
# SENATE STANDING COMMITTEE

# FOR THE

# SCRUTINY OF BILLS

## FOURTH REPORT

## OF

## 2001

## 28 March 2001

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## MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
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

## FOURTH REPORT OF 2001

The Committee presents its Fourth Report of 2001 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:

Australia New Zealand Food Authority Amendment Bill 2001

Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000

Migration Legislation Amendment (Integrity of Regional Migration Schemes) Bill 2000

Pig Industry Bill 2000

Remuneration Tribunal Amendment Bill 2000

# Australia New Zealand Food Authority Amendment Bill 2001

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 2 of 2001*, in which it made various comments. The Parliamentary Secretary to the Minister for Health and Aged Care has responded to those comments in a letter dated 26 March 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Parliamentary Secretary's response are discussed below.

### *Extract from Alert Digest No. 2 of 2001*

This bill was introduced into the Senate on 8 February 2001 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Health and Aged care]

The bill proposes to amend the *Australia New Zealand Food Authority Act 1991* to implement food regulatory reforms agreed to by the Council of Australian Governments on 3 November 2000. These reforms include the establishment of:

- a Ministerial Council to develop domestic food regulation policy as well as policy guidelines for setting domestic food standards, and to make arrangements to provide for high level consultation with key stakeholders;
- Foods Standards Australia New Zealand – a new statutory authority based on the existing Australia New Zealand Food Authority – to develop domestic food standards that are to be adopted nationally; and
- an Authority Board that will approve standards developed by the Authority and notify those standards to the Ministerial Council.

The bill also proposes a technical correction to the *Australia New Zealand Food Authority Amendment Act (No. 2) 1997* and makes consequential amendments to the *Agricultural and Veterinary Chemicals Act 1994*; *Gene Technology Act 2000*; *Imported Food Control Act 1992*; *Industrial Chemicals (Notifications and Assessments) Act 1989;* and *Therapeutic Goods Act 1989.*

**Retrospective commencement**
**Subclauses 2(3) and (4)**

By virtue of subclause 2(3) of this bill, Part 2 of Schedule 1 is to have commenced retrospectively on 23 December 1999, immediately after the commencement of an earlier amendment to the Principal Act. However, the amendment proposed in this Part seems to be technical only – remedying an incorrect paragraph reference in the previous amending bill.

In a similar manner, subclause 2(4) of the bill provides that Schedule 2 is to have commenced retrospectively on 16 December 1997, immediately after the commencement of another earlier amendment to the Principal Act. However, the amendment proposed in this Schedule similarly seems to be technical in nature – clarifying that a "variation of a food regulatory measure" includes, and has always included, the revocation of a food regulatory measure.

Nevertheless, the Committee **seeks the Minister's confirmation** that no person will be disadvantaged by the retrospective commencement of these provisions.

*Pending the Minister's confirmation, the Committee draws Senators' attention to these 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 Parliamentary Secretary to the Minister*

As Parliamentary Secretary to the Minister for Health and Aged Care, Dr Michael Wooldridge, I am responding on the Minister's behalf.

**Subclause 2(3)**

This subclause will commence Item 178 of Part 2 of Schedule 1 of the Bill on 23 December 1999. Item 178 substitutes the reference to "paragraph (1)(n)" in subsection 7(2) of the Australia New Zealand Food Authority Act 1991 (the Act) with a reference to "paragraph (1)(o)". This remedies an incorrect paragraph reference in that subsection made by, the Australia New Zealand Food Authority Amendment Bill 1999 (the 1999 Bill).

Item 9 of the 1999 Bill substituted a new subsection 7(1) into the Act. This new subsection 7(1) inserted a renumbered list of the functions of the Australia New Zealand Food Authority (ANZFA) and also inserted some new functions. Item 10 of the 1999 Bill then incorrectly inserted a reference to "paragraph 7(1)(n)" into subsection 7(2) of the Act instead of a reference to "paragraph 7(1)(o)". However, it

was paragraph 7(l)(o) that replaced original paragraph 7(1)(1a) that was originally referred to in subsection 7(2) of the Act, not paragraph 7(1)(n). Original paragraph 7(1)(1a) provided that a function of the Authority was to make the Authority's knowledge, expertise, equipment, facilities and intellectual property available to other persons on a commercial basis".

This function has been in the Act for some time. It is this function to which subsection 7(2) of the Act originally referred, and to which it was intended to continue to refer when it was amended by the 1999 Bill to provide that:

"The function conferred by paragraph (1)(n) (sic):
(a) can only be exercised:
    (i) for a purpose for which the Parliament has power to make laws; or
    (ii) to utilise the Authority's spare capacity ..."

The current incorrect reference to paragraph 7(1)(n) has the consequence of meaning that ANZFA can only exercise its function set out in paragraph 7(1)(n), that is, of participating in international, regional and bilateral negotiations on matters that may be included in standards, for purposes for which the Parliament has the power to make laws, and to utilise the Authority's spare capacity. This was not intended.

The retrospective commencement of Item 178 of Part 2 of Schedule 1 of the Bill is merely to correct an incorrect reference in subsection 7(2) that in any event under the "slip rule" might be interpreted as referring to current Item (1)(o).

**Subclause 2(4)**

The Alert Digest notes that subclause 2(4) of the Bill provides that Schedule 2 of the Bill is to have commenced retrospectively on 16 December 1997, immediately after the commencement of an earlier amendment to the Principal Act. However it does not, as stated by the Alert Digest, have the effect of "clarifying that a "variation of a food regulatory measure includes, and has always included, the revocation of a food regulatory measure." Instead, subclause 2(4) retrospectively substitutes the incorrect reference to the "Public Service Act 1997" made by that earlier amending Bill with a reference to the Public Service Act 1999 - that is, to the correct year in which the new Public Service Act was passed. This is merely a technical correction and no person will be disadvantaged by it.

The Alert Digest's description of the impact of subclause 2(4) of the Bill leads me to believe that it may have intended to refer instead to subclause 2(1)(b) of the Bill. It is that subclause that provides that Item 179 of Part 3 of the Bill will not have a retrospective commencement but will commence on the day the Act receives the Royal Assent. Item 179 is an explanatory provision only. It makes clear that a "variation of a food regulatory measure includes, and is taken always to have included, a reference to the revocation of a food regulatory measure". This is a technical amendment only.

The Act at present enables ANZFA to develop food standards and variations of food standards. Once the Bill amends the Act, the statutory authority Food Standards Australia New Zealand will have similar powers. Were variations of food standards not allowed to include revocations of food standards, then persons who relied upon previous variations of standards that had the effect of revoking earlier standards would be disadvantaged. They would have acted in reliance upon the purported revokations, but would continue to have obligations under the law of which they are unaware, and which were not in any event intended by the Ministerial Council that

approved the relevant variations (the Australia New Zealand Food Standards Council).

Similarly, future variations of food standards approved by FSANZ that have the effect of revoking previous food standards, and that are not objected to by the new Australia and New Zealand Food Regulation Council, would have no effect.

I trust that this response assists the Committee.

The Committee thanks the Parliamentary Secretary for this response.

# Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2001*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 26 March 2001. 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. 1 of 2001*

This bill was introduced into the House of Representatives on 6 December 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Justice and Customs]

Part of a package of three bills in relation to the management and processing of cargo, the bill proposes to amend the *Customs Act 1901* and *Customs Administration Act 1985* to modernise the way in which Customs manages the movement of cargo into and out of Australia.

The bill creates the legal framework for an electronic business environment for cargo management; establishes a new approach to compliance management that recognises that 'one size doesn't fit all'; and improves controls over cargo and its movement where there has been a failure to comply with regulatory requirements.

The bill also repeals the *Import Processing Charges Act 1997*.

**Search and entry provisions**
**Proposed new Subdivision J of Division 1 of Part XII**

Part 5 of Schedule 1 to the bill inserts a number of provisions which repeal the existing 'audit' powers in the Customs Act, and replaces them with new 'monitoring powers'. In his Second Reading Speech, the Minister observes that these provisions "have been drafted in accordance with the Fourth Report of the Senate Standing Committee for the Scrutiny of Bills dated 6 April 2000 which examined entry and search provisions in Commonwealth legislation".

Specifically the bill provides that:

- only Customs officers authorised by the CEO will be able to exercise the powers of monitoring officers, and such officers must be suitably qualified and have the ability and experience to exercise those powers (proposed subsection 214AC(2));
- authorised officers must carry an identity card at all times while exercising monitoring powers (proposed section 4C)
- the primary means of entry to premises for monitoring purposes is through consent, which must be given and withdrawn in writing (proposed section 214AE);
- entry may also be pursuant to a warrant issued by a magistrate (proposed section 214AF);
- a monitoring officer may give an occupier notice of intended entry, but this is optional (proposed section 214AD);
- a monitoring officer may ask an occupier who has consented to entry to answer questions or provide reasonable assistance – a refusal will not constitute an offence (proposed subsections 214AH(1) and 214AI(1));
- a monitoring officer who enters premises under warrant may require an occupier to answer questions and provide reasonable assistance – a refusal will be an offence of strict liability (proposed subsections 214AH(2) and 214AI(3) and (4));
- the powers exercisable by monitoring officers include:
- the current power to inspect and make copies of documents, as well as 'records';
- the power to inspect, examine, count, measure, weigh, gauge, test or analyse, and take samples;
- the power to take equipment or material on to premises;
- the power to undertake systems audits to check the ability of computer-based system to accurately generate or record information or documents;
- the power to operate electronic equipment used to store records and documents used in the communication of information to Customs and to copy relevant records and documents; and
- the power to search premises.

- in entering premises and exercising monitoring powers, an officer may use such force as is necessary and reasonable in the circumstances, but only against things – there is no power to use force against persons (proposed subsection 214AC(3))
- where a monitoring officer finds evidence of the commission of a Customs-related offence, that officer has the power to secure that evidence until a warrant to seize can be obtained – the power to secure evidence lapses after 72 hours if a warrant to seize has not been obtained; and
- Customs must pay reasonable compensation where damage is caused to equipment or data as a result of carelessness in its operation of that equipment.

The Committee notes that many of these changes draw on principles set out in its *Fourth Report of 2000*, and thanks the Minister for having regard to those principles. However, some principles do not seem to have been addressed in the bill. The Committee, therefore, **seeks Minister's advice** as to whether the legislation or operational procedures should provide for:

- an occupier to be informed of his or her rights and responsibilities, and given an opportunity to have independent third party present, where a search occurs under warrant;
- the situation of officers exercising monitoring powers and finding evidence of an offence that is not a Customs-related offence; and
- whether Customs intends reporting annually to the Parliament on the exercise of its monitoring powers.

## *Relevant extract from the response from the Minister*

**Rights and responsibilities under a monitoring warrant**

The Committee asked whether the legislation or operational procedures should provide for an occupier to be informed of his or her rights and responsibilities and given an opportunity to have an independent third party present, where a search occurs under a warrant.

The Bill proposes two methods for monitoring compliance - either with the consent of the occupier or under a 'monitoring warrant'. The preferred means of entry is with the consent of the occupier. Under the Government's policy in respect of criminal law matters, 'monitoring warrants' have traditionally been employed where search powers are primarily necessary to monitor compliance with legislative requirements, rather than for the investigation of a specific offence.

The monitoring powers proposed are for the purpose of assessing compliance with Australian Customs Service (Customs)-related laws, the correctness of information communicated to Customs, and whether the record keeping, accounting and computing systems accurately record or generate that information. The power to search is included in the monitoring powers in accordance with similar schemes in Commonwealth legislation. It might be necessary to exercise this power, for example, to search for documents or records on the premises that relate to the communication of information to Customs.

It is proposed that an occupier would not be prevented from having a third party present during a search of premises if requested. This principle would apply whether monitoring powers are exercised with the consent of the occupier or under a warrant. This approach reflects Customs current practice.

Customs is currently developing guidelines on the administrative aspects of the exercise of monitoring powers proposed in the Bill. The purpose of the guidelines is to provide a framework for Customs officers to administer specific elements of the legislation. The guidelines will include informing occupiers of their rights and responsibilities, regardless of whether the monitoring powers are exercised with the consent of the occupier or under a monitoring warrant. Rights such as the privilege against self-incrimination would be included in this notification.

**Evidence of an offence that is not a Customs-related law**

The Committee has sought advice on the situation of officers exercising monitoring powers and finding evidence of an offence that is not a Customs-related offence.

While the purpose of exercising monitoring powers is to assess compliance in a self-assessment environment with Customs-related laws, a monitoring officer may find a thing that the officer believes on reasonable grounds affords evidence of the commission of an offence against a Customs-related law and may be lost, destroyed or tampered with. In such circumstances, monitoring officers will be able to secure evidence of the commission of an offence against a Customs-related law for 72 hours or until a seizure warrant is obtained.

Customs-related law is defined in new section 4B (item 11 of Schedule 1 of the Bill) to include the *Customs Act 1901* (the Customs Act), the *Excise Act 1901* and any other Act, or regulations in so far as they relate to the importation or exportation of goods, where the importation or exportation is subject to compliance with any condition or restriction or is subject to any tax, duty, levy or charge (however described). This broad definition of Customs-related law acknowledges that Customs performs import and export related compliance monitoring on behalf of other Commonwealth agencies, such as the Australian Quarantine and Inspection Service (AQIS), the Australian Taxation Office (ATO) and other permit issuing agencies.

Where a monitoring officer finds evidence of the commission of an offence against a law that is *not* a Customs-related law the monitoring officer may inform another relevant agency, usually the police. Customs officers are permitted to disclose this type of information to other agencies under section 16 of the *Customs Administration Act 1985*.

**Reporting to the Parliament**

The Committee has sought advice on whether Customs intends reporting annually to the Parliament on the exercise of its monitoring powers.

It is proposed to continue the current practice of reporting statistical information on the result of compliance activities undertaken by Customs in the Annual Report of the Australian Customs Service. This information is reported quantitatively.

The Committee thanks the Minister for this response and notes that Customs is currently developing guidelines which, among other things, are to make provision for informing occupiers of their rights and responsibilities. While the development of such guidelines is important, they would seem to be essentially administrative documents, and their scope and legal effect is unclear.

For example, if the guidelines as issued fail to provide that occupiers be informed of their rights and responsibilities, or if such a provision were included but later removed from the guidelines, it is unclear what effect this would have on the rights of occupiers. The remedies available to an occupier if Customs officers fail to observe such a guideline are also unclear, as is whether the guidelines are to be tabled in the Parliament, or disallowable, or otherwise made publicly available for scrutiny.

Rights and liberties are too significant to be left to administrative documents. The Committee, therefore, **seeks the Minister's further advice** as to the status of the Customs guidelines, and why information about the rights and responsibilities of occupiers when their premises are to be searched should not be dealt with in the bill itself rather than in guidelines.

*Pending the Minister's further advice, the Committee continues to draw Senators' attention to these 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.*

**Strict liability offences**
**Proposed new sections 243SA, 243SB, 243T, 243U and 243V**

Item 5 of Schedule 2 to the bill proposes to insert in the *Customs Act 1901* new sections 243SA (which deals with the failure to answer questions), 243SB (which deals with the failure to produce books and records), 243T (which deals with making false or misleading statements resulting in the loss of duty), 243U (which deals with false or misleading statements not resulting in the loss of duty) and 243V (which deals with false or misleading statements in cargo reports or outturn reports).

In each case, these new sections create offences of strict liability. Under a strict liability offence, a person may be punished for doing something, or failing to do something, whether or not they have a guilty intent.

These strict liability offences are accompanied by a penalty regime which introduces the option of issuing an infringement notice, to the value of 20% of the penalty that would have been payable if a prosecution had been commenced. Payment of this penalty extinguishes Customs' right to prosecute. However, prosecutions may be commenced where Customs believes it can be proved that a person intended to breach the law.

The Explanatory Memorandum seeks to justify this approach in the following terms:

[T]he mischief intended to be addressed in the legislation is (for the most part) either the late or inaccurate reporting of information to Customs. If this information is received either late or inaccurately, Customs cannot perform its community service obligations of analysing information about incoming cargo so as to ensure that prohibited goods such as drugs are kept out of the country, or that the correct amount of duty and taxes is paid as a result of the importation or exportation of goods. The intention of the communicator is therefore irrelevant. The critical outcome is the quality of the information …

As the offences can be characterised as being technical or regulatory in nature, it is appropriate in the circumstances for there to be an infringement notice/strict liability penalty regime in place.

Where a person is charged with a strict liability offence, the prosecution does not have to prove intent. This invites consideration of the defences available to those charged with such offences. At common law, there is a defence of honest and reasonable mistake of fact. The Criminal Code makes available defences such as mistake of fact, intervening conduct or event, duress, sudden or extraordinary emergency and self-defence.

In addition to these defences, the bill provides two further defences where a person is charged with an offence under proposed section 243T (false or misleading statements resulting in the loss of duty). These additional defences are:

- voluntary disclosure of false or misleading statements – where this occurs before the issue of a monitoring notice, and is made in writing, and where any additional duty is paid or any refund or drawback is repaid; and
- genuine uncertainty as to the accuracy or completeness of the information included in a statement made to Customs which has duty implications (this defence is in similar terms to the existing section 234V in the *Customs Act 1901*) – the Explanatory Memorandum states that this defence acknowledges that "sometimes not all relevant information in relation to goods is available" to owners or their agents and where the doubtful or incomplete information is identified, and reasons given for the uncertainty, no penalty should apply.

The defence of voluntary disclosure is also made available to a person charged with an offence under proposed section 243U (false or misleading statements not resulting in a loss of duty), but not the defence of genuine uncertainty. The Explanatory Memorandum notes that strict liability has been introduced in this situation "to improve the quality of information received by Customs. This data is used for trade statistics and border control purposes and any inaccuracy in that data impinges on Customs' ability to perform its functions in these areas effectively".

No further specific defences are made available to a person charged with making false or misleading statements in cargo reports or outturn reports (under proposed section 243V).

The Committee recognises that creating offences of strict liability may be acceptable in some circumstances. However, it is not clear why a failure to answer questions or produce records should be a strict liability offence in a Customs context, when it is not a strict liability offence in many other similar contexts (see for example, *Agricultural and Veterinary Chemicals Code 1994* s 144; *Industrial Chemicals (Notification and Assessment) Act 1989* s 88; *Health Insurance Commission Act 1973* s 8R).

In creating these strict liability offences (which, arguably, impose greater burdens on persons charged) it is also not clear whether the substantive penalties have been reviewed for the offences when prosecuted. In this regard, the Committee draws attention to its *Eighth Report of 1998* which dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information.

In addition, it is not clear why the defence of genuine uncertainty should be applicable to statements which result in a loss of duty, but not to statements which result in no loss of duty, or to statements in cargo or outturn reports.

Finally, where a matter is dealt with under the infringement notice scheme, it is not clear whether an offence will be recorded against the person concerned. The Committee, therefore, **seeks the Minister's advice** on these four issues.

*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*

**Strict liability**

The Committee has sought further explanation as to why failure to answer questions or produce records should be strict liability offences in a Customs context.

Strict liability offence regimes are common across jurisdictions to encourage compliance with regulatory requirements ranging from speeding offences to not being able to substantiate entitlement to diesel fuel rebate. The approach in this Bill reflects overall Government policy on strict liability. Strict liability is a deliberate (and necessary) policy to catch inadvertent errors, because otherwise the self-assessment regime would be seriously undermined by people failing to take sufficient care. In accordance with criminal law policy, the penalties for these offences are relatively modest.

While the conduct that is the subject of each offence may not appear significant when viewed in isolation, there are significant consequences for the community where the regulatory framework is breached. There is significant risk to revenue if imports or exports are inaccurately reported, as well as to the community if prohibited imports such as narcotics and weapons are not stopped at the border. The proposed controls and sanctions are designed around early identification and intervention of high-risk cargo.

The Government believes that these risks, that is the risk to the community and to the revenue, justify the introduction of strict liability offences for breaches of the regulatory mechanisms designed to reduce those risks.

Strict liability offences also lend themselves to using infringement notices to impose a lesser penalty administratively rather than prosecuting in court in the first instance. Infringement notices are justified by the efficiency and cost savings they provide and as low-key means of applying sanctions to unacceptable performance.

*Failure to answer questions*

Customs uses risk assessment to fulfil its border protection and revenue collection responsibilities. The information provided to Customs is the basis of the risk assessment. Failure to provide information affects a Customs officer's ability to conduct a proper risk assessment, in the same way that false or misleading information also impedes proper risk assessment. Consequently, inaccurate risk assessments can allow prohibited imports, such as narcotics and weapons into the community. Risk assessments in 'real time' audits are especially important, where risk assessment is conducted immediately the cargo arrives. Delays in the risk assessment can hinder the release of cargo.

While the Committee has provided examples of offences for failure to answer questions that are not offences of strict liability, there are also examples of strict liability offences in Commonwealth legislation for failing to answer questions. In section 70A of the *Quarantine Act 1908* a quarantine officer may ask questions where the officer is searching, examining or entitled to search or examine goods. The context of the Quarantine offence is similar to the Customs context - that is the search and examination of goods in a controlled environment. The *Trade Marks Act 1995* also has a strict liability offence for failing to answer questions that a person is lawfully required to answer (section 154 refers).

It also should be noted that when questions are asked during the exercise of monitoring powers, the Bill proposes that there will be only a strict liability offence for failing to answer a question put to a person where the monitoring officer enters those premises under a monitoring warrant.

Where a monitoring officer enters premises with the *consent* of the occupier, the occupier is not obliged to answer any questions put to them by the monitoring officer. A person who is asked a question they are required to answer may exercise their privilege against self-incrimination.

*Failure to produce documents or records*

The reporting of information to Customs is primarily done electronically. To assess the correctness of information communicated by, or on behalf of, a person to Customs it is necessary for Customs to be able to examine the documents or records that formed the basis of information supplied to Customs. While Customs assesses compliance by both 'real time' and post transaction audits, access to source documents and records is especially important in post transaction audits where information provided is treated, at first instance, as true and correct. The strict liability offence for failing to produce records is necessary to underpin Customs self-assessment regime.

There are strict liability offences in other Commonwealth legislation for failing to produce documents or records. In section 50 of the *Excise Act 1901*, manufacturers must keep records and on demand produce them to the requesting officer. In section 164AC of the Customs Act failure to produce records where there is an audit of diesel fuel rebate applications results in a penalty equal to the amount of the rebate applied for and not substantiated. The *Quarantine Act 1908* also has a strict liability offence for failing to produce documents requested by a Quarantine officer (section 38 refers).

Where documents or records are required to be produced under proposed sections 240AA and 240AC of the Customs Act, there must be period of at least 14 days from the day of notice within which to produce. It is proposed that, in most cases the time period for production will be 14 days and, when the documents are overseas, 16 days. Therefore the penalties cannot be imposed for failure to produce documents or records until after the period specified in the notice to produce the documents or records has expired. Additionally a person who is asked to produce a document or record may exercise their privilege against self-incrimination.

The defences in the *Criminal Code*, as it applies to the Customs Act, will be available for the offences of strict liability introduced by the Bill.

In view of the above it is considered appropriate that failing to answer questions and failing to produce documents or records be strict liability offences.

**Penalties**

The Committee asked whether the substantive penalties have been reviewed for the offences when prosecuted.

The strict liability offence and infringement notice system proposed in the Bill was developed in consultation with the Attorney-General's Department.

The penalty levels for each strict liability offence in the Bill were settled with the Criminal Law Branch of the Attorney-General's Department in accordance with Commonwealth Criminal Law policy.

**Defence of genuine uncertainty**

The Committee has sought further explanation why the defence of genuine uncertainty should be applicable to statements that result in a loss of duty, but not to statements which result in no loss of duty or to statements in cargo or outturn reports.

Currently section 243V of the Customs Act allows people to avoid an administrative penalty for a false or misleading statement resulting in an underpayment of duty by stating their uncertainty as to the correctness of the information at the time of lodging the import entry. This procedure is known throughout Customs and the importing community as 'amber line'.

The retention of this facility as a defence to new section 243T of the Customs Act is a legacy of the current penalty regime. Nowhere else in Commonwealth legislation does a similar defence exist for corresponding offences for false and misleading statements - section 243T is a special case. The defence is available for an offence against new section 243T to ensure that the scope of the new offence is not wider than that of the current administrative penalty provision.

The defence is considered appropriate for false or misleading statements resulting in a loss of duty because the penalty for such statements is directly related to the amount of duty short paid. The greater the short payment, the greater the penalty - with no upper limit. New sections 243U and 243V (for false or misleading statements not resulting in a loss of duty and in cargo and outturn reports), on the other hand, have maximum penalties of 50 penalty units.

The 'real time' context of cargo and outturn reporting is another factor that makes this defence unsuited to false or misleading statements in cargo and outturn reports. In the case of entries there is an opportunity to 'settle-up' the correct amount of duty after verifying information about which the communicator was initially uncertain. In contrast, Customs must be able to rely on the accuracy of the information in cargo and outturn reports at first instance to make sound decisions in relation to the release of cargo upon arrival in Australia. There is no opportunity to remedy the situation, for example, of illicit drugs being delivered into home consumption on the basis of a false or misleading statement made in a cargo report.

As Customs risk assessment of cargo is dependent on timely and accurate reporting, there is no scope for the defence of uncertainty to apply to this offence. The preferred outcome is that any uncertainty is addressed before the report is made.

There are other reasons for not extending the defence to false or misleading statements not resulting in a loss of duty (particularly in relation to exports). These include:

- In most cases exporters should know exactly what goods they are sending out of the country as they are in possession of those goods before they leave, unlike importers who often require clarification on the exact nature of the goods arriving;

- Where it is known that an exporter will not be able to ascertain particular information until after the goods are exported (for example the exact quantity of bulk commodities may not be known until after they are loaded onto a ship), section 114B of the Customs Act allows a person to apply for confirming exporter status;

- the delay of export cargo for clarification purposes may lead to those goods not being shipped as clearance cannot be issued until clarification is made - a risk not present for imported cargo.

**Recording of offences**

The Committee asked where a matter is dealt with under an infringement notice, whether an offence will be recorded against the person concerned.

New section 243ZB of the Customs Act provides that where the penalty specified in the infringement notice is paid any liability for the offence is discharged. It also provides that further proceedings cannot be taken for the offence and that the person is not regarded as having being convicted of the offence. These provisions will not allow an offence to be recorded against a person where a matter is dealt with entirely under the infringement notice scheme.

Customs will, however, keep an administrative record of the number and nature of infringement notices served on a person. The purpose of this record will be to assist in deciding whether to issue an infringement notice, prosecute, or do nothing, on any future commission of a strict liability offence.

If you have any further queries on any of the above issues, please do not hesitate to contact me or my office.

The Committee thanks the Minister for this response which indicates that no offence will be recorded against a person where a matter is dealt with entirely under the infringement notice scheme. However, the Committee notes that Customs proposes to keep an administrative record of the number and nature of infringement notices issued – apparently for an indefinite period. The Committee **seeks the Minister's further advice** as to whether 'stale' infringement notices are to be removed from this record after a period of time (in the same manner as the 'spent convictions' scheme operates under the Crimes Act).

# Migration Legislation Amendment (Integrity of Regional Migration Schemes) Bill 2000

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 18 of 2000*, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 24 December 2000. 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. 18 of 2000*

This bill was introduced into the House of Representatives on 29 November 2000 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to introduce a new cancellation power for regional sponsored migration scheme visas. The regional sponsored migration scheme is intended to encourage the migration of skilled persons for the benefit of regional and rural Australia. The amendments seek to prevent any potential misuse of the scheme, and discourage persons who have no genuine intention of settling in rural or regional Australia. The amendments will not affect existing scheme visa holders or persons who are granted a scheme visa as a result of an application made before the amendments commence.

### Rights and liberties on the termination of employment
### Proposed new subsection 137Q(2)

Among other things, this bill proposes to include a new section 137Q in the *Migration Act 1958*. Under proposed subsection 137Q(2), the Minister may cancel a regional sponsored employment visa held by a person if the Minister is satisfied that "the employment terminated" within 2 years of commencement and "the person does not satisfy the Minister that he or she has made a genuine effort to be engaged in that employment for the required [2 year] period". Where a visa is cancelled under section 137Q, visas held by other members of the family unit are similarly cancelled under proposed section 137T. Paragraph 137S(b) indicates that, in some circumstances, a decision to cancel a visa may be reviewable under Part 5 of the Act.

In his Second Reading Speech, the Minister provides an example of a situation in which the new cancellation power could be used. In this example, a person applied for, and was granted, a regional sponsored migration scheme visa at a Departmental office overseas. On arrival in Australia, this visa holder informed his nominating employer that he did not want to start work immediately, then moved to a capital city in another State and presented at Centrelink for assistance. The Committee has no concerns with legislation which addresses situations such as these.

Elsewhere in his Second Reading Speech, the Minister observes that the new cancellation power "would not generally be used where a nominating employer terminates the employment contract within the two year period". Cancelling a visa in such a situation "would not serve the purposes of the scheme particularly where the circumstances leading to the termination are outside the employer's or visa-holder's control".

It is arguable that such situations of involuntary termination may be covered by the proviso that a visa holder must demonstrate "a genuine effort" to be engaged in employment for the required period. However, it would lead to greater certainty if the bill itself reflected the approach to involuntary termination which is referred to in the Second Reading Speech. The Committee, therefore, **seeks the Minister's advice** as to whether the bill should explicitly provide that a visa will not be cancelled where the visa holder's employment is terminated in circumstances outside the employer's or visa-holder's control. The Committee also **seeks the Minister's advice** as to the circumstances in which a decision to cancel a regional sponsored employment visa is reviewable under the Act.

*Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly or 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 scope of the cancellation power in proposed section 137Q**

The Migration Legislation Amendment (Integrity of Regional Migration Schemes) Bill 2000 ("the Bill") proposes to amend the *Migration Act 1958* ("the Act") to introduce a new visa cancellation scheme for regional sponsored migration scheme visas.

The regional sponsored migration scheme encourages the migration of skilled persons particularly for the benefit of regional and rural Australia. In order to achieve a more even distribution of skilled migrants across the country, substantial

concessions are made in relation to the criteria for the grant of a regional sponsored migration scheme visa. For instance, only diploma level qualifications are needed and language and age requirements may be waived.

However, the key criterion for the grant of a regional sponsored migration scheme visa is that the visa applicant has been nominated by an employer in respect of an approved appointment that will provide full-time employment for at least two years.

Under proposed section 137Q, a regional sponsored migration scheme visa may be cancelled in two broad circumstances:

- where the visa holder has not commenced the employment referred to in the relevant employer nomination within the period prescribed in the *Migration Relations 1994* and he or she has not made a genuine effort to commence that employment (subsection 137Q(1)); and

- where the visa holder commenced the employment referred to in the employer nomination but that employment terminated within the required employment period of 2 years and he or she has not made a genuine effort to be engaged in that employment for the required period (subsection 137Q(2)).

It should be emphasised that this proposed cancellation power is discretionary in nature.

The purpose of the new visa cancellation scheme is to promote the continued integrity of the regional sponsored migration scheme by:

- safeguarding against any potential abuse of the scheme; and

- discouraging persons who have no genuine intention of settling in rural of regional Australia.

The Committee has sought my advice as to whether the Bill should explicitly provide that a regional sponsored migration scheme visa will not be cancelled where the visa holder's employment is terminated in circumstances outside the employer's or visa-holder's control. For example, generally a regional sponsored migration scheme visa will not be cancelled where the visa holder has failed to commence, or remain, in the relevant employment because of a downturn in business activity, closure of business, financial loss or bankruptcy.

This is because, as the Committee has noted, in these types of circumstances it cannot be said that the regional sponsored migration scheme visa holder failed to demonstrate "a genuine effort" to commence, or remain, in the employment referred to in the relevant employment nomination.

However, a situation may arise where, for instance, the closure of the business is attributable to a deliberate and/or fraudulent act. It is possible that this may even be the result of some collusion between the nominating employer and the regional sponsored migration scheme visa holder.

If the Bill explicitly provided that a regional sponsored migration scheme visa will not be cancelled in such situations of "involuntary termination" then the stated purpose of the new visa cancellation scheme may be undermined.

Therefore, the Bill, as currently drafted, safeguards in a flexible manner against any future abuse of the regional sponsored migration scheme by persons with non-genuine intentions.

**The circumstances in which a decision to cancel a regional sponsored migration scheme visa is reviewable under the *Migration Act 1958***

Part 5 of the Act provides for merits review of certain decisions made under the Act. Under subsection 338(3), a decision under proposed section 137Q to cancel a regional sponsored migration scheme visa held by a non-citizen who is in Australia at the time of the cancellation will be an "MRT-reviewable decision" unless the decision:

- is a decision covered by subsection 338(4) (a decision to refuse to grant, or to cancel, a bridging visa); or

- is made at a time when the non-citizen was in immigration clearance; or

- was made under subsection 134(1), (3A) or (4) (cancellation of business visas) or section 501 (refusal or cancellation of visa on character grounds).

Therefore, merits review will be available under the Act for a decision to cancel a regional sponsored migration scheme visa. In addition, this will continue to be the case when the Administrative Review Tribunal commences.

The Committee thanks the Minister for this response and notes that a decision to cancel a regional sponsored migration scheme visa will be subject to merits review.

# Pig Industry Bill 2000

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 18 of 2000*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter received 14 February 2001. 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. The Committee notes that the Senate passed this bill, with amendments, on 26 March 2001.

## *Extract from Alert Digest No. 18 of 2000*

This bill was introduced into the House of Representatives on 30 November 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Forestry and Fisheries]

The bill proposes to create a pig industry services body responsible for the industry's strategic policy development as well as the industry's marketing and R&D services, formerly provided by the Australian Pork Corporation (APC) and the Pig Research and Development Corporation (PRDC). The bill will repeal the enabling legislation for the APC and the PRDC and provide for the transfer of assets, liabilities and staff of the statutory authorities to the new industry services body.

The new not-for-profit industry services body, limited by guarantee, will operate under Corporations Law and all statutory levy payers will be eligible to register for membership and full voting rights in the industrial services body.

The bill also provides the Minister with the power to enter into a funding contract with an eligible body to enable that body to receive and administer levies collected by the Commonwealth for industry marketing and promotion, research and development (R&D), and the Commonwealth's matching funding for eligible R&D expenditure. The contract will also impose certain obligations and accountability requirements on the industry services body.

## Parliamentary scrutiny of Ministerial decision
## Subclause 9(1)

Subclause 9(1) of this bill authorises the Minister (on behalf of the Commonwealth) to enter into a contract with an eligible body (or with an eligible body and other persons) that provides for the Commonwealth to make marketing, R&D and matching payments to that body. An eligible body is defined simply as "a body that is registered under the Corporations Law as a company limited by guarantee". "Other persons" is not defined, and the bill does not specify any qualifications or attributes which those persons should or should not possess.

Once a funding contract with a body is entered into, the Minister may then declare that body to be the pig industry services body.

The bill makes no provision for Parliamentary scrutiny of these Ministerial decisions. In its *Seventeenth Report of 2000* the Committee drew attention to a similar Ministerial discretion to enter into a deed of agreement with, and to determine, an industry services body for the horticulture industry. Notably, the Horticulture Marketing and Research and Development Services Bill 2000 also authorised the Minister to declare that a body should cease to be the relevant industry services body – something apparently not contemplated by this bill.

The Committee, therefore, **seeks the Minister's advice** as to why the exercise of the discretion to contract with, and declare, an eligible body should not be subject to Parliamentary scrutiny or some form of review. The Committee also **seeks the Minister's advice** as to the persons contemplated by the term "other persons" and whether these persons should be limited in some way by reference to appropriate qualifications or attributes.

Finally, the Committee notes that Horticulture Marketing and Research and Development Services Bill 2000 was subsequently amended in the Senate to take account of issues raised by the Committee. The Committee **seeks the Minister's advice** as to whether this bill might be amended in similar terms.

*Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may insufficiently subject the exercise of delegated 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*

**Subclause 9(1)**

**Why the exercise of the discretion to contract with, and declare, an eligible body should not be subject to Parliamentary scrutiny or some form of review?**

The decision relating to the declaration of the company as the industry services body is properly seen as an administrative, rather than a legislative decision to be taken by the Minister.

The declaration of the industry services body is of lesser significance than the entering into of the contract. The main significance of the declaration is that it nominates the successor body to the Australian Pork Corporation and the Pig Research and Development Corporation thereby enabling the one off transfer of assets and liabilities. The additional aspect of the declaration is that the Minister's power of direction is associated with it. There is little to be gained in providing for the declaration to be subject to Parliamentary scrutiny.

The funding arrangements are implemented as a consequence of the contract. However, as a contract is not a legislative or statutory instrument it is not normally disallowable in Parliament. This is consistent with the recently implemented wool and horticulture models.

Similar to wool and horticulture arrangements, the contract with Australian Pork Limited will be made publicly available. The contract and APL constitution will be made available to Members of Parliament as soon as they are closer to final resolution and prior to the debate in the Senate.

**Who are the persons contemplated by the term 'other persons' and whether these persons should be limited in some way by reference to appropriate qualifications or attributes?**

The Minister's ability to enter into a contract with an 'eligible body and other persons' allows flexibility in making the funding contract. It would allow the flexibility for example, for the industry services body to seek the services of another entity to manage the R&D program. At this stage it is not foreseen that this would be the case, however, the principle and the flexibility is the same as has been adopted in the wool industry restructure model.

Placing a limitation in some way to reference to appropriate qualifications or attributes is not considered crucial as the Minister has control over whom the contract is entered into with.

**Can the bill be amended in terms similar to the Horticulture Marketing and Research and Development Services Bill 2000?**

Under the pork arrangements the declaration confirms the contractual arrangements and triggers the commencement of the contract. As such the declaration serves little purpose (although the declaration can be terminated). The contract contains the grounds for terminating or suspending the funding and hence the arrangement.

Similar to the wool and horticulture arrangements, the contact will be made publicly available, and there should be no need for it to be a statutory requirement.

The Committee thanks the Minister for this response. The Committee notes that this bill was amended in the Senate on 26 March 2001 to provide that the declaration of the industry services body is to be subject to Parliamentary scrutiny.

The Committee acknowledges that authorising the Minister to enter into a contract with 'other persons' gives the Minister complete flexibility in making those contractual arrangements. However, the more flexible the power available to the Minister, the more difficult is Parliament's ability (and duty) to adequately scrutinise the exercise of that power. The Committee considers that placing a limitation on 'delegates' by reference to appropriate qualifications or attributes may significantly assist the Parliament in that scrutiny.

For this reason the Committee continues to draw Senators attention to this provision as it may insufficiently subject the exercise of delegated legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

**Non disallowable Ministerial directions**
**Clause 12**

Clause 12 of this bill authorises the Minister to give a binding written direction to the declared pig industry services body if the Minister:

- is satisfied that such a direction is "in Australia's national interest because of exceptional and urgent circumstances"; and
- is satisfied that the direction would not require the body to incur expenses greater than amounts paid to the body under the Act; and
- has given the directors an adequate opportunity to discuss with the Minister the need for the proposed direction and its impact on the body's commercial activities.

Such a direction must be made for a purpose that is within the Commonwealth's legislative power.

Under subclause 12(3), the Minister must table a copy of such a direction within 15 sitting days "unless the Minister makes a written determination that doing so would be likely to prejudice the national interest of Australia or the body's commercial activities".

In its *Seventeenth Report of 2000*, the Committee considered a similar clause in the Horticulture Marketing and Research and Development Services Bill 2000. The Committee again notes that neither "the national interest" nor "exceptional and urgent circumstances" are defined in the bill or referred to in the Explanatory Memorandum. In addition, clause 12 makes no provision for Parliamentary scrutiny of a Ministerial direction to the industry services body. Further, were the Minister to make a written determination not to table such a direction (on national interest or commercial prejudice grounds), it is not clear whether, and how, Parliament would be informed of the fact that such a determination had been made.

With regard to this bill, the Committee **seeks the Minister's advice** as to:

- the circumstances contemplated by the terms "the national interest" and "exceptional and urgent circumstances";

- the reason why the bill makes no provision for Parliamentary scrutiny of directions under clause 12, or how the Parliament is to be made aware of, and able to scrutinise, determinations not to table such directions; and

- the appropriateness of retaining key powers, such as the ability to issue binding Ministerial directions, while establishing a new company which is to be accountable to shareholders for the effective use of funds provided.

The Committee notes that Horticulture Marketing and Research and Development Services Bill 2000 was subsequently amended in the Senate to take account of issues raised by the Committee. The Committee also **seeks the Minister's advice** as to whether this bill might be amended in similar terms.

*Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may insufficiently subject the exercise of delegated 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*

**Clause 12**

Give examples of the circumstances contemplated by the terms 'the national interest' and 'exceptional and urgent circumstances'.

This clause provides the Minister with a reserve power in the event of serious and unforseen circumstances with the potential to affect the nation. The intent is to ensure the application of statutory and Commonwealth funds are not being applied to purposes which might conflict with the national interest. The use of the reserve power could only occur where the Minister is satisfied that such conditions apply.

Such circumstances may arise for example where the industry services body is required to immediately suspend an R&D program because to continue the spending would place the national interest at risk. For instance, it might be inappropriate to continue an ongoing joint research expenditure with a country which Australia has suspended all diplomatic and commercial relations. Similarly a case may arise where a marketing program could threaten to jeopardise Australia's ability to meet its international obligations, for example, marketing assistance which was deemed to be inconsistent with Australia's undertakings in the WTO.

The reason why the bill makes no provision for Parliamentary scrutiny of directions under clause 12 or how the Parliament is to be made aware of, and able to scrutinise, determinations not to table such directions.

The Bill provides for a direction made by the Minister under clause 12 to be tabled in the Parliament within 15 sitting days. The only circumstances where this would not occur is if the Minister makes a written direction that to do so would be likely to prejudice the national interest of Australia or the bodies commercial interests. The latter circumstances are designed to protect the nation and the company in circumstances where to table the direction could be harmful to those interests. It is seen as necessary to provide such safeguards in the legislation, although it is acknowledged that Parliament would not be informed immediately of the determination. The Minister can be questioned about any directions through the normal Parliamentary processes.

**The appropriateness of retaining key powers, such as the ability to issue binding Ministerial directions, while establishing a new company which is to be accountable to shareholders for the effective use of funds provided.**

In moving to a company arrangement for the delivery of services, the legislation, contract and constitution all provide public accountability constraints on how the company operates since levy payer and Government matching funds for R&D are involved. (Noting that the levy funds are raised from industry participants by compulsory statutory taxation by the Commonwealth.) These requirements are necessary to ensure public accountability for use of these funds, while at the same time providing scope for the company to focus on the commercial delivery of the services in an efficient and effective manner to its members.

The Ministerial Direction provision is retained to ensure that in circumstances of the national interest because of exceptional and urgent circumstances, the Government is in a position to issue a direction to the company and have it followed, backed by the legislation, under the constraints contained in clause 12.

Can the bill be amended in terms similar to the Horticulture Marketing and Research and Development Services Bill 2000?

While it is noted that Parliamentary scrutiny is already provided for in Clause 12(3), the bill could be amended in a similar manner as Horticulture if considered appropriate by the Senate.

Thank you for your consideration of these legislative matters.

The Committee thanks the Minister for this response. The Committee notes that, on 26 March 2001, clause 12 of the bill was amended in the Senate to increase the scope for Parliamentary scrutiny of Ministerial directions.

# Remuneration Tribunal Amendment Bill 2000

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 18 of 2000*, in which it made various comments. The Minister for Finance and Administration has responded to those comments in a letter dated 30 January 2001. 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. 18 of 2000*

This bill was introduced into the House of Representatives on 29 November 2000 by the Parliamentary Secretary to the Minister for Finance and Public Administration. [Portfolio responsibility: Finance and Public Administration]

The bill proposes to amend the role of the Remuneration Tribunal in relation to principal executive offices by:

- allowing the Tribunal to make recommendations to the Minister on the classification and commencing remuneration to apply to each principal executive office;
- specifying that the employing body of a principal executive office may determine terms and conditions for the office only in a manner that is consistent with the Tribunal's classification structure for principal executive offices, or in accordance with specific written advice received from the Tribunal; and
- allowing for transitional arrangements for offices that were declared by regulation to be a principal executive office, before drafting of this Bill commenced.

### Inappropriate delegation of legislative power
### Schedule 1, items 2 and 6

Item 2 of Schedule 1 to this bill proposes to add a new paragraph (m) to the definition of ***principal executive office***. This new paragraph includes within the definition "any other office or appointment declared by the Minister … to be a principal executive office".

In similar terms, item 6 of Schedule 1, among other things, proposes to insert a new subsection 3A(1) in the *Remuneration Tribunal Act 1973*. This section authorises the Minister to declare that a specified office or appointment is a principal executive office and, by virtue of proposed new section 3C, such a declaration must be published in the *Gazette*. However, such a declaration is not subject to any Parliamentary oversight. This is in direct contrast to the current provision under which ***principal executive office*** is defined to mean "an office or appointment declared by the regulations … to be a principal executive office". Regulations are disallowable instruments.

The Explanatory Memorandum notes that, while the Act currently vests the power to create a principal executive office in the Governor-General, he does not have the power to identify the remuneration to apply to that office. The Explanatory Memorandum goes on to observe that, transferring this power to the Minister, together with the power to identify remuneration, is "designed to improve accountability".

The Committee **seeks the Minister's advice** as to why the power to be transferred from the Governor-General to the Minister will not be subject to the Parliamentary oversight applicable to the existing power.

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

## *Relevant extract from the response from the Minister*

The Senate Standing Committee for the Scrutiny of Bills (the Committee) has noted that the Bill seeks to move the power to declare an office to be a Principal Executive Office (PEO) from the Governor-General to me as the Minister responsible for the administration of the *Remuneration Tribunal Act 1973* (the Act). The Committee has also noted that the movement of this power may be an inappropriate delegation of power. I offer the following comments in respect of these matters.

**Transferral of Authority from the Governor-General**

The increased use of the PEO structure represents a significant improvement to the way in which the CEOs of certain Government agencies are remunerated. It removes unnecessary limitations on the composition of remuneration packages and brings these CEOs more into line with best practice that exists in the private sector and elsewhere in the public sector. Consistent with the Government's wages policy as provided for in the *Public Service Act 1999*, the PEO structure encourages wage setting at the workplace level. Furthermore, these new arrangements present the opportunity to reinforce and refocus the performance management and remuneration

environment in which the Government expects these offices (and their employing bodies) to operate. The presentation of remuneration packages in total remuneration terms is an important step in the move to reporting the true cost to the Commonwealth for the employment of each CEO.

The remuneration flexibilities associated with the PEO structure also result in an enhancement to the remuneration packages of the offices affected – without necessarily increasing their quantum. Access to these packages will, therefore, assist the Government in the attraction and retention of high performing people.

Under the existing provisions of the Act, the Government recommends to the Governor-General that he regulate an office as a PEO without consulting the Remuneration Tribunal. In the past, the limited number of PEOs created has consisted largely of CEOs of Government Business Enterprises. In fact, since the concept of a PEO was first introduced in 1988, the Governor-General has been asked to consider only about 14 PEO-related regulations. In my view, the arrangements relating to the establishment and administration of PEOs under this original arrangement were reasonable in the light of the volume of transactions required. It should be noted that during this time, none of the PEO-related regulations have attracted comment by the Governor-General or by the Parliament.

In the amendments to the Act made by the *Public Employment (Consequential and Transitional Arrangements) Act 1999*, the Parliament provided for a PEO structure, to be determined by the Remuneration Tribunal, that would establish a framework for the remuneration and other conditions of employment for PEOs. This was to clear the way for a larger number of public offices to be considered as PEOs and to achieve the improvements to CEO remuneration that I have outlined above. The Government is now proposing an expansion in the use of the PEO structure that will affect about 100 offices. The issues to do with managing this large number of offices and dealing with routine administrative changes to such offices has led the Government to consider existing arrangements. Were the current arrangements to continue, they would result in a significant increase in the number of regulations submitted to the Governor-General for approval. It is my view that these arrangements are not workable in the "new" PEO environment.

With this in mind and in consultation with ministerial colleagues and the Remuneration Tribunal, I considered options that would provide a sensible public policy outcome. Ultimately, it was agreed that the most administratively effective option was that I establish each PEO by declaration, rather than regulation.

I accept that the proposed arrangements alter the manner in which decisions relating to the establishment of PEOs are publicly made available and I recognise that transparency and accountability are important elements of this process. It is for this reason that I am proposing that the role of the independent Remuneration Tribunal be clarified and strengthened and that all declarations made by me are to be Gazetted.

The Bill clarifies the overarching role that the Remuneration Tribunal plays in relation to the PEO structure and consistent with this, it is entirely appropriate for the Tribunal to be consulted before new offices are moved into it. Consistent with the provisions to determine the remuneration for Secretaries of Departments and Heads of Executive Agencies contained within the *Public Service Act 1999*, the Bill requires me as the Minister responsible for the Act to consult the Remuneration Tribunal on these matters. The reporting of senior executives' remuneration packages in annual reports will, of course, continue.

I should stress that the imperative for moving from regulations to declarations lies solely in administrative efficiency and the Government's desire not to burden the Governor-General unnecessarily with matters of routine administration. The process of setting and administering remuneration is one that should occur to the greatest extent possible at the agency level. The Government is mindful, however, that the process relates to the expenditure of public funds and that there should be appropriate controls. The new arrangements, therefore, retain and enhance the role of the independent Remuneration Tribunal.

**Jurisdiction of the Remuneration Tribunal**

It should be noted that under current arrangements, the Parliament does not scrutinise the creation of offices within the Remuneration Tribunal's jurisdiction unless that office is a new office created by an Act of Parliament. Subsection 3(4) of the Act specifies that certain offices are *public offices* where the responsible Minister writes to the President of the Tribunal seeking that the office be moved into the Tribunal's determining jurisdiction. This lends support to my view that there is no compelling policy reason for parliamentary scrutiny of offices that are moved from the Tribunal's direct determining jurisdiction into its Principal Executive Office structure. The proposal to allow the Minister responsible for the Act to declare an office to be a PEO would not be derogating from the role of the Parliament.

**A new role for the Remuneration Tribunal**

This Bill proposes a number of changes to enhance the role of the Remuneration Tribunal in relation to PEOs. I mentioned above that the Bill proposed that the Government be required to consult the Tribunal before declaring a public office as a PEO. The amendments proposed in this Bill also require any remuneration decisions taken by employing bodies to be consistent with Remuneration Tribunal Determination No.15 of 1999. Similarly, any proposal by employing bodies to go outside Determination No.15 of 1999 must have the Tribunal's written consent. Under existing arrangements, employing bodies can step outside of the parameters of the PEO structure against the expressed wishes of the Tribunal, provided only that they have consulted with the Tribunal (s.12C of the Act). The Government has had to put in place administrative arrangements to deal with this possibility to ensure that the Tribunal's central role is not undermined. The insertion in the Act of the revised clause 12C(2) ensures that the authority of the Tribunal is not circumvented.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

**Senator the Hon Grant Tambling**
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Senator B Cooney
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AUSTRALIA

Dear Senator

I refer to Alert Digest 2/01 of the Scrutiny of Bills Committee. The Committee has sought the Minister's confirmation that no person will be disadvantaged by the retrospective commencement of the two provisions of the Australia New Zealand Food Authority Amendment Bill 2001 (the Bill) that are specified in that Alert Digest. As Parliamentary Secretary to the Minister for Health and Aged Care, Dr Michael Wooldridge, I am responding on the Minister's behalf.

**Subclause 2(3)**

This subclause will commence Item 178 of Part 2 of Schedule 1 of the Bill on 23 December 1999. Item 178 substitutes the reference to "paragraph (1)(n)" in subsection 7(2) of the Australia New Zealand Food Authority Act 1991 (the Act) with a reference to "paragraph (1)(o)". This remedies an incorrect paragraph reference in that subsection made by the Australia New Zealand Food Authority Amendment Bill 1999 (the 1999 Bill).

Item 9 of the 1999 Bill substituted a new subsection 7(1) into the Act. This new subsection 7(1) inserted a renumbered list of the functions of the Australia New Zealand Food Authority (ANZFA) and also inserted some new functions. Item 10 of the 1999 Bill then incorrectly inserted a reference to "paragraph 7(1)(n)" into subsection 7(2) of the Act instead of a reference to "paragraph 7(1)(o)". However, it was paragraph 7(1)(o) that replaced original paragraph 7(1)(la) that was originally referred to in subsection 7(2) of the Act, not paragraph 7(1)(n). Original paragraph 7(1)(la) provided that a function of the Authority was to make the Authority's knowledge, expertise, equipment, facilities and intellectual property available to other persons on a commercial basis".

This function has been in the Act for some time. It is this function to which subsection 7(2) of the Act originally referred, and to which it was intended to continue to refer when it was amended by the 1999 Bill to provide that:

"The function conferred by paragraph (1)(n) **(sic)**:
(a) can only be exercised:
(i) for a purpose for which the Parliament has power to make laws; or
(ii) to utilise the Authority's spare capacity ..."

The current incorrect reference to paragraph 7(1)(n) has the consequence of meaning that ANZFA can only exercise its function set out in paragraph 7(1)(n), that is, of participating in international, regional and bilateral negotiations on matters that may be included in standards, for purposes for which the Parliament has the power to make laws, and to utilise the Authority's spare capacity. This was not intended.

The retrospective commencement of Item 178 of Part 2 of Schedule 1 of the Bill is merely to correct an incorrect reference in subsection 7(2) that in any event under the "slip rule" might be interpreted as referring to current Item (1)(o).

**Subclause 2(4)**

The Alert Digest notes that subclause 2(4) of the Bill provides that Schedule 2 of the Bill is to have commenced retrospectively on 16 December 1997, immediately after the commencement of an earlier amendment to the Principal Act. However it does not, as stated by the Alert Digest, have the effect of "clarifying that a "variation of a food regulatory measure includes, and has always included, the revocation of a food regulatory measure." Instead, subclause 2(4) retrospectively substitutes the incorrect reference to the "Public Service Act 1997" made by that earlier amending Bill with a reference to the Public Service Act 1999 – that is, to the correct year in which the new Public Service Act was passed. This is merely a technical correction and no person will be disadvantaged by it.

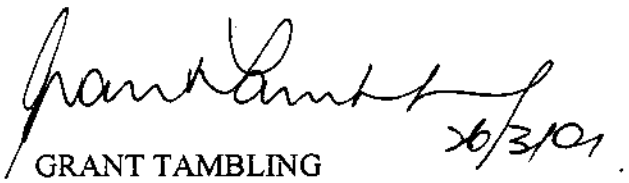
The Alert Digest's description of the impact of subclause 2(4) of the Bill leads me to believe that it may have intended to refer instead to subclause 2(1)(b) of the Bill. It is that subclause that provides that Item 179 of Part 3 of the Bill will not have a retrospective commencement but will commence on the day the Act receives the Royal Assent. Item 179 is an explanatory provision only. It makes clear that a "variation of a food regulatory measure includes, and is taken always to have included, a reference to the revocation of a food regulatory measure". This is a technical amendment only.

The Act at present enables ANZFA to develop food standards and variations of food standards. Once the Bill amends the Act, the statutory authority Food Standards Australia New Zealand will have similar powers. Were variations of food standards not allowed to include revocations of food standards, then persons who relied upon previous variations of standards that had the effect of revoking earlier standards would be disadvantaged. They would have acted in reliance upon the purported revokations, but would continue to have obligations under the law of which they are unaware, and which were not in any event intended by the Ministerial Council that approved the relevant variations (the Australia New Zealand Food Standards Council).

Similarly, future variations of food standards approved by FSANZ that have the effect of revoking previous food standards, and that are not objected to by the new Australia and New Zealand Food Regulation Council, would have no effect.

I trust that this response assists the Committee.

Yours sincerely



GRANT TAMBLING

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

RECEIVED
27 MAR 2001
Senate Standing C'ttee for the Scrutiny of Bills

26 MAR 2001

Senator Barney Cooney
Chairman
Senate Standing for the Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney Barney,

I am writing in response to the Scrutiny of Bills Alert Digest Number 1 of 2001, dated 7 February 2001, which contained comments on the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000 (the Bill).

Your committee has sought my advice on a number of issues relating to the search and entry provisions and strict liability offences, which are addressed below.

**Rights and responsibilities under a monitoring warrant**

The Committee asked whether the legislation or operational procedures should provide for an occupier to be informed of his or her rights and responsibilities and given an opportunity to have an independent third party present, where a search occurs under a warrant.

The Bill proposes two methods for monitoring compliance - either with the consent of the occupier or under a 'monitoring warrant'. The preferred means of entry is with the consent of the occupier. Under the Government's policy in respect of criminal law matters, 'monitoring warrants' have traditionally been employed where search powers are primarily necessary to monitor compliance with legislative requirements, rather than for the investigation of a specific offence.

The monitoring powers proposed are for the purpose of assessing compliance with Australian Customs Service (Customs)-related laws, the correctness of information communicated to Customs, and whether the record keeping, accounting and computing systems accurately record or generate that information. The power to search is included in the monitoring powers in accordance with similar schemes in Commonwealth legislation. It might be necessary to exercise this power, for example, to search for documents or records on the premises that relate to the communication of information to Customs.

It is proposed that an occupier would not be prevented from having a third party present during a search of premises if requested. This principle would apply whether monitoring powers are exercised with the consent of the occupier or under a warrant. This approach reflects Customs current practice.

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Customs is currently developing guidelines on the administrative aspects of the exercise of monitoring powers proposed in the Bill. The purpose of the guidelines is to provide a framework for Customs officers to administer specific elements of the legislation. The guidelines will include informing occupiers of their rights and responsibilities, regardless of whether the monitoring powers are exercised with the consent of the occupier or under a monitoring warrant. Rights such as the privilege against self-incrimination would be included in this notification.

**Evidence of an offence that is not a Customs-related law**

The Committee has sought advice on the situation of officers exercising monitoring powers and finding evidence of an offence that is not a Customs-related offence.

While the purpose of exercising monitoring powers is to assess compliance in a self-assessment environment with Customs-related laws, a monitoring officer may find a thing that the officer believes on reasonable grounds affords evidence of the commission of an offence against a Customs-related law and may be lost, destroyed or tampered with. In such circumstances, monitoring officers will be able to secure evidence of the commission of an offence against a Customs-related law for 72 hours or until a seizure warrant is obtained.

Customs-related law is defined in new section 4B (item 11 of Schedule 1 of the Bill) to include the *Customs Act 1901* (the Customs Act), the *Excise Act 1901* and any other Act, or regulations in so far as they relate to the importation or exportation of goods, where the importation or exportation is subject to compliance with any condition or restriction or is subject to any tax, duty, levy or charge (however described). This broad definition of Customs-related law acknowledges that Customs performs import and export related compliance monitoring on behalf of other Commonwealth agencies, such as the Australian Quarantine and Inspection Service (AQIS), the Australian Taxation Office (ATO) and other permit issuing agencies.

Where a monitoring officer finds evidence of the commission of an offence against a law that is *not* a Customs-related law the monitoring officer may inform another relevant agency, usually the police. Customs officers are permitted to disclose this type of information to other agencies under section 16 of the *Customs Administration Act 1985*.

**Reporting to the Parliament**

The Committee has sought advice on whether Customs intends reporting annually to the Parliament on the exercise of its monitoring powers.

It is proposed to continue the current practice of reporting statistical information on the result of compliance activities undertaken by Customs in the Annual Report of the Australian Customs Service. This information is reported quantitatively.

**Strict liability**

The Committee has sought further explanation as to why failure to answer questions or produce records should be strict liability offences in a Customs context.

Strict liability offence regimes are common across jurisdictions to encourage compliance with regulatory requirements ranging from speeding offences to not being able to substantiate entitlement to diesel fuel rebate. The approach in this Bill reflects overall Government policy on strict liability. Strict liability is a deliberate (and necessary) policy to catch inadvertent errors, because otherwise the self-assessment regime would be seriously undermined by people failing to take sufficient care. In accordance with criminal law policy, the penalties for these offences are relatively modest.

While the conduct that is the subject of each offence may not appear significant when viewed in isolation, there are significant consequences for the community where the regulatory framework is breached. There is significant risk to revenue if imports or exports are inaccurately reported, as well as to the community if prohibited imports such as narcotics and weapons are not stopped at the border. The proposed controls and sanctions are designed around early identification and intervention of high-risk cargo.

The Government believes that these risks, that is the risk to the community and to the revenue, justify the introduction of strict liability offences for breaches of the regulatory mechanisms designed to reduce those risks.

Strict liability offences also lend themselves to using infringement notices to impose a lesser penalty administratively rather than prosecuting in court in the first instance. Infringement notices are justified by the efficiency and cost savings they provide and as low-key means of applying sanctions to unacceptable performance.

*Failure to answer questions*

Customs uses risk assessment to fulfil its border protection and revenue collection responsibilities. The information provided to Customs is the basis of the risk assessment. Failure to provide information affects a Customs officer's ability to conduct a proper risk assessment, in the same way that false or misleading information also impedes proper risk assessment. Consequently, inaccurate risk assessments can allow prohibited imports, such as narcotics and weapons into the community. Risk assessments in 'real time' audits are especially important, where risk assessment is conducted immediately the cargo arrives. Delays in the risk assessment can hinder the release of cargo.

While the Committee has provided examples of offences for failure to answer questions that are not offences of strict liability, there are also examples of strict liability offences in Commonwealth legislation for failing to answer questions. In section 70A of the *Quarantine Act 1908* a quarantine officer may ask questions where the officer is searching, examining or entitled to search or examine goods. The context of the Quarantine offence is similar to the Customs context - that is the search and examination of goods in a controlled environment. The *Trade Marks Act 1995* also has a strict liability offence for failing to answer questions that a person is lawfully required to answer (section 154 refers).

It also should be noted that when questions are asked during the exercise of monitoring powers, the Bill proposes that there will be only a strict liability offence for failing to answer a question put to a person where the monitoring officer enters those premises under a monitoring warrant.

Where a monitoring officer enters premises with the *consent* of the occupier, the occupier is not obliged to answer any questions put to them by the monitoring officer. A person who is asked a question they are required to answer may exercise their privilege against self-incrimination.

*Failure to produce documents or records*

The reporting of information to Customs is primarily done electronically. To assess the correctness of information communicated by, or on behalf of, a person to Customs it is necessary for Customs to be able to examine the documents or records that formed the basis of information supplied to Customs. While Customs assesses compliance by both 'real time' and post transaction audits, access to source documents and records is especially important in post transaction audits where information provided is treated, at first instance, as true and correct. The strict liability offence for failing to produce records is necessary to underpin Customs self-assessment regime.

There are strict liability offences in other Commonwealth legislation for failing to produce documents or records. In section 50 of the *Excise Act 1901,* manufacturers must keep records and on demand produce them to the requesting officer. In section 164AC of the Customs Act failure to produce records where there is an audit of diesel fuel rebate applications results in a penalty equal to the amount of the rebate applied for and not substantiated. The *Quarantine Act 1908* also has a strict liability offence for failing to produce documents requested by a Quarantine officer (section 38 refers).

Where documents or records are required to be produced under proposed sections 240AA and 240AC of the Customs Act, there must be period of at least 14 days from the day of notice within which to produce. It is proposed that, in most cases the time period for production will be 14 days and, when the documents are overseas, 16 days. Therefore the penalties cannot be imposed for failure to produce documents or records until after the period specified in the notice to produce the documents or records has expired. Additionally a person who is asked to produce a document or record may exercise their privilege against self-incrimination.

The defences in the *Criminal Code*, as it applies to the Customs Act, will be available for the offences of strict liability introduced by the Bill.

In view of the above it is considered appropriate that failing to answer questions and failing to produce documents or records be strict liability offences.

**Penalties**

The Committee asked whether the substantive penalties have been reviewed for the offences when prosecuted.

The strict liability offence and infringement notice system proposed in the Bill was developed in consultation with the Attorney-General's Department.

The penalty levels for each strict liability offence in the Bill were settled with the Criminal Law Branch of the Attorney-General's Department in accordance with Commonwealth Criminal Law policy.

**Defence of genuine uncertainty**

The Committee has sought further explanation why the defence of genuine uncertainty should be applicable to statements that result in a loss of duty, but not to statements which result in no loss of duty or to statements in cargo or outturn reports.

Currently section 243V of the Customs Act allows people to avoid an administrative penalty for a false or misleading statement resulting in an underpayment of duty by stating their uncertainty as to the correctness of the information at the time of lodging the import entry. This procedure is known throughout Customs and the importing community as 'amber line'.

The retention of this facility as a defence to new section 243T of the Customs Act is a legacy of the current penalty regime. Nowhere else in Commonwealth legislation does a similar defence exist for corresponding offences for false and misleading statements - section 243T is a special case. The defence is available for an offence against new section 243T to ensure that the scope of the new offence is not wider than that of the current administrative penalty provision.

The defence is considered appropriate for false or misleading statements resulting in a loss of duty because the penalty for such statements is directly related to the amount of duty short paid. The greater the short payment, the greater the penalty - with no upper limit. New sections 243U and 243V (for false or misleading statements not resulting in a loss of duty and in cargo and outturn reports), on the other hand, have maximum penalties of 50 penalty units.

The 'real time' context of cargo and outturn reporting is another factor that makes this defence unsuited to false or misleading statements in cargo and outturn reports. In the case of entries there is an opportunity to 'settle-up' the correct amount of duty after verifying information about which the communicator was initially uncertain. In contrast, Customs must be able to rely on the accuracy of the information in cargo and outturn reports at first instance to make sound decisions in relation to the release of cargo upon arrival in Australia. There is no opportunity to remedy the situation, for example, of illicit drugs being delivered into home consumption on the basis of a false or misleading statement made in a cargo report.

As Customs risk assessment of cargo is dependent on timely and accurate reporting, there is no scope for the defence of uncertainty to apply to this offence. The preferred outcome is that any uncertainty is addressed before the report is made.

There are other reasons for not extending the defence to false or misleading statements not resulting in a loss of duty (particularly in relation to exports). These include:

- In most cases exporters should know exactly what goods they are sending out of the country as they are in possession of those goods before they leave, unlike importers who often require clarification on the exact nature of the goods arriving;

- Where it is known that an exporter will not be able to ascertain particular information until after the goods are exported (for example the exact quantity of bulk commodities may not be known until after they are loaded onto a ship), section 114B of the Customs Act allows a person to apply for confirming exporter status;

- the delay of export cargo for clarification purposes may lead to those goods not being shipped as clearance cannot be issued until clarification is made - a risk not present for imported cargo.

**Recording of offences**

The Committee asked where a matter is dealt with under an infringement notice, whether an offence will be recorded against the person concerned.

New section 243ZB of the Customs Act provides that where the penalty specified in the infringement notice is paid any liability for the offence is discharged. It also provides that further proceedings cannot be taken for the offence and that the person is not regarded as having being convicted of the offence. These provisions will not allow an offence to be recorded against a person where a matter is dealt with entirely under the infringement notice scheme.

Customs will, however, keep an administrative record of the number and nature of infringement notices served on a person. The purpose of this record will be to assist in deciding whether to issue an infringement notice, prosecute, or do nothing, on any future commission of a strict liability offence.

If you have any further queries on any of the above issues, please do not hesitate to contact me or my office.

Yours sincerely

**CHRIS ELLISON**
**Senator for Western Australia**

**The Hon. Philip Ruddock MP**
Minister for Immigration and Multicultural Affairs
Minister Assisting the Prime Minister for Reconciliation

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24 DEC 2000

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- 5 FEB 2001
Senate Standing C'ttee for the Scrutiny of Bills

Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 7 December 2000 from Mr James Warmenhoven, Secretary to the Committee, to my Senior Adviser referring to the comments contained in the Scrutiny of Bills Alert Digest No. 18 of 2000 (6 December 2000) concerning the Migration Legislation Amendment (Integrity of Regional Migration Schemes) Bill 2000.

The Committee seeks my advice about the following matters which it believes may be in breach of principle 1(a)(i) of the Committee's terms of reference:

- the scope of the cancellation power in proposed section 137Q; and
- the circumstances in which a decision to cancel a regional sponsored migration scheme visa is reviewable under the *Migration Act 1958*.

Advice on these matters is contained in Attachment A to this letter.

I trust that these comments will be of assistance to the Committee.

Yours sincerely

Philip Ruddock

**The scope of the cancellation power in proposed section 137Q**

The Migration Legislation Amendment (Integrity of Regional Migration Schemes) Bill 2000 ("the Bill") proposes to amend the *Migration Act 1958* ("the Act") to introduce a new visa cancellation scheme for regional sponsored migration scheme visas.

The regional sponsored migration scheme encourages the migration of skilled persons particularly for the benefit of regional and rural Australia. In order to achieve a more even distribution of skilled migrants across the country, substantial concessions are made in relation to the criteria for the grant of a regional sponsored migration scheme visa. For instance, only diploma level qualifications are needed and language and age requirements may be waived.

However, the key criterion for the grant of a regional sponsored migration scheme visa is that the visa applicant has been nominated by an employer in respect of an approved appointment that will provide full-time employment for at least two years.

Under proposed section 137Q, a regional sponsored migration scheme visa may be cancelled in two broad circumstances:

- where the visa holder has not commenced the employment referred to in the relevant employer nomination within the period prescribed in the *Migration Regulations 1994* and he or she has not made a genuine effort to commence that employment (subsection 137Q(1)); and

- where the visa holder commenced the employment referred to in the employer nomination but that employment terminated within the required employment period of 2 years and he or she has not made a genuine effort to be engaged in that employment for the required period (subsection 137Q(2)).

It should be emphasised that this proposed cancellation power is discretionary in nature.

The purpose of the new visa cancellation scheme is to promote the continued integrity of the regional sponsored migration scheme by:

- safeguarding against any potential abuse of the scheme; and

- discouraging persons who have no genuine intention of settling in rural of regional Australia.

The Committee has sought my advice as to whether the Bill should explicitly provide that a regional sponsored migration scheme visa will not be cancelled where the visa holder's employment is terminated in circumstances outside the employer's or visa-holder's control. For example, generally a regional sponsored migration scheme visa will not be cancelled where the visa holder has failed to commence, or remain, in the relevant employment because of a downturn in business activity, closure of business, financial loss or bankruptcy.

This is because, as the Committee has noted, in these types of circumstances it cannot be said that the regional sponsored migration scheme visa holder failed to demonstrate "a genuine effort" to commence, or remain, in the employment referred to in the relevant employment nomination.

However, a situation may arise where, for instance, the closure of the business is attributable to a deliberate and/or fraudulent act. It is possible that this may even be the result of some collusion between the nominating employer and the regional sponsored migration scheme visa holder.

If the Bill explicitly provided that a regional sponsored migration scheme visa will not be cancelled in such situations of "involuntary termination" then the stated purpose of the new visa cancellation scheme may be undermined.

Therefore, the Bill, as currently drafted, safeguards in a flexible manner against any future abuse of the regional sponsored migration scheme by persons with non-genuine intentions.

**The circumstances in which a decision to cancel a regional sponsored migration scheme visa is reviewable under the *Migration Act 1958***

Part 5 of the Act provides for merits review of certain decisions made under the Act. Under subsection 338(3), a decision under proposed section 137Q to cancel a regional sponsored migration scheme visa held by a non-citizen who is in Australia at the time of the cancellation will be an "MRT-reviewable decision" unless the decision:

- is a decision covered by subsection 338(4) (a decision to refuse to grant, or to cancel, a bridging visa); or
- is made at a time when the non-citizen was in immigration clearance; or
- was made under subsection 134(1), (3A) or (4) (cancellation of business visas) or section 501 (refusal or cancellation of visa on character grounds).

Therefore, merits review will be available under the Act for a decision to cancel a regional sponsored migration scheme visa. In addition, this will continue to be the case when the Administrative Review Tribunal commences.

# HON WARREN TRUSS MP

## Minister for Agriculture, Fisheries and Forestry

Senator Barney Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to matters raised in the Alert Digest 18/00 regarding the *Pig Industry Bill 2000*. Please find below the answers to the questions asked by the Committee.

**Subclause 9(1)**

**Why the exercise of the discretion to contract with, and declare, an eligible body should not be subject to Parliamentary scrutiny or some form of review?**

The decision relating to the declaration of the company as the industry services body is properly seen as an administrative, rather than a legislative decision to be taken by the Minister.

The declaration of the industry services body is of lesser significance than the entering into of the contract. The main significance of the declaration is that it nominates the successor body to the Australian Pork Corporation and the Pig Research and Development Corporation thereby enabling the one off transfer of assets and liabilities. The additional aspect of the declaration is that the Minister's power of direction is associated with it. There is little to be gained in providing for the declaration to be subject to Parliamentary scrutiny.

The funding arrangements are implemented as a consequence of the contract. However, as a contract is not a legislative or statutory instrument it is not normally disallowable in Parliament. This is consistent with the recently implemented wool and horticulture models.

Similar to wool and horticulture arrangements, the contract with Australian Pork Limited will be made publicly available. The contract and APL constitution will be made available to Members of Parliament as soon as they are closer to final resolution and prior to the debate in the Senate.

**Who are the persons contemplated by the term 'other persons' and whether these persons should be limited in some way by reference to appropriate qualifications or attributes?**

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The Minister's ability to enter into a contract with an 'eligible body and other persons' allows flexibility in making the funding contract. It would allow the flexibility for example, for the industry services body to seek the services of another entity to manage the R&D program. At this stage it is not foreseen that this would be the case, however, the principle and the flexibility is the same as has been adopted in the wool industry restructure model.

Placing a limitation in some way to reference to appropriate qualifications or attributes is not considered crucial as the Minister has control over whom the contract is entered into with.

**Can the bill be amended in terms similar to the Horticulture Marketing and Research and Development Services Bill 2000?**

Under the pork arrangements, the declaration confirms the contractual arrangements and triggers the commencement of the contract. As such the declaration serves little purpose (although the declaration can be terminated). The contract contains the grounds for terminating or suspending the funding and hence the arrangement.

Similar to the wool and horticulture arrangements, the contact will be made publicly available, and there should be no need for it to be a statutory requirement.

Clause 12

**Give examples of the circumstances contemplated by the terms 'the national interest' and 'exceptional and urgent circumstances'.**

This clause provides the Minister with a reserve power in the event of serious and unforseen circumstances with the potential to affect the nation. The intent is to ensure the application of statutory and Commonwealth funds are not being applied to purposes which might conflict with the national interest. The use of the reserve power could only occur where the Minister is satisfied that such conditions apply.

Such circumstances may arise for example where the industry services body is required to immediately suspend an R&D program because to continue the spending would place the national interest at risk. For instance, it might be inappropriate to continue an ongoing joint research expenditure with a country which Australia has suspended all diplomatic and commercial relations. Similarly a case may arise where a marketing program could threaten to jeopardise Australia's ability to meet its international obligations, for example, marketing assistance which was deemed to be inconsistent with Australia's undertakings in the WTO.

**The reason why the bill makes no provision for Parliamentary scrutiny of directions under clause 12 or how the Parliament is to be made aware of, and able to scrutinise, determinations not to table such directions.**

The Bill provides for a direction made by the Minister under clause 12 to be tabled in the Parliament within 15 sitting days. The only circumstances where this would not occur is if the Minister makes a written direction that to do so would be likely to

prejudice the national interest of Australia or the bodies commercial interests. The latter circumstances are designed to protect the nation and the company in circumstances where to table the direction could be harmful to those interests. It is seen as necessary to provide such safeguards in the legislation, although it is acknowledged that Parliament would not be informed immediately of the determination. The Minister can be questioned about any directions through the normal Parliamentary processes.

**The appropriateness of retaining key powers, such as the ability to issue binding Ministerial directions, while establishing a new company which is to be accountable to shareholders for the effective use of funds provided.**

In moving to a company arrangement for the delivery of services, the legislation, contract and constitution all provide public accountability constraints on how the company operates since levy payer and Government matching funds for R&D are involved.-(Noting that the levy funds are raised from industry participants by compulsory statutory taxation by the Commonwealth.) These requirements are necessary to ensure public accountability for use of these funds, while at the same time providing scope for the company to focus on the commercial delivery of the services in an efficient and effective manner to its members.

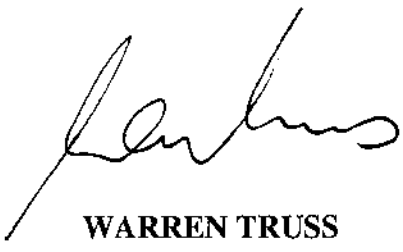
The Ministerial Direction provision is retained to ensure that in circumstances of the national interest because of exceptional and urgent circumstances, the Government is in a position to issue a direction to the company and have it followed, backed by the legislation, under the constraints contained in clause 12.

**Can the bill be amended in terms similar to the Horticulture Marketing and Research and Development Services Bill 2000?**

While it is noted that Parliamentary scrutiny is already provided for in Clause 12(3), the bill could be amended in a similar manner as Horticulture if considered appropriate by the Senate.

Thank you for your consideration of these legislative matters.

Yours sincerely



**WARREN TRUSS**

RECEIVED
31 JAN 2001
Senate Standing C'ttee
for the Scrutiny of Bills

MINISTER FOR FINANCE AND ADMINISTRATION

Senator B Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

Dear Senator

I am writing in response to comments made in the Scrutiny of Bills Alert Digest No.18 of 2000 concerning the Remuneration Tribunal Amendment Bill 2000 (the Bill).

The Senate Standing Committee for the Scrutiny of Bills (the Committee) has noted that the Bill seeks to move the power to declare an office to be a Principal Executive Office (PEO) from the Governor-General to me as the Minister responsible for the administration of the *Remuneration Tribunal Act 1973* (the Act). The Committee has also noted that the movement of this power may be an inappropriate delegation of power. I offer the following comments in respect of these matters.

**Transferral of Authority from the Governor-General**

The increased use of the PEO structure represents a significant improvement to the way in which the CEOs of certain Government agencies are remunerated. It removes unnecessary limitations on the composition of remuneration packages and brings these CEOs more into line with best practice that exists in the private sector and elsewhere in the public sector. Consistent with the Government's wages policy as provided for in the *Public Service Act 1999*, the PEO structure encourages wage setting at the workplace level. Furthermore, these new arrangements present the opportunity to reinforce and refocus the performance management and remuneration environment in which the Government expects these offices (and their employing bodies) to operate. The presentation of remuneration packages in total remuneration terms is an important step in the move to reporting the true cost to the Commonwealth for the employment of each CEO.

The remuneration flexibilities associated with the PEO structure also result in an enhancement to the remuneration packages of the offices affected – without necessarily increasing their quantum. Access to these packages will, therefore, assist the Government in the attraction and retention of high performing people.

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Under the existing provisions of the Act, the Government recommends to the Governor-General that he regulate an office as a PEO without consulting the Remuneration Tribunal. In the past, the limited number of PEOs created has consisted largely of CEOs of Government Business Enterprises. In fact, since the concept of a PEO was first introduced in 1988, the Governor-General has been asked to consider only about 14 PEO-related regulations. In my view, the arrangements relating to the establishment and administration of PEOs under this original arrangement were reasonable in the light of the volume of transactions required. It should be noted that during this time, none of the PEO-related regulations have attracted comment by the Governor-General or by the Parliament.

In the amendments to the Act made by the *Public Employment (Consequential and Transitional Arrangements) Act 1999*, the Parliament provided for a PEO structure, to be determined by the Remuneration Tribunal, that would establish a framework for the remuneration and other conditions of employment for PEOs. This was to clear the way for a larger number of public offices to be considered as PEOs.and to achieve the improvements to CEO remuneration that I have outlined above. The Government is now proposing an expansion in the use of the PEO structure that will affect about 100 offices. The issues to do with managing this large number of offices and dealing with routine administrative changes to such offices has led the Government to consider existing arrangements. Were the current arrangements to continue, they would result in a significant increase in the number of regulations submitted to the Governor-General for approval. It is my view that these arrangements are not workable in the "new" PEO environment.

With this in mind and in consultation with ministerial colleagues and the Remuneration Tribunal, I considered options that would provide a sensible public policy outcome. Ultimately, it was agreed that the most administratively effective option was that I establish each PEO by declaration, rather than regulation.

I accept that the proposed arrangements alter the manner in which decisions relating to the establishment of PEOs are publicly made available and I recognise that transparency and accountability are important elements of this process. It is for this reason that I am proposing that the role of the independent Remuneration Tribunal be clarified and strengthened and that all declarations made by me are to be Gazetted.

The Bill clarifies the overarching role that the Remuneration Tribunal plays in relation to the PEO structure and consistent with this, it is entirely appropriate for the Tribunal to be consulted before new offices are moved into it. Consistent with the provisions to determine the remuneration for Secretaries of Departments and Heads of Executive Agencies contained within the *Public Service Act 1999*, the Bill requires me as the Minister responsible for the Act to consult the Remuneration Tribunal on these matters. The reporting of senior executives' remuneration packages in annual reports will, of course, continue.

I should stress that the imperative for moving from regulations to declarations lies solely in administrative efficiency and the Government's desire not to burden the Governor-General unnecessarily with matters of routine administration. The process of setting and administering remuneration is one that should occur to the greatest extent possible at the agency level. The Government is mindful, however, that the process relates to the

expenditure of public funds and that there should be appropriate controls. The new arrangements, therefore, retain and enhance the role of the independent Remuneration Tribunal.

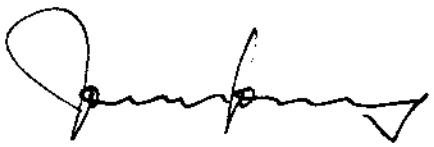
**Jurisdiction of the Remuneration Tribunal**

It should be noted that under current arrangements, the Parliament does not scrutinise the creation of offices within the Remuneration Tribunal's jurisdiction unless that office is a new office created by an Act of Parliament. Subsection 3(4) of the Act specifies that certain offices are *public offices* where the responsible Minister writes to the President of the Tribunal seeking that the office be moved into the Tribunal's determining jurisdiction. This lends support to my view that there is no compelling policy reason for parliamentary scrutiny of offices that are moved from the Tribunal's direct determining jurisdiction into its Principal Executive Office structure. The proposal to allow the Minister responsible for the Act to declare an office to be a PEO would not be derogating from the role of the Parliament.

**A new role for the Remuneration Tribunal**

This Bill proposes a number of changes to enhance the role of the Remuneration Tribunal in relation to PEOs. I mentioned above that the Bill proposed that the Government be required to consult the Tribunal before declaring a public office as a PEO. The amendments proposed in this Bill also require any remuneration decisions taken by employing bodies to be consistent with Remuneration Tribunal Determination No.15 of 1999. Similarly, any proposal by employing bodies to go outside Determination No.15 of 1999 must have the Tribunal's written consent. Under existing arrangements, employing bodies can step outside of the parameters of the PEO structure against the expressed wishes of the Tribunal, provided only that they have consulted with the Tribunal (s.12C of the Act). The Government has had to put in place administrative arrangements to deal with this possibility to ensure that the Tribunal's central role is not undermined. The insertion in the Act of the revised clause 12C(2) ensures that the authority of the Tribunal is not circumvented.

Yours sincerely



JOHN FAHEY