



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2000

16 August 2000

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
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 2000

The Committee presents its Tenth Report of 2000 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 Amendment (Digital Agenda) Bill 1999

Excise Amendment (Compliance Improvement) Bill 2000

Renewable Energy (Electricity) Bill 2000

*Telecommunications (Consumer Protection and Service Standards)
Amendment Act (No. 1) 2000*

Copyright Amendment (Digital Agenda) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No 14 of 1999*, in which it made various comments. The Attorney-General and Minister for Communications, Information Technology and the Arts have jointly responded to those comments in a letter dated 10 August 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the response are discussed below.

Extract from Alert Digest No. 14 of 1999

This bill was introduced into the House of Representatives on 2 September 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Copyright Act 1968* to:

- introduce a technology-neutral right of communication to the public to replace the technology-specific broadcasting right (which applies only to “wireless” broadcasts) and the cable diffusion right;
- provide for exceptions to the technology-neutral right of communication;
- extend existing exceptions for libraries and archives to the reproduction and communication of copyright material in electronic form;
- extend existing statutory licences for copying by educational institutions to the reproduction and communication of copyright material in electronic form;
- provide criminal sanctions and civil remedies against:
 - persons who manufacture, deal in, import, distribute or make available online devices, or provide services, for the circumvention of technological protection measures designated to inhibit the infringement of copyright;
 - international tampering or removal of electronic rights management information (RMI); and
 - persons who manufacture, deal in, import, distribute or make available online devices for the unauthorised reception of encoded subscription broadcasts;

- limit and clarify the liability of carriers and Internet Service Providers in relation to both direct and authorisation liability; and
- provide a statutory licence scheme for the payment of equitable remuneration to underlying rights holders whose works are used in retransmitted broadcasts.

Reversal of the onus of proof

Proposed new subsections 132(5F), (5G), (5H) and (5K) and 135AS(2) and (3)

Item 100 of Schedule 1 to this bill creates a number of new criminal offences in relation to circumvention services and devices, and electronic rights management information. Proposed new subsections 132(5F), (5G) and (5H) provide some specific exemptions from these offences in certain circumstances (for example, actions lawfully done for the purposes of law enforcement or national security).

Proposed new subsection 132(5K) states that the only burden of proof that a defendant bears under these new subsections is an evidential one – “the burden of adducing or pointing to evidence that suggests a reasonable possibility that the act or matter in question was done or existed”.

The Explanatory Memorandum states that the reason for imposing an evidential burden in these circumstances is that “it is believed that the matters referred to in those subsections will be peculiarly within the knowledge of the defendant and will be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish”.

Similar reasoning applies to proposed new subsections 135AS(2) and (3), which are concerned with offences involving the manufacture, dealing in or making available of online broadcast decoding devices.

In principle, the growing tendency to reverse the onus of proof in legislation remains a matter of continuing concern. However, the Committee has, on occasion, accepted the imposition of an evidential burden on a defendant to a criminal prosecution in circumstances such as those referred to in the Explanatory Memorandum – where matters are peculiarly within the defendant’s knowledge.

To determine whether the imposition of an evidential burden is appropriate in this case, the Committee **seeks the Attorney-General's advice** on why it is believed that the matters referred to in proposed new subsections 132(5F), (5G), (5H) and (5K) and 135AS(2) and (3) are peculiarly within the defendant's knowledge, and would be more difficult and costly for the prosecution to disprove than for the defendant to establish.

Pending the Attorney's response, the Committee draws Senators' attention to these 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 Attorney-General and Minister

As the Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston, has joint portfolio responsibility for this Bill, I present the following response to the Committee on behalf of both myself and Senator Alston:

Standing Committee comments regarding sections 132(5F), (5G), (5H) and (5K)

The Committee has made a number of comments regarding sections 132(5F), (5G), (5H) and (5K). As a result of Government amendments, these provisions have been re-numbered respectively as subsections 132(5E), (5F), (5G) and (5J). The Committee has drawn attention to subsection 132 (5J), (formerly subsection 132(5K)) which places on a defendant the evidential burden of raising a defence under subsections 132(5E), (5F) and (5G) (formerly subsections 132(5F), (5G) and (5H)). These subsections provide defences to the offences set out in subsections 132 (5A) and (5B) (formerly subsections 132(5B) and (5C)) of the Bill.

Subsection 132(5A) prohibits the provision of a service to circumvent a technological protection measure. Subsection 132(5B) prohibits the manufacture, commercial dealing, importation for commercial dealing and making available online of a device to circumvent a technological protection measure.

Subsection 132(5E) provides a defence to the above offences if the prohibited act was done for the purposes of law enforcement or national security. Subsection 132(5F) provides a defence if the defendant supplied the device or service to a person to use only for a permitted purpose. The person being supplied with the device or service must provide the supplier with a signed declaration that the device or service is only to be used for an identified permitted purpose. A circumvention device or service is used for a "permitted purpose" if it is used to do an act comprised in the copyright in the work or other subject-matter and this act is done either with the permission of the copyright owner (or licensee), or under an existing identified exception under the *Copyright Act 1968* (see subsection 132(5H)). For example, a "permitted purpose" includes reproducing a work relying on the exceptions for libraries and archives. Subsection 132(5G) provides a defence if the defendant made or imported a circumvention device for use only for a permitted

purpose or for the purpose of enabling another person to supply the device or service for use only for a permitted purpose.

Subsection 132(5J) provides that in relation to subsections 132(5E), (5F) and (5G), the defendant bears the evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the act or matter claimed as a defence was done or existed.

Comments regarding sections 135AS(2) and (3)

The Committee has drawn attention to subsection 135AS(3) which provides for the burden of proof placed on a defendant raising a defence under subsection 135(2). The latter subsection provides a defence to the offences set out in subsection 135AS(1) of the Bill.

Subsection 135AS(1) prohibits the manufacture, commercial dealing, importation for commercial dealing and making available online of a broadcast decoding device. Subsection 135AS(2) provides a defence to these offences if the prohibited act was done for the purposes of law enforcement or national security. Subsection 135AS(3) provides that the defendant bears the evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the act was done for the purposes of law enforcement or national security.

Government's response

The Government considers that once the substantive offence has been proved by the prosecution, the evidential onus may fairly be placed on the defendant to raise the above defences because relevant information is clearly within the defendant's own knowledge. Furthermore, it would be more costly for the prosecution to disprove these defences than for the defendant to establish them. The shift in the evidential burden does not go to the substance of the conduct. It merely requires the defendant, once the conduct has been proved, to adduce evidence of a matter which would not only be peculiarly within his or her own knowledge, but would also be in his or her interest to bring to the immediate attention of the Court.

For example, in relation to a defence under either subsections 132(5E) or 135AS(2), it is clearly within the defendant's knowledge whether he or she undertook the proscribed acts for the purposes of law enforcement or national security. In relation to a defence under subsection 132(5F), it is clearly within the defendant's knowledge whether he or she has received a signed declaration in relation to the supply of a circumvention device or service stating that the device or service is to be used only for an identified permitted purpose. Further, a copy of such a declaration is likely to be in the defendant's possession. For a defence under subsection 132(5G) it is clearly within the defendant's knowledge whether he or she made or imported a circumvention device for use only for a permitted purpose or for supply only for a permitted purpose.

Furthermore, it would be difficult and costly for the prosecution to disprove these offences. For example, it would be difficult for the prosecution to prove that the defendant had not received a signed declaration in relation to the supply of a circumvention device or service. Similarly, it would be difficult and costly for the prosecution to prove that the defendant did not undertake a proscribed act for the purposes of law enforcement or national security.

Increased monetary penalties for certain offences under section 132 - Government amendments

I would also take this opportunity to draw the Committee's attention to further Government amendments to the Bill as first introduced. Item 100A of the Bill introduces new subsections 132(6AA) and 132(6AB). New subsection 132(6AA) provides that a higher monetary penalty (850 penalty points), but not an increased prison term, may be imposed for offences involving the first digitisation of copyright material. This is in comparison to subsection 132(AB) which maintains the current penalties of 550 penalty points for offences which do not involve the first digitisation of copyright material.

It is important to note that the increased monetary penalty does not apply to those new offences where there has been an imposition of an evidential burden on the defendant (subsections 132(5A) and 132(5B)). In relation to these offences only the current monetary penalty of 550 penalty points will apply.

The higher monetary penalty available under subsection 132(6AA) is intended to address the concerns of copyright owners regarding the additional risk of infringement to copyright material that has been converted into digital form. This amendment was made in response to the key recommendation (recommendation 1) of the House of Representatives Standing Committee on Legal and Constitutional Affairs Advisory Report on the Digital Agenda Bill. The Committee recommended that copyright owners receive greater protection in relation to the conversion of their material from hardcopy to digital form.

The Government is satisfied that the evidential onus placed on the defendant, and the increased monetary penalty for certain offences, in the above sections do not trespass unduly on personal rights and liberties.

The Committee thanks the Attorney-General and the Minister for Communications, Information Technology and the Arts for this comprehensive response.

Excise Amendment (Compliance Improvement) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 9 of 2000*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 8 August 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 9 of 2000

This bill was introduced into the House of Representatives on 21 June 2000 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Excise Act 1901* to strengthen the provisions that regulate the production, dealing, manufacturing and storage specifically of tobacco, and excisable goods generally. The measures are designed to provide a stronger statutory framework within which the Australian Taxation Office can combat illegal activities that threaten the revenue base for tobacco excise.

Measures proposed include the introduction of a comprehensive licensing scheme for the production of and dealing in tobacco, and for the manufacturing and storage of excisable goods generally; the implementation of controls over the movement and possession of tobacco seeds, plant and leaf and related offence provisions; increased penalties; and the provision of extended powers to officers to stop and search conveyances for tobacco leaf or excisable goods.

Strict liability offences

Proposed new subsections 39K(4), 39L(7), 39M(3), 44(5), 61(3), 61A(6), 61C(4B), 117(2) to 117H(2) and 117I(3)

A number of provisions included in this bill will impose strict liability for various criminal offences. Strict liability permits a person to be convicted of an offence irrespective of his or her state of mind.

In setting out the background to these provisions, the Explanatory Memorandum observes that “the revised offence provisions will introduce a tiered penalty structure. The higher level of penalty will apply where the requisite fault elements are established. A lower level of penalty will apply if only the physical elements of the offence are established, that is, where the offence is one of strict liability. This is consistent with the classification of offences in the Criminal Code”.

While these observations are correct, the Explanatory Memorandum does not elaborate on the need for this new tiered penalty structure in the case of this bill. The Committee therefore **seeks the Treasurer’s advice** on why a tiered penalty structure is now to be imposed under this bill.

Pending the Treasurer’s advice, the Committee draws Senators’ attention to these 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 Assistant Treasurer

The Bill proposes a tiered structure for offences against the *Excise Act 1901*. You have sought advice on why the tiered structure is now to be imposed by this Bill.

The offence provisions of the Excise Act have been accumulated over many years and in many instances are silent on the fault elements that constitute the offence. This has resulted in uncertainty about the presumption of *mens rea* as an essential element of a particular offence, in the context of the Excise Act as a revenue statute, and about available defences.

Moreover, administrative attempts to counter the recent growth in the trade in illicit tobacco have identified deficiencies in the existing offence provisions and in the relativity between current penalties and the prospective gains from illicit activity. The Bill proposes to address these matters.

In the course of reviewing offences covered by the proposed amendments the opportunity was taken to bring the provisions into line with current Commonwealth criminal law policy. Accordingly, the Attorney-General’s Department was consulted in the drafting of the amendments which resulted in the tiered structure proposed by the Bill.

The tiered structure recognises the seriousness of offences that are associated with deliberate excise evasion or otherwise undermine the excise revenue base. For these offences, the mental elements are specified and a higher level of pecuniary penalty and imprisonment are provided for.

These offences are designed to regulate the behaviour of persons who conduct excise-related business activities. There is an expectation that such persons will apply a standard of care to their conduct which should ensure that non-compliant

behaviour does not occur. It is recognised, however, that circumstances may arise where the offending conduct occurs but the requisite mental element cannot be established without admission by the offender. Independent evidence of the mental element may also be difficult to gather for these offences.

Alternative offences based on strict liability are therefore needed to deter non-compliant behaviour of this kind. As these offences are less serious, the maximum penalty is one-fifth of that specified for that where the mental element is established. Imprisonment is obviously not appropriate in these cases. The common law defence of honest and reasonable mistake applies to these offences.

In the context of the growth of the illicit tobacco trade it is important that there is an effective enforcement regime to prevent erosion of the excise revenue base. In these circumstances, I consider that the tiered structure of offences, which includes strict liability and infringement notices for minor offences, is appropriate and will not unduly trespass on personal rights and liberties.

The Committee thanks the Assistant Treasurer for this response which addresses the Committee's concerns.

Old convictions, continuing consequences

Proposed new paragraphs 39B(b), 39C(b), 39H(b) and 39I(b)

A number of provisions included in this bill authorise the Collector to determine whether a person or a company is "fit and proper" for certain purposes. In making such a determination, the Collector may have regard to, among other things, convictions for offences within the previous 10 years.

Such provisions may be regarded as somewhat arbitrary, and as imposing a double penalty on the person or company concerned in that the fact of a conviction may be held against them, possibly long after the offence was committed.

These particular provisions also refer to offences "punishable" by imprisonment for a period of one year or longer, or by a fine of 50 penalty units. Such provisions are potentially inequitable in that they take account of nominal penalties but not of penalties actually imposed. For example, under proposed paragraph 39B(b), a person who has actually served a sentence of imprisonment of 6 months for an offence which was punishable by imprisonment for 6 months (ie the worst category of such an offence) would not have this sentence taken onto account. However, a person who was fined \$50 for an offence punishable by imprisonment for a year (ie not at all a serious category of such an offence) might nevertheless have this sentence taken into account.

The Committee notes that the bill merely enables past offences to be taken into account – such offences do not preclude the grant of a licence. However, there is a real possibility that such a provision may lead to a refusal to grant a licence in circumstances of apparent unfairness. The Committee, therefore, **seeks the Treasurer’s advice** as to the appropriateness of enabling such old convictions to be taken into account.

Pending the Treasurer’s advice, the Committee draws Senators’ attention to these 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 Assistant Treasurer

Under the licensing scheme proposed by the Bill the grant of a licence to an applicant may be refused, or an existing licence may be suspended or cancelled, if the decision maker forms the opinion that the applicant, or licence holder (as the case may be), is not a ‘fit and proper person’ (or a ‘fit and proper company’, if the applicant or licence holder is a company).

Proposed sections 39B and 39H provide that, in forming an opinion as to whether an individual is a ‘fit and proper person’, the decision maker can have regard to a number of matters that are indicative of compliance risks associated with the individual’s personal attributes. Proposed sections 39C and 39I provide a corresponding list of matters, in forming an opinion as to whether a company is a ‘fit and proper company’.

The matters listed in proposed sections 39B and 39H include whether the individual has previously held a licence which has been cancelled, or has participated in the management or control of a company that has had its licence cancelled, or whether the individual is an undischarged bankrupt. In applying for a licence, the making of a false or misleading statement in the application is also a relevant consideration.

If a person has been convicted of an offence of the requisite seriousness within the preceding 10 -year period, or charged with such an offence in the preceding year, these are indicative of compliance risks associated with that person holding a licence, and are therefore matters that the decision maker should take into account in considering whether the person is a fit and proper person to hold the relevant licence.

The choice of nominal rather than actual penalties as the threshold for determining the seriousness of an offence is based both on consistency with other Commonwealth statutes and, because of remissions and alternative sentencing practices, on uncertainties associated with defining what an actual penalty is.

Nevertheless, the nature and circumstances of a previous offence and the penalty actually imposed for the offence are likely to be relevant in forming a conclusion about whether the individual is a fit and proper person. Details such as these may well be relevant to the assessment of the compliance risk presented by the individual having regard to the activities that would be permitted by the licence.

The proposed 'fit and proper person' criteria are based on those listed in subsection 81(2) of the *Customs Act 1901*. Section 81 sets out the matters relevant to a decision by the CEO of Customs not to grant a warehouse licence. There are similarities between warehouse licences and the proposed licences for excise purposes.

If the application is for a producer licence or dealer licence, the grant of the licence can be refused on 'fit and proper person' grounds only if the decision maker is also satisfied that it is necessary to refuse to grant the licence to protect the revenue. Similarly, if the licence held is a producer licence or dealer licence it can be suspended or cancelled on 'fit and proper person' grounds only if the decision maker is also satisfied that it is necessary to suspend or cancel the licence to protect the revenue. Protecting the revenue is, however, not a mandatory requirement for refusing to grant, suspending or cancelling a manufacturer licence or storage licence on 'fit and proper person' grounds.

A decision to refuse to grant, or to cancel or suspend, a licence may also be made on other grounds relevant to compliance risks associated with the applicant or licence holder, such as the physical security of the premises relating to the licence. A decision to refuse to grant, or to cancel or suspend, a licence may therefore be made either solely on 'fit and proper person' grounds (in the case of a manufacturer licence or storage licence) or in conjunction with other grounds.

A person dissatisfied with a decision to refuse to grant, or to cancel or suspend, a licence would be able to seek internal review of that decision, and would have rights to seek external review of the decision both on the merits and on its legal validity.

The time period within which prior convictions can be taken into account is also consistent with the Spent Convictions Scheme in Part VIIC of the *Crimes Act 1914*.

It is considered that these prior convictions, and matters relating to those convictions, can be relevant considerations in forming a conclusion about whether an individual is a fit and proper person to hold a licence for excise purposes. Review processes will ensure that prior convictions are not unfairly emphasised in exercising the discretion to refuse to grant, or to cancel or suspend, a licence.

The Committee thanks the Assistant Treasurer for this detailed response which addresses the Committee's concerns.

Apparently non-reviewable discretion

Proposed new subsection 129F(1)

The bill proposes to include a new Part XA in the Principal Act. This Part creates a system of infringement notices for certain offences as an alternative to prosecutions for those offences.

Under proposed subsection 129F(1), the CEO of Customs, if he or she is satisfied that it is proper in all the circumstances, may withdraw an infringement notice. The Explanatory Memorandum suggests that such a withdrawal would then expose the alleged offender to the full rigour of a prosecution, with the likelihood that a more severe penalty will be imposed. No reference is made to the possibility that such a withdrawal may result in an offender not being prosecuted at all.

It is not clear whether this discretion is to be subject to any form of review. The Committee therefore, **seeks the Treasurer's advice** as to the possible consequences of the exercise of this discretion, and whether its exercise is subject to any form of review, and, if not, whether it ought be.

Pending the Treasurer's advice, the Committee draws Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable discretions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Assistant Treasurer

Proposed Part XA of the Excise Act introduces an infringement notice scheme that will provide some offenders with the option of paying a fixed fine and avoiding the vexation and costs of court proceedings. Alternatively, offenders can choose not to pay the fine and have their case heard in court. The infringement notice penalty is one-fifth of the maximum penalty for the corresponding strict liability offence, which in turn is one-fifth of the maximum pecuniary penalty where the prosecutor establishes the requisite mental element for the offence.

An offender would not have the right to require an infringement notice to be issued to them. The decision to prosecute or to issue an infringement notice would be entirely at the discretion of the CEO, his delegate or other authorised officer.

Proposed section 129E provides for the withdrawal of an infringement notice. The possible consequences that flow from withdrawal are either that the recipient of the notice is to be prosecuted or that the recipient is to be neither prosecuted nor subject to the infringement notice penalty. This is a corollary of the discretion of whether to prosecute, which is not a reviewable decision.

It is not considered that any rights, liberties or obligations of the recipient of an infringement notice can be adversely affected by a decision to withdraw the notice. The prospect of prosecution for the offence is made clear to the recipient at the time the notice is issued to them. Proposed subsection 129C(2) expressly requires the infringement notice to state that payment of the infringement notice penalty will excuse the person from prosecution, unless the notice is withdrawn. If a decision is made to prosecute, and the infringement notice is withdrawn, the offender will have the opportunity of a hearing in court.

Accordingly, it is considered that the exercise of the discretion to withdraw an infringement notice is not one that should also be subject to administrative review.

I trust that the above information will be useful in the Committee's deliberations in relation to these matters.

The Committee thanks the Assistant Treasurer for this response.

Renewable Energy (Electricity) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 9 of 2000*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 4 August 2000. 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 2000

This bill was introduced into the House of Representatives on 22 June 2000 by the Parliamentary Secretary to the Minister for the Environment and Heritage. [Portfolio responsibility: Environment and Heritage]

The bill implements a commitment to introduce a mandatory target for the uptake of renewable energy in power supplies in order to contribute to the reduction of Australia's greenhouse gas emissions. In general terms, the bill establishes:

- a requirement for wholesale purchasers and notional wholesale purchasers of electricity to purchase additional renewable energy, substantiated through holding renewable energy certificates;
- a regulatory framework for parties able to create renewable energy certificates for their electricity generation which may be traded;
- a Renewable Energy Regulator to oversee the scheme;
- reporting requirements to record and report to the Regulator liabilities incurred under the legislation and the surrendering of certificates to meet those liabilities; and
- the authority for some administrative details, definitions and guidelines to be prescribed by regulation.

Strict liability offences

Subclauses 24(1) and 154(1)

Subclauses 24(1) and 154(1) of this bill create offences of strict liability, where the prosecution need prove only the fact of the contravention, but is not required to prove that the conduct was done intentionally or recklessly. Subclauses 24(3) and 154(3) provide that the same conduct, if done intentionally, is also a criminal offence which attracts a greater penalty, and the provisions are therefore in accord with the *Criminal Code*.

However, the Explanatory Memorandum fails to provide any reason for the imposition of strict liability in these instances. The Committee, therefore, **seeks the Minister's advice**, as to the reasons for the imposition of strict liability in these circumstances.

Pending the Minister's advice, the Committee draws Senators' attention to these 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 following outlines the reasons behind the inclusion of a strict liability offence in the Renewable Energy (Electricity) Bill 2000.

Clause	Reason for penalty
24 (3)	The creation of valid renewable energy certificates is integral to the effectiveness of the measure. Renewable energy certificates can only be created for eligible electricity, which can contribute towards the achievement of the target. The sale of these certificates provides an important revenue stream for renewable energy generators. Renewable energy certificates that are intentionally, invalidly created displace eligible electricity required to meet the targets (reducing the overall greenhouse gas impact of the measure) which would impact on the revenue of generators validly producing eligible electricity. It is therefore necessary to have both a strict liability offence and one with a higher penalty for intentionally creating invalid renewable energy certificates.
154 (3)	The provision of documents, such as the statements and returns required by the Regulator, is fundamental in assessing compliance with the requirements of the measure. Where a party intentionally delays in providing documents

	to the Regulator, this may cause: unnecessary delays in determining liabilities and overall compliance with the measure; expense to the Regulator in undertaking default assessments; or disruption to the ability of the Regulator to review decisions under appeal. The legislation therefore includes a stronger penalty to discourage a party intentionally delaying the provision of documents.
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I trust this adequately addresses your issues.

The Committee thanks the Minister for this response.

Telecommunications (Consumer Protection and Service Standards) Amendment Act (No. 1) 2000

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No 7 of 2000*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 1 August 2000.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 30 June 2000), the response from the Minister 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 2000

This bill was introduced into the House of Representatives on 10 May 2000 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the universal service regime contained in the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to:

- enhance industry certainty by enabling the Minister to determine a universal service provider's net universal service cost (NUSC) in advance for 2000-01 and for up to 3 years in advance;
- support the proposed \$150 million tender for untimed local calls in Telstra's Extended Zones in remote Australia; and
- provide greater flexibility in relation to the declaration of universal service providers and digital data service providers.

The bill also contains application and transitional provisions.

Non-reviewable discretion

Schedule 1, items 16 and 18

The effect of the amendments proposed by items 16 and 18 of Schedule 1 to this bill would seem to grant the relevant Minister a completely unfettered discretion to decide what system he or she might use to determine who is to be a national or regional Universal Service Provider. The exercise of this discretion does not appear to be subject to any form of judicial or Parliamentary oversight.

In the case of each item, the Explanatory Memorandum states that the proposed new provision “will enable the Minister to use any selection system that has been determined under section 22” for the purpose of deciding what carrier should be declared as a universal service provider in a particular situation, “or to make that decision on some other basis”.

Such Ministerial decisions may have serious financial effects, both on the company chosen to be a Universal Service Provider, and on others not so chosen. The Committee, therefore, **seeks the Minister’s advice** as to why such Ministerial decisions should not be reviewable either by Parliament or judicially.

Pending the Minister’s advice, the Committee draws Senators’ attention to these provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee’s terms of reference.

Relevant extract from the response from the Minister

As you may be aware, the Bill received passage on 30 June 2000. The Bill made a number of amendments to Part 2 of the *Telecommunications (Consumer Protection and Services Standards) Act 1999* (the Act).

Sections 22 and 23 of the Act provide for the Minister to determine a selection system for the selection of national or regional universal service providers (USPs). As explained in the Explanatory Memorandum to the Bill, a selection system does not need to be determined in order for a USP to be declared.

The amendments to ss.22 and 23 (in items 16 and 18 of the Bill) clarify that if a system has been determined, then the Minister has discretion as to whether or not to use it in declaring a USP. This is necessary because it may not always be appropriate for the existing selection system to be used to select a USP.

The Committee specifically raised the issue of the lack of Parliamentary or judicial review should a declaration decision be made without reference to a selection system in existence. If the Minister declares a USP with or without the use of a selection system, the declaration is disallowable (s.20). In addition, to the extent that any

selection process is administrative in nature, it will be subject to the usual scrutiny procedures applying to Government administration.

I trust that this information satisfies the Committee's concerns about the Bill.

The Committee thanks the Minister for this response, which confirms that, under these provisions, a universal service provider (USP) may be declared through the application of a selection system, or in any other way.

While such a declaration may indeed be disallowable, the Parliament, in considering possible disallowance, is unlikely to be aware of whether the declaration was made following the application of a selection system, or arbitrarily.

As the Committee noted, such a declaration may have serious financial consequences, both on the company chosen as a USP and on others not so chosen. Notwithstanding that this bill has now been enacted, the Committee remains concerned by a non-reviewable discretion of such arbitrariness.

The Committee notes that, on 29 June 2000, the Minister introduced the Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No 2) 2000 (the No 2 bill). That bill proposes the repeal of the universal service regime amended by this Act, and the introduction of a revised regime. The Committee would appreciate the Minister's confirmation, during debate on the No 2 bill, that the issue of the possible arbitrary selection of a USP is no longer contemplated under the revised universal service regime.

Barney Cooney
Chairman



Min No. 99/194320

Senator B Cooney
Chairman
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

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10 AUG 2000

10 AUG 2000

Senate Standing C'ttee
for the Scrutiny of Bills

Dear Senator Cooney

I refer to the letter sent to my office from Mr James Warmenhoven, Secretary of the Standing Committee for the Scrutiny of Bills, dated 23 September 1999. Mr Warmenhoven wrote regarding the comments contained in the Scrutiny of Bills Alert Digest No.14 of 1999 (22 September 1999) concerning the Copyright Amendment (Digital Agenda) Bill 1999 (the Bill).

As the Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston, has joint portfolio responsibility for this Bill, I present the following response to the Committee on behalf of both myself and Senator Alston:

Standing Committee comments regarding sections 132(5F), (5G), (5H) and (5K)

The Committee has made a number of comments regarding sections 132(5F), (5G), (5H) and (5K). As a result of Government amendments, these provisions have been re-numbered respectively as subsections 132(5E), (5F), (5G) and (5J). The Committee has drawn attention to subsection 132 (5J), (formerly subsection 132(5K)) which places on a defendant the evidential burden of raising a defence under subsections 132(5E), (5F) and (5G) (formerly subsections 132(5F), (5G) and (5H)). These subsections provide defences to the offences set out in subsections 132 (5A) and (5B) (formerly subsections 132(5B) and (5C)) of the Bill.

Subsection 132(5A) prohibits the provision of a service to circumvent a technological protection measure. Subsection 132(5B) prohibits the manufacture, commercial dealing, importation for commercial dealing and making available online of a device to circumvent a technological protection measure.

Subsection 132(5E) provides a defence to the above offences if the prohibited act was done for the purposes of law enforcement or national security. Subsection 132(5F) provides a defence if the defendant supplied the device or service to a person to use only for a permitted purpose. The person being supplied with the device or service must provide the supplier with a signed declaration that the device or service is only to be used for an identified permitted purpose. A circumvention device or service is used for a "permitted purpose" if it is used to do an act comprised in the copyright in the work or other subject-matter and this act is done either with the permission of the copyright owner (or licensee), or under an existing identified exception under the *Copyright Act 1968* (see subsection 132(5H)). For example, a "permitted purpose" includes reproducing a work relying on the exceptions for libraries and archives. Subsection 132(5G) provides a defence if the defendant made or imported a circumvention device for use only for a permitted purpose or for the purpose of

enabling another person to supply the device or service for use only for a permitted purpose.

Subsection 132(5J) provides that in relation to subsections 132(5E), (5F) and (5G), the defendant bears the evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the act or matter claimed as a defence was done or existed.

Comments regarding sections 135AS(2) and (3)

The Committee has drawn attention to subsection 135AS(3) which provides for the burden of proof placed on a defendant raising a defence under subsection 135(2). The latter subsection provides a defence to the offences set out in subsection 135AS(1) of the Bill.

Subsection 135AS(1) prohibits the manufacture, commercial dealing, importation for commercial dealing and making available online of a broadcast decoding device. Subsection 135AS(2) provides a defence to these offences if the prohibited act was done for the purposes of law enforcement or national security. Subsection 135AS(3) provides that the defendant bears the evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the act was done for the purposes of law enforcement or national security.

Government's response

The Government considers that once the substantive offence has been proved by the prosecution, the evidential onus may fairly be placed on the defendant to raise the above defences because relevant information is clearly within the defendant's own knowledge. Furthermore, it would be more costly for the prosecution to disprove these defences than for the defendant to establish them. The shift in the evidential burden does not go to the substance of the conduct. It merely requires the defendant, once the conduct has been proved, to adduce evidence of a matter which would not only be peculiarly within his or her own knowledge, but would also be in his or her interest to bring to the immediate attention of the Court.

For example, in relation to a defence under either subsections 132(5E) or 135AS(2), it is clearly within the defendant's knowledge whether he or she undertook the proscribed acts for the purposes of law enforcement or national security. In relation to a defence under subsection 132(5F), it is clearly within the defendant's knowledge whether he or she has received a signed declaration in relation to the supply of a circumvention device or service stating that the device or service is to be used only for an identified permitted purpose. Further, a copy of such a declaration is likely to be in the defendant's possession. For a defence under subsection 132(5G) it is clearly within the defendant's knowledge whether he or she made or imported a circumvention device for use only for a permitted purpose or for supply only for a permitted purpose.

Furthermore, it would be difficult and costly for the prosecution to disprove these offences. For example, it would be difficult for the prosecution to prove that the defendant had not received a signed declaration in relation to the supply of a circumvention device or service. Similarly, it would be difficult and costly for the prosecution to prove that the defendant did not undertake a proscribed act for the purposes of law enforcement or national security.

Increased monetary penalties for certain offences under section 132 - Government amendments

I would also take this opportunity to draw the Committee's attention to further Government amendments to the Bill as first introduced. Item 100A of the Bill introduces new subsections 132(6AA) and 132(6AB). New subsection 132(6AA) provides that a higher monetary penalty (850 penalty points), but not an increased prison term, may be imposed for offences involving the first digitisation of copyright material. This is in comparison to subsection 132(AB) which maintains the current penalties of 550 penalty points for offences which do not involve the first digitisation of copyright material.

It is important to note that the increased monetary penalty does not apply to those new offences where there has been an imposition of an evidential burden on the defendant (subsections 132(5A) and 132(5B)). In relation to these offences only the current monetary penalty of 550 penalty points will apply.

The higher monetary penalty available under subsection 132(6AA) is intended to address the concerns of copyright owners regarding the additional risk of infringement to copyright material that has been converted into digital form. This amendment was made in response to the key recommendation (recommendation 1) of the House of Representatives Standing Committee on Legal and Constitutional Affairs Advisory Report on the Digital Agenda Bill. The Committee recommended that copyright owners receive greater protection in relation to the conversion of their material from hardcopy to digital form.

The Government is satisfied that the evidential onus placed on the defendant, and the increased monetary penalty for certain offences, in the above sections do not trespass unduly on personal rights and liberties.

Yours sincerely



DARYL WILLIAMS



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11 AUG 2000

Senate Standing C'ttee
for the Scrutiny of Bills

ASSISTANT TREASURER
Senator The Hon. Rod Kemp

PARLIAMENT HOUSE
CANBERRA ACT 2600

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- 8 AUG 2000

Senator Barney Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA

Dear Senator Cooney

I refer to Alert Digest No. 9 of 2000 and the concerns expressed by the Committee in relation to certain amendments proposed by the Excise Amendment (Compliance Improvement) Bill 2000.

Strict liability offences

The Bill proposes a tiered structure for offences against the *Excise Act 1901*. You have sought advice on why the tiered structure is now to be imposed by this Bill.

The offence provisions of the Excise Act have been accumulated over many years and in many instances are silent on the fault elements that constitute the offence. This has resulted in uncertainty about the presumption of *mens rea* as an essential element of a particular offence, in the context of the Excise Act as a revenue statute, and about available defences.

Moreover, administrative attempts to counter the recent growth in the trade in illicit tobacco have identified deficiencies in the existing offence provisions and in the relativity between current penalties and the prospective gains from illicit activity. The Bill proposes to address these matters.

In the course of reviewing offences covered by the proposed amendments the opportunity was taken to bring the provisions into line with current Commonwealth criminal law policy. Accordingly, the Attorney-General's Department was consulted in the drafting of the amendments which resulted in the tiered structure proposed by the Bill.

The tiered structure recognises the seriousness of offences that are associated with deliberate excise evasion or otherwise undermine the excise revenue base. For these offences, the mental elements are specified and a higher level of pecuniary penalty and imprisonment are provided for.

These offences are designed to regulate the behaviour of persons who conduct excise-related business activities. There is an expectation that such persons will apply a standard of care to their conduct which should ensure that non-compliant behaviour does not occur. It is recognised, however, that circumstances may arise where the offending conduct occurs but the requisite mental



element cannot be established without admission by the offender. Independent evidence of the mental element may also be difficult to gather for these offences.

Alternative offences based on strict liability are therefore needed to deter non-compliant behaviour of this kind. As these offences are less serious, the maximum penalty is one-fifth of that specified for that where the mental element is established. Imprisonment is obviously not appropriate in these cases. The common law defence of honest and reasonable mistake applies to these offences.

In the context of the growth of the illicit tobacco trade it is important that there is an effective enforcement regime to prevent erosion of the excise revenue base. In these circumstances, I consider that the tiered structure of offences, which includes strict liability and infringement notices for minor offences, is appropriate and will not unduly trespass on personal rights and liberties.

Old convictions, continuing consequences

Under the licensing scheme proposed by the Bill the grant of a licence to an applicant may be refused, or an existing licence may be suspended or cancelled, if the decision maker forms the opinion that the applicant, or licence holder (as the case may be), is not a 'fit and proper person' (or a 'fit and proper company', if the applicant or licence holder is a company).

Proposed sections 39B and 39H provide that, in forming an opinion as to whether an individual is a 'fit and proper person', the decision maker can have regard to a number of matters that are indicative of compliance risks associated with the individual's personal attributes. Proposed sections 39C and 39I provide a corresponding list of matters, in forming an opinion as to whether a company is a 'fit and proper company'.

The matters listed in proposed sections 39B and 39H include whether the individual has previously held a licence which has been cancelled, or has participated in the management or control of a company that has had its licence cancelled, or whether the individual is an undischarged bankrupt. In applying for a licence, the making of a false or misleading statement in the application is also a relevant consideration.

If a person has been convicted of an offence of the requisite seriousness within the preceding 10 year period, or charged with such an offence in the preceding year, these are indicative of compliance risks associated with that person holding a licence, and are therefore matters that the decision maker should take into account in considering whether the person is a fit and proper person to hold the relevant licence.

The choice of nominal rather than actual penalties as the threshold for determining the seriousness of an offence is based both on consistency with other Commonwealth statutes and, because of remissions and alternative sentencing practices, on uncertainties associated with defining what an actual penalty is.

Nevertheless, the nature and circumstances of a previous offence and the penalty actually imposed for the offence are likely to be relevant in forming a conclusion about whether the individual is a fit and proper person. Details such as these may well be relevant to the assessment of the compliance risk presented by the individual having regard to the activities that would be permitted by the licence.

The proposed 'fit and proper person' criteria are based on those listed in subsection 81(2) of the *Customs Act 1901*. Section 81 sets out the matters relevant to a decision by the CEO of Customs not

to grant a warehouse licence. There are similarities between warehouse licences and the proposed licences for excise purposes.

If the application is for a producer licence or dealer licence, the grant of the licence can be refused on 'fit and proper person' grounds only if the decision maker is also satisfied that it is necessary to refuse to grant the licence to protect the revenue. Similarly, if the licence held is a producer licence or dealer licence it can be suspended or cancelled on 'fit and proper person' grounds only if the decision maker is also satisfied that it is necessary to suspend or cancel the licence to protect the revenue. Protecting the revenue is, however, not a mandatory requirement for refusing to grant, suspending or cancelling a manufacturer licence or storage licence on 'fit and proper person' grounds.

A decision to refuse to grant, or to cancel or suspend, a licence may also be made on other grounds relevant to compliance risks associated with the applicant or licence holder, such as the physical security of the premises relating to the licence. A decision to refuse to grant, or to cancel or suspend, a licence may therefore be made either solely on 'fit and proper person' grounds (in the case of a manufacturer licence or storage licence) or in conjunction with other grounds.

A person dissatisfied with a decision to refuse to grant, or to cancel or suspend, a licence would be able to seek internal review of that decision, and would have rights to seek external review of the decision both on the merits and on its legal validity.

The time period within which prior convictions can be taken into account is also consistent with the Spent Convictions Scheme in Part VIIC of the *Crimes Act 1914*.

It is considered that these prior convictions, and matters relating to those convictions, can be relevant considerations in forming a conclusion about whether an individual is a fit and proper person to hold a licence for excise purposes. Review processes will ensure that prior convictions are not unfairly emphasised in exercising the discretion to refuse to grant, or to cancel or suspend, a licence.

Apparently non-reviewable discretion

Proposed Part XA of the Excise Act introduces an infringement notice scheme that will provide some offenders with the option of paying a fixed fine and avoiding the vexation and costs of court proceedings. Alternatively, offenders can choose not to pay the fine and have their case heard in court. The infringement notice penalty is one-fifth of the maximum penalty for the corresponding strict liability offence, which in turn is one-fifth of the maximum pecuniary penalty where the prosecutor establishes the requisite mental element for the offence.

An offender would not have the right to require an infringement notice to be issued to them. The decision to prosecute or to issue an infringement notice would be entirely at the discretion of the CEO, his delegate or other authorised officer.

Proposed section 129F provides for the withdrawal of an infringement notice. The possible consequences that flow from withdrawal are either that the recipient of the notice is to be prosecuted or that the recipient is to be neither prosecuted nor subject to the infringement notice penalty. This is a corollary of the discretion of whether to prosecute, which is not a reviewable decision.

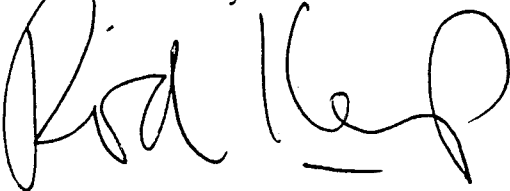
It is not considered that any rights, liberties or obligations of the recipient of an infringement notice can be adversely affected by a decision to withdraw the notice. The prospect of prosecution for the

offence is made clear to the recipient at the time the notice is issued to them. Proposed subsection 129C(2) expressly requires the infringement notice to state that payment of the infringement notice penalty will excuse the person from prosecution, unless the notice is withdrawn. If a decision is made to prosecute, and the infringement notice is withdrawn, the offender will have the opportunity of a hearing in court.

Accordingly, it is considered that the exercise of the discretion to withdraw an infringement notice is not one that should also be subject to administrative review.

I trust that the above information will be useful in the Committee's deliberations in relation to these matters.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rod Kemp', with a stylized flourish at the end.

ROD KEMP



Senator the Hon Robert Hill

Leader of the Government in the Senate
Minister for the Environment and Heritage

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14 AUG 2000

Senate Standing Committee
for the Scrutiny of Bills

Senator Barney Cooney
Chairman of the Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Attention: James Warmenhoven, Secretary
Standing Committee for the Scrutiny of Bills

- 4 AUG 2000

Dear Senator Cooney 

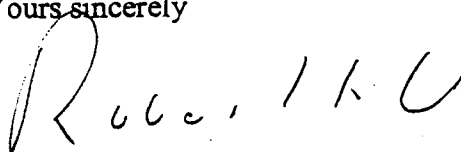
Thank you for your letter of 29 June 2000 advising of the Standing Committee's questions relating to the Renewable Energy (Electricity) Bill 2000, as outlined in the Scrutiny of Bills Alert Digest No 9 of 2000.

The following outlines the reasons behind the inclusion of a strict liability offence in the Renewable Energy (Electricity) Bill 2000.

Clause	Reason for penalty
24 (3)	The creation of valid renewable energy certificates is integral to the effectiveness of the measure. Renewable energy certificates can only be created for eligible electricity, which can contribute towards the achievement of the target. The sale of these certificates provides an important revenue stream for renewable energy generators. Renewable energy certificates that are intentionally, invalidly created displace eligible electricity required to meet the targets (reducing the overall greenhouse gas impact of the measure) which would impact on the revenue of generators validly producing eligible electricity. It is therefore necessary to have both a strict liability offence and one with a higher penalty for intentionally creating invalid renewable energy certificates.
154 (3)	The provision of documents, such as the statements and returns required by the Regulator, is fundamental in assessing compliance with the requirements of the measure. Where a party intentionally delays in providing documents to the Regulator, this may cause: unnecessary delays in determining liabilities and overall compliance with the measure; expense to the Regulator in undertaking default assessments; or disruption to the ability of the Regulator to review decisions under appeal. The legislation therefore includes a stronger penalty to discourage a party intentionally delaying the provision of documents.

I trust this adequately addresses your issues.

Yours sincerely



Robert Hill



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2 AUG 2000

Senate Standing Committee
for the Scrutiny of Bills

SENATOR THE HON RICHARD ALSTON

Minister for Communications, Information Technology and the Arts

Deputy Leader of the Government in the Senate

Senator B Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

01 AUG 2000

Dear Senator Cooney *Barnes* -

I am writing in response to the Committee's comments relating to the *Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 1) 2000* (the Bill) raised in the Scrutiny of Bills Alert Digest No.7 of 2000.

As you may be aware, the Bill received passage on 30 June 2000. The Bill made a number of amendments to Part 2 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Act).

Sections 22 and 23 of the Act provide for the Minister to determine a selection system for the selection of national or regional universal service providers (USPs). As explained in the Explanatory Memorandum to the Bill, a selection system does not need to be determined in order for a USP to be declared.

The amendments to ss.22 and 23 (in items 16 and 18 of the Bill) clarify that if a system has been determined, then the Minister has discretion as to whether or not to use it in declaring a USP. This is necessary because it may not always be appropriate for the existing selection system to be used to select a USP.

The Committee specifically raised the issue of the lack of Parliamentary or judicial review should a declaration decision be made without reference to a selection system in existence. If the Minister declares a USP with or without the use of a selection system, the declaration is disallowable (s.20). In addition, to the extent that any selection process is administrative in nature, it will be subject to the usual scrutiny procedures applying to Government administration.

I trust that this information satisfies the Committee's concerns about the Bill.

Yours sincerely

RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts