



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTH REPORT

OF

2004

24 March 2004

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTH REPORT

OF

2004

24 March 2004

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 2004

The Committee presents its Fourth Report of 2004 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:

Customs Legislation Amendment (Application of International
Trade Modernisation and Other Measures) Bill 2003

Dairy Produce Amendment Bill 2003

Military Rehabilitation and Compensation Bill 2003

Customs Legislation Amendment (Application of International Trade Modernisation and Other Measures) Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2004*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 8 March 2004.

Although this bill has been passed by both Houses, the response may, nevertheless, be of interest to Senators. 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 2004

[Introduced into the House of Representatives on 4 December 2003. Portfolio: Justice and Customs]

Introduced with the Import Processing Charges (Amendment and Repeal) Amendment Bill 2003, the bill amends the *Customs Act 1901*, *Customs Legislation Amendment Act (No. 1) 2002*, *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*, *Import Processing Charges (Amendment and Repeal) Act 2002* and *Migration Act 1958* to:

- make transitional arrangements for the handling of imports during the transition between the Customs legacy electronic systems and the new Integrated Cargo System;
- clarify the operation of the legislation that implements Customs international trade modernisation;
- enhance Customs border controls in relation to certain restricted goods such as firearms; and

- clarify cargo reporting requirements, record retention obligations, certain maritime powers, impoundment provisions and charges payable for in-transit cargo reports; and
- clarify the basis for calculating customs duties on certain alcoholic beverages.

The bill also repeals existing transitional provisions in respect of import entries for when the import provisions of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* commence and enacts transitional provisions for imports, arrival and cargo reporting.

Non-reviewable discretion

Proposed new section 77EA

Proposed new section 77EA of the *Customs Act 1901*, to be inserted by item 5 of Schedule 2 to this bill, would give to the Minister an apparently unfettered discretion to order Customs to detain certain goods, provided only that the goods come within the limits specified in proposed new subsection 77EA(2). Although the provision states that the Minister must consider that the detention is “in the public interest”, there is apparently no means by which the owner of those goods could challenge the exercise of the Minister’s discretion. The Committee consistently draws attention to provisions which explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee therefore **seeks the Minister’s advice** as to the reason for the grant of this discretion.

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

Relevant extract from the response from the Minister

The Committee is seeking my advice as to the reason for the provision dealing with detention of goods in the public interest - proposed new section 77EA of the *Customs Act 1901* (the Customs Act).

The Government protects the Australian community by restricting the import of certain goods, such as dangerous weapons and drugs. Primarily this is achieved through the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations). New or amending regulations are disallowable instruments.

The proposed new provisions will only apply to imports which are restricted by the Prohibited Imports Regulations.

At times the circumstances relating to the import of goods, which otherwise meet the requirements of the Prohibited Imports Regulations, indicate that it would be in the public interest to more closely regulate the flow, or in some cases deny, release of the goods into the Australian community. For example, it may not be in the public interest for a large import shipment of firearms which meets all requirements applicable to the import of firearms to be released into the community at the one time. The Australian community in that case may be better served by a more gradual release of the goods over time.

The Government views the availability of restricted goods in the community very seriously and a decision to detain goods in the public interest should only be made personally at Ministerial level. Accordingly the Bill also prohibits the Minister from delegating his or her powers under the new provisions - item 2 of Schedule 2 to the Bill refers. On this basis the Government does not propose that the Minister's decision be subject to merits review.

The Government anticipates that the Minister would only need to consider exercising this power in extreme circumstances. Where this occurs the importer, under the terms of proposed new section 77EF, will be entitled to receive compensation on just terms unless the situation is amicably resolved earlier.

The Government has proposed the new provisions after long and careful consideration. The proposed new provisions strike an effective balance between guarding the community from potential harm and the commercial interests of legitimate importers.

The Committee thanks the Minister for this response.

Dairy Produce Amendment Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2004*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 17 March 2004. 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 2004

[Introduced into the House of Representatives on 3 December 2003. Portfolio: Agriculture, Fisheries and Forestry]

Further to the *Dairy Industry Service Reform Act 2003*, the bill amends the *Dairy Produce Act 1986* to provide for the industry services body, Dairy Australia Limited, to:

- be fully indemnified, out of the assets of the Dairy Structural Adjustment Fund, for any liabilities incurred by it in managing and administering the fund; and
- have the power to enter into financial and other arrangements and perform contracts associated with risk management in the administration of the fund.

The bill also contains application provisions.

Retrospectivity Schedules 2 and 3

By virtue of item 3 in the table to subclause 2(1) of this bill, the amendments proposed in Schedules 2 and 3 would commence immediately after the commencement of Schedule 1 to the *Dairy Industry Service Reform Act 2003*. That table also indicates that this Act commenced on 1 July 2003. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

The Explanatory Memorandum observes that the retrospectivity is “necessary to ensure [that] the industry services body is not exposed or in any way impeded in its prudent management of the Dairy Structural Adjustment Fund and that there is no concern as to the nature of current contracts and financial arrangements.” The Explanatory Memorandum, however, does not provide any express assurance that the retrospectivity will not affect any person adversely. The Committee **seeks the Minister’s advice** as to whether an assurance can be provided that no person will be affected by the retrospectivity.

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

In relation to the Bill, I can assure the Committee that there will be no person affected adversely by the retrospective aspects of the Bill. The amendments in Schedule 2 relate to Dairy Australia’s ability to enter into certain financial arrangements. The Bill will provide assurance to financial institutions dealing with Dairy Australia of its capacity to enter into such arrangements.

These financial arrangements were available to the Australian Dairy Corporation as a statutory corporation and it is appropriate that the arrangements are also available to Dairy Australia from 1 July 2003 as manager of the Dairy Structural Adjustment Fund. These amendments do not adversely affect any person because they ensure current financial arrangements can continue without creating ambiguity for the parties to the arrangements.

The Committee also expressed concern about the retrospective nature of broadening the definition of an Australian Deposit Taking Institution to include the Reserve Bank in Schedule 3 of the Bill. This amendment will also not affect any person because of its retrospectivity as the amendment provides assurance to the company that it is appropriate to maintain accounts held with the Reserve Bank of Australia. These arrangements were in place when the Australian Dairy Corporation managed the Dairy Structural Adjustment Fund.

I trust my comments on these amendments will assure you that the retrospective nature of matters in the Bill will not adversely affect any individual.

The Committee thanks the Minister for this response.

Military Rehabilitation and Compensation Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2004*, in which it made various comments. The Minister for Defence has responded to those comments in a letter dated 23 March 2004. 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 2004

[Introduced into the House of Representatives on 4 December 2003. Portfolio: Veterans' Affairs]

Introduced with the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003, the bill proposes a new military rehabilitation and compensation scheme for members of the Australian Defence Force (ADF) who suffer an injury or disease, or die, as a result of ADF service on or after commencement of the proposed Act.

The bill also contains a regulation-making power.

Ministerial discretion

Subclause 6(1)

Subclause 6(1) would permit the Minister for Defence to determine (in writing) whether any particular kind of service with the Defence Force is warlike or non-warlike. Such a determination is not reviewable in any way by the Parliament. The Explanatory Memorandum seeks to justify this lack of Parliamentary scrutiny on the basis the Minister's determinations "relate to decisions on national defence and security that are taken by the government of the day." The Committee therefore **seeks the Minister's advice** on whether a fuller explanation may be provided of the reason for such determinations not being made disallowable.

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 and 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

I received a request from your Committee dated 12 February 2004 seeking a fuller explanation of why determinations of particular kinds of service are not disallowable under the MRCB.

The Explanatory Memorandum for the Bill says that these determinations relate to decisions on national defence and security taken by the Government of the day. In fact, they are based on advice from the Chief of the Defence Force, who relies on material which is always sensitive and frequently classified.

The implications of these determinations relate directly to the allowances and benefits of members of the Australian Defence Force on deployments. In these circumstances it is not proposed to make these determinations disallowable and I do not propose any change to the Bill in this regard.

The Committee thanks the Minister for this response. The Committee continues to draw this matter to the attention of the Senate.

Trish Crossin
Chair



SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia

Ministerial No. 83628

- 8 MAR 2004

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

RECEIVED

8 MAR 2004

Senate Standing Cttee
for the Scrutiny of Bills

Dear Senator Crossin *Trish,*

I refer to the Scrutiny of Bills Alert Digest No. 1 of 2004 concerning the *Customs Legislation Amendment (Application of International Trade Modernisation and Other Measures) Bill 2003* (the Bill). The Committee is seeking my advice as to the reason for the provision dealing with detention of goods in the public interest – proposed new section 77EA of the *Customs Act 1901* (the Customs Act).

The Government protects the Australian community by restricting the import of certain goods, such as dangerous weapons and drugs. Primarily this is achieved through the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations). New or amending regulations are disallowable instruments.

The proposed new provisions will only apply to imports which are restricted by the Prohibited Imports Regulations.

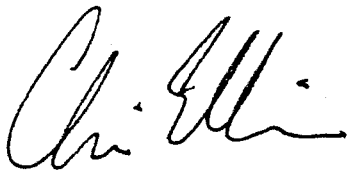
At times the circumstances relating to the import of goods, which otherwise meet the requirements of the Prohibited Imports Regulations, indicate that it would be in the public interest to more closely regulate the flow, or in some cases deny, release of the goods into the Australian community. For example, it may not be in the public interest for a large import shipment of firearms which meets all requirements applicable to the import of firearms to be released into the community at the one time. The Australian community in that case may be better served by a more gradual release of the goods over time.

The Government views the availability of restricted goods in the community very seriously and a decision to detain goods in the public interest should only be made personally at Ministerial level. Accordingly the Bill also prohibits the Minister from delegating his or her powers under the new provisions – item 2 of Schedule 2 to the Bill refers. On this basis the Government does not propose that the Minister's decision be subject to merits review.

The Government anticipates that the Minister would only need to consider exercising this power in extreme circumstances. Where this occurs the importer, under the terms of proposed new section 77EF, will be entitled to receive compensation on just terms unless the situation is amicably resolved earlier.

The Government has proposed the new provisions after long and careful consideration. The proposed new provisions strike an effective balance between guarding the community from potential harm and the commercial interests of legitimate importers.

Yours sincerely

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

CHRIS ELLISON
Senator for Western Australia



RECEIVED

18 MAR 2004

Senate Standing Committee
for the Scrutiny of Bills

HON WARREN TRUSS MP

Minister for Agriculture, Fisheries and Forestry

17 MAR 2004

Senator T Crossin
Chair
Standing Committee for the Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

I refer to the letter of Ms Janice Paull, the Acting Secretary of the Standing Committee for the Scrutiny of Bill of 12 February 2004 regarding the retrospective impact of the Dairy Produce Amendment Bill 2003 (the Bill).

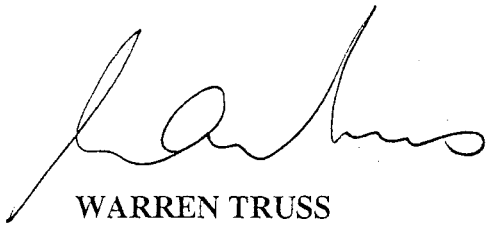
In relation to the Bill, I can assure the Committee that there will be no person affected adversely by the retrospective aspects of the Bill. The amendments in Schedule 2 relate to Dairy Australia's ability to enter into certain financial arrangements. The Bill will provide assurance to financial institutions dealing with Dairy Australia of its capacity to enter into such arrangements.

These financial arrangements were available to the Australian Dairy Corporation as a statutory corporation and it is appropriate that the arrangements are also available to Dairy Australia from 1 July 2003 as manager of the Dairy Structural Adjustment Fund. These amendments do not adversely affect any person because they ensure current financial arrangements can continue without creating ambiguity for the parties to the arrangements.

The Committee also expressed concern about the retrospective nature of broadening the definition of an Australian Deposit Taking Institution to include the Reserve Bank in Schedule 3 of the Bill. This amendment will also not affect any person because of its retrospectivity as the amendment provides assurance to the company that it is appropriate to maintain accounts held with the Reserve Bank of Australia. These arrangements were in place when the Australian Dairy Corporation managed the Dairy Structural Adjustment Fund.

I trust my comments on these amendments will assure you that the retrospective nature of matters in the Bill will not adversely affect any individual.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Warren Truss', with a stylized, cursive script. The signature is positioned above the printed name.

WARREN TRUSS



RECEIVED

23 MAR 2004

THE HON DANNA VALE MP

MINISTER FOR VETERANS' AFFAIRS

Senate Standing C'ttee
for the Scrutiny of Bills

23 March 2004

The Chairman
Scrutiny of Bills Committee
The Australian Senate
Parliament House
CANBERRA ACT..2600

Dear Senator Crossin

Military Rehabilitation and Compensation Bill 2003

I received a request from your Committee dated 12 February 2004 seeking a fuller explanation of why determinations of particular kinds of service are not disallowable under the MRCB.

The Explanatory Memorandum for the Bill says that these determinations relate to decisions on national defence and security taken by the Government of the day. In fact, they are based on advice from the Chief of the Defence Force, who relies on material which is always sensitive and frequently classified.

The implications of these determinations relate directly to the allowances and benefits of members of the Australian Defence Force on deployments. In these circumstances it is not proposed to make these determinations disallowable and I do not propose any change to the Bill in this regard.

Yours sincerely

DANNA VALE MP

