SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2002

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MEMBERS OF THE COMMITTEE

Senator J McLucas (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator T Crossin
Senator D Johnston
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 2002

The Committee presents its Eighth Report of 2002 to the Senate.

The Committee draws the attention of the Senate to clauses of the following which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Aboriginal and Torres Strait Islander Commission Amendment Bill 2002

Financial Services Reform Act 2001

Proceeds of Crime Bill 2002

Proceeds of Crime (Consequential Amendments and Transitional Provisions Bill 2002

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

Aboriginal and Torres Strait Islander Commission Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. The Minister for Immigration and Multicultural and Indigenous Affairs responded to those comments in a letter received on 13 May 2001.

In its *Fifth Report of 2002*, the Committee sought the tabling of an additional Explanatory Memorandum to explain concerns it had with regard to retrospective application.

The Minister for Immigration and Multicultural and Indigenous Affairs has further responded in a letter dated 27 June 2002. 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. 3 of 2002

This bill was introduced into the House of Representatives on 13 March 2002 by the Minister for Immigration and Multicultural and Indigenous Affairs. [Portfolio responsibility: Immigration and Multicultural and Indigenous Affairs]

The bill proposes to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* (the Act) to:

- implement some of the recommendations contained in the review of the Act conducted under section 26 of the Act, and some of the recommendations of the Review Panel established by section 141 of the Act;
- prevent an ATSIC Commissioner or Regional Councillor who has been removed from office for misbehaviour from standing for the next round of Regional Council elections;
- entitle corporations to appeal to the ATSIC Board and Administrative Appeals Tribunal against refusals of loans for business enterprises;
- allow the Commission to delegate its power to review delegates' decisions;

- allow review by the Administrative Appeals Tribunal of the merits of a decision to refuse a loan or guarantee once internal review by the Commission has been exhausted; and
- amend financial provisions of the ATSIC Act to ensure consistency with the accrual budgeting system.

Retrospective application
Subclause 4(1) and Schedule 1, items 1, 3, 6, 8, 28, 30, 33, 34, 40 and 41

By virtue of subclause 4(1), the above amendments contained in Schedule 1 will have a measure of retrospective application, as they render a person ineligible to stand for election where he or she has been convicted of an offence prior to the commencement of Schedule 1. The Explanatory Memorandum provides no reason for this retrospective application. The Committee, therefore, **seeks the Minister's advice** as to why these provisions should apply retrospectively.

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

Relevant extract from the response from the Minister received on 13 May 2002

I understand that the Committee is seeking information as to why the amendments in relation to criminal convictions have retrospective application so as to render a person ineligible to stand for election as a member of a Regional Council where he or she has been convicted of an offence prior to the commencement of Schedule 1.

The Bill does have a measure of retrospective application in relation to persons standing for office. The amendments in Schedule 1 disqualify a person from standing for election as a member of a Regional Council or being appointed as a Commissioner where they have been convicted and given a single sentence of imprisonment for multiple offences. The amendments also provide that a person must be removed from the office of a Regional Council Chair or Commissioner if convicted and given a single sentence of imprisonment for multiple offences.

Under the *Aboriginal and Torres Strait Islander Commission Act 1989* (the ATSIC Act) persons are disqualified from standing for election as a Regional Councillor and appointment as a Commissioner if they have been convicted and sentenced to certain periods of imprisonment for single offences. The Bill will amend the ATSIC Act so that persons who receive a single sentence of imprisonment for multiple offences are similarly disqualified from election or appointment.

The ATSIC Act operates so that a degree of retrospectivity applies to ATSIC elected and potential office holders in relation to matters dealing with their conduct prior to occupation of a relevant office. Regional Councillors and Commissioners hold responsible and representative offices on behalf of Australia's Indigenous people. In order to maintain public confidence in office holders it is necessary to ensure that such persons meet a high standard of probity. As such, the Bill like the ATSIC Act contains provisions which make recent past conduct relevant to their fitness for office.

I consider the retrospective application of the criminal conviction and sentencing provisions in the Bill to be necessary and reasonable. The amendments will ensure that termination and eligibility provisions in the ATSIC Act are consistent across the office holders.

Thank you for drawing this matter to my attention. I trust that the above information allays your concerns.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Relevant extract from the further response from the Minister dated 27 June 2002

I wish to draw to your attention Government amendments to the Bill which were recently passed by the Parliament. Clause 4(1) of the Bill which was of concern to the Committee has been removed to avoid any uncertainty in regard to the application of the criminal conviction amendments.

I have enclosed a copy of the amendments and Supplementary Explanatory Memorandum for your information.

The Committee thanks the Minister for this further response, which advises that amendments have been made which remove the provisions which the Committee drew to the attention of Senators. These amendments were noted by the Committee in the Parliamentary amendments section of *Alert Digest No. 6 of 2002*, tabled on 26 June 2002.

Financial Services Reform Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 6 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation responded to those comments in a letter dated 7 August 2001. The response was reported in the Committee's *Ninth Report of 2001*.

In its *Alert Digest No. 11 of 2001*, the Committee sought advice regarding an amendment made to insert a proposed new section 854B in the *Corporations Act 2001*. The Parliamentary Secretary to the Treasurer responded in a letter dated 13 May 2002. The response was reported in the Committee's *Fourth Report of 2002*.

Whilst this bill received Royal Assent on 27 September 2001, the Committee further sought from the Parliamentary Secretary an indication of the type of circumstances where the s.854B regulation-making power would be used. The Parliamentary Secretary has responded in a letter dated 8 August 2002. A copy of the letter is attached to this report. An extract from the *Fourth Report of 2002* and relevant parts of the Parliamentary Secretary's response are discussed below.

Amendment commented on in Alert Digest No. 11 of 2001

Henry VIII clause
Proposed new section 854B

This bill proposes a number of amendments to the law relating to financial services and markets. The Committee considered the bill in *Alert Digest No. 6 of 2001* in which it sought the Minister's advice in relation to certain matters, and has reported on that advice in its *Ninth Report of 2001*.

On 22 and 23 August 2001, the Senate agreed to amend the bill. Most of these amendments raised no issues within the Committee's terms of reference. However, amendment (36) proposes to insert a new section 854B in the *Corporations Act 2001*. This provision states that regulations may exempt a person or class of persons from the provisions of the relevant Part of the Act, or provide that that Part applies as if specified provisions "were omitted, modified or varied as specified in the regulations".

This provision would seem to authorise the modification of the application of primary legislation by regulation. In the absence of an explanation, the Committee **seeks the Minister's advice** as to why it is appropriate that regulations are able to affect the operation of primary legislation in these circumstances.

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

Relevant extract from the response from the Parliamentary Secretary dated 13 May 2002

You have also requested information on section 854B. This section contains a regulation making power which enables exemption and modifications to be made to the application of Part 7.4 of the *Corporations Act 2001* (limits on involvement with licensees), to allow flexibility in applying the provisions in this Part. As you would be aware, Part 7.4 contains a range of measures that relate to limits on control of certain licensees, a requirement that those involved in markets and clearing and settlement facilities be fit and proper and also record keeping requirements.

The regulation making power was primarily inserted to ensure that in the case of limits on control, the provisions did not prevent licensees structuring their businesses in ways which would, on the face of the legislation, be prohibited and which would on every occasion require a ministerial decision. The particular circumstance contemplated was where the licence is held by a wholly owned subsidiary company. The explanatory memorandum to the amendment indicates that the regulation making power is only intended to be used in exceptional circumstances.

I trust this information will be of assistance to you.

The Committee thanks the Parliamentary Secretary for this response.

Relevant extract from the further response from the Parliamentary Secretary dated 8 August 2002

I refer to Mr Creed's letter of 17 May 2002 concerning section 854B of the *Corporations Act 2001* (the Corporations Act). This letter sought further information in relation to the types of situations in which this regulation making power might be expected to be exercised. I apologise for the delay in replying.

Part 7.4 of the Corporations Act is concerned with limits on involvement with market and clearing and settlement (CS) facility licensees. Division 1 of Part 7.4 imposes a 15 per cent voting power limitation on prescribed bodies corporate that are either market or CS facility licensees or are holding companies of bodies corporate that are market or CS facility licensees ('widely held market bodies'). The Minister is empowered to vary the 15 per cent limitation in relation to a body other than the

Australian Stock Exchange Limited (ASX) if the Minister considers it to be in the national interest to do so. In the relation to the ASX, the 15 per cent limitation may only be varied through the regulations.

Division 2 of Part 7.4 requires individuals who are involved in a market or CS facility licensee (or an applicant for a market or CS facility licence) as either a director, secretary or executive officer to be fit and proper persons. In addition to providing for the automatic disqualification of certain individuals, it enables the Australian Securities and Investments Commission (ASIC) to declare that an individual is disqualified from involvement in a market or CS facility licensee (as well as to revoke such a declaration).

Section 854B enables regulations to be made that exempt a person or class of persons from all or specified provisions of Part 7.4 or that modify the application of Part 7.4 in relation to particular persons or classes or persons.

Exemption and modification provisions are common throughout the Corporations Act.

Provisions that allow the regulations to exempt a person or class of persons from certain Chapters and Parts of the Act are contained in sections 111AS (Part 1.2A), 742 and 1368 (Chapters 6D and 7). Provisions that allow the regulations to modify the application of certain Chapters or Parts of the Act are contained in sections 111AT (Part 1.2A), section 601QB (Chapter 5C), section 742 (Chapter 6D), section 891C (Part 7.5) and section 1020G (Part 7.9). In addition, ASIC has its own exemption and modification powers in relation to particular Chapters and Parts of the Act.

Exemption and modification provisions are not generally inserted into legislation to deal with specific situations that can be foreseen at the time that the relevant Chapters or Parts are drafted. This is because these situations are accommodated within the provisions of the Chapters or Parts themselves.

Instead, they are typically inserted into an Act as a precautionary measure. This is common where the Act seeks to regulate an industry that is highly complex and subject to rapid change. In these circumstances, it is likely that even a highly flexible regulatory framework will be required to confront unforeseen situations, as well as anomalous circumstances in which compliance with the framework would be either impossible or disproportionately burdensome having regard to the regulatory objectives that the legislation seeks to achieve.

These considerations are particularly relevant in relation to financial markets and CS facilities, which are expected to experience rapid change in the next few years as a result of the emergence of new technology, the development of new areas of business, the emergence of cross-border linkages and the development of new corporate structures. The new regulatory regime contained in the *Financial Services Reform Act 2001* was intended to be sufficiently flexible to accommodate these developments, by setting out the key features of the regulatory framework in the Corporations Act and enabling detailed provisions to be dealt with in subordinate legislation.

The inclusion of exemption and modification powers such as those contained in section 854B is intended to maximise the capacity of the new regulatory framework to accommodate situations that could not be foreseen at the time it was drafted where commercial timing imperatives preclude amendments to the primary legislation. In

these circumstances, exemptions and modifications contained in delegated legislation strike an appropriate balance between the need to effectively accommodate new and exceptional situations and the need to maintain appropriate parliamentary scrutiny through the disallowance process.

While it is difficult to predict the types of situations in which regulations may be made under section 854B, it is possible to conceive of a situation in which it might be considered appropriate (for whatever reason) to exempt a market or CS facility licensee from the requirement to obtain the relevant licence but still require senior personnel to satisfy the fit and proper person test contained in Division 2 of Part 7.4.

I trust this information will be of assistance to you.

The Committee thanks the Parliamentary Secretary for this response.

Proceeds of Crime Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 8 May 2002. 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. 3 of 2002

This bill was introduced into the House of Representatives on 13 March 2002 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

Introduced with the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, the bill proposes:

- a legislative framework to prevent criminals from being able to profit from their crimes, by depriving them of the proceeds and benefits gained from criminal conduct, and to prevent the re-investment of those proceeds and benefits in further criminal activities;
- a civil forfeiture regime, in addition to a strengthened conviction-based confiscation scheme, to enable the freezing and confiscation of property used in, intended to be used in or derived from terrorism offences;
- to strengthen provisions relating to the existing conviction-based scheme;
- the implementation of Australia's obligations under the International Convention for the Suppression of the Financing of Terrorism and resolutions of the United Nations Security Council relevant to the seizure of terrorism related property;
- the introduction of provisions for the forfeiture of literary proceeds, which are benefits a person derives from the commercial exploitation of their notoriety from committing a criminal offence; and
- sets out provisions for the confiscation of proceeds derived from the exploitation of criminal notoriety by means of a type of pecuniary penalty order against the person.

The bill replicates the safeguards for innocent third parties, dependents and people with an interest in property which exists in the current legislation.

Trespasses on rights and liberties
General comment

This bill is similar to a bill of the same name which was introduced into the House of Representatives on 20 September 2001, and on which the Committee commented in *Alert Digest No. 14 of 2001*. In relation to that earlier bill, the Committee observed that:

- the bill seemed to trespass on the rights of persons who had neither been charged with, nor convicted of, any wrong-doing, and the Committee **requested a briefing,** as soon as was practicable, on the provisions of the bill, the persons at whom those provisions were directed, the effect of the bill on rights and liberties, and on the application of the bill (if any) to the proceeds of foreign offences where those proceeds are 'laundered' in Australia;
- clause 14 of that bill (reproduced in clause 14 of the current bill) applied retrospectively to offences committed prior to its coming into force, and to convictions prior to that commencement – the Explanatory Memorandum provided no reason for this retrospective application and the Committee **sought the Minister's advice** on this issue. The Committee also noted that some provisions referred to offences having occurred within a period of 6 years before the application for an order was made and **sought the Minister's advice** as to whether any provisions applied retrospectively in an open-ended manner;
- subclause 190(1) of that bill, when read with paragraph 191(2)(a) (reproduced in subclause 196(1) and paragraph 197(2)(a) of the current bill) had the effect of abrogating the privilege against self-incrimination for a person attending an examination under Part 3-1 of the bill, as well as failing to provide an explanation for removing derivative use immunity – specifically the Committee **sought the Minister's advice** as to why clause 192 (now clause 197) made no provision for derivative use immunity, and why it was appropriate that information compelled from a person should be admissible in proceedings for an application under the Act;
- clause 259 of that bill (reproduced in clause 271 of the current bill) would abrogate the privilege against self-incrimination in relation to a person who provides information under Part 4-1 of the bill. However, derivative use immunity applied to this clause and, in general terms, the information or document was only admissible in criminal proceedings for providing false and misleading information; and

- subclause 324(3) of that bill (reproduced in subclause 329(3) of the current bill) provided that any property may be the proceeds of an offence, or an instrument of an offence "even if no person has been convicted of the offence" – the Committee **sought the Minister's advice** as to how any person's property could be subject to a restraining order, or subsequent order, on the basis that it was related to the commission of an offence, notwithstanding that no person had been convicted of that offence.

With regard to the current bill, the Committee reaffirms the above comments and **continues to seek the Minister's advice** about the above concerns.

In addition, in *Alert Digest No. 14 of 2001*, the Committee noted that clause 200 of the previous bill provided for derivative use immunity where information was compelled from a person against whom a production order was made under clause 196. These circumstances are now reproduced in clause 206 of the current bill. However clause 206 provides protection only in relation to information in a document – it provides no protection against the use of information derived indirectly from the production of the relevant document. The Explanatory Memorandum provides no reason for the removal of the protection provided by derivative-use immunity where persons are compelled to incriminate themselves in these circumstances, and the Committee, therefore, **seeks the Minister's advice** on this issue.

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

Relevant extract from the response from the Minister

Please find enclosed advice on particular provisions of the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, as requested by the Committee in the Scrutiny of Bills Alert Digest No. 3 of 2002. I note that the Committee also requested a briefing on certain aspects of the Bills, which I would be happy to arrange.

Application of Bill

The provisions of the Bill apply to offences which occurred prior to the Bill being introduced. Importantly, the Bill does not introduce criminal offences capable of operating retrospectively.

In part, the application of the Bill in the way proposed under clause 14 is necessary to ensure the transition from the existing conviction-based regime under the

Proceeds of Crime Act 1987 to the conviction-based regime in the Bill. Without clause 14, it would be necessary to have both Acts in use, which would cause significant operational difficulty and confusion, and delay the repeal of the existing Act.

The application of the civil-forfeiture laws in this way is likewise necessary to ensure a transition to the new Bill and the eventual repeal of the existing Act. Aside from terrorist offences, the application of the civil-forfeiture provisions is confined by the requirement that the relevant offence was committed within the 6 years preceding the application for a restraining order or pecuniary penalty order.

The removal of the six year limitation on bringing applications under the civil forfeiture regime in relation to terrorism offences is in recognition that in some cases it is likely to take a very long period of time to unravel complex terrorist financing arrangements, particularly where they span across international borders.

The Committee thanks the Minister for this response.

Relevant extract from the response from the Minister

Abrogation of the privilege against self-incrimination and the lack of derivative-use immunity in relation to examinations

The Bill enables an order to be made for the examination of any person, including the suspect and any person whose property is restrained, about the affairs of a person whose property is restrained, or who has an interest in the restrained property, the suspect, or the spouse of such a person. Examination orders may only be made by a court, and only after a restraining order has been obtained. An examination cannot occur if that restraining order subsequently ceases to have effect.

The privilege against self-incrimination is abrogated in relation to examinations, as it is in relation to the form of examinations provided for in the existing Act, and in all existing state and territory confiscation legislation. The privilege has been removed to make examination orders more effective in identifying and locating property suspected of being the proceeds or instrument of crime.

To reduce the effect of the removal of the privilege, the Bill provides use-immunity in relation to all criminal proceedings except proceedings for providing false or misleading information. In relation to civil proceedings, the Bill specifies that answers given or documents provided in examinations may only be used in proceedings under the Bill, and proceedings ancillary to those proceedings or for the enforcement of a confiscation order. Where a document is provided, it is admissible in civil proceedings against the person in relation to a right or liability conferred or imposed by the document.

Derivative-use immunity (DUI) has not been conferred in relation to examination orders in the Bill as it creates a significant risk that any future criminal investigation or prosecution will be adversely affected by allegations that the evidential material

was derived from the information provided in the examination. By claiming that the prosecution's evidence was derived from information or documents provided in an examination, and thus forcing the prosecution to prove the contrary, a well advised criminal can make it extremely difficult for a prosecution to succeed.

Examinations are an important tool, enabling the DPP to establish a true picture of the relevant person's property. In most proceeds of crime proceedings, the examination would occur quite soon after the restraining order has been made. The possibility of a person manipulating the process at that stage, where criminal proceedings may still be likely, would severely undermine the use and effectiveness of examinations.

The Committee thanks the Minister for this response, which advises the reasons for abrogation of this privilege and gives details of the safeguards which mitigate its operation. The Minister also explains why the bill does not confer derivative-use immunity in relation to examination orders. The Committee, however, 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 response from the Minister

Abrogation of the privilege against self-incrimination and the removal of derivative-use immunity in relation to production orders

Production orders are issued by magistrates, and enable law enforcement agencies to obtain or view property-tracking documents.

The Bill follows the existing provisions for production orders by abrogating the privilege against self-incrimination and conferring use immunity. This increases the effectiveness of production orders and enables investigative agencies to accurately trace and locate property suspected of being the proceeds or instrument of crime. An effective production order is beneficial to law enforcement officers and the recipient of the production order alike - production orders are less time-consuming, less costly, less intrusive and less dangerous than search warrants.

The provisions in the Bill differ from the existing Act by not conferring derivative-use immunity**.** As for examination orders, the primary reason for not conferring derivative-use immunity in relation to production orders is that the full scope of the immunity can never be accurately predicted in advance. Production orders are able to be used at all stages of an investigation, including at the preliminary stage, when no decision has been made as to whether criminal or confiscatory proceedings will be taken, and prior to a restraining order being sought. Granting derivative-use immunity in relation to documents provided at that stage may place future investigations or prosecutions in jeopardy.

To reduce the potential for the removal of derivative use immunity to adversely affect individuals, the class of documents that can be obtained under a production order has been limited under the Bill to documents held by a corporation or business. Whilst that will reduce the utility of the production order provisions, it will avoid the risk of people incriminating themselves by producing personal documents.

In addition, the current restriction on when search warrants under the Proceeds of Crime legislation can be used has been removed. This will enable law enforcement agencies to use either a search warrant or production order depending on which tool is viewed as most appropriate in the circumstances.

The Committee thanks the Minister for this response, which gives an explanation for the abrogation of the privilege and the removal of the immunity, together with an outline of the protections available for those affected. The Committee, however, 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 response from the Minister

Subclause 329(3) : what property can be proceeds

Clauses 329 and 330 operate together to define the terms 'proceeds' and 'instrument' and to establish when property becomes, remains and ceases to be the proceeds or instrument of an offence.

Subclause 329(3) makes it clear that it is not necessary for a person to be convicted of a particular offence for property to be defined as the proceeds or instrument of that offence. As the Bill provides for civil-forfeiture of the proceeds (and in relation to terrorist offences, the instruments) of crime, it would be inconsistent to require a person to have been convicted of the offence of which the property is the proceeds or instrument.

The Committee thanks the Minister for this concise response. The Committee, however, 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.

Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 8 May 2002. 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.

In relation to absolute and strict liability, the Senate on 28 June 2001 referred the following matter to the Committee for inquiry and report:

> The application of absolute and strict liability offences in Commonwealth legislation, with particular reference to:
>
> (a) the merit of making certain offences ones of absolute or strict liability;
>
> (b) the criteria used to characterise an offence, or an element of an offence, as appropriate for absolute or strict liability;
>
> (c) whether these criteria are applied consistently to all existing and proposed Commonwealth offences; and
>
> (d) how these criteria relate to the practice in other Australian jurisdictions, and internationally.

The Committee, on 26 June 2002, tabled its *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation.* The report includes a set of principles upon which the policy and administration of Commonwealth absolute and strict liability offences should be based.

Relevant Extract from Alert Digest No. 3 of 2002

This bill was introduced into the House of Representatives on 13 March 2002 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

Introduced with the Proceeds of Crime Bill 2002, the bill proposes to supplement the principal bill by providing transitional provisions and making consequential amendments to other Commonwealth legislation.

Schedule 1 to the bill proposes new money laundering offences in the *Criminal Code Act 1995* which replace the money laundering offences in the *Proceeds of Crime Act 1987*, and updates cross references in the *Telecommunications (Interception) Act 1979.*

Schedule 2 amalgamates and co-locates provisions currently in the *Proceeds of Crime Act 1987* and the *Mutual Assistance Act in Criminal Matters Act 1987* which provide for the registration and enforcement of foreign restraining and confiscation orders in Australia in relation to the confiscation of assets located in Australia, which are the proceeds of a foreign offence.

Schedule 3 re-enacts the document retention provisions currently in the *Proceeds of Crime Act 1987* (sections 76-78B) and in the *Financial Transaction Reports Act 1988*, which already contains record retention provisions.

Schedule 4 makes amendments to the *Bankruptcy Act 1966*, giving priority to recovery of forfeited property or pecuniary penalty/literary proceeds amounts due under the Proceeds of Crime Bill 2002 over bankruptcy proceedings.

Schedule 5 amends the *Family Law Act 1975* to provide for the stay of family law property settlement and spousal maintenance proceedings where some or all of the property of one or both of the parties, is the subject of a forfeiture application or POC order under the Proceeds of Crime Bill 2002.

Schedule 6 amends 12 other Acts to provide clarification and consistency with the Proceeds of Crime Bill 2002 measures.

Schedule 7 contains transitional and related measures to facilitate the transition from the *Proceeds of Crime Act 1987* to the proposed *Proceeds of Crime Act 2002*.

Absolute liability offences

Proposed new subsections 400.3(4), 400.4(4), 400.5(4), 400.6(4) and 400.7(4)

Proposed new subsections 400.3(4), 400.4(4), 400.5(4), 400.6(4) and 400.7(4) of the *Criminal Code*, to be inserted by Schedule 1 to this bill, impose absolute criminal liability on some elements of the offences created by each of those new sections (which involve dealing in the proceeds of crime in varying amounts).

The usual principle of criminal liability requires that the prosecution prove intentional or reckless conduct on the part of an accused. The Explanatory Memorandum seeks to justify this departure from the usual principle by observing that "it is not necessary for the prosecution to prove that the defendant knew, or was aware of, the value of the dealing for him or her to be convicted of these offences. This is achieved by providing that absolute liability applies to that element of the offence. This is consistent with other offences that have been enacted in recent years."

The Committee **seeks the Minister's advice** as to why imposing absolute criminal liability is seen as necessary in the circumstances of these offences.

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

Relevant extract from the response from the Minister

As explained in the Explanatory Memorandum, absolute liability only applies to a particular element of the offence - the value of the money and property involved. It is not concerned with an element that goes to culpability. In each case the prosecutor must prove beyond reasonable doubt that the person intentionally deals in money and the money or property is, and the person believes it to be proceeds of crime or the person intends that the money or property will become an instrument of crime. Requiring the prosecution to also prove the person knew at the time the value was more than a particular amount would be very difficult in marginal cases and unnecessary, given the other requirements of proof. The approach used, is a product of the transparency of the new *Criminal Code* and has been used in other legislation. For example, the burglary offence in the *Criminal Code* (s.132.4) does not require knowledge to be proved in relation to whether the offence committed in conjunction with the entry into the building involved a maximum penalty of 5 years or more imprisonment, whether it was a State or Territory offence; or whether the building was owned or occupied by the Commonwealth.

The Committee thanks the Minister for this response.

Absolute liability offence
Proposed new subsection 400.9(4)

Proposed new subsection 400.9(4) of the *Criminal Code* will impose absolute criminal liability in relation to one element of the offence created by that section (possession of property reasonably suspected of being the proceeds of crime). However, the Explanatory Memorandum merely describes the effect of this subsection, and does not seek to justify its inclusion in the legislation. The Committee **seeks the Minister's advice** as to the reason for this provision.

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

Relevant extract from the response from the Minister

> In this case absolute liability is used for a different purpose. It is used for technical reasons to make the proposed reverse onus provision in proposed new subsection 400.9(5) work in the way intended. Section 5.6 of the *Criminal Code* provides that proof of recklessness by the prosecution would otherwise automatically apply to this circumstantial element of the offence. However, the policy on this point was to be consistent with the equivalent offence under the existing law in subsection 82(2) of *Proceeds of Crime Act 1987*. Proposed subsection 400.9(5) provides that the defendant must prove that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity. Under section 13.5 of the *Criminal Code* the defendant can discharge the legal burden on the balance of probabilities (he or she must adduce or point to evidence that suggests a reasonable possibility that the matter in question exists or does not exist - subsection 13.3(6)). Further, the prosecution will in any case have to prove beyond a reasonable doubt that it is in fact reasonable to suspect that the money or property is proceeds of crime. The use of absolute liability in this instance is not unreasonable.

The Committee thanks the Minister for this response.

Reversal of the onus of proof
Proposed new subsection 400.9(5)

Proposed new subsection 400.9(5) of the *Criminal Code* will reverse the normal onus of proof in criminal matters, and impose upon the defendant the legal burden of proving that he or she had no reasonable grounds for suspecting that money or property was derived or realised from some form of illegal activity.

The Explanatory Memorandum claims that this provision is appropriate (given the knowledge and information the defendant will have concerning the transaction), however the Committee **seeks the Minister's advice** as to the need for this provision, which seems to require people to prove that property in their possession has been legally obtained.

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

Relevant extract from the response from the Minister

> The manner in which this provision is intended to operate is explained in detail above. The explanatory memorandum succinctly outlines the policy reasons for the provision and notes that a similar provision exists in section 82 of the *Proceeds of Crime Act 1987*. Section 82 has been part of our law for 15 years and does not appear to have led to cases of injustice. As mentioned above, it is still for the prosecution to prove that it was in fact reasonable to suspect that the money or property is proceeds of crime. Given these factors and the lower level maximum penalty (maximum 2 years imprisonment and or $5,500 for individuals, $27,500 for corporations), it is not a measure which trespasses unduly on personal rights and liberties.

The Committee thanks the Minister for this response.

Strict liability offence
Proposed new section 40R

Schedule 3 to this bill proposes to insert a new section 40R in the *Financial Transactions Reports Act 1988*. This new section (which requires financial institutions to retain and store documents in a way that makes their retrieval reasonably practical) will impose strict criminal liability, but the Explanatory Memorandum does not indicate the reason for imposing strict liability. The Committee, therefore, **seeks the Minister's advice** as to why strict liability is to be imposed in this provision.

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

Relevant extract from the response from the Minister

Proposed section 40R replicates subsection 71(5) of the *Proceeds of Crime Act 1987*. Subsection 71(6A) of that Act provides that the offence in subsection 71(5) is an offence of strict liability.

Proposed section 40R (like subsection 71(5) of the Proceeds Act) provides for a minor regulatory offence within the parameters set by the courts as well as the legislature for applying strict liability. It would be unduly onerous on the prosecution to require proof of fault in this case, where institutions should have administrative systems in place to prevent breaches. It is also noted that where strict liability applies, mistake of fact can be relied on by the defendant (sections 9.2 and 12.5 of the Criminal Code).

The Committee thanks the Minister for this response.

No reasons for decision
Schedule 6, item 1

Item 1 of Schedule 6 will render decisions of the Director of Public Prosecutions, given under Part 3-1 of the *Proceeds of Crime Act 2002*, no longer subject to the *Administrative Decisions (Judicial Review) Act 1977*. The Explanatory Memorandum does not indicate the reason for removing these decisions from the scope of that Act. The Committee, therefore, **seeks the Minister's advice** as to why these decisions are no longer subject to the *Administrative Decisions (Judicial Review) Act 1977*.

Pending the Minister's response, the Committee draws Senators' attention to these provisions as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> Decisions of the Director of Public Prosecutions which are exempt from the application of the *Administrative Decisions (Judicial Review) Act 1977* are decisions in relation to the conduct of examination orders. Examination orders are granted by courts on the application of the DPP and the examination is conducted by an approved examiner although the DPP can ask questions. Under these circumstances where courts and approved examiners already monitor the activities of the DPP and review under 39B of the Judiciary Act remains available.
>
> I trust this information is of assistance.

The Committee thanks the Minister for this response.

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2002*, in which it made various comments. The Minister for Employment and Workplace Relations responded to those comments in a letter dated 21 May 2002.

In its *Fifth Report of 2002*, the Committee sought further advice regarding information supplied in the Explanatory Memorandum.

The Minister has further responded in a letter dated 7 August 2002. 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. 2 of 2002

This bill was introduced into the House of Representatives on 20 February 2002 by the Minister for Employment and Workplace Relations. [Portfolio responsibility: Employment and Workplace Relations]

The bill proposes to amend the *Workplace Relations Act 1996* to amend the certified agreement and freedom of association provisions. The proposed amendments will:

- prevent the Australian Industrial Relations Commission (the AIRC) from certifying or varying an agreement that contains a provision requiring the payment of a bargaining services fee;
- amend section 298Y to make clear that bargaining services fee clauses in certified agreement are void and authorise the AIRC to remove these clauses on application by a party to the agreement or the Office of the Employment Advocate; and
- prohibit conduct designed to compel individuals to pay bargaining services fees.

The amendments proposed apply equally to fees for bargaining services imposed by trade unions or by employer associations.

Retrospective application
Schedule 1, item 11

By virtue of item 14 of Schedule 1 to this bill, the amendment proposed by item 11 would apply retrospectively to any certified agreement, whenever it had been certified. Since the effect of the amendment proposed by item 11 is to render void certain provisions in certified agreements, the operation of item 14 may retrospectively avoid a provision in a certified agreement which has been in force, and on which the parties have been acting, for some time.

Neither the Explanatory Memorandum nor the Minister's Second Reading Speech seeks to justify this retrospective application. The Committee, therefore, **seeks the Minister's advice** as to why this provision applies retrospectively.

Pending the Minister's response, 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 dated 21 May 2002

The Bill prohibits a range of conduct related to the imposition of bargaining services fees; as well as addressing bargaining services fee clauses in existing certified agreements and prohibiting certification of further agreements containing such clauses.

The Alert Digest draws attention to the effect of item 11 of Schedule 1, which is to render void a provision of certified agreement to the extent that it requires payment of a bargaining services fee. The Alert Digest then suggests that the operation of item 14 may retrospectively make void a provision in a certified agreement which has been in force, and on which the parties have been acting, for some time. The Committee seeks advice as to why this provision applies retrospectively.

Item 11 of the Bill seeks to ensure that parties are clear about their legal rights and obligations, and that they not mislead by the existence of a void clause in an agreement, by confirming the current legal position, which is that bargaining services fees clauses in certified agreements are not enforceable. In this respect, the Bill does not seek to amend (but to clarify) the existing law. (This objective is further reflected in the power the Bill vests in the Australian Industrial Relations Commission to remove such clauses from agreements.)

In the Federal Court judgment in *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600, Merkel J held that a so-called 'bargaining agent fee' clause is not a matter that pertains to the relationship between employers and employees and therefore cannot be included in claims for a certified agreement.

Against that background, item 14 cannot be regarded as taking away rights retrospectively, as these rights never existed.

Although the judgment of Merkel J has been appealed, the Government is of the view that his Honour's finding that a bargaining services fee clause is not a matter pertaining to the relationship between employers and employees is likely to be upheld, as it is consistent with High Court authorities about analogous clauses. In his judgment, Merkel J noted the similarities (in terms of their relevance to the employment relationship) between bargaining agent fees and the payment of union dues by union members. His Honour referred to the judgments of the High Court in *R v Portus; Ex parte Australian and New Zealand Banking Group Limited (1972) 172* CLR 353, and *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96. In those cases the High Court found that provision by employers of a facility for payroll deduction of union dues was not a matter pertaining to the employment relationship between employers and employees.

I hope this information addresses the Committee's concerns.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Relevant extract from the response from the Minister dated 7 August 2002

I am writing in response to the Committee's request that I table an additional Explanatory Memorandum to the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 (the Bill). The additional Explanatory Memorandum would contain background information about the reason certain provisions are contained in the Bill.

I do not consider it necessary to table an additional Explanatory Memorandum.

The Committee's Alert Digest No. 2 of 2002 (13 March 2002) drew attention to the operation of items 11 and 14 of the Bill, suggesting that the effect of these two provisions might act retrospectively to make void a provision in a certified agreement under which the parties had been acting for some time.

I wrote to the Committee on 21 May, setting out the legal basis for items 11 and 14. The majority of my letter was extracted in the Committee's Fifth Report, which is easily accessible by parliamentarians and the public. Given the extent of my letter which appears in the Fifth Report and the accessibility of this Report, I do not consider an additional Explanatory Memorandum is necessary.

I would also note that the purpose of an Explanatory Memorandum is to provide assistance in understanding the terms of legislation, rather than to provide general background information (other than to the extent that this assists in the understanding of the legislation). In the present case, the intended operation of the relevant provision is clearly explained in the Explanatory Memorandum.

I would also like to take this opportunity to update the information I provided in my earlier letter. As noted in that letter, the decision by the Federal Court in *Electrolux* went on appeal to the Full Court. The decision by the Full Court was handed down on Friday 21 June 2002. The reasoning of the Full Court did not require any findings to be made on whether a bargaining services fee clause pertained to the employment relationship or if such a clause could be enforced.

The Committee thanks the Minister for this further response.

Jan McLucas
Chair

THE HON PHILIP RUDDOCK MP
Minister for Immigration and Multicultural and Indigenous Affairs
Minister Assisting the Prime Minister for Reconciliation

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27 JUN 2002

Mr David Creed
Secretary
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Mr Creed

Thank you for your letter of 20 June 2002, concerning the Aboriginal and Torres Strait Islander Commission Amendment Bill 2002 (the Bill).

I wish to draw to your attention Government amendments to the Bill which were recently passed by the Parliament. Clause 4(1) of the Bill which was of concern to the Committee has been removed to avoid any uncertainty in regard to the application of the criminal conviction amendments.

I have enclosed a copy of the amendments and Supplementary Explanatory Memorandum for your information.

Yours sincerely

Philip Ruddock

2002

The Parliament of the
Commonwealth of Australia

THE SENATE

Aboriginal and Torres Strait Islander Commission Amendment Bill 2002

(Government)

(1) Clause 2, page 1 (line 8) to page 2 (line 6), omit the clause, substitute:

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

[commencement]

(2) Clause 4, page 2 (lines 13 to 16), omit subclause (1).

[transitional]

(3) Schedule 1, page 10 (after line 8), after item 45, insert:

45A Section 141T

Repeal the section.

[Section 141T—Commission Chairperson]

2002

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION AMENDMENT BILL 2002

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Multicultural and Indigenous Affairs,
The Hon Philip Ruddock MP)

49613 Cat. No. 02 1325 X ISBN 1740 928253

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION AMENDMENT BILL 2002

OUTLINE

The Bill amends the *Aboriginal and Torres Strait Islander Commission Act 1989* (the ATSIC Act).

The amendments to the Bill would

- change the date of commencement of Schedule 1 to the day the Bill receives the Royal Assent;
- omit subclause 4(1) of the Bill;
- repeal section 141T of the ATSIC Act.

FINANCIAL IMPACT STATEMENT

There are no financial implications arising from the amendments to the Bill.

NOTES ON CLAUSES

Subclause 2(1) - Commencement

This clause provides that the Bill commences on the day on which it receives Royal Assent.

The Bill currently provides for commencement of Schedule 1 of the Bill on the 28th day after the day on which the Act receives the Royal Assent.

Item 35 of the Bill provides for the making of Election Rules to introduce nomination fees. The Election Rules must be in force when the election is called in early July, which will be less that 28 days after the earliest possible date of Royal Assent. It is therefore necessary for the Bill to be amended to ensure that the amendments commence on receiving the Royal Assent.

Subclause 4(1) - Omit

This amendment provides for the omission of subclause 4(1).

Subclause 4(1) is a transitional provision and was intended to ensure that where a current office-holder had received a single sentence for multiple convictions earlier in their term, he or she had to be removed from office.

This subclause is not necessary because no current office-holder has received a single sentence for multiple convictions. Omitting the subclause removes any doubt that a person will be disqualified from election as a Regional Councillor or appointment as a Commissioner if that person has received a single sentence for multiple convictions and that sentence has not been spent for two years, or less than two years has elapsed since conviction if the person was never actually imprisoned.

Item 45A – Section 141T

Inserts a new item in the Bill with the effect of repealing section 141T of the ATSIC Act.

Section 141T states that the 'Commission Chairperson is the Chairperson of an Augmented Review Panel'.

The repeal of this section is consequential to item 45 of the Bill which amends section 141S so that the Chairperson of the Augmented Review Panel will be an Aboriginal or Torres Strait Islander person appointed by the Minister and not an ATSIC Commissioner.

PARLIAMENTARY SECRETARY
TO THE TREASURER
MANAGER OF GOVERNMENT
BUSINESS IN THE SENATE
Senator the Hon Ian Campbell

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Senator Trish Crossin
Acting Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

-8 AUG 2002

Dear Chairman

I refer to Mr Creed's letter of 17 May 2002 concerning section 854B of the *Corporations Act 2001* (the Corporations Act). This letter sought further information in relation to the types of situations in which this regulation making power might be expected to be exercised. I apologise for the delay in replying.

Part 7.4 of the Corporations Act is concerned with limits on involvement with market and clearing and settlement (CS) facility licensees. Division 1 of Part 7.4 imposes a 15 per cent voting power limitation on prescribed bodies corporate that are either market or CS facility licensees or are holding companies of bodies corporate that are market or CS facility licensees ('widely held market bodies'). The Minister is empowered to vary the 15 per cent limitation in relation to a body other than the Australian Stock Exchange Limited (ASX) if the Minister considers it to be in the national interest to do so. In the relation to the ASX, the 15 per cent limitation may only be varied through the regulations.

Division 2 of Part 7.4 requires individuals who are involved in a market or CS facility licensee (or an applicant for a market or CS facility licence) as either a director, secretary or executive officer to be fit and proper persons. In addition to providing for the automatic disqualification of certain individuals, it enables the Australian Securities and Investments Commission (ASIC) to declare that an individual is disqualified from involvement in a market or CS facility licensee (as well as to revoke such a declaration).

Section 854B enables regulations to be made that exempt a person or class of persons from all or specified provisions of Part 7.4 or that modify the application of Part 7.4 in relation to particular persons or classes or persons.

Exemption and modification provisions are common throughout the Corporations Act.

Provisions that allow the regulations to exempt a person or class of persons from certain Chapters and Parts of the Act are contained in sections 111AS (Part 1.2A), 742 and 1368 (Chapters 6D and 7). Provisions that allow the regulations to modify the application of certain Chapters or Parts of the Act are contained in sections 111AT (Part 1.2A), section 601QB (Chapter 5C), section 742 (Chapter 6D), section 891C (Part 7.5) and section 1020G (Part 7.9). In addition, ASIC has its own exemption and modification powers in relation to particular Chapters and Parts of the Act.

Exemption and modification provisions are not generally inserted into legislation to deal with specific situations that can be foreseen at the time that the relevant Chapters or Parts are drafted. This is because these situations are accommodated within the provisions of the Chapters or Parts themselves.

Instead, they are typically inserted into an Act as a precautionary measure. This is common where the Act seeks to regulate an industry that is highly complex and subject to rapid change. In these circumstances, it is likely that even a highly flexible regulatory framework will be required to confront unforeseen situations, as well as anomalous circumstances in which compliance with the framework would be either impossible or disproportionately burdensome having regard to the regulatory objectives that the legislation seeks to achieve.

These considerations are particularly relevant in relation to financial markets and CS facilities, which are expected to experience rapid change in the next few years as a result of the emergence of new technology, the development of new areas of business, the emergence of cross-border linkages and the development of new corporate structures. The new regulatory regime contained in the *Financial Services Reform Act 2001* was intended to be sufficiently flexible to accommodate these developments, by setting out the key features of the regulatory framework in the Corporations Act and enabling detailed provisions to be dealt with in subordinate legislation.

The inclusion of exemption and modification powers such as those contained in section 854B is intended to maximise the capacity of the new regulatory framework to accommodate situations that could not be foreseen at the time it was drafted where commercial timing imperatives preclude amendments to the primary legislation. In these circumstances, exemptions and modifications contained in delegated legislation strike an appropriate balance between the need to effectively accommodate new and exceptional situations and the need to maintain appropriate parliamentary scrutiny through the disallowance process.

While it is difficult to predict the types of situations in which regulations may be made under section 854B, it is possible to conceive of a situation in which it might be considered appropriate (for whatever reason) to exempt a market or CS facility licensee from the requirement to obtain the relevant licence but still require senior personnel to satisfy the fit and proper person test contained in Division 2 of Part 7.4.

I trust this information will be of assistance to you.

Yours sincerely

IAN CAMPBELL

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

01/9175 CRJ RG

8 MAY 2002

Senator B Cooney
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite SG.49
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney Barney,

Please find enclosed advice on particular provisions of the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, as requested by the Committee in the Scrutiny of Bills Alert Digest No. 3 of 2002. I note that the Committee also requested a briefing on certain aspects of the Bills, which I would be happy to arrange.

Proceeds of Crime Bill 2002

Application of Bill

The provisions of the Bill apply to offences which occurred prior to the Bill being introduced. Importantly, the Bill does not introduce criminal offences capable of operating retrospectively.

In part, the application of the Bill in the way proposed under clause 14 is necessary to ensure the transition from the existing conviction-based regime under the *Proceeds of Crime Act 1987* to the conviction-based regime in the Bill. Without clause 14, it would be necessary to have both Acts in use, which would cause significant operational difficulty and confusion, and delay the repeal of the existing Act.

The application of the civil-forfeiture laws in this way is likewise necessary to ensure a transition to the new Bill and the eventual repeal of the existing Act. Aside from terrorist offences, the application of the civil-forfeiture provisions is confined by the requirement that the relevant offence was committed within the 6 years preceding the application for a restraining order or pecuniary penalty order.

The removal of the six year limitation on bringing applications under the civil forfeiture regime in relation to terrorism offences is in recognition that in some cases it is likely to take a very long period of time to unravel complex terrorist financing arrangements, particularly where they span across international borders.

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Abrogation of the privilege against self-incrimination and the lack of derivative-use immunity in relation to examinations

The Bill enables an order to be made for the examination of any person, including the suspect and any person whose property is restrained, about the affairs of a person whose property is restrained, or who has an interest in the restrained property, the suspect, or the spouse of such a person. Examination orders may only be made by a court, and only after a restraining order has been obtained. An examination cannot occur if that restraining order subsequently ceases to have effect.

The privilege against self-incrimination is abrogated in relation to examinations, as it is in relation to the form of examinations provided for in the existing Act, and in all existing state and territory confiscation legislation. The privilege has been removed to make examination orders more effective in identifying and locating property suspected of being the proceeds or instrument of crime.

To reduce the effect of the removal of the privilege, the Bill provides use-immunity in relation to all criminal proceedings except proceedings for providing false or misleading information. In relation to civil proceedings, the Bill specifies that answers given or documents provided in examinations may only be used in proceedings under the Bill, and proceedings ancillary to those proceedings or for the enforcement of a confiscation order. Where a document is provided, it is admissible in civil proceedings against the person in relation to a right or liability conferred or imposed by the document.

Derivative-use immunity (DUI) has not been conferred in relation to examination orders in the Bill as it creates a significant risk that any future criminal investigation or prosecution will be adversely affected by allegations that the evidential material was derived from the information provided in the examination. By claiming that the prosecution's evidence was derived from information or documents provided in an examination, and thus forcing the prosecution to prove the contrary, a well advised criminal can make it extremely difficult for a prosecution to succeed.

Examinations are an important tool, enabling the DPP to establish a true picture of the relevant person's property. In most proceeds of crime proceedings, the examination would occur quite soon after the restraining order has been made. The possibility of a person manipulating the process at that stage, where criminal proceedings may still be likely, would severely undermine the use and effectiveness of examinations.

Abrogation of the privilege against self-incrimination and the removal of derivative-use immunity in relation to production orders

Production orders are issued by magistrates, and enable law enforcement agencies to obtain or view property-tracking documents.

The Bill follows the existing provisions for production orders by abrogating the privilege against self-incrimination and conferring use immunity. This increases the effectiveness of production orders and enables investigative agencies to accurately trace and locate property suspected of being the proceeds or instrument of crime. An effective production order is beneficial to law enforcement officers and the recipient of the production order alike - production orders are less time-consuming, less costly, less intrusive and less dangerous than search warrants.

The provisions in the Bill differ from the existing Act by not conferring derivative-use immunity. As for examination orders, the primary reason for not conferring derivative-use immunity in relation to production orders is that the full scope of the immunity can never be accurately predicted in advance. Production orders are able to be used at all stages of an investigation, including at the preliminary stage, when no decision has been made as to whether criminal or confiscatory proceedings will be taken, and

prior to a restraining order being sought. Granting derivative-use immunity in relation to documents provided at that stage may place future investigations or prosecutions in jeopardy.

To reduce the potential for the removal of derivative use immunity to adversely affect individuals, the class of documents that can be obtained under a production order has been limited under the Bill to documents held by a corporation or business. Whilst that will reduce the utility of the production order provisions, it will avoid the risk of people incriminating themselves by producing personal documents.

In addition, the current restriction on when search warrants under the Proceeds of Crime legislation can be used has been removed. This will enable law enforcement agencies to use either a search warrant or production order depending on which tool is viewed as most appropriate in the circumstances.

Subclause 329(3) : what property can be proceeds

Clauses 329 and 330 operate together to define the terms 'proceeds' and 'instrument' and to establish when property becomes, remains and ceases to be the proceeds or instrument of an offence.

Subclause 329(3) makes it clear that it is not necessary for a person to be convicted of a particular offence for property to be defined as the proceeds or instrument of that offence. As the Bill provides for civil-forfeiture of the proceeds (and in relation to terrorist offences, the instruments) of crime, it would be inconsistent to require a person to have been convicted of the offence of which the property is the proceeds or instrument.

Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002.

Absolute liability – Schedule 1 – proposed new subsections 400.3(4), 400.4(4), 400.6(4) and 400.7(4)

As explained in the Explanatory Memorandum, absolute liability only applies to a particular element of the offence – the value of the money and property involved. It is not concerned with an element that goes to culpability. In each case the prosecutor must prove beyond reasonable doubt that the person intentionally deals in money and the money or property is, and the person believes it to be proceeds of crime or the person intends that the money or property will become an instrument of crime. Requiring the prosecution to also prove the person knew at the time the value was more than a particular amount would be very difficult in marginal cases and unnecessary, given the other requirements of proof. The approach used is a product of the transparency of the new *Criminal Code* and has been used in other legislation. For example, the burglary offence in the *Criminal Code* (s.132.4) does not require knowledge to be proved in relation to whether the offence committed in conjunction with the entry into the building involved a maximum penalty of 5 years or more imprisonment, whether it was a State or Territory offence; or whether the building was owned or occupied by the Commonwealth.

Absolute liability – Schedule 1 – proposed new subsection 400.9(4)

In this case absolute liability is used for a different purpose. It is used for technical reasons to make the proposed reverse onus provision in proposed new subsection 400.9(5) work in the way intended. Section 5.6 of the *Criminal Code* provides that proof of recklessness by the prosecution would otherwise automatically apply to this circumstantial element of the offence. However, the policy on this point was to be consistent with the equivalent offence under the existing law in subsection 82(2) of *Proceeds of Crime Act 1987*. Proposed subsection 400.9(5) provides that the defendant must prove that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity. Under section 13.5 of the *Criminal Code* the defendant can discharge the legal burden on the balance of probabilities (he or she must adduce or point to evidence that suggests a reasonable possibility that the matter in question exists or does not

exist – subsection 13.3(6)). Further, the prosecution will in any case have to prove beyond a reasonable doubt that it is in fact reasonable to suspect that the money or property is proceeds of crime. The use of absolute liability in this instance is not unreasonable.

Reversal of Onus of Proof – Schedule 1 – proposed new subsection 400.9(5)

The manner in which this provision is intended to operate is explained in detail above. The explanatory memorandum succinctly outlines the policy reasons for the provision and notes that a similar provision exists in section 82 of the *Proceeds of Crime Act 1987*. Section 82 has been part of our law for 15 years and does not appear to have led to cases of injustice. As mentioned above, it is still for the prosecution to prove that it was in fact reasonable to suspect that the money or property is proceeds of crime. Given these factors and the lower level maximum penalty (maximum 2 years imprisonment and or $5,500 for individuals, $27,500 for corporations), it is not a measure which trespasses unduly on personal rights and liberties.

Strict liability offence – Schedule 3 – Proposed new section 40R

Proposed section 40R replicates subsection 71(5) of the *Proceeds of Crime Act 1987*. Subsection 71(6A) of that Act provides that the offence in subsection 71(5) is an offence of strict liability.

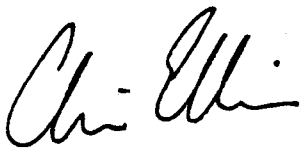
Proposed section 40R (like subsection 71(5) of the Proceeds Act) provides for a minor regulatory offence within the parameters set by the courts as well as the legislature for applying strict liability. It would be unduly onerous on the prosecution to require proof of fault in this case, where institutions should have administrative systems in place to prevent breaches. It is also noted that where strict liability applies, mistake of fact can be relied on by the defendant (sections 9.2 and 12.5 of the Criminal Code).

No reasons for decision - Schedule 6, item 1

Decisions of the Director of Public Prosecutions which are exempt from the application of the *Administrative Decisions (Judicial Review) Act 1977* are decisions in relation to the conduct of examination orders. Examination orders are granted by courts on the application of the DPP and the examination is conducted by an approved examiner although the DPP can ask questions. Under these circumstances where courts and approved examiners already monitor the activities of the DPP and review under 39B of the Judiciary Act remains available.

I trust this information is of assistance.

Yours sincerely



CHRIS ELLISON
Senator for Western Australia

THE HON TONY ABBOTT MP

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS

Leader of the House of Representatives
Minister Assisting the Prime Minister for the Public Service

PARLIAMENT HOUSE
CANBERRA ACT 2600

- 7 AUG 2002

Senator Trish Crossin
Acting Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

I am writing in response to the Committee's request, in the Fifth Report of 2002 of the Senate Standing Committee for the Scrutiny of Bills (19 June 2002), that I table an additional Explanatory Memorandum to the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 (the Bill). The additional Explanatory Memorandum would contain background information about the reason certain provisions are contained in the Bill.

I do not consider it necessary to table an additional Explanatory Memorandum.

The Committee's Alert Digest No. 2 of 2002 (13 March 2002) drew attention to the operation of items 11 and 14 of the Bill, suggesting that the effect of these two provisions might act retrospectively to make void a provision in a certified agreement under which the parties had been acting for some time.

I wrote to the Committee on 21 May, setting out the legal basis for items 11 and 14. The majority of my letter was extracted in the Committee's Fifth Report, which is easily accessible by parliamentarians and the public. Given the extent of my letter which appears in the Fifth Report and the accessibility of this Report, I do not consider an additional Explanatory Memorandum is necessary.

I would also note that the purpose of an Explanatory Memorandum is to provide assistance in understanding the terms of legislation, rather than to provide general background information (other than to the extent that this assists in the understanding of the legislation). In the present case, the intended operation of the relevant provision is clearly explained in the Explanatory Memorandum.

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I would also like to take this opportunity to update the information I provided in my earlier letter. As noted in that letter, the decision by the Federal Court in *Electrolux* went on appeal to the Full Court. The decision by the Full Court was handed down on Friday 21 June 2002. The reasoning of the Full Court did not require any findings to be made on whether a bargaining services fee clause pertained to the employment relationship or if such a clause could be enforced.

Yours sincerely

TONY ABBOTT