



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2005

9 February 2005

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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

FIRST REPORT OF 2005

The Committee presents its First Report of 2005 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:

Copyright Legislation Amendment Act 2004

Water Efficiency Labelling and Standards Bill 2004

Copyright Legislation Amendment Act 2004

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 12 of 2004*. The Attorney-General responded to the Committee's comments in a letter dated 1 February 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 12 of 2004

[Introduced in the Senate on 30 November 2004. Portfolio: Attorney-General]

The bill makes minor, technical and 'clarifying' amendments to the *Copyright Act 1968* and the *US Free Trade Agreement Implementation Act 2004* relating to copyright protection. According to the explanatory memorandum, the bill 'will also ensure that Australia fully complies with its obligations under the Australia-United States Free Trade Agreement'.

The bill:

- broadens the scope of some criminal offences to apply to commercial infringements that do not occur in a trade context;
- clarifies the effect of provisions relating to prima facie recognition of the maker of a recording or owner of copyright in a recording; and
- narrows the scope of the 'incidental copies' exception.

The bill also clarifies the remedies available against carriage service providers and amends the *US Free Trade Agreement Implementation Act 2004* to limit the application of transitional provisions relating to the term of copyright protection.

Uncertainty of commencement

Schedule 1

By virtue of item 2 in the table to subclause 2(1) in this bill, Schedule 1 is to commence on the later of the day on which this bill is assented to or the day on which the Australia-United States Free Trade Agreement comes into force for Australia. The item goes on to provide that the provisions do not commence at all if the Free Trade Agreement does not come into force, but the item does not provide any fixed date by which it can be determined that the Free Trade Agreement will not come into force.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force and commented on this issue in relation to the *US Free Trade Agreement Implementation Act 2004* and an associated Act.

In its *Eleventh Report of 2004*, the Committee also noted with approval paragraphs 81 to 83 of the Drafting Direction No. 3 of 2003 from the Office of Parliamentary Counsel and endorsed 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 **seeks the Minister’s advice** as to whether the item might not also provide a means of determining when (if ever) the Agreement is to be regarded as not coming into force.

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 Attorney-General

The Committee noted that clause 2(1) of the Bill provided for Schedule 1 to the Bill to commence on the later of the day on which it was assented to or the day on which the Australia-United States Free Trade Agreement (AUSFTA) came into force for Australia. It also provided that Schedule 1 was not to commence at all if the AUSFTA did not come into force. The Committee was concerned that because no

time limit was set for the entry into force of the AUSFTA, there could be indefinite uncertainty whether Schedule 1 would ever commence.

As notified in *Gazette* No. GN51 of 22 December 2004, the AUSFTA entered into force on 1 January 2005. Accordingly the date of commencement of Schedule 1 to the *Copyright Legislation Amendment Act 2004* is ascertainable and has occurred. However, the Committee's point will be kept in mind in the preparation of any future bills the commencement of which is to be made contingent on the happening of some independent event.

The Committee thanks the Attorney-General for this response. The Committee particularly thanks the Attorney for his undertaking to be mindful of this issue in the preparation of similar bills in the future.

Water Efficiency Labelling and Standards Bill 2004

Introduction

The Committee originally dealt with this bill in *Alert Digest No. 9 of 2004*. On 1 December 2004 the bill was re-introduced. It was dealt with by the Committee in its *Alert Digest No. 12 of 2004*.

In a letter dated 21 December, the Minister for the Environment and Heritage responded to the comments by the Committee made in *Alert Digest No. 9 of 2004*. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2004

[Introduced into the House of Representatives on 24 June 2004. Portfolio: Environment and Heritage]

The bill provides for the establishment and operation of a scheme to apply national water efficiency labelling and minimum performance standards to certain water-use products. The bill also creates offences and associated penalties, establishes a Special Account to receive funds and to make payments, and includes internal and Administrative Appeals Tribunal review of decisions.

The bills also contains a regulation-making power.

Strict liability

Clauses 33, 34, 35, 36, 37 and 38

Clauses 33, 34, 35, 36, 37 and 38 would impose criminal offences of strict liability.

The Committee will generally draw to the Senators' attention provisions which create strict liability and absolute liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum which accompanies the bill. The explanatory memorandum seeks to justify these provisions on the basis that strict liability will "facilitate the expedient enforcement of the provisions given that there are expected to be a high number of inadvertent contraventions of the Act."

The explanatory memorandum also observes that “Without a strict liability regime in place, it would be very difficult to enforce these provisions.”

There is no indication in the explanatory memorandum whether consideration has been given either to the Committee’s Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the authority of the Minister for Justice and Customs in February 2004, which, in paragraph 4.5 states that “strict ... liability should only be used in an offence where there are well thought out grounds for this.”

The Committee **seeks the Minister’s advice** as to whether consideration was given to either of the above papers in the framing of the above clauses.

Pending the Minister’s advice, the Committee draws 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.

Relevant extract from the response from the Minister

The Committee has asked whether consideration was given to either the Committee’s Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in imposing strict liability for the offences against clauses 33, 34, 35, 36, 37 and 38 of the Bill and has expressed concerns that the provisions may unduly trespass on personal rights and liberties.

The water efficiency labelling and standards regime, contained within the WELS Bill, is designed to minimise urban water consumption and thereby conserve urban water resources and protect urban water catchments. In order to achieve these aims, the WELS Bill provides for the establishment and operation of a scheme to apply national water efficiency labelling and minimum performance standards to certain water-use products to encourage the uptake of water-efficient products and appliances in domestic and commercial areas while maintaining individual choice and accounting for regional variations in water supply.

Officers of my Department sought advice from the Attorney-General’s Department on the appropriate offence provisions to be included in this legislation. In consultation with the Attorney-General’s Department various enforcement options were explored. The most suitable option was found to be that of applying strict liability to the physical element of the offences under the WELS scheme. This is in order to meet its enforcement objectives of providing adequate incentives to avoid

actions that lead to excess water consumption that jeopardises urban water resource supplies, and of ensuring communication of a consistent message as to the seriousness of water conservation measures being introduced by the WELS Bill. The application of strict liability to the physical element of the offences under the WELS scheme were also considered to be the most appropriate for ensuring the maintenance of the integrity of the regulatory regime of the WELS scheme.

Accordingly, the Bill creates strict liability offences in relation to failing to comply with registration, labelling and minimum efficiency and performance requirements, and in relation to the misuse of standards established under the WELS scheme, pursuant to clauses 33, 34, 35, 36, 37 and 38. It also provides for an enforcement regime that includes infringement notices, enforceable undertakings and injunctions.

In identifying the “Merits of strict liability and criteria for its application”, the Committee acknowledged on page 284 of its report that (subject to other relevant principles) “strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance those relating to ... the environment”. The Attorney-General’s Department’s guidelines for the application of strict and absolute liability offences also advise that it may usefully be applied in a regulatory context relating to the protection of the environment. Clearly, the WELS Bill introduces such an environmental regulatory regime that has as its aim the protection of an increasingly limited resource in the urban environment and is accordingly of the nature and character to which the above papers give particular reference in relation to the application of a strict liability regime.

While no direct reference is given in the Explanatory Memorandum to either the Committee’s Sixth Report of 2002 on Application of Absolute and Strict Liability Offences in Commonwealth Legislation or to the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, these papers were farther taken into account in framing the strict liability offences. The following provisions of the WELS Bill, by way of illustration, reflect this position.

The strict liability offences contained in the WELS Bill will apply to the actual suppliers of WELS regulated products which is consistent with the Committee’s principle stated on page 285 of the Committee’s report that “strict liability should depend as far as possible on the actions ...of those who are actually liable for an offence”.

If strict liability did not apply to the offences in clauses 33, 34, 35, 36, 37 and 38, the prosecution would have to prove the supplier intended to engage in the conduct. Attempting to prove, for example, that a person intended to supply unregistered products, unlabelled products, and products that don’t comply with minimum requirements set out in the WELS Bill would be an unreasonable burden given the physical nature of the conduct. Accordingly, the imposition of strict liability in these circumstances is consistent with the Committee’s principle stated on page 285 of the Committee’s report that “strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent”.

Strict liability in these circumstances is further warranted on the grounds of its consistency with the Committee's principle that "strict liability may be appropriate to overcome the 'knowledge of law' problem, where a physical element of the offence expressly incorporates a reference to a legislative provision". Unless strict liability is applied to the physical element of the offences in clauses 33, 34, 35, 36, 37, and 38 the provisions would be rendered virtually unenforceable, as the onus would otherwise fall to the prosecution to prove the defendant's intent; i.e. that the defendant was aware that information or standards were being misused or used not in accordance with the WELS Standard. This gives rise to a situation that the Committee noted, in the absence of strict liability for a similar class of offences, would be potentially damaging to the credibility of the legal system (see Committee's report page 265).

Notwithstanding the imposition of strict liability to the offences in clauses 33, 34, 35, 36, 37 and 38, the defence of honest and reasonable mistake of fact remains available to a potential defendant in accordance with the Criminal Code (see Section 9.2 of the Code) and in accordance with the Committee's Basic Principles provided at pages 283-284. Also in accordance with the Criminal Code, the legislative provisions of the WELS Bill that attract strict liability expressly state that it is an offence of strict liability (see Section 6.1 of the Code) which appears in the primary legislation in accordance with the Committee's general rule (see Committee's report page 287).

The associated pecuniary penalty provisions applicable to the strict liability offences are all set at 60 penalty units which is consistent with the Committee's basic principle stated on page 284 of the Committee's report that "strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate) appears to be a reasonable maximum."

In accordance with the Committee's principles (at pages 286 and 287) for safeguarding the interests of parties affected by the strict liability provisions, the WELS Bill incorporates provisions for both internal and Administrative Appeals Tribunal review.

In accordance with the Committee's Principles of sound administration, the Explanatory Memorandum also demonstrates the extensive consultation that was undertaken with industry and the States and Territories throughout the process of developing the WELS scheme and during the framing of the WELS Bill.

In light of these and other considerations, the application of strict liability was necessary to ensure that a defendant who fails to comply with the registration, labelling or minimum efficiency and performance requirements, or who misuses the standards established under the WELS scheme, cannot escape liability by demonstrating that he or she was not aware of these requirements or was otherwise reckless as to the requirements. Accordingly, I consider the application of strict liability to the offences does not unduly trespass upon personal rights and liberties. I hope this clarifies the Committee's concerns.

The Committee thanks the Minister for this response. The Committee's comments, and the Minister's response, relate to the first version of the bill and explanatory memorandum, introduced and tabled on 24 June 2004. In its *Alert Digest No. 12 of 2004*, the Committee discussed a subsequent version of the bill introduced on 1 December 2004. The Committee noted that the explanatory memorandum to the second bill repaired the deficiency raised by the Committee in relation to the first bill.

The Committee, nevertheless, sees the value in placing this additional explanation on the public record.

Robert Ray
Chair



01 FEB 2005

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

RECEIVED

2 FEB 2005

Senate Standing C'ttee
for the Scrutiny of Bills

05/157
MC04/15671

Senator the Hon Robert Ray
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to Alert Digest No. 12 of 2004 in which the Committee sought my advice in relation to a provision of the Copyright Legislation Amendment Bill 2004, which has now passed into law as Act No. 154 of 2004.

The Committee noted that clause 2(1) of the Bill provided for Schedule 1 to the Bill to commence on the later of the day on which it was assented to or the day on which the Australia-United States Free Trade Agreement (AUSFTA) came into force for Australia. It also provided that Schedule 1 was not to commence at all if the AUSFTA did not come into force. The Committee was concerned that because no time limit was set for the entry into force of the AUSFTA, there could be indefinite uncertainty whether Schedule 1 would ever commence.

As notified in *Gazette* No. GN51 of 22 December 2004, the AUSFTA entered into force on 1 January 2005. Accordingly, the date of commencement of Schedule 1 to the *Copyright Legislation Amendment Act 2004* is ascertainable and has occurred. However, the Committee's point will be kept in mind in the preparation of any future bills the commencement of which is to be made contingent on the happening of some independent event.

Yours sincerely

Philip Ruddock



SENATOR THE HON IAN CAMPBELL

Minister for the Environment and Heritage
Senator for Western Australia

21 DEC 2004

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

Dear Senator ~~Marshall~~

Gavin

I refer to the letter of 5 August 2004 from Mr Richard Pye, Secretary to the Standing Committee for the Scrutiny of Bills, to my Senior Adviser, concerning comments in the Scrutiny of Bills Alert Digest No. 9 of 2004 about the *Water Efficiency Labelling and Standards Bill 2004* (the 'WELS Bill'). I regret the time it has taken to reply. I'm sure you would understand that I was unable to respond while the Government was in caretaker mode during the recent Federal election period.

The Committee has asked whether consideration was given to either the Committee's Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in imposing strict liability for the offences against clauses 33, 34, 35, 36, 37 and 38 of the Bill and has expressed concerns that the provisions may unduly trespass on personal rights and liberties.

The water efficiency labelling and standards regime, contained within the WELS Bill, is designed to minimise urban water consumption and thereby conserve urban water resources and protect urban water catchments. In order to achieve these aims, the WELS Bill provides for the establishment and operation of a scheme to apply national water efficiency labelling and minimum performance standards to certain water-use products to encourage the uptake of water-efficient products and appliances in domestic and commercial areas while maintaining individual choice and accounting for regional variations in water supply.

Officers of my Department sought advice from the Attorney-General's Department on the appropriate offence provisions to be included in this legislation. In consultation with the Attorney-General's Department various enforcement options were explored. The most suitable option was found to be that of applying strict liability to the physical element of the offences under the WELS scheme. This is in order to meet its enforcement objectives of providing adequate incentives to avoid actions that lead to excess water consumption that jeopardises urban water resource supplies, and of ensuring communication of a consistent message as to the seriousness of water conservation

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measures being introduced by the WELS Bill. The application of strict liability to the physical element of the offences under the WELS scheme were also considered to be the most appropriate for ensuring the maintenance of the integrity of the regulatory regime of the WELS scheme.

Accordingly, the Bill creates strict liability offences in relation to failing to comply with registration, labelling and minimum efficiency and performance requirements, and in relation to the misuse of standards established under the WELS scheme, pursuant to clauses 33, 34, 35, 36, 37 and 38. It also provides for an enforcement regime that includes infringement notices, enforceable undertakings and injunctions.

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While no direct reference is given in the Explanatory Memorandum to either the Committee’s Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, these papers were further taken into account in framing the strict liability offences. The following provisions of the WELS Bill, by way of illustration, reflect this position.

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The associated pecuniary penalty provisions applicable to the strict liability offences are all set at 60 penalty units which is consistent with the Committee's basic principle stated on page 284 of the Committee's report that "strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate) appears to be a reasonable maximum."

In accordance with the Committee's principles (at pages 286 and 287) for safeguarding the interests of parties affected by the strict liability provisions, the WELS Bill incorporates provisions for both internal and Administrative Appeals Tribunal review.

In accordance with the Committee's Principles of sound administration, the Explanatory Memorandum also demonstrates the extensive consultation that was undertaken with industry and the States and Territories throughout the process of developing the WELS scheme and during the framing of the WELS Bill.

In light of these and other considerations, the application of strict liability was necessary to ensure that a defendant who fails to comply with the registration, labelling or minimum efficiency and performance requirements, or who misuses the standards established under the WELS scheme, cannot escape liability by demonstrating that he or she was not aware of these requirements or was otherwise reckless as to the requirements. Accordingly, I consider the application of strict liability to the offences does not unduly trespass upon personal rights and liberties. I hope this clarifies the Committee's concerns.



IAN CAMPBELL

