SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SEVENTH REPORT

OF

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

SEVENTH REPORT OF 2001

The Committee presents its Seventh 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:

Australian Securities and Investments Commission Bill 2001

Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001

Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001

Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001

Migration Legislation Amendment (Application of Criminal Code) Bill 2001

Migration Legislation Amendment (Electronic Transaction and Methods of Notification) Bill 2001

National Crime Authority Amendment Bill 2000

Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000

Australian Securities and Investments Commission Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation has responded to those comments in a letter dated 15 June 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. 6 of 2001

This bill was introduced into the House of Representatives on 4 April 2001 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

This bill is part of a package of bills introduced in response to the High Court's decisions in *Re Wakim; ex parte McNally* and *R v Hughes*. The bill proposes to replace the *Australian Securities and Investments Commission Act 1989* and the ASIC Law of the Australian Capital Territory, and corresponding provisions of Corporations Acts of the Northern Territory and certain States, to provide for a Commonwealth Act capable of operating throughout Australia in accordance with section 51(xxxvii) of the Constitution.

The bill provides for the continued existence of the:

- Australian Securities and Investments Commission;
- Companies and Securities Advisory Committee;
- Corporations and Securities Panel;
- Companies Auditors and Liquidators Disciplinary Board;
- Financial Reporting Council;
- Australian Accounting Standards Board; and
- Parliamentary Joint Committee on Corporations and Securities.

The bill also contains transitional provisions, corrects a number of anomalies and updates the drafting style, but involves no substantive policy changes.

Delegation to 'a person'
Clauses 102 and 118A

Clause 102 of this bill will permit the Australian Securities and Investments Commission (ASIC) to delegate to "a person" (which includes a body) all or any of its functions and powers". Clause 119A provides ASIC members with a similar power of delegation.

While each clause does go on to limit the range of persons to whom such a delegation may routinely be made, neither clause contains any limitation on the range of persons whom the Minister may approve as delegates. In practice, the Minister may approve a delegation to anyone at all. The Committee, therefore, **seeks the Minister's advice** as to why some limitation should not be placed on such a wide and unfettered power of delegation.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The comments in the Digest relate to two provisions of the Bill that permit functions and powers to be delegated (specifically, clause 102 dealing with delegations by the Commission, and clause 119A with delegations by Commission members). In both cases, the functions and powers must be delegated to person set out in each clause, unless the Minister's approval is obtained.

As you will be aware, the Government has introduced a package of new corporations legislation (of which the Bill is part) in response to the High Court's decision last year in *The Queen v Hughes.* The legislative package will replace the current Corporations Law regime with a new corporate regulatory regime supported by referrals of power by the States.

The referrals of State power are to be provided, in part, in the form of a referral of the text of the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001 to the Commonwealth. As a result, it is crucial to the constitutional validity of the Bill that it be in the same form as the text referred by the States. Further, the referral mechanism was negotiated with the States on the basis that there would be no substantial changes to law and policy under the Corporations Law regime.

In addition, one of the intentions of the new regime is for a smooth transition, with no change from current arrangements under the Corporations Law regime, to

minimise disruption to the wider community. For the most part, the provisions of the new legislation duplicate their equivalent provision in the current legislation.

Accordingly, apart from minor changes to drafting style and removal of words that are needed because of the current scheme structure, clauses 102 and 119A have not changed from their original form and operation under the *Australian Securities and Investments Commission Act 1989*. Limiting the powers of delegation would amount to a substantial change to the current arrangements that have operated for 10 years under the Corporations Law framework.

It is also worth noting that the Parliamentary Joint Statutory Committee on Corporations and Securities, in its report on the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001, remarked that the Bills did not make any substantial policy changes to the Acts which they replace. The Committee recommended that the Bills be passed without amendments as early as possible.

In these circumstances, I consider that amendment of the clauses concerned would not be warranted.

The Committee thanks the Minister for this response and notes that it is crucial to the constitutional validity of the bill that it be in the same form as the text referred by the States.

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 responded to those comments in a letter dated 26 March 2001.

In its *Fourth Report of 2001*, the Committee sought further advice regarding the status of Customs guidelines and whether 'stale' infringement notices are to be removed from the record after a period of time. The Minister has further responded in a letter dated 8 June 2001. A copy of the letter is attached to this report. An extract from the *Fourth Report* 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 dated 26 March 2001

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.

Relevant extract from the further response from the Minister dated 8 June 2001

The Committee has sought my advice as to the status of Customs guidelines for administering monitoring powers 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 the guidelines.

When performing a function or exercising a power under a law of Customs, officers of the Australian Customs Service are subject to the directions of the Chief Executive Officer of Customs (the CEO) pursuant to subsection 4(4) of the *Customs Administration Act 1985*. The guidelines being developed for the administration of the monitoring powers proposed in the Bill will be approved by the CEO and have the status of directions under that provision. Any failure to comply with such directions would render the officer in breach of the Australian Public Service Code of Conduct as set out in section 13 of the *Public Service Act 1999* and subject to disciplinary action under section 15 of that Act.

While it is intended that the guidelines be publicly available, they will not be disallowable instruments. As well as the provision of information about rights and responsibilities, the guidelines will cover purely administrative matters, such as the internal Customs process to be followed before applying for a monitoring warrant, the classification of officers who should apply for monitoring warrants and procedures for obtaining informed consent to exercise monitoring powers where a warrant is not considered appropriate. These administrative matters are not of a kind that would warrant the parliamentary scrutiny required of disallowable instruments.

I note, however, the Committee's concerns in relation to non-compliance with the direction in the guidelines to inform an occupier of premises of their rights during the exercise of monitoring powers. While the Government considers that the rights of the occupier under the monitoring powers provisions would be unaffected by a failure to notify of their existence, we acknowledge that a failure to notify may result in a person acting in a way that is not in their own interests because he or she does not know that those rights exist.

To address this possibility, I propose to move Government amendments to the Bill to require monitoring officers to inform occupiers of premises of their rights and responsibilities under new Subdivision J of Division 1 of Part XII of the *Customs Act 1901* (the Act) before seeking consent to enter premises and exercise monitoring powers or entering premises under a monitoring warrant.

The Committee thanks the Minister for this further response and for the amendment foreshadowed, which takes account of one the most important recommendations made by the Committee in its *Fourth Report of 2000* and which greatly advances the protection of rights in these circumstances.

In his response, the Minister notes that the proposed Customs guidelines will cover administrative matters (such as internal procedures to be followed before applying for a warrant) as well as other matters. Guidelines which cover matters which are purely administrative in nature are often not subject to parliamentary scrutiny. However, guidelines which are quasi-legislative in character are usually subject to parliamentary scrutiny.

The Committee **would appreciate the Minister's further advice** as to whether the proposed Customs guidelines will be purely administrative in character, and, if not, whether any quasi-legislative guidelines might be issued separately, be tabled and be subject to parliamentary scrutiny.

Pending the Minister's further advice, the Committee continues to draw Senators' attention to these provisions as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

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 dated 26 March 2001

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).

Relevant extract from the further response from the Minister dated 8 June 2001

In my letter of 26 March I advised the Committee that no offence will be recorded against a person where a matter is dealt with entirely under the infringement notice scheme, but that an administrative record of decisions taken in respect of infringement notices would be kept. The Committee sought further advice as to whether 'stale' infringement notices would be removed after a period of time from the record (in the same manner as the 'spent convictions' scheme in the *Crimes Act 1914* [the Crimes Act]).

Apart from the general requirement to keep records of how decisions are made, the rationale for keeping an administrative record of decisions under the proposed penalty regime in the Bill, is to provide the CEO with relevant information in deciding whether to serve an infringement notice, prosecute or do nothing in the event of a breach of a strict liability offence. It provides a mechanism to gauge what is the most appropriate response to non-compliance in a particular case.

The establishment of an administrative equivalent to the spent convictions scheme in the Crimes Act for stale infringement notices is considered inappropriate because:

- any recording or disclosure of information would be subject to the confidentiality requirements of section 16 *Customs Administration Act 1985;*
- standard archiving procedures result in files over 10 years old not being readily available; and
- the circumstances in which the record is to be taken into account, if the offence the subject of the recorded infringement notice had been the subject of a conviction, would be exempt from the spent convictions provisions by virtue of paragraph 85ZZH(a) of the Crimes Act. Law enforcement agencies are exempted from the 'spent convictions' in the Crimes Act (the Australian Customs Service is defined as a law enforcement agency, section 85ZL refers).

In Alert Digest No. 4 of 2001 the Committee sought my advice as to whether amendments made to the Bill in the House of Representatives create new strict liability offences, and if so, why it is appropriate that these offences are offences of strict liability.

All of the Principal Act offence provisions to which the amendments mentioned by the Committee relate are provisions relating to the regulatory control over goods for export. The relevant offences relate to:

- failure to enter goods for export (proposed subsection 113(1));
- loading goods for export without an authority to deal (proposed section 115);
- failure to communicate a submanifest as required by proposed section 117A;
- allowing a ship or aircraft to depart without a Certificate of Clearance having been issued (proposed section 118);
- using an Accredited Client Export Approval Number (ACEAN) that relates to more than one consignment (proposed section 114BA);
- delivering goods, other than excluded goods, to a person at a wharf or airport for export without entering them and providing the person particulars of the authority to deal or, if the goods are not required to be entered, providing the person with particulars of the goods or the goods (proposed section 114E); and
- failing to notify Customs where goods are released from a warehouse for export (proposed new section 102A).

The offence in new section 114BA relates to using the same ACEAN for more than one export consignment. The integrity of the periodic reporting system for exports is dependent upon accredited clients properly acquitting their goods exported using an ACEAN in their periodic declaration. Using a single ACEAN in respect of more than one consignment of goods for export will significantly undermine the acquittal process.

The strict liability offences proposed in sections 102A, 114E and 117A are new offences for breaches of the various new exporting reporting obligations in relation to goods for export. As detailed in Chapter 5 of the revised explanatory memorandum, the export reporting obligations are designed to enable Customs more effectively to perform its roles of:

- preventing the export of prohibited goods;
- monitoring compliance with the GST law in relation to the GST-status of supplies of goods for export; and
- ensuring that goods with outstanding duty liability are not diverted into the domestic market.

These offences are designed to improve Customs ability to track the movement of all goods for export and in particular to avoid diversion of goods with outstanding duty liabilities into the domestic market. The diversion of such goods into the domestic market causes significant loss of government revenue and commercial disadvantage to legitimate operators.

The proscribed conduct in proposed sections 113, 115 and 118 of the Act relates to the unauthorised movement of goods for export and is currently the subject of fault based offences in the existing export control provisions of the Act. These offences are to be made offences of strict liability and, in the case of sections 115 and 118, the penalty will be reduced to 60 penalty units in accordance with criminal law policy. (The current penalties for offences against sections 115 and 118 are $10,000 and $50,000, respectively.)

As stated in my letter of 26 March 2001, while the conduct that is the subject of each of the proposed strict liability offences may not appear significant when viewed in isolation, there are significant consequences for the community where the regulatory framework is breached. The Government believes that the risk to the revenue of diversion, the commercial disadvantage to legitimate operators, and the risk of prohibited goods being exported undetected, justify the introduction of strict liability offences for breaches of the regulatory mechanisms designed to reduce those risks. 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.

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 further response and notes the proposed operation of the infringement notice scheme.

Given that an administrative record of decisions under this scheme will be kept for some time, and (though not readily available) may be used more than 10 years later, the Committee **would appreciate the Minister's further advice** as to whether any guidelines or standards will be issued covering the use that may be made of infringement notices both during and after the 10 year period.

Pending the Minister's further advice, the Committee continues to draw 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.

Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2001*, in which it made various comments. The Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 13 June 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. 5 of 2001

This bill was introduced into the House of Representatives on 29 March 2001 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *Primary Industries (Customs) Charges Amendment Regulations (No 1) 2000* to clarify the rate of charge intended to be struck on dried vine fruits that were exported from 1 January 2000. The bill validates regulations that were established to retrospectively reduce the rate of export charge on dried vine fruits exported in that period.

Commencement
Clause 2

The general outline of this bill included in the Explanatory Memorandum concludes with the statement that "it is necessary for this Bill to commence from 1 January 2000". However, clause 2 of the bill states that it commences on the day on which it receives Royal Assent. Given this apparent inconsistency in commencement provisions, the Committee **seeks the Minister's advice** as to whether the bill's commencement clause ensures that the bill achieves its purpose.

Other than this, the Committee makes no further comment on this provision.

Relevant extract from the response from the Parliamentary Secretary

> As you point out, the Explanatory Memorandum indicates that "it is necessary for the Bill to take effect from 1 January 2000". While clause 2 of the Bill states that it commences on the day after it receives Royal Assent, there is no conflict between these two statements. It simply means that while this Bill will come into effect from the date of Royal Assent, its provisions will have retrospective effect from 1 January 2000. This is in accord with the request from industry that the date at which the new reduced levy should come into force was 1 January 2000.

The Committee thanks the Parliamentary Secretary for this response.

A necessary validation?
Clause 3

Subsection 48(2) of the *Acts Interpretation Act 1901* invalidates any regulation which is expressed to take effect at a time before it is gazetted and which operates to the disadvantage of any person other than the Commonwealth.

The Minister, in his Second Reading Speech to this bill, observes that the purpose of the bill is to ensure that subsection 48(2) is taken not to have applied to certain Statutory Rules. Given this, it might be thought that the Statutory Rules which are to be validated by the bill operate to the disadvantage of persons other than the Commonwealth. However, the Minister concludes his Speech by noting that "the only rights adversely affected are those of the Commonwealth". In these circumstances, the Committee **seeks the Minister's advice** as to why it is necessary to retrospectively remove the application of the Acts Interpretation Act.

Other than this, the Committee makes no further comment on this provision.

Relevant extract from the response from the Parliamentary Secretary

> The decision to retrospectively remove the application of the *Acts Interpretation Act 1901* (the Act), to Schedule 1 of the Primary Industries (Customs) Charges

Amendment Regulations 2000 (No.1) (Statutory Rule No. 236), was on the advice of the Office of Legislative Drafting (OLD) within the Attorney-General's Department, which suggested that it could be argued that the amendments could potentially disadvantage persons other than the Commonwealth. Accordingly, the OLD advised that it would be prudent to validate the original amendments aimed at reducing the rate of levy, resulting in the retrospective removal of the application of the Act to the particular amendments. Again, I can re-assure the Committee that this legislation does not in any way disadvantage persons other than the Commonwealth.

The Committee thanks the Parliamentary Secretary for this response.

Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2001*, in which it made various comments. The Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 13 June 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. 5 of 2001

This bill was introduced into the House of Representatives on 29 March 2001 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *Primary Industries (Excise) Levies Amendment Regulations 2000 (No 3)* to clarify the rate of charge intended to be struck on dried vine fruits that were processed between 1 January and 1 October 2000, and validate the *Primary Industries Levies and Charges Collection Amendment Regulations 2000 (No 2)* which allow for the collection of the levy. The bill validates regulations that were established to retrospectively reduce the rate of excise levy on dried vine fruits processed.

Commencement
Clause 2 and subclauses 3(1) and (2)

Clause 2 provides that this bill is to commence on Assent. However, subclauses 3(1) and (2) are to apply from 31 December 1999.

In his Second Reading Speech, the Minister observes that the purpose of the bill is to validate a reduction in the rate of the relevant levy. The bill, therefore, appears to be beneficial to taxpayers.

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

Relevant extract from the response from the Parliamentary Secretary

As with the related Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001, the Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001 is to commence on the date of Royal Assent. However, provisions within the Bill are (again in accord with the request from industry) necessarily made retrospective to validate the reduction in the levy from 1 January 2000.

As the Committee has correctly noted, by reducing the amount of levy required to be paid, the levy payer is the beneficiary. Accordingly, there are no adverse effects on anyone but the Commonwealth as a result of this Bill.

The Committee thanks the Parliamentary Secretary for this response.

Retrospective validation
Clause 3

This bill has the same purpose as the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001, discussed above. That bill retrospectively removed the application of subsection 48(2) of the *Acts Interpretation Act 1901* to certain Statutory Rules. However, this bill, in addition to such a provision, also retrospectively validates other Statutory Rules with effect from 31 December 1999. The Committee **seeks the Minister's advice** as to why the approach taken in this bill differs from that adopted in the Customs (Charge) Validation Bill.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Parliamentary Secretary

As the Committee has correctly identified, the approach taken in the Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001 differs from that taken in the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge)

Validation Bill 2001. This is due to the past consolidations of both the Primary Industries (Excise) Levies Regulations 1999 and the Primary Industries (Customs) Charges Regulations 2000 that occurred during a process of amalgamation of individual levy regulations into two sets of regulations covering excise levies and custom charges.

Essentially, the difference in the approach to the two Bills is that the customs charge regulations misdescription has only been notified recently and thus no amendments were carried out earlier to correct the potential error. This means the operative rate of customs charge was not reduced, as was thought (and which *was* the case with the excise levy). Accordingly, it is necessary for the specific provisions within the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001 to take effect from 1 January 2000. The Bill simply states that Section 48(2) of the *Acts Interpretation Act 1901* does not apply to the Primary Industries (Customs) Charges Amendment Regulations 2000 Statutory Rule 2000 No. 236 (which reduces the rate of charge from 10.00 per tonne to $7.00 per tonne).

Conversely, the Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001 is to commence from 1 January 2000 and have particular effect, from 1 January 2000 to 1 October 2000 only. Due to the previously advised misdescription and the associated correction attempt, the approach in this Bill differs from that of the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001. Subsequent amendments have been approved to correctly implement the excise levy from 2 October 2000. This Bill simply says that particular pieces of legislation which came into effect on 1 July are taken to have been in effect on 31 December 1999 which is a day before the reduced rate of levy was to come into effect. If this were the case then Section 48(2) of the *Acts Interpretation Act 1901* would not be contravened.

A further explanation of this is described below.

The Primary Industries (Excise) Levies Regulations 1999 took effect on 1 January 2000. However, due to the approach taken in consolidating groups of levies and charges (intended for administrative ease) this particular consolidation did not include dried fruits. The consolidation to include dried fruit was not to come into effect until **1 October 2000**.

It was later established that this meant that any lowering of the excise levy rate could not occur until **after** 1 October 2000. Thus, the retrospective levy rate reduction procedure (which was completed in August 2000) for dried fruit, backdated to take effect from **1 January 2000** and intended to be consolidated into the Primary Industries (Excise) Levies Regulations 1999 (which took effect on 1 October 2000), were, by virtue of Section 48(2) of the *Acts Interpretation Act 1901,* deemed invalid **before** 1 October 2000.

The OLD argument indicates that regulations intending to reduce the levy from $10.00 to $7.00 per tonne could be inoperable because **the consolidated Primary Industries (Excise) Levies Regulations 1999** (including dried fruit) were not in effect at the time the amending regulations were approved at the Executive Council meeting on 29 August 2000.

This rationale suggests that as a result, it could be argued that a levy was actually imposed by the amending regulations, rather than a mere reduction in the existing levy. If this were the case, then it would contravene the *Acts Interpretation Act 1901*. This misdescription was only noted and advised after the event by the OLD.

Subsequent, amendments were approved in September 2000 to correctly implement the reduced rate of $7.00 from 2 October 2000.

Conversely, in the case of the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001, the related **Primary Industries (Customs) Charges Regulations 2000** came into effect on **1 July 2000** and again, due to the stages of consolidating the levy groups, they also did not include dried fruit at that time. Thus, the attempt to reduce the charge retrospectively to 1 January 2000 has also been deemed, by OLD, to be potentially inoperative by virtue of Section 48(2) of the Act.

The OLD rationale suggests that the regulations reducing the rate of charge could be seen to be inoperative due to the fact that the only regulations in operation (at the time the proposed amendments reducing the rate of charge were approved by the Executive Council in August 2000) relative to dried vine fruits (viz: under Section 6 of Schedule 10 of the *Primary Industries* (*Customs) Charges Act 1999)* were transitional regulations. These transitional regulations however, did not provide for amendments to be made retrospectively.

The main Primary Industries (Customs) Charges Regulations 2000 did not commence until **1 July 2000**. Thus, the OLD has indicated that amending a set of regulations to retrospectively reduce a rate of charge *before* the actual regulations commenced is invalid. What is required therefore is legislation prescribing that Section 48(2) of the Acts Interpretation Act 1901 not to have applied to the regulations reducing the rate of charge.

Again, the difference is essentially that the error in the excise levy was notified and attempted to be corrected which resulted in additional amendments that further complicated the issue and the error in the customs charge has only just been identified so no correcting amendments were carried out.

I trust the above information allays the Committee's concerns in relation to this matter. However, if the Committee has any further concerns, an officer from the Department can be made available to explain the proposed Bills in person.

The Committee thanks the Parliamentary Secretary for this response.

Migration Legislation Amendment (Application of Criminal Code) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2001*, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 13 June 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. 6 of 2001

This bill was introduced into the House of Representatives on 5 April 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958*, *Australian Citizenship Act 1948* and *Immigration (Guardianship of Children) Act 1946* to reflect the application of the *Criminal Code Act 1995* to existing offence provisions from 15 December 2001.

Strict liability and absolute liability offences
Schedule 1, items 6, 8, 11, 12, 17, 20, 22, 24, 25, 26, 28, 31, 35, 53, 60 to 64, 67, 70, 77, 80, 82, 85, 89, 92 and 96

This bill amends various offence and related provisions in legislation administered by the Immigration and Multicultural Affairs portfolio to harmonise existing criminal offence provisions with Chapter 2 of the *Criminal Code*. The Explanatory Memorandum observes that the purpose of the bill "is to ensure that, in applying the *Criminal Code*, the relevant offences continue to have the same meaning and operate in the same way as they do now".

The Explanatory Memorandum also states that the intention behind this series of amendments "is to preserve the status quo in relation [to] strict liability. In other words, only those offences that are judged to be presently strict liability offences are amended to provide expressly that they are offences of strict liability". The Committee notes this assurance and **seeks the Minister's confirmation** that the bill also preserves the status quo with respect to absolute liability offences.

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

The Committee has sought my confirmation that the Bill preserves the status quo with respect to two absolute liability offences found in the *Migration Act 1958.*

The Alert Digest quotes the Bill's Explanatory Memorandum which relevantly states that the intention behind the amendments "is to preserve the status quo in relation to strict liability. In other words, only those offences that are judged to be presently strict liability offences are amended to provide expressly that these are offences of strict liability".

I can assure the Committee that exactly the same intention applies in relation to the amendments dealing with the absolute liability offences found at subsections 229(1) and 232(1) of the *Migration Act 1958.* These offences deal generally with masters, owners, agents, charterers and operators of vessels bringing non-citizens into Australia either without documentation or in circumstances where the non-citizens would be unlawful.

The offences in subsections 229(1) and 232(1) do not currently have any fault element and would in fact be unenforceable if there were such a requirement, as very few aircraft or shipping operators would have the necessary fault element to sustain a conviction. Being wholly regulatory in nature, the offences serve broader public policy interests by having the effect of ensuring that carriers check the visa status of non-citizens wishing to travel to Australia. I would also note that the consequences of conviction do not involve imprisonment.

Although the two offences have no fault element, they do have express defences of mistake of fact. However if the offences were to be described as strict liability (rather than absolute liability) a logical problem arises, as there is an overlap between the defence of mistake of fact found in the *Criminal Code* and the defences found in subsections 229(5) and 232(2) of the Migration Act. The defence of mistake of fact created by the *Criminal Code* places an *evidential* burden on the defendant whilst the defence in the existing provisions of the Migration Act places a *legal* burden on the defendant.

It would be unsatisfactory to maintain both the defence of mistake of fact established by the *Criminal Code* and the defences found in subsections 229(5) and 232(2) because of the differing burdens they place on a defendant. To maintain the status quo, the offences need to be amended as provided for in the Bill.

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

The Committee thanks the Minister for this response.

Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2001*, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 13 June 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. 6 of 2001

This bill was introduced into the House of Representatives on 5 April 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the following Acts:

- *Australian Citizenship Act 1948* and the *Migration Act 1958*, to facilitate the use of electronic transactions as a consequence of the *Electronic Transactions Act 1999*; and to enable the use of computer-based decision making;
- *Migration Act 1958*, in relation to provision and deemed receipt of documents, including the electronic transmission of documents; and
- *Migration Act 1958* and the *Migration Legislation Amendment Act (No. 1) 1998*, to correct technical errors and misdescribed amendments.

Retrospective commencement
Subclauses 2(4) to (6)

By virtue of subclauses 2(4) to (6), the three items in Schedule 4 to this bill will commence, to some extent, retrospectively. It is clear that the amendments proposed by items 2 and 3 are technical, in that they simply correct erroneous cross-references.

However, the amendment proposed by item 1 amends the definition of "application form" in section 97 of the Principal Act by omitting a reference to subsection 45(2) and substituting a reference to regulations made for the purposes of section 46. The Explanatory Memorandum states that this is a technical amendment and is necessary because subsection 45(2) of the Principal Act has been repealed. The Committee **seeks the Minister's confirmation** that this amendment makes no substantive change to the law and will not adversely affect any person.

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

The Committee seeks my confirmation that the amendment to the definition of "application form" in item 1 of Schedule 4 to the Bill does not change the substantive law or adversely affect any person.

Schedule 4 to the Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001 ("the Bill") proposes to amend the *Migration Act 1958* ("the Act") to correct technical errors and misdescribed amendments.

Item 1 of Schedule 4 amends the definition of "application form" in section 97 of the Act: Currently, section 97 of the Act defines "application form" to mean a form on which a non-citizen applies for a visa, being a form that *subsection 45(2)* allows to be used for making the application.

On 28 April 2000, the *Migration Legislation Amendment Act (No. 1) 2000* repealed subsection 45(2) of the Act and transferred its contents to section 46. Section 46, in particular subsections 46(3) and (4), has the same effect and operation as the repealed subsection 45(2).

As a consequence, it is incorrect for section 97 to continue to refer to subsection 45(2). Therefore, item 1 of Schedule 4 to the Bill amends section 97 to correct a *technical error* which was overlooked when subsection 45(2) was repealed.

For this reason I confirm that the amendment does not change the substantive law nor is it likely to adversely affect any person.

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

The Committee thanks the Minister for this response.

National Crime Authority Legislation Amendment 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 12 June 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 Senate on 7 December 2000 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

Schedule 1 to the bill proposes to amend the *National Crime Authority Act 1984* in relation to the administration and operations of the National Crime Authority (NCA); the relationship between the Parliamentary Joint Committee on the National Crime Authority and the NCA; and the application of chapter 2 of the *Criminal Code*.

Schedule 2 proposes to amend the *Privacy Act 1988* to insert a note which modifies the application of the Act and alerts the reader of that Act to the requirements of the NCA Act.

Schedule 3 proposes to amend the *Ombudsman Act 1976* to extend the Ombudsman's jurisdiction to deal with complaints against the NCA.

Schedule 4 proposes to amend the *Administrative Decisions (Judicial Review) Act 1977* to exclude the operation of that Act in relation to certain decisions made under the NCA Act.

General comment

The National Crime Authority (NCA) was established in 1984, essentially to combat drug-related "organised crime", and was granted significant powers to enable it to undertake this function.

However, under the definition of 'relevant offence' as set out in this bill, the NCA may pursue various other offences, including offences involving theft, fraud, tax evasion, bankruptcy and company violations (where these involve multiple offenders, substantial planning and organisation, and the use of sophisticated methods and techniques).

This bill now proposes to increase the powers available to the NCA, and reduce the safeguards available to those affected by them. This raises a number of issues within the Committee's terms of reference.

The NCA is to exercise powers that are markedly greater than those held by other law enforcement bodies, such as police forces, who are apparently able to investigate crimes such as murder, rape and armed robbery without having to trespass unduly on personal rights and liberties. This raises the question of why the NCA should be given extended powers.

The bill imposes heavy penalties on people who decline to answer questions or produce documents. It is of concern that what was formerly a right to silence should now have become a crime punishable by a prison term of up to 5 years and a heavy fine. In addition, a person can be charged with contempt for maintaining silence before, and declining to produce documents to, an investigative body. In addition, the Committee notes that the bill adds 'perverting the course of justice' to the list of relevant offences in section 4. The Committee **seeks the Minister's advice** as to whether such an offence could be committed by a person who refused to answer a question at an NCA hearing. All this seems to constitute a major shift in people's rights when under investigation.

The Committee notes that the power to issue warrants is to be extended not just to federal magistrates but to magistrates at large, and that the bill refers to the disclosure of information by legal practitioners. The Committee would like to see any issues involved here clarified.

The Committee considers that there would be value in its **receiving a briefing** on the provisions of the bill in general.

Pending this briefing, the Committee draws Senators' attention to the provisions of this bill, 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

On 1 March 2001, the Parliamentary Joint Committee on the National Crime Authority (PJC-NCA) also tabled a report on the amendments proposed by the Bill. I have considered the matters raised by the Committee in conjunction with that Report. I also note that officers from the Commonwealth Attorney-General's Department briefed the Committee on the general nature of the Bill, and in particular on the operation of proposed amendments to the reasonable excuse and self-incrimination provisions. I take this opportunity to respond to the specific issues raised by the Committee.

The report infers that the Bill expands the offences that the National Crime Authority (the Authority) may investigate from drug-related organised crime, to the matters listed in Item 23, Part 4 of the Bill. However, the Bill only proposes the addition of two new offences to the list of offences that may currently be investigated by the Authority. Those offences are money laundering and perverting the course of justice. Although the Bill proposes reformatting the relevant paragraph of the definition (in subsection 4(1) of the *National Crime Authority Act 1984* (the NCA Act)) of relevant offence, the remainder of the offences listed have been included in that definition since the establishment of the Authority in 1984 (Act No. 41 of 1984).

Secondly, in relation to the Authority's use of the special investigatory powers, the Authority may only exercise those special powers when a matter has been referred to the Authority by either the Commonwealth Minister, following consultation with the Inter-Governmental Committee of the National Crime Authority (IGC-NCA) or by a State Minister with the approval of the IGC-NCA. When the IGC-NCA is determining whether a relevant criminal activity (as defined in subsection 4(1) of the NCA Act) should be referred to the Authority, it is required to consider whether ordinary police methods of investigation are likely to be effective. It is only in cases where the traditional methods of investigation are likely to be ineffective, that references are issued and the Authority may use the special investigatory powers.

Perverting the course of justice

The Committee seeks my advice as to whether the offence of perverting the course of justice could be committed by a person who refused to answer a question at a hearing of the Authority. The strict answer is that a failure to answer, without more, would not involve perverting the course of justice. Authority hearings, like all other investigatory processes, are not part of the course of justice and therefore a person cannot pervert the course of justice by failing to answer a question at such a hearing. The course of justice does not commence unless and until the jurisdiction of a court is invoked.

However, it is theoretically possible for a person to commit the offence of *attempting* to pervert the course of justice if the act (of failing to answer a question) has a tendency to pervert the course of justice by frustrating or deflecting a possible criminal prosecution and the act was intended to have that effect. It could also be possible for a person to be charged with *conspiring* to pervert the course of justice if the necessary conspiracy elements exist.

I add that the possibility of a person who fails to answer a question at a hearing of the Authority being charged with attempting or conspiring to pervert the course of justice is not altered by the provisions of the Bill.

The Committee thanks the Minister for this response and for the briefing provided.

Defence of reasonable excuse
Schedule 1, Part 1, items 1, 3, 5, 11

Items 1, 3, 5 and 11 in Part 1 of Schedule 1 to this bill omit the defence of 'reasonable excuse' from various provisions in the *National Crime Authority Act 1984*.

The Explanatory Memorandum states that:

> The removal of the 'reasonable excuse' defence is consistent with the move to more specific defences under Chapter 2 of the Criminal Code (the Code). The Code … sets out general principles of criminal responsibility and includes defences applicable to all offences.

The general defences are contained in Part 2.3 of the Code, and include defences relating to intervening conduct or event, duress, and sudden and extraordinary emergency. By replacing the less clear notion of 'reasonable excuse' with these specific defences, the scope for disputes as to whether a reasonable excuse exists will be significantly reduced.

This Digest considers a number of bills which seek to apply the Criminal Code to legislation across a number of portfolio areas. Some of these bills also refer to the defences of 'lawful excuse' and 'reasonable excuse' as they are to apply under the *Code*.

For example the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000, among other things, proposes to amend section 63 of the *Australian Federal Police Act 1979.* This section makes it an offence to impersonate an AFP officer, or, without lawful excuse, to wear or possess any AFP clothing or equipment. The proposed amendment is intended to:

- remove the specific defence of 'lawful excuse' from section 63 (because general defences of lawful excuse and lawful authority are now to be inserted in the Criminal Code as section 10.5); but

- insert a specific defence of 'reasonable excuse' in section 63 (because a general defence of 'lawful excuse' would not cover situations where someone might have some other reasonable excuse for possessing that clothing or equipment – for example, finding a piece of lost equipment and intending to return it).

From this, it would seem that the *Criminal Code* will contain a generally applicable defence of 'lawful excuse', and some individual offences will also contain a specific defence of 'reasonable excuse'. It is not clear how this scheme will affect the NCA. The Committee, therefore, **seeks the Minister's advice** as to whether the proposed *Criminal Code* defence of 'lawful excuse' will apply to offences under the *National Crime Authority Act 1984*, and what those offences are. The Committee also **seeks the Minister's advice** as to why the *Code* seems to contemplate a defence of 'reasonable excuse' as appropriate for some Commonwealth offences, but not for offences under the *National Crime Authority Act 1984*.

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

The proposal to remove the defence of reasonable excuse was extensively canvassed by the Committee during the briefing session held with members of the Department. However, the Committee seeks my advice as to whether the *Criminal Code* defence of lawful excuse will apply to offences under the NCA Act and what those offences are. The Committee also seeks my advice as to why the *Criminal Code* seems to contemplate a defence of reasonable excuse as appropriate for some Commonwealth offences, but not for offences under the NCA Act.

The *Criminal Code* defence of lawful authority, which will apply to all offences under the NCA Act, is in the following terms:

> "A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law." (Section 10.5 of the *Criminal Code)*

The list of offences created by the NCA Act is at Attachment A.

While the defence of reasonable excuse is not provided by the *Criminal Code* that Code does not prevent other defences being available in appropriate circumstances. This includes the defence of reasonable excuse in circumstances where, as a matter of policy, it is appropriate to have an open-textured defence. However, the preferred approach is to have clearly defined defences, and this is reflected in the fact that the

vast majority of Commonwealth offences do not specify reasonable excuse as a defence.

In relation to offences under the NCA Act, the *Criminal Code* defences are considered adequate and appropriate, a point accepted by all members of the PJC-NCA.

The Committee thanks the Minister for this response which states that "the *Criminal Code* defences are considered adequate and appropriate". Whether reasonable excuse should be retained as a defence in relation to offences under the National Crime Authority Act is an issue best left for resolution by the Senate as whole.

For this reason, the Committee continues to draw Senators' attention to this provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the Committee's terms of reference

Abrogation of the privilege against self-incrimination Schedule 1, Part 1, item 12

Item 12 in Part 1 of Schedule 1 to the bill creates a new scheme where a witness appearing at an NCA hearing claims that the answer to a question or the production of a document or thing might tend to incriminate them. Under the current provisions, if a witness makes such a claim:

- the NCA must decide whether it is a valid claim;
- if it is a valid claim, then the person has a reasonable excuse for not answering the question or producing the document or thing;
- however, if the DPP or State Attorney-General gives the person a written undertaking that any answer, document or thing, or anything derived from it, will not be used in evidence against the person in later proceedings, then the person does not have a reasonable excuse; and
- if the person is given such an undertaking, or does not have a valid claim, then they must answer the question or produce the document or thing.

Under the proposed new scheme:

- the witness must answer the incriminating question or produce the document, and it is an offence if they fail to do so; but

- the answer or document is not admissible in evidence against the witness in any later criminal proceeding.

Therefore the new scheme differs from the existing scheme in that there is no longer an issue of reasonable excuse, or the need for the DPP to give an undertaking, and evidence that derives from an answer or document may now be used against the person ('derivative use immunity').

The EM justifies this change by noting the NCA's unique nature and its critical role in the fight against organised crime. This means that the public interest in the NCA having full and effective investigatory powers, and in being able to use against a person any incriminating material derived from that person's evidence "outweigh the merits of affording full protection to self-incriminatory material".

The EM also notes that the proposed provision is similar to section 68 of the *Australian Securities and Investments Commission Act 1989* (which was amended in 1992 following a report of the PJC on Corporations and Securities).

This Committee considered that amendment in its *Fourth Report of 1992*. In that report, the Committee acknowledged the argument that "effective investigation and prosecution of corporate offences [should not be] hindered by inappropriate evidentiary requirements". However, the Committee concluded that the common law privilege against self-incrimination was a fundamental right which, in the absence of good reason, ought not be interfered with.

In similar terms, the Committee acknowledges that this amendment is intended to enhance the investigatory power of the NCA by limiting the ability of witnesses to challenge the NCA's role. However, it is always cause for concern where the legitimate and essential rights of witnesses are limited in the interest of expedient investigations. The Committee, therefore, **seeks the Minister's advice** as to why derivative use immunity should not be retained during NCA investigations and hearings as a fundamental right of long-standing.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

While the proposal to remove the derivative-use immunity in relation to self-incriminatory evidence was also the subject of discussion during the Departmental briefing session, the Committee seeks my advice as to why derivative-use immunity should not be retained during hearings conducted by the Authority as a fundamental right of long standing.

The Committee is aware of the history behind the common law privilege against self-incrimination and the various modifications to that privilege that have occurred by various Acts. The Committee is also aware of the reasons put forward in support of the proposed changes to that privilege as set out in the Explanatory Memorandum for the Bill. I do not intend to revisit those issues.

It is true that the privilege against self-incrimination will be further modified as a result of these amendments. However, the amendments will also mean that a once a person claims privilege then any evidence that the person gives at a hearing cannot be directly used against him or her in criminal proceedings without the need for a certificate of immunity from a prosecuting authority. Removal of the broader derivative-use immunity means that the Authority will have the benefit of information that it would not otherwise have. It will now be able to use the direct evidence of the witness to derive other evidence that will establish the elements of the offence. This is a matter of balancing the interests of the individual with the interests of the community in uncovering serious and complicated organised criminal activity.

I also note that the PJC-NCA was persuaded that the work of the Authority is being impeded by the existence of derivative-use immunity and supports the proposal to remove that immunity. I add, however, that the PJC-NCA recommended that, as was done in the case of the then Australian Securities Commission, a five-year review of the effectiveness of the amendment be undertaken to provide an assurance to the community of the continuing appropriateness of these provisions.

I take this opportunity to advise the Committee that the Government is considering the PJC-NCA's recommendation in this regard. I also add that in view of the concerns expressed about the removal of the defence of reasonable excuse, the Government is considering an amendment to require a five-year review not only of the removal of derivative-use immunity but also of the removal of the defence of reasonable excuse.

The Committee thanks the Minister for this response.

The loss of derivative use immunity has been the subject of considerable comment in previous Committee reports, and remains a matter of concern to the Committee. As the Minister observes, the issue involves striking an appropriate balance between the rights of the individual and the interests of the community. This is an issue best left for resolution by the Senate as a whole.

For this reason, the Committee continues to draw Senators' attention to this provision as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the Committee's terms of reference

Safety, Rehabilitation and Compensation and Other Legislation Amendment 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 Employment, Workplace Relations and Small Business has responded to those comments in a letter dated 30 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 7 December 2000 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business]

Schedule 1 to the bill proposes to amend the *Industrial Chemicals (Notification and Assessment) Act 1989* to streamline and improve the operation of the National Industrial Chemicals Notification and Assessment Scheme by amending the definition of synthetic polymers of low concern; improving the secondary notification procedures for existing chemicals; and making other minor and technical corrections.

Schedule 2 proposes to amend the *Safety, Rehabilitation and Compensation Act 1988* in relation to the operation of the Commonwealth workers' compensation scheme, including the streamlining and updating of various provisions and the making of minor technical, policy and consequential amendments.

Schedule 3 proposes to amend the following Acts:

Equal Opportunity for Women in the Workplace Act 1999 to correct a technical anomaly arising from an omission in the Act;

Income Tax Assessment Act 1936 to authorise provision of taxation information to Comcare as well as to the Safety, Rehabilitation and Compensation Commission;

National Occupational Health and Safety Commission Act 1985 to reflect the name change of the Australian Chamber of Commerce and Industry; and the

Occupational Health and Safety (Commonwealth Employment) Act 1991 to make consequential amendments in relation to the collection of premiums.

Consistent with section 4AB of the *Crimes Act 1914*, the bill also converts certain penalties currently expressed in monetary terms into penalty units.

Retrospective application
Schedule 2, Part 4

The amendment proposed in Part 4 of Schedule 2 to the bill will add a new subsection 27(3) to the *Safety, Rehabilitation and Compensation Act 1988*. This new subsection will prevent any person who suffered a permanent impairment prior to 1 December 1988 from claiming compensation for non-economic loss, unless they had lodged an application for compensation before the date on which this bill was introduced into the Parliament.

The Explanatory Memorandum states that the proposed amendment "clarifies that an employee who suffered a permanent impairment prior to the commencement date should not receive compensation under section 27 of the SRC Act because such an employee would not have been entitled to receive compensation for non-economic loss under the previous legislation (the 1971 Act)".

While the EM asserts that the bill "clarifies" the law, the fact that some people were still, at the date of the introduction of the bill, apparently making claims for compensation for non-economic loss in respect of impairments which were suffered before 1 December 1988, indicates that the new provision is intended to have some substantive effect, and this effect operates retrospectively. Given this, the Committee **seeks the Minister's advice** as to how many claimants are likely to be affected by this amendment, what notice those claimants have received concerning the introduction of the amendment, and why the amendment will not operate in a more conventional manner from the date that the bill is passed.

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

Relevant extract from the response from the Minister

> Section 27 of the SRC Act currently provides for the payment of compensation for non-economic loss for a permanent impairment where compensation is payable in respect of the injury under section 24 of the Act.

The new subsection will clarify the operation of section 27 to expressly exclude a permanent impairment which arose before 1 December 1988, unless the claim was lodged prior to the Bill's introduction (7 December 2000).

On 1 December 1988, the operative provisions of the SRC Act commenced. The SRC Act contains transitional provisions to ensure that compensation will be payable under the Act to employees who had an entitlement to compensation under the previous legislation (1912, 1930 and 1971 Acts). However, it was never intended that the entitlements of employees injured prior to 1 December 1988 would be extended. As there was no entitlement to non-economic loss payments for permanent impairment under the previous legislation, it follows that it was not intended that employees injured prior to the commencement of the SRC Act would have an entitlement to the non-economic loss compensation arising from section 27. However, it has been held by the Federal court that the SRC Act, as drafted, does allow for such compensation.

The aim of the Bill therefore is to return the operation of the Act to its original intention.

The Committee sought advice on three aspects of the proposed amendment.

Number of claimants likely to be affected

There are 4 "determining authorities" determining claims of this type under the SRC Act - the Australian Defence Force (ADF), Australia Post, Telstra and Comcare.

The ADF has by far the largest number of claims received of this type. The past pattern of claims for permanent impairment (which might attract a payment for non-economic loss) where the permanent impairment arose prior to the commencement of the SRC Act is as follows:

When claim received	**Number of claims received**
July 97 - June 98	1211
July 98 - June 99	1225
July 99 - June 00	1061
July 00 - June 01	439
Introduction of Bill to early March 2001	247

There appears to be an overall downward trend in the lodgement of ADF claims - not surprisingly given that such claims only relate to permanent impairments which arose before 1 December 1988. However, there tend be significant time lags between injury and lodgement of ADF claims generally, so this trend may not remain consistent in the next few years.

At Australia Post there have been only 2 such claims determined since 1 July 1998 - it would therefore be reasonable to anticipate that no more than a handful of such claimants might be affected by the proposed change.

Telstra has had between 150 - 160 such claims over the last 3 years with 10 from the date of introduction of the Bill to early March 2001.

Finally Comcare has received an average of 97 per year over the last 3 years, with 12 such claims lodged with Comcare from the date of introduction of the Bill to early March 2001.

Notice to claimants about the introduction of the Bill

No notice could have been forwarded to claimants prior to the introduction of the Bill as those who would have been affected would be those who hadn't yet lodged a claim. If they hadn't lodged a claim then it is difficult to see how the determining authorities would know who to notify. In relation to those who lodge a claim after the introduction of the Bill, Comcare will issue a jurisdictional policy advice to determining authorities requesting that they advise claimants whose claim for permanent impairment is accepted, that the Bill is presently before the Parliament and that payments for economic loss should not be determined, pending the outcome of the Bill. Other compensation in respect of an accepted permanent impairment will be unaffected.

Retrospective operation

The Committee observed that the effect of the Bill "operates retrospectively". This is because the proposed section applies to claims lodged after the date of introduction of the Bill. The committee asked why the amendment will not operate in a "more conventional manner" from the date the Bill is passed.

The reason for the proposed provision operating from the date of introduction is to preclude what might be expected to be speculative claims being made during the "window of opportunity" between introduction and passage. Given that the purpose of the amendment is to return the interpretation of the Act to that originally intended, it would be counterproductive to create the incentive for the lodgement of claims which, in the Government's view, ought not to be available. In addition it must be remembered that the amendment only relates to a permanent impairment (not the injury giving rise to the impairment but the actual impairment itself) which arose before December 1988. In other words any such potential claimant has had the permanent impairment for more than 12 years but has not yet made a claim. It might be considered that there has been a reasonable amount of time for any person to make a claim.

The practice of legislation providing for a changed state of affairs commencing after introduction is not unprecedented and is, for example, common in the area of taxation legislation. Such a practice in relation to taxation legislation is recognised by the Senate. Resolution 23 of 8 November 1988 provides that where the Government has announced its intention to introduce legislation to amend taxation law and a bill to do so is not introduced into the Parliament or made available by way of publication of a draft bill within 6 months of the announcement, the Senate shall amend any such bill to provide for *commencement no earlier than introduction* (emphasis added) or the date of publication of the draft bill.

I trust that this information assists the Committee in its consideration of the SRCOLA Bill.

The Committee thanks the Minister for this response which seems to suggest that this bill does not remove rights retrospectively, but rather prevents certain claimants from accruing rights which previous legislation had not intended to confer on them. The Committee **would appreciate the Minister's confirmation** that this is the effect of the bill.

Barney Cooney
Chairman

JUN 2001

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18 JUN 2001

Senate Standing C'ttee for the Scrutiny of Bills

Senator Barney Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
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Dear Senator Cooney Barney

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION BILL 2001

I refer to a letter from Mr James Warmenhoven, Secretary, Standing Committee for the Scrutiny of Bills dated 24 May 2001, concerning comments contained in the Scrutiny of Bills Alert Digest No. 6 of 2001 regarding the Australian Securities and Investments Commission Bill 2001 ("the Bill"). Mr Warmenhoven has asked that responses in relation to the comments on the Bill be directed to yourself.

The comments in the Digest relate to two provisions of the Bill that permit functions and powers to be delegated (specifically, clause 102 dealing with delegations by the Commission, and clause 119A with delegations by Commission members). In both cases, the functions and powers must be delegated to person set out in each clause, unless the Minister's approval is obtained.

As you will be aware, the Government has introduced a package of new corporations legislation (of which the Bill is part) in response to the High Court's decision last year in *The Queen v Hughes*. The legislative package will replace the current Corporations Law regime with a new corporate regulatory regime supported by referrals of power by the States.

The referrals of State power are to be provided, in part, in the form of a referral of the text of the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001 to the Commonwealth. As a result, it is crucial to the constitutional validity of the Bill that it be in the same form as the text referred by the States. Further, the referral mechanism was negotiated with the States on the basis that there would be no substantial changes to law and policy under the Corporations Law regime.

In addition, one of the intentions of the new regime is for a smooth transition, with no change from current arrangements under the Corporations Law regime, to minimise disruption to the wider community. For the most part, the provisions of the new legislation duplicate their equivalent provision in the current legislation.

Accordingly, apart from minor changes to drafting style and removal of words that are needed because of the current scheme structure, clauses 102 and 119A have not changed from their original form and operation under the *Australian Securities and Investments Commission Act 1989*. Limiting the powers of delegation would amount to a substantial change to the current arrangements that have operated for 10 years under the Corporations Law framework.

It is also worth noting that the Parliamentary Joint Statutory Committee on Corporations and Securities, in its report on the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001, remarked that the Bills did not make any substantial policy changes to the Acts which they replace. The Committee recommended that the Bills be passed without amendments as early as possible.

In these circumstances, I consider that amendment of the clauses concerned would not be warranted.

Yours sincerely,

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

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

Dear Senator Cooney Barney,

I am writing in response to additional matters, relating to the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001 (the Bill) raised by the Senate Standing Committee for the Scrutiny of Bills in its Fourth Report of 2001 and Alert Digest Number 4 of 2001.

The Committee has sought my advice as to the status of Customs guidelines for administering monitoring powers 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 the guidelines.

When performing a function or exercising a power under a law of Customs, officers of the Australian Customs Service are subject to the directions of the Chief Executive Officer of Customs (the CEO) pursuant to subsection 4(4) of the *Customs Administration Act 1985*. The guidelines being developed for the administration of the monitoring powers proposed in the Bill will be approved by the CEO and have the status of directions under that provision. Any failure to comply with such directions would render the officer in breach of the Australian Public Service Code of Conduct as set out in section 13 of the *Public Service Act 1999* and subject to disciplinary action under section 15 of that Act.

While it is intended that the guidelines be publicly available, they will not be disallowable instruments. As well as the provision of information about rights and responsibilities, the guidelines will cover purely administrative matters, such as the internal Customs process to be followed before applying for a monitoring warrant, the classification of officers who should apply for monitoring warrants and procedures for obtaining informed consent to exercise monitoring powers where a warrant is not considered appropriate. These administrative matters are not of a kind that would warrant the parliamentary scrutiny required of disallowable instruments.

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I note, however, the Committee's concerns in relation to non-compliance with the direction in the guidelines to inform an occupier of premises of their rights during the exercise of monitoring powers. While the Government considers that the rights of the occupier under the monitoring powers provisions would be unaffected by a failure to notify of their existence, we acknowledge that a failure to notify may result in a person acting in a way that is not in their own interests because he or she does not know that those rights exist.

To address this possibility, I propose to move Government amendments to the Bill to require monitoring officers to inform occupiers of premises of their rights and responsibilities under new Subdivision J of Division 1 of Part XII of the *Customs Act 1901* (the Act) before seeking consent to enter premises and exercise monitoring powers or entering premises under a monitoring warrant.

In my letter of 26 March I advised the Committee that no offence will be recorded against a person where a matter is dealt with entirely under the infringement notice scheme, but that an administrative record of decisions taken in respect of infringement notices would be kept. The Committee sought further advice as to whether 'stale' infringement notices would be removed after a period of time from the record (in the same manner as the 'spent convictions' scheme in the *Crimes Act 1914* [the Crimes Act]).

Apart from the general requirement to keep records of how decisions are made, the rationale for keeping an administrative record of decisions under the proposed penalty regime in the Bill, is to provide the CEO with relevant information in deciding whether to serve an infringement notice, prosecute or do nothing in the event of a breach of a strict liability offence. It provides a mechanism to gauge what is the most appropriate response to non-compliance in a particular case.

The establishment of an administrative equivalent to the spent convictions scheme in the Crimes Act for stale infringement notices is considered inappropriate because:

- any recording or disclosure of information would be subject to the confidentiality requirements of section 16 *Customs Administration Act 1985*;
- standard archiving procedures result in files over 10 years old not being readily available; and
- the circumstances in which the record is to be taken into account, if the offence the subject of the recorded infringement notice had been the subject of a conviction, would be exempt from the spent convictions provisions by virtue of paragraph 85ZZH(a) of the Crimes Act. Law enforcement agencies are exempted from the 'spent convictions' in the Crimes Act (the Australian Customs Service is defined as a law enforcement agency, section 85ZL refers).

In Alert Digest No. 4 of 2001 the Committee sought my advice as to whether amendments made to the Bill in the House of Representatives create new strict liability offences, and if so, why it is appropriate that these offences are offences of strict liability.

All of the Principal Act offence provisions to which the amendments mentioned by the Committee relate are provisions relating to the regulatory control over goods for export. The relevant offences relate to:

- failure to enter goods for export (proposed subsection 113(1));
- loading goods for export without an authority to deal (proposed section 115);
- failure to communicate a submanifest as required by proposed section 117A;
- allowing a ship or aircraft to depart without a Certificate of Clearance having been issued (proposed section 118);
- using an Accredited Client Export Approval Number (ACEAN) that relates to more than one consignment (proposed section 114BA);
- delivering goods, other than excluded goods, to a person at a wharf or airport for export without entering them and providing the person particulars of the authority to deal or, if the goods are not required to be entered, providing the person with particulars of the goods or the goods (proposed section 114E); and
- failing to notify Customs where goods are released from a warehouse for export (proposed new section 102A).

The offence in new section 114BA relates to using the same ACEAN for more than one export consignment. The integrity of the periodic reporting system for exports is dependent upon accredited clients properly acquitting their goods exported using an ACEAN in their periodic declaration. Using a single ACEAN in respect of more than one consignment of goods for export will significantly undermine the acquittal process.

The strict liability offences proposed in sections 102A, 114E and 117A are new offences for breaches of the various new exporting reporting obligations in relation to goods for export. As detailed in Chapter 5 of the revised explanatory memorandum, the export reporting obligations are designed to enable Customs more effectively to perform its roles of:

- preventing the export of prohibited goods;
- monitoring compliance with the GST law in relation to the GST-status of supplies of goods for export; and
- ensuring that goods with outstanding duty liability are not diverted into the domestic market.

These offences are designed to improve Customs ability to track the movement of all goods for export and in particular to avoid diversion of goods with outstanding duty liabilities into the domestic market. The diversion of such goods into the domestic market causes significant loss of government revenue and commercial disadvantage to legitimate operators.

The proscribed conduct in proposed sections 113, 115 and 118 of the Act relates to the unauthorised movement of goods for export and is currently the subject of fault based offences in the existing export control provisions of the Act. These offences are to be made offences of strict liability and, in the case of sections 115 and 118, the penalty will be reduced to 60 penalty units in accordance with criminal law policy. (The current penalties for offences against sections 115 and 118 are $10,000 and $50,000, respectively.)

As stated in my letter of 26 March 2001, while the conduct that is the subject of each of the proposed strict liability offences may not appear significant when viewed in isolation, there are significant consequences for the community where the regulatory framework is breached. The Government believes that the risk to the revenue of diversion, the commercial disadvantage to legitimate operators, and the risk of prohibited goods being exported undetected, justify the introduction of strict liability offences for breaches of the regulatory mechanisms designed to reduce those risks. 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.

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

- 8 JUN 2001

Senator the Hon Judith Troeth
Senator for Victoria

PARLIAMENTARY SECRETARY TO THE MINISTER
FOR AGRICULTURE, FISHERIES AND FORESTRY

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

13 JUN 2001

Dear Senator

Thank you for your letter of 5 April 2001 in relation to the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001 and the Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001. As requested, I have provided additional information in response to the comments made in the Senate Scrutiny of Bills Alert Digest No.5 of 2001 (4 April 2001).

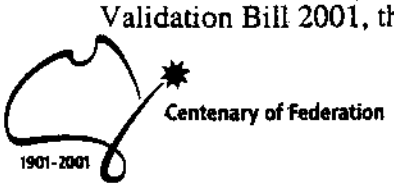
Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001.

Commencement
Clause 2
As you point out, the Explanatory Memorandum indicates that "it is necessary for the Bill to take effect from 1 January 2000". While clause 2 of the Bill states that it commences on the day after it receives Royal Assent, there is no conflict between these two statements. It simply means that while this Bill will come into effect from the date of Royal Assent, its provisions will have retrospective effect from 1 January 2000. This is in accord with the request from industry that the date at which the new reduced levy should come into force was 1 January 2000.

A necessary validation?
Clause 3
The decision to retrospectively remove the application of the *Acts Interpretation Act 1901* (the Act), to Schedule 1 of the Primary Industries (Customs) Charges Amendment Regulations 2000 (No.1) (Statutory Rule No. 236), was on the advice of the Office of Legislative Drafting (OLD) within the Attorney-General's Department, which suggested that it could be argued that the amendments could potentially disadvantage persons other than the Commonwealth. Accordingly, the OLD advised that it would be prudent to validate the original amendments aimed at reducing the rate of levy, resulting in the retrospective removal of the application of the Act to the particular amendments. Again, I can re-assure the Committee that this legislation does not in any way disadvantage persons other than the Commonwealth.

Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001.

Commencement
Clause 2 and subclauses 3(1) and (2)
As with the related Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001, the Dried Vine Fruits (Rate of Primary Industry (Excise) Levy)



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Validation Bill 2001 is to commence on the date of Royal Assent. However, provisions within the Bill are (again in accord with the request from industry) necessarily made retrospective to validate the reduction in the levy from 1 January 2000.

As the Committee has correctly noted, by reducing the amount of levy required to be paid, the levy payer is the beneficiary. Accordingly, there are no adverse effects on anyone but the Commonwealth as a result of this Bill.

Retrospective validation

Clause 3

As the Committee has correctly identified, the approach taken in the Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001 differs from that taken in the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001. This is due to the past consolidations of both the Primary Industries (Excise) Levies Regulations 1999 and the Primary Industries (Customs) Charges Regulations 2000 that occurred during a process of amalgamation of individual levy regulations into two sets of regulations covering excise levies and custom charges.

Essentially, the difference in the approach to the two Bills is that the customs charge regulations misdescription has only been notified recently and thus no amendments were carried out earlier to correct the potential error. This means the operative rate of customs charge was not reduced, as was thought (and which *was* the case with the excise levy). Accordingly, it is necessary for the specific provisions within the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001 to take effect from 1 January 2000. The Bill simply states that Section 48(2) of the *Acts Interpretation Act 1901* does not apply to the Primary Industries (Customs) Charges Amendment Regulations 2000 Statutory Rule 2000 No. 236 (which reduces the rate of charge from 10.00 per tonne to $7.00 per tonne).

Conversely, the Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001 is to commence from 1 January 2000 and have particular effect, from 1 January 2000 to 1 October 2000 only. Due to the previously advised misdescription and the associated correction attempt, the approach in this Bill differs from that of the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001. Subsequent amendments have been approved to correctly implement the excise levy from 2 October 2000. This Bill simply says that particular pieces of legislation which came into effect on 1 July are taken to have been in effect on 31 December 1999 which is a day before the reduced rate of levy was to come into effect. If this were the case then Section 48(2) of the *Acts Interpretation Act 1901* would not be contravened.

A further explanation of this is described below.

The Primary Industries (Excise) Levies Regulations 1999 took effect on 1 January 2000. However, due to the approach taken in consolidating groups of levies and charges (intended for administrative ease) this particular consolidation did not include dried fruits. The consolidation to include dried fruit was not to come into effect until **1 October 2000**.

It was later established that this meant that any lowering of the excise levy rate could not occur until **after** 1 October 2000. Thus, the retrospective levy rate reduction procedure (which was completed in August 2000) for dried fruit, backdated to take effect from **1 January 2000** and intended to be consolidated into the Primary Industries (Excise) Levies

Regulations 1999 (which took effect on 1 October 2000), were, by virtue of Section 48(2) of the *Acts Interpretation Act 1901*, deemed invalid **before** 1 October 2000.

The OLD argument indicates that regulations intending to reduce the levy from $10.00 to $7.00 per tonne could be inoperable because **the consolidated Primary Industries (Excise) Levies Regulations 1999** (including dried fruit) were not in effect at the time the amending regulations were approved at the Executive Council meeting on 29 August 2000.

This rationale suggests that as a result, it could be argued that a levy was actually imposed by the amending regulations, rather than a mere reduction in the existing levy. If this were the case, then it would contravene the *Acts Interpretation Act 1901*. This misdescription was only noted and advised after the event by the OLD. Subsequent, amendments were approved in September 2000 to correctly implement the reduced rate of $7.00 from 2 October 2000.

Conversely, in the case of the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001, the related **Primary Industries (Customs) Charges Regulations 2000** came into effect on **1 July 2000** and again, due to the stages of consolidating the levy groups, they also did not include dried fruit at that time. Thus, the attempt to reduce the charge retrospectively to 1 January 2000 has also been deemed, by OLD, to be potentially inoperative by virtue of Section 48(2) of the Act.

The OLD rationale suggests that the regulations reducing the rate of charge could be seen to be inoperative due to the fact that the only regulations in operation (at the time the proposed amendments reducing the rate of charge were approved by the Executive Council in August 2000) relative to dried vine fruits (viz: under Section 6 of Schedule 10 of the *Primary Industries (Customs) Charges Act 1999)* were transitional regulations. These transitional regulations however, did not provide for amendments to be made retrospectively.

The main Primary Industries (Customs) Charges Regulations 2000 did not commence until **1 July 2000**. Thus, the OLD has indicated that amending a set of regulations to retrospectively reduce a rate of charge *before* the actual regulations commenced is invalid. What is required therefore is legislation prescribing that Section 48(2) of the Acts Interpretation Act 1901 not to have applied to the regulations reducing the rate of charge.

Again, the difference is essentially that the error in the excise levy was notified and attempted to be corrected which resulted in additional amendments that further complicated the issue and the error in the customs charge has only just been identified so no correcting amendments were carried out.

I trust the above information allays the Committee's concerns in relation to this matter. However, if the Committee has any further concerns, an officer from the Department can be made available to explain the proposed Bills in person.

Yours sincerely

Judith Troeth

JUDITH TROETH

The Hon. Philip Ruddock MP
Minister for Immigration and Multicultural Affairs
Minister for Reconciliation and Aboriginal and
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-6 JUN 2001

RECEIVED
13 JUN 2001
Senate Standing C'ttee for the Scrutiny of Bills

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

Dear Senator Cooney

I refer to the letter of 24 May 2001 from Mr James Warmenhoven, Secretary to the Standing Committee for the Scrutiny of Bills, to my Senior Adviser referring to the comments contained in the Scrutiny of Bills Alert Digest No. 6 of 2001 concerning the Migration Legislation Amendment (Application of Criminal Code) Bill 2001.

The Committee has sought my confirmation that the Bill preserves the status quo with respect to two absolute liability offences found in the *Migration Act 1958*.

The Alert Digest quotes the Bill's Explanatory Memorandum which relevantly states that the intention behind the amendments "is to preserve the status quo in relation to strict liability. In other words, only those offences that are judged to be presently strict liability offences are amended to provide expressly that these are offences of strict liability".

I can assure the Committee that exactly the same intention applies in relation to the amendments dealing with the absolute liability offences found at subsections 229(1) and 232(1) of the *Migration Act 1958*. These offences deal generally with masters, owners, agents, charterers and operators of vessels bringing non-citizens into Australia either without documentation or in circumstances where the non-citizens would be unlawful.

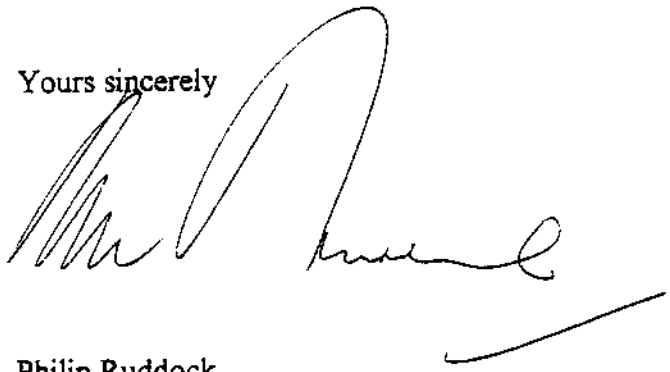
The offences in subsections 229(1) and 232(1) do not currently have any fault element and would in fact be unenforceable if there were such a requirement, as very few aircraft or shipping operators would have the necessary fault element to sustain a conviction. Being wholly regulatory in nature, the offences serve broader public policy interests by having the effect of ensuring that carriers check the visa status of non-citizens wishing to travel to Australia. I would also note that the consequences of conviction do not involve imprisonment.

Although the two offences have no fault element, they do have express defences of mistake of fact. However if the offences were to be described as strict liability (rather than absolute liability) a logical problem arises, as there is an overlap between the defence of mistake of fact found in the *Criminal Code* and the defences found in subsections 229(5) and 232(2) of the Migration Act. The defence of mistake of fact created by the *Criminal Code* places an *evidential* burden on the defendant whilst the defence in the existing provisions of the Migration Act places a *legal* burden on the defendant.

It would be unsatisfactory to maintain both the defence of mistake of fact established by the *Criminal Code* and the defences found in subsections 229(5) and 232(2) because of the differing burdens they place on a defendant. To maintain the status quo, the offences need to be amended as provided for in the Bill.

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

Yours sincerely



Philip Ruddock

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

Dear Senator Cooney

I refer to the letter of 24 May 2001 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. 6 of 2001 (23 May 2001) concerning the Migration Legislation Amendment (Electronic Transaction and Methods of Notification) Bill 2001.

The Committee seeks my confirmation that the amendment to the definition of "application form" in item 1 of Schedule 4 to the Bill does not change the substantive law or adversely affect any person.

Schedule 4 to the Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001 ("the Bill") proposes to amend the *Migration Act 1958* ("the Act") to correct technical errors and misdescribed amendments.

Item 1 of Schedule 4 amends the definition of "application form" in section 97 of the Act. Currently, section 97 of the Act defines "application form" to mean a form on which a non-citizen applies for a visa, being a form that *subsection 45(2)* allows to be used for making the application.

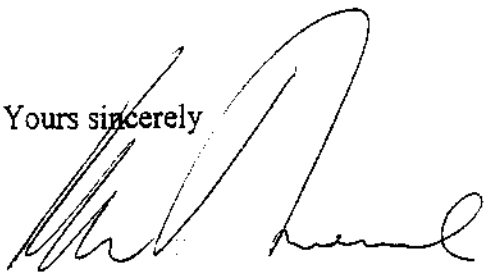
On 28 April 2000, the *Migration Legislation Amendment Act (No. 1) 2000* repealed subsection 45(2) of the Act and transferred its contents to section 46. Section 46, in particular subsections 46(3) and (4), has the same effect and operation as the repealed subsection 45(2).

As a consequence, it is incorrect for section 97 to continue to refer to subsection 45(2). Therefore, item 1 of Schedule 4 to the Bill amends section 97 to correct a *technical error* which was overlooked when subsection 45(2) was repealed.

For this reason I confirm that the amendment does not change the substantive law nor is it likely to adversely affect any person.

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

Yours sincerely



Philip Ruddock

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

Senator B Cooney
Chairman
Senate Standing Committee for the
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SG 49
Parliament House
CANBERRA ACT 2600

12 JUN 2001

Dear Senator Cooney Barney,

NATIONAL CRIME AUTHORITY LEGISLATION AMENDMENT BILL 2000

In its first report of 2001, the Senate Standing Committee for the Scrutiny of Bills (the Committee) discussed the National Crime Authority Legislation Amendment Bill 2000 (the Bill). On 1 March 2001, the Parliamentary Joint Committee on the National Crime Authority (PJC-NCA) also tabled a report on the amendments proposed by the Bill. I have considered the matters raised by the Committee in conjunction with that Report. I also note that officers from the Commonwealth Attorney-General's Department briefed the Committee on the general nature of the Bill, and in particular on the operation of proposed amendments to the reasonable excuse and self-incrimination provisions. I take this opportunity to respond to the specific issues raised by the Committee.

The report infers that the Bill expands the offences that the National Crime Authority (the Authority) may investigate from drug-related organised crime, to the matters listed in Item 23, Part 4 of the Bill. However, the Bill only proposes the addition of two new offences to the list of offences that may currently be investigated by the Authority. Those offences are money laundering and perverting the course of justice. Although the Bill proposes reformatting the relevant paragraph of the definition (in subsection 4(1) of the *National Crime Authority Act 1984* (the NCA Act)) of relevant offence, the remainder of the offences listed have been included in that definition since the establishment of the Authority in 1984 (Act No. 41 of 1984).

Secondly, in relation to the Authority's use of the special investigatory powers, the Authority may only exercise those special powers when a matter has been referred to the Authority by either the Commonwealth Minister, following consultation with the

Inter-Governmental Committee of the National Crime Authority (IGC-NCA) or by a State Minister with the approval of the IGC-NCA. When the IGC-NCA is determining whether a relevant criminal activity (as defined in subsection 4(1) of the NCA Act) should be referred to the Authority, it is required to consider whether ordinary police methods of investigation are likely to be effective. It is only in cases where the traditional methods of investigation are likely to be ineffective, that references are issued and the Authority may use the special investigatory powers.

Perverting the course of justice

The Committee seeks my advice as to whether the offence of perverting the course of justice could be committed by a person who refused to answer a question at a hearing of the Authority. The strict answer is that a failure to answer, without more, would not involve perverting the course of justice. Authority hearings, like all other investigatory processes, are not part of the course of justice and therefore a person cannot pervert the course of justice by failing to answer a question at such a hearing. The course of justice does not commence unless and until the jurisdiction of a court is invoked.

However, it is theoretically possible for a person to commit the offence of *attempting* to pervert the course of justice if the act (of failing to answer a question) has a tendency to pervert the course of justice by frustrating or deflecting a possible criminal prosecution and the act was intended to have that effect. It could also be possible for a person to be charged with *conspiring* to pervert the course of justice if the necessary conspiracy elements exist.

I add that the possibility of a person who fails to answer a question at a hearing of the Authority being charged with attempting or conspiring to pervert the course of justice is not altered by the provisions of the Bill.

Reasonable excuse

The proposal to remove the defence of reasonable excuse was extensively canvassed by the Committee during the briefing session held with members of the Department. However, the Committee seeks my advice as to whether the *Criminal Code* defence of lawful excuse will apply to offences under the NCA Act and what those offences are. The Committee also seeks my advice as to why the *Criminal Code* seems to contemplate a defence of reasonable excuse as appropriate for some Commonwealth offences, but not for offences under the NCA Act.

The *Criminal Code* defence of lawful authority, which will apply to all offences under the NCA Act, is in the following terms:

> "A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law." (Section 10.5 of the *Criminal Code*)

The list of offences created by the NCA Act is at Attachment A.

While the defence of reasonable excuse is not provided by the *Criminal Code* that Code does not prevent other defences being available in appropriate circumstances. This includes the defence of reasonable excuse in circumstances where, as a matter of policy, it is appropriate to have an open-textured defence. However, the preferred approach is to have clearly defined defences, and this is reflected in the fact that the vast majority of Commonwealth offences do not specify reasonable excuse as a defence.

In relation to offences under the NCA Act, the *Criminal Code* defences are considered adequate and appropriate, a point accepted by all members of the PJC-NCA.

Self-incrimination

While the proposal to remove the derivative-use immunity in relation to self-incriminatory evidence was also the subject of discussion during the Departmental briefing session, the Committee seeks my advice as to why derivative-use immunity should not be retained during hearings conducted by the Authority as a fundamental right of long standing.

The Committee is aware of the history behind the common law privilege against self-incrimination and the various modifications to that privilege that have occurred by various Acts. The Committee is also aware of the reasons put forward in support of the proposed changes to that privilege as set out in the Explanatory Memorandum for the Bill. I do not intend to revisit those issues.

It is true that the privilege against self-incrimination will be further modified as a result of these amendments. However, the amendments will also mean that a once a person claims privilege then <u>any</u> evidence that the person gives at a hearing cannot be directly used against him or her in criminal proceedings without the need for a certificate of immunity from a prosecuting authority. Removal of the broader derivative-use immunity means that the Authority will have the benefit of information that it would not otherwise have. It will now be able to use the direct evidence of the witness to derive other evidence that will establish the elements of the offence. This is a matter of balancing the interests of the individual with the interests of the community in uncovering serious and complicated organised criminal activity.

I also note that the PJC-NCA was persuaded that the work of the Authority is being impeded by the existence of derivative-use immunity and supports the proposal to remove that immunity. I add, however, that the PJC-NCA recommended that, as was done in the case of the then Australian Securities Commission, a five-year review of the effectiveness of the amendment be undertaken to provide an assurance to the community of the continuing appropriateness of these provisions.

I take this opportunity to advise the Committee that the Government is considering the PJC-NCA's recommendation in this regard. I also add that in view of the concerns expressed about the removal of the defence of reasonable excuse, the Government is

considering an amendment to require a five-year review not only of the removal of derivative-use immunity but also of the removal of the defence of reasonable excuse.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

OFFENCES UNDER THE NATIONAL CRIME AUTHORITY ACT 1984

- Subsection 19A(4). Failing to comply with a direction by a prescribed officer of an agency to comply with a request by the Authority to furnish information to the Authority, for the person to not comply with that request.

- Subsection 20(4). Subject to prescribed secrecy provisions, failing to comply with a notice requiring the person (in an agency) to provide certain information to the Authority.

- Subsection 24(2). Leaving Australia in contravention of an order by a Judge of the Federal Court (following surrender of passport).

- Subsection 25(7). Being present at a hearing of the Authority unless entitled to be present because of a direction by the Authority.

- Subsection 25(9). Failing to comply with a non-publication order given by the Authority in relation to a hearing.

- Subsection 29(3). Failing to comply with a notice requiring the person to attend at a specified time and place and to produce specified documents or things.

- Subsections 30(1). Failing to attend in answer to a summons or to attend from day to day unless excused or released.

- Subsections 30(2). Refusing or failing to comply with a requirement to take an oath or make an affirmation, refusing or failing to answer a question when required to do so, or refusing or failing to produce a document or thing when required to do so.

- Subsection 30(3). A legal practitioner failing to provide the name and address of his or her client when required to do so.

- Subsection 33(1). Giving evidence at a hearing before the Authority that is to the person's knowledge false or misleading in a material particular

- Subsection 35(1). Obstructing or hindering the Authority or a member of the Authority in the performance of the functions of the Authority; or disrupting a hearing of the Authority.

- Section 51. A member or a member of the staff of the Authority disclosing information otherwise than in accordance with the performance of his or her duties under the Act.

THE HON TONY ABBOTT MP
MINISTER FOR EMPLOYMENT, WORKPLACE RELATIONS AND SMALL BUSINESS

PARLIAMENT HOUSE
CANBERRA ACT 2600

30 MAR 2001

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

Dear Senator Cooney

In Alert Digest No. 1 of 2001, the Senate Standing Committee for the Scrutiny of Bills commented on Part 4 of Schedule 2 to the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000 (the SRCOLA Bill).

In particular, the Committee drew attention to proposed subsection 27(3) of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act).

Section 27 of the SRC Act currently provides for the payment of compensation for non-economic loss for a permanent impairment where compensation is payable in respect of the injury under section 24 of the Act.

The new subsection will clarify the operation of section 27 to expressly exclude a permanent impairment which arose before 1 December 1988, unless the claim was lodged prior to the Bill's introduction (7 December 2000).

On 1 December 1988, the operative provisions of the SRC Act commenced. The SRC Act contains transitional provisions to ensure that compensation will be payable under the Act to employees who had an entitlement to compensation under the previous legislation (1912, 1930 and 1971 Acts). However, it was never intended that the the entitlements of employees injured prior to 1 December 1988 would be extended. As there was no entitlement to non-economic loss payments for permanent impairment under the previous legislation, it follows that it was not intended that employees injured prior to the commencement of the SRC Act would have an entitlement to the non-economic loss compensation arising from section 27. However, it has been held by the Federal Court that the SRC Act, as drafted, does allow for such compensation.

The aim of the Bill therefore is to return the operation of the Act to its original intention.

The Committee sought advice on three aspects of the proposed amendment.

Number of claimants likely to be affected

There are 4 "determining authorities" determining claims of this type under the SRC Act – the Australian Defence Force (ADF), Australia Post, Telstra and Comcare.

The ADF has by far the largest number of claims received of this type. The past pattern of claims for permanent impairment (which might attract a payment for non-economic loss) where the permanent impairment arose prior to the commencement of the SRC Act is as follows.

When claim received	Number of claims received
July 97 – June 98	1211
July 98 – June 99	1225
July 99 – June 00	1061
July 00 – June 01	439
Introduction of Bill to early March 2001	247

There appears to be an overall downward trend in the lodgement of ADF claims – not surprisingly given that such claims only relate to permanent impairments which arose before 1 December 1988. However, there tend be significant time lags between injury and lodgement of ADF claims generally, so this trend may not remain consistent in the next few years.

At Australia Post there have been only 2 such claims determined since 1 July 1998 – it would therefore be reasonable to anticipate that no more than a handful of such claimants might be affected by the proposed change.

Telstra has had between 150 – 160 such claims over the last 3 years with 10 from the date of introduction of the Bill to early March 2001.

Finally Comcare has received an average of 97 per year over the last 3 years, with 12 such claims lodged with Comcare from the date of introduction of the Bill to early March 2001.

Notice to claimants about the introduction of the Bill

No notice could have been forwarded to claimants prior to the introduction of the Bill as those who would have been affected would be those who hadn't yet lodged a claim. If they hadn't lodged a claim then it is difficult to see how the determining authorities would know who to notify. In relation to those who lodge a claim after the introduction of the Bill, Comcare will issue a jurisdictional policy advice to determining authorities requesting that they advise claimants whose claim for permanent impairment is accepted, that the Bill is presently before the Parliament and that payments for economic loss should not be determined, pending the outcome of the Bill. Other compensation in respect of an accepted permanent impairment will be unaffected.

Retrospective operation

The Committee observed that the effect of the Bill "operates retrospectively". This is because the proposed section applies to claims lodged after the date of introduction of the Bill. The Committee asked why the amendment will not operate in a "more conventional manner" from the date the Bill is passed.

The reason for the proposed provision operating from the date of introduction is to preclude what might be expected to be speculative claims being made during the "window of opportunity" between introduction and passage. Given that the purpose of the amendment is to return the interpretation of the Act to that originally intended, it would be counterproductive to create the incentive for the lodgement of claims which, in the Government's view, ought not to be available. In addition it must be remembered that the amendment only relates to a permanent impairment (not the injury giving rise to the impairment but the actual impairment itself) which arose before December 1988. In other words any such potential claimant has had the permanent impairment for more than 12 years but has not yet made a claim. It might be considered that there has been a reasonable amount of time for any person to make a claim.

The practice of legislation providing for a changed state of affairs commencing after introduction is not unprecedented and is, for example, common in the area of taxation legislation. Such a practice in relation to taxation legislation is recognised by the Senate. Resolution 23 of 8 November 1988 provides that where the Government has announced its intention to introduce legislation to amend taxation law and a bill to do so is not introduced into the Parliament or made available by way of publication of a draft bill within 6 months of the announcement, the Senate shall amend any such bill to provide for *commencement no earlier than introduction* (emphasis added) or the date of publication of the draft bill.

I trust that this information assists the Committee in its consideration of the SRCOLA Bill.

Yours sincerely

TONY ABBOTT