SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2005

22 June 2005

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator G Marshall
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 2005

The Committee presents its Sixth Report of 2005 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:

Family and Community Services Legislation Amendment (Family Assistance and Related Measures) Bill 2005

Film Licensed Investment Company Bill 2005

Maritime Transport Security Amendment Bill 2005

Family and Community Services Legislation Amendment (Family Assistance and Related Measures) Bill 2005

The Committee dealt with this bill in *Alert Digest No. 5 of 2005*. The Minister for Family and Community Services responded to the Committee's comments in a letter dated 20 June 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2005

Introduced into the House of Representatives on 26 May 2005
Portfolio: Family and Community Services

Background

According to the Minister's second reading speech the bill will 'amend the social security law, the family assistance law and the *Veterans' Entitlements Act 1986* to provide several important measures for families and for low income Australians renting their homes.'

The measures include:

- a new method of calculating FTB Part B applicable to 'secondary earners' who commence or return to work;
- expanding the maternity payment eligibility criteria for adopting parents to cover children adopted under age two, including from overseas (rather than the current 26 weeks); and
- improvements to the administration of the rent assistance program for people in receipt of social security and family tax benefit.

Retrospective commencement
Schedule 3, item 4

The amendment proposed by item 4 of Schedule 3 inserts additional detail into the formula used to calculate an individual's Part B Family Tax Benefit rate. The new detail specifies the order in which a reduction for income is applied to the components of the rate.

By virtue of item 7 in the table in subclause 2(1) of this bill, the amendment is to commence retrospectively on 1 January 2005. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

In this case, while the explanatory memorandum gives some information on the effect of the amendment, on page 28, it does not indicate whether this retrospective commencement will adversely affect any person. The committee **seeks the Minister's advice** as to whether anyone will be disadvantaged by the retrospective application of the provision.

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

> Item 4 inserts an order of reduction rule for Family Tax Benefit (FTB) Part B, whereby the two components of rate, being the standard rate and FTB Part B supplement, are affected by the income test in that order. The amendment applies from 1 January 2005, which corresponds to the commencement of the FTB Part B supplement. I note, however, that the FTB Part B supplement is payable as a lump sum on income reconciliation after the end of the relevant income year, which means that the first payments of the supplement will be made from July 2005.
>
> The amendment does not change the rate of FTB Part B to which a customer is entitled. It does, however, enable the components that make up that rate to be quantified. The retrospective commencement therefore does not adversely affect any person.

The Committee thanks the Minister for this response, and for clarifying the intended operation of the provision.

The Committee makes no further comment on the provision.

Film Licensed Investment Company Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2005*. The Minister for the Arts and Sport responded to the Committee's comments in a letter received on 21 June 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2005

Introduced into the House of Representatives on 26 May 2005
Portfolio: Communications, Information Technology and the Arts

Background

This bill provides for an extension of the pilot Film Licensed Investment Company (FLIC) scheme. It provides for a company to apply for a concessional capital licence, which according to the explanatory memorandum, will be allocated following a competitive process. That company may then raise up to $10 million in each of 2005-06 and 2006-07 for investment in qualifying Australian films.

The bill also provides a 100% income tax deduction for taxpayers investing funds in the company during the licence period.

The bill was introduced with the Film Licensed Investment Company (Consequential Provisions) Bill 2005.

Reversal of the onus of proof
Clause 41

As the explanatory memorandum notes, 'Clause 40 creates an offence if a person or persons acquire shares in a company either knowing, or reckless as to whether, the acquisition would create or exacerbate an "unacceptable level of foreign ownership" in relation to the FLIC.' Although not explicitly spelt out in the memorandum, the offence also applies to the creation of an 'unacceptable level of individual ownership'. These concepts are introduced in clause 27 of the bill, which establishes ownership conditions for FLIC shares.

Clause 41 establishes a separate offence relating to the failure to dispose of shares in accordance with a written direction from the Minister.

Subclause 41(1) would permit the Minister to give a stakeholder a written direction to cease holding a stake in a film licensed investment company if the Minister has 'reasonable grounds to believe' that the stakeholder's sole or dominant purpose was to avoid the restrictions on ownership levels stated in clause 27. By virtue of subclause 41(3), the stakeholder's failure to comply with such a direction is a criminal offence. It appears that, although, in a prosecution for such an offence, the prosecution would have to prove beyond reasonable doubt that the accused had failed to divest himself or herself of the stake in the film licensed investment company, it would not have to prove to any degree at all that the accused person's sole or dominant purpose in entering into a scheme was to avoid the limitations stated in clause 27.

The only circumstance in which the accused person's state of mind in entering into any scheme might be tested would be if he or she challenged the Minister's decision to issue the divestiture order. Such a challenge could only be made under the *Administrative Decisions (Judicial Review) Act 1977*, in which case the onus would be on the stakeholder to prove that the Minister did not have reasonable grounds for issuing the divestiture order.

The Committee usually comments adversely on provisions which place the onus on an accused person to disprove one or more elements of an offence with which he or she is charged. The Committee expects that the justification for such a provision will be set out in the explanatory memorandum.

It appears that the effect of clause 41 is to reverse the normal onus of proof in a criminal prosecution. The Committee **seeks the Minister's advice** as to whether that is in fact the case and, if so, whether reversal of the onus of proof is justified in these circumstances.

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

As stated in the Scrutiny of Bills Alert Digest No.5 of 2005, the Committee seeks advice as to whether the effect of clause 41 of the FLIC Bill is to reverse the onus of proof in a criminal prosecution. I am responding to this request for advice as the FLIC Bill falls within my portfolio responsibilities.

In relation to clause 41 of the FLIC Bill the Digest notes:

> "Clause 41 establishes a separate offence relating to the failure to dispose of shares in accordance with a written direction from the Minister.
> Subclause 41(1) would permit the Minister to give a stakeholder a written direction to cease holding a stake in a film licensed investment company if the Minister has 'reasonable grounds to believe' that the stakeholder's sole or dominant purpose was to avoid restrictions on ownership levels stated in clause 27."

The second sentence of the above passage does not appear to correctly represent the legislative provision. To clarify, clause 41 provides that, where one or more persons enter into, or begin to carry out a scheme, and the Minister has reasonable grounds for believing that the person, or any of the persons, did so for the sole or dominant purpose of avoiding the restriction on ownership levels set out in clause 27 and as a result of the scheme, or part of the scheme, a person (the stakeholder) increases his or her stake in the FLIC, the Minister may give the stakeholder a written direction to cease holding that stake within a reasonable time specified in the notice. In other words, the stakeholder may or may not be involved in the scheme - the stakeholder needs only to be a person whose stake in the FLIC increased as a result of the actions of others.

The offence created by clause 41 is contained in subclause 41(3). An offence is committed if a person has been given a direction by the Minister to cease holding his or her stake and the person engages in conduct and the conduct breaches the direction. The state of mind of the person or persons who entered into, or began to carry out or carried out the scheme, is not an element of the offence and there is no reversal of the onus of proof on the accused in relation to the offence. Further, the decision to issue a notice under subclause 41(1) is an administrative decision. As discussed in the Explanatory Memorandum, requiring the Minister to give reasons for the issuing of a notice and allowing a specified reasonable time for the recipient of the notice to take action in relation to the stake, incorporates safeguards in the administrative decision-making processes.

The recipient of a notice who is aggrieved by the Minister's decision could lodge an application under the *Administrative Decisions (Judicial Review) Act 1977* for a review of the decision. A basis of the challenge could be that the Minister did not have reasonable grounds for believing that the person who entered into, or began to carry out or carried out the scheme, did so for the sole or dominant purpose of avoiding the restriction on ownership levels set out in clause 27. However, actions for review of an administrative decision are not criminal proceedings and the appellant is not 'the accused'. The fact that the appellant would bear the onus of

adducing evidence to support his or her case does not constitute a reversal of the onus of proof.

I trust this response addresses the Committee's concerns.

The Committee thanks the Minister for his response and for clarifying the circumstances in which clause 41 might apply.

The Committee accepts that there is not a technical reversal of the onus of proof in relation to the offence created in subclause 41(3). The Committee's concern was (and is) that the interaction of the provisions in subclauses 41(1) and 41(3) have an effect *equivalent* to reversing the onus.

The *circumstances* of the offence are as follows:

- a person or persons enter into a scheme, the purpose of which is to circumvent the ownership restrictions in the bill;
- the stakeholder's stake in the company thereby exceeds the ownership restrictions; and
- the stakeholder fails to reduce his, her or its stake in the company (within a reasonable time).

If these were the *elements* of an offence the prosecution would have to prove each of those elements: the stakeholder would not have to prove anything. Instead, the mechanism in clause 41(1) removes the first circumstance from the elements of the offence, creating *in effect* a presumption as to the purpose of the scheme. This presumption cannot be challenged by the stakeholder in criminal proceedings and, importantly, need not be proved by the prosecution.

Instead the presumption can only be challenged by the stakeholder in proceedings challenging the administrative decision. It falls to the appellant stakeholder in such proceedings to prove that the basis for issuing the notice was defective by challenging, for instance, the reasonableness of the Minister's conclusion as to the nature or purpose of the offending scheme. The Committee notes the administrative safeguards implicit in requiring the Minister to give reasons for issuing the notice, but the threshold question remains: is it appropriate in all the circumstances to require the stakeholder to prove anything?

It seems likely that the Minister's determination of the purpose of a 'scheme' will include an assessment of the intention of persons entering into that scheme. The Committee is concerned that the determination of that intention is so divorced from the elements of the offence that it cannot be tested in criminal proceedings brought under clause 41(3). The lack of this fault element will make it easier for the prosecution to make its case and the Committee is concerned that this may not be appropriate.

The Minister's response also raises the prospect of the stakeholder not being involved in the offending scheme. This would seem to make it more difficult for the stakeholder to challenge the decision to issue the notice, as it reduces the likelihood that the stakeholder would be aware of the circumstances of the scheme.

As a final comment, the Committee notes that the provisions in clause 41 are at odds with the usual approach to criminal share transactions under the Corporations Law. This may have an adverse impact on persons who typically operate under that law. The Committee considers that this inconsistency may be undesirable, since persons dealing with share transactions will typically be familiar with and be guided in their behaviour by Corporations Law.

In any case, the Committee notes that the bill has been passed, without comment on this issue. The Committee nevertheless continues to draw the provision, and the Minister's explanation, to the attention of the Senate.

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.

Maritime Transport Security Amendment Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2005*. The Minister for Transport and Regional Services responded to the Committee's comments in a letter dated 21 June 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5. of 2005

Introduced into the House of Representatives on 25 May 2005
Portfolio: Transport and Regional Services

Background

The bill amends the *Maritime Transport Security Act 2003* to extend the coverage of that Act to Australia's offshore oil and gas facilities located in Australia's territorial sea, the Exclusive Economic Zone and the continental shelf.

The bill also amends that Act to provide for the introduction of the Maritime Security Identification Card (MSIC). According to the explanatory memorandum, the current provisions of the Act provide 'the power to make most of the regulations required to introduce and implement the MSIC scheme.' The amendments contained in the bill provide that regulations may be made:

- to enable the recovery of costs incurred by bodies issuing an MSIC; and
- to authorise the use or disclosure of personal information by relevant organisations conducting background checks to determine eligibility to hold an MSIC.

Absolute and strict liability
Schedule 1, item 105

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

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

Although this bill creates both offences of strict liability and of absolute liability, it is not clear from the explanatory memorandum whether the principles contained in the Committee's report or the matters listed at Part 4.5 of the Guide have been considered.

The Committee will generally draw to Senators' attention provisions which create strict liability and absolute liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum which accompanies the bill.

Proposed new subsections 100C(3), 100D(3) and 100W(3) of the *Maritime Transport Security Act 2003*, to be added by item 105 of Schedule 1 to this bill, would create criminal offences of strict liability. The explanatory memorandum records the fact of the proposed imposition of strict criminal liability, but does not explain what that imposition involves.

Proposed new subsection 100ZD(2) of the same Act, also to be inserted by item 105 of Schedule 1, would apply absolute criminal liability to some elements of the offence created by subsection 100ZD(1). Again, the explanatory memorandum is silent as to the effect of applying absolute criminal liability.

The Committee **seeks the Minister's advice** as to the justification for the application of strict and absolute criminal liability and, further, whether consideration has been given to the principles contained in the *Sixth Report of 2002* on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and the matters listed at Part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The MTSAB applies the same penalty regime consistently with existing provisions in the Act. Subsections 100C(3), 100D(3) and 100W(3), which will apply to offshore facilities and offshore industry participants, are equivalent of provisions already applying to maritime industry participants (existing subsections 43(3), 44(3), and 80(3) respectively). Subsection 100ZD(2), which deals with false or misleading statements in relation to the possession of an International Ship Security Certificate (ISSC) by the master of an Australian ship regulated as an offshore facility, is the equivalent of existing subsection 87(2).

If a maritime industry participant is required to have an approved security plan, it is an offence under the existing legislation for the participant to operate without an approved security plan (see section 43). The offence is one of strict liability and does not apply if the participant has a reasonable excuse. Similarly the MTSAB makes it an offence for an offshore industry participant to operate without an offshore security plan (see proposed section 100C). The Bill applies the same penalty regime, based on a graduated penalty scheme. Offshore facility operators face 200 penalty units for a breach; less critical offshore industry participants face 100 penalty units, and any other person 50 penalty units. It is also an offence for a maritime industry participant to fail to comply with their approved maritime security plan under the existing legislation (see section 44). A graduated penalty scheme applies for this offence. The offence is one of strict liability and does not apply if the participant has a reasonable excuse. Similarly the MTSAB makes it an offence for an offshore industry participant to fail to comply with their approved offshore security plan (see proposed section 100D). The MTSAB applies the same penalty regime.

The existing legislation provides that where the master of a regulated Australian ship makes a false or misleading statement in connection with an ISSC, the person is guilty of an offence of absolute liability and liable to a penalty of 50 penalty points (see section 87). Similarly the MTSAB provides that where the master of an Australian ship regulated as an offshore facility makes a false or misleading statement in connection with an ISSC the person is guilty of an offence of absolute liability and liable to a penalty of 50 penalty points (see section 100ZD).

I note that when the *Maritime Transport Security Bill 2003* was introduced into Parliament, the Committee, in its Alert Digest 12/03, focused on concerns in relation to the inappropriate delegation of legislative power (s.33 of the Act) and the delegation of the power of the Secretary (under s.88 of the Act) to determine a 'recognised security organisation', without this determination being subject to Parliamentary oversight. At that stage, concerns were not raised in relation to the strict liability provisions in subsections 43(3), 44(3) and 80(3) or in relation to the absolute liability provision in subsection 87(2). In response, I emphasised the importance of a mechanism for the development of a swift and often confidential response to a probable or imminent unlawful interference with maritime transport as essential. I also provided reasons in justification of the various provisions referred to by the Committee.

In considering the proposed offence provisions contained in the MTSAB consideration was given to the principles contained in the Committee's *Sixth Report of 2002* on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and to matters discussed in Part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers.* For example, the MTSAB provides (as does the Act) that a participant will not be liable for an offence, in relation to subsections 100C(3), 100D(3) and 100W(3), if they have a reasonable excuse. As the Committee has observed, the general defence of mistake of fact with its lower evidentiary burden is a substantial safeguard for those affected by strict liability. It should also be noted that the existence of strict liability or absolute liability provisions does not make any other defence unavailable. Defences available to an accused other than those removed by making a matter one of strict or absolute liability remain available to him or her.

In the development of the MTSAB, including the proposed strict liability and absolute liability offence provisions, my department undertook extensive consultation with the offshore oil and gas industry and offshore service-providers. Consistent with the Committee's principles of protection for those affected by strict and absolute liability, my department also undertook consultation with the Attorney-General's Department in relation to the various offence provisions contained in the MTSAB.

An effective security regime is crucial to ensure better security for our ports, port facilities, ships and offshore facilities against international terrorism. To complement the regulatory model governing the maritime and offshore facility industries, it is necessary to include in the legislation a number of offences with serious offences to indicate where there is no room for leniency. While the structure of these offences is outside usual Commonwealth criminal law policy, I believe it is necessary for this approach to be adopted due to the public harm which could result. Potential consequences of non-compliance are high and range from detrimentally affecting confidence in the offshore petroleum industry and the Australian economy, right through to the adverse consequences a terrorist attack could have on a facility operator's assets and physical operations.

In summary, I do not consider that the proposed provisions trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the Committee's terms of reference. The proposed provisions are necessary to ensure the integrity of the new security regime for the offshore oil and gas sector and to minimise the risk of unlawful interference with offshore facilities.

The Committee thanks the Minister for his response and particularly for his assurance that consideration was given to the principles contained in the Committee's *Sixth Report of 2002* and matters discussed in the relevant part of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The Committee accepts the Minister's explanation as meeting the Committee's concerns with this legislation, but would have preferred to see this level of detail in the explanatory memorandum to the bill.

As noted at page 24 of the *Guide*, 'Commonwealth Governments and Parliaments have long taken the view that any use of strict or absolute liability should be properly justified.' The Committee has long maintained that the justification for such provisions should be set out in explanatory memorandum, a position reinforced in its *Third Report of 2004* on the *Quality of Explanatory Memoranda Accompanying Bills*.

The Committee notes the Minister's comment that 'the structure of these offences is outside usual Commonwealth criminal law policy.' Where provisions depart from the usual criminal law policy – which is set out in general terms in the *Guide* – it is even more important that the Committee, the Parliament and readers of legislation have access to material fully explaining the justification for those provisions.

In the circumstances, the Committee makes no further comment on these provisions.

Robert Ray
Chair

SENATOR THE HON KAY PATTERSON

Minister for Family and Community Services

Minister Assisting the Prime Minister for Women's Issues

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

20 JUN 2005

Dear Senator

The Scrutiny of Bills Alert Digest No. 5 of 2005 includes comment on the retrospective effect of the amendment made by item 4 of Schedule 3 to the *Family and Community Services Legislation Amendment (Family Assistance and Related Measures) Bill 2005* (the Bill). The Committee has sought my advice on whether anyone will be disadvantaged by the retrospective commencement of this measure.

Item 4 inserts an order of reduction rule for Family Tax Benefit (FTB) Part B, whereby the two components of rate, being the standard rate and FTB Part B supplement, are affected by the income test in that order. The amendment applies from 1 January 2005, which corresponds to the commencement of the FTB Part B supplement. I note, however, that the FTB Part B supplement is payable as a lump sum on income reconciliation after the end of the relevant income year, which means that the first payments of the supplement will be made from July 2005.

The amendment does not change the rate of FTB Part B to which a customer is entitled. It does, however, enable the components that make up that rate to be quantified. The retrospective commencement therefore does not adversely affect any person.

Yours sincerely

Senator Kay Patterson

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SENATOR THE HON ROD KEMP

Minister for the Arts and Sport

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

Dear Senator Ray Robert

I refer to correspondence of 1 June 2005 from Richard Pye, Secretary to the Standing Committee for the Scrutiny of Bills, to the Minister for Communications, Information Technology and the Arts in relation to the Film Licensed Investment Company Bill 2005 (the FLIC Bill).

As stated in the Scrutiny of Bills Alert Digest No.5 of 2005, the Committee seeks advice as to whether the effect of clause 41 of the FLIC Bill is to reverse the onus of proof in a criminal prosecution. I am responding to this request for advice as the FLIC Bill falls within my portfolio responsibilities.

In relation to clause 41 of the FLIC Bill the Digest notes:

> "Clause 41 establishes a separate offence relating to the failure to dispose of shares in accordance with a written direction from the Minister.
> Subclause 41(1) would permit the Minister to give a stakeholder a written direction to cease holding a stake in a film licensed investment company if the Minister has 'reasonable grounds to believe' that the stakeholder's sole or dominant purpose was to avoid restrictions on ownership levels stated in clause 27."

The second sentence of the above passage does not appear to correctly represent the legislative provision. To clarify, clause 41 provides that, where one or more persons enter into, or begin to carry out a scheme, and the Minister has reasonable grounds for believing that the person, or any of the persons, did so for the sole or dominant purpose of avoiding the restriction on ownership levels set out in clause 27 and as a result of the scheme, or part of the scheme, a person (the stakeholder) increases his or her stake in the FLIC, the Minister may give the stakeholder a written direction to cease holding that stake within a reasonable time specified in the notice. In other words, the stakeholder may or may not be involved in the scheme – the stakeholder needs only to be a person whose stake in the FLIC increased as a result of the actions of others.

The offence created by clause 41 is contained in subclause 41(3). An offence is committed if a person has been given a direction by the Minister to cease holding his or her stake and the person engages in conduct and the conduct breaches the direction. The state of mind of the person or persons who entered into, or began to carry out or carried out the scheme, is not an element of the offence and there is no reversal of the onus of proof on the accused in relation to the offence. Further, the decision to issue a notice under subclause 41(1) is an administrative decision. As discussed in the Explanatory Memorandum, requiring the Minister to give reasons for the issuing of a notice and allowing a specified reasonable time for the recipient of the notice to take action in relation to the stake, incorporates safeguards in the administrative decision-making processes.

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The recipient of a notice who is aggrieved by the Minister's decision could lodge an application under the *Administrative Decisions (Judicial Review) Act 1977* for a review of the decision. A basis of the challenge could be that the Minister did not have reasonable grounds for believing that the person who entered into, or began to carry out or carried out the scheme, did so for the sole or dominant purpose of avoiding the restriction on ownership levels set out in clause 27. However, actions for review of an administrative decision are not criminal proceedings and the appellant is not 'the accused'. The fact that the appellant would bear the onus of adducing evidence to support his or her case does not constitute a reversal of the onus of proof.

I trust this response addresses the Committee's concerns.

Yours sincerely

ROD KEMP

The Hon John Anderson MP
Deputy Prime Minister
Minister for Transport and Regional Services
Leader of The Nationals

Reference: 02094.2005

21 JUN 2005

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

Dear Senator Ray

I refer to the letter of 1 June 2005 from Mr Richard Pye, Secretary of the Senate Standing Committee for the Scrutiny of Bills, addressed to my Senior Adviser, in relation to a number of provisions included in the *Maritime Transport Security Amendment Bill 2005* (MTSAB), introduced into the House of Representatives on 25 May 2005. I appreciate the opportunity to respond to the Committee's comments.

The purpose of the MTSAB is to amend the *Maritime Transport Security Act 2003* (the Act) to strengthen Australia's offshore maritime security by extending coverage of the Act to offshore oil and gas facilities and ensuring that all regulated offshore facility operators and other prescribed offshore industry participants develop, and comply with, an offshore security plan based on a security assessment of each regulated facility. The existing provisions of the Act, regarding maritime industry participants and their obligations to have risk-based and outcome focussed security plans, form the basis of the maritime security regime in Australia, which is proposed to be extended to the offshore oil and gas industry. It is considered necessary to take this approach due to the public harm which could result as a consequence of terrorist action.

The MTSAB applies the same penalty regime consistently with existing provisions in the Act. Subsections 100C(3), 100D(3) and 100W(3), which will apply to offshore facilities and offshore industry participants, are equivalent of provisions already applying to maritime industry participants (existing subsections 43(3), 44(3), and 80(3) respectively). Subsection 100ZD(2), which deals with false or misleading statements in relation to the possession of an International Ship Security Certificate (ISSC) by the master of an Australian ship regulated as an offshore facility, is the equivalent of existing subsection 87(2).

If a maritime industry participant is required to have an approved security plan, it is an offence under the existing legislation for the participant to operate without an approved security plan (see section 43). The offence is one of strict liability and does not apply if the participant has a reasonable excuse. Similarly the MTSAB makes it an offence for an offshore industry participant to operate without an offshore security plan (see proposed section 100C). The Bill applies the same penalty regime, based on a graduated penalty scheme. Offshore

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facility operators face 200 penalty units for a breach; less critical offshore industry participants face 100 penalty units, and any other person 50 penalty units. It is also an offence for a maritime industry participant to fail to comply with their approved maritime security plan under the existing legislation (see section 44). A graduated penalty scheme applies for this offence. The offence is one of strict liability and does not apply if the participant has a reasonable excuse. Similarly the MTSAB makes it an offence for an offshore industry participant to fail to comply with their approved offshore security plan (see proposed section 100D). The MTSAB applies the same penalty regime.

The existing legislation provides that where the master of a regulated Australian ship makes a false or misleading statement in connection with an ISSC, the person is guilty of an offence of absolute liability and liable to a penalty of 50 penalty points (see section 87). Similarly the MTSAB provides that where the master of an Australian ship regulated as an offshore facility makes a false or misleading statement in connection with an ISSC the person is guilty of an offence of absolute liability and liable to a penalty of 50 penalty points (see section 100ZD).

I note that when the *Maritime Transport Security Bill 2003* was introduced into Parliament, the Committee, in its Alert Digest 12/03, focused on concerns in relation to the inappropriate delegation of legislative power (s.33 of the Act) and the delegation of the power of the Secretary (under s.88 of the Act) to determine a 'recognised security organisation', without this determination being subject to Parliamentary oversight. At that stage, concerns were not raised in relation to the strict liability provisions in subsections 43(3), 44(3) and 80(3) or in relation to the absolute liability provision in subsection 87(2). In response, I emphasised the importance of a mechanism for the development of a swift and often confidential response to a probable or imminent unlawful interference with maritime transport as essential. I also provided reasons in justification of the various provisions referred to by the Committee.

In considering the proposed offence provisions contained in the MTSAB consideration was given to the principles contained in the Committee's *Sixth Report of 2002* on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and to matters discussed in Part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*. For example, the MTSAB provides (as does the Act) that a participant will not be liable for an offence, in relation to subsections 100C(3), 100D(3) and 100W(3), if they have a reasonable excuse. As the Committee has observed, the general defence of mistake of fact with its lower evidentiary burden is a substantial safeguard for those affected by strict liability. It should also be noted that the existence of strict liability or absolute liability provisions does not make any other defence unavailable. Defences available to an accused other than those removed by making a matter one of strict or absolute liability remain available to him or her.

In the development of the MTSAB, including the proposed strict liability and absolute liability offence provisions, my department undertook extensive consultation with the offshore oil and gas industry and offshore service-providers. Consistent with the Committee's principles of protection for those affected by strict and absolute liability, my department also undertook consultation with the Attorney-General's Department in relation to the various offence provisions contained in the MTSAB.

An effective security regime is crucial to ensure better security for our ports, port facilities, ships and offshore facilities against international terrorism. To complement the regulatory model governing the maritime and offshore facility industries, it is necessary to include in the legislation a number of offences with serious offences to indicate where there is no room for leniency. While the structure of these offences is outside usual Commonwealth criminal law policy, I believe it is necessary for this approach to be adopted due to the public harm which could result. Potential consequences of non-compliance are high and range from detrimentally

affecting confidence in the offshore petroleum industry and the Australian economy, right through to the adverse consequences a terrorist attack could have on a facility operator's assets and physical operations.

In summary, I do not consider that the proposed provisions trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the Committee's terms of reference. The proposed provisions are necessary to ensure the integrity of the new security regime for the offshore oil and gas sector and to minimise the risk of unlawful interference with offshore facilities.

Yours sincerely

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