SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2002

20 February 2002

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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

FIRST REPORT OF 2002

The Committee presents its First Report of 2002 to the Senate.

The Committee 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:

Air Passenger Ticket Levy (Collection) Act 2001

Border Protection (Validation and Enforcement) Act 2001

Defence Legislation Amendment (Application of Criminal Code) Act 2001

Electoral and Referendum Amendment Act (No. 1) 2001

Environment and Heritage Legislation Amendment Bill (No. 2) 2000 [2001]

Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001

Health and Aged Care Legislation Amendment (Application of Criminal Code) Act 2001

Migration Amendment (Excision from Migration Zone) Bill 2001

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001

Migration Legislation Amendment Act (No. 6) 2001

Taxation Laws Amendment Act (No. 5) 2001

Trade Practices Amendment (Telecommunications) Act 2001

Air Passenger Ticket Levy (Collection) Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 14 of 2001*, in which it made various comments. The Minister for Transport and Regional Services has responded to those comments in a letter dated 24 December 2001. 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.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 27 September 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 14 of 2001

This bill was introduced into the House of Representatives on 20 September 2001 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Transport and Regional Services]

The bill proposes a framework for the collection of a passenger ticket levy on all flights originating in Australia and which have been delivered to passengers in Australia. The proceeds of this levy are to fund a scheme for the payment of entitlements to the former employees of companies in the Ansett group following the insolvency of Ansett Airlines and a number of its subsidiaries.

The bill also contains a regulation-making power.

Cessation of levy by Ministerial determination
Clause 12

As noted above, this bill is concerned with the collection of a levy. Subclause 9(1) makes clear that the levy is to be imposed and collected only for a limited time. However, clause 12 provides that the date of termination of the levy (the 'final levy month') is to be determined solely by the Minister, by notice published in the *Gazette*, with no provision for parliamentary oversight.

The Committee **seeks the Minister's advice** as to why it is appropriate that he have an unfettered discretion to determine the period during which this levy is to be collected, and why the bill makes no provision for Parliamentary oversight of the exercise of this discretion.

Pending the Minister's advice, the Committee draws Senators' attention to this 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, and to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Section 12 states that I may, by notice in the Gazette, notify a month as the final levy month for the purposes of the Act and that once made, the notice cannot be revoked or amended.

The purpose of the Levy is to fund the costs of the Special Employee Entitlements Scheme. The Scheme ensures payment of entitlements to Ansett Group employees terminated by reason of the Group's insolvency to the standard enjoyed by the general community. The total amount of these payments is indeterminate at this time. The Scheme is administered by the Workplace Relations Minister who determines the terms for its operation, including the amounts that are paid in connection with the Scheme.

The effect of the Act is to separate the administration of the collection of the levy from the administration of the Scheme itself, but to ensure that the collection process compliments the manner in which the Scheme handles payments to the terminated employees. In drafting the Act, it was recognised that the indeterminate nature of the Scheme meant that over-collection of the Levy was a real risk. For this reason, there are a number of safeguards built into the Act, only one of which is the power given to the Minister for Transport and Regional Services to decide the final levy month.

In particular I refer the Committee to section 24 of the Act, which places an obligation on the Workplace Relations Minister to report to Parliament annually on the administration of the Scheme. This provides for a high degree of Parliamentary scrutiny of how the money collected will be used.

My decision to turn the Levy off will be based on the information provided by the Minister for Workplace Relations and is an administrative decision designed to ensure that air passengers will not be required to pay the Levy any longer than is absolutely necessary to assist the former employees of the Ansett Group to obtain their entitlements.

The Committee thanks the Minister for this response which indicates that Parliamentary oversight is to be maintained through the requirement for an annual report. While the provision of an annual report provides for a degree of Parliamentary scrutiny, this scrutiny usually only occurs many months after the fact. Further, the requirement for an annual report seems to indicate that the levy may be in place for a considerable time.

Insufficient Parliamentary scrutiny of entitlement scheme
Clause 22

Clause 22 of this bill will permit the Minister to determine the terms of a scheme for the payment of certain entitlements to former employees of companies in the Ansett group. Such a scheme appears to be legislative in nature, but the bill makes no provision for Parliamentary scrutiny of the scheme, or its possible disallowance. Indeed, while the Minister's determination must be in writing, the provision contains no statutory requirement that the details of the scheme be publicly notified in any manner.

The approach in clause 22 contrasts with the approach in clause 23, which authorises the Minister to determine how any surplus levy is to be distributed. Under clause 23, the Minister may determine that any surplus be distributed "in accordance with a scheme prescribed by the regulations". Such a scheme would be subject to Parliamentary scrutiny, and disallowance.

The Committee, therefore, **seeks the Minister's advice** as to why the scheme for distributing surplus levy is subject to Parliamentary scrutiny, while the scheme for distributing the levy itself is not.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> The Scheme utilises a private sector entity to administer payments of employee entitlements. The entity was appointed by way of contract. In order to attract a commercial entity willing and able to take on the role, it was necessary to provide commercial certainty. A provision that allows for decisions relating to the funds used by the private sector entity to be overturned as disallowable instruments would not provide that certainty and would have seriously inhibited the ability to provide assistance to the Ansett employees.
>
> Section 22 is open to Parliamentary scrutiny by virtue of section 24, which clearly states that the Minister for Workplace Relations must provide an Annual Report to both Houses of Parliament regarding the amounts he has authorised for payment as well as the activities undertaken by the private sector entity.
>
> Thank you for raising this matter with me.

The Committee thanks the Minister for this response which indicates that a private sector entity has been chosen to administer payments of employee entitlements and that Parliamentary oversight of the scheme would affect the need for "commercial certainty".

Unfortunately, this provision seems to be another instance where the delegating of a task to a private sector entity has had the result (presumably unintended) of reducing transparency and the capacity for scrutiny.

Notwithstanding that this bill has been enacted, the Committee continues to draw Senators' attention to this provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Border Protection (Validation and Enforcement Powers) Bill 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 13 of 2001*, in which it made various comments. The Minister for Immigration and Multicultural and Indigenous Affairs has responded to those comments in a letter dated 25 January 2002. 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.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 27 September 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 13 of 2001

This bill was introduced into the House of Representatives on 18 September 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to validate certain actions taken in relation to vessels carrying persons reasonably believed to be intending to enter Australia unlawfully. These provisions:

- apply to any action taken by the Commonwealth or others in relation to particular vessels in the period commencing on 27 August 2001 and ending on the day on which the bill commences;
- specify that any such action was lawful when it occurred; and
- provide that no proceedings against the Commonwealth or others may be instituted or continued in any court in respect of these actions.

In addition, Schedules 1 and 2 to the bill amend the *Customs Act 1901* and the *Migration Act 1958* to clarify the operation of certain existing powers in those Acts, and to provide additional powers in relation to vessels which are carrying persons who are believed to be attempting to enter Australia unlawfully.

Schedule 2 also proposes to amend the *Migration Act 1958* to provide for mandatory minimum penalties in relation to people smuggling offences.

Retrospective validation of 'any action'
Part 2

Part 2 of this bill deems all actions to have been lawful when they occurred, and provides that no civil or criminal proceedings may be instituted or continued against the Commonwealth, or a Commonwealth officer, or any other person who acted on behalf of the Commonwealth in respect of those actions.

Relevant actions are defined as any action taken during the validation period by the Commonwealth, or a Commonwealth officer, or by any other person, acting on behalf of the Commonwealth, in relation to the *MV Tampa,* or the *Aceng*, or any other vessel carrying persons reasonably believed to be intending to enter Australia unlawfully, or any person on board any such vessel. Vessel is defined as having the same meaning as in the Migration Act, (where it includes an aircraft or an installation)

Clause 4 of the bill specifies the validation period as the period from 27 August 2001 until the date on which the bill commences (ie receives Royal Assent).

Clause 8 provides that compensation is payable for any acquisition of property under this Part.

These provisions raise a number of issues. First, they seek to validate actions retrospectively from 27 August. Secondly, they seek to validate any action in relation to two specified vessels, and in relation to any other unspecified vessel carrying persons reasonably believed to be intending to enter Australia unlawfully for an undefined period.

The Committee is usually concerned by provisions which retrospectively validate actions, particularly when they are expressed in such wide terms. The Committee, therefore, **seeks the Minister's advice** as to:

- whether these provisions have the effect of making lawful acts which are currently unlawful, or which would be unlawful if they occurred in Australia;
- why the validation is expressed so widely, and whether it would operate to validate all actions by an officer during the relevant period (including, for example, an action which caused the death of, or serious injury to, a person detained on a vessel);

- whether the actions which are retrospectively validated must have complied with guidelines as to conduct or other internal regulatory procedures, and what remedies would be available to a person where, for example, a Commonwealth official took action which was 'improper' but which was validated by the bill; and
- whether the phrase 'an intention to enter Australia' refers to Australian land or Australian territorial waters.

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

Schedules 1 and 2 to the Act amend the *Customs Act 1901* ("the Customs Act") and the *Migration Act 1958* ("the Migration Act") to introduce:

- new provisions regarding the detention of a person found on a detained ship or aircraft and to expressly clarify the nature of the powers an officer may exercise in relation to such persons; and
- a new search power in relation to persons on certain detained ships or aircraft and a power to return persons to a detained ship.

Schedule 2 also amends the Migration Act to provide for mandatory minimum penalties in relation to people smuggling offences. These provisions do not apply to persons under the age of 18 years.

Part 2 - Retrospective validation of 'any action'

The Committee has expressed concern about the retrospective application and the broad scope of the validation provisions in Part 2 of the Act.

In particular, the Committee seeks advice in relation to the following matters:

Whether these provisions have the effect of making lawful acts which are currently unlawful, or which would be unlawful if they occurred in Australia

Why the validation is expressed so widely, and whether it would operate to validate all actions by an officer during the relevant period including, for example, an action which caused the death of, or serious injury to, a person detained on a vessel)

The purpose of the Act is to enhance Australia's border protection powers and to confirm that recent actions taken in relation to vessels carrying unauthorised arrivals to Australian waters are valid.

The Government believes that all actions taken between 27 August 2001 and 27 September 2001 are, and have always been, lawful. This position was recently vindicated by the decision of the Full Federal Court in relation to issues surrounding the *MV Tampa.*

The Act ensures that there is no doubt about the validity of our border control powers and the Government's actions in relation to vessels such as the *MV Tampa*.

Whether the actions which are retrospectively validated must have complied with guidelines as to conduct or other internal regulatory procedures

Actions taken by naval personnel under the Act must be taken in accordance with established rules of engagement. The rules provide guidance on the exercise of powers and limit the use of force. These are standing orders which all naval staff are aware of.

What remedies would be available to a person where, for example, a Commonwealth official took action which was 'improper' but which was validated by the Act

The Government believes that no Commonwealth official took improper action that would give rise to the grant of a remedy in a court of law. All actions taken between 27 August 2001 and 27 September 2001 are, and have always been, lawful. This position was recently vindicated by the decision of the Full Federal Court in relation to issues surrounding the *MV Tampa.*

Whether the phrase 'an intention to enter Australia' refers to Australian land or Australian territorial waters

Under section 15B of the *Acts Interpretation Act 1901,* "Australia" includes both the landmass as well as the territorial sea of Australia. Therefore, an 'intention to enter Australia' means both an intention to enter Australian land and an intention to enter Australian territorial waters.

The Committee thanks the Minister for this response which reaffirms a belief that no improper or unlawful actions have taken place. Given this, it would seem unnecessary to have legislated to retrospectively validate proper or lawful actions.

Notwithstanding that this bill has been enacted, the Committee continues to draw 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.

Detention and search of persons
Schedule 1, items 3 and 4; Schedule 2 items 8 and 9

Items 3 and 4 of Schedule 1 to this bill propose to insert certain provisions in the Customs Act. Items 8 and 9 of Schedule 2 propose to insert similar provisions in the Migration Act. In general terms, these provisions:

- prohibit the institution of proceedings for restraints on the liberty of persons where those persons are on board a detained ship or aircraft;

- empower officers to detain persons found on ships or aircraft and either bring them to the migration zone or to a place outside Australia;
- empower officers, without warrant, to search a detained person's clothing or property for weapons or items which might assist in an escape; and
- empower officers to use reasonable force to return a detained person to a ship.

These provisions raise a number of issues within the Committee's terms of reference. The Committee **seeks the Minister's advice** as to:

- why it is thought necessary to prohibit the institution of proceedings in relation to (presumably otherwise unlawful) detention;
- whether the powers to detain and search are to be carried out on the high seas or in Australia's territorial waters;
- why, given the availability of telephone warrants, it is appropriate that searches of detainees be conducted without warrant;
- whether this bill is seen as dealing with 'extraordinary circumstances' or a situation of emergency, and why these powers are not subject to a sunset clause.

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 Committee has expressed concern about a number of provisions in Schedules 1 and 2 to the Act. The provisions clarify the operation of existing powers in the Customs Act and Migration Act and provide additional powers in relation to vessels carrying persons who are believed to be seeking to enter Australia unlawfully.

In particular, the Committee seeks advice in relation to the following matters:

Why it is thought necessary to prohibit the institution of proceedings in relation to (presumably otherwise unlawful) detention

The Act is concerned with circumstances where vessels are intercepted at sea and ensures that there is no doubt about the validity of our border control powers and the Government's actions in relation to vessels such as the *MV Tampa*.

The Government believes it is inappropriate to allow litigation to compromise actions that are aimed at protecting Australia's sovereign right to determine who is authorised to enter Australia.

However, the Act does not purport to affect the jurisdiction of the High Court under section 75 of the Constitution, and as such it does not provide a blanket exclusion from judicial supervision.

Whether the powers to detain and search are to be carried out on the high seas or in Australia's territorial waters

There are three circumstances in which the power proposed under section 245E of the Migration Act may be exercised on the high seas:

- where the ship is Australian;
- where the ship is one "without nationality" on the high seas - this would include a lot of the smaller Indonesian fishing boats; and
- where the ship is a mother ship supporting contraventions in Australia.

Why, given the ability of telephone warrants it is appropriate that searches of detainees be conducted without warrant

It is not practical to require an officer to obtain a telephone warrant before conducting a search of a person who is on a ship or aircraft that has been detained.

The search powers in new section 245FA are based on existing section 252 of the Migration Act which applies to persons in immigration detention and others. That power is also exercised without the need to obtain a warrant.

Whether this Act is seen as dealing with "extraordinary circumstances" or a situation of emergency, and why these powers are not subject to a sunset clause

This Act is a direct response to the increasing threat to Australia's sovereign right to determine who will enter and remain here. The threats have resulted from the growth of organised criminal gangs of people smugglers who bypass normal entry procedures.

Schedule 2 to the Act provides additional statutory authority to deal with vessels carrying unauthorised arrivals and the unauthorised arrivals themselves who may arrive in the future.

It is not appropriate for the legislation to have a sunset clause as such a clause would merely send a signal to people smugglers to delay rather than cease their operations.

The Committee thanks the Minister for this response which notes that the Act is a response to the increasing threat to Australia's right to determine who will enter and remain within its borders. Nevertheless, a number of provisions in the bill continue to raise issues within the Committee's terms of reference.

Notwithstanding that this bill has been enacted, the Committee continues to draw 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.

Mandatory minimum sentences
Proposed new section 233C

Item 5 of Schedule 2 to this bill proposes to insert a new section 233C in the *Migration Act 1958*. This new provision will impose mandatory minimum sentences for various offences under that Act. In general, mandatory sentences limit the usual judicial discretion exercised when determining a proper sentence given all the circumstances of a particular offence.

The Committee **seeks the Minister's advice** as to why it is appropriate to give the Executive control by limiting judicial discretion in these circumstances.

Pending the Minister's advice, the Committee draws Senators' attention to this 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 Committee seeks advice as to why it is appropriate to give the Executive control by limiting judicial discretion in relation to sentencing in circumstances described in new section 233C.
>
> New sections 233B and 233C introduce minimum mandatory penalties in relation to the people smuggling offences in sections 232A and 233A of the Migration Act. These provisions do not apply to persons under the age of 18 years.
>
> In 1999, the Parliament created new people smuggling offences that carried maximum penalties of 20 years imprisonment. However, since the creation of those offences, the penalties imposed by the Courts have generally been much less than the maximum penalty available.
>
> This has not been a strong deterrent to persons who are participating in people smuggling, and some have committed repeat offences once they were released from prison.
>
> New sections 233B and 233C make it absolutely clear that Australia considers people smuggling to be a very serious offence. The provisions are intended to provide a deterrent to those people who might be minded to act as people smugglers.

The Committee thanks the Minister for this response. Mandatory sentencing raises a number of issues within the Committee's terms of reference.

Notwithstanding that this bill has been enacted, the Committee continues to draw Senators' attention to this 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.

Defence Legislation Amendment (Application of Criminal Code) Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 12 of 2001*, in which it made various comments. The then Minister Assisting the Minister for Defence responded to those comments in a letter dated 8 November 2001. 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.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 1 October 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 12 of 2001

This bill was introduced into the House of Representatives on 29 August 2001 by the Minister for Veterans' Affairs. [Portfolio responsibility: Defence]

The bill proposes amendments to:

- the *Defence Force Discipline Act 1982* to harmonise the offence-creating and related provisions of that Act with general principles of criminal responsibility as codified in the Criminal Code. The bill also makes a technical amendment to the definition of 'defence member'; and
- eleven other Acts within the defence portfolio so that those Acts will operate harmoniously with the Criminal Code. The amendments include repealing unnecessary offences; re-formulating offences into the *Criminal Code* drafting format in order that their physical and fault elements are readily apparent; and removing ambiguity with respect to their interpretation.

Strict liability offences
Various provisions

The effect of this bill is to include, in legislation administered within the Defence portfolio offences which are specified as offences of strict liability. An offence is one of strict liability where it provides that a person may be punished for doing something, or failing to do something, whether or not they have a guilty intent. The Committee is usually concerned at the imposition of strict liability and is currently inquiring generally into the issue.

The Explanatory Memorandum states that these particular amendments are intended to ensure that when Chapter 2 of the *Criminal Code* is applied to all Commonwealth criminal offences, from 15 December 2001, the relevant offences "continue to operate as intended by Parliament".

The Committee has considered a number of bills which make similar provision for legislation administered within other portfolio areas. With regard to this bill, the Committee **seeks the Minister's advice** as to whether any of its provisions converts an offence which previously was not one of strict liability into such an offence.

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

As identified in the Digest, the Bill proposes to amend a number of existing criminal offences within the Defence portfolio to expressly provide that they are offences of strict and absolute liability. This is made necessary by section 6.1 of the *Criminal Code,* which states that a criminal offence is a strict or absolute liability offence only if express provision is made to that effect. The converse will also apply, namely that any offence which is not expressly stated to be an offence of strict or absolute liability will be interpreted to be a fault-based offence. The intention behind the strict and absolute liability amendments made by the Bill is to preserve the status quo in relation to strict and absolute liability. It is important to note that such amendments are only made to offences that are judged to be presently of a strict or absolute liability character, thus maintaining the status quo.

The operation of strict and absolute liability in Commonwealth criminal offences is currently uncertain and haphazard because the principles used by courts over time to identify strict liability offences have been inconsistently developed and applied. As a result of inconsistent judicial interpretation, some uncertainty will inevitably exist whether some individual criminal offences - and in particular those which have never been prosecuted are offences of strict or absolute liability. This important matter must therefore be settled by judicial interpretation in almost all instances.

In the absence of specific judicial interpretation, it has been necessary for officers of the Defence Department to determine in each instance whether Parliament originally intended that the subject criminal offence be one of strict liability. This has been done in consultation with officers of the Attorney-General's Department and the Office of Parliamentary Counsel.

In determining whether an individual offence is one of strict liability, this office followed a process of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The reasons are detailed in the attached policy document at Annex A. The process began with the primary position established by the High Court in *R v He Kaw The* (1984-85) 157 CLR 523, which was stated by Brennan J at 566:

"It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

Accordingly, all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to identify which of the remaining offences were intended by Parliament to be offences of strict or absolute liability or were intended to have strict or absolute liability elements. These offences were also identified by reference to the policy at **Annex A,** although a number of factors were particularly relevant: penalty, nature of the offence and the existence of a general defence, particularly reasonable excuse.

A key factor that facilitates the identification of strict or absolute liability offences or elements of offences is the applicable penalty, either pecuniary or by way of incarceration. Judicial interpretation on this point was broadly examined and was found to be applied in an inconsistent manner. Courts have generally presumed that Parliament would not want strict or absolute liability to apply if the consequences of conviction are likely to involve imprisonment. If the maximum penalty for an offence is 6 months imprisonment and the offence is stated to be a strict or absolute liability offence, the reality is that courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than 6 months. Therefore, to introduce a measure of certainty into the process by which strict and absolute liability offences and elements of offences are identified, the former Minister for Justice and Customs set a benchmark of a maximum penalty of 6 months imprisonment. The policy at **Annex A** therefore states that strict (or absolute) liability should not apply to any offence that prescribes imprisonment for a term greater than 6 months.

The approval of the Prime Minister and the Minister for Justice and Customs has, however, been obtained for the continued application of strict and absolute liability to some offences or elements of offences within Defence portfolio legislation whose penalties exceed the benchmark six months imprisonment. These offences and their strict and absolute liability elements include assault on an inferior or on a superior officer (the fact that a person is of superior or inferior rank), low flying (mistake of law), failure to comply with general orders (mistake of law) and failure to comply with a direction of a person in command (mistake of law, and reflection of current prosecution practice and a statutory defence).

A major consideration utilised in the examination of criminal offences for strict and absolute liability is the nature of each offence. Many provisions of the Defence

Force Discipline Act 1982 (DFDA) are regulatory in nature and therefore create disciplinary offences. These offences include absence from duty, insubordination, disobeying lawful commands and failing to comply with lawful general orders. Other DFDA offences, such as driving offences, are currently, specified as offences of strict or absolute liability, consistent with civilian practice with regard to these offences. Current prosecution practice within the Australian Defence Force, treats these disciplinary or regulatory offences as offences of strict or absolute liability. In addition, in these cases, it can be readily inferred that Parliament intended that strict or absolute liability should apply. This inference is also based upon the view of Barwick CJ in *Cameron v Holt* (1980) 142 CLR 342 at 346, where he stated that the presumption of fault would be displaced:

> "… the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

DFDA section 60 prejudicial behaviour is, however, one disciplinary provision that is sometimes treated as a strict liability offence and sometimes not as a matter of prosecution practice. Consequently, the approval of the Prime Minister and the Minister for Justice and Customs has been obtained to apply strict liability to this classic disciplinary offence.

The final factor that influenced the identification of strict or absolute liability offences or elements of offences was the presence of an express defence, and in particular a defence of reasonable excuse. It is accepted that the provision of a broad-based defence (such as a defence of reasonable excuse) creates an equitable public interest balance between two conflicting requirements. The first requirement is the need for efficient prosecution of offences. The second requirement is the need to provide a defence to persons who are caught by an offence provision in circumstances where the apparent contravention is excusable. The provision of such a defence is sufficient grounds for the imposition of strict or absolute liability. For example, a number of existing DFDA strict liability offences including absence from duty, absence without leave and failure to comply with a general order have defences of reasonable excuse or similar. A key exception is DFDA section 60 which, traditionally, is sometimes treated as being a strict liability offence and sometimes is not. The approval of the Minister for Justice and Customs and the Prime Minister has therefore been obtained for the addition of the statutory defence of reasonable excuse to DFDA section 60.

The foregoing factors were taken into account in assessing the application of strict or absolute liability to each offence or element of an offence within Defence portfolio legislation. Please be assured that, except for DFDA section 60, the offences to which strict and absolute liability are applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict or absolute liability would apply. Specific approval of the Prime Minister and the Minister for Justice has been obtained for the application of strict liability to DFDA section 60.

The Committee thanks the Minister for this response.

Electoral and Referendum Amendment Act (No. 1) 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 4 of 2001*, in which it made various comments. The Special Minister of State responded to those comments in a letter dated 1 May 2001.

In its *Sixth Report of 2001*, the Committee sought further advice from the Minister as to whether guidelines used by Divisional Returning Officers or Australian Electoral Officers when exercising their discretions under the bill were subject to parliamentary scrutiny.

The Special Minister of State has further responded in a letter dated 8 January 2002. A copy of the letter is attached to this report. An extract from the *Sixth Report* and relevant parts of the Minister's response are discussed below.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 27 September 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 4 of 2001

This bill was introduced into the House of Representatives on 7 March 2001 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes technical amendments to the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to implement recommendations of the Joint Standing Committee on Electoral Matters following their inquiry into the 1998 Federal Election. The major amendments proposed:

- improve identification provisions for persons enrolling or voting from overseas;
- provide for the rejection, with review rights, of applications for enrolment from persons who have changed their names to something 'inappropriate';
- authorise the provision of certain electronic lists to candidates, members of the House of Representatives, the Senate, and registered political parties;

- allow for the amendment or withdrawal of Group Voting Tickets (GVT) or Individual Voting Tickets (IVT) under certain circumstances up until the closing time for the lodgement of such statements;
- improve provisions for the return of Senate nomination deposits; substitution of candidates in bulk nominations; management of multiple declaration votes; initialling of ballot papers; display of GVT and IVT information; and abbreviations for registered party names; and
- provide the Australian Electoral Commission (AEC) with the power to review the continuing eligibility of registered political parties.

The bill also contains transitional provisions.

Refusing enrolment in the 'public interest'
Proposed new subsections 93A(3) and 98A(3)

The bill proposes to insert new sections 93A and 98A in the Principal Act. In each case, a Divisional Returning Officer (DRO) or Australian Electoral Officer (AEO) has a discretion to refuse to include in a Roll, or transfer to a Roll, a person's name if the officer considers:

- that the name is fictitious, frivolous, offensive or obscene, or is not the name by which the person is usually known, or is not written in English; or
- that it would be "contrary to the public interest".

Decisions made by DROs under these provisions will be reviewable by the relevant AEO, and decisions made by AEOs will be reviewable by the Administrative Appeals Tribunal (or Administrative Review Tribunal).

The Explanatory Memorandum justifies these amendments by noting "an increasing tendency towards people using names which have electoral and political, and in some cases commercial, significance for enrolment and nomination. The placement of enrolled electors on the electoral roll, or candidates names on ballot papers, was never intended to give electors or candidates free publicity for the particular cause they espouse or business that they run".

The Committee acknowledges that ballot papers should not include offensive or obscene or misleading names adopted by candidates. However, these amendments provide a returning officer or electoral officer with an apparently unqualified discretion to declare that a voter should not be enrolled under a particular name because someone considers that name to be "frivolous" or "contrary to the public interest" – terms which themselves seem broad and lacking in definition. While a voter may have the right to seek review where their enrolment is refused, the AAT (or ART) will be left with the same difficulties in interpreting a broadly expressed provision.

Any candidate or voter is entitled to know, with some certainty, whether he or she complies with defined and specific criteria as to their eligibility. The expressions used in these provisions are not specific enough to give a voter that certainty.

The Committee, therefore, **seeks the Minister's advice** as to:

- why the bill should not limit the exercise of these powers in some way, or better define them; and
- whether the AEC will be required to produce any criteria or guidelines governing how the powers are to be exercised fairly, consistently and with certainty for those affected.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Special Minister of State dated 1 May 2001

These amendments will allow Divisional Returning Officers (DROs), or Australian Electoral Officers (AEOs) a discretion to refuse to include in a Roll, or transfer to a roll, a person's name if the officer considers;

- that the name is fictitious, frivolous, offensive or obscene, or is not the name by which the person is usually known, or is not written in English; or
- that it would be "contrary to the public interest".

The Committee has advised that it:

"acknowledges that ballot papers should not include offensive or obscene or misleading names adopted by candidates. However, these amendments provide a returning officer or

> electoral officer with an apparently unqualified discretion to declare that a voter should not be enrolled under a particular name because someone considers that name to be "frivolous" or "contrary to the public interest" - terms which themselves seem to be broad and lacking in definition. While a voter may have the right to seek review where their enrolment is refused, the AAT (or ART) will be left with the same difficulties in interpreting a broadly expressed provision.
>
> Any candidate is entitled to know, with some certainty, whether he or she complies with defined and specific criteria as to their eligibility. The expressions used in these provisions are not specific enough to give a voter that certainty."

The Committee seeks the Minister's advice as to:

- why the bill should not limit the exercise of these powers in some way, or better define them; and
- whether the AEC will be required to produce any criteria or guidelines governing how the powers are to be exercised fairly, consistently and with certainty for those affected.

As stated above, proposed sections 93A and 98A of the CEA will allow DROs or AEOs to refuse to add a person's name to the electoral roll if it is inappropriate. The sections specifically provide that a DRO or AEO may refuse on the basis that the person's name is fictitious, frivolous**,** offensive, obscene, is not the name by which the person is usually known or is not written in the alphabet used for the English language. However, as these categories may not cover all circumstances in which a name that is inappropriate for inclusion on the electoral roll has been adopted, subsection (3), which provides that a DRO or AEO can refuse to include a name if it is contrary to the public interest, has been included. This subsection is not meant to provide the AEC with unlimited power to refuse genuine names but to ensure that the AEC has the ability, where appropriate, to refuse to include inappropriate names on the electoral roll.

For example, there are three names which are mentioned in paragraph 2.51 of the Joint Standing Committee on Electoral Matters (JSCEM) report of its inquiry into the conduct of the 1998 federal election. Those names are:

- Mr Prime Minister Piss the Family Court-Legal Aid
- Mr Justice Abolish Child Support and Family Court
- Mr Bruce The Family Court Refuses My Daughter's Right to Know Her Father

These are names by which these people are generally known in the community and use the English language alphabet, so they could not be refused under either of those provisions in proposed sections 93A and 98A. Given that these are names by which these people are generally known, it could be difficult to now argue that they are fictitious and given that the issue they relate to (ie. decisions of the Family Court and the operation of child support payments) is a serious one, it could be difficult to argue that they are frivolous. Also, given the words used in the names it would be difficult to argue that all but the first name is offensive or obscene. However, clearly it is contrary to the public interest to allow the electoral roll to be used to denigrate the office of Prime Minister and the operations of the Family Court.

The inclusion of the "contrary to the public interest" provision in these sections is meant to allow the AEC the ability to protect the integrity of the electoral process and ensure that it is not brought into disrepute. The electoral roll is not an appropriate forum for people to obtain free publicity for the cause they espouse or

the businesses that they run. This is more appropriately done through advertising, the publicising of political platforms or the distribution of how-to-vote material. The roll, and the electoral process as whole, is not the appropriate place for people to be able to denigrate the actions of certain organisations and people.

The "contrary to the public interest" provision should also cover circumstances where people wish to enrol under names which use the names of registered political parties, public bodies, government agencies, courts, companies, registered organisations and the like.

The AEC's decisions have to be defensible:

- the AEC has a reputation for fairness and integrity that it wishes to maintain;
- the decisions in question will be appellable; and
- the AEC is subject to various legislative constraints such as the provisions of the *Administrative Decisions (Judicial Review) Act 1977*

It is the intention of the AEC to develop guidelines, to be included the AEC's General Enrolment Manual (which staff must apply in carrying out enrolment processing under direction from the Electoral Commissioner), which DROs and AEOs would use when deciding whether to refuse to include a person's name on the electoral roll.

The Office of the Director of Public Prosecutions (DPP) has guidelines of this type for use in determining whether the pursuit of prosecution for an offence is in the public interest (see pages 3-4 of Attachment A).

The Australian Government Solicitor advises that "the leading authority on the meaning of 'public interest' is the decision of the High Court (Mason CJ, Brennan, Dawson and Gaudron CJ) on *O'Sullivan v Farrer (1989) 168* CLR *210* at *216:*

> '(T)he expression "in the public interest", when used in a statute, classically imports a discretionary value judgement to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view": *Water Conservation and Irrigation Commission (NSW) v. Browning* (1947) 74 C.L.R. 492, at pp. 504-505, per Dixon J.' "

Besides being used by the DPP in deciding whether to proceed to prosecution, it is also used in several pieces of legislation, such as:

- *Freedom of Information Act 1982* (Attachment B)
- *Broadcasting Services Act 1992* (Attachment C)
- *Workplace Relations Act 1996* (Attachment D)
- *Migration Act 1958* (Attachment E)
- *Health Insurance Act 1973* (Attachment F)
- *Industrial Chemicals (Notification and Assessment) Act 1989* (Attachment G)

Also attached are details of two cases heard in the Industrial Relations Court where the matter of "public interest" was considered. The cases are *Lionel Finch and Others v The Herald and Weekly Times Limited* (Attachment H) and a matter of an application for writs of prohibition, certiorari and mandamus (Attachment I).

As can be seen from the above information, it would appear that tribunals, courts and government agencies have had considerable experience over many years in dealing with the concept of public interest and what might be in the public interest or contrary to it.

The AEC will rely on this experience to guide it in its decision-making in these matters.

The Committee thanks the Special Minister for this detailed response and notes that the Australian Electoral Commission intends to develop guidelines to be used by Divisional Returning Officers or Australian Electoral Officers when exercising their discretions under this bill. The Committee **would appreciate the Minister's further advice** as to whether these guidelines will be subject to Parliamentary scrutiny.

Pending the Minister's further advice, the Committee continues to draw Senators' attention to these provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the further response from the Special Minister of State dated 8 January 2002

New sections 93A and 98A were inserted into the CEA by the *Electoral and Referendum Amendment Act (No. 1) 2001* which was proclaimed on 16 July 2001. The provisions allow Divisional Returning Officers (DROs), or Australian Electoral Officers (AEOs) a discretion to refuse to include in a Roll, or transfer to a roll, a person's name if the officer considers that:

- the name is fictitious, frivolous, offensive or obscene, or is not the name by which the person is usually known, or is not written in English; or

- it would be "contrary to the public interest".

The transitional provisions of the *Electoral and Referendum Amendment Act (No. 1) 2001* allow DROs and AEOs to review names already accepted on the roll in light of new sections 93A and 98A of the CEA.

Decisions made by DROs and AEOs under the new provisions are subject to review.

The AEC has advised me that the guidelines have been developed as part of its General Enrolment Manual issued as an Electoral Commissioner's Direction for use by all AEC staff involved in enrolment processing. This means that all AEC staff involved in enrolment processing are obliged to follow the guidelines.

The guidelines are not subject to Parliamentary scrutiny.

The Committee thanks the Special Minister for this further response which indicates that the guidelines to be applied by the AEC are not subject to Parliamentary scrutiny. By virtue of its independent status, the AEC will effectively become the sole authority on the appropriateness of the names on the electoral roll.

The Committee acknowledges that those refused enrolment under this legislation retain a right of review. Notwithstanding this, the guidelines to be applied by those exercising a discretion to refuse enrolment would seem to represent a significant exercise of delegated legislative power which ought be subject to Parliamentary scrutiny.

Notwithstanding that this bill has been enacted, the Committee continues to draw Senators' attention to this provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference

Environment and Heritage Legislation Amendment Bill (No. 2) 2000 [2001]

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2001*, in which it made various comments. The then Minister for the Environment and Heritage responded to those comments in a letter dated 20 August 2001.

In its *Tenth Report of 2001* the Committee sought further advice from the then Minister as to whether regulations which implement the principles would be amended whenever the principles are amended, and how the management principles will apply on private and indigenous land.

The then Minister has further responded in a letter dated 20 September 2001. A copy of the letter is attached to this report. An extract from the *Tenth Report* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 8 of 2001

This bill was introduced into the Senate on 7 December 2000 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

In conjunction with other complementary legislation, the bill proposes to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the Principal Act) to:

- establish a Commonwealth heritage regime focussed on matters of national significance and Commonwealth responsibility;
- establish a National Heritage List using a process of community consultation, expert advice and ministerial responsibility; and to protect and manage places on the National Heritage List; and
- establish a Commonwealth Heritage List of Commonwealth areas of national significance using a process of community consultation, expert advice and ministerial responsibility; advise Commonwealth agencies on actions in relation to places on the Commonwealth Heritage List; and to provide for the management of places on the list.

The bill also contains transitional provisions in relation to places included in the current Register of the National Estate, including the Interim List, and kept under the *Australian Heritage Commission Act 1975*.

The bill was previously considered by the Committee in *Alert Digest No. 1 of 2001* in which it made no comment. After the publication of that *Digest*, the following issue has come to the Committee's attention.

Insufficient Parliamentary scrutiny of heritage principles
Proposed new sections 324W and 341W

Among other things, the bill proposes to insert new sections 324W and 341W in the Principal Act. Subsection 324W(1) requires the Minister to make principles for managing national heritage and to publish those principles in the *Gazette*. Subsection 324W(2) states that the regulations may prescribe obligations to implement or give effect to these principles. Subsection 324W(3) states that a person must comply with the regulations to the extent that they impose obligations on the person.

Subsections (1), (2) and (3) of proposed new section 341W set up a similar scheme for the making and publishing of principles for managing Commonwealth heritage.

While the management principles in each case must be published, they are not subject to Parliamentary scrutiny. It may be suggested that such principles do not need to be subject to Parliamentary scrutiny as they are unlikely to be legislative in character. Support for this view might be found in subsection (2) of each provision, which permits the making of regulations by which the principles may be implemented or given effect. Such regulations would be subject to Parliamentary scrutiny.

However, there is nothing to prevent any such regulations being expressed in the broadest possible terms. For example, a regulation might simply state that a person or State or Territory government must comply with the relevant management principles. Such a broad regulation would leave the principles made under subsection (1) as the source of detailed regulation of matters relating to Commonwealth or national heritage.

In such a situation, the principles themselves would come to have legislative effect, but not be subject to Parliamentary scrutiny. The Committee, therefore, **seeks the Minister's advice** as to why the principles made under proposed new subsections 324W(1) and 341W(1) should not be subject to Parliamentary scrutiny.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister dated 20 August 2001

I refer to the Scrutiny of Bills Alert Digest No. 8 of 2001, particularly the matter relating to the Environment and Heritage Legislation Amendment Bill (No. 2) 2000. The Committee sought my advice as to why the principles made under proposed new section 324W(1) and 341W(1) should not be subject to Parliamentary scrutiny.

I consider that the setting of management principles by notice in the Gazette is a straightforward and practical way of dealing with a device that is essentially technical in nature. I expect the principles will be based on recognised heritage management benchmarks such as the long-standing and widely accepted Burra Charter for the management of historic heritage.

You will note that proposed new subsection 324W(2) provides that regulations may prescribe obligations or give effect to the national heritage management principles. As your Committee points out, such regulations will be subject to Parliamentary scrutiny. Implementation of the principles in this way is therefore subject to Parliamentary scrutiny.

Your Committee cites an example of a regulation that simply states that a person must comply with the relevant management principles. You argue that this would allow the principles themselves to have legislative effect without Parliamentary scrutiny. However, as indicated above, such a regulation is itself subject to Parliamentary scrutiny. In addition, the *Acts Interpretation Act 1901* (section 49) deals with the making of regulations which purport to incorporate by reference another instrument as in force from time to time.

For the above reasons, I do not believe that the principles themselves should be subject to Parliamentary scrutiny. It is sufficient that any regulations giving effect to the principles will be subject to Parliamentary scrutiny.

The Committee thanks the Minister for this response and notes the burden placed on the Senate's Regulations and Ordinances Committee to ensure proper scrutiny of those regulations made under the legislation.

Proposed section 324W authorises the making of national heritage management principles, and the making of regulations which "may prescribe obligations to implement or give effect to" those principles. The management principles are not subject to Parliamentary scrutiny, but the regulations which implement or give effect to the principles are.

Under such a scheme, there is a danger that a regulation may give effect to a principle, or a group of principles, and those principles may later be changed without the Parliament having an opportunity to scrutinise that change. For example, a regulation may prescribe an obligation to implement Principle No 1 in a set of principles – arguably, this obligation will continue no matter how often that principle may be changed.

The Committee notes that section 49A of the *Acts Interpretation Act 1901* provides that regulations may not 'apply, adopt or incorporate' any extrinsic material as in force from time to time unless a contrary intention appears. As a matter of interpretation, it is not clear whether regulations which prescribe an obligation to give effect to a principle 'apply, adopt or incorporate' that principle within the meaning of the Acts Interpretation Act. In any event, adequate Parliamentary scrutiny should not depend on statutory interpretation.

The national heritage may include places which are on private or indigenous land. Principles for managing the national heritage are matters of significance which would seem to be quasi-legislative in nature. In order to ensure adequate Parliamentary scrutiny of changes in management principles, the Committee **seeks the Minister's further advice** as to whether the regulations which implement the principles will be amended whenever the principles are amended. The Committee also **seeks the Minister's further advice** as to how the management principles will apply on private and indigenous land, particularly where they are inconsistent with land owners' other statutory responsibilities under Federal, State, Territory or local government legislation.

Pending the Minister's further advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the further response from the Minister dated 26 September 2001

1. Amendment of regulations governing management principles

The Committee has asked whether the regulations which implement or give effect to the national and Commonwealth heritage management principles will be amended whenever the principles are amended. The question stems from a concern that a regulation may give effect to a principle, or a group of principles, and that those principles may later be changed without the Parliament having an opportunity to scrutinize that change.

As I indicated in my letter to you of 20 August 2001, the management principles will be based on nationally-recognised benchmarks for heritage protection which have been developed as a result of many years of heritage conservation practice. To be constantly changing these principles would impair the integrity of the management processes provided for in the Bill and I would see no good reason to do this. However, should a change in the principles require the regulations to be amended this would be done. Furthermore, in the event that the Parliament considered that any regulations in this matter were too broad or vague in their scope, it could exercise its right to disallow them thus preserving its capacity for appropriate scrutiny.

2 Application of management principles on private and indigenous land

The second matter on which the Committee has sought further advice is in relation to how the management principles will apply on private land, including land for which Indigenous people have usage rights particularly where the management principles might be inconsistent with other statutory responsibilties of landowners.

The inference for this second matter is that the management principles would apply in some independent capacity on State or private land. This is not the case. The management principles provide direction for the making of management plans for national or Commonwealth heritage places on Commonwealth land, for management plans for such places in State and self-governing Territories or for conservation agreements for such places between the Commonwealth and landowners.

The Bill, along with the existing *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), provides for the Commonwealth to use its best endeavours to prepare and implement a management plan or conservation agreement in cooperation with a State, Territory or person who has a usage right relating to the land. In the matter of inconsistency with State or Territory law, the EPBC Act clearly states that "a conservation agreement has no effect to the extent (if any) to which it is inconsistent with a law of the Commonwealth, or of a State or Territory" (Section 311). In regard to indigenous land, Section 8 of the EPBC Act states that Native title rights will not be affected by the operation of the Act. The system established by the EPBC Act is intended to complement State and Territory environmental laws and provide for the integration of Commonwealth and State regimes. The amendment Bill seeks to preserve this intention.

For the above reasons I propose that the Bills remain as drafted.

The Committee thanks the Minister for this further response.

Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001

Introduction

The Committee dealt with a number of amendments to the bill for this Act in *Alert Digest No. 9 of 2001*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 18 October 2001. A copy of the letter is attached to this report. An extract from the Amendments section of the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 11 July 2001), the response may, nevertheless, be of interest to Senators.

Amendment commented on in Alert Digest No. 9 of 2001

Non disallowable instrument
Proposed new section 303FP

The Committee considered this bill in *Alert Digest No. 7 of 2001* in which it made no comment. On 27 June, the House of Representatives agreed to amend this bill and, on 28 June, the Senate agreed to these amendments and passed the bill. Most of the amendments raised no issues within the Committee's terms of reference.

Amendment (64) deleted proposed subclause 303FP(10). Clause 303FP provides that the Minister may, by instrument published in the *Gazette*, declare an operation to be an accredited wildlife trade management plan for the purposes of the section. Proposed subclause (10) provided that an instrument declaring a specified plan to be an accredited wildlife trade management plan was a disallowable instrument. Deleting this subclause has the effect of removing such an instrument from Parliamentary scrutiny. Notwithstanding that the bill has passed both Houses, the Committee would **appreciate the Minister's advice** as to the reason for removing such instruments from Parliamentary scrutiny.

Relevant extract from the response from the Minister

I refer to the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills dated 23 August 2001, regarding parliamentary amendments to the Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001.

Subclause 303FP(10) was not included in the Bill as first introduced in the Senate. This clause was inserted during the process of parliamentary debate, and there was not sufficient time for proper consideration of its possible impacts before the Bill initially left the Senate.

After review, both the House and the Senate rejected the clause. The clause would have provided that an instrument declaring a specified plan to be an accredited wildlife trade management plan was a disallowable instrument. The equivalent declarations made under the Wildlife Protection (Regulation of Exports and Imports) Act 1982 are not disallowable.

The inclusion of proposed subclause 303FP(10) would have increased the levels of bureaucracy and created delays for individuals and industry operating under the Act, while not enhancing the conservation outcomes of the legislation.

In relation to the issue of parliamentary scrutiny, both the House and Senate did not consider that there was any need to introduce parliamentary scrutiny of declarations of accredited wildlife trade management plans.

The Committee thanks the Minister for this response.

Health and Aged Care Legislation Amendment (Application of Criminal Code) Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 10 of 2001*, in which it made various comments. The then Minister for Health and Aged Care responded to those comments in a letter dated 1 October 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the then Minister's response are discussed below.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 17 September 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 10 of 2001

This bill was introduced into the House of Representatives on 8 August 2001 by the Minister for Community Services. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend 15 Acts administered within the Health and Aged Care portfolio to reflect the application of the *Criminal Code Act 1995* from 15 December 2001. The amendments made by the bill include:

- specifying the physical elements of an offence and corresponding fault elements, where these fault elements vary from those specified by the Code;
- specifying that an offence is one of strict liability; and
- converting penalties currently expressed as dollar amounts to penalty units, where appropriate.

Strict liability offences
Various provisions

The effect of this bill is to include, in legislation administered within the Health and Aged Care portfolio, a number of offences which are specified as offences of strict liability. An offence is one of strict liability where it provides that a person may be punished for doing something, or failing to do something, whether or not they have a guilty intent. The Committee is usually concerned at the imposition of strict liability and is currently inquiring generally into the issue.

The Explanatory Memorandum accompanying this bill does not set out the policy adopted, or guidelines used, to specify existing offences as offences of strict liability – the Committee assumes that the purpose of the bill is to ensure that offences will have the same meaning and operate in the same manner as they do at present when Chapter 2 of the *Criminal Code* is applied to all Commonwealth criminal offences.

On this assumption, the Committee **seeks the Minister's advice** as to whether this bill converts any offence which previously was not one of strict liability into a strict liability offence.

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 Committee noted that the Explanatory Memorandum to the Bill did not set out the policy which was applied in determining whether offences are to attract strict liability.

In determining whether an individual offence is one of strict liability, my Department and the Attorney-General's Department followed a process of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The process began with the primary position established by the High Court in *R v He Kaw Teh* (1984-85) 157 CLR 523, which was stated by Brennan J at 566:

> 'It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication.'

Accordingly, all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to exclude all offences where the relevant penalty is sufficiently high, either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment, to indicate that Parliament intended that the offences be fault based. If the maximum penalty for an offence is six months imprisonment and the offence is stated to be a strict liability offence, the reality is that the courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than six months, and therefore the policy of a maximum penalty of six months has been set as a benchmark.

Two other significant considerations weighed in the consideration of individual criminal offence provisions. First, the presence of an express defence, and in particular, a defence of reasonable excuse, is a good indicator that fault need not be

proved. The provision of a broadly based defence, such as a defence of reasonable excuse, creates an equitable public interest balance between the need for efficient prosecution of offences and the need to provide a defence to persons who are caught by an offence provision in circumstances where the apparent contravention is excusable, and is sufficient grounds for the imposition of strict liability.

The remaining major consideration utilised in the examination of criminal offences for strict liability is the nature of each offence. Offences that are wholly regulatory in nature are an example of offences where it can be readily inferred that Parliament intended that strict liability should apply. Common examples of wholly regulatory offences in the Health and Aged Care portfolio include those concerning failure to comply with reporting or record keeping requirements, attendance before panels of inquiry, and failure to comply with conditions of permits or licences.

These factors were all taken into account as a matrix in assessing each individual criminal offence for strict liability. The offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply. No new offences of strict liability have been created by this Bill.

The Committee thanks the Minister for this response.

Migration Amendment (Excision from Migration Zone) Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 13 of 2001*, in which it made various comments. The Minister for Immigration and Multicultural and Indigenous Affairs has responded to those comments in a letter dated 25 January 2002. 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.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 27 September 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 13 of 2001

This bill was introduced into the House of Representatives on 18 September 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to excise certain places from the migration zone in relation to those who arrive in those places unlawfully. These places referred to are:

- the Territory of Christmas Island (from 2pm on 8 September 2001);
- the Territory of Ashmore and Cartier Islands (from 2pm on 8 September 2001);
- the Territory of Cocos (Keeling) islands (from 12 noon on 17 September 2001);
- any other prescribed external Territory (from the time the relevant regulations commence);
- any prescribed island that forms part of a State or Territory (from the time the relevant regulations commence); and
- an Australian sea or resources installation (from the commencement of the bill).

The bill also proposes to amend the *Migration Act 1958* to prevent non-citizens who enter Australia at one of the specified places or installations after the relevant 'excision time' without a visa from making a valid visa application unless the Minister determines that such a person should be able to make such an application in the public interest.

Retrospective operation
Schedule 1, item 2

Item 2 of Schedule 1 to this bill specifies dates and times for the 'excision' of various offshore places from the Australian migration zone. Under this item, the Territories of Christmas Island and Ashmore and Cartier Islands are deemed to have been 'excised' from the migration zone from 2pm on 8 September 2001. The Territory of Cocos (Keeling) Islands is deemed to have been 'excised' from 12 noon on 17 September 2001.

The Explanatory Memorandum does not indicate why these dates and times have been chosen, nor whether any person will be disadvantaged by the retrospective operation of these provisions. The Committee **seeks the Minister's advice** as to these matters. The Committee also **seeks the Minister's advice** as to the head of power which authorises the excision of various parts of Australia from the migration zone.

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

This Act was passed by the Parliament on 26 September 2001 and received the Royal Assent on 27 September. It also commenced operation on 27 September 2001.

The.following places are defined as "excised offshore places" with the effect of barring those persons who arrive unlawfully from making a valid application for any visa:

- the Territory of Christmas Island (from 2pm on 8 September 2001);
- the Territory of Ashmore and Cartier Islands (from 2pm on 8 September 2001);
- the Territory of Cocos (Keeling) islands (from 12 noon on 17 September 2001);
- any other prescribed external Territory (from the time the relevant regulations commence);
- any prescribed island that forms part of a State or Territory (from the time the relevant regulations commence); and

• an Australian sea or resources installation (from 27 September 2001).

Schedule 1, item 2 - Retrospective application

As indicated above, the Act specifies particular dates and times for the "excision" of various offshore places and installations, for the purposes of preventing visa applications being made by "offshore entry persons".

The Committee seeks advice in relation to the following matters:

Why these dates and times specified above have been chosen

The Act fulfils the commitment the Prime Minister made on 8 September 2001 to excise certain places from the migration zone. The places affected by this commitment are Christmas Island and Ashmore and Cartier Islands.

The Government also decided that the Cocos (Keeling) Islands should be excised from the migration zone with effect from noon 17 September 2001.

Whether any person will be disadvantaged by the retrospective operation of these provisions

The Act only affects those people who arrive at an "excised offshore place" without lawful authority after the relevant date and time. As noted above, the relevant dates and times are in line with the Government's announcements made in September 2001. It will not affect Australian citizens and others with lawful authority to enter or reside in an excised offshore place.

What head of power authorises the excision of various parts of Australia from the migration zone

Section 7 of the Migration Act provides that that Act extends to prescribed territories. Section 5 of the Migration Act defines where the 'migration zone' is.

These amendments rely on the same power that allows the existence of sections 5 and 7 of the Migration Act. As stated above, the effect of the provisions is to bar certain persons who arrive at an "excised offshore place" from being able to apply for a visa.

The Committee thanks the Minister for this response but remains concerned about the possible effect of these provisions.

Notwithstanding that this bill has been enacted, the Committee continues to draw 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.

Henry VIII clause
Schedule 1, item 1

Item 1 of Schedule 1 to this bill proposes to add a new definition of 'excised offshore place' in the *Migration Act 1958*. Paragraph (d) of this definition extends the meaning of this term to "any other external Territory that is prescribed by the regulations". Paragraph (e) of this definition extends the meaning of the term to "any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph".

These provisions authorise a statutory definition to be amended simply by the passing of a regulation. While such regulations would be subject to Parliamentary scrutiny and disallowance, they would nevertheless have full force and effect from the time they were made and, depending on the pattern of Parliamentary sittings, might not be scrutinised by the Parliament for a period of some months.

The Committee **seeks the Minister's advice** as to why it is appropriate that such a significant definition is able to be amended by regulation.

Pending the Minister's advice, the Committee draws Senators' attention to this 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

Item 1 of Schedule I to the Act inserts a new definition of "excised offshore place" into the Migration Act. Paragraph (d) of this definition extends the meaning of this term to "any other external Territory that is prescribed by the regulations". Paragraph (e) of the definition extends the meaning of the term to "any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph".

The Committee seeks advice as to why it is appropriate that such a significant definition is able to be amended by regulation.

The regulation making provisions in the definition of "excised offshore place" are intended to provide flexibility to deal with circumstances that may arise in the future.

As is the case with all regulations, any regulations made in relation to an "excised offshore place" must be tabled in Parliament and may be subject to a disallowance motion.

The Committee thanks the Minister for this response but remains concerned about the possible effect of this provision.

Notwithstanding that this bill has been enacted, the Committee continues to draw Senators' attention to this 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.

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 13 of 2001*, in which it made various comments. The Minister for Immigration and Multicultural and Indigenous Affairs has responded to those comments in a letter dated 25 January 2002. 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.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 27 September 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 13 of 2001

This bill was introduced into the House of Representatives on 18 September 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* and the *Migration Regulations 1994* to provide powers to deal with unauthorised arrivals who land in places or installations excised from the migration zone.

Schedule 1 to the bill:

- provides an officer with a discretionary power to detain, in certain circumstances, a non-citizen who is in, or is seeking to enter, a specified "excised offshore place";
- introduces a new power to take an "offshore entry person" from Australia to a declared country in certain circumstances, and clarify that this does not amount to immigration detention; and
- bars certain legal proceedings relating to the entry, status and detention of a non-citizen who entered Australia at a specified "excised offshore place" after the relevant "excision time" without a visa and the exercise of powers under new section 198A.

Schedule 2 amends the Migration Regulations to create a new class of visa, to be known as the Refugee and Humanitarian (Class XB) visa. The purpose of this new visa class is to provide for the grant of a temporary visa to:

- a non-citizen who entered Australia at an "excised offshore place" after the relevant "excision time" without a visa; and
- a non-citizen who is outside his or her home country and is not a non-citizen who entered Australia at an "excised offshore place" after the relevant "excision time" without a visa.

Bar on certain legal proceedings
Proposed new section 494AA

Item 7 of Schedule 1 to this bill proposes to insert a new section 494AA in the *Migration Act 1958*. This provision would prohibit the institution or continuance of any legal proceedings against the Commonwealth, or an officer of the Commonwealth, or anyone acting on behalf of the Commonwealth, which relate to offshore entry persons.

The Explanatory Memorandum states that this provision "is intended to ensure that court proceedings are not used by an 'offshore entry person' to frustrate the resolution of his or her immigration status, movement to a 'declared country' or to obtain desirable migration outcomes".

The Committee is concerned by provisions which remove access to the courts. The Committee, therefore, **seeks the Minister's advice** as to how court proceedings have been used by 'offshore entry persons' to frustrate the resolution of their immigration status.

Pending the Minister'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 decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

This Act was passed by the Parliament on 26 September 2001 and received the Royal Assent on 27 September 2001. It also commenced operation on 27 September 2001.

The Act amends the Migration Act and the *Migration Regulations 1994* to provide the necessary powers to deal with unauthorised arrivals who land in places or installations excised from the migration zone by the *Migration Amendment (Excision from Migration Zone) Act 2001*.

Item 7 of Schedule 1 to the Act inserts new section 494AA into the Migration Act. This new section bars certain legal proceedings relating to entry, status and detention of a non-citizen who entered Australia at a specified "excised offshore place" after the relevant "excision time" without a visa and the exercise of powers under new section 198A.

The Committee seeks advice as to how court proceedings have been used by "offshore entry persons" to frustrate the resolution of their immigration status.

New section 494AA is intended to limit the potential for future abuse of legal proceedings by persons seeking to frustrate the resolution of their immigration status or their movement to a "declared country", or to obtain desirable migration outcomes.

The Committee thanks the Minister for this response which indicates that new section 494AA is intended to "limit the potential for future abuse of legal proceedings". As noted previously, the Committee is concerned by provisions which remove access to the courts. Such provisions are contrary to the principles and traditions of our judicial system which see judicial review and due process as fundamental rights.

Notwithstanding that this bill has been enacted, the Committee continues to draw Senators' attention to this provision, as it 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.

Migration Legislation Amendment Act (No. 6) 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 13 of 2001*, in which it made various comments. The Minister for Immigration and Multicultural and Indigenous Affairs has responded to those comments in a letter dated 25 January 2002. 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.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 27 September 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 13 of 2001

This bill was introduced into the House of Representatives on 28 August 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to:

- clarify the application of the Convention relating to the Status of Refugees as amended by the Protocol relating to the Status of Refugees in Australia; and
- promote integrity in protection visa application and decision-making processes.

The bill also contains application provisions.

Drawing inferences from a refusal to produce documents
Proposed new sections 91V and 91W

Proposed new subsections 91V(3) and (5) of the *Migration Act 1958*, to be inserted by item 5 of Schedule 1 to this bill, would permit the Minister to draw "any reasonable inference unfavourable to [a person's] credibility" if the person is asked to verify on oath or affirmation information which they have previously provided, and the person fails to do so.

Similarly, proposed new subsection 91W(2) permits the Minister to draw "any reasonable inference unfavourable to [a person's] identity [or] nationality" if the person is asked to provide documentary evidence thereof, and the person fails to do so.

Such provisions appear to limit a person's right to remain silent, and their right not to have unfavourable inferences drawn from the fact that they have said nothing. While the right to remain silent, in the context of a criminal trial, generally relates to the accused person's failure to provide any evidence of their actions or whereabouts, and has not been regarded as extending to the right either to refrain from verifying information already provided, or to refrain from providing documentary evidence of personal details such as one's name or nationality, these provisions propose to extend this to what are non-criminal – essentially administrative – matters.

The Committee **seeks the Minister's advice** as to why it is appropriate that unfavourable inferences be drawn in administrative proceedings, and what the consequences of drawing those unfavourable inferences might be.

While these provisions are not strictly within the Committee's terms of reference, the Committee nevertheless draws Senators' attention to them.

Relevant extract from the response from the Minister

This Act was passed by the Parliament on 26 September 2001 and received the Royal Assent on 27 September 2001. It was commenced by proclamation on 1 October 2001.

It amends the Migration Act to:

- restore the application of the Convention relating to the Status of Refugees as amended by the Protocol relating to the Status of Refugees in Australia to its proper interpretation; and

- enhance the integrity of protection visa application and decision-making processes.

In particular, the Act inserts new sections 91 V and 91 W into the Migration Act. In summary, these provisions allow the Minister, in certain circumstances, to draw a reasonable inference unfavourable to an unauthorised arrival or protection visa applicant if they fail to provide information on oath or affirmation or to produce documentary evidence of the applicant's identity, nationality or citizenship.

The Committee seeks advice in relation to the following matters:

- why it is appropriate unfavourable inference should be drawn in administrative proceedings; and

- what the consequences of drawing those unfavourable inferences may be.

New section 91V - Verification of information

Inferences relating to a person's credibility are already able to be made by decision-makers. New section 91V provides a legislative basis for this existing ability.

The new provision does not determine a visa applicant's overall credibility, nor is a decision-maker compelled to draw an adverse inference. However, where a visa applicant makes a claim and then, on being asked to support that claim by an oath or affirmation, and after being warned about the consequences of refusing to make that oath or affirmation, they refuse to make it, an adverse inference is able to be drawn about their credibility.

The fact that the setting is administrative and not criminal does not detract from the applicant's responsibility to provide truthful statements in relation to his or her application for a protection visa.

In criminal proceedings, the right to remain silent does not extend to the verification of information already provided and also relates to persons who may be harmed by making admissions. In the visa application context, the verification sought is intended to further reinforce claims.

New section 91W - Documentary evidence

The purpose of new section 91W is to strengthen the Commonwealth's powers to test protection claims effectively, given the increasingly sophisticated attempts at nationality, identity and claims fraud.

The need for this power arises in the context of the high percentage of unauthorised arrivals coming to Australia without any identity documentation, combined with evidence of deliberate disposal of documentation. In addition, there have been challenges to nationality claims that have been made by members of the community groups to which the claimant allegedly belongs.

New section 91W enables decision-makers to draw adverse inferences about a person's nationality or identity claims where the person:

- does not have any or adequate documentation; and

- fails to provide a reasonable explanation for the lack of that documentation.

It does not penalise unauthorised arrivals if they are able to provide a reasonable account of their absence of documentation. This is consistent with Article 31 of the Refugees Convention.

Decision-makers already have the ability to draw adverse inferences about a person's claims, with protection decisions always involving the evaluation and weighting of a range of considerations. Where an adverse inference is drawn, the applicant runs the risk of having their application rejected.

New section 91W puts beyond doubt the legitimacy of decision-makers drawing such inferences.

The Committee thanks the Minister for this response.

Taxation Laws Amendment Act (No. 5) 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 11 of 2001*, in which it made various comments. The then Assistant Treasurer responded to those comments in a letter dated 14 September 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the then Assistant Treasurer's response are discussed below.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 1 October 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 11 of 2001

This bill was introduced into the House of Representatives on 23 August 2001 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Schedule 1 of the bill proposes to amend the *A New Tax System (Australian Business Number) Act 1999*, *A New Tax System (Goods and Services Tax) Act 1999, Fringe Benefits Tax Assessment Act 1986*, *Income Tax Assessment Act 1997*, and *Taxation Administration Act 1953* to clarify the treatment of religious practitioners under the new tax system. The amendments will broadly ensure that religious practitioners who are not employees are treated in the same way as employees and office holders.

Schedule 2 proposes to amend the *Income Tax Assessment Act 1936* and *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* to facilitate the change in status of constitutionally protected superannuation funds that elect to become taxed superannuation funds.

Schedule 3 proposes to amend the *Income Tax Assessment Act 1997* to prevent capital gains tax (CGT) event E4 provisions applying to payments out of the CGT discount, and to correct the treatment of certain capital gains passing through a chain of trusts. Amendments dealing with payments of non-assessable amounts associated with building allowances and minor amendments are also made.

Schedule 4 proposes to amend the *Income Tax Assessment Act 1997* to allow income tax deductions for certain gifts of $2 or more made to certain organisations.

Schedule 5 proposes to amend the *Income Tax Assessment Act 1997* to exempt from income tax the income of a non-profit society or association established for the purpose of promoting the development of Australian information and communications technology resources. This schedule also proposes to amend the *Fringe Benefits Tax Assessment Act 1986* to provide a rebate of FBT to an employer which is a non-profit society or association established for the purpose of promoting the development of information and communications technology, aquaculture and fishing resources of Australia.

The bill also contains application and transitional provisions.

Retrospective commencement
Subclause 2(2)

Schedule 2 to this bill amends the income tax law and the superannuation surcharge legislation to facilitate the change in status of constitutionally protected superannuation funds that elect to become taxed superannuation funds. Subclause 2(2) provides that this Schedule is to commence retrospectively on 1 July 2000.

The Explanatory Memorandum summarises the effect of these provisions as follows: "the assessable income of the fund will include the amount that would be assessable if member benefits were rolled over from an untaxed source to a taxed source … Benefits subsequently paid from the fund will be treated as though they are paid wholly from a taxed source. However, a pension that commenced to be paid from the fund before the fund changed its status will not qualify for the 15% pension rebate".

From this explanation, it is not clear whether the amendments proposed in Schedule 2 will benefit taxpayers, or will retrospectively increase the burden of taxation on them. The Committee, therefore, **seeks the Minister's advice** on this issue.

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 Assistant Treasurer

The amendments in Schedule 2 to the Bill, which apply from 1 July 2000, implement my announcement of 16 June 2000 to facilitate the change in status of constitutionally protected superannuation funds. The amendments were announced in response to a request from the South Australian Government that sought to change the status of the South Australian Electricity Industry Superannuation Fund with effect from 1 July 2000. No other fund has changed its constitutionally protected status since 1 July 2000.

The impact of the South Australian Electricity Industry Superannuation Fund changing status was that member benefits were adjusted from 1 July 2000 to reflect that the benefits payable from that date were coming from a taxed source rather than an untaxed source. As a consequence, lump sums paid by the scheme are taxed at a lower rate and pensions qualify for the 15% superannuation pension rebate. The South Australian Parliament implemented legislation to achieve this outcome with effect from 1 July 2000. The relevant South Australian legislation provides that the net after tax benefits of members cannot be reduced as a result in the change in the Fund's tax status - that is, the South Australian legislation ensures that members cannot be worse off.

In addition, I understand that no superannuation surcharge assessments have arisen in relation to members of the Fund. Consequently, the surcharge amendments will have no practical application to those members.

Therefore, I can confirm that no taxpayers will be adversely affected by the retrospective application of the amendments in Schedule 2 to the Bill. Rather, if the application date of the Schedule were to be made prospective, the trustees of the Fund and the South Australian Government would have significant administrative difficulties.

The Committee thanks the then Assistant Treasurer for this response.

Retrospective application
Schedule 3, item 4

Schedule 3 to the bill amends the tax law to ensure that CGT event E4 does not apply to certain payments of CGT discount amounts made by trustees to beneficiaries, but does apply to payments associated with building allowances made by trustees to beneficiaries.

In general terms, these amendments apply to payments made by trustees on or after 1 July 2001. However, a "transitional measure that corrects the chain of trusts deficiencies applies to payments made by trustees on or after 11.45 am … on 21 September 1999 and before 1 July 2001". This transitional measure was detailed in a Press Release issued on 31 July 2001.

With regard to this provision, the Explanatory Memorandum notes that "if a payment of the CGT discount amount passes through 2 or more trusts before being paid to the beneficiary at the end of the chain of trusts, cost base adjustments under CGT event E4 may be made to each of the trustee's units or interests in the chain … This inappropriate outcome is removed by reducing the non-assessable part by the amount of the CGT discount allowed against a capital gain made by a trust that is paid to the trustee of another trust … a payment of the small business 50% reduction amount will not generate a capital gain under CGT event E4".

From this explanation, it is not clear why the date of 21 September 1999 was chosen, nor is it clear whether the transitional provision is beneficial to taxpayers. The Committee, therefore, **seeks the Minister's advice** on these matters.

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 Assistant Treasurer

> The amendments in Schedule 3 to the Bill implement my announcement of 31 July 2001, which in turn related to the Treasurer's announcement of 22 March 2001, about the capital gains tax (CGT) treatment of payments made by a trustee to a beneficiary of the trust out of the CGT discount amount claimed by the trustee.
>
> These measures generally apply for payments made by a trustee on or after 1 July 2001. The one transitional element relates to payments of the CGT discount claimed by a trustee and passed through a chain of trusts, at any time after 21 September 1999, being the start date for the CGT discount provisions. The effect of this change is to prevent adverse CGT consequences for any trustees in the chain of trusts, where they received payments of the CGT discount amount from another trustee. The measure ensures that, within a chain of trusts, there is no inappropriate reduction in the trustee's cost base of their interest in the trust at any time since the commencement of the CGT discount rules.
>
> Therefore, I can confirm that no taxpayers will be adversely affected by the retrospective application of the amendments in Schedule 3 to the Bill.
>
> I trust this information will be of assistance to you.

The Committee thanks the Assistant Treasurer for this response.

Trade Practices Amendment (Telecommunications) Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 10 of 2001*, in which it made various comments. The Minister for Communications, Information Technology and the Arts responded to those comments in a letter dated 14 September 2001.

In it's *Twelfth Report of 2001*, the Committee sought further advice from the Minister in relation to limiting the rights of parties to arbitration. The Minister responded in a letter dated 24 September 2001.

In it's *Thirteenth Report of 2001*, the Committee sought further advice from the Minister in regard to the necessity for amending procedural law where there was no evidence of its abuse, in anticipation of its possible abuse at some time in the future.

The Minister has responded in a letter dated 13 December 2001. A copy of the letter is attached to this report. An extract from the *Thirteenth Report* and relevant parts of the Minister's response are discussed below.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 27 September 2001) the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 10 of 2001

This bill was introduced into the House of Representatives on 9 August 2001 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 *Trade Practices Act 1974* to streamline the telecommunications access regime. Specific provisions encourage commercial negotiation and the expedition of the resolution of access disputes notified to the Australian Competition and Consumer Commission.

The bill also contains application and transitional provisions.

Limiting the rights of parties to arbitration
Proposed new section 152DOA

Item 19 of Schedule 1 to this bill proposes to insert a new section 152DOA in the *Trade Practices Act 1974*. This new section specifies the matters to which the Australian Competition Tribunal may have regard when it is conducting a review of a determination of the Australian Competition and Consumer Commission (ACCC) in arbitrating a telecommunications access dispute.

At present, review by the Tribunal is a re-arbitration of the dispute, and the Tribunal may have regard to any information, documents or evidence which it considers relevant, whether or not those matters were before the ACCC in the course of making its initial determination. Proposed new section 152DOA will, in effect, limit the Tribunal to consideration of information, documents or evidence which were before the ACCC initially.

Referring to this provision, the Explanatory Memorandum (at pp 13-14) states that determinations by the ACCC "involve a lengthy and complex hearing process" and that restricting the material which the Tribunal may consider "will ensure that the Tribunal process involves a review of the Commission's decision, rather than a complete re-arbitration of the dispute". The Explanatory Memorandum goes on to observe that:

> Although this option should reduce delay in the review of Commission decisions, it will reduce the extent of Tribunal review. On balance, it is considered that the limitations on the review are justified on the basis of the length and depth of the Commission's arbitration process.

Given that this provision will reduce the extent of Tribunal review, the Committee **seeks the Minister's advice** as to how the existing review processes have been abused and whether the Tribunal has been consulted about the proposed changes.

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 dated 14 September

> The Committee has already noted provisions in the Explanatory Memorandum that justify the proposed limitations on bringing evidence to the Tribunal 'on the basis of the length and depth of the Commission's arbitration process.' However, the

Committee has sought advice particularly on how the existing review processes have been abused and whether the Tribunal has been consulted about the proposed changes.

In October 2000, the Tribunal commenced its only reviews of final determinations made by the Australian Competition and Consumer Commission (ACCC) under Part XIC. The two determinations that are subject to review relate to access to the Public Switched Telephone Network (PSTN) for the period concluding on 30 June 2001. The PSTN disputes commenced in December 1998 and February 1999 and the review are unlikely to be finalised before late 2002, 18 months after the agreement concluded.

The proposed amendment would apply to future Tribunal hearings, rather than the existing review of final determinations with respect to the PSTN. The lengthy process of the ACCC, already noted in the Explanatory Memorandum, will be replicated in future Tribunal hearings if there is no limitation on the evidence brought before it. The resulting delay would have the potential to cause continued investor uncertainty and advantage incumbent owners of infrastructure. While there is no direct evidence that the first stages of the Tribunal hearings have been abused, the proposed amendment will remove the potential for procedural abuse in the future.

The Tribunal is an independent statutory tribunal whose primary role is to reconsider certain matters on which the ACCC has made a decision. The Tribunal does not have a role in providing policy advice to the Government and has not been consulted in relation to the proposal to limit the evidence available to it in reviewing a decision of the ACCC.

The Committee thanks the Minister for this response which indicates that there is "no direct evidence that the first stages of the Tribunal hearings have been abused" but that the proposed amendment "will remove the potential for abuse".

The Minister's response notes that current Tribunal hearings regarding access to the Public Switched Telephone Network were commenced in October 2000, but are unlikely to be completed until late in 2002 – 18 months after the relevant access arrangements will have expired. The reasons for this delay are not clear. Specifically, it is not clear whether the Tribunal is simply in the process of developing its hearing procedures, or whether it has been asked by the parties to consider significant quantities of new material (and whether any such material assists the Tribunal in its ultimate decision), or whether there are other reasons for the delay.

Given that there is no evidence that the hearings have been abused, the Committee **seeks the Minister's further advice** as to whether the Tribunal, in its current hearings, has been asked to consider significant quantities of material not originally put before the ACCC, and whether any comment has been made during the course of the hearings as to the value of such new material.

Pending the Minister's further advice, the Committee continues to draw 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 further response from the Minister dated 24 September 2001

> The Committee has sought further advice with respect to proposed amendments to limit rights to bring evidence before the Australian Competition Tribunal (Tribunal). In particular, the Committee has sought advice as to whether the Tribunal, in its current hearings, has been asked to consider significant quantities of material not originally put before the Australian Competition and Consumer Commission (ACCC) and whether any comment has been made during the course of the hearings as to the value of such new material.
>
> The ACCC has advised that witness statements in relation to the existing Tribunal hearings are not due until November 2001, but that Telstra has already introduced fresh evidence through its statement of issues in contention. The ACCC also expects that parties will use their existing rights to adduce further new evidence when filing witness statements in November. Due to the private nature of Tribunal hearings, no comment has been made on the value of the new material introduced to date. While there is no direct evidence of existing procedural abuse, the proposed amendment is concerned with removing the potential for procedural abuse in the future.
>
> I hope that information provided in this letter adequately addresses the Committee's concerns with the Bill.

The Committee thanks the Minister for this further response and notes that an amendment to procedural law, where there is no evidence of its abuse, in anticipation of its possible abuse at some time in the future, appears to represent a precedent which could become unfortunate if legislators were to start anticipating all possible breaches or abuses of the provisions of a law. The Committee, therefore, **seeks the Minister's further advice** as to the necessity for this approach in the circumstances covered by this bill.

Pending the Minister's further advice, the Committee continues to draw 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 further response from the Minister dated 13 December 2001

The Committee has sought further advice with respect to the amendments in the Act limiting rights to bring evidence before the Australian Competition Tribunal (Tribunal). In particular, the Committee has sought advice as to the necessity of the amendments and noted that an amendment to procedural law in anticipation of some future abuse 'appears to represent a precedent which could become unfortunate'.

The amendments in the Act respond to particular circumstances experienced in the telecommunications access regime. There are strong concerns within the telecommunications industry that regulatory gaming in the arbitration process has produced substantial delay, to the detriment of the industry. The presence of gaming was identified by the Productivity Commission in the Draft Report into Telecommunications Competition Regulation and confirmed by witnesses in the hearing of the Senate Environment. Communications, Information Technology and the Arts Legislation Committee in its inquiry into the Act.

There is a likelihood that regulatory gaming would also extend to Tribunal hearings of arbitration disputes. In its Draft Report on Telecommunications Competition Regulation, the Productivity Commission recognised the need to anticipate regulatory gaming:

'Gaming permeates the operation of the regime, as parties strategically try to exploit the procedures to their advantage. An efficient regime must anticipate and counter such gaming.' (pp. XXVIII-XXIX)

On the basis of the above arguments and experience in relation to the operation of the telecommunications access regime, it is prudent to anticipate future procedural abuse and take appropriate regulatory action.

I hope that information provided in this letter adequately addresses the Committee's concerns with the Act.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

The Hon John Anderson MP
Deputy Prime Minister
Minister for Transport and Regional Services
Leader National Party of Australia

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

Dear Senator Cooney

I refer to a letter dated 27 September 2001 from Mr James Warmenhoven, Secretary of the standing Committee for the Scrutiny of Bills, concerning the Air Passenger Ticket Levy (Collection) Bill 2001. I regret the delay in replying.

The Alert Digest records that the Committee has raised some issues of concern in relation to the Bill (which commenced on 1 October 2001 and henceforward called "the Act"). I have addressed these issues in the same order.

Cessation of Levy by Ministerial Determination
Section 12

Section 12 states that I may, by notice in the Gazette, notify a month as the final levy month for the purposes of the Act and that once made, the notice cannot be revoked or amended.

The purpose of the Levy is to fund the costs of the Special Employee Entitlements Scheme. The Scheme ensures payment of entitlements to Ansett Group employees terminated by reason of the Group's insolvency to the standard enjoyed by the general community. The total amount of these payments is indeterminate at this time. The Scheme is administered by the Workplace Relations Minister who determines the terms for its operation, including the amounts that are paid in connection with the Scheme.

The effect of the Act is to separate the administration of the collection of the levy from the administration of the Scheme itself, but to ensure that the collection process compliments the manner in which the Scheme handles payments to the terminated employees. In drafting the Act, it was recognised that the indeterminate nature of the Scheme meant that over-collection of the Levy was a real risk. For this reason, there are a number of safeguards built into the Act, only one of which is the power given to the Minister for Transport and Regional Services to decide the final levy month.

In particular I refer the Committee to section 24 of the Act, which places an obligation on the Workplace Relations Minister to report to Parliament annually on the administration of the Scheme. This provides for a high degree of Parliamentary scrutiny of how the money collected will be used.

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My decision to turn the Levy off will be based on the information provided by the Minister for Workplace Relations and is an administrative decision designed to ensure that air passengers will not be required to pay the Levy any longer than is absolutely necessary to assist the former employees of the Ansett Group to obtain their entitlements.

Insufficient Parliamentary Scrutiny of Entitlement Scheme
Section 22

The Scheme utilises a private sector entity to administer payments of employee entitlements. The entity was appointed by way of contract. In order to attract a commercial entity willing and able to take on the role, it was necessary to provide commercial certainty. A provision that allows for decisions relating to the funds used by the private sector entity to be overturned as disallowable instruments would not provide that certainty and would have seriously inhibited the ability to provide assistance to the Ansett employees.

Section 22 is open to Parliamentary scrutiny by virtue of section 24, which clearly states that the Minister for Workplace Relations must provide an Annual Report to both Houses of Parliament regarding the amounts he has authorised for payment as well as the activities undertaken by the private sector entity.

Thank you for raising this matter with me.

Yours sincerely

JOHN ANDERSON

The Hon. Philip Ruddock MP
Minister for Immigration and Multicultural
and Indigenous Affairs
Minister Assisting the Prime Minister for Reconciliation

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25 JAN 2002

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6 FEB 2002
Senate Standing C'ttee
for the Scrutiny of Bills

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

Dear Senator Cooney

I refer to four letters of 20 September 2001 from Mr James Warmenhoven, Secretary to the Committee, to my Senior Adviser referring to the comments contained in the Scrutiny of Bills Alert Digest No. 13 of 2001 (20 September 2001) concerning:

- Border Protection (Validation and Enforcement of Powers) Bill 2001;
- Migration Amendment (Excision from Migration Zone) Bill 2001;
- Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001; and
- Migration Legislation Amendment Bill (No. 6) 2001.

As you may recall, the above Bills were passed by the Senate on 26 September 2001 and received the Royal Assent on 27 September 2001.

The Committee seeks my advice in relation to a number of matters concerning the above-listed Bills. Advice on these matters is contained in Attachment A to this letter.

I trust that the attached comments will be of assistance to the Committee.

Yours sincerely

Philip Ruddock

Border Protection (Validation and Enforcement Powers) Act 2001

1. This Act was passed by the Parliament on 26 September 2001 and received the Royal Assent on 27 September 2001. It also commenced operation on 27 September 2001.

2. Part 2 of the Act validates certain actions of the Commonwealth and others taken in relation to vessels carrying persons reasonably believed to be intending to enter Australia unlawfully. The provisions:

- apply to any action taken by the Commonwealth or others in relation to particular vessels between 27 August 2001 and 27 September 2001;
- specify that any such action was lawful when it occurred; and
- provide that no proceedings against the Commonwealth, a Commonwealth officer or any other person acting on behalf of the Commonwealth may be instituted or continued in any court in respect of these actions.

3. Schedules 1 and 2 to the Act amend the *Customs Act 1901* ("the Customs Act") and the *Migration Act 1958* ("the Migration Act") to introduce:

- new provisions regarding the detention of a person found on a detained ship or aircraft and to expressly clarify the nature of the powers an officer may exercise in relation to such persons; and
- a new search power in relation to persons on certain detained ships or aircraft and a power to return persons to a detained ship.

4. Schedule 2 also amends the Migration Act to provide for mandatory minimum penalties in relation to people smuggling offences. These provisions do not apply to persons under the age of 18 years.

Part 2 – Retrospective validation of 'any action'

5. The Committee has expressed concern about the retrospective application and the broad scope of the validation provisions in Part 2 of the Act.

6. In particular, the Committee seeks advice in relation to the following matters:

Whether these provisions have the effect of making lawful acts which are currently unlawful, or which would be unlawful if they occurred in Australia

Why the validation is expressed so widely, and whether it would operate to validate all actions by an officer during the relevant period (including, for example, an action which caused the death of, or serious injury to, a person detained on a vessel)

7. The purpose of the Act is to enhance Australia's border protection powers and to confirm that recent actions taken in relation to vessels carrying unauthorised arrivals to Australian waters are valid.

8. The Government believes that all actions taken between 27 August 2001 and 27 September 2001 are, and have always been, lawful. This position was recently vindicated by the decision of the Full Federal Court in relation to issues surrounding the *MV Tampa*.

9. The Act ensures that there is no doubt about the validity of our border control powers and the Government's actions in relation to vessels such as the *MV Tampa*.

Whether the actions which are retrospectively validated must have complied with guidelines as to conduct or other internal regulatory procedures

10. Actions taken by naval personnel under the Act must be taken in accordance with established rules of engagement. The rules provide guidance on the exercise of powers and limit the use of force. These are standing orders which all naval staff are aware of.

What remedies would be available to a person where, for example, a Commonwealth official took action which was 'improper' but which was validated by the Act

11. The Government believes that no Commonwealth official took improper action that would give rise to the grant of a remedy in a court of law. All actions taken between 27 August 2001 and 27 September 2001 are, and have always been, lawful. This position was recently vindicated by the decision of the Full Federal Court in relation to issues surrounding the *MV Tampa*.

Whether the phrase 'an intention to enter Australia' refers to Australian land or Australian territorial waters

12. Under section 15B of the *Acts Interpretation Act 1901*, "Australia" includes both the landmass as well as the territorial sea of Australia. Therefore, an 'intention to enter Australia' means both an intention to enter Australian land and an intention to enter Australian territorial waters.

Items 3 and 4 of Schedule 1 and items 8 and 9 of Schedule 2 - Detention and search of persons

13. The Committee has expressed concern about a number of provisions in Schedules 1 and 2 to the Act. The provisions clarify the operation of existing powers in the Customs Act and Migration Act and provide additional powers in relation to vessels carrying persons who are believed to be seeking to enter Australia unlawfully.

14. In particular, the Committee seeks advice in relation to the following matters:

Why it is thought necessary to prohibit the institution of proceedings in relation to (presumably otherwise unlawful) detention

15. The Act is concerned with circumstances where vessels are intercepted at sea and ensures that there is no doubt about the validity of our border control powers and the Government's actions in relation to vessels such as the *MV Tampa*.

16. The Government believes it is inappropriate to allow litigation to compromise actions that are aimed at protecting Australia's sovereign right to determine who is authorised to enter Australia.

17. However, the Act does not purport to affect the jurisdiction of the High Court under section 75 of the Constitution, and as such it does not provide a blanket exclusion from judicial supervision.

Whether the powers to detain and search are to be carried out on the high seas or in Australia's territorial waters

18. There are three circumstances in which the power proposed under section 245F of the Migration Act may be exercised on the high seas:

- where the ship is Australian;
- where the ship is one "without nationality" on the high seas – this would include a lot of the smaller Indonesian fishing boats; and
- where the ship is a mother ship supporting contraventions in Australia.

Why, given the ability of telephone warrants, it is appropriate that searches of detainees be conducted without warrant

19. It is not practical to require an officer to obtain a telephone warrant before conducting a search of a person who is on a ship or aircraft that has been detained.

20. The search powers in new section 245FA are based on existing section 252 of the Migration Act which applies to persons in immigration detention and others. That power is also exercised without the need to obtain a warrant.

Whether this Act is seen as dealing with "extraordinary circumstances" or a situation of emergency, and why these powers are not subject to a sunset clause

21. This Act is a direct response to the increasing threat to Australia's sovereign right to determine who will enter and remain here. The threats have resulted from the growth of organised criminal gangs of people smugglers who bypass normal entry procedures.

22. Schedule 2 to the Act provides additional statutory authority to deal with vessels carrying unauthorised arrivals and the unauthorised arrivals themselves who may arrive in the future.

23. It is not appropriate for the legislation to have a sunset clause as such a clause would merely send a signal to people smugglers to delay rather than cease their operations.

New section 233C – Mandatory minimum sentences

24. The Committee seeks advice as to why it is appropriate to give the Executive control by limiting judicial discretion in relation to sentencing in circumstances described in new section 233C.

25. New sections 233B and 233C introduce minimum mandatory penalties in relation to the people smuggling offences in sections 232A and 233A of the Migration Act. These provisions do not apply to persons under the age of 18 years.

26. In 1999, the Parliament created new people smuggling offences that carried maximum penalties of 20 years imprisonment. However, since the creation of those offences, the penalties imposed by the Courts have generally been much less than the maximum penalty available.

27. This has not been a strong deterrent to persons who are participating in people smuggling, and some have committed repeat offences once they were released from prison.

28. New sections 233B and 233C make it absolutely clear that Australia considers people smuggling to be a very serious offence. The provisions are intended to provide a deterrent to those people who might be minded to act as people smugglers.

Migration Amendment (Excision from Migration Zone) Act 2001

29. This Act was passed by the Parliament on 26 September 2001 and received the Royal Assent on 27 September. It also commenced operation on 27 September 2001.

30. The following places are defined as "excised offshore places" with the effect of barring those persons who arrive unlawfully from making a valid application for any visa:

- the Territory of Christmas Island (from 2pm on 8 September 2001);
- the Territory of Ashmore and Cartier Islands (from 2pm on 8 September 2001);
- the Territory of Cocos (Keeling) islands (from 12 noon on 17 September 2001);
- any other prescribed external Territory (from the time the relevant regulations commence);
- any prescribed island that forms part of a State or Territory (from the time the relevant regulations commence); and
- an Australian sea or resources installation (from 27 September 2001).

Schedule 1, item 2 - Retrospective application

31. As indicated above, the Act specifies particular dates and times for the "excision" of various offshore places and installations, for the purposes of preventing visa applications being made by "offshore entry persons".

32. The Committee seeks advice in relation to the following matters:

Why these dates and times specified above have been chosen

33. The Act fulfils the commitment the Prime Minister made on 8 September 2001 to excise certain places from the migration zone. The places affected by this commitment are Christmas Island and Ashmore and Cartier Islands.

34. The Government also decided that the Cocos (Keeling) Islands should be excised from the migration zone with effect from noon 17 September 2001.

Whether any person will be disadvantaged by the retrospective operation of these provisions

35. The Act only affects those people who arrive at an "excised offshore place" without lawful authority after the relevant date and time. As noted above, the relevant dates and times are in line with the Government's announcements made in September 2001. It will not affect Australian citizens and others with lawful authority to enter or reside in an excised offshore place.

What head of power authorises the excision of various parts of Australia from the migration zone

36. Section 7 of the Migration Act provides that that Act extends to prescribed territories. Section 5 of the Migration Act defines where the 'migration zone' is.

37. These amendments rely on the same power that allows the existence of sections 5 and 7 of the Migration Act. As stated above, the effect of the provisions is to bar certain persons who arrive at an "excised offshore place" from being able to apply for a visa.

Schedule 1, item 1 – Henry VIII clause

38. Item 1 of Schedule 1 to the Act inserts a new definition of "excised offshore place" into the Migration Act. Paragraph (d) of this definition extends the meaning of this term to "any other external Territory that is prescribed by the regulations". Paragraph (e) of the definition extends the meaning of the term to "any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph".

39. The Committee seeks advice as to why it is appropriate that such a significant definition is able to be amended by regulation.

40. The regulation making provisions in the definition of "excised offshore place" are intended to provide flexibility to deal with circumstances that may arise in the future.

41. As is the case with all regulations, any regulations made in relation to an "excised offshore place" must be tabled in Parliament and may be subject to a disallowance motion.

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001

42. This Act was passed by the Parliament on 26 September 2001 and received the Royal Assent on 27 September 2001. It also commenced operation on 27 September 2001.

43. The Act amends the Migration Act and the *Migration Regulations 1994* to provide the necessary powers to deal with unauthorised arrivals who land in places or installations excised from the migration zone by the *Migration Amendment (Excision from Migration Zone) Act 2001*.

44. Item 7 of Schedule 1 to the Act inserts new section 494AA into the Migration Act. This new section bars certain legal proceedings relating to entry, status and detention of a non-citizen who entered Australia at a specified "excised offshore place" after the relevant "excision time" without a visa and the exercise of powers under new section 198A.

45. The Committee seeks advice as to how court proceedings have been used by "offshore entry persons" to frustrate the resolution of their immigration status.

46. New section 494AA is intended to limit the potential for future abuse of legal proceedings by persons seeking to frustrate the resolution of their immigration status or their movement to a "declared country", or to obtain desirable migration outcomes.

Migration Legislation Amendment Act (No. 6) 2001

47. This Act was passed by the Parliament on 26 September 2001 and received the Royal Assent on 27 September 2001. It was commenced by proclamation on 1 October 2001.

48. It amends the Migration Act to:

- restore the application of the Convention relating to the Status of Refugees as amended by the Protocol relating to the Status of Refugees in Australia to its proper interpretation; and
- enhance the integrity of protection visa application and decision-making processes.

49. In particular, the Act inserts new sections 91V and 91W into the Migration Act. In summary, these provisions allow the Minister, in certain circumstances, to draw a reasonable inference unfavourable to an unauthorised arrival or protection visa applicant if they fail to provide information on oath or affirmation or to produce documentary evidence of the applicant's identity, nationality or citizenship.

50. The Committee seeks advice in relation to the following matters:

- why it is appropriate unfavourable inference should be drawn in administrative proceedings; and
- what the consequences of drawing those unfavourable inferences may be.

New section 91V – Verification of information

51. Inferences relating to a person's credibility are already able to be made by decision-makers. New section 91V provides a legislative basis for this existing ability.

52. The new provision does not determine a visa applicant's overall credibility, nor is a decision-maker compelled to draw an adverse inference. However, where a visa applicant makes a claim and then, on being asked to support that claim by an oath or affirmation, and after being warned about the consequences of refusing to make that oath or affirmation, they refuse to make it, an adverse inference is able to be drawn about their credibility.

53. The fact that the setting is administrative and not criminal does not detract from the applicant's responsibility to provide truthful statements in relation to his or her application for a protection visa.

54. In criminal proceedings, the right to remain silent does not extend to the verification of information already provided and also relates to persons who may be harmed by making admissions. In the visa application context, the verification sought is intended to further reinforce claims.

New section 91W – Documentary evidence

55. The purpose of new section 91W is to strengthen the Commonwealth's powers to test protection claims effectively, given the increasingly sophisticated attempts at nationality, identity and claims fraud.

56. The need for this power arises in the context of the high percentage of unauthorised arrivals coming to Australia without any identity documentation, combined with evidence of deliberate disposal of documentation. In addition, there have been challenges to nationality claims that have been made by members of the community groups to which the claimant allegedly belongs.

57. New section 91W enables decision-makers to draw adverse inferences about a person's nationality or identity claims where the person:

- does not have any or adequate documentation; and
- fails to provide a reasonable explanation for the lack of that documentation.

58. It does not penalise unauthorised arrivals if they are able to provide a reasonable account of their absence of documentation. This is consistent with Article 31 of the Refugees Convention.

59. Decision-makers already have the ability to draw adverse inferences about a person's claims, with protection decisions always involving the evaluation and weighting of a range of considerations. Where an adverse inference is drawn, the applicant runs the risk of having their application rejected.

60. New section 91W puts beyond doubt the legitimacy of decision-makers drawing such inferences.

MINISTER FOR VETERANS' AFFAIRS
MINISTER ASSISTING THE MINISTER FOR DEFENCE

PARLIAMENT HOUSE
CANBERRA ACT 2600

Senator Barney Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
SG-49
Parliament House
CANBERRA ACT 2600

8 NOV 2001

Dear Senator Cooney

I refer to the letter of 20 September 2001 from your Committee Secretary concerning the Defence Legislation Amendment (Application of Criminal Code) Bill 2001. The letter identified the reference to the Bill in the Committee's Alert Digest and invited my response to the matter raised by the Committee, namely the Bill's application of strict and absolute liability to certain Defence portfolio criminal offence provisions.

As identified in the Digest, the Bill proposes to amend a number of existing criminal offences within the Defence portfolio to expressly provide that they are offences of strict and absolute liability. This is made necessary by section 6.1 of the *Criminal Code*, which states that a criminal offence is a strict or absolute liability offence only if express provision is made to that effect. The converse will also apply, namely that any offence which is not expressly stated to be an offence of strict or absolute liability will be interpreted to be a fault-based offence. The intention behind the strict and absolute liability amendments made by the Bill is to preserve the status quo in relation to strict and absolute liability. It is important to note that such amendments are only made to offences that are judged to be presently of a strict or absolute liability character, thus maintaining the status quo.

The operation of strict and absolute liability in Commonwealth criminal offences is currently uncertain and haphazard because the principles used by courts over time to identify strict liability offences have been inconsistently developed and applied. As a result of inconsistent judicial interpretation, some uncertainty will inevitably exist whether some individual criminal offences – and in particular those which have never been prosecuted – are offences of strict or absolute liability. This important matter must therefore be settled by judicial interpretation in almost all instances.

In the absence of specific judicial interpretation, it has been necessary for officers of the Defence Department to determine in each instance whether Parliament originally intended that the subject criminal offence be one of strict liability. This has been done in consultation with officers of the Attorney-General's Department and the Office of Parliamentary Counsel.

In determining whether an individual offence is one of strict liability, this office followed a process of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The reasons are detailed in the attached policy document at **Annex A**. The process began with the primary position established by the High Court in *R v He Kaw The* (1984-85) 157 CLR 523, which was stated by Brennan J at 566:

> "It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

Accordingly, all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to identify which of the remaining offences were intended by Parliament to be offences of strict or absolute liability or were intended to have strict or absolute liability elements. These offences were also identified by reference to the policy at **Annex A**, although a number of factors were particularly relevant: penalty, nature of the offence and the existence of a general defence, particularly reasonable excuse.

A key factor that facilitates the identification of strict or absolute liability offences or elements of offences is the applicable penalty, either pecuniary or by way of incarceration. Judicial interpretation on this point was broadly examined and was found to be applied in an inconsistent manner. Courts have generally presumed that Parliament would not want strict or absolute liability to apply if the consequences of conviction are likely to involve imprisonment. If the maximum penalty for an offence is 6 months imprisonment and the offence is stated to be a strict or absolute liability offence, the reality is that courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than 6 months. Therefore, to introduce a measure of certainty into the process by which strict and absolute liability offences and elements of offences are identified, the former Minister for Justice and Customs set a benchmark of a maximum penalty of 6 months imprisonment. The policy at **Annex A** therefore states that strict (or absolute) liability should not apply to any offence that prescribes imprisonment for a term greater than 6 months.

The approval of the Prime Minister and the Minister for Justice and Customs has, however, been obtained for the continued application of strict and absolute liability to some offences or elements of offences within Defence portfolio legislation whose penalties exceed the benchmark six months imprisonment. These offences and their strict and absolute liability elements include assault on an inferior or on a superior officer (the fact that a person is of superior or inferior rank), low flying (mistake of law), failure to comply with general orders (mistake of law) and failure to comply with a direction of a person in command (mistake of law, and reflection of current prosecution practice and a statutory defence).

A major consideration utilised in the examination of criminal offences for strict and absolute liability is the nature of each offence. Many provisions of the Defence Force

Discipline Act 1982 (DFDA) are regulatory in nature and therefore create disciplinary offences. These offences include absence from duty, insubordination, disobeying lawful commands and failing to comply with lawful general orders. Other DFDA offences, such as driving offences, are currently specified as offences of strict or absolute liability, consistent with civilian practice with regard to these offences. Current prosecution practice within the Australian Defence Force, treats these disciplinary or regulatory offences as offences of strict or absolute liability. In addition, in these cases, it can be readily inferred that Parliament intended that strict or absolute liability should apply. This inference is also based upon the view of Barwick CJ in *Cameron v Holt* (1980) 142 CLR 342 at 346, where he stated that the presumption of fault would be displaced:

> "... if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

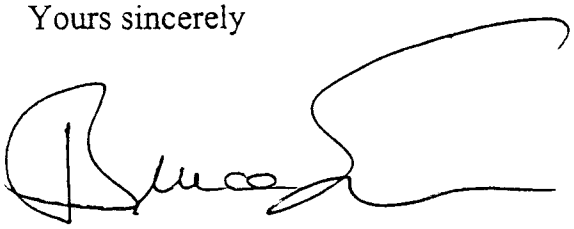
DFDA section 60 prejudicial behaviour is, however, one disciplinary provision that is sometimes treated as a strict liability offence and sometimes not as a matter of prosecution practice. Consequently, the approval of the Prime Minister and the Minister for Justice and Customs has been obtained to apply strict liability to this classic disciplinary offence.

The final factor that influenced the identification of strict or absolute liability offences or elements of offences was the presence of an express defence, and in particular a defence of reasonable excuse. It is accepted that the provision of a broad-based defence (such as a defence of reasonable excuse) creates an equitable public interest balance between two conflicting requirements. The first requirement is the need for efficient prosecution of offences. The second requirement is the need to provide a defence to persons who are caught by an offence provision in circumstances where the apparent contravention is excusable. The provision of such a defence is sufficient grounds for the imposition of strict or absolute liability. For example, a number of existing DFDA strict liability offences including absence from duty, absence without leave and failure to comply with a general order have defences of reasonable excuse or similar. A key exception is DFDA section 60 which, traditionally, is sometimes treated as being a strict liability offence and sometimes is not. The approval of the Minister for Justice and Customs and the Prime Minister has therefore been obtained for the addition of the statutory defence of reasonable excuse to DFDA section 60.

The foregoing factors were taken into account in assessing the application of strict or absolute liability to each offence or element of an offence within Defence portfolio legislation. Please be assured that, except for DFDA section 60, the offences to which strict and absolute liability are applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict or absolute liability would apply. Specific

approval of the Prime Minister and the Minister for Justice has been obtained for the application of strict liability to DFDA section 60.

Yours sincerely



BRUCE SCOTT MP

Annex:

A. Strict liability - preferred approach to harmonisation

ANNEX A

STRICT LIABILITY - PREFERRED APPROACH TO HARMONISATION

The *Criminal Code* harmonisation exercise has focused attention on where strict liability exists or does not exist in current offences.

Under the common law, if strict liability applies the prosecution does not have to prove fault on the part of the defendant. Fault includes a variety of elements including intention, knowledge, recklessness and negligence. Under strict liability the defendant can raise the defence of honest and reasonable mistake of fact. The defendant will activate the defence if he or she can point to or adduce evidence that he or she made a relevant mistake of fact. If that occurs, then the prosecution bears the onus prove beyond reasonable doubt that there was no mistake, (*Proudman v Dayman* (1941) 67 CLR 536).

Under the existing law the legislature and the courts have not always been clear about where strict liability applies. Brent Fisse, in *Howards Criminal Law* (5th Edition), has concluded at p.536:

> "Whatever else may be said of judicial interpretation of regulatory statutes in the last century, it cannot be called consistent."

The *Criminal Code* addresses this concern by providing that strict liability must be identified expressly, otherwise a fault element will apply automatically (ss 5.6 and 6.1).Section 6.1 recognises that strict liability may be applied to all or specified physical elements of an offence. Many offences will have one element which requires proof of fault, another where strict liability applies. For example, if making a statement which is false and misleading were to be the physical element of the offence and it were proposed that strict liability apply, the most sensible way to do it would be to provide that the act of making a statement should be intentional and that strict liability should apply to the physical element that the statement was not correct.

The *Criminal Code* harmonisation exercise is designed to ensure old offences operate in the way they were intended by the Parliament when they have operated prior to the commencement of the Code, not just in a way which is preferred by the agencies or those who represent the interests of defendants. However, with the *Criminal Code* harmonisation Bills it is open to the Government and Parliament to clarify its intention where there is uncertainty. It is important that Parliament is given a very clear indication in the Explanatory Memorandum where it is proposed that strict liability apply but there is doubt about the existing law. This paper is designed to set a bench-mark beyond which there will need to be additional Government approval and a special explanation in the Explanatory Memorandum. It is critical that this be done if the harmonisation process is to have credibility and not create confusion for prosecutors, defence counsel and the courts. It is therefore very important to identify offences involving doubt about the requirement of proof early in the process.

A reasonable benchmark

1. **There is a strong presumption that proof of fault is required. This can be displaced, but not easily, even with 'regulatory statutes'.**

   The authority for this in the High Court decisions, particularly in *Cameron v Holt* (1980) 142 CLR 342 at 346 and *He Kaw Teh v R* (1985) 157 CLR 523. The principle of course has its origin in the landmark *Woolmington v Director of Public Prosecutions* [1935] AC 462. *Cameron v Holt* concerned a social security false and misleading statement offence with a maximum penalty of 6 months imprisonment / $500 fine. Mason J noted that in his view the penalty was "by no means small." It was not an indictable offence, it involved protecting the revenue and concerned wrongdoing that is not always easy to detect and punish, yet the High Court required proof of fault. In *He Kaw Teh v R* Gibbs CJ said at 528 there "has been a tendency in Australia to regard this presumption as only a weak one, at least in the case of modern regulatory statutes: *Proudman v Dayman*; *Bergin v Stack*. However, the principle in *Sherras v De Rutzen* has more recently been reaffirmed ....in this Court: *Cameron v Holt*."

2. **Subject matter alone is not enough. The language of the statute must also suggest that fault is not required.** In *Cameron v Holt* (1980) 142 CLR 342 Barwick CJ said at 346 the presumption would only be displaced "if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

3. **Subject matter: regulation of social or industrial conditions (health and safety/consumer protection/driving offences) where physical injury to a person or something of special value is involved (particularly where the penalty is monetary and not too large, 'regulatory' as opposed to 'penal').** There would appear to be reasonably consistent authority for this description of the subject matter in the cases and relevant texts. (For example, see Dawson J in *He Kaw Teh v R* at 595. Less helpful descriptions have been used, such as that suggesting strict liability should not apply in relation to activity which is not regarded as being a real social evil, or likely to result in stigma or obloquy, or as being 'truly criminal'. All these considerations have been mentioned in the cases but are unhelpful to the harmonisation task because they are vague concepts. While a single judge of the Victorian Supreme Court on 20 March 1985 suggested the regulation of companies was on the subject matter list (*Poyser v Commissioner of Corporate Affairs* (1985) 3 ACLC 584 at 588) and preferred a restrictive interpretation of *Cameron v Holt*, the High Court reaffirmed *Cameron v Holt* in unambiguous terms a few months later in *He Kaw Teh* on 1 July 1985. It is noted that the regulation of companies is not included on the subject matter list in either *Cameron v Holt* (see at 350) or *He Kaw Teh*. The regulation of corporations has nothing to do with public safety matters mentioned in those cases. *Poyser* was in fact decided primarily on the construction of the offence and it was an offence which had a maximum penalty of 12 months imprisonment (it is just beyond

the proposed benchmark). *Cameron v Holt* is also notable because it also excludes 'protecting the public revenue' as a broad category to which strict liability might apply. Note Mason J at p.348. It should also be remembered the purpose of the offence in *Cameron v Holt* was clearly about protecting public monies and only had a maximum penalty of 6 months imprisonment/$500. By analogy, it may argued that protecting shareholders monies is unlikely to be treated differently by the High Court.

4. The language of the statute.

Fault may be inferred simply from the way the wrongful conduct is described, for example the words 'possess', 'calculate', 'allow' and 'permit' have all been held to imply proof of fault is necessary . However, many offences say nothing that assists. For the presumption of proof of fault to be overturned there must be something. The most meaningful indicators are:

(a) Penalty - 6 months imprisonment or less

Imprisonment is the indicator of the seriousness of the offence and the courts presume Parliament would not want strict liability if the consequences of conviction are 'penal' - likely to involve imprisonment. A maximum penalty of 6 months imprisonment was considered to be sufficient indication of seriousness in *Cameron v Holt* (Barwick CJ at 345) and that the respected commentator Colin Howard QC was saying much the same things many years ago in his book *Strict Responsibility* (1963). He noted that strict liability should only apply to offences punishable by nothing more than a small fine or even a substantial fine providing that imprisonment is not an alternative. He suggested that it was only appropriate for summary offences which in 1963 did not include offences where imprisonment was likely (it was indictable if the maximum penalty was more than 6 months imprisonment).

There are some examples where strict liability was held to apply to a corporate regulation offence where the maximum penalty was as high as 5 years imprisonment. In*Von Lieven v Stewart* (1990) 21 NSWLR at 61 Handley JA of the NSW Supreme Court made the surprising statement that "While the penalties under s.174 for principal offenders are heavy - a fine of up to $20,000 or imprisonment for 5 years, or both, in my opinion the offences are not strictly criminal in nature at all." Notwithstanding Handley JA's assertions to the contrary, this is clearly at odds with the comments of the High Court in *Cameron v Holt* and *He Kaw Teh.*. It is also inconsistent with *Aberfoyle v Western Metals Ltd* [1998] 744 FCA where Finkelstein J said the offence at s.698 which provides for a maximum penalty of 6 months imprisonment / $500 fine in relation to false and misleading matters in a statement to shareholders concerning takeovers is not truly of a "criminal character." He said the penalty imposed for a contravention is slight when compared to other penalties that are imposed for a contravention of other provisions of the *Corporations Law* . The decision is therefore

consistent with the view that other offences in the *Corporations Law* with higher penalties (the maximum of these being 5 years) would be treated differently.

Where the penalty is only monetary it is more difficult to make a judgment. In 1980 $100,000 was considered to be a very heavy penalty and a factor in favour of requiring the prosecution to prove fault which was outweighed by other considerations such as the consumer protection nature of Part V of the *Trade Practices Act 1974* and the construction of the relevant provisions (*Darwin Bakery Pty Ltd v Sully* (1981) 36 ALR 371). Under that Act penalties of $40,000 (individual) and $200,000 (body corporate) have been held to be acceptable. The Act in that case covers a wide range of businesses, from corner stores and cottage manufacturing to national retailers and mass producers of goods. It is reasonable to assume the court will take into account the industry which is being regulated to make a judgment on this. If it were an offence likely to be committed by a welfare recipient a penalty of $5,000 could be considered to be a significant penalty and implies fault (in *Cameron v Holt* which was also in 1980 it was thought that $500 was a considerable monetary penalty for such an offence). On the other hand, if the offence was only likely to be committed by a large multinational company $100,000 might now be considered to be a more acceptable threshold.

There are of course notable examples where Parliament has provided for strict liability in relation to quite serious offences which have significant penalties of imprisonment. This is the case with some State driving and environmental offences. Where this has occurred the statute makes it clear that strict liability applies.

In view of the above, an appropriate general benchmark is that strict liability should not apply to offences which have a maximum penalty of more than 6 months imprisonment. This is because:

- People convicted of such offences are almost invariably not imprisoned. Only people who have committed such offences on a number of occasions have a chance of being imprisoned. It is therefore artificial to provide as a general rule that fault must be proved in these cases, but not where the maximum penalty is only a fine.

- The High Court has presumed fault must be proved in *Cameron v Holt* where the maximum penalty for the offence was 6 months imprisonment. However the case concerned someone who made a false statement to obtain a welfare benefit and the High Court did not specifically say what level of penalty would be appropriate as a general benchmark. There is evidence that those convicted of welfare offences may be more vulnerable to being imprisoned than those in breach of other offences. Indeed the Federal Prisoners Database as in February 2000 shows that there are 38 people in prison for Social Security offences (which now has a maximum penalty of 12 months imprisonment) and none in relation to the minor *Corporations Law* offences. The DPP advises that no one

has been imprisoned as a result of its prosecution of minor *Corporations Law* offences since its computer records started in 1991. It is very unusual for a person to be imprisoned for an offence with a maximum penalty of 6 months imprisonment.

It is important to stress that penalty is an important consideration but it is not the only consideration. The language of the statute may suggest strict liability or indeed in some cases absolute liability may apply to offences which have much higher penalties.

(b) Implicit in the wording of other offences in the same provision

Where a fault element is not expressed in the offence, or where fault is expressed in one offence, but not in an adjacent offence in the same statute, courts are more likely to accept that strict liability is meant to apply.

(c) Use of the term 'without reasonable excuse' or some other express defence which implies fault need not be proved

The reference to 'without reasonable excuse' is taken to indicate that the legislature only wanted the general defences and mistake of fact to apply, not proof of fault. However, where the penalty is significant and/or there are other indicators that fault should apply, the court will not conclude that the presumption is over-turned simply by use of the words 'without reasonable excuse'. This happened in *He Kaw Teh-v-R* . Even Wilson J, who was the only judge prepared to find that strict liability applied to the offence in that case, concluded at 557 that he "found such phrases inconclusive. It may readily be said that the legislature, having expressly placed an onus on an accused person in these paragraphs, supplies a clear inference that in para (b) where the words do not appear, the legislature intended the onus of proof to remain on the prosecution."

Other defences of this nature are that the acts "were not knowingly performed" or "the defendant exercised due diligence."

(c) Enforcement implications

This is at best a supplementary consideration. Brent Fisse notes in *Howards Criminal Law* (5th Edition) at 531 "Feasibility of enforcement is also difficult to assess. A claim that an offence will prove unworkable if interpreted as requiring proof of subjective fault is hard to substantiate in the absence of empirical inquiry and is likely to depend on contentious questions of allocation of police resources and choice of enforcement methods."

However the enforcement implications are mentioned in and rejected on the facts in *He Kaw Teh-v-R* , but are accepted as a consideration amongst others in cases like *Poyser* and the English case *Lim Chin Aik-v-R* [1963] AC 160 where it was said:

> "It is pertinent also to enquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly .... which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

He Kaw Teh v R is a good example of how logically scrambled this criteria can become. If there was ever an area that is a significant problem for the community and difficult to enforce it is drug trafficking. However, all the Justices of the High Court except Wilson J did not seriously entertain it to be a consideration in an offence with such a high penalty. Enforcement is also a problem with welfare fraud, yet it did not enter the equation in *Cameron v Holt* which concerned least significant fraud related offence with a maximum penalty of 6 months imprisonment /$500 fine. The problem with the enforcement ground is that if the social impact of the crime becomes more serious then a more serious punishment is warranted. If the penalty involves imprisonment it is more likely that fault will be inferred.

At the end of the day, if enforcement is a problem then the court will be looking for a lead from the Parliament in the language of the offence to provide relief to those enforcing the law. One only has to look at the number of inference and reverse onus provisions in the Commonwealth statute book to realise that the Parliament is prepared to include these provisions when it can be persuaded it is necessary. Arguments about problems with the enforceability of offences can be raised with almost any offence. We suggest that an argument based on enforceability alone may be one that can in appropriate cases be used to persuade Parliament to specify strict liability, but it is not one that on its own that is likely to be accepted by the High Courts under the existing law. If an agency is concerned about enforceability, it can always push for specification of strict liability in relation to a particular element of the offence or the whole offence, but it would need to be stated in the Explanatory Memorandum that it is doubtful the offence would be interpreted that way by the High Court under the existing law. There would also need to be Government approval of adjustments of this nature.

(d) Certain specific elements of offences which the prosecution would not otherwise be required to prove under the existing law

Subsections 6.1(2) and 6.2(2) of the *Criminal Code* provide that strict liability or absolute liability may be isolated to a particular element of the offence. There will be cases where this is appropriate even though the penalties involve significant terms of imprisonment. This is because fault is required to be proved in relation to other elements that are more critical to the person's culpability and the existing law does not require intention or knowledge about the particular element.

An example of this which is important to in Commonwealth offences is the jurisdictional element of the offence. If a person steals Commonwealth property it is not, and should not

be, for the prosecution to prove the person knew he or she was specifically stealing Commonwealth property. In that case it is appropriate for absolute liability to apply to that element of the offence because even a mistake about who owned the property (which is a defence with strict liability) should not be relevant.

Another example concerns contraventions which can involve an omission. Sometimes the wording of the offence is such that under the *Criminal Code* the court might expect the prosecution to prove the defendant knew the details of the regulations being contravened. While there is a general principle that a person can be criminally responsible for an offence even if he or she is mistaken about or ignorant of the requirements of the law (subsection 9.3(1) of the *Criminal Code*) there is provision that an Act may expressly or impliedly provide to the contrary or that the ignorance or mistake can negate a fault element (subsection 9.3(2)). It is therefore necessary in such cases to provide for strict liability in relation to the 'knowledge of requirements' element of the offence to make many Commonwealth regulatory offences to work in the way they were intended.

An alternative approach

A solution that has been used in some legislation which applies the Code is to provide for a lower penalty strict liability offence paired with another that requires proof of intention or some other fault element. For example, the *Environmental Protection and Biodiversity Conservation Act 1999* has an offence s.254 for the reckless killing or injuring certain marine species with a maximum penalty of 2 years imprisonment/$110,000 fine) together with another at s.254A with a maximum penalty of $55,000 fine. It should be noted that even if there was one offence based on s.254A and the maximum penalty was 2 years imprisonment, the courts would probably only sentence the person to imprisonment if the prosecution could show the defendant had intended or was reckless with respect to the death or injury. This will be a suitable solution in cases where a significant penalty differential is appropriate and it is workable from an enforcement perspective.

Geoff McDonald
Criminal Law Division
Attorney-General's Department
5 April 2000

SENATOR THE HON ERIC ABETZ
Special Minister of State
Liberal Senator for Tasmania

RECEIVED
10 JAN 2002
Senate Standing C'ttee for the Scrutiny of Bills

- 8 JAN 2002

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

Dear Senator Cooney Barney,

The Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 2001, asks that I further advise the Committee as to whether the guidelines developed by the Australian Electoral Commission (AEC) to implement new sections 93A and 98A of the *Commonwealth Electoral Act 1918* (the CEA) and the related transitional provisions, relating to 'inappropriate' names, will be subject to Parliamentary scrutiny.

New sections 93A and 98A were inserted into the CEA by the *Electoral and Referendum Amendment Act (No. 1) 2001* which was proclaimed on 16 July 2001. The provisions allow Divisional Returning Officers (DROs), or Australian Electoral Officers (AEOs) a discretion to refuse to include in a Roll, or transfer to a roll, a person's name if the officer considers that:

- the name is fictitious, frivolous, offensive or obscene, or is not the name by which the person is usually known, or is not written in English; or
- it would be "contrary to the public interest".

The transitional provisions of the *Electoral and Referendum Amendment Act (No. 1) 2001* allow DROs and AEOs to review names already accepted on the roll in light of new sections 93A and 98A of the CEA.

Decisions made by DROs and AEOs under the new provisions are subject to review.

The AEC has advised me that the guidelines have been developed as part of its General Enrolment Manual issued as an Electoral Commissioner's Direction for use by all AEC staff involved in enrolment processing. This means that all AEC staff involved in enrolment processing are obliged to follow the guidelines.

The guidelines are not subject to Parliamentary scrutiny.

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At Attachment A is a copy of the guidelines. However, the AEC has advised that it should be noted that the guidelines (as well as the rest of the General Enrolment Manual) may be amended from time to time as new issues arise or as a result of legal advice or legislative change.

Yours sincerely

ERIC ABETZ

Senator the Hon Robert Hill

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

RECEIVED

26 SEP 2001

Senate Standing C'ttee
for the Scrutiny of Bills

20 SEP 2001

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

Dear Senator Cooney

I refer to the Scrutiny of Bills Tenth Report of 2001, particularly the matter relating to the Environment and Heritage Legislation Amendment Bill (No.2) 2000. The Committee has sought my advice again in relation to two matters pertaining to the application of heritage management principles.

1. Amendment of regulations governing management principles

The Committee has asked whether the regulations which implement or give effect to the national and Commonwealth heritage management principles will be amended whenever the principles are amended. The question stems from a concern that a regulation may give effect to a principle, or a group of principles, and that those principles may later be changed without the Parliament having an opportunity to scrutinize that change.

As I indicated in my letter to you of 20 August 2001, the management principles will be based on nationally-recognised benchmarks for heritage protection which have been developed as a result of many years of heritage conservation practice. To be constantly changing these principles would impair the integrity of the management processes provided for in the Bill and I would see no good reason to do this. However, should a change in the principles require the regulations to be amended this would be done. Furthermore, in the event that the Parliament considered that any regulations in this matter were too broad or vague in their scope, it could exercise its right to disallow them thus preserving its capacity for appropriate scrutiny.

2. Application of management principles on private and indigenous land

The second matter on which the Committee has sought further advice is in relation to how the management principles will apply on private land, including land for which Indigenous people have usage rights particularly where the management principles might be inconsistent with other statutory responsibilties of landowners.

The inference for this second matter is that the management principles would apply in some independent capacity on State or private land. This is not the case. The management principles provide direction for the making of management plans for

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national or Commonwealth heritage places on Commonwealth land, for management plans for such places in State and self-governing Territories or for conservation agreements for such places between the Commonwealth and landowners.

The Bill, along with the the existing *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), provides for the Commonwealth to use its best endeavours to prepare and implement a management plan or conservation agreement in cooperation with a State, Territory or person who has a usage right relating to the land. In the matter of inconsistency with State or Territory law, the EPBC Act clearly states that "a conservation agreement has no effect to the extent (if any) to which it is inconsistent with a law of the Commonwealth, or of a State or Territory" (Section 311). In regard to indigenous land, Section 8 of the EPBC Act states that Native title rights will not be affected by the operation of the Act. The system established by the EPBC Act is intended to complement State and Territory environmental laws and provide for the integration of Commonwealth and State regimes. The amendment Bill seeks to preserve this intention.

For the above reasons I propose that the Bills remain as drafted.

Yours sincerely

Robert Hill

cc. Committee Secretary (SG.49, Parliament House)

Senator the Hon Robert Hill

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

18 OCT 2001

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

Dear Senator Cooney

I refer to the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills dated 23 August 2001, regarding parliamentary amendments to the *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001*.

Subclause 303FP(10) was not included in the Bill as first introduced in the Senate. This clause was inserted during the process of parliamentary debate, and there was not sufficient time for proper consideration of its possible impacts before the Bill initially left the Senate.

After review, both the House and the Senate rejected the clause. The clause would have provided that an instrument declaring a specified plan to be an accredited wildlife trade management plan was a disallowable instrument. The equivalent declarations made under the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* are not disallowable.

The inclusion of proposed subclause 303FP(10) would have increased the levels of bureaucracy and created delays for individuals and industry operating under the Act, while not enhancing the conservation outcomes of the legislation.

In relation to the issue of parliamentary scrutiny, both the House and Senate did not consider that there was any need to introduce parliamentary scrutiny of declarations of accredited wildlife trade management plans.

Yours sincerely

Robert Hill

Cc: James Warmenhoven
Secretary
Senate Standing Committee for the Scrutiny of Bills
SG 49
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CANBERRA ACT 2600

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The Hon Dr Michael Wooldridge
Minister for Health and Aged Care

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

Dear Senator Cooney

I refer to the reference to strict liability offences in the Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill in the Committee's *Alert Digest*, which was released on 22 August 2001.

The Committee noted that the Explanatory Memorandum to the Bill did not set out the policy which was applied in determining whether offences are to attract strict liability.

In determining whether an individual offence is one of strict liability, my Department and the Attorney-General's Department followed a process of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The process began with the primary position established by the High Court in *R v He Kaw Teh* (1984-85) 157 CLR 523, which was stated by Brennan J at 566:

> 'It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication.'

Accordingly, all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to exclude all offences where the relevant penalty is sufficiently high, either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment, to indicate that Parliament intended that the offences be fault based. If the maximum penalty for an offence is six months imprisonment and the offence is stated to be a strict liability offence, the reality is that the courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than six months, and therefore the policy of a maximum penalty of six months has been set as a benchmark.

Two other significant considerations weighed in the consideration of individual criminal offence provisions. First, the presence of an express defence, and in particular, a defence of reasonable excuse, is a good indicator that fault need not be proved. The provision of a broadly based defence, such as a defence of reasonable excuse, creates an equitable public interest balance between the need for efficient prosecution of offences and the need to provide a defence to persons who are caught by an offence provision in circumstances where the apparent contravention is excusable, and is sufficient grounds for the imposition of strict liability.

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The remaining major consideration utilised in the examination of criminal offences for strict liability is the nature of each offence. Offences that are wholly regulatory in nature are an example of offences where it can be readily inferred that Parliament intended that strict liability should apply. Common examples of wholly regulatory offences in the Health and Aged Care portfolio include those concerning failure to comply with reporting or record keeping requirements, attendance before panels of inquiry, and failure to comply with conditions of permits or licences.

These factors were all taken into account as a matrix in assessing each individual criminal offence for strict liability. The offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply. No new offences of strict liability have been created by this Bill.

Yours sincerely

Dr Michael Wooldridge

- 1 OCT 2001

ASSISTANT TREASURER
Senator The Hon. Rod Kemp

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14 SEP 2001

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

Dear Senator Cooney

I refer to the concerns expressed by the Senate Standing Committee for the Scrutiny of Bills in Alert Digest No 11 of 2001 dated 29 August 2001 concerning the retrospective application of Schedules 2 and 3 to Taxation Laws Amendment Bill (No 5) 2001.

The amendments in Schedule 2 to the Bill, which apply from 1 July 2000, implement my announcement of 16 June 2000 to facilitate the change in status of constitutionally protected superannuation funds. The amendments were announced in response to a request from the South Australian Government that sought to change the status of the South Australian Electricity Industry Superannuation Fund with effect from 1 July 2000. No other fund has changed its constitutionally protected status since 1 July 2000.

The impact of the South Australian Electricity Industry Superannuation Fund changing status was that member benefits were adjusted from 1 July 2000 to reflect that the benefits payable from that date were coming from a taxed source rather than an untaxed source. As a consequence, lump sums paid by the scheme are taxed at a lower rate and pensions qualify for the 15% superannuation pension rebate. The South Australian Parliament implemented legislation to achieve this outcome with effect from 1 July 2000. The relevant South Australian legislation provides that the net after tax benefits of members cannot be reduced as a result in the change in the Fund's tax status – that is, the South Australian legislation ensures that members cannot be worse off.

In addition, I understand that no superannuation surcharge assessments have arisen in relation to members of the Fund. Consequently, the surcharge amendments will have no practical application to those members.

Therefore, I can confirm that no taxpayers will be adversely affected by the retrospective application of the amendments in Schedule 2 to the Bill. Rather, if the application date of the Schedule were to be made prospective, the trustees of the Fund and the South Australian Government would have significant administrative difficulties.

1901-2001

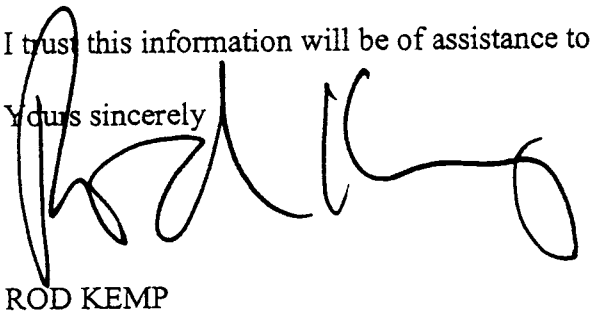
The amendments in Schedule 3 to the Bill implement my announcement of 31 July 2001, which in turn related to the Treasurer's announcement of 22 March 2001, about the capital gains tax (CGT) treatment of payments made by a trustee to a beneficiary of the trust out of the CGT discount amount claimed by the trustee.

These measures generally apply for payments made by a trustee on or after 1 July 2001. The one transitional element relates to payments of the CGT discount claimed by a trustee and passed through a chain of trusts, at any time after 21 September 1999, being the start date for the CGT discount provisions. The effect of this change is to prevent adverse CGT consequences for any trustees in the chain of trusts, where they received payments of the CGT discount amount from another trustee. The measure ensures that, within a chain of trusts, there is no inappropriate reduction in the trustee's cost base of their interest in the trust at any time since the commencement of the CGT discount rules.

Therefore, I can confirm that no taxpayers will be adversely affected by the retrospective application of the amendments in Schedule 3 to the Bill.

I trust this information will be of assistance to you.

Yours sincerely



ROD KEMP

SENATOR THE HON RICHARD ALSTON

Minister for Communications, Information Technology and the Arts
Deputy Leader of the Government in the Senate

The Chairman
Senator Barney Cooney
Senate Standing Committee
for the Scrutiny of Bills
The Senate
Parliament House
Canberra ACT 2600

13 DEC 2001

Dear Chairman Barney,

I refer to the Senate Standing Committee for the Scrutiny of Bills Thirteenth Report of 2001, particularly the matter relating to the *Trade Practices Amendment (Telecommunications) Act 2001* (Act).

The Committee has sought further advice with respect to the amendments in the Act limiting rights to bring evidence before the Australian Competition Tribunal (Tribunal). In particular, the Committee has sought advice as to the necessity of the amendments and noted that an amendment to procedural law in anticipation of some future abuse 'appears to represent a precedent which could become unfortunate'.

The amendments in the Act respond to particular circumstances experienced in the telecommunications access regime. There are strong concerns within the telecommunications industry that regulatory gaming in the arbitration process has produced substantial delay, to the detriment of the industry. The presence of gaming was identified by the Productivity Commission in the Draft Report into Telecommunications Competition Regulation and confirmed by witnesses in the hearing of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee in its inquiry into the Act.

There is a likelihood that regulatory gaming would also extend to Tribunal hearings of arbitration disputes. In its Draft Report on Telecommunications Competition Regulation, the Productivity Commission recognised the need to anticipate regulatory gaming:

> 'Gaming permeates the operation of the regime, as parties strategically try to exploit the procedures to their advantage. An efficient regime must anticipate and counter such gaming.' (pp. XXVIII-XXIX)

On the basis of the above arguments and experience in relation to the operation of the telecommunications access regime, it is prudent to anticipate future procedural abuse and take appropriate regulatory action.

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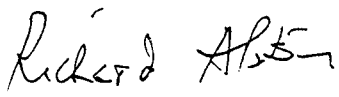
I hope that information provided in this letter adequately addresses the Committee's concerns with the Act.

Yours sincerely



RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts