



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

ELEVENTH REPORT

OF

2004

1 December 2004

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator G Marshall
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

ELEVENTH REPORT OF 2004

The Committee presents its Eleventh 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:

US Free Trade Agreement Implementation Act 2004

US Free Trade Agreement Implementation (Customs Tariff) Act 2004

US Free Trade Agreement Implementation Act 2004

US Free Trade Agreement Implementation (Customs Tariff) Act 2004

Introduction

The Committee dealt with the bills for these Acts in *Alert Digest No. 9 of 2004*. The Minister for Justice and Customs responded to those comments in a letter dated 30 August 2004.

Although the bills have passed 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. 9 of 2004

Uncertainty of commencement

Subclause 2(1), item 2

By virtue of item 2 in the table in subclause 2(1), and other items in that table which refer to item 2, a large number of the amendments proposed in this bill commence on the later of 1 January 2005 or the day on which the Australia-United States Free Trade Agreement comes into force for Australia. If the Agreement does not come into force, those items do not commence at all. The timing of the commencement is therefore uncertain, although item 2 requires the Minister for Trade to announce by notice in the *Gazette* the day on which that Agreement comes into force for Australia.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee is wary, for instance, of provisions which enable legislation to commence on a date 'to be proclaimed' rather than on a determinable date and seeks an explanation, where one is not provided, for any significant delay in commencement.

The Committee is equally wary of provisions which link commencement to an 'uncertain event' and would generally expect to see a fixed date (or period of time) by which that event must occur to trigger either commencement or repeal.

The Committee would also expect the explanatory memorandum accompanying a bill to explain the reasons for including uncertain commencement provisions, as outlined in Drafting Direction No. 3 of 2003. In this case, the memorandum makes no reference to the reasons for uncertainty.

The Committee therefore **seeks the Minister's advice** as to whether item 2 of the table might not also be subject to the provision that if the Agreement has not entered into force for Australia by some further fixed date then the Act will be automatically treated as having been repealed on that date.

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

In proposing the formulation for commencement set out in section 2 of the *US Free Trade Agreement Implementation (Customs Tariff) Act 2004*, the Government was acting on advice from the Office of Parliamentary Counsel. I understand that this formulation was also used in the *Customs Amendment Act (No. 1) 2004*, which implements the Australia-Singapore Free Trade Agreement, and has been used more broadly when translating international treaty obligations into domestic legislation.

The Government has endeavoured to provide additional clarity by including our target date for entry into force of the Agreement (1 January 2005) and by including a requirement for the Minister for Trade, the Hon Mark Vaile MP, to announce by notice in the Gazette the day on which the Agreement comes into force for Australia.

I trust the above information will assist the Committee in its consideration of the proposed amendments.

The Committee thanks the Minister for this response. While it appears that this legislation will now commence, as intended, on 1 January 2005, the fact that doubts remained more than 3 months after the passage of the legislation as to when and, indeed, if it would commence underscores the Committee's concerns.

The Committee takes the view that the Parliament is responsible for determining when laws are to come into force and has consistently opposed the inclusion in legislation of open-ended proclamation provisions. The commencement provisions in these bills have all the hallmarks of open-ended proclamation provisions. They provide for commencement on the date of an ‘uncertain event’ without providing the means for determining conclusively that the event has not occurred or will not occur. The choice of the date of commencement is delegated by the Parliament to the Executive, without limitation.

The Committee notes the admonition in paragraph 13 of Drafting Direction No. 3 of 2003 from the Office of Parliamentary Counsel that ‘Providing for commencement to be fixed by another official (eg the Minister by notice in the *Gazette*) is generally unacceptable as a matter of policy,’ yet that is effectively the mechanism that is created in these provisions should the target date not be met.

The Committee does not see why legislation implementing international treaty obligations should be treated differently from any other legislation susceptible to delay, namely, by including a date (or period) after which the legislation must commence or be taken to be repealed and providing an explanation where a particular date (or period) represents a significant delay in commencement.

The Committee considers that paragraphs 81 to 83 of the above Drafting Direction give appropriate guidance and endorses the formulation in paragraph 83:

83 In some situations, there may be a need to build a time limit into the wording that states that the relevant items do not commence if an uncertain event does not occur. For example, “However, the items do not commence at all if the event mentioned in paragraph (b) does not occur before 1 July 2004” (where the event might, eg, be Australia entering into an international agreement).

The Committee recommends the use of this formulation in commencement provisions for legislation implementing treaty obligations where the date the agreement enters into force for Australia is uncertain at the time the legislation is drafted.

Robert Ray
Chair



SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia

Ministerial No. 84808/9242

30 AUG 2004

RECEIVED

8 SEP 2004

Senate Standing C'ttee
for the Scrutiny of Bills

Senator G Marshall
Chair
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Marshall

I am writing in response to the Scrutiny of Bills Alert Digest No. 9 of 2004, dated 4 August 2004, which contained comments on the US Free Trade Agreement Implementation (Customs Tariff) Bill 2004. I offer the following information in relation to the Committee's concerns for its consideration.

In proposing the formulation for commencement set out in section 2 of the *US Free Trade Agreement Implementation (Customs Tariff) Act 2004*, the Government was acting on advice from the Office of Parliamentary Counsel. I understand that this formulation was also used in the *Customs Amendment Act (No. 1) 2003*, which implements the Australia-Singapore Free Trade Agreement, and has been used more broadly when translating international treaty obligations into domestic legislation.

The Government has endeavoured to provide additional clarity by including our target date for entry into force of the Agreement (1 January 2005) and by including a requirement for the Minister for Trade, the Hon Mark Vaile MP, to announce by notice in the Gazette the day on which the Agreement comes into force for Australia.

I trust the above information will assist the Committee in its consideration of the proposed amendments.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

