A of the Corporation Act, confirms the common law position that a corporation is not entitled to the privilege against self-incrimination (see *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, *Trade Practices Commission v Abbco Ice Works Pty Limited* (1994) 52 FCR 96, V Waye, 'The Corporation and Legal Professional Privilege' (1997) 8 *Aust Jnl of Corp Law* 25 and *Ford's Principles of Corporation Law* (11th ed, 2003) at [4.120]). The common law reflects the accepted position that the privilege against self-incrimination developed historically to protect individuals from oppressive methods of obtaining evidence and that its extension to corporations, whose prosecution usually relies on documents in the corporation's possession, may often make the liability of corporations to criminal sanction unenforceable.

Similar limitations on self-incrimination immunities have also been accepted as appropriate for legislation governing the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority and the Australian Competition and Consumer Commission in the exercise of their corporate regulation responsibilities following a number of enquiries and empirical research (see the 'Use Immunity Provisions in the Corporations Law and the Australian Securities Commission law', Joint Statutory Committee on Corporations and Securities (1991) and the 'Review of the Derivative Use Immunity Reforms' by John Kluver (1997)).

It should also be noted that clause 566-20 has no effect on the privilege against self-incrimination for natural persons.

In light of the above, the Government is of the view that clause 566-20 of the CATSI Bill does not trespass unduly on personal rights and liberties.

Yours sincerely



MAL BROUGH

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Senator the Hon Robert Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT

Dear Senator Ray Robert,

I am writing in relation to the Scrutiny of Bills Alert Digest No 7 of 2006 (9 August 2006).

The Digest contains the Committee's comments regarding the Migration Amendment (Visa Integrity) Bill 2006, which was introduced into the Senate on 21 June 2006.

The Committee has sought my advice in relation to the Bill. My advice in response to the Committee's comments is set out in the Attachment to this letter.

Thank you for bringing this matter to my attention.

Yours sincerely

Amanda Van

AMANDA VANSTONE

Retrospective application

Schedule 1, items 1 and 5

The Committee notes that items 2 and 6 of Schedule 1 to the bill provide for the amendments proposed to be made by items 1 and 5 respectively of that Schedule to apply to a non-citizen child who has been born in Australia on or after 1 September 1994.

The Committee states that the explanatory memorandum describes the effect of each of these items and notes that the date in question corresponds with the introduction of the concept of 'immigration clearance' and the relevant provisions into the Act by the *Migration Reform Act 1992*. It states further that the explanatory memorandum does not indicate whether this retrospective application would adversely affect any non-citizen child. The Committee seeks the Minister's advice as to why such a long period of retrospectivity is necessary in each case and whether it would result in a detrimental effect on people.

The Committee is of the view that pending the Minister's advice this 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.

Response to Committee

Items 1 and 2

Item 1 inserts new paragraph (ba) into subsection 172(1) of the *Migration Act 1958* (the Act).

Subsection 172(1) sets out when a non-citizen is immigration cleared. Immigration clearance is the process which regulates the entry of people to Australia to ensure that those who enter have authority to do so, that they are who they claim to be and that they provide other information if required to do so.

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