



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2002

28 August 2002

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ISSN 0729-6258

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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

NINTH REPORT OF 2002

The Committee presents its Ninth Report of 2002 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:

Criminal Code Amendment (Espionage and Related Offences)
Bill 2002

Customs Legislation Amendment Bill (No. 1) 2002

Higher Education Funding Amendment Bill 2002

Import Processing Charges (Amendment and Repeal) Bill 2002

Criminal Code Amendment (Espionage and Related Offences) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 12 June 2002. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General'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: Attorney-General]

The bill proposes to amend the *Crimes Act 1914*, the *Criminal Code Act 1995* and the *Australian Protective Service Act 1987* to establish new offences dealing with the protection of security and defence in Part 5.2 of the *Criminal Code Act 1995*. These offences relate to espionage and similar activities and soundings.

The bill substantially replicates the provisions in Part VII of the Crimes Act with respect to unlawful soundings offences (formerly section 83 of the Crimes Act). Espionage offences have been changed to establish a more effective legal framework that both deters, and punishes, people who intend to betray Australia's security interests. The bill will strengthen Australia's espionage laws by:

- referring to conduct that may prejudice Australia's security and defence, rather than safety and defence, and explicitly defining this term;
- expanding the range of activity that may constitute espionage;
- affording the same protection to foreign-sourced information belonging to Australia as Australian-generated information; and
- increasing the maximum penalty for a person convicted of espionage from seven years imprisonment to 25 years imprisonment.

The bill also sets out procedural matters in relation to the prosecution of offences under Part 5.2 of the Criminal Code (Division 93) and provides for the forfeiture of articles that have been dealt with in contravention of Part 5.2 (Division 94). In addition, some offences in Part VII of the Crimes Act are repealed but are not replaced in the Criminal Code because they are no longer relevant or appropriate.

Reversal of the onus of proof

Proposed new subsections 92.1(2) and (3)

Proposed new subsections 92.1(2) and (3), to be inserted in the *Criminal Code* by Schedule 1 to this bill, will reverse the burden of proof in a prosecution for an offence under subsection 92.1(1) which concerns the taking or recording of soundings. The Explanatory Memorandum provides no reason for the inclusion of these provisions. The Committee, therefore, **seeks the Attorney-General's advice** as to why the defendant should bear the burden of proving the matters referred to in these provisions.

Pending the Attorney'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 Attorney-General

The proposed new subsections allow for a reversal of the burden of proof in a prosecution for an offence under subsection 92.1(1) concerning the taking or recording of soundings.

Section 83 of the *Crimes Act 1914* is repealed by item 3 of Schedule 1 of the Bill and replaced by new subsection 92.1(2) and (3) in the Criminal Code. The new subsections do not alter the law as it stands; they simply modernise the language of the provisions. This is consistent with the purpose of the bill, which is to strengthen Australia's laws and modernise the offence provisions in Part VII of the Crimes Act for insertion in the Criminal Code.

Commonwealth criminal law policy on reversing the onus of proof is that it should only be allowed in cases where the matters to be proved are peculiarly within the knowledge of the defendant and are difficult for the prosecution to disprove beyond a reasonable doubt. It must be peculiarly within the defendant's knowledge and therefore within his or her ability to prove or disprove. In the case of the taking or recording of soundings, it is not within the scope of the Commonwealth's capabilities to ascertain the necessity of soundings taken for the navigation of the vessel or for any purpose in which the vessel was lawfully engaged.

The new subsections do not constitute a change in the law; they merely reflect the current state of the law and the view that a reversal of the onus of proof is appropriate in the circumstances.

The Committee thanks the Attorney-General for this response, which advises that the provisions do not alter the substance of the present law, which reflects a view that a reversal of the onus of proof is appropriate in the circumstances. The Committee notes, however, that others may hold a different view. The Committee considers that, in this case, the question of whether the provisions trespass unduly on personal rights and liberties is one that is best left to the Senate.

For this reason, 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.

Customs Legislation Amendment Bill (No. 1) 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2002*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 20 August 2002. The letter also addressed comments by the Committee in relation to the Import Processing Charges (Amendment and Repeal) Bill 2002, dealt with later in this report.

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 2002

This bill was introduced into the House of Representatives on 19 June 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Justice and Customs]

The bill is part of a package with the Import Processing Charges (Amendment and Repeal) Bill 2002.

Schedule 1 of the bill proposes to amend the *Customs Act 1901* to ensure that Customs offences are consistent with the *Criminal Code*, and that there is consistency in the presentation of financial penalties in the *Customs Act 1901*.

Schedule 2 of the bill proposes to amend the *Customs Act 1901* provisions relating to the valuation of imported goods to ensure that the legislation is consistent with the *Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*.

Schedule 3 of the bill proposes to amend the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* to:

- delay the provisions depending on the introduction of Customs' new cargo management computer system for a further one year so that the sector is better able to prepare for it;
- allow the repeal of provisions in the *Customs Act 1901* that govern the operation of Customs current cargo management computer systems to commence on different days; and

- make consequential amendments to the *A New Tax System (Goods and Services Tax) Act 1999* and the *A New Tax System (Wine Equalisation Tax) Act 1999*.

Schedule 4 of the bill proposes to amend the *Customs Act 1901* to allow the seizure, without warrant, of special forfeited goods in the Torres Strait Protected Zone in certain circumstances.

Schedule 5 of the bill proposes to amend the *Customs Act 1901* to create a system under which re-mail reporters may be registered and may provide less information in respect of re-mail items in their cargo reports.

Schedule 6 of the bill proposes to amend the *Passenger Movement Charge Collection Act 1978* to clarify existing circumstances in which passenger movement charge is not payable and include a new group of people who do not have to pay that charge.

Commencement

Subclause 2(1)

By virtue of the table to subclause 2(1), the amendments referred to in items 22 to 27 and 30 of that table will commence at the same time as the commencement of various provisions in the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*. Although the Explanatory Memorandum does not indicate when that Act might commence (or whether it has already commenced), the Minister's second reading speech is extremely helpful in detailing the fact that all of the provisions in that Act must (currently) commence by 20 July 2003 and that the reason for the delay in commencement is to enable a new computer system relating to cargo management to be introduced, and any problems associated therewith to be solved. The Committee, however, **seeks the Minister's advice** as to why this information was included only in the second reading speech, the content of which is not as readily accessible as the Explanatory Memorandum.

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.

Commencement

Schedule 3, Item 65

Item 65 of Schedule 3 to this bill is proposed to amend section 2 of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* to permit items in any Schedule to that Act other than Schedule 4 to commence at any time up to three years after that Act was assented to. Although the Explanatory Memorandum does not give a reason for this further departure from Drafting Direction No. 2 of 2002, the Minister's second reading speech does provide such an explanation. The second reading speech, however, has a different purpose to the Explanatory Memorandum, which should include information of this nature whether or not it is mentioned in the speech. In this context, the Department of the Prime Minister and Cabinet, Legislation Circular No. 5 of 2002, advises that matters coming within the terms of reference of the Scrutiny of Bills Committee should be fully and clearly explained in the Explanatory Memorandum. The Committee **seeks the Minister's advice** as to why this information was included only in the second reading speech and not in the Explanatory Memorandum as well.

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

Relevant extract from the response from the Minister

The Committee has asked for advice on:

- The reasons why information relating to commencement provisions in both Bills was included in the second reading speeches but not fully and clearly set out in the respective explanatory memoranda.
- Further details of the types of offences provisions that will become strict liability offences and the reasons why these offences are already ones of strict liability.
- Confirmation that consideration was given to the *Entry and Search Provisions in Commonwealth Legislation Report, April 2000* in formulating the provisions for the seizure of special forfeited goods in the Torres Strait Protected Zone.

Commencement Provisions

I acknowledge the Committee's concerns that the explanatory memoranda to both Bills do not fully explain matters relating to the commencement provisions for the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* ("the ITM Act").

Initially, the ITM Act commencement changes were all located in the CLA Bill. On advice that extending the operation of the *Import Processing Charges Act 1997* (“the Charges Act 1997”) may have been considered to impose taxation, in so far as they relate to the Charges Act 1997, the commencement changes were relocated to the separate IPC Bill. However, the CLA and IPC Bills are to be debated cognately because, in part, they both deal with the issue of extending the commencement provisions of the ITM Act.

As noted by the committee, the second reading speech to the CLA Bill provides an explanation of the commencement provisions of the ITM Act and reasons why the commencement date needs to be extended. Some of this information was inadvertently excluded from the explanatory memoranda when the separate Bills were drafted.

I agree that, as advised in Legislation Circular No. 5 of 2002, each Explanatory Memorandum should fully and clearly explain the purpose of amendments in the Bills and in particular those that come within the terms of reference of the Committee.

I wish to assure the Committee that neither Bill will have any retrospective operation. As the explanatory memorandum to the CLA Bill notes, most of the amendments to be made to the *Customs Act 1901* by the ITM Act have not yet commenced. In the notes on clauses, the discussion of the amendments makes it clear that the particular ITM provisions are not yet in operation and therefore the amendments made by the CLA Bill and the IPC Bill would not have retrospective effect.

I will amend the Explanatory Memoranda to address the matters raised by the committee and to make it absolutely clear that there is no intention that any of the amendments will have retrospective operation. The amended explanatory memoranda will be tabled in the next sitting period of the Parliament.

The Committee thanks the Minister for this response.

Strict Liability Schedule 1

Various items in Schedule 1 to this bill appear to create offences of strict liability. The item numbers are listed in the Explanatory Memorandum on page 9. That Memorandum goes on to suggest that the offence provisions amended in this way are already offences of strict liability, and that the amendments proposed in Schedule 1 will merely “ensure that after the application of the *Criminal Code* they continue to be strict liability offences.” The Committee **seeks the Minister’s advice** on further details of the types of offence provisions to be amended and the reason, in each case, for his view that the offences are already ones of strict liability.

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

Creation of criminal offences of strict liability

Schedule 1 to the CLA Bill provides that particular offences in the Customs Act are offences of strict liability. In February 2001, I wrote to the Committee in respect of the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 which similarly declared certain offences in 50 Acts administered by the Attorney-General's portfolio to be offences of strict liability.

As outlined in that letter, prior to these amendments, only a handful of Commonwealth criminal offences were expressly stated to be strict liability offences. It was therefore necessary to identify which offences should be so characterised. In that process, a number of offences in the Customs Act were not considered because of impending amendments.

The process described in that letter of determining whether in each instance Parliament originally intended that the subject offence be one of strict liability was applied in this case. In addition, I outlined some common examples of offences where it can be readily inferred that Parliament intended that strict liability should apply, including those concerning failure to comply with reporting requirements and conditions of permits.

As outlined in the explanatory memorandum to Schedule 1 to the CLA Bill, the majority of these offences concern failure to comply with reporting requirements or failure to comply with conditions. The remaining offences are:

- failure to provide suitable office accommodation to an officer employed at a wharf or airport (section 19 of the Customs Act);
- failure to provide reasonable assistance when requested (section 67ET – note that this offence has been repealed by the operation of the ITM Act since the CLA Bill was tabled);
- communicating more than one import entry in respect of the same goods (section 71G);
- failure to withdraw or amend an export entry where the authority to deal with the goods has been revoked (section 116);
- unauthorised entry into restricted areas or on certain ships, aircraft or wharves (section 234A).

Consistent with the policy for identifying strict liability offences, it should be noted that none of these offences have imprisonment as a penalty and almost all have a low pecuniary penalty.

The Committee thanks the Minister for this response, but draws the attention of Senators to the Committee's *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, which sets out principles for the protection of people affected by strict liability provisions and for the administration of such provisions.

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.

Seizure of goods without a warrant Proposed new sections 203CA and 203CB

Proposed new sections 203CA and 203CB of the *Customs Act 1901*, to be inserted by item 3 of Schedule 4 to this bill, would permit an authorised person to seize any goods (other than narcotic goods) on a ship or aircraft without a warrant, but subject to the requirement that the authorised person reasonably suspects the goods to be special forfeited goods. The Explanatory Memorandum seeks to justify these provisions, at pages 32 to 33. The Committee, however, **seeks the Minister's confirmation** that consideration was given to the Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation, April 2000*, when the proposals were formulated.

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

Seizure of Goods

The Committee has sought confirmation that consideration was given to the Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation, April 2000*, ("the Report") when proposing the amendments to the Customs Act by sections 203CA and 203CB.

The Torres Strait Treaty 1978 (“the Treaty”) provides for the free movement of traditional inhabitants between places within the area covered by the Treaty. This area, known as the Protected Zone, includes part of the coast of Papua and New Guinea (PNG) and islands in the Torres Strait that are part of Australia. Consequently a journey within the Protected Zone between a place that is in PNG and a place in Australia is not subject to the normal requirements of the Customs Act. As such, Customs does not have the normal opportunity to check the persons or goods being landed at, or leaving from, a place in Australia.

The ability under the Treaty of traditional inhabitants to move freely between places in PNG and Australia in the Protected Zone has required Customs to adopt a different approach to control the importation and exportation of goods into and out of Australia, in particular special forfeited goods. The approach adopted involves intercepting such vessels wherever a Customs officer locates them. Sometimes this occurs when the vessel has just beached on an island, while on other occasions such vessels are sighted at sea in the Protected Zone.

Sections 184A and 185 of the Customs Act empower a Customs officer to board a vessel in the various maritime zones (as expressed by the United Nations Law of the Sea). An entry warrant is not required in the exercise of these powers.

Currently, a Customs officer is unable to exercise the power to seize special forfeited goods without a warrant in relation to these vessels. However, if these vessels were required to go to an appointed port in accordance with the Customs Act then a Customs officer would be able to seize such goods without a warrant. Consequently it is considered appropriate that, when a Customs officer uncovers goods that the officer reasonably suspects are special forfeited goods on such vessels, the officer be able to seize those goods without a warrant.

While consideration was given to the Report in drafting these amending provisions, I believe that the special circumstances of boarding of vessels at sea in the Protected Zone warrant a departure from the principles contained in the Report.

I trust this advice addresses the Committee’s concerns satisfactorily.

The Committee thanks the Minister for this response, which gives reasons why the bill provides for the seizure of goods without a warrant. The relevant provisions, however, are nevertheless still a departure from the principles set out by the Committee in relation to search and seizure in its *Fourth Report of 2000*.

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.

Higher Education Funding Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2002*, in which it made various comments. The Minister for Education, Science and Training has responded to those comments in a letter dated 19 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. 5 of 2002

This bill was introduced into the House of Representatives on 5 June 2002 by the Minister for Education, Science and Training. [Portfolio responsibility: Education, Science and Training]

Schedule 1 of the bill proposes to amend the *Higher Education Funding Act 1988* (HEFA) to make provision for grants of financial assistance to higher education institutions and other bodies for higher education purposes, establish the Higher Education Contribution Scheme (HECS), the Post-graduate Education Loan Scheme (PELS), the Open Learning Deferred Payment Scheme and the Bridging for Overseas-trained Professionals Loan Scheme and makes provision for the repayment of monies lent by the Commonwealth to students under those schemes.

Schedule 2 of the bill proposes to amend the *Australian Research Council Act 2001* to:

- vary the annual funding caps in section 49 of the Act for 2003, 2004 and 2005 to provide supplementation in accordance with indexation arrangements;
- vary the annual funding caps in section 49 of the Act for 2003, 2004 and 2005 to permit the Institute of Advanced Studies at the Australian National University to access the research schemes of the Australian Research Council; and
- insert an additional funding cap in section 49 of the Act for 2006 to reflect the current Budget forward estimates and to allow the Minister to approve projects for funding for up to four years.

Retrospective commencement

Subclause 2(1)

The table to subclause 2(1) indicates, in item 4, that items 22 and 23 of Schedule 1 to this bill are to commence (presumably) retrospectively, immediately after the commencement of subsection 23(1C) of the *Higher Education Funding Act 1988*. However, although the Explanatory Memorandum describes the amendments proposed in those items as being “technical”, neither that Memorandum, nor the Second Reading speech, provides any further information about those amendments. There is no indication of when subsection 23(1C) commenced, nor of whether retrospective commencement will adversely affect any person.

Given this, the Committee **seeks the Minister’s advice** as to the effect of the amendments and the reasons for the retrospectivity, if this is the case.

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

Thank you for the letter of 20 June 2002 concerning the effect of amendments made by items 22 and 23 of Schedule 1 to the Higher Education Funding Amendment Bill 2002 (the Bill) and the reasons for their retrospective application, as set out at pp. 16 and 17 of the Committee’s *Alert Digest* No. 5 of 19 June 2002.

Section 23 of the *Higher Education Funding Act 1988* (HEFA) provides for the Minister to approve grants for special research assistance on certain conditions. Subsection 23(1B) has the effect of providing that such a grant cannot be approved unless, inter alia, the relevant institution or body has a research training and management plan approved by the Minister. These plans are approved by the Minister making a declaration pursuant to paragraph 23(1C)(b).

Items 22 and 23 of Schedule 1 to the Bill amend paragraph 23(1C)(b) of HEFA to replace an erroneous reference to “paragraph (1E)(a)” with a reference to “subsection (1E)” and validate any declaration made under existing paragraph 23(1C)(b).

Subsections 23(1B), (1C), (1D) and (1E) of HEFA were inserted by item 4 of Schedule 1 to the *Australian Research Council (Consequential and Transitional Provisions) Act 2001*, which commenced on 1 July 2001 upon the proclamation of the *Australian Research Council Act 2001*. Due to a drafting error paragraph 23(1C)(b) referred to “requirements in force under paragraph (1E)(a)” as the requirements the Minister must be satisfied of before making a declaration under paragraph 23(1C)(b) concerning a plan.

There has never been a paragraph (1E)(a) of HEFA and the reference should have been to “subsection (1E)”. Item 22 of Schedule 1 to the Bill corrects this error while the retrospective application of the transitional provisions in item 23 are intended to ensure that all plans submitted by an institution or body and declared by the Minister under the current paragraph 23(1C)(b) since 1 July 2001, remain approved research training and management plans.

The amendments are beneficial and relate to institutions and bodies rather than natural persons. Consequently I do not believe the proposed amendments breach principle 1(a)(i) of the Committee’s terms of reference.

I would be happy to provide any further information the Committee requires.

The Committee thanks the Minister for this response.

Import Processing Charges (Amendment and Repeal) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2002*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 20 August 2001. The letter also addressed comments by the Committee in relation to the Customs Legislation Amendment Bill (No. 1) 2002, dealt with earlier in this report.

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 2002

This bill was introduced into the House of Representatives on 19 June 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Justice and Customs]

Introduced with the Customs Legislation Amendment Bill (No. 1) 2002, the bill proposes to continue the imposition of the import processing charges imposed by the *Import Processing Charges Act 2001* after these provisions are repealed by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*. That latter Act introduced substantial new import reporting and entry processes under the *Customs Act 1901* as a part of the Integrated Cargo System but it has now become apparent that the sector is not in a position to implement the new regime as originally planned. The existing charges will apply until all of the new reporting and entry processes have commenced.

The bill also continues the imposition of charges for documentary cargo reports made during the six month general moratorium period, or any further moratorium period granted by the Chief Executive Officer of Customs.

Commencement

Clause 6

By virtue of item 4 in the table to subclause 2(1), the amendment proposed in clause 6 would commence at the same time as the commencement of item 1 of Schedule 4 to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*. Although the Explanatory Memorandum does not indicate when that Act either has commenced or will commence, that information is provided by the Minister's second reading speech to the Customs Legislation Amendment Bill (No. 1) 2002. The second reading speech, however, has a function different to that of the Explanatory Memorandum, which should provide details of this kind regardless of whether they are mentioned in the speech. Also, in this case, the necessary information was not included in the second reading speech for the bill itself, but in the speech for another bill. In this context, the Department of the Prime Minister and Cabinet, Legislation Circular No. 5 of 2002, advises that matters coming within the terms of reference of the Scrutiny of Bills Committee should be fully and clearly explained in the Explanatory Memorandum. The Committee **seeks the Minister's advice** as to why that information does not also appear in the Explanatory Memorandum to this bill.

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

Commencement Provisions

I acknowledge the Committee's concerns that the explanatory memoranda to both Bills do not fully explain matters relating to the commencement provisions for the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* ("the ITM Act").

Initially, the ITM Act commencement changes were all located in the CLA Bill. On advice that extending the operation of the *Import Processing Charges Act 1997* ("the Charges Act 1997") may have been considered to impose taxation, in so far as they relate to the Charges Act 1997, the commencement changes were relocated to the separate IPC Bill. However, the CLA and IPC Bills are to be debated cognately because, in part, they both deal with the issue of extending the commencement provisions of the ITM Act.

As noted by the committee, the second reading speech to the CLA Bill provides an explanation of the commencement provisions of the ITM Act and reasons why the commencement date needs to be extended. Some of this information was inadvertently excluded from the explanatory memoranda when the separate Bills were drafted.

I agree that, as advised in Legislation Circular No. 5 of 2002, each Explanatory Memorandum should fully and clearly explain the purpose of amendments in the Bills and in particular those that come within the terms of reference of the Committee.

I wish to assure the Committee that neither Bill will have any retrospective operation. As the explanatory memorandum to the CLA Bill notes, most of the amendments to be made to the *Customs Act 1901* by the ITM Act have not yet commenced. In the notes on clauses, the discussion of the amendments makes it clear that the particular ITM provisions are not yet in operation and therefore the amendments made by the CLA Bill and the IPC Bill would not have retrospective effect.

I will amend the Explanatory Memoranda to address the matters raised by the committee and to make it absolutely clear that there is no intention that any of the amendments will have retrospective operation. The amended explanatory memoranda will be tabled in the next sitting period of the Parliament.

The Committee thanks the Minister for this response.

Jan McLucas
Chair



ATTORNEY-GENERAL
THE HON. DARYL WILLIAMS AM QC MP

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RECEIVED

14 JUN 2002

Senate Standing Committee
for the Scrutiny of Bills

Mr James Warmenhoven
Secretary
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

12 JUN 2002

Dear Mr Warmenhoven

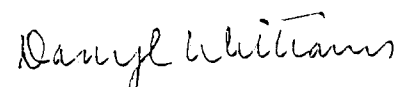
Thank you for your letter of 21 March 2002 drawing my attention to the Scrutiny of Bills Alert Digest No. 3 of 2002 concerning the proposed new subsections 92.1(2) and (3) to be inserted into the *Criminal Code 1995* by the Criminal Code Amendment (Espionage and Related Offences) Bill 2002 (the Bill). The proposed new subsections allow for a reversal of the burden of proof in a prosecution for an offence under subsection 92.1(1) concerning the taking or recording of soundings.

Section 83 of the *Crimes Act 1914* is repealed by item 3 of Schedule 1 of the Bill and replaced by new subsections 92.1(2) and (3) in the Criminal Code. The new subsections do not alter the law as it stands; they simply modernise the language of the provisions. This is consistent with the purpose of the Bill, which is to strengthen Australia's laws and modernise the offence provisions in Part VII of the Crimes Act for insertion in the Criminal Code.

Commonwealth criminal law policy on reversing the onus of proof is that it should only be allowed in cases where the matters to be proved are peculiarly within the knowledge of the defendant and are difficult for the prosecution to disprove beyond a reasonable doubt. It must be peculiarly within the defendant's knowledge and therefore within his or her ability to prove or disprove. In the case of the taking or recording of soundings, it is not within the scope of the Commonwealth's capabilities to ascertain the necessity of soundings taken for the navigation of the vessel or for any purpose in which the vessel was lawfully engaged.

The new subsections do not constitute a change in the law; they merely reflect the current state of the law and the view that a reversal of the onus of proof is appropriate in the circumstances.

Yours sincerely


DARYL WILLIAMS



SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia

RECEIVED

20 AUG 2002

Senate Standing Committee
for the Scrutiny of Bills

Ministerial No 80463

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

Dear Senator Crossin

I refer to the Scrutiny of Bills Alert Digest No. 6 of 2002, particularly the matters relating to the Customs Legislation Amendment Bill (No 1) 2002 ("the CLA Bill") and the Import Processing Charges (Amendment and Repeal) Bill 2002 ("the IPC Bill"). The Committee has asked for advice on:

- The reasons why information relating to commencement provisions in both Bills was included in the second reading speeches but not fully and clearly set out in the respective explanatory memoranda.
- Further details of the types of offences provisions that will become strict liability offences and the reasons why these offences are already ones of strict liability.
- Confirmation that consideration was given to the *Entry and Search Provisions in Commonwealth Legislation Report, April 2000* in formulating the provisions for the seizure of special forfeited goods in the Torres Strait Protected Zone.

Commencement Provisions

I acknowledge the Committee's concerns that the explanatory memoranda to both Bills do not fully explain matters relating to the commencement provisions for the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* ("the ITM Act").

Initially, the ITM Act commencement changes were all located in the CLA Bill. On advice that extending the operation of the *Import Processing Charges Act 1997* ("the Charges Act 1997") may have been considered to impose taxation, in so far as they relate to the Charges Act 1997, the commencement changes were relocated to the separate IPC Bill. However, the CLA and IPC Bills are to be debated cognately because, in part, they both deal with the issue of extending the commencement provisions of the ITM Act.

As noted by the committee, the second reading speech to the CLA Bill provides an explanation of the commencement provisions of the ITM Act and reasons why the commencement date needs to be extended. Some of this information was inadvertently excluded from the explanatory memoranda when the separate Bills were drafted.

I agree that, as advised in Legislation Circular No. 5 of 2002, each Explanatory Memorandum should fully and clearly explain the purpose of amendments in the Bills and in particular those that come within the terms of reference of the Committee.

I wish to assure the Committee that neither Bill will have any retrospective operation. As the explanatory memorandum to the CLA Bill notes, most of the amendments to be made to the *Customs Act 1901* by the ITM Act have not yet commenced. In the notes on clauses, the discussion of the amendments makes it clear that the particular ITM provisions are not yet in operation and therefore the amendments made by the CLA Bill and the IPC Bill would not have retrospective effect.

I will amend the Explanatory Memoranda to address the matters raised by the committee and to make it absolutely clear that there is no intention that any of the amendments will have retrospective operation. The amended explanatory memoranda will be tabled in the next sitting period of the Parliament.

Creation of criminal offences of strict liability

Schedule 1 to the CLA Bill provides that particular offences in the Customs Act are offences of strict liability. In February 2001, I wrote to the Committee in respect of the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 which similarly declared certain offences in 50 Acts administered by the Attorney-General's portfolio to be offences of strict liability.

As outlined in that letter, prior to these amendments, only a handful of Commonwealth criminal offences were expressly stated to be strict liability offences. It was therefore necessary to identify which offences should be so characterised. In that process, a number of offences in the Customs Act were not considered because of impending amendments.

The process described in that letter of determining whether in each instance Parliament originally intended that the subject offence be one of strict liability was applied in this case. In addition, I outlined some common examples of offences where it can be readily inferred that Parliament intended that strict liability should apply, including those concerning failure to comply with reporting requirements and conditions of permits.

As outlined in the explanatory memorandum to Schedule 1 to the CLA Bill, the majority of these offences concern failure to comply with reporting requirements or failure to comply with conditions. The remaining offences are:

- failure to provide suitable office accommodation to an officer employed at a wharf or airport (section 19 of the Customs Act);

- failure to provide reasonable assistance when requested (section 67ET - note that this offence has been repealed by the operation of the ITM Act since the CLA Bill was tabled);
- communicating more than one import entry in respect of the same goods (section 71G);
- failure to withdraw or amend an export entry where the authority to deal with the goods has been revoked (section 116);
- unauthorised entry into restricted areas or on certain ships, aircraft or wharves (section 234A).

Consistent with the policy for identifying strict liability offences, it should be noted that none of these offences have imprisonment as a penalty and almost all have a low pecuniary penalty.

Seizure of Goods

The Committee has sought confirmation that consideration was given to the Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation, April 2000*, ("the Report") when proposing the amendments to the Customs Act by sections 203CA and 203CB.

The Torres Strait Treaty 1978 ("the Treaty") provides for the free movement of traditional inhabitants between places within the area covered by the Treaty. This area, known as the Protected Zone, includes part of the coast of Papua and New Guinea (PNG) and islands in the Torres Strait that are part of Australia. Consequently a journey within the Protected Zone between a place that is in PNG and a place in Australia is not subject to the normal requirements of the Customs Act. As such, Customs does not have the normal opportunity to check the persons or goods being landed at, or leaving from, a place in Australia.

The ability under the Treaty of traditional inhabitants to move freely between places in PNG and Australia in the Protected Zone has required Customs to adopt a different approach to control the importation and exportation of goods into and out of Australia, in particular special forfeited goods. The approach adopted involves intercepting such vessels wherever a Customs officer locates them. Sometimes this occurs when the vessel has just beached on an island, while on other occasions such vessels are sighted at sea in the Protected Zone.

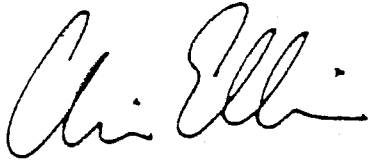
Sections 184A and 185 of the Customs Act empower a Customs officer to board a vessel in the various maritime zones (as expressed by the United Nations Law of the Sea). An entry warrant is not required in the exercise of these powers.

Currently, a Customs officer is unable to exercise the power to seize special forfeited goods without a warrant in relation to these vessels. However, if these vessels were required to go to an appointed port in accordance with the Customs Act then a Customs officer would be able to seize such goods without a warrant. Consequently it is considered appropriate that, when a Customs officer uncovers goods that the officer reasonably suspects are special forfeited goods on such vessels, the officer be able to seize those goods without a warrant.

While consideration was given to the Report in drafting these amending provisions, I believe that the special circumstances of boarding of vessels at sea in the Protected Zone warrant a departure from the principles contained in the Report.

I trust this advice addresses the Committee's concerns satisfactorily.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Ellison', with a stylized, cursive script.

CHRIS ELLISON
Senator for Western Australia

20 AUG 2002



RECEIVED

20 AUG 2002

MINISTER FOR EDUCATION, SCIENCE AND TRAINING
THE HON DR BRENDAN NELSON MP

19 AUG 2002

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

Dear Senator Cooney

Thank you for the letter of 20 June 2002 concerning the effect of amendments made by items 22 and 23 of Schedule 1 to the Higher Education Funding Amendment Bill 2002 (the Bill) and the reasons for their retrospective application, as set out at pp.16 and 17 of the Committee's *Alert Digest* No. 5 of 19 June 2002.

Section 23 of the *Higher Education Funding Act 1988* (HEFA) provides for the Minister to approve grants for special research assistance on certain conditions. Subsection 23(1B) has the effect of providing that such a grant cannot be approved unless, inter alia, the relevant institution or body has a research training and management plan approved by the Minister. These plans are approved by the Minister making a declaration pursuant to paragraph 23(1C)(b).

Items 22 and 23 of Schedule 1 to the Bill amend paragraph 23(1C)(b) of HEFA to replace an erroneous reference to "paragraph (1E)(a)" with a reference to "subsection (1E)" and validate any declaration made under existing paragraph 23(1C)(b).

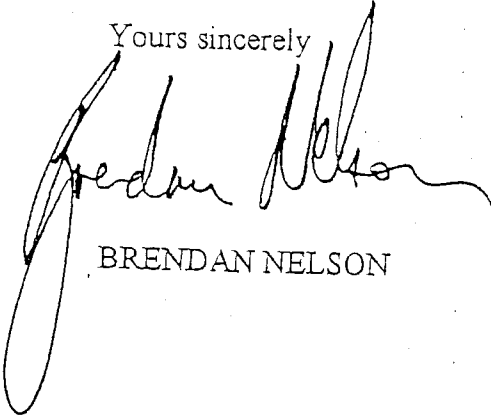
Subsections 23(1B), (1C), (1D) and (1E) of HEFA were inserted by item 4 of Schedule 1 to the *Australian Research Council (Consequential and Transitional Provisions) Act 2001*, which commenced on 1 July 2001 upon the proclamation of the *Australian Research Council Act 2001*. Due to a drafting error paragraph 23(1C)(b) referred to "requirements in force under paragraph (1E)(a)" as the requirements the Minister must be satisfied of before making a declaration under paragraph 23(1C)(b) concerning a plan.

There has never been a paragraph (1E)(a) of HEFA and the reference should have been to "subsection (1E)". Item 22 of Schedule 1 to the Bill corrects this error while the retrospective application of the transitional provisions in item 23 are intended to ensure that all plans submitted by an institution or body and declared by the Minister under the current paragraph 23(1C)(b) since 1 July 2001, remain approved research training and management plans.

The amendments are beneficial and relate to institutions and bodies rather than natural persons. Consequently I do not believe the proposed amendments breach principle 1(a)(i) of the Committee's terms of reference.

I would be happy to provide any further information the Committee requires.

Yours sincerely

A handwritten signature in black ink, appearing to read "Brendan Nelson". The signature is fluid and cursive, with a large loop at the end of the last name.

BRENDAN NELSON