



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2005

14 September 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 A McEwen
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

TENTH REPORT OF 2005

The Committee presents its Tenth Report of 2005 to the Senate. The Report contains the following statement on the work of the Committee:

Retrospectivity — Scrutiny of Bills Committee Practice

The Committee also draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand) Bill 2005

Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Act 2005

Retrospectivity—Scrutiny of Bills Committee Practice

Legislation has retrospective effect when it makes a law applicable to an act or omission which took place before the legislation was enacted. The Scrutiny of Bills Committee endorses a traditional view, critical of the use of retrospective legislation to affect people's rights and liberties.

The Committee draws attention to any bill which seeks to have an impact on matters which have occurred prior to its enactment. It will generally *not* comment adversely if:

- the bill is for the benefit of those affected;
- the bill merely makes technical amendments or corrects drafting errors; or
- the bill implements a tax or revenue measure which is to apply from the date the measure was announced.¹

The Committee *will* comment adversely, however, where such a bill has a detrimental effect on people. Under this principle, the Committee has consistently criticised bills which sought to impose criminal liability retrospectively² and has been critical of measures which retrospectively increase penalties, or apply new penalties.³

The Committee is also critical of the practice of 'legislation by press release', which creates the twin difficulties of retrospective operation and uncertainty in the content of the law.⁴

These long-standing principles warrant reiteration in the light of recent Senate and Senate committee proceedings on the Building and Construction Industry Improvement Bill 2005. The Committee commented on this bill in its *Alert Digest No. 3 of 2005* and again in *Alert Digest No. 10 of 2005*, after the bill was substantially amended in the House of Representatives.

The Committee noted that the bill makes provision, retrospectively, for increased penalties for unlawful industrial action. The Committee also noted that, under Chapter 6 of the bill:

¹ See Senate resolution of 8 November 1988, *Journals of the Senate*, pp. 1104-5.

² See, eg, *Fourth Report of 2002*, Criminal Code Amendment (Anti-Hoax and Other Measures) Bill 2002, pp. 156-160

³ See, eg, *Seventeenth Report of 1994*, Employment Services Bill 1994, pp. 298-302

⁴ *Work of the Committee during the 39th Parliament*, pp. 21-31

...industrial action which is currently lawful, or which currently falls within the definition of 'protected action', may be rendered unlawful by the bill and those taking part in such action retrospectively subjected to the 'sanctions and greater penalties' in the bill.⁵

In a submission to the Senate Employment, Workplace Relations and Education Legislation Committee inquiry into the bill, and in giving evidence at that committee's hearing on 4 May 2005, officers of the Department of Employment and Workplace Relations argued that retrospective legislation was 'not uncommon', and stated that:

In each of the previous four Parliaments, there were over 100 Bills with retrospective effect that attracted comment from the Senate Standing Committee for the Scrutiny of Bills...⁶

This statement gives a misleading impression. As noted by Senators Murray and Marshall at the hearing, the overwhelming majority of these retrospective provisions fall within the exceptions noted above; that is, measures which are beneficial (rather than detrimental) in effect, which are technical, or which fall into the exception made for tax or revenue measures. While the Committee *notes* such measures, it does *not* draw them to the attention of the Senate in a formal sense.

At the hearing, departmental officers noted four bills 'that imposed penalties retrospectively'. In fact, the Committee had made adverse comments in relation to those bills and restated its opposition to the retrospective imposition of related sanctions, for example:

- Superannuation Industry (Supervision) Bill 1993 – 'The Committee remains opposed, in principle, to the imposition of a criminal penalty retrospectively especially where a prior statement announcing the legislation is not detailed sufficiently to remove uncertainty about the prohibited activity'.⁷
- Employment Services Bill 1994 – 'The committee ... continues to disagree with the retrospective application [of the proposed additional penalty] to crimes committed before the commencement of the legislation'.⁸

In the case of the most recent of the bills cited by departmental officers, the Criminal Code Amendment (Anti-Hoax and Other Measures) Bill 2002, the Committee distinguished between the exception made in respect of some tax measures and the retrospective application of criminal penalties:

⁵ Alert Digest No. 3 of 2005, p. 8

⁶ Submission, p. 2

⁷ *Seventh Report of 1993*, p. 189

⁸ *Seventeenth Report of 1994*, p. 302

...these amendments propose to retrospectively create criminal offences – a much more serious issue when considering the merits of retrospectivity. The practices developed for amending taxation law are not an appropriate precedent for amendments which go to criminal responsibility.

... Declaring something ‘illegitimate’, and then retrospectively declaring it to be a crime, would seem to establish an unfortunate and undesirable precedent.⁹

The Committee reiterated ‘its concern at the use of retrospectivity in the creation of criminal offences’ and sought an assurance from the Attorney-General that the provisions ‘will not be used as a precedent for the retrospective creation of criminal offences in other circumstances.’ The Attorney provided that assurance.¹⁰

In its *Alert Digest No. 10 of 2005* the Committee summarised its approach to provisions which retrospectively expose individuals to civil or criminal penalties:

The effect of this retrospective commencement is therefore to render a person potentially liable to a pecuniary penalty in a substantial amount for engaging in conduct which ... is perfectly legal at the time that it was engaged in. The retrospective imposition of penalties – whether for criminal conduct or a civil penalty – is a matter which the Committee has regularly brought to the attention of the Senate.¹¹

The committee has often noted that ‘publishing an intention to process a bill through Parliament does not convert its provisions into law; only Parliament can do that.’¹² This underscores the committee’s long-standing principle that legislation which changes the nature of people’s rights should commence after it is finally passed by the Parliament, rather than on the date of its introduction.

The committee noted that the approach taken in the Building and Construction Industry Improvement Bill ‘carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with laws passed by the Parliament.’¹³ The uncertainty this creates is compounded by the possibility that the Parliament may – quite properly – pass the legislation in an amended form.

The Committee notes the view expressed by the Special Minister of State, Senator Abetz, in taking the bill through the Senate:

⁹ *Fourth Report of 2002*, pp. 158–9

¹⁰ *Fourth Report of 2002*, pp. 159–60

¹¹ At p. 16

¹² *Work of the Committee during the 39th Parliament*, p. 21

¹³ *Alert Digest No. 10 of 2005*, pp. 16-17; *Work of the Committee during the 39th Parliament*, p. 22

All around the chamber there seems to be agreement that retrospectivity in principle is not a good thing but we would all use it if we believed the circumstances justified it. I suppose that is the big divide in this debate: we in fact believe that the circumstances in the building industry do require retrospectivity on this occasion, albeit we would not make a habit of doing this and we in fact do not like doing it.¹⁴

The Committee also notes that the Minister sought to justify the use of retrospectivity in the circumstances:

The decision to designate 9 March as the date of effect was taken to ensure that industry parties did not take advantage of the time between the bill's introduction and its passage to engage in unlawful or antisocial conduct of the sort identified by the Cole Royal Commission. As a consequence, persons taking unprotected action from the date of the bill's introduction would run the risk that it will be unlawful and attract significant penalties...

I think we are all agreed that retrospectivity should be used sparingly. We as a government believe that this is one of those rare occasions when retrospectivity is justified. I can understand that, on balance, others would come to a different conclusion.¹⁵

The Committee will continue to comment adversely on legislation which may operate retrospectively to the detriment of people's rights. The Committee nonetheless appreciates the Minister spelling out the Government's position on retrospectivity, and his agreement that 'it should be used sparingly'. The Committee also considers it essential that those proposing retrospective provisions should seek to justify them, including by setting out the reasons for that retrospectivity in the explanatory memorandum to the bill. Those reasons should include a statement of whether any person will be adversely affected by the retrospective provisions and, if so, the number of people involved and the extent to which their interests are likely to be affected.

¹⁴ Senate Hansard, 5 September 2005, p. 85

¹⁵ Senate Hansard, 5 September 2005, p. 85

Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2005*. The Minister for Transport and Regional Services responded to the Committee's comments in a letter dated 6 September 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2005

Introduced into the Senate on 23 June 2005
Portfolio: Transport and Regional Services

Background

The bill amends the *Civil Aviation Act 1988* to permit the mutual recognition of Air Operator's Certificates for operation of aircraft of more than 30 seats or 15,000 kg, as issued by the Civil Aviation Safety Authority in Australia and the Civil Aviation Authority of New Zealand.

Commencement on Proclamation

Schedule 1, items 1 to 19

Item 2 in the table to subclause 3(1) in the bill provides that the amendments proposed in items 1 to 19 of Schedule 1 would commence on 'a single day to be fixed by Proclamation' with no limit specified within which the bill must commence in any event.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force, and that commencement provisions should contain appropriate restrictions on the period during which legislation might commence. This view has long been reflected in the drafting directions issued by the Office of Parliamentary Counsel (currently *Drafting Direction 2005, No. 10* at paragraphs 16 to 22).

The drafting direction provides that a clause which provides for commencement by proclamation should also specify a period or date after which the Act either commences or is taken to be repealed. It also provides that any proposal to defer commencement for more than 6 months after assent should be explained in the explanatory memorandum.

The explanatory memorandum states that the deferred commencement is ‘to enable the signing of the inter-governmental arrangement on mutual recognition by the Governments of Australia and New Zealand.’ The Committee has usually accepted this situation as justifying an extended, but not an open-ended, period for commencement (see *Drafting Direction 2005, No. 10* at paragraphs 88 to 90). Accordingly, the Committee **seeks the Minister’s advice** as to whether the commencement clause should not also be subject to a provision that, if the agreement has not been signed by some fixed date, the Act will be automatically treated as having been repealed.

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

At the time the Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand and Other Matters) Bill 2003 (2003 Bill) was introduced, there was some uncertainty regarding the commencement of the Bill, due to the necessity for passage of complementary legislation in New Zealand. The commencement clause for the 2003 Bill had the substance of the Bill commencing on a date to be fixed by Proclamation, without a maximum time after which the Act would be repealed. This commencement provision inadvertently was carried over into the current Bill, despite the complementary New Zealand legislation passing in early 2004. Because of the passage of the complementary New Zealand legislation, only administrative arrangements need to be made after passage of the Bill to give effect to the Government’s mutual recognition policy, and I can confirm that the Government intends for the commencement of the Bill to occur no later than 6 months after Royal Assent.

The Committee thanks the Minister for this response. In the circumstances, the Committee makes no further comment on the provision.

Retrospective commencement
Schedule 1, items 20 and 29 to 31

Items 3 and 5 in the table to subclause 3(1) in the bill provide that the amendments proposed in item 20 and items 29 to 31 of Schedule 1 commence immediately after the commencement of item 10 of Schedule 2 to the *Civil Aviation Amendment Act 2005*. That Act commenced on 6 July 2005, so it appears these items will have some period of retrospective effect. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee **seeks the Minister's advice** as to the effect of the retrospective commencement of these provisions.

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

In relation to the Committee's concern about retrospective commencement of some provisions of the Bill, under items 3 and 5 of the commencement table in clause 2, items 20 and 29 to 31 of Schedule 1 will commence at the same time that items 1 to 19 of the Bill do, that is, on a single day to be fixed by Proclamation. This is because items 3 and 5 of the commencement table indicate that items 20 and 29 to 31 of Schedule 1 commence on the later of the two events noted, and one of those events (commencement of item 10 of Schedule 2 of the Civil Aviation Amendment Act 2005) has already occurred. There will therefore be no retrospective commencement of items 20 and 29 to 31 of Schedule 1 of the Bill.

The Committee thanks the Minister for this response.

Strict liability
Schedule 1, item 34

Proposed new subsection 28C(4) of the *Civil Aviation Act 1988*, to be inserted by item 34 of Schedule 1 to the bill, would create criminal offences of strict liability.

In its *Sixth Report of 2002* the Committee reported on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. It recommended a range of principles which the Committee concluded should form the framework for Commonwealth policy and practice in relation to strict and absolute liability.

In February 2004, the Minister for Justice and Customs published a *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*. The Guide draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the Guide contains a statement of the matters which should be considered in framing strict and absolute liability offences.

The Committee will generally draw to 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.

While the explanatory memorandum explains the nature of strict criminal liability, it does not seek to justify its imposition in these circumstances. It is therefore not clear from the explanatory memorandum whether the principles contained in the Committee's report or the matters listed at Part 4.5 of the Guide have been considered.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the Guide.

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

Finally, the two offences in new subsections 28C(2) and (3) are administrative in nature and are subject to a maximum fine of 2 penalty units. Offences such as failure to provide information which are subject to trivial sanctions are commonly strict liability offences. It is essential to the operation of the mutual recognition scheme that regulators be informed of changes to details of holders of Australian and New Zealand Aviation (ANZA) Air Operator Certificates (AOCs), and that therefore holders of ANZA AOCs guard against failing to provide this necessary information to regulators.

The Committee thanks the Minister for this response. This explanation meets the Committee's concerns. The Committee takes the opportunity, however, to draw attention to its long-standing position that the justification for the imposition of strict liability offences should be set out in the explanatory memorandum to a bill.

Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Act 2005

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 8 of 2005*. The Minister for Communications, Information Technology and the Arts responded to the Committee's comments in a letter dated 6 September 2005.

Although the bill has passed both Houses the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2005

Introduced into the House of Representatives on 23 June 2005
Portfolio: Communications, Information Technology and the Arts

Background

This bill amends the *Telecommunications Act 1997* to enable the Australian Communications and Media Authority (ACMA) to establish protection zones to prevent damage to submarine telecommunications cables of national significance.

The explanatory memorandum indicates that the protection scheme has been developed in consultation with a wide range of stakeholders, including Commonwealth, state and territory governments, the fishing petroleum exploration industries and the telecommunications industry.

The ACMA will be authorised to vary and revoke protection zones and to issue permits to install submarine cables within protection zones and Commonwealth controlled waters. Heavy criminal penalties will apply for breaking or damaging a submarine cable within a protection zone, and for engaging in prohibited or restricted activity.

Strict liability

Proposed new Schedule 3A, items 36, 37, 39, 44 and 84

Items 36, 37, 39, 44 and 84 of proposed new Schedule 3A to the *Telecommunications Act 1997*, to be inserted by item 6 of Schedule 1 to this bill, would impose strict criminal liability for various offences.

In its *Sixth Report of 2002* the Committee reported on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. It recommended a range of principles which the Committee concluded should form the framework for Commonwealth policy and practice in relation to strict and absolute liability.

In February 2004, the Minister for Justice and Customs published a *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*. The Guide draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the Guide contains a statement of the matters which should be considered in framing strict and absolute liability offences.

The Committee will generally draw to Senators' attention provisions which create strict 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.

In this case the explanatory memorandum, while explaining the effect of strict criminal liability, does not seek to justify its imposition in these circumstances. It is therefore not clear from the explanatory memorandum whether the principles contained in the Committee's report or the matters listed at Part 4.5 of the Guide have been considered.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the Guide.

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

The offences referred to by the Committee relate to provisions contained within the Act imposing strict criminal liability for various offences.

The relevant offences are contained within the new Schedule 3A to the *Telecommunications Act 1997*:

- clause 36, which creates an offence of damaging a submarine cable in a protection zone;
- clause 37, which creates the offence of negligently damaging a submarine cable in a protection zone;
- clause 39, which creates the offence for a master or owner of a ship used in the offence of damaging a submarine cable;
- clause 44, which creates the offence for a master or owner of a ship used in the offence of engaging in prohibited or restricted activities; and
- clause 84, which creates the offence of installing a cable without a permit.

The inclusion of a strict liability component is appropriate for these offences, primarily because of the need for the legislation to provide sufficient deterrent against undertaking these activities.

In particular, in the case of the offences created by clauses 36 and 37, strict liability attaches to the location of a cable in a protection zone.

In the case of the offences created by clauses 39 and 44, applying to the master or owner of a ship, these offences refer to offences by another person.

In the case of clause 84, strict liability applies to the location of a cable in Australian waters. This is a jurisdictional issue, and again it is appropriate that such elements of the offence attract strict liability.

The imposition of strict liability is justified in these circumstances, particularly in light of the importance of developing a robust protection regime for submarine telecommunications cables. Prior to this Act, there was very limited protection of vital submarine telecommunications cables and cables were damaged.

During the development of the legislation, the Department of Communications, Information Technology and the Arts consulted closely with the Attorney-General's Department about these offences. I therefore consider that these provisions are consistent with Commonwealth criminal law guidelines.

The Committee thanks the Minister for this response. This explanation meets the Committee's concerns. The Committee takes the opportunity, however, to draw attention to its long-standing position that the justification for the imposition of strict liability offences should be set out in the explanatory memorandum to a bill.

Brett Mason
Deputy Chair



HON WARREN TRUSS MP
Minister for Transport and Regional Services
Deputy Leader of The Nationals

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8 SEP 2005

Senate Standing Committee
for the Scrutiny of Bills

Reference: 04578-2005

Senator R Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament house
CANBERRA ACT 2600

06 SEP 2005

Dear Senator Ray

Thank you for your letter of 11 August 2005 regarding comments in the Scrutiny of Bills Alert Digest concerning the *Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand) Bill 2005*.

Specifically, the Committee has asked for advice on the commencement of certain provisions of the Bill and some strict liability offences in the Bill.

At the time the *Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand and Other Matters) Bill 2003* (2003 Bill) was introduced, there was some uncertainty regarding the commencement of the Bill, due to the necessity for passage of complementary legislation in New Zealand. The commencement clause for the 2003 Bill had the substance of the Bill commencing on a date to be fixed by Proclamation, without a maximum time after which the Act would be repealed. This commencement provision inadvertently was carried over into the current Bill, despite the complementary New Zealand legislation passing in early 2004. Because of the passage of the complementary New Zealand legislation, only administrative arrangements need to be made after passage of the Bill to give effect to the Government's mutual recognition policy, and I can confirm that the Government intends for the commencement of the Bill to occur no later than 6 months after Royal Assent.

In relation to the Committee's concern about retrospective commencement of some provisions of the Bill, under items 3 and 5 of the commencement table in clause 2, items 20 and 29 to 31 of Schedule 1 will commence at the same time that items 1 to 19 of the Bill do, that is, on a single day to be fixed by Proclamation. This is because items 3 and 5 of the commencement table indicate that items 20 and 29 to 31 of Schedule 1 commence on the later of the two events noted, and one of those events (commencement of item 10 of Schedule 2 of the *Civil Aviation Amendment Act 2005*) has already occurred. There will therefore be no retrospective commencement of items 20 and 29 to 31 of Schedule 1 of the Bill.

Finally, the two offences in new subsections 28C(2) and (3) are administrative in nature and are subject to a maximum fine of 2 penalty units. Offences such as failure to provide information which are subject to trivial sanctions are commonly strict liability offences. It is essential to the operation of the mutual recognition scheme that regulators be informed of changes to details of holders of Australian and New Zealand Aviation (ANZA) Air Operator Certificates (AOCs), and that therefore holders of ANZA AOCs guard against failing to provide this necessary information to regulators.

I trust this clarifies the issues you have raised and appreciate your comments in relation to this Bill.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Warren Truss', written in a cursive style.

WARREN TRUSS



MINISTER FOR COMMUNICATIONS,
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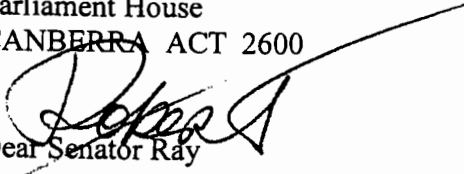
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7 SEP 2005

Senate Standing Cttee
for the Scrutiny of Bills

Senator Robert Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600


Dear Senator Ray

Strict liability in the Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Act 2005

I refer to the Committee's letter of 11 August 2005 drawing my attention to the Scrutiny of Bills Alert Digest No 8 of 2005 which refers to certain offences contained within the *Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Act 2005*. The Act was passed by Parliament on 11 August 2005 and received Royal Assent on 23 August 2005.

The offences referred to by the Committee relate to provisions contained within the Act imposing strict criminal liability for various offences.

The relevant offences are contained within the new Schedule 3A to the *Telecommunications Act 1997*:

- clause 36, which creates an offence of damaging a submarine cable in a protection zone;
- clause 37, which creates the offence of negligently damaging a submarine cable in a protection zone;
- clause 39, which creates the offence for a master or owner of a ship used in the offence of damaging a submarine cable;
- clause 44, which creates the offence for a master or owner of a ship used in the offence of engaging in prohibited or restricted activities; and
- clause 84, which creates the offence of installing a cable without a permit.

The inclusion of a strict liability component is appropriate for these offences, primarily because of the need for the legislation to provide sufficient deterrent against undertaking these activities.

In particular, in the case of the offences created by clauses 36 and 37, strict liability attaches to the location of a cable in a protection zone.

In the case of the offences created by clauses 39 and 44, applying to the master or owner of a ship, these offences refer to offences by another person.

In the case of clause 84, strict liability applies to the location of a cable in Australian waters. This is a jurisdictional issue, and again it is appropriate that such elements of the offence attract strict liability.

The imposition of strict liability is justified in these circumstances, particularly in light of the importance of developing a robust protection regime for submarine telecommunications cables. Prior to this Act, there was very limited protection of vital submarine telecommunications cables and cables were damaged.

During the development of the legislation, the Department of Communications, Information Technology and the Arts consulted closely with the Attorney-General's Department about these offences. I therefore consider that these provisions are consistent with Commonwealth criminal law guidelines.

Yours sincerely



HELEN COONAN