SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2004

4 August 2004

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MEMBERS OF THE COMMITTEE

Senator G Marshall (Chair)
Senator B Mason (Deputy Chair)
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

NINTH REPORT OF 2004

The Committee presents its Ninth Report of 2004 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Acts 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 (Export Control) Act 2004

Australian Energy Market Act 2004

Customs Legislation Amendment (Airport, Port and Cargo Security) Act 2004

Trade Practices Amendment (Australian Energy Market) Act 2004

Agriculture, Fisheries and Forestry Legislation Amendment (Export Control) Act 2004

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 7 of 2004*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 23 June 2004.

Although this bill has been passed by both Houses (and was assented to on 29 June 2004) 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. 7 of 2004

[Introduced into the House of Representatives on 2 June 2004. Portfolio: Agriculture, Fisheries and Forestry]

The bill amends the *Australian Meat and Live-stock Industry Act 1997* to increase government regulation of the live animal export trade by:

- providing for the Minister to determine a set of principles, known as the Australian Code for the Export of Live-stock, that must be taken into account by the Secretary and authorised officers in exercising powers or performing functions under the Act;
- improving the integration of the provisions of the Act and the *Export Control Act 1982* in relation to the export licence and permit systems; and
- enabling the Secretary to deal with the licences of associates or previous associates of applicants or holders of live-stock export licences under the Act.

The bill also amends the *Export Control Act 1982* to:

- provide a legislative basis for the scheme relating to accredited veterinarians under the Act; and

- create seven new offences in relation to the scheme for accredited veterinarians under the Act which apply to both accredited veterinarians and other persons, including exporters.

The bill also contains an application provision.

Retrospective application
Schedule 1, item 12

By virtue of item 12 of Schedule 1 to this bill, the amendment proposed by item 11 of that Schedule, which is to insert a new section 25A into the *Australian Meat and Live-stock Industry Act 1997*, would apply to circumstances which occurred before the commencement of that new section. 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.

Section 25A would permit the Secretary to the Department, among other things, to refuse to grant a live-stock export licence to a person on the ground that the applicant for the licence had been an "associate" (as that term is to be defined in section 3 of the Act) of some-one who had previously been refused the same sort of licence. Item 12 of the Schedule would apparently mean that a person could be refused a live-stock export licence on the ground that he or she had been an associate of some-one who had previously been refused such a licence, despite the fact that both the earlier refusal, and the association between the two applicants for a licence, had all occurred before this bill was assented to, and despite the fact that any such association had ceased before that Assent. Neither the Explanatory Memorandum nor the Minister's Second Reading speech seek to justify this retrospective application of the proposed amendment. The Committee therefore **seeks the Minister's advice** as to whether this case of retrospective application is justified.

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

My advice is sought about the application of the provisions in the Bill, which relate to associates, as the Committee considers the provisions may trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Participation in the live-stock export trade is restricted to those to whom the Secretary of the Australian Government Department of Agriculture, Fisheries and Forestry has granted a live-stock export licence under section 10 of the *Australian Meat and Livestock Industry Act 1997* ("the AMLI Act"), based on the criteria set out in section 12 of the AMLI Act. The criteria are that the applicant is a person of integrity, competent to hold a licence and of sound financial standing. Under section 24 of the AMLI Act, the Secretary may, amongst other things, cancel or suspend a licence if a licence holder ceases to satisfy these criteria. Section 54 of the AMLI Act makes it an offence for a person to export live-stock without a licence.

The Keniry Report into Live-stock Exports found that the current licensing arrangements are deficient in that they allow a person who has been refused a licence or who has had his or her licence suspended or cancelled to continue to trade with impunity through licences held by related third parties. This deficiency has already been exploited and, as long as such a loophole continues in the legislation, any attempt to reform the trade will have limited success.

I would like to assure the Committee that the Secretary's power under the proposed new subsection 25A(2) of the AMLI Act cannot be exercised with effect from a time before the commencement of the relevant Part of the Bill.

However, I confirm that after the commencement of the relevant part of the Bill, the Secretary will be able to take action against a person who was an associate before the commencement, even if the person is no longer an associate and the association ceased before the commencement.

Retrospective application is necessary to prevent persons from frustrating the intention of the legislation and undermining the effective regulation of this high-risk trade. The power to take action after the commencement of the relevant part of the Bill against a person who was an associate before the commencement, even though the person may no longer be an associate, is considered necessary to ensure that licensing is in fact controlling entry to and participation in the industry by those who do not meet the statutory criteria. In the live-stock export industry, which has a small number of often closely linked participants, business relationships could still continue notwithstanding the apparent severance of formal "associate" links. In such an environment, it would be relatively easy for a person who does not hold a licence to participate in the trade through these more nebulous links.

I would also like to bring to the Committee's attention that, in relation to the associate provisions, the Secretary is required to give a written show cause notice to a person under new subsection 23(2A) of the AMLI Act if that person is the holder

of a licence. The Secretary is also required to consider any written statement received in response before taking action in relation to the licence.

I trust that this information is of assistance to your committee.

The Committee thanks the Minister for this response.

Australian Energy Market Act 2004

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 8 of 2004*, in which it made various comments. The Minister for Industry, Tourism and Resources has responded to those comments in a letter dated 24 June 2004.

Although this bill has been passed by both Houses (and was assented to on 30 June 2004) 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. 8 of 2004

[Introduced into the House of Representatives on 17 June 2004. Portfolio: Industry, Tourism and Resources]

Introduced with the Trade Practices Amendment (Australian Energy Market) Bill 2004 to provide for a national legislative framework for the operation of an Australian energy market, the bill applies the National Electricity Law, the National Electricity Code (and other Rules) and regulations as Commonwealth law in offshore areas. The bill also contains a regulation-making power to allow regulations to prescribe further State and Territory energy laws to be applied in the offshore areas.

The total package is intended to improve the quality, timeliness and national character of the Australian energy market. The Commonwealth legislation complements legislation which is to be passed by State and Territory Governments in the coming months.

Commencement on proclamation
Clauses 3 to 14

By virtue of item 2 in the table in subclause 2(1), clauses 3 to 14 of this bill might commence on Proclamation, but in any event must commence 12 months after Assent.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will not usually comment where the period of delayed commencement is 6 months or less, but where the delay is longer would expect that the Explanatory Memorandum will comply with both paragraph 18 of Drafting Direction 2003, No. 3 and paragraph 6.17 of the *Legislation Handbook.*

Although the item does ensure commencement at a specified time, no reason for the delay has been provided in the Explanatory Memorandum. The Committee therefore **seeks the Minister's advice** as to the reason for the potential delay in commencement longer than six months after Assent.

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

Relevant extract from the response from the Minister

By virtue of clause 2, the substantive provisions of the Bill commence on a day or days to be fixed by Proclamation, and in any event no later than 12 months after Royal Assent.

The Bill allows 12 months for the Proclamation to be made because of the Bill's role in the Commonwealth, State and Territory co-operative legislative scheme.

This Bill should not commence until amendments of State and Territory legislation are made. This includes amendments of the National Electricity Law under the *National Electricity (South Australia) Act 1996* (SA) by the South Australian Parliament. It also includes amendments of application Acts by other States and Territories. Those amendments will, among other things, confer functions and powers on the new Australian Energy Regulator. The intention is that the Commonwealth bill and the emended State and Territory legislation will commence operation at the same time.

While it is hoped that the State and Territory amendments will be made later this year, it is not possible to guarantee that they will all be made within 6 months of this Bill receiving Royal Assent.

The Committee thanks the Minister for this response. The Committee notes, however, that it would have been useful if this explanation had been included in the Explanatory Memorandum to this bill.

Customs Legislation Amendment (Airport, Port and Cargo Security) Act 2004

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 7 of 2004*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 18 June 2004.

Although this bill has been passed by both Houses (and was assented to on 13 July 2004) 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. 7 of 2004

[Introduced into the House of Representatives on 27 May 2004. Portfolio: Justice and Customs]

The bill amends the *Customs Act 1901* to:

- enable Customs officers to detain passengers who have committed or are suspected to have committed offences and are seeking to enter or depart Australia;
- enable Customs officers to control goods and people in Customs areas;
- establish reporting requirements for certain vessels, aircraft passengers and crew; and
- allow the Chief Executive Officer of Customs to take security related matters into account when appointing or revoking an appointment of a port under the Act.

The bill also contains an application provision and amends a regulation-making power.

Search of persons
Schedule 1, item 1, proposed section 219ZJD

Proposed new section 219ZJD of the *Customs Act 1901*, to be inserted by item 1 of Schedule 1 to this bill, would permit a Customs officer to conduct either a frisk search or an ordinary search of a person whom the officer has detained on suspicion of having committed a serious offence against a law of the Commonwealth. In a *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued in February 2004 by authority of the Minister for Justice and Customs, it is said, in paragraph 11.3, that any "proposal for new powers to search persons, whether in the form of a frisk, ordinary or strip search, should have strong justification." The Committee notes that no reference was made in the Second Reading speech to this bill in relation to this proposed search power and the Explanatory Memorandum advises only that the "search and seizure powers set out in this [proposed] section are similar to the powers that are conferred on protective service officers." The Committee therefore **seeks the Minister's advice** as to the "strong justification" for this power in accordance with the *Guide* referred to above.

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

> Specifically, the Committee has asked for an explanation, in accordance with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, of the "strong justification" for the personal search powers contained in proposed section 219ZJD of the *Customs Act 1901* (the Customs Act) as contained in the Bill. I offer the following explanation for the inclusion of the personal search provisions.
>
> Proposed section 219ZJD relates to the frisk or ordinary search of a person who has been detained by a Customs officer due to the officer having reasonable suspicion that the person has committed or is committing a serious Commonwealth offence, or that the person is the subject of a Commonwealth arrest warrant, or is on bail where a condition of the bail is that they not depart Australia. This power can be exercised only in a Customs designated place, generally a port, wharf or airport where passengers and crew are processed by Customs and for the purpose of determining whether there is concealed on the person, or in the person's clothing or property, a weapon or other thing capable of being used to inflict bodily injury or to assist the person to escape from detention.

Due to the serious nature of the offences for which a Customs officer may detain a person and given the nature of the places in which an officer may detain a person, the personal search provisions provide protection for the Customs officer against the concealment and subsequent use of a weapon or other devices capable of inflicting bodily injury or assisting in the escape from lawful detention.

By the very nature of the serious offences that an officer will suspect that the person has committed in order to detain them, it is indeed possible that such a person who is seeking to depart Australia, in some cases illegally, may carry weapons or other dangerous items on their person. Without the ability to conduct a frisk or ordinary search in circumstances where the officer reasonably believes the person may have such items, the Customs officer is left unnecessarily exposed to possible injury.

If the person is detained because an officer suspects on reasonable grounds that the person has committed, or is committing, a serious Commonwealth offence the proposed section 219ZJD also allows for the Customs officer to search for the purpose of preventing the concealment, loss or destruction of evidence that may assist in the prosecution of the detainee. Without the power to conduct a frisk or ordinary search evidence relevant to the commission of the offence may be lost.

Customs officers involved in the clearance of passengers already have broad personal search powers under the Customs Act and receive extensive training in relation to this aspect of their operational activity. Whilst the proposed powers have a different purpose (officer safety and preventing the destruction of evidence as opposed to the identification of prohibited goods), the provisions do not represent a new type of power for Customs officers. This provision is also consistent with the search and seizure powers that Protective Services Officers can also exercise, where it is suspected that a protective services related offence has been committed.

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

The Committee thanks the Minister for this response. The Committee notes, however, that its consideration of the bill would have been assisted by the inclusion of this explanation in the Explanatory Memorandum.

The Committee notes that Customs officers have broad personal search powers under the *Customs Act 1901* for the purpose of identifying prohibited goods. The Minister advises that the purpose of the proposed powers is to protect Customs officers and to prevent the destruction of evidence when a person is suspected of committing or having committed a serious Commonwealth offence, is the subject of a Commonwealth arrest warrant, or is on bail where a condition of the bail is that the person not depart Australia. Nevertheless, the Committee continues to have concerns with personal search provisions as they may be considered to trespass on personal rights and liberties. Ultimately, this is an issue best left for resolution by the Senate.

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

Trade Practices Amendment (Australian Energy Market) Act 2004

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 8 of 2004*, in which it made various comments. The Minister for Industry, Tourism and Resources (on behalf of the Treasurer) has responded to those comments (in conjunction with a response to the *Australian Energy Market Act 2004*) in a letter dated 24 June 2004.

Although this bill has been passed by both Houses (and was assented to on 30 June 2004) 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. 8 of 2004

[Introduced into the House of Representatives on 17 June 2004. Portfolio: Treasury]

Introduced with the Australian Energy Market Bill 2004 to provide for a national legislative framework for the operation of an Australian energy market.

The bill amends the *Trade Practices Act 1974* to provide for the establishment of the Australian Energy Regulator (AER) as a body corporate responsible for the economic regulation of Australian energy markets, and to establish its functions and governing regime. The AER will perform functions and exercise powers as conferred by Commonwealth, State and Territory legislation.

The bill also amends the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to insert a reference to the *National Electricity (South Australia) Act 1996* of South Australia so that decisions of Commonwealth officers or authorities, such as the AER, under the National Electricity Law, Regulations and Rules, including the National Electricity Code, will be subject to judicial review by the Federal Court under the ADJR Act.

The bill also contains a regulation-making power.

Commencement on proclamation
Schedules 1 and 2

By virtue of item 2 in the table in subclause 2(1), Schedules 1 and 2 to this bill might commence on Proclamation, but in any event must commence 12 months after Assent.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will not usually comment where the period of delayed commencement is 6 months or less, but where the delay is longer would expect that the Explanatory Memorandum will comply with both paragraph 18 of Drafting Direction 2003, No. 3 and paragraph 6.17 of the *Legislation Handbook.*

Although the item does ensure commencement at a specified time, no reason for the delay has been provided in the Explanatory Memorandum. The Committee therefore **seeks the Treasurer's advice** as to the reason for the potential delay in commencement longer than six months after Assent.

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

Relevant extract from the response from the Minister

> By virtue of clause 2, the substantive provisions of the Bill commence on a day or days to be fixed by Proclamation, and in any event no later than 12 months after Royal Assent.
>
> The Bill allows 12 months for the Proclamation to be made because of the Bill's role in the Commonwealth, State and Territory co-operative legislative scheme.
>
> It is desirable for the provisions establishing the Australian Energy Regulator to be able to commence before provisions conferring substantive functions on the Regulator commence. This will allow the Regulator to prepare for operations.
>
> However, other provisions of the Bill should not commence until amendments of State and Territory legislation are made.
>
> This includes amendments of the National Electricity Law under the *National Electricity (South Australia) Act 1996* (SA) by the South Australian Parliament. It

also includes amendments of application Acts by other States and Territories. Those amendments will, among other things, confer functions and powers on the Australian Energy Regulator. The intention is that the Commonwealth bill and the emended State and Territory legislation will commence operation at the same time.

While it is hoped that the State and Territory amendments will be made later this year, it is not possible to guarantee that they will all be made within 6 months of this Bill receiving Royal Assent.

The Committee thanks the Minister for this response. The Committee notes, however, that it would have been useful if this explanation had been included in the Explanatory Memorandum to this bill.

Gavin Marshall
Chair

AUSTRALIA

HON WARREN TRUSS MP

Minister for Agriculture, Fisheries and Forestry

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

23 JUN 2004

Dear Senator Crossin

I refer to the letter of 17 June 2004 from Ms Janice Paull , Acting Secretary of the Standing Committee for the Scrutiny of Bills to my Senior Adviser, inviting me to respond to the Committee's comments contained in the Scrutiny of Bills Alert Digest No. 7 of 2004 (16 June 2004) regarding the Agriculture, Fisheries and Forestry Legislation Amendment (Export Control) Bill 2004 ("the Bill").

My advice is sought about the application of the provisions in the Bill, which relate to associates, as the Committee considers the provisions may trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Participation in the live-stock export trade is restricted to those to whom the Secretary of the Australian Government Department of Agriculture, Fisheries and Forestry has granted a live-stock export licence under section 10 of the *Australian Meat and Live-stock Industry Act 1997* ("the AMLI Act"), based on the criteria set out in section 12 of the AMLI Act. The criteria are that the applicant is a person of integrity, competent to hold a licence and of sound financial standing. Under section 24 of the AMLI Act, the Secretary may, amongst other things, cancel or suspend a licence if a licence holder ceases to satisfy these criteria. Section 54 of the AMLI Act makes it an offence for a person to export live-stock without a licence.

The Keniry Report into Live-stock Exports found that the current licensing arrangements are deficient in that they allow a person who has been refused a licence or who has had his or her licence suspended or cancelled to continue to trade with impunity through licences held by related third parties. This deficiency has already been exploited and, as long as such a loophole continues in the legislation, any attempt to reform the trade will have limited success.

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I would like to assure the Committee that the Secretary's power under the proposed new subsection 25A(2) of the AMLI Act cannot be exercised with effect from a time before the commencement of the relevant Part of the Bill.

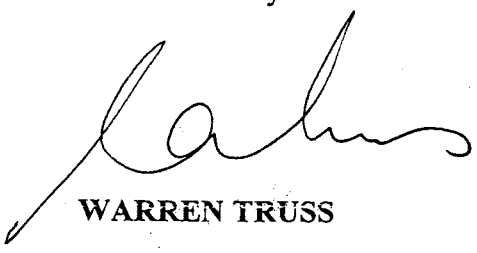
However, I confirm that after the commencement of the relevant part of the Bill, the Secretary will be able to take action against a person who was an associate before the commencement, even if the person is no longer an associate and the association ceased before the commencement.

Retrospective application is necessary to prevent persons from frustrating the intention of the legislation and undermining the effective regulation of this high-risk trade. The power to take action after the commencement of the relevant part of the Bill against a person who was an associate before the commencement, even though the person may no longer be an associate, is considered necessary to ensure that licensing is in fact controlling entry to and participation in the industry by those who do not meet the statutory criteria. In the live-stock export industry, which has a small number of often closely linked participants, business relationships could still continue notwithstanding the apparent severance of formal "associate" links. In such an environment, it would be relatively easy for a person who does not hold a licence to participate in the trade through these more nebulous links.

I would also like to bring to the Committee's attention that, in relation to the associate provisions, the Secretary is required to give a written show cause notice to a person under new subsection 23(2A) of the AMLI Act if that person is the holder of a licence. The Secretary is also required to consider any written statement received in response before taking action in relation to the licence.

I trust that this information is of assistance to your committee.

Yours sincerely



WARREN TRUSS

The Hon Ian Macfarlane MP
Minister for Industry, Tourism and Resources

PARLIAMENT HOUSE
CANBERRA ACT 2600

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

24 JUN 2004

Trish

Dear Senator Crossin

I refer to the letter of 24 June 2004 from the Acting Secretary of your Committee, drawing to my attention comments in the Scrutiny of Bills Alert Digest No 8 of 2004 concerning the delayed commencement provision contained in the Australian Energy Market Bill 2004.

I note that page 13 and 14 of the Alert Digest raises the same issue with respect to the Trade Practices Amendment (Australian Energy Market) Bill 2004. This bill is the responsibility of the Treasurer, the Hon Peter Costello MP. Each of these bills has been developed in close cooperation between our two offices. As the digest notes, the bills have been introduced together to provide for a national legislative framework for the operation of an Australian energy market. The overall policy package has been agreed to by the Treasurer and the Treasurer's office has agreed that I should provide a response in relation to both bills. My response in relation to the matters raised in the Alert Digest is set out below. I have provided a copy of this correspondence to the Treasurer.

Australian Energy Market Bill 2004

By virtue of clause 2, the substantive provisions of the Bill commence on a day or days to be fixed by Proclamation, and in any event no later than 12 months after Royal Assent.

The Bill allows 12 months for the Proclamation to be made because of the Bill's role in the Commonwealth, State and Territory co-operative legislative scheme.

This Bill should not commence until amendments of State and Territory legislation are made. This includes amendments of the National Electricity Law under the *National Electricity (South Australia) Act 1996* (SA) by the South Australian Parliament. It also includes amendments of

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application Acts by other States and Territories. Those amendments will, among other things, confer functions and powers on the new Australian Energy Regulator. The intention is that the Commonwealth bill and the emended State and Territory legislation will commence operation at the same time.

While it is hoped that the State and Territory amendments will be made later this year, it is not possible to guarantee that they will all be made within 6 months of this Bill receiving Royal Assent.

Trade Practices Amendment (Australian Energy Market) Bill 2004

By virtue of clause 2, the substantive provisions of the Bill commence on a day or days to be fixed by Proclamation, and in any event no later than 12 months after Royal Assent.

The Bill allows 12 months for the Proclamation to be made because of the Bill's role in the Commonwealth, State and Territory co-operative legislative scheme.

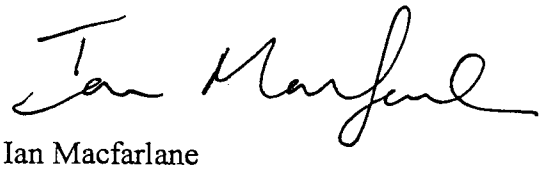
It is desirable for the provisions establishing the Australian Energy Regulator to be able to commence before provisions conferring substantive functions on the Regulator commence. This will allow the Regulator to prepare for operations.

However, other provisions of the Bill should not commence until amendments of State and Territory legislation are made.

This includes amendments of the National Electricity Law under the *National Electricity (South Australia) Act 1996* (SA) by the South Australian Parliament. It also includes amendments of application Acts by other States and Territories. Those amendments will, among other things, confer functions and powers on the Australian Energy Regulator. The intention is that the Commonwealth bill and the emended State and Territory legislation will commence operation at the same time.

While it is hoped that the State and Territory amendments will be made later this year, it is not possible to guarantee that they will all be made within 6 months of this Bill receiving Royal Assent.

Yours sincerely



Ian Macfarlane

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

18 JUN 2004

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

Dear Senator Crossin Trish,

I refer to the Scrutiny of Bills Alert Digest No. 7 of 2004, particularly the matter relating to the Customs Legislation Amendment (Airport, Port and Cargo Security) Bill 2004 (the Bill). Specifically, the Committee has asked for an explanation, in accordance with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, of the "strong justification" for the personal search powers contained in proposed section 219ZJD of the *Customs Act 1901* (the Customs Act) as contained in the Bill. I offer the following explanation for the inclusion of the personal search provisions.

Proposed section 219ZJD relates to the frisk or ordinary search of a person who has been detained by a Customs officer due to the officer having reasonable suspicion that the person has committed or is committing a serious Commonwealth offence, or that the person is the subject of a Commonwealth arrest warrant, or is on bail where a condition of the bail is that they not depart Australia. This power can be exercised only in a Customs designated place, generally a port, wharf or airport where passengers and crew are processed by Customs and for the purpose of determining whether there is concealed on the person, or in the person's clothing or property, a weapon or other thing capable of being used to inflict bodily injury or to assist the person to escape from detention.

Due to the serious nature of the offences for which a Customs officer may detain a person and given the nature of the places in which an officer may detain a person, the personal search provisions provide protection for the Customs officer against the concealment and subsequent use of a weapon or other devices capable of inflicting bodily injury or assisting in the escape from lawful detention.

By the very nature of the serious offences that an officer will suspect that the person has committed in order to detain them, it is indeed possible that such a person who is seeking to depart Australia, in some cases illegally, may carry weapons or other dangerous items on their person. Without the ability to conduct a frisk or ordinary search in circumstances where the officer reasonably believes the person may have such items, the Customs officer is left unnecessarily exposed to possible injury.

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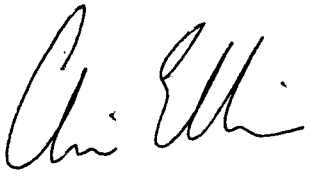
If the person is detained because an officer suspects on reasonable grounds that the person has committed, or is committing, a serious Commonwealth offence the proposed section 219ZJD also allows for the Customs officer to search for the purpose of preventing the concealment, loss or destruction of evidence that may assist in the prosecution of the detainee. Without the power to conduct a frisk or ordinary search evidence relevant to the commission of the offence may be lost.

Customs officers involved in the clearance of passengers already have broad personal search powers under the Customs Act and receive extensive training in relation to this aspect of their operational activity. Whilst the proposed powers have a different purpose (officer safety and preventing the destruction of evidence as opposed to the identification of prohibited goods), the provisions do not represent a new type of power for Customs officers. This provision is also consistent with the search and seizure powers that Protective Services Officers can also exercise, where it is suspected that a protective services related offence has been committed.

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

Yours sincerely



CHRIS ELLISON
Senator for Western Australia