NOTES ON STATUTES

NARCOTIC DRUGS AND WIRELESS TELEGRAPHY ACTS, 1967

The feature common to the Narcotic Drugs Act 1967[1] and the Wireless Telegraphy Act 1967[2] (and shared by the Customs Act 1967[3]) is not, as might cynically be supposed, that wireless telegraphy is used to disseminate a kind of audible narcotic drug in the form of "pop" music, but that an adverse vote in the Senate forced the Government to accept that a person accused of an offence under any of the three Acts may not be tried summarily without his consent; in effect, that he must have the option of trial by jury. In his speech on the Narcotic Drugs Bill while it was in the Committee stage in the Senate, Senator Murphy drew attention[4] to the provision in section 80 of the Australian Constitution that:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury

and observed that:

> Irrespective of the interpretation of that provision,[5] the philosophy of our law is that any serious offence against the criminal code shall be dealt with by a jury.

Clause 20 of the Bill, which first imposed by way of penalty for any offence a fine not exceeding $4000, or imprisonment not exceeding a period of ten years, or both, then provided that an offence might be prosecuted summarily or upon indictment, and that where proceedings were brought in a court of summary jurisdiction that court

---

1 No. 53 of 1967.

2 No. 59 of 1967.

3 No. 54 of 1967. The principal purpose of this legislation was to increase the penalties under the principal Act (the Customs Act 1901-1966) in relation to offences involving narcotic drugs.

4 36 COMMONWEALTH PARL. DEB. (Sen.) 1351.

5 The decision of the High Court in R. v. Archdall and Roskruge, (1928) 41 C.L.R. 128, was described by Senator Murphy (ibid.) as furnishing 'an interpretation which has been much criticized as one of the most ridiculous interpretations ever given by a court'.

might either determine the proceedings or commit the defendant for trial, but that if the proceedings were determined by a court of summary jurisdiction the court might not impose a larger fine than $1000 or a longer sentence of imprisonment than two years, but might impose both. This Senator Murphy characterised as a serious departure from the principle which he saw enshrined in section 80 of the Constitution. He went on:

> It is no use saying, as the Minister may say, that such provisions have occurred in the Customs Act previously and that there may be a few similar provisions in State legislation. That is true, but I am raising this matter because at some point of time it has to stop.

He pointed out that to begin with summary trial was introduced in respect of certain offences for which a person was liable to serious punishment or indictment on trial before a jury, but that the maximum sentence on summary conviction was only six months imprisonment. Then the Commonwealth Crimes Act[6] provided for a maximum sentence of twelve months imprisonment on summary conviction, but also contained a provision[7] that in most instances a person might be dealt with summarily only with his consent. The present Bill contained twin evils: the defendant had no option of trial by jury, and the penalty was two years imprisonment. He therefore moved the insertion into clause 20 (3) of words which would give the defendant the option to choose trial by jury.[8] As Senator Murphy had predicted, the Minister for Customs (Senator Anderson) justified the provision on the grounds that it was of long standing. He said that the Government was not taking the right of trial by jury away:

> We are leaving the position as it is and as it has existed since 1910, to my knowledge, in the Customs Act, relating to narcotics.[9]

and, he went on to say, an identical provision was contained in the Customs Bill. If when that Bill came to be dealt with the principle for which the Opposition was contending were to be adopted

> we would get ourselves into a situation in which we would allow the Customs Bill to move away from the customs law as it has existed for many years. . . . It is not a case of taking away a liberty for the first time. It is a case of adopting a principle that has been recognised in the customs law for a very long time.

---

6 Crimes Act 1914-1960, s. 12.
7 ss. 12A and 24E.
8 36 COMMONWEALTH PARL. DEB. (Sen.) 1381.
9 Id. at 1384.

> I would think that the legislators, when they passed the Customs Act 1901 and subsequent amending measures, were always conscious of the fact that customs law is severe compared to other sections of our law. Of necessity customs law is severe because it deals with the kind of things that we are discussing today. It has always had to be severe because it deals with matters that fundamentally affect our economic security.[10]

Fortunately, a majority of the Senate was not prepared to accept either Senator Anderson's 'as it was in the beginning . . . ever shall be' philosophy, nor the even more extraordinary argument developed in the passage last quoted, on which Senator Wheeldon commented:

> Are we to say that because murder is a very serious offence murder cases should be dealt with summarily by a magistrate? Is that what the Minister means?[11]

and the amendment was passed. A similar amendment to the relevant clause of the Customs Bill, moved by Senator Mulvihill, was accepted by the Government.[12]

The debate on a similar amendment to the Wireless Telegraphy Bill proceeded on slightly different grounds. The Bill itself contained no provisions concerning the alternatives of trial by jury or trial on summary conviction, these being already set out in section 9 of the principal Act;[13] that Act also provides that the penalty on summary conviction is six months imprisonment or a fine not exceeding fifty pounds. Senator Cohen took the opportunity provided by the introduction of the Bill, which was intended to deal with pirate radio stations and make amendments consequential on the provision relating to these, to move a further amendment to section 9 giving all persons accused of offences against the Act the right of trial by jury.[14] In the course of his speech Senator Cohen said:

> We believe that when a man is charged with a serious offence and it is looked at in a preliminary way in a court capable of exercising summary jurisdiction, if the magistrate decides that there is a prima facie case against him and if the penalty for that offence is up to six months' imprisonment (*scil.* on summary conviction) he should be able to say to the magistrate: 'It is not your prerogative to decide to deal with me here summarily against my will. I want a trial by jury.'

---

10 Id. at 1385.
11 Id. at 1385-6.
12 Id. at 1406.
13 The Wireless Telegraphy Act 1905-1966.
14 33 COMMONWEALTH PARL. DEB. (Sen.) 220 *et seq.*

> That seems to us to be an absolutely unassailable proposition and all that we seek to do here is to take away from the magistrate the right to say: 'Very well. I have heard the evidence. I propose to deal with you summarily and the sentence is six months.' The man may prefer to say: 'Your Worship, I will not take that. I am prepared to run the risk of getting five years gaol, but I want my guilt or innocence to be established by a jury.'

Once again Senator Anderson deployed the argument described above. If the amendment were accepted it would cut across the whole of the Wireless Telegraphy Act, and across a series of principles which had been embodied in the Act since 1905;[15] and then went on to say:

> If the honourable senator has a philosophy in relation to the question of summary conviction and being taken to a higher court, I think he ought to use the forms of the Senate to deal with the matter in its aspects. . . . This is not the occasion to argue a proposal for such a tremendous and dramatic change in the law of Australia, as it has existed in the law of the States before that. Bringing it into this climate is out of all proportion.[16]

This rather hollow rhetoric, however, had no influence except with Senator Anderson's own party, and the amendment was carried.

Dealing with the substantive provisions of the two Acts in question, the Narcotic Drugs Act 1967 is intended to enable Australia to fulfil her obligations under the Single Convention on Narcotic Drugs 1961, and so to pave the way for her ratification of that Convention. The purpose of the Convention, and hence of the Act, is to control the manufacture within signatory countries, and hence within Australia, of narcotic drugs as defined in the Convention.[17] Broadly the system of control is to be effected by licensing manufacturers of narcotic drugs,[18] and then forbidding them to manufacture the drugs except by and in accordance with the conditions of a permit.[19] It is an offence to manufacture a drug without a licence,[20] or at premises

15 What this series of principles might be was not disclosed.

16 33 COMMONWEALTH PARL. DEB. (Sen.) 222.

17 As the definition in the Convention did not include the substance known as LSD, the Narcotics Drugs Act, which relies for its validity on the External Affairs power in sec. 51 (xxix) of the Constitution, does not define its subject matter as including LSD; but the ancillary Customs Act 1967, s. 3, does define "narcotic drug" to include a drug consisting of or a mixture containing, inter alia, lysergide.

18 Under Part II, ss. 9-14.

19 Under ss. 15-16.

20 s. 15 (1) and s. 20.

other than those specified in the licence,[21] or otherwise than in accordance with the conditions[22] specified in the licence; it is also an offence to manufacture without a current permit,[23] or to manufacture during any permit period more than the maximum quantity of the drug specified in the permit;[24] and it is an offence for a manufacturer to have in his possession at any time more of the drug than the maximum quantity specified in the permit.[25] Licences to manufacture must be granted to a manufacturer or a person proposing to manufacture a drug, unless the applicant has failed to furnish information required of him, or the Minister is not satisfied that the applicant manufactures or proposes to manufacture the drug specified at the premises specified, or the Minister is of the opinion that it would be inconsistent with the obligations of the Commonwealth under the Convention to grant the licence.[26] This last power is obviously conditioned on very vague and general terms, and there is no appeal from the decision of the Minister under this or under section 10 which gives the Minister power to revoke a manufacturer's licence in certain circumstances. Dealing with criticisms expressed in the Senate debate concerning the absence of any right of appeal against the Ministerial decision to revoke a licence, Senator Anderson said that there was a fairly circumscribed area in which the Minister might do so; and he also said that even if the power were in the hands of the Minister he was answerable to Parliament.[27] On the latter point one can only comment that answerability to Parliament is not always a guarantee against arbitrary ministerial action; but on the former point it is necessary to say that, perhaps by an accident of drafting, the power to revoke appears to be much less circumscribed than the Minister thinks. It may be exercised (a) if the licence-holder does not begin to manufacture, or ceases to manufacture, the specified drug at the specified premises; (b) if the licence holder has failed to comply with one of the conditions specified in the licence; (c) if the licence-holder is convicted of an offence against the Act; and (d) if the Minister is of the opinion that it would be inconsistent with the obligations of the Commonwealth under the Convention that the licence continue in

---

21 s. 15 (2) (a) and s. 20.
22 s. 15 (2) (b) and s. 20.
23 s. 15 (2) (c); the issue of permits is the subject of s. 11.
24 s. 16 (a).
25 s. 16 (b).
26 s. 9 (3).
27 36 COMMONWEALTH PARL. DEB. (Sen.) 1396-1397.

force.[28] The last provision, like the corresponding provision concerning the refusal, to issue licences, is sufficiently vague; but it is the first provision which appears to give the Minister considerable power. As has already been indicated, a licence-holder requires periodically to obtain a permit to manufacture the drug in question (this double system of licensing and permit-issuing is required by the terms of the Convention itself).[29] The terms of any permit will be dictated by the estimated quantity of any drug which is required to be manufactured at any time;[30] and it is easy, looking at the Act from outside, to imagine that permits will not necessarily be continuous, nor will a permit necessarily be issued immediately a licence is granted. A manufacturer who receives a licence, therefore, and does not immediately receive a permit, will not have begun to manufacture the drug, and a manufacturer who has manufactured the quantity specified in the permit, or whose permit has expired, will have ceased to manufacture the drug; in either case the licence will be subject to revocation. One wonders whether this result was intended or not.

Other areas in which control of narcotic drugs within Australia may be exercised are the handling of drugs,[31] the labelling of drugs,[32] and the destruction of drugs;[33] drugs may not be destroyed by a licensed manufacturer except with the consent in writing of a Collector of Customs and in accordance with any directions given in the consent, and similarly no by-product of manufacture may be destroyed except under the same conditions. The intention is presumably to secure that the destruction is under supervision and that drugs do not find their way onto the free market after having been allegedly "destroyed" by a not-too-scrupulous manfacturer. Manufacturers are required to keep records and make returns, as specified by the Comptroller of Customs;[34] the power to inspect the premises, records, stocks, etc. of manufacturers, conferred upon an authorized inspector by section 24, is to be exercised only at a reasonable time; moreover, sub-section (2) apparently contemplates that a person may have a reasonable cause for obstructing or hindering an authorized inspector acting in pursuance of the section, though it is difficult to see what this might be,

---

28 s. 10.
29 Article 29 of the Convention, which appears as the 1st Schedule to the Act.
30 See Article 21 of the Convention.
31 s. 12.
32 ss. 13 and 18; the latter makes it an offence to supply to any person any drug not properly labelled.
33 s. 19.
34 s. 23.

unless perhaps the presence of the inspector was in some way endangering a critical stage in the process of manufacture and the inspector lacked the wit to understand that he ought not to proceed with his requests or his inspection for the time being. Still, it is refreshing to find some recognition of the rights of the subject as against some at least of the army of inspectors. Senator Wright pointed out, indeed, that the power of the authorized inspector appeared to be limited to entry upon premises on which drugs were manufactured or the business of a wholesale dealer in drugs was carried on, so that entry for the purpose of discovering whether the premises were such premises would be unlawful if they happened not to be such premises; and he compared it favourably with the powers of inspectors under the Poultry Industry Levy Collection Act 1966,[35] but commented rather acidly that it seemed to him that the law should be far more stringent in respect of narcotic drugs than in respect of a levy on hens!

The second of the Acts discussed under this heading, the Wireless Telegraphy Act 1967,[36] is intended to prevent the growth of "pirate" radio stations off the coast of Australia; the mischief aimed at is not that such stations pollute the air waves with commercial advertising,[37] but that they occupy sections of the broadcast band without being licensed to transmit on the wavelength in question, and so interfere with other broadcasting and receiving. The activities of these "pirates" is of course carried out beyond the jurisdiction, usually from ships anchored outside the three-mile limit;[38] and therefore the legislation needs to be extra-territorial in operation. The Act inserts in the principal Act a new section, 6A, which is a nice-blend of extra- and intra-territorial operation. Subsection (1) creates the offence of establishing, maintaining or using on a ship outside Australia but in waters

---

35 Act No. 67 of 1966, s. 5 of which (inserting a new s. 11 into the principal Act, the Poultry Industry Levy Collection Act 1965), empowers an authorized person at all reasonable times to enter any building or place in which he has reason to believe there are hens kept for commercial purposes, or books documents or other papers relating to this activity, and to search for these things, count them and examine them.

36 No. 59 of 1967.

37 There would appear to be ample provision for commercial radio broadcasting in Australia; not so, of course, in Great Britain and New Zealand, where "pirate" radios have already been in operation.

38 On the other side of the world some "pirate" broadcasting has been carried out from artificial structures attached to the sea-bed, beyond territorial waters; it is evidently not contemplated that anything like this will be tried in Australia.

adjacent to Australia[39] any station or appliance[40] for broadcasting, and transmitting on a ship a broadcast programme;[41] subsection (2) creates the ancillary offences of supplying goods for use in connexion with the making of unauthorized broadcasts or with the navigation working operation and maintenance of a ship used for or in connexion with this, maintaining or installing the offending apparatus knowing or having reasonable cause to believe that it is to be used for unauthorized broadcasts, doing any act[42] in connexion with the navigation working operation or maintenance of the ship, or transporting any goods to the ship, if the persons concerned knows or has reasonable cause to believe that it is used or to be used in connexion with the making of unauthorized broadcasts. Members of the Labour Party made strenuous efforts to have included in the section a clause making it an offence to encourage transmission from such a station by entering into an advertising contract, but unsuccessfully.[43] The maximum penalty provided for any of these offences is a fine of $1,000 or imprisonment for a term not exceeding five years.

By comparison with the corresponding United Kingdom legislation,[44] the Australian Act will appear somewhat rough and ready. There is no attempt to distinguish between persons ordinarily subject to Australian jurisdiction and others, such as appears in sections 3 (3) and 4 (1)(b) of the United Kingdom Act; but it appears extremely unlikely that any attempt at "pirate" broadcasting will be made by any other than Australian citizens or residents. To bring a "pirate" radio ship across the Tasman, and then supply and service it from New Zealand, is simply not practicable as a commercial proposition,

---

39 These words "adjacent to Australia" will no doubt call for judicial definition sooner or later. But it is difficult to see how they could have been replaced by anything more precise; see the remarks of Senator Marriott and Senator Anderson, 33 COMMONWEALTH PARL. DEB. (Sen.) 213 and 214 respectively.

40 Why "station"? The words "station or appliance" are common form in the principal Act; but one would have thought that in this special instance "appliance" would have been enough.

41 No doubt in any prosecution for an offence under the legislation the court will overlook the fact that strictly speaking it is a different matter to transmit a broadcast programme *on* a ship than *from* a ship, which is what the legislation is aimed at.

42 The sub-section in question says "act or thing". How do you do a thing? Is this not an unfortunate and unnecessary colloquialism?

43 33 COMMONWEALTH PARL. DEB. (Sen.) 217-220. Senator Anderson disclosed (at 218) that the Government had the proposition put to it in the House of Representatives and rejected it.

44 The Marine, etc., Broadcasting Offences Act 1967.

and it is most improbable that anyone would attempt it for any other motives. Again, no attempt has been made in the Australian legislation to deal with the possibility that some person or persons may seek to establish a radio broacasting station on some artificial structure; if such a structure were within territorial waters it may be presumed that the general provisions of the principal Act would apply in any case, and to attempt to provide for the unlikely eventuality of a structure outside territorial waters would require an excursion into the cloudy waters of extra-territorial jurisdiction in International Law[45] which the Government may well be pardoned for side-stepping until the need arises.

E. K. BRAYBROOKE

---

45 For some account of the problems involved see Hunnings, *Pirate Broadcasting in European Waters,* (1965) 14 I.C.L.Q. 410; van Panhuys and Boas, *Legal Aspects of Pirate Broadcasting,* (1966) 60 A.J.I.L. 303.