SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

2003

5 March 2003

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

2003

5 March 2003

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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

SECOND REPORT OF 2003

The Committee presents its Second Report of 2003 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:

Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 2002

Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002

Migration Legislation Amendment Bill (No. 1) 2002

Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2003*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 12 February 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 2003

This bill was introduced into the House of Representatives on 12 December 2002 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

Schedule 1 to the bill proposes to amend the *Australian Wine and Brandy Corporation Act 1980* to increase the Corporation's powers to:

- amend the Register of Protected Names;
- extend the time to commence a prosecution for breaches of export provisions;
- provide a regulation-making power; and
- make technical amendments.

Schedule 2 to the bill proposes to amend the *Export Control Act 1982* to insert a provision to enable orders to be made that apply, adopt or incorporate, with or without modification, the Codex Alimentarius or the Food Standards Code as in force at a particular time or as in force from time to time.

Schedule 3 to the bill proposes to amend the *National Residue Survey Administration Act 1992* in relation to payments from the National Residue Survey Reserve; and to update provisions relating to the protection of personal information, consistent with other Commonwealth legislation.

Schedule 4 to the bill proposes to amend the *Quarantine Act 1908* to comply with the *Criminal Code*.

Schedule 5 to the bill proposes to amend the proposed *Agriculture, Fisheries and Forestry Legislation Amendment Act (No. 1) 2002* and the *Quarantine Act 1908* to make contingent amendments relating to the application of the *Quarantine Act 1908* to Christmas Island.

Schedule 6 to the bill proposes to amend the *Dairy Industry Legislation Amendment Act 2002* to correct a misdescribed amendment.

Parliamentary scrutiny
Schedule 2

The amendment proposed by Schedule 2 to this bill would permit Orders made under the *Export Control Act 1982* to incorporate any matter contained in either the Australia New Zealand Food Standards Code (made by Food Standards Australia New Zealand, under the authority of the *Food Standards Australia New Zealand Act 1991*) or the Codex Alimentarius issued by the United Nations Food and Agriculture Organisation and the World Health Organisation, as in force from time to time. Neither that Code nor the Codex Alimentarius is subject to Parliamentary oversight, hence the Orders made under the *Export Control Act 1982*, to the extent to which they incorporate matter from those documents, would not be subject to any Parliamentary scrutiny. The Explanatory Memorandum seeks to justify this departure from the terms of section 49A of the *Acts Interpretation Act 1901* by observing that "it will not be necessary to amend the Orders each time the standards [specified in either of those external documents] change to ensure their currency." The Committee may be prepared to accept that justification, but it **seeks the Minister's advice** about aspects of the process under which the Food Standards Code and the Codex Alimentarius may be incorporated into Commonwealth legislation.

In particular, the Committee would appreciate advice on how often and the procedures under which the two Codes are amended. Also, how are amendments initiated and by whom? In addition, the Committee would be grateful for advice on the extent to which the two codes are made available to those likely to be affected by the terms of any Order. For instance, are the codes available on the internet? Finally, the Committee asks whether it is intended to table in Parliament information on the number and effect of amendments of the codes, either directly or, say, through the annual report of the agency which administers the Orders.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Thank you for your Committee's letter of 6 February 2003 drawing my attention to the comments contained in the Scrutiny of Bills Alert Digest No. 1 of 2003 (5 February 2003) concerning the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No, 2) 2002.

1 have accepted the opportunity to respond to the matters raised by the Standing Committee for the Scrutiny of Bills concerning Schedule 2 of the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 2002. Please find my response attached.

Rationale for Amendment

The purpose of the *Export Control Act 1982* (the Act) is to regulate the export of certain primary products such as meat, dairy products, fish, eggs, grains and processed and fresh fruit and vegetables so that Australia's international trading partners can be confident that these goods satisfy their requirements. Goods regulated under the Act are known as "prescribed goods". The Act was introduced to overcome the trade crisis arising from a meat substitution racket in which kangaroo and horsemeat was labelled as beef for the US market. This crisis reflected poorly on the existing export systems and threatened our international trade for not only Australian meat but also for other food and agricultural products.

The Act enables conditions and restrictions to be imposed on the export of prescribed goods, and imposes penalties for non-compliance. The Act underpins the integrity of the certificates issued by AQIS to importing countries that guarantee that the Australian goods meet the requirements of the importing country. In particular, certification of export goods by AQIS represents confirmation of one or more of the following:

(a) that government assurances have been met,
(b) that inspection has been carried out during the preparation of the goods to protect public health, and
(c) the specific market access requirements have been met including product labelling and description to maintain the integrity of the product.

Our key trading partners place a great deal of importance on robust legislation to support export certification and regularly send inspectors to Australia to audit our legislation and export systems against their requirements.

In relation to food exports, importing country requirements may be met if Australian exporters satisfy our own domestic standards as set out the Australia New Zealand

Food Standards Code under the *Food Standards Australia New Zealand Act 1991*. The Code is a key component of a co-operative bi-national system of food regulation, established through intergovernmental agreement under the Food Regulation Agreement (2000) and by treaty under the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System. The Code is adopted or incorporated by reference and without amendment into food legislation in Australia and New Zealand.

However, as a result of the ongoing process of international harmonisation of food standards, where our trade occurs with fellow members of the World Trade Organisation, importing country requirements that are either not addressed or inconsistent with our own domestic standards may be met if Australia exporters comply with the food standards set out in Codex Alimentarius issued by the body known as the Codex Alimentarius Commission of the Food and Agriculture Organization of the United Nations and the World Health Organization.

In either case, it is crucial that exporters comply with the current versions of these Codes. At present, these Codes are incorporated by reference into the relevant subordinate legislation under the Act (the Export Control (Processed Food) Orders) but in both cases, due the absence of a contrary intention in the Act, AQIS can only enforce compliance with the Codes in the form in which they existed at the time of the incorporation. While the subordinate legislation could, in theory, be amended each time one of the Codes is updated, in practice there will always be a delay. This delay could mean that Australia is unable to deal with a breach of an overseas country requirement arising from non-compliance with a recent amendment to one of the Codes. The cost of this gap in our system could be very high in terms of a loss of confidence amongst our trading partners in our export system.

Particular questions from Committee

How often and under what procedures are the Codes amended?

Australia New Zealand Food Standards Code
The procedures for the amendment of the Australia New Zealand Food Standards Code (the Code) are set out in detail in the *Food Standards Australia New Zealand Act 1991* (the FSANZ Act). Food Standards Australia New Zealand (FSANZ) may develop or vary a food standard in response to an application made by any body or person that has been accepted by FSANZ after an initial assessment, or by preparing a proposal on its own initiative.

FSANZ must seek public comment, following initial assessment of an application or raising a proposal. Having regard to public submissions, FSANZ must then conduct a draft assessment of the application or proposal, and prepare a draft food standard or variation, or reject the application/abandon the proposal.

FSANZ must again seek public comment, following draft assessment of an application or proposal. Having regard to public submissions, FSANZ must then conduct a final assessment of the application or proposal, and approve or reject the draft food standard or variation.

If FSANZ approves the food standard or variation, it notifies the Australia and New Zealand Food Regulation Ministerial Council (the Council). The Council comprises Ministers from the Commonwealth, State and Territory, and New Zealand

governments. The lead Minister for each jurisdiction is the Minister for Health. Other Ministers include Ministers for Agriculture and for Consumer Affairs.

The Council may then request FSANZ to review the standard or variation. After two reviews, if the Council has remaining concerns with the standard or variation, it may reject or amend the standard or variation.

If the Council does not request FSANZ to review the standard or variation, and does not reject the standard or variation, it comes into effect in accordance with a notice in the Commonwealth of Australia Gazette.

If the Council amends the standard or variation, it comes into effect as amended in accordance with a notice in the Commonwealth of Australia Gazette.

The Gazette notices comprising the Code are available free of charge on the internet, on the FSANZ website at http://foodstandards.gov.au. An unofficial consolidation of the Code is also available on the FSANZ website and in hard copy.

The Code is amended with reasonable frequency. In 2002, for example, there were five Commonwealth of Australia Gazettes published with amendments to the Code. Generally such gazettes contain multiple amendments to the Code.

Codex Alimentarius Commission
The procedures to amend Codex standards are published in the *Codex Alimentarius - procedural manual,* currently in its twelfth edition. Like all other aspects of the Commission's work, the procedures for preparing standards are well defined, open and transparent. The process is initiated by a proposal for a standard to be developed by a national government or a subsidiary committee of the Commission.

"Formal Criteria for the Establishment of Work Priorities and for the Establishment of Subsidiary Bodies" exist to assist the Commission or Executive Committee in the decision about the proposal and in selecting or creating the subsidiary body to be responsible for steering the standard through its development.

The preparation of a proposed draft standard is arranged by the Commission Secretariat and circulated to Member Governments for comment. Comments are considered by the subsidiary body allocated to be responsible for the development of the proposed draft standard, and this subsidiary body may present the text to the Commission as a draft standard.

If the Commission adopts the draft standard, it is sent to governments a number of times in a step procedure which, if completed satisfactorily, results in the draft becoming a Codex standard. In an accelerated procedure, the number of steps required for the development of a standard varies from a maximum of eight to a minimum of five. In some circumstances, steps may be repeated. Most standards take a number of years to develop.

Once adopted by the Commission, a Codex standard is added to the Codex Alimentarius.

The complete list of standards adopted by the Codex Alimentarius Commission up to 2001 identified on the web at httm://www.codexalimentarius.net/standard_list.asp suggests that 313 standards have been adopted since 1966.

How are amendments initiated and by whom?

Australia New Zealand Food Standards Code
Food Standards Australia New Zealand (FSANZ) may develop or vary a food standard:

- in response to an application made by any body or person, that has been accepted by FSANZ after an initial assessment, or
- by preparing a proposal on its own initiative.

Codex Alimentarius Commission
The development of a Codex standard is initiated by:

- a proposal by a national government, or
- a subsidiary committee of the Commission.

The Commission and its subsidiary bodies are committed to the revision of Codex standards and related texts as necessary to ensure they are consistent with current scientific knowledge. There are currently 32 Committees and Task Forces. Of these, 5 are adjourned sine die. Of the 28 functioning committees, Australia is represented on 22 Committees including the Executive Committee and the Codex Alimentarius Commission. Australia's involvement in Codex includes attendance at meetings, leading or participating in out of session working groups and drafting groups, and through the submission of written comments.

It is member countries' responsibility to identify and present to the appropriate committee any new scientific and/or other relevant information that may warrant revision of existing Codex standards or related texts.

How are the Codes made available to those that are affected? For instance are the Codes available on the internet.

Australia New Zealand Food Standards Code
The Gazette notices comprising the Code are available free of charge on the internet, on the FSANZ website. An unofficial consolidation of the Code is also available on the FSANZ website and in hard copy.

Codex Alimentarius Commission
The Codex Alimentarius Commission has its own Secretariat based in the FAO in Rome, Italy. The Rome Secretariat distributes all Codex documentation electronically and in hard copy to member countries. These documents are also publicly available on the FAO Codex website. Each member country has a Codex Contact Point; Australia's Codex Contact Point is located within Agriculture Fisheries and Forestry - Australia (AFFA).

The Codex Contact Point (Codex Australia) is responsible for distributing all Codex documents within its own country. These documents include proposed draft standards, amendments to standards and reports of meetings. Codex Australia distributes documentation to an extensive list of clients/stakeholders via email and, in some cases, in hard copy. Documents are also provided to industry through other areas of AFFA, for example, the Australian Quarantine and Inspection Service (AQIS) provides extensive liaison with the meat industry on matters relating to the Codex Committee on Meat and Poultry Hygiene.

In developing Australian positions on Codex issues, AFFA has an extensive consultation process, which includes taking into account the different views of stakeholders (Commonwealth, State and Territory governments, together with industry and consumer organisations) through consultative meetings or by accepting written comments from these stakeholders. Industry and consumer organisations are also able to participate as members of Australian delegations to Codex meetings.

Standards adopted as final texts are listed in the report of the Codex Alimentarius Commission. These reports are available on the FAO Codex website and are also distributed by Codex Australia to stakeholders. The Codex Alimentarius Commission currently meets biennially, the next meeting will be held in July 2003.

As part of the National Food Industry Strategy, consultation is currently underway with the processed food industry on how to better engage them in the Codex process.

Is it intended to table in Parliament information on the number and effect of amendments to the codes, either directly for say through the annual report of the agency which administers the Orders?

Australia New Zealand Food Standards Code
It is a statutory requirement that FSANZ's Annual Report includes various particulars in relation to applications and proposals to amend the Code. The various particulars are prescribed in Section 69 of the *Food Standards Australia New Zealand Act 1991*. I trust that the Committee's requirements for the tabling of amendments to the Food Standards Code are satisfied by section 69. A copy of section 69 of the *Food Standards Australia New Zealand Act 1991* is attached.

Codex Alimentarius Commission
Although the information on Codex amendments is not currently tabled in Parliament, in view of the Committee's concerns to ensure adequate scrutiny of such amendments, I undertake to ensure that information on the number and effect of amendments is tabled either as a separate document or as part of the AFFA Annual Report. Please note that as the Codex Commission mets every two years to finalise amendments, tabling of amendment information would occur biannually. However, if the Codex Commission decided to meet more frequently (for instance, annually) then tabling would occur annually.

The Committee thanks the Minister for this detailed response and for undertaking to table the Codex amendments.

The Committee leaves to the Senate the question of whether the incorporation into Commonwealth legislation of this material as amended from time to time is subject to sufficient parliamentary scrutiny.

Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 16 of 2002*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 10 February 2003.

Although this bill has been passed by both Houses (and received Royal Assent on 19 December 2002) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from *Alert Digest No. 16 of 2002* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 16 of 2002

This bill was introduced into the House of Representatives on 4 December 2002 by the Minister for Children and Youth Affairs, on behalf of the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

Schedule 1 to the bill proposes to:

- amend the *Criminal Code Act 1995* to insert new provisions criminalising the smuggling of persons from Australia to another country, or from a country other than Australia to a third country, with or without transit through Australia; and
- insert offences prohibiting the making, providing or possessing false travel or identity documents for use in securing the unlawful entry of a person into a foreign country.

Schedule 2 to the bill proposes to amend the *Criminal Code Act 1995* to insert cross-border firearms trafficking offences.

Schedule 3 to the bill proposes to amend the:

- *Criminal Code Act 1995* to make minor amendments to the theft and fraud offences;
- *Crimes Act 1914* to amend sentencing provisions;

- *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* to include the drug 'fantasy' as a psychotropic drug;

- *International Transfer of Prisoners Act 1997* to clearly define the role of the Minister for Immigration and Multicultural and Indigenous Affairs; and the

- *Financial Transaction Reports Act 1988* to ensure that remittance dealers are covered by the definition of 'cash dealer' in the Act and to correct a cross reference.

Absolute liability and double jeopardy
Proposed new subsection 360.2(2)

Proposed new subsection 360.2(2) of the *Criminal Code*, to be inserted by item 1 of Schedule 2 to this bill, would impose absolute criminal liability on one element of the offence to be created by subsection 360.2(1). The relevant element is that the accused has engaged in conduct which constitutes an offence against a State or Territory law relating to firearms. As the Explanatory Memorandum observes, at page 16, absolute liability has been imposed in order to prevent the application of the default provision of the prosecution having to prove intention or recklessness. Since the Commonwealth offence is constituted (in part) by conduct which is an offence under State or Territory law – which includes any necessary mental element on the part of the accused – it is unnecessary to provide for any further mental element in the Commonwealth offence. In that respect, it is suggested that the imposition of absolute criminal liability is unexceptionable. However, there does not appear to be any provision in the bill relating to the interaction between State and Territory laws on the one hand and the provisions of this bill on the other. It is not clear, for instance, whether a person is liable to be prosecuted and convicted of an offence against a State or Territory firearms law, and might then be charged, for the second time, because his or her conduct included the interstate disposal of firearms. The Committee **seeks the Minister's advice** as to this latter point.

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

Please find enclosed advice on the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* as requested by the Committee in the Scrutiny of Bills Alert Digest No. 16 of 2002.

The Committee has sought advice on whether a person is liable to be prosecuted and convicted of an offence against a State or Territory firearms law and then later charged under the new Commonwealth firearms trafficking laws for the same activity (section 360.2).

The principle of double jeopardy would prohibit a person being prosecuted for an offence in circumstances where the person has already been tried for the activity constituting the offence.

Section 4C of the *Crimes Act 1914* deals with the double jeopardy principle at the Commonwealth level. Subsection 4C(2) provides that where an act or omission constitutes an offence under both a law of the Commonwealth and a law of a State or Territory, and the person has been punished for the State or Territory offence, that person cannot be punished for the Commonwealth offence. Where the person is first prosecuted under the Commonwealth offence, the common law or relevant State or Territory laws on double jeopardy will apply. The principle of double jeopardy exists in all Australian jurisdictions.

I trust this information is of assistance.

The Committee thanks the Minister for this response.

Migration Legislation Amendment Bill (No. 1) 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 has responded to those comments in a letter dated 15 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 Minister for Immigration and Multicultural and Indigenous Affairs. [Portfolio responsibility: Immigration and Multicultural and Indigenous Affairs]

The bill proposes to amend the *Migration Act 1958* to:

- provide that non-citizen children born in Australia are 'immigration cleared' for the purposes of their "birth entry";
- authorise the taking of security for compliance with conditions to be imposed on a visa before it is granted;
- ensure that non-citizens who leave and re-enter Australia on a bridging visa are subject to the section 48 bar on further applications;
- provide that a bridging visa held by a non-citizen ceases at the moment that person's substantive visa is cancelled;
- ensure that a special purpose visa ceases to be in effect at a specified time if the Minister declares that it is undesirable for a non-citizen to travel to or remain in Australia, and render the rules of natural justice inapplicable to the making of such a declaration;
- impose a time limit on a non-citizen in immigration clearance to apply for revocation of the automatic cancellation of that person's student visa, and to ensure that a decision not to revoke the cancellation is not subject to merits review;
- create a Deputy Principal Member position for the Migration Review Tribunal;

- ensure that certain offence provisions operate as they did prior to the application of the Criminal Code; and
- make minor technical amendments.

The bill also contains application provisions.

Retrospective application
Schedule 1, items 2 and 5

By virtue of items 2 and 5 of Schedule 1 to this bill, the amendments proposed by items 1 and 4 (which concern certain rights of non-citizen children) will apply from 1 September 1994 – a period of more than 7 years. The Explanatory Memorandum merely states the effect of these items, but provides no reason for their retrospective application (other than a reference to the date on which the concept of "immigration clearance" was introduced into the Act). The Committee, therefore, **seeks the Minister's advice** as to why these provisions apply retrospectively and whether they will disadvantage any person.

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

10. Items 2 and 5 of Schedule 1 to the Bill provide that the amendments made by item 1 and 4 apply to a non-citizen child born in Australia on or after 1 September 1994.

11. The Committee seeks advice as to why these provisions apply retrospectively and whether they will disadvantage any person.

12. These provisions clarify the "immigration clearance" status of most non-citizen children who have been born in Australia since introduction of the concept of "immigration clearance" into the Act. Immigration clearance is a process designed to regulate the entry of people to Australia effectively, and to ensure that those who enter have authority to do so.

13. The key legislative provision for immigration clearance is section 166 of the Act. This section makes it clear that all persons, including Australian citizens, are required, without unreasonable delay, to identify themselves to a clearance officer and to provide information required by the Act or the Regulations. At present it is unclear how, or whether, non-citizen children born in Australia must comply with these requirements.

14. The benefit of clarifying the status of these non-citizen children is to remove possible disadvantage in relation to other parts of migration legislation, which can require that a person must be "immigration cleared". For example, such a non-citizen child might not be able to be granted a bridging visa because, under sections 72 and 73 of the Act, only eligible non-citizens may be granted bridging visas. The definition of "eligible non-citizens" includes non-citizens who have been immigration cleared.

15. Similarly, the benefit in applying the amendment in item 4 of Schedule 1 to the Bill to relevant non-citizen children born in Australia is that the visas taken to have been granted to them by virtue of the operation of section 78 of the Act, will not cease to be in effect under section 173 of the Act. Section 173 provides, in effect, that a visa will cease if the holder enters Australia other than at a recognised air or sea port.

16. Finally, I confirm that the amendments are entirely beneficial and that their retrospective application will not disadvantage any person.

The Committee thanks the Minister for this response.

Abrogation of the rules of natural justice
Schedule 3, item 2

The amendment proposed by item 2 of Schedule 3 makes it clear that the rules of natural justice do not apply in relation to the making of a declaration under subsection 33(9) of the *Migration Act 1958*. The Explanatory Memorandum seeks to justify this trespass on civil liberties, in the following terms:

The purpose of new section 33(11) is to ensure that, as originally intended, quick action can be taken to prevent the travel to, entry or stay in Australia of a special purpose visa holder whose entry or stay is not in Australia's interest. It also avoids the operational difficulties associated with an obligation to afford natural justice. In many cases, it is difficult or impossible to contact persons who may be the subject of subsection 33(9) (for example, a seafarer who has deserted his or her vessel and who cannot be located). In other cases, the reasons for making the declaration cannot be put to the person because of adverse intelligence reports or time constraints.

The rules of natural justice have been developed over many years to ensure fairness in the application of the law. It is unusual to see them cast aside simply to avoid "operational difficulties". The Committee, therefore, **seeks the Minister's advice** as to the deficiencies in the existing provision and why such an extreme amendment is seen as necessary to deal with them.

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

17. The Committee has concerns about item 2 of Schedule 3 to the Bill. In particular, the Committee seeks advice as to the deficiencies in the existing provision and why such an "extreme" amendment is seen as necessary to deal with them.

18. Section 33 of the Act provides that there is a class of temporary visas to travel to, enter and remain in Australia to be known as special purpose visas.

19. These visas are designed to provide lawful status to non-citizens who need to travel to, enter and remain in Australia but to whom Australia's standard visa regime and immigration clearance processes are taken not to apply. It is also a visa that needs no application but is granted by operation of law to particular categories of people for the duration of that particular purpose of stay in Australia. In those situations, there is no assessment of the individual circumstances of each person in the category.

20. The kinds of people to whom special purpose visas apply are, for example, crew members of non-military ships and airlines, members of certain military forces, guests of Government, transit passengers from certain countries and members of the Royal Family.

21. Under subsection 33(9) of the Act, the Minister may make a written declaration, for the purposes of section 33, that it is undesirable that a person, or any persons in a class of persons, travel to and enter Australia or remain in Australia. The effect of such a declaration is that the person is no longer the holder of a special purpose visa, and is instead subject to the normal visa regime provided for under the Act.

22. The amendment contained in item 2 of Schedule 3 to the Bill makes it clear that the rules of natural justice do not apply in relation to the making of such a declaration. The amendment is necessary to ensure that quick action can be taken to protect the Australian community from persons who pose a threat to the safety and security of the community. For example, if a person travelling to Australia on a special purpose visa was found to present a risk to national security it would extremely important to be able to make a declaration under subsection 33(9) to immediately stop the person from entering Australia.

23. This amendment will provide consistency under the Act between those people who have their visa cancelled under 501 on character grounds and those people whose special purpose visa ceases to be in effect because of the substantial risk they present to the safety of the Australian community. Under section 501 of the Act, the rules of natural justice do not apply in relation to the Minister making a decision that it is in the national interest to cancel a person's visa on character grounds.

24. In addition, it is important to note that although the rules of natural justice will not apply in relation to the making of a subsection 33(9) declaration, the person will still be able to apply for another substantive visa. The former special purpose visa holder may also have held another substantive visa at the time his or her special purpose visa ceased to be in effect. In this case, the codified procedures in the Act that apply to the various cancellation powers would apply if the Department sought to cancel this other substantive visa.

25. As a matter of policy, the Minister may also revoke a declaration made under subsection 33(9) in order to allow a person to again be the holder of a special purpose visa.

The Committee thanks the Minister for this response and accepts that there may be substantial reasons in this case to abrogate the rules of natural justice. However, those rules are central to personal rights and should be excluded only in exceptional cases. The absence of procedural fairness in these provisions is a breach of such rights, but the Committee leaves to the Senate to decide whether, in the circumstances, it is an undue breach.

Strict liability offence
Proposed new subsection 241(3)

Subsection 241(1) makes it an offence for a person to make arrangements that make it look as if two people are de facto spouses for the purposes of the regulations where that person knows or reasonably believes that they are not de facto spouses.

The Explanatory Memorandum states that the structure of this offence requires the prosecution to prove that the defendant knew that the two people were not de facto spouses for the purposes of the regulations. As the definition of de facto spouse in the regulations is said to be "complex", requiring the prosecution to prove this element "may prove an extremely difficult task".

The Explanatory Memorandum concludes that this amendment is intended to make it clear that "the prosecution is required only to prove that the de facto relationship was not genuine, and that the defendant knew, or reasonably believed, that this was the case". However, it is not clear whether this amendment simply restates the existing law in the light of the application of the *Criminal Code*, or changes that law by creating a new strict liability offence.

The Committee, therefore, **seeks the Minister's advice** as to whether the amendment proposed by item 7 of Schedule 5 will make a change to the law, and, if so, whether options other than the imposition of strict criminal liability were considered.

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

26. The Committee seeks advice as to whether the amendment proposed by item 7 of Schedule 5 will make a change to the law and, if so, whether options other than the imposition of strict criminal liability were considered.

27. Subsection 241(1), as contained in item 7 of Schedule 5 to the Bill, makes it an offence for a person to make arrangements that make it look as if two people are de facto spouses, where that person knows or believes on reasonable grounds that they are not de facto spouses for the purposes of the regulations.

28. In September 2001, the Commonwealth Director of Public Prosecutions advised my Department that the structure of this offence provision raised a "knowledge of law" issue. That is, the prosecution would be required to prove that the person knew the two people were not de facto spouses, as defined in the Migration Regulations 1994 (*"the Regulations"*).

29. The definition of de facto spouse contained in the Regulations requires the Minister to be satisfied as to the veracity of the relationship. The Commonwealth Director of Public Prosecutions confirmed with my Department that this requirement would be very difficult to prove, and that, in effect, the intention of Parliament in creating the offence would be frustrated, as it would be close to impossible to convict people.

30. In this way, the amendment ensures that the offence provision is workable, as originally intended by Parliament.

31. In consultation with the Commonwealth Director of Public Prosecutions and the Attorney-General's Department, various options were explored. The most suitable option was found to be that of applying strict liability to the element of the offence that the two people were not de facto spouses for the purposes of the regulations in so far as the regulations require the Minister to be satisfied of any matter in determining whether the persons are de facto spouses of each other. That is, that the prosecution need not prove that the person knew or was reckless as to requirements in the Regulations which require *the Minister to be satisfied* that the two persons are de facto spouses. The prosecution must still prove that the person knew or believed that the two people were otherwise not de facto spouses within the definition in the regulations.

32. It is important to note that the amendment only applies strict liability to this specific part of the offence. Strict liability does not apply to any other elements, such as the requirement to show the person made, or helped to make it look as if the 2 persons were de facto spouses.

The Committee thanks the Minister for this response, which appears to indicate that the provisions are in accordance with the principles relating to strict liability contained in the Committee's *Sixth Report of 2002: The Application of Absolute and Strict Liability Offences in Commonwealth Legislation.*

The Committee emphasises that an Explanatory Memorandum should include a full explanation of the background to the bill and its intended effect. This is particularly the case where it includes provisions which may affect personal rights or parliamentary propriety. An Explanatory Memorandum should be more than a brief introduction followed by notes on clauses which largely reproduce the clauses themselves. The purpose of an Explanatory Memorandum is to assist parliamentarians during passage of the bill and to be a guide for those affected by its proposed provisions. It is therefore necessary for it to include all matters relevant to this purpose. This would usually include a substantial discussion of these issues in addition to the notes on clauses.

The Committee has decided to write to the Acting Parliamentary Secretary to the Prime Minister and to the First Parliamentary Counsel about its concerns in this area. The Committee will report to the Senate after it has considered advice from these agencies.

Jan McLucas
Chair

HON WARREN TRUSS MP

Minister for Agriculture, Fisheries and Forestry

RECEIVED

24 FEB 2003

Senate Standing C'ttee
for the Scrutiny of Bills

12 FEB 2003

Senator J McLucas
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator McLucas

Thank you for your Committee's letter of 6 February 2003 drawing my attention to the comments contained in the Scrutiny of Bills Alert Digest No. 1 of 2003 (5 February 2003) concerning the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 2002.

I have accepted the opportunity to respond to the matters raised by the Standing Committee for the Scrutiny of Bills concerning Schedule 2 of the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 2002. Please find my response attached. Additionally, as requested, a copy of my response has been e-mailed to the Secretariat.

Yours sincerely

WARREN TRUSS

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7520 Facsimile: (02) 6273 4120

Rationale for Amendment

The purpose of the *Export Control Act 1982* (the Act) is to regulate the export of certain primary products such as meat, dairy products, fish, eggs, grains and processed and fresh fruit and vegetables so that Australia's international trading partners can be confident that these goods satisfy their requirements. Goods regulated under the Act are known as "prescribed goods". The Act was introduced to overcome the trade crisis arising from a meat substitution racket in which kangaroo and horsemeat was labelled as beef for the US market. This crisis reflected poorly on the existing export systems and threatened our international trade for not only Australian meat but also for other food and agricultural products.

The Act enables conditions and restrictions to be imposed on the export of prescribed goods, and imposes penalties for non-compliance. The Act underpins the integrity of the certificates issued by AQIS to importing countries that guarantee that the Australian goods meet the requirements of the importing country. In particular, certification of export goods by AQIS represents confirmation of one or more of the following:

(a) that government assurances have been met,
(b) that inspection has been carried out during the preparation of the goods to protect public health, and
(c) the specific market access requirements have been met including product labelling and description to maintain the integrity of the product.

Our key trading partners place a great deal of importance on robust legislation to support export certification and regularly send inspectors to Australia to audit our legislation and export systems against their requirements.

In relation to food exports, importing country requirements may be met if Australian exporters satisfy our own domestic standards as set out the Australia New Zealand Food Standards Code under the *Food Standards Australia New Zealand Act 1991*. The Code is a key component of a co-operative bi-national system of food regulation, established through intergovernmental agreement under the Food Regulation Agreement (2000) and by treaty under the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System. The Code is adopted or incorporated by reference and without amendment into food legislation in Australia and New Zealand.

However, as a result of the ongoing process of international harmonisation of food standards, where our trade occurs with fellow members of the World Trade Organisation, importing country requirements that are either not addressed or inconsistent with our own domestic standards may be met if Australia exporters comply with the food standards set out in Codex Alimentarius issued by the body known as the Codex Alimentarius Commission of the Food and Agriculture Organization of the United Nations and the World Health Organization.

In either case, it is crucial that exporters comply with the current versions of these Codes. At present, these Codes are incorporated by reference into the relevant subordinate legislation under the Act (the Export Control (Processed Food) Orders) but in both cases, due the absence of a contrary intention in the Act, AQIS can only enforce compliance with the Codes in the form in which they existed at the time of the incorporation. While the subordinate legislation could, in theory, be amended each time one of the Codes is updated, in practice there will always be a delay. This delay could mean that Australia is unable to deal with a breach of an overseas country requirement arising from non-compliance with a recent amendment to one of the Codes. The cost of this gap in our system could be very high in terms of a loss of confidence amongst our trading partners in our export system.

Particular questions from Committee

How often and under what procedures are the Codes amended?

Australia New Zealand Food Standards Code
The procedures for the amendment of the Australia New Zealand Food Standards Code (the Code) are set out in detail in the *Food Standards Australia New Zealand Act 1991* (the FSANZ Act). Food Standards Australia New Zealand (FSANZ) may develop or vary a food standard in response to an application made by any body or person that has been accepted by FSANZ after an initial assessment, or by preparing a proposal on its own initiative.

FSANZ must seek public comment, following initial assessment of an application or raising a proposal. Having regard to public submissions, FSANZ must then conduct a draft assessment of the application or proposal, and prepare a draft food standard or variation, or reject the application/abandon the proposal.

FSANZ must again seek public comment, following draft assessment of an application or proposal. Having regard to public submissions, FSANZ must then conduct a final assessment of the application or proposal, and approve or reject the draft food standard or variation.

If FSANZ approves the food standard or variation, it notifies the Australia and New Zealand Food Regulation Ministerial Council (the Council). The Council comprises Ministers from the Commonwealth, State and Territory, and New Zealand governments. The lead Minister for each jurisdiction is the Minister for Health. Other Ministers include Ministers for Agriculture and for Consumer Affairs.

The Council may then request FSANZ to review the standard or variation. After two reviews, if the Council has remaining concerns with the standard or variation, it may reject or amend the standard or variation.

If the Council does not request FSANZ to review the standard or variation, and does not reject the standard or variation, it comes into effect in accordance with a notice in the Commonwealth of Australia Gazette.

If the Council amends the standard or variation, it comes into effect as amended in accordance with a notice in the Commonwealth of Australia Gazette.

The Gazette notices comprising the Code are available free of charge on the internet, on the FSANZ website at http://foodstandards.gov.au . An unofficial consolidation of the Code is also available on the FSANZ website and in hard copy.

The Code is amended with reasonable frequency. In 2002, for example, there were five Commonwealth of Australia Gazettes published with amendments to the Code. Generally such gazettes contain multiple amendments to the Code.

Codex Alimentarius Commission
The procedures to amend Codex standards are published in the *Codex Alimentarius - procedural manual*, currently in its twelfth edition. Like all other aspects of the Commission's work, the procedures for preparing standards are well defined, open and transparent. The process is initiated by a proposal for a standard to be developed by a national government or a subsidiary committee of the Commission.

"Formal Criteria for the Establishment of Work Priorities and for the Establishment of Subsidiary Bodies" exist to assist the Commission or Executive Committee in the decision about the proposal and in selecting or creating the subsidiary body to be responsible for steering the standard through its development.

The preparation of a proposed draft standard is arranged by the Commission Secretariat and circulated to Member Governments for comment. Comments are considered by the subsidiary body allocated to be responsible for the development of the proposed draft standard, and this subsidiary body may present the text to the Commission as a draft standard.

If the Commission adopts the draft standard, it is sent to governments a number of times in a step procedure which, if completed satisfactorily, results in the draft becoming a Codex standard. In an accelerated procedure, the number of steps required for the development of a standard varies from a maximum of eight to a minimum of five. In some circumstances, steps may be repeated. Most standards take a number of years to develop.

Once adopted by the Commission, a Codex standard is added to the Codex Alimentarius.

The complete list of standards adopted by the Codex Alimentarius Commission up to 2001 identified on the web at http://www.codexalimentarius.net/standard_list.asp suggests that 313 standards have been adopted since 1966.

How are amendments initiated and by whom?

Australia New Zealand Food Standards Code
Food Standards Australia New Zealand (FSANZ) may develop or vary a food standard:

- in response to an application made by any body or person, that has been accepted by FSANZ after an initial assessment, or

- by preparing a proposal on its own initiative.

Codex Alimentarius Commission
The development of a Codex standard is initiated by:

- a proposal by a national government, or
- a subsidiary committee of the Commission.

The Commission and its subsidiary bodies are committed to the revision of Codex standards and related texts as necessary to ensure they are consistent with current scientific knowledge. There are currently 32 Committees and Task Forces. Of these, 5 are adjourned sine die. Of the 28 functioning committees, Australia is represented on 22 Committees including the Executive Committee and the Codex Alimentarius Commission. Australia's involvement in Codex includes attendance at meetings, leading or participating in out of session working groups and drafting groups, and through the submission of written comments.

It is member countries' responsibility to identify and present to the appropriate committee any new scientific and/or other relevant information that may warrant revision of existing Codex standards or related texts.

How are the Codes made available to those that are affected? For instance are the Codes available on the internet.

Australia New Zealand Food Standards Code
The Gazette notices comprising the Code are available free of charge on the internet, on the FSANZ website. An unofficial consolidation of the Code is also available on the FSANZ website and in hard copy.

Codex Alimentarius Commission
The Codex Alimentarius Commission has its own Secretariat based in the FAO in Rome, Italy. The Rome Secretariat distributes all Codex documentation electronically and in hard copy to member countries. These documents are also publicly available on the FAO Codex website. Each member country has a Codex Contact Point; Australia's Codex Contact Point is located within Agriculture Fisheries and Forestry - Australia (AFFA).

The Codex Contact Point (Codex Australia) is responsible for distributing all Codex documents within its own country. These documents include proposed draft standards, amendments to standards and reports of meetings. Codex Australia distributes documentation to an extensive list of clients/stakeholders via email and, in some cases, in hard copy. Documents are also provided to industry through other areas of AFFA, for example, the Australian Quarantine and Inspection Service (AQIS) provides extensive liaison with the meat industry on matters relating to the Codex Committee on Meat and Poultry Hygiene.

In developing Australian positions on Codex issues, AFFA has an extensive consultation process, which includes taking into account the different views of

stakeholders (Commonwealth, State and Territory governments, together with industry and consumer organisations) through consultative meetings or by accepting written comments from these stakeholders. Industry and consumer organisations are also able to participate as members of Australian delegations to Codex meetings.

Standards adopted as final texts are listed in the report of the Codex Alimentarius Commission. These reports are available on the FAO Codex website and are also distributed by Codex Australia to stakeholders. The Codex Alimentarius Commission currently meets biennially, the next meeting will be held in July 2003.

As part of the National Food Industry Strategy, consultation is currently underway with the processed food industry on how to better engage them in the Codex process.

Is it intended to table in Parliament information on the number and effect of amendments to the codes, either directly for say through the annual report of the agency which administers the Orders?

Australia New Zealand Food Standards Code
It is a statutory requirement that FSANZ's Annual Report includes various particulars in relation to applications and proposals to amend the Code. The various particulars are prescribed in Section 69 of the *Food Standards Australia New Zealand Act 1991.* I trust that the Committee's requirements for the tabling of amendments to the Food Standards Code are satisfied by section 69. A copy of section 69 of the *Food Standards Australia New Zealand Act 1991* is attached

Codex Alimentarius Commission
Although the information on Codex amendments is not currently tabled in Parliament, in view of the Committee's concerns to ensure adequate scrutiny of such amendments, I undertake to ensure that information on the number and effect of amendments is tabled either as a separate document or as part of the AFFA Annual Report. Please note that as the Codex Commission mets every two years to finalise amendments, tabling of amendment information would occur biannually. However, if the Codex Commission decided to meet more frequently (for instance, annually) then tabling would occur annually.

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

RECEIVED
11 FEB 2003
Senate Standing C'ttee
for the Scrutiny of Bills

File No. 03/320
Min No. 02/225943

10 FEB 2003

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

Dear Senator McLucas

Please find enclosed advice on the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* as requested by the Committee in the Scrutiny of Bills Alert Digest No. 16 of 2002.

The Committee has sought advice on whether a person is liable to be prosecuted and convicted of an offence against a State or Territory firearms law and then later charged under the new Commonwealth firearms trafficking laws for the same activity (section 360.2).

The principle of double jeopardy would prohibit a person being prosecuted for an offence in circumstances where the person has already been tried for the activity constituting the offence.

Section 4C of the *Crimes Act 1914* deals with the double jeopardy principle at the Commonwealth level. Subsection 4C(2) provides that where an act or omission constitutes an offence under both a law of the Commonwealth and a law of a State or Territory, and the person has been punished for the State or Territory offence, that person cannot be punished for the Commonwealth offence. Where the person is first prosecuted under the Commonwealth offence, the common law or relevant State or Territory laws on double jeopardy will apply. The principle of double jeopardy exists in all Australian jurisdictions.

I trust this information is of assistance.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

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

Parliament House, Canberra ACT 2600
Telephone: (02) 6277 7860
Facsimile: (02) 6273 4144

15 MAY 2002
RECEIVED
27 MAY 2002
Senate Standing C'ttee
for the Scrutiny of Bills

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

Dear Senator Cooney

I refer to two letters of 21 March 2003 from Mr James Warmenhoven, Secretary to the Committee, to my Senior Adviser referring to the comments contained in the Scrutiny of Bills Alert Digest No. 3 of 2002 (20 March 2002) concerning the:

- Migration Legislation Amendment (Transitional Movement) Bill 2002; and
- Migration Legislation Amendment (No. 1) Bill 2002.

As you may recall, the *Migration Legislation Amendment (Transitional Movement) Bill 2002* was passed by the Parliament on 21 March 2002 and received the Royal Assent on 4 April 2002. The *Migration Legislation Amendment (No. 1) Bill 2002* is presently before the House of Representatives but is expected to be ready for consideration by the Senate during the Spring Sittings 2002.

The Committee seeks my advice in relation to a number of matters concerning the above Bills. Advice on these matters is contained in Attachment A to this letter.

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

Yours sincerely

Philip Ruddock

Migration Legislation Amendment (Transitional Movement) Bill 2002

1. This Bill is now an Act, having been passed by the Parliament on 21 March 2002 and receiving the Royal Assent on 4 April 2002. It commenced operation on 12 April 2002.

2. The Act amends the *Migration Act 1958* to:

- allow a "transitory person" to be brought to Australia without a visa for a temporary purpose;
- bar the person from making a valid visa application in Australia, unless the Minister believes that it is in the public interest to allow the person to apply for a visa
- bar the person from instituting certain legal proceedings against the Commonwealth, an officer of the Commonwealth, or any other person acting on behalf of the Commonwealth whilst in Australia; and
- allow certain transitory persons to make a request for an assessment by the Refugee Review Tribunal as to whether they are a "refugee" where they have been in Australia for a continuous period of six months and have cooperated with relevant authorities.

Section 494AB – Bar on certain legal proceedings relating to transitory persons.

3. Section 494AB prohibits a transitory person from instituting certain legal actions against the Commonwealth, an officer of the Commonwealth or a person acting on behalf of the Commonwealth. The Committee seeks advice as to the reasons for "abrogating" these common law rights of action, in relation to transitory persons.

4. First, it is important to note that these common law rights of action are not totally abrogated. A transitory person can still appeal to the High Court in relation to the matters listed in paragraphs 494AB(1)(a) – (d) under the jurisdiction conferred on the High Court by section 75 of the Constitution.

5. Second, the bar on legal proceedings is intended to limit the potential for future abuse of legal proceedings by persons seeking to frustrate the resolution of their immigration status, removal or to obtain desirable migration outcomes. The bar on legal proceedings means that Commonwealth officers are able to undertake their duties without fear of being unreasonably brought to court for the performance of their legal duties.

6. In this regard, it is important to note that the transitory person still has common law rights of action. The bar is limited to those matters set out in paragraphs 494AB(1)(a) – (d) and the right to bring legal action in relation to all other matters, for example, negligence, is unaffected.

7. Finally, the Government remains committed to preserving the integrity of Australia's immigration processes and a balance between the "rights" of the individual and the interests of the wider Australian community. I believe that section 494AB strikes such an appropriate balance.

Migration Legislation Amendment (No. 1) Bill 2002

8. This Bill was introduced into the House of Representatives on 13 March 2002.

9. The items contained in the Bill that are of interest to the Committee amend the *Migration Act 1958* to:

- provide that non-citizen children born in Australia are "immigration cleared" for the purposes of their birth entry;
- clarify that the rules of natural justice do not apply in relation to the making of a declaration under subsection 33(9) of the Act that it is undesirable for a non-citizen to travel to, enter and remain in Australia; and
- ensure that certain offence provisions operate as they did prior to the application of the Criminal Code.

Schedule 1, items 2 and 5 – Retrospective application

10. Items 2 and 5 of Schedule 1 to the Bill provide that the amendments made by item 1 and 4 apply to a non-citizen child born in Australia on or after 1 September 1994.

11. The Committee seeks advice as to why these provisions apply retrospectively and whether they will disadvantage any person.

12. These provisions clarify the "immigration clearance" status of most non-citizen children who have been born in Australia since introduction of the concept of "immigration clearance" into the Act. Immigration clearance is a process designed to regulate the entry of people to Australia effectively, and to ensure that those who enter have authority to do so.

13. The key legislative provision for immigration clearance is section 166 of the Act. This section makes it clear that all persons, including Australian citizens, are required, without unreasonable delay, to identify themselves to a clearance officer and to provide information required by the Act or the Regulations. At present it is unclear how, or whether, non-citizen children born in Australia must comply with these requirements.

14. The benefit of clarifying the status of these non-citizen children is to remove possible disadvantage in relation to other parts of migration legislation, which can require that a person must be "immigration cleared". For example, such a non-citizen child might not be able to be granted a bridging visa because, under sections 72 and 73 of the Act, only eligible non-citizens may be granted bridging visas. The definition of "eligible non-citizens" includes non-citizens who have been immigration cleared.

15. Similarly, the benefit in applying the amendment in item 4 of Schedule 1 to the Bill to relevant non-citizen children born in Australia is that the visas taken to have been granted to them by virtue of the operation of section 78 of the Act, will not cease to be in

effect under section 173 of the Act. Section 173 provides, in effect, that a visa will cease if the holder enters Australia other than at a recognised air or sea port.

16. Finally, I confirm that the amendments are entirely beneficial and that their retrospective application will not disadvantage any person.

Schedule 3, item 2 – Abrogation of the rules of natural justice

17. The Committee has concerns about item 2 of Schedule 3 to the Bill. In particular, the Committee seeks advice as to the deficiencies in the existing provision and why such an "extreme" amendment is seen as necessary to deal with them.

18. Section 33 of the Act provides that there is a class of temporary visas to travel to, enter and remain in Australia to be known as special purpose visas.

19. These visas are designed to provide lawful status to non-citizens who need to travel to, enter and remain in Australia but to whom Australia's standard visa regime and immigration clearance processes are taken not to apply. It is also a visa that needs no application but is granted by operation of law to particular categories of people for the duration of that particular purpose of stay in Australia. In those situations, there is no assessment of the individual circumstances of each person in the category.

20. The kinds of people to whom special purpose visas apply are, for example, crew members of non-military ships and airlines, members of certain military forces, guests of Government, transit passengers from certain countries and members of the Royal Family.

21. Under subsection 33(9) of the Act, the Minister may make a written declaration, for the purposes of section 33, that it is undesirable that a person, or any persons in a class of persons, travel to and enter Australia or remain in Australia. The effect of such a declaration is that the person is no longer the holder of a special purpose visa, and is instead subject to the normal visa regime provided for under the Act.

22. The amendment contained in item 2 of Schedule 3 to the Bill makes it clear that the rules of natural justice do not apply in relation to the making of such a declaration. The amendment is necessary to ensure that quick action can be taken to protect the Australian community from persons who pose a threat to the safety and security of the community. For example, if a person travelling to Australia on a special purpose visa was found to present a risk to national security it would extremely important to be able to make a declaration under subsection 33(9) to immediately stop the person from entering Australia.

23. This amendment will provide consistency under the Act between those people who have their visa cancelled under 501 on character grounds and those people whose special purpose visa ceases to be in effect because of the substantial risk they present to the safety of the Australian community. Under section 501 of the Act, the rules of natural

justice do not apply in relation to the Minister making a decision that it is in the national interest to cancel a person's visa on character grounds.

24. In addition, it is important to note that although the rules of natural justice will not apply in relation to the making of a subsection 33(9) declaration, the person will still be able to apply for another substantive visa. The former special purpose visa holder may also have held another substantive visa at the time his or her special purpose visa ceased to be in effect. In this case, the codified procedures in the Act that apply to the various cancellation powers would apply if the Department sought to cancel this other substantive visa.

25. As a matter of policy, the Minister may also revoke a declaration made under subsection 33(9) in order to allow a person to again be the holder of a special purpose visa.

Proposed new subsection 241(3) – Strict liability offence

26. The Committee seeks advice as to whether the amendment proposed by item 7 of Schedule 5 will make a change to the law and, if so, whether options other than the imposition of strict criminal liability were considered.

27. Subsection 241(1), as contained in item 7 of Schedule 5 to the Bill, makes it an offence for a person to make arrangements that make it look as if two people are de facto spouses, where that person knows or believes on reasonable grounds that they are not de facto spouses for the purposes of the regulations.

28. In September 2001, the Commonwealth Director of Public Prosecutions advised my Department that the structure of this offence provision raised a "knowledge of law" issue. That is, the prosecution would be required to prove that the person knew the two people were not de facto spouses, as defined in the Migration Regulations 1994 (*"the Regulations"*).

29. The definition of de facto spouse contained in the Regulations requires the Minister to be satisfied as to the veracity of the relationship. The Commonwealth Director of Public Prosecutions confirmed with my Department that this requirement would be very difficult to prove, and that, in effect, the intention of Parliament in creating the offence would be frustrated, as it would be close to impossible to convict people.

30. In this way, the amendment ensures that the offence provision is workable, as originally intended by Parliament.

31. In consultation with the Commonwealth Director of Public Prosecutions and the Attorney-General's Department, various options were explored. The most suitable option was found to be that of applying strict liability to the element of the offence that the two people were not de facto spouses for the purposes of the regulations in so far as the regulations require the Minister to be satisfied of any matter in determining whether the

persons are de facto spouses of each other. That is, that the prosecution need not prove that the person knew or was reckless as to requirements in the Regulations which require *the Minister to be satisfied* that the two persons are de facto spouses. The prosecution must still prove that the person knew or believed that the two people were otherwise not de facto spouses within the definition in the regulations.

32. It is important to note that the amendment only applies strict liability to this specific part of the offence. Strict liability does not apply to any other elements, such as the requirement to show the person made, or helped to make it look as if the 2 persons were de facto spouses.

[Previous] [Next] [Table of Contents]

FOOD STANDARDS AUSTRALIA NEW ZEALAND ACT 1991 - SECT 69 Annual Report

The members must include in each report on the Authority under section 9 of the *Commonwealth Authorities and Companies Act 1997* particulars of:

(a) the number of applications made to the Authority under section 12 during that year; and
(b) the number of applications so made that were disposed of during that year and the manner of their disposal; and
(c) the number of proposals made by the Authority under section 12AA during that year; and
(d) the number of proposals so made that were disposed of during that year and the manner of their disposal; and
(e) any occasion during that year that the Authority, after preparing a draft standard or a draft variation of a standard, failed to make decision under section 18 within the period required under section 35 and a statement of the reasons for that failure; and
(f) each extension of time granted by the Authority under subsection 35(2) during that year and the reasons for that extension; and
(g) the number of applications made to the Administrative Appeals Tribunal during that year for review of decisions of the Authority; and
(h) the results of the applications made to the Administrative Appeals Tribunal that were determined during that year;
(i) the number of standards made under this Act during that year; and
(j) the number of draft standards and draft variations approved during that year under:

    (i) section 18; or
    (ii) subsection 26(1); and

(k) the number of occasions during that year when requests were made under section 21 for a review of a draft standard or draft variation; and
(l) the number of occasions during that year when requests were made under section 22 for a review of a draft standard or draft variation; and
(m) the number of occasions during that year when a draft standard or draft variation was rejected under section 23; and
(n) the number of occasions during that year when requests were made under section 28A for a review of a standard or variation; and
(o) the number of occasions during that year when requests were made under section 28B for a review of a standard or variation; and
(p) the number of occasions during that year when a standard or variation was revoked or amended under section 28C; and
(q) a summary of policy guidelines notified to the Authority during that year under paragraph 10(2)(e); and
(r) such other matters (if any) as are specified in the regulations.

[Previous] [Next] [Table of Contents] [Back to top]