



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

ELEVENTH REPORT

OF

2006

29 November 2006

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MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT OF 2006

The Committee presents its Eleventh Report of 2006 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:

Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 *

Customs Legislation Amendment (New Zealand Rules of Origin)
Bill 2006 *

Datacasting Transmitter Licence Fees Bill 2006 *

Defence Legislation Amendment Bill 2006 *

Environment and Heritage Legislation Amendment (No. 1) Bill 2006

Medibank Private Sale Bill 2006

- * Although these bills have not yet been introduced in the Senate, the Committee may report on its proceedings in relation to the bills, under standing order 24(9).

Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2006*. The Minister for Justice and Customs responded to the Committee's comments in a letter dated 27 November 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 13 of 2006

Introduced into the House of Representatives on 1 November 2006

Portfolio: Justice and Customs

Background

Introduced with the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006, this bill implements changes to Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) regulatory regime in relation to the identification, management and mitigation of money laundering and terrorism financing. The bill introduces reporting obligations for the financial sector in relation to customer due diligence, reporting of certain matters, development and maintenance of AML/CTF programs and record-keeping. The changes are to be phased in over two years and incorporate a risk based approach to compliance.

The bill expands the regulatory role of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to provide advisory, monitoring and enforcement functions across a range of industry sectors. The bill provides for review of the operation of the provisions, regulations and AML/CTF rules at the end of seven years.

Abrogation of privilege against self-incrimination Clauses 48, 150, 169 and 205

Clause 48 would abrogate the privilege against self-incrimination for a person required to give a report to the Chief Executive Officer of the AUSTRAC under clause 47. Although subclause 48(2) would protect the information so provided from being admissible in evidence in proceedings against the affected person, the subclause does not protect the person from having information obtained from other sources being used against him or her, when that information has been obtained as a result of the compliance with clause 47. Subclause 150(4) also abrogates the privilege against self-incrimination, and, in the same way as subclause 48(2), subclause 150(5) provides only direct-use immunity but not derivative-use immunity. The explanatory memorandum seeks to justify these two instances of a lack of derivative-use immunity, on page 89, on the ground that to permit derivative-use immunity 'would unacceptably fetter the effective investigation and prosecution of offences under the bill.' The explanatory memorandum goes on to observe that subclauses 48(2) and 150(5), in providing direct-use immunity, provide greater immunity than provisions in other corporate regulation. Clauses 169 and 205 also abrogate the same privilege, and provide only direct-use immunity. In these instances, the explanatory memorandum explains the effect of the provisions, but does not seek to justify their insertion in this bill. The Committee considers that these provisions may be regarded as trespassing on personal rights and liberties. The Committee makes no further determination on this matter but **leaves for the Senate as a whole** the question of whether the amendments trespass *unduly* on personal rights and liberties.

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

Relevant extract from the response from the Minister

The Committee has raised the question whether clauses 48 (which requires reporting entities to provide compliance reports), 150 (which requires persons to answer questions and produce documents), 169 (which requires persons to comply with written notices to provide information or documents) and 205 (which requires persons to comply with notices to produce) unduly trespass on personal rights and liberties. This is because the provisions abrogate the privilege against self incrimination and only provide direct use immunity and not derivative use immunity.

The Committee notes that the explanatory memorandum seeks to justify the lack of derivative use immunity in clauses 48 and 150 but not in clauses 169 and 205.

The justification for the exclusion of derivative use immunity is the same for all four provisions. The granting of derivative use immunity would unacceptably hinder the effective investigation and the prosecution of offences under the AML/CTF Bill. As noted in the *Report on Review of the Derivative Use Immunity Reforms* by John Kliver in May 1997 at page 46, former Chief Justice Mason supported the view that direct use immunity was a satisfactory balance between public and private interests where it was provided in the Corporations Law. A correction will be made to the explanatory memorandum for clauses 169 and 205.

The Committee thanks the Minister for this response and notes that a correction will be made to the explanatory memorandum in relation to clauses 169 and 205.

Strict liability

Subclauses 53(2), 55(2), 61(5) and 62(4)

Subclauses 74(3), 74(5), 74(7) and 74(9)

Subclause 66(4)

Various subclauses in this bill would impose strict liability for particular elements of offences created by the bill. The Committee notes that the explanation and justification provided in the explanatory memorandum for the imposition of strict liability in each case is partial and inconsistent. Subclauses 53(2), 55(2), 61(5) and 62(4) impose strict liability offences in relation to Reports about physical currency movements and in relation to notices about reporting obligations. However the Committee notes that the explanatory memorandum, on pages 93-98, merely describes the effect of the respective subclause and continues, in each case: ‘See section 6.1 *Criminal Code* in relation to strict liability.’

This treatment is to be contrasted with the consideration of subclauses 74(3), (5), (7) and (9), which also impose strict liability for particular elements of other offences. In this case the explanatory memorandum explains rather more fully the effect of strict liability, but does not attempt to justify its imposition in these circumstances.

On the other hand, subclause 66(5) imposes strict liability for the physical element of the offence created by subclause 66(4), and the explanatory memorandum, at page 102, not only explains the effect of imposing strict liability, but seeks to justify it, in this instance, by observing that without it there would be ‘difficulty in proving that a person intentionally failed to do something, especially as the reason for the failure will usually only be within the knowledge of the defendant.’

The Committee notes that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) advises that ‘[s]trict or absolute liability should only be used in an offence where there are well thought out grounds for this.’ The Guide also observes that ‘Commonwealth Governments and Parliaments have long taken the view that any use of strict or absolute liability should be properly justified’. The Committee expects that the justification for the imposition of such offences should be clearly set out in the explanatory memorandum in each case. The Committee **seeks the Minister’s advice** whether the explanatory memorandum could be amended to provide a clear justification for the imposition of strict liability in each of the circumstances where it is proposed to be imposed.

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

A correction will be made to the explanatory memorandum, adding additional justifications as recommended by the Committee in the following terms.

Sub-clause 53(2) (Failure to report cross border movements of physical currency)

The physical elements of the offence in sub-clause 53(1) are set out in paragraphs (a), (b) and (c). Sub-clause 53(2) provides that the fault element for paragraph 53(1)(c) is strict liability. This means that the prosecution will only have to prove the physical aspect of this element (ie that the report required by clause 53 has not been provided).

In the absence of sub-clause 53(2), the prosecution would have to prove that the defendant was ‘reckless’ in failing to provide the report required by clause 53.

Strict liability is provided because paragraph 53(1)(c) involves a 'knowledge of law' issue. This is one of the justifications indicated in the Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* at 285:

'strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply'

The defence of reasonable mistake of fact will still be available for this physical element.

Sub-clause 55(2) (Reports about cross border movements of physical currency)

Sub-clause 55(2) applies strict liability to the offence at sub-clause 55(1). A person commits an offence if the person receives not less than \$10 000 in physical currency moved to the person from outside Australia and a report under clause 53 has not been made, and a report in respect of the receipt is not given in accordance with this clause before the end of 5 business days.

The physical elements of the offence in sub-clause 55(1) are set out in paragraphs (a), (b), (c) and (d). Sub-clause 55(2) provides that strict liability applies to the elements in paragraphs 55(1)(c) and (d). This means that the prosecution will not have to prove any fault element for the physical elements in paragraph 55(1)(c) and (d).

If sub-clause 55(1) was not a strict liability offence as provided in sub-clause 55(2), the prosecution would have to prove that:

- (c) the person knew or was reckless as to whether a report has been made in accordance with clause 53, and
- (d) that they knew or were reckless as to whether they had to make a report in respect of receipt of the physical currency in accordance with this clause within 5 business days.

The fault element in relation to paragraph (c) would then rest on matters solely within the defendant's knowledge.

Strict liability has been applied to the element in paragraph (d) to overcome the problem of the prosecution needing to prove that the defendant had knowledge of the clause under which he or she was required to provide a report.

This is consistent with the justifications for strict liability indicated by Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* at 285:

'strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a

reference to a legislative provision; in such cases the defence of mistake of fact should apply'

The defence of mistake of fact under section 9.2 of the *Criminal Code* is available in relation to these elements, as stated in section 6.1 of the *Criminal Code*.

Sub-clause 61(5) (Interference with notices affixed by customs officers)

Sub-clause 61(5) provides that the offence in sub-clause 61(3) is one of strict liability. The offence created by sub-clause 61(3) relates to conduct which results in interference with, removal of, or the defacement of a notice about reporting obligations.

A convicted person does not face imprisonment and a fine is capped at 50 penalty units which is under the threshold suggested by the Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* Committee at 284.

Compliance with the requirement to display these notices ensures that passengers entering or leaving Australia have notice of their obligations to declare the physical carriage of currency. Any person who defaces these signs significantly affects the operation of these provisions. Strict liability is an effective deterrent.

The defence of mistake of fact under section 9.2 of the *Criminal Code* is available in relation to the physical element, as stated in section 6.1 of the *Criminal Code*.

Sub-clause 62(4) (Failure to respond to notice to report)

The physical elements of the offence in sub-clause 62(3) are set out in paragraphs (a), (b) and (c). Sub-clause 62(4) means that the prosecution will not have to prove any fault element for the physical elements in paragraphs 62(3)(a)-(c).

If this was not a strict liability offence, the prosecution would have to prove that the person intentionally failed to provide a copy of a notice to travellers on board a ship or aircraft travelling to Australia.

Strict liability is justified for the circumstance element of the offence (paragraph 62(3)(a)) because of the 'knowledge of law' difficulty. This is consistent with the possible justifications for strict liability indicated by Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* at 285:

'strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply'

The defence of mistake of fact under section 9.2 of the *Criminal Code* is available in relation to that physical element, as stated in section 6.1 of the *Criminal Code*.

The penalty is a fine rather than imprisonment and is capped at 50 penalty units which is under the threshold suggested by the Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* Committee at 284.

Strict liability is consistent with the regulatory nature of the offence, and is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences. This is particularly important because compliance with this provision ensures that all passengers entering Australia are given notice of their obligations under sub-clause 53(2) to report the transfer of currency of more than \$10 000 AUD into Australia.

Sub-clause 66(4) should be deleted. Its inclusion in Division 3 was a drafting oversight.

Sub-clauses 74(3) (Providing remittance services when unregistered), 74(5) (Repeated failure to respond to notice to report), 74(7) (More than one repeated failure to respond to notice to report), 74(9) (Providing remittance services when unregistered where previously convicted of this offence)

If paragraphs 74(2)(b) and (c) were not strict liability, the prosecution would need to prove that a person intentionally failed to register on the Register of Providers of Remittance Services, which would require proof that the defendant was aware of his or her obligations under sub-clause 74(1), and was then reckless as to his or her obligation.

Strict liability in this instance is necessary in order to overcome this ‘knowledge of law’ difficulty. This is consistent with the justifications for strict liability indicated by Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* Committee at the Scrutiny of Bills Committee at 285:

‘strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply’

Sub-clause 74(5) provides that strict liability applies to paragraphs 74(4)(b) and (c). See the above comment on sub-clause 74(3) concerning strict liability for some of the physical elements of the offences at sub-clause 74(2). In addition to the justification provided under sub-clause 74(3), strict liability is further justified in relation to the sub-clause 74(4) offence by the fact that the element in paragraph (d) requires that the AUSTRAC CEO has previously given a direction under sub-clause 191(2) or accepted an undertaking under clause 197. The defendant accordingly has been put on notice about the possibility of the contravention.

Sub-clause 74(6) provides a further aggravated offence where the elements of the offence in sub-clause 74(4) apply and the AUSTRAC CEO has, on more than one

occasion, previously given a direction to the person or has previously accepted an undertaking from the person.

Sub-clause 74(7) provides that strict liability applies to paragraphs 74(6)(b) and 74(6)(c). In addition to the justification provided under sub-clause 74(3), strict liability is further justified for sub-clause 74(7) by the fact that the element in paragraph 74(6)(d) requires that the AUSTRAC CEO has previously given a direction under sub-clause 191(2) or accepted an undertaking under sub-clause 197. The element in paragraph 74(6)(e) requires that this was not the first occasion that the AUSTRAC CEO has issued such a direction or accepted such an undertaking referred to in paragraph 74(6)(e). The defendant accordingly has been put on notice on more than once occasion about the possibility of contravention.

Sub-clause 74(8) provides for a further aggravated offence where the elements of the offence in sub-clause 74(1) apply and the person has been previously convicted of an offence against sub-clauses 74(2), (4) or (6). In addition to the justification provided under sub-clause 74(3), strict liability is further justified for sub-clause 74(8) by the fact that paragraph 8(d) requires that the defendant has been previously convicted of an offence against (2), (4) or (6) or that an order has been made against the person under section 19B of the *Crimes Act 1914* in respect of one of those offences. This indicates that the defendant has been put on notice of the possibility of contravention.

In relation to all of the above offences, the defence of mistake of fact under section 9.2 of the *Criminal Code* is available for that physical element (section 6.1 of the *Criminal Code*). Also see the explanatory memorandum on sub-clauses 74(11) and 74(12) for additional defences for criminal proceedings for an offence against subclauses 74(2), (4), (6) or (8) or in civil penalty proceedings for a contravention of sub-clause 74(1).

Sub-clause 66(5) (Electronic funds transfer instructions - only one institution involved in the transfer)

If paragraph 66(4)(b) was not strict liability, the prosecution would have to prove that a person intentionally failed to obtain complete payer information before performing the actions in paragraphs 66(2)(a) or (b), or intentionally failed to comply with a request by the AUSTRAC CEO in the manner specified in paragraphs 66(3)(c) and (d), in circumstances in which sub-paragraphs 66(3)(a)(i) or (ii) applied. To prove this, it would be necessary to prove that the defendant was aware of his or her obligations under sub-clause 66(2) or 66(3), and was then reckless as to his or her obligation.

Strict liability in this instance is necessary to overcome this 'knowledge of law' difficulty. This is consistent with the possible justifications for strict liability indicated by the Scrutiny of Bills Committee Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* at 285:

'strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply'

The defence of mistake of fact under section 9.2 of the *Criminal Code* is available in relation to that physical element, as stated in section 6.1 of the *Criminal Code*.

The Committee thanks the Minister for this clear explanation for the imposition of strict liability in each of these cases and notes that a correction will be made to the explanatory memorandum to include this explanation.

**Legislative Instruments Act—declarations
Subclauses 75(3) and 191(6), 75(1) and 191(2)**

Subclauses 75(3) and 191(6) provide respectively that the Register of Providers of Designated Remittance Services, required to be maintained under subclause 75(1), and a Remedial direction issued under subclause 191(2) are not legislative instruments. In each case, the explanatory memorandum apparently seeks to justify these provisions by stating that the register and direction respectively do not need to be made public because each document is not one that 'the public needs access to in order to understand rights and obligations under the bill.' The explanatory memorandum also states that Remedial directions may include commercially confidential information. The Committee **seeks the Minister's advice** as to whether either of these documents is legislative in character, or whether subclauses 75(3) and 191(6) have been included simply to assure readers that the documents in question are not legislative in character.

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

Neither of the instruments referred to in sub-clauses 75(3) and 191(6) are legislative in character. Subclauses 75(3) and 191(6) are merely declaratory and intended to provide clarification for readers.

The Committee thanks the Minister for this response and notes that it would have been helpful if this clarification had been included in the explanatory memorandum.

Absolute liability

Subclauses 136(4) and 137(3), 136(1) and 137(1)

Subclauses 136(4) and 137(3) would impose absolute liability for one particular element of the offences created by subclauses 136(1) and 137(1) respectively. The element in respect of which absolute liability is imposed is that information was given, or a document produced, under this Act. The explanatory memorandum correctly observes that the imposition of absolute liability means that the prosecution need not prove fault in relation to that aspect of the offence, and that the defence of mistake of fact is not available. The explanatory memorandum seeks to justify these subclauses (at pages 148 and 149) on the basis that ‘it would be difficult for the prosecution to prove this element as the information would be only within the knowledge of the defendant.’ However, the Committee notes that Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs in February 2004, states that:

Application of strict or absolute liability to a particular physical element of an offence has generally only been considered appropriate where one of the following considerations is applicable:

- There is demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking ‘fault’ in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact in respect of that element.
- The element is a jurisdictional element rather than one going to the essence of the offence.

- Where one provision refers to another, strict liability should attach to that cross reference.

In light of the advice in the Guide, the Committee **seeks the Minister's advice** as to the grounds for these subclauses.

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

Sub-clauses 136(4) (Providing false or misleading information) and 137(3) (Producing false or misleading documents)

These provisions relate to the offences of providing false or misleading information (clause 136) and producing false or misleading documents (clause 137).

The application of absolute liability means that no fault element applies to the physical element for paragraphs 136(1)(c) and 137(1)(c), and that a defence of mistake of fact is unavailable.

The application of absolute liability was included to overcome the 'knowledge of law' issue for these elements.

The Committee thanks the Minister for this response. While the Committee acknowledged in its *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, that the 'knowledge of law' issue may well be a justification for the imposition of strict liability, the Committee did not suggest that the 'knowledge of law' issue was a justification for the imposition of absolute liability. The Committee **seeks the Minister's further advice** as to the particular manner in which the 'knowledge of law' issue arises in these circumstances and the justification for the application of absolute liability in response to this.

Absolute liability

Subclauses 139(2), 140(2) and 141(2), 139(1), 140(1) and 141(1)

Subclauses 139(2), 140(2) and 141(2) would impose absolute liability for one particular element of the offences created by subclauses 139(1), 140(1) and 141(1) respectively. The element in respect of which absolute liability is imposed is that ‘at least one provision of Division 2, 3 or 4 of Part 2 applies to the provision of a designated service’. Divisions 2, 3 and 4 of Part 2 deal with identification procedures to be carried out by financial institutions on their customers. The explanatory memorandum correctly observes that the imposition of absolute liability means that the prosecution need not prove fault in relation to that aspect of the offence, and that the defence of mistake of fact is not available.

The explanatory memorandum seeks to justify these subclauses (at pages 151, 152 and 153 respectively) on the basis that their purpose is ‘to avoid the prosecution having to prove that the defendant was reckless’ as to this element of the offence, and that it would be ‘difficult for the prosecution to prove that the defendant was reckless’ as to this element of the offence. However, the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, makes no mention, in Part 4.5, of such a justification for strict liability and absolute liability, and observes that there should be ‘legitimate grounds for penalising a person who made an honest and reasonable mistake of fact’ in relation to the relevant element of the offence. The Committee **seeks the Minister’s advice** whether he could provide further information as to the justification for these subclauses.

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

Sub-clauses 139(2) (Providing a designated service using a false customer name or customer anonymity), 140(2) (Receiving a designated service using a false customer name or customer anonymity) and 141(2) (Receiving a designated service without disclosing names by which a person is commonly known)

Sub-clauses 139(2), 140(2), and 141(2), apply absolute liability to an element of the offences in sub-clauses 139(1), 140(1) and 141(1) respectively. Similarly, provisions in sub-clauses 139(4) and 140(4) apply absolute liability to the same element of the respective offences in sub-clauses 139(3) and 140(3).

The application of absolute liability means that no fault element applies to the physical elements in relation to paragraphs 139(1)(d), 140(1)(c) and 141(1)(e) and that a defence of mistake of fact is unavailable.

The application of absolute liability was included to overcome the 'knowledge of law' issue in relation to these elements.

The Committee thanks the Minister for this response. While the Committee acknowledged in its *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, that the 'knowledge of law' issue may well be a justification for the imposition of strict liability, the Committee did not suggest that the 'knowledge of law' issue was a justification for the imposition of absolute liability. The Committee **seeks the Minister's further advice** as to the particular manner in which the 'knowledge of law' issue arises in these circumstances and the justification for the application of absolute liability in response to this.

Customs Legislation Amendment (New Zealand Rules of Origin) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2006*. The Minister for Justice and Customs responded to the Committee's comments in a letter dated 20 November 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 13 of 2006

Introduced into the House of Representatives on 1 November 2006

Portfolio: Justice and Customs

Background

This bill amends the *Customs Act 1901* by introducing new rules of origin for goods imported into Australia from New Zealand. The bill gives effect to recent amendments to the Australia New Zealand Closer Economic Relations Trade Agreement to enable goods that have been determined as New Zealand originating goods to enter Australia at preferential rates of customs duty. The new rules would apply to goods imported on or after 1 January 2007.

The bill also contains complementary amendments to the *Customs Tariff Act 1995* and consequential provisions in relation to the *Customs Tariff (Anti-Dumping) Act 1975* and the *Legislative Instruments Act 2003*.

Delegation of legislative power

Schedule 1, item 1

Proposed new subsection 153ZIB(2) and (3) of the *Customs Act 1901*, to be inserted by item 1 of Schedule 1, would provide for the making of regulations for the purposes of proposed new Division 1E of the Act and proposed new subsection 153ZIB(6) would allow such regulations to 'apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing from time to time.'

The explanatory memorandum states that '[t]his provision will override section 49A of the *Acts Interpretation Act 1901* in order to enable the *Customs New Zealand Rules of Origin Regulations 2006* (New Zealand Regulations) to refer to the general accounting principles of New Zealand for the purposes of the regional value content calculations'. The Committee notes that following the repeal of Division 12 of the *Acts Interpretation Act 1901* in 2005, subsection 14(2) of the *Legislative Instruments Act 2003* deals with prescribing matters by reference to other instruments.

The Committee also notes that, while the stated purpose of the provision might be regarded as a sufficient reason for a provision of this type, the terms of the provision go very much wider than that stated purpose and permit the incorporation into the regulations of any material at all. The Committee **seeks the Minister's advice** as to the justification for this considerable delegation of legislative power.

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

I refer to the Committee's Alert Digest No. 13 dated 8 November 2006, dealing with the Customs Legislation Amendment (New Zealand Rules of Origin) Bill 2006 (the Bill), in which you seek my advice on the prescription of matters in legislative instruments or other writing contained in subsection 153ZIB(6) of the proposed Bill. The Committee also raised a concern about the reference in the Bill to section 49A of the *Acts Interpretation Act 1901*.

The Bill amends the *Customs Act 1901* (the Customs Act) to implement amendments to article 3 of the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA).

This proposed subsection 153ZIB(6) is consistent with the provisions contained in subsections 153YA(5) and 153ZA(5) of the Customs Act, which relate to the implementation of the Australia-United States Free Trade Agreement and the Thailand-Australia Free Trade Agreement respectively.

Also consistently with previous free trade agreement implementation, the purpose of this provision is to allow the relevant regulations implementing the product specific rules of origin to refer to the general accounting principles of the relevant country as in force from time to time. This obviates the need to amend the relevant regulations each time these principles are amended.

At this stage, it is not necessary to use this provision to refer to any other instrument or other writing in order to implement the amendments to ANZCERTA. However, should the ANZCERTA be further amended and require the use of the provision in the future, its general nature would allow for more seamless implementation of such amendments without having to also amend the Customs Act. In addition, any necessary amendments to the regulations would still be subject to parliamentary scrutiny.

Arrangements are currently under way to correct the Explanatory Memorandum to the Bill, omitting the reference to section 49A of the *Acts Interpretation Act 1901*, and substituting it with section 14 of the *Legislative Instruments Act 2003*. This incorrect reference was an unfortunate oversight during the preparation of the Explanatory Memorandum and I thank the Committee for bringing this to my attention.

Should the Committee require any further clarification about these matters, I would be pleased to assist.

The Committee thanks the Minister for this response and notes that a correction to the explanatory memorandum has been circulated. However, the Committee remains concerned at the apparently excessive width of this proposed delegation of legislative power, particularly as the subjection appears to have been drafted in this manner for little more than administrative convenience.

The Committee continues to draw Senators' attention to the 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.

Datacasting Transmitter Licence Fees Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2006*. The Minister for Communications, Information Technology and the Arts responded to the Committee's comments in a letter dated 27 November 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 12 of 2006

Introduced into the House of Representatives on 12 October 2006
Portfolio: Communications, Information Technology and the Arts

Background

Introduced with the Broadcasting Services Amendment (Collection of Datacasting Transmitter Licence Fees) Bill 2006, this bill requires channel A datacasting transmitter licence holders to be subject to annual licence fees based on revenue received by the datacasting transmitter licence operator.

This bill follows the introduction of the Broadcasting Legislation Amendment (Digital Television) Bill 2006 and the Broadcasting Services Amendment (Media Ownership) Bill 2006 which the Committee dealt with in *Alert Digest No. 11 of 2006*.

Excluding merits review

Clause 9

Clause 9 would empower the Australian Communications and Media Authority to direct that the earnings of one entity be treated as the earnings of another entity, if the Authority is 'of the opinion' that certain conditions have been met. The Committee notes it appears that the Authority is given an unfettered discretion in forming such an opinion, and that this discretion appears not to be subject to merits (or any other) review by the Administrative Appeals Tribunal. Since its establishment, the Committee has consistently drawn attention to provisions which explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee **seeks the Minister's advice** whether the exercise of this discretion ought to be subject to such review.

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

The Bill closely mirrors the provisions of the *Television Licence Fees Act 1964*. Clause 9 of the Bill uses words very similar to those in section 7 of the *Television Licence Fees Act*.

Clause 9 is intended to ensure that the earnings of subsidiary companies and other related entities of the licensee can be included in the calculation of the annual licence fee payable by a channel A datacasting transmitter licensee, in the same way that section 7 of the *Television Licence Fees Act* operates in relation to commercial television broadcasting licensees.

Procedures for collecting licence fees for a channel A licence are provided in amendments to the *Broadcasting Services Act 1992* (BSA) and the *Radiocommunications Act 1992* (RA) by the Broadcasting Services Amendment (Collection of Datacasting Transmitter Licence Fees) Bill 2006. These procedures will be subject to an application to the Administrative Appeals Tribunal (AAT) in the same way that the procedures relating to collection of commercial television broadcasting licence fees are already.

Section 205A of the BSA (as amended) will provide that the definition of "licence fee" will include a fee imposed under section 7 of the *Datacasting Transmitter Licence Fees Act 2006*.

New paragraphs 109A(1)(ba) and 109A(1)(bb) of the RA will provide that it is a condition of a channel A datacasting transmitter licence that the licensee will meet all obligations to pay amounts of datacasting transmitter licence fees, and that the licensee will comply with the requirements of section 205BA of the BSA.

New Section 205BA will require a channel A licence holder to:

- keep financial accounts in relation to the transmission of matter by transmitters operating under the licence;
- give ACMA an audited balance sheet and audited profit and loss account in relation to the transmission of matter by transmitters operating under the licence; and

- provide ACMA with a statutory declaration stating the gross earnings in relation to the licence during the financial year.

Subsection 205C(1) of the BSA (as amended) will provide that a channel A datacasting transmitter licensee must pay a licence fee and inform ACMA as to the manner in which that fee was determined. Under subsection 205C(2), where ACMA is of the opinion that the licence fee due is not the same as the amount paid, ACMA must give notice to the licensee of the method by which it determined the discrepancy in the licence fee due.

Under section 204 of the BSA, the licensee can make an application to the AAT in relation to a decision by ACMA to issue a notice under s 205C(2).

I trust this information is of assistance to the Committee.

The Committee thanks the Minister for this response.

Defence Legislation Amendment Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2006*. The Minister for Veterans' Affairs responded to the Committee's comments in a letter received on 28 November 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 11 of 2006

Introduced into the House of Representatives on 14 September 2006
Portfolio: Defence

Background

This bill amends the *Defence Force Discipline Act 1982*, the *Defence Act 1903*, the *Defence Force Discipline Appeals Act 1955* and the *Migration Act 1958* to establish the Australian Military Court in accordance with the recommendations of the 2005 Senate Foreign Affairs, Defence and Trade References Committee's *Inquiry into the effectiveness of Australia's military justice system*. The bill provides for the statutory appointment of a Chief Military Judge and two military judges for a fixed term of five years with a possible renewal of five years. The bill also contains a regulation-making power to facilitate the creation of a 'Chief of Defence Force Commission of Inquiry' to conduct independent and impartial inquiries into notifiable incidents including suicide, accidental death or serious injury.

The bill contains application and transitional provisions.

Constitution of military jury

Item 11, Schedule 1, Sections 122 and 124

In considering this bill, the Committee noted the 2005 Report of the Senate Foreign Affairs, Defence and Trade References Committee and in particular that Committee's concerns regarding the means through which the need for operational effectiveness is balanced against the individual rights of Defence members and Defence civilians, within the military justice system.

By virtue of proposed subsection 115(1) of this bill the Australian Military Court has jurisdiction to try any charge against any Defence member or Defence civilian. The Committee notes that the classes of offences to be heard by a Military Judge and jury could potentially include offences of treason, murder and manslaughter. The Committee is concerned that the provision for a military jury to be composed of six members (proposed section 122) and to determine questions of guilt on the agreement of a two-thirds majority (proposed subsection 124(2)) is an infringement on the rights of an individual.

The Committee notes that the constitution of a military jury and the manner in which questions are to be determined differs substantially from the constitution and operation of civilian juries in criminal matters, which generally require, as a minimum, the agreement of 10 out of 12 jurors and then only in specific circumstances and with the approval of the judge. As the explanatory memorandum is silent on the basis for the proposed constitution and operation of a military jury, and the extent to which the rights of the individual have been balanced against the particular needs of the military justice system, the Committee **seeks the Minister's advice** as to the justification for this apparent variance from accepted practice.

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

I have noted your comments on the Commencement on Proclamation. As you have commented, the amendments must commence on 1 October 2007, if not before on Proclamation.

I have also noted your comments on the Constitution of the Military Jury and am pleased to report that for the Class 1, most serious offences, I have instigated a specific amendment to meet the civilian practice referred to in your letter.

The Committee thanks the Minister for this response and notes the Minister's intention to amend the provisions in relation to Class 1 offences.

Environment and Heritage Legislation Amendment (No. 1) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2006*. The Minister for the Environment and Heritage responded to the Committee's comments in a letter dated 10 November 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 12 of 2006

Introduced into the House of Representatives on 12 October 2006
Portfolio: Environment and Heritage

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC), the *Australian Heritage Council Act 2003*, the *Environment and Heritage Legislation Amendment Act (No. 1) 2003*, the *Environment Protection (Alligator Rivers Region) Act 1978*, the *Environment Protection (Northern Territory Supreme Court) Act 1978*, the *Environment Protection (Sea Dumping) Act 1981* and the *Migration Act 1958* to:

- reduce processing time and costs for development interests;
- allow World Heritage properties to be transferred to the National Heritage List;
- improve cooperation on environmental assessment and approval processes between the Government and state and territory governments;
- clarify responsibilities for proponents and simplify the referral, assessment and approval processes;
- allow the Minister to publish policy statements on the application of the Act to assist in decision-making and inform the community;

- change the approach to the list of heritage places and threatened species and ecological communities;
- continue the Register of the National Estate as a statutory register for a further five years to allow for the transfer of places to other registers;
- establish a List of Overseas Places of Historic Significance to Australia;
- align the EPBC Act and the *Fisheries Management Act 1991* to provide increased scope for the fisheries regulator to manage depleted fisheries to environmental and economic sustainability; and
- clarify and strengthen compliance and enforcement provisions of the Act.

The bill also contains application, saving and transitional provisions and a number of technical provisions designed to reduce duplication and complexity.

Commencement

Schedule 1, items 3, 8, 10, 12, and 14

Items 3, 8, 10, 12 and 14 in the table in subclause 2(1) provide for items 607, 808, 836, 838 and 841 to 845 of Schedule 1 to this bill to commence five years after the day on which item 550 of Schedule 1 commences. Item 550 inserts new Subdivisions BA, BB and BC into Division 1 of Part 15 of the *Environment Protection and Biodiversity Conservation Act 1999*, which seek to reform the National Heritage nomination and listing process. The Committee notes that each of the items seek to repeal sections relating to the Register of the National Estate, however, limited explanation is provided in the explanatory memorandum as to the reason for this lengthy delay in commencement. The only place in the explanatory memorandum in which there is an explanation for the five-year delay in commencement is in paragraph 591 of the memorandum, on page 104, in relation to the repeal to be effected by item 841 of Schedule 1. Paragraph 591 states that the delayed commencement ‘will allow time for the states and territories to amend legislation or processes and to heritage list places which are in the Register of the National Estate.’ The relationship between that explanation and the new Subdivisions BA, BB and BC of Division 1 of Part 15 is not clear. The Committee **seeks the Minister’s advice** as to the reason for the five-year delay in commencement.

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

My response to the comments made by the Scrutiny of Bills Committee is set out in the attached document. As can be seen from the response, careful consideration was given to existing guidelines and precedents in framing the EHLA Bill. The Bill also includes appropriate limitations and leaves open defence options to ensure that the application of the penalty and enforcement provisions cannot be applied in a manner which would unduly trespass on personal rights and liberties.

It needs to be recognised that a primary objective of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is to protect matters of national environmental significance. Many of the amendments contained in the EHLA Bill are aimed at addressing the shortcomings in the current EPBC Act which prevent environment and heritage which is of national importance being protected as intended by Parliament. The framing of the commencement provisions, penalty offence and enforcement provisions, exemptions from the *Legislative Instruments Act 2003*, and limiting merits review are based on the recognition that special requirements are required to ensure the integrity of the regulatory regime which has been put in place to protect Australia's most valuable environmental and heritage assets.

Thank you for the opportunity to respond to the comments made by the Committee.

Commencement

Schedule 1, items 3, 8, 10, 12 and 14

The Committee seeks advice as to the reasons for the five-year delay in commencement for the proposed amendments which remove the statutory basis for the Register of the National Estate from the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and make amendments consequential to this removal in the EPBC Act and the *Australian Heritage Council Act 2003*.

The Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment establishes that the Australian Government's involvement in heritage matters should focus on World Heritage properties and places of national significance. The EPBC Act was amended in 2003 to include provisions relating to the listing and protection of National Heritage places and, in addition, similar provisions relating to Commonwealth heritage places were introduced in recognition of the Australian Government's responsibility to protect the heritage values of places it owns or controls.

Since this time many heritage places have been added to the National Heritage and Commonwealth Heritage Lists. Most of these places were listed on the Register of the National Estate along with many other places that are of State or local heritage significance.

The commencement period of five years for the amendments takes into account consultations with government and non-government stakeholders. These consultations indicated that amendment of the statutes of other jurisdictions that refer directly or indirectly to the Register of the National Estate, and development of heritage listing programmes in states and territories to pick up suitable places in the Register that are not already in state or territory heritage lists, could usefully precede repeal of the Register. However, the tasks involved would require a reasonable time.

Item 550 was referred to in the commencement provisions to ensure that the delayed commencement of a heritage related matter was linked to the commencement of amendments relating to other heritage related matters.

The Committee thanks the Minister for this response and notes that it would have assisted the Committee if this explanation had been clearly expressed in the explanatory memorandum.

Commencement Schedule 1, items 781 and 782

Items 5 and 6 in the table in subclause 2(1) provide for items 781 and 782 of Schedule 1 to this bill to commence immediately after the *Heritage of Western Australia Act 1990* of Western Australia starts to apply to freehold land in the territories of Christmas Island and Cocos (Keeling) Islands respectively.

The Committee notes the statement in the explanatory memorandum, at page 93, that the provisions recognise that alternative means to the Commonwealth Heritage List can be put in place to ensure the ongoing protection of heritage places on freehold land in these territories. For heritage property owners in the Cocos (Keeling) Islands and Christmas Island, this provision will have the effect of replacing Commonwealth heritage protection with State heritage protection, similar to that which applies to heritage property owners elsewhere in Australia.

The explanatory memorandum goes on to state that ‘[i]t would be appropriate for the heritage legislation of Western Australia to be applied to protect the heritage values of these existing freehold properties, and future freehold heritage places in the territories.

To ensure there is no gap in protection ... this provision ... will commence when the *Heritage of Western Australia Act 1990* starts to be applied in Christmas Island Territory and the Territory of Cocos (Keeling) Islands.’ It is not clear from the explanatory memorandum when the *Heritage of Western Australia Act 1990* might be expected to be applied to these territories. Similarly, the Committee notes that while the Minister must announce by *Gazette* notice the day on which the *Heritage of Western Australia Act 1990* is applied to these territories, there is nothing in this bill which imposes any obligation on the Minister to have that Western Australian legislation apply to either of those Territories. The Committee is concerned that this would grant the Minister an unfettered discretion to determine when items 781 and 782 of Schedule 1 will commence. The Committee **seeks the Minister’s advice** regarding the degree of certainty surrounding the commencement of these alternative means of protection in the *Heritage of Western Australia Act 1990* and whether items 5 and 6 in the table in clause 2(1) of this bill might be amended to set a time limit within which items 781 and 782 will commence.

Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to 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 Committee seeks advice regarding the degree of certainty surrounding the commencement of alternative means of protecting heritage places on “freehold land” within the Territories of Cocos (Keeling) Island and Christmas Island and whether the EHLA Bill might be amended to set a time limit for commencement.

The proposed amendment is to remove, from the definition of Commonwealth Area, those areas within the Territories of Cocos (Keeling) Island and Christmas Island where a person holds a freehold interest in the land. This recognises that alternative means to the Commonwealth Heritage List can be put in place to ensure the ongoing protection of heritage places on “freehold land” in the Cocos Keeling Islands and Christmas Island. For heritage property owners in these territories, it will have the effect of replacing Commonwealth heritage protection with state heritage protection. This will result in owners of heritage places on freehold land being treated in a similar fashion to owners of heritage places on freehold land in other parts of Australia.

To ensure there is no gap in protection for the Commonwealth Heritage places in the Christmas Island Territory and the Territory of Cocos (Keeling) Islands, special commencement provisions were applied.

The *Cocos (Keeling) Islands Act 1995* and *Christmas Island Act 1958* provide the legislative basis for the Territories administrative, legislative and judicial systems. The *Territories Law Reform Act 1992* amended these two Acts to apply certain Commonwealth laws and the laws of the State of Western Australia. The *Applied Laws (Implementation) Ordinance 1992* for each Territory, however effectively removed the *Heritage of Western Australia Act 1990* from those Western Australian Acts that apply within the Territories.

It is proposed that the amendments will commence when the *Heritage of Western Australia Act 1990* starts to be applied in Christmas Island Territory and the Territory of Cocos (Keeling) Islands. Amendments to the *Applied Laws (Implementation) Ordinance 1992* for each Territory are necessary for this to occur. My Department is liaising with the Department of Transport and Regional Services with a view to ensuring that these changes will be made within a timely fashion. Before the necessary amendments can be made to the *Applied Laws (Implementation) Ordinance 1992*, negotiations with the Western Australian Government on the administrative arrangements relating to the application of the Western Australian legislation must be finalised, consultation with the Indian Ocean Territories Shire Councils and other relevant stakeholders undertaken and any necessary listing processes in relation to the heritage properties concerned commenced. It is not possible to give a definitive date for completion of these processes at this stage.

The Committee thanks the Minister for this detailed response. The long-standing position of the Committee is that it is properly the role of the Parliament to determine the date upon which legislation ought to commence. Where it is not possible to specify a particular date, the Committee considers that the Parliament should set a defined period of time during which legislation might commence.

Provisions such as the one contained in this bill remove that role from the Parliament and place it in the hands of the Executive, with virtually unfettered discretion vesting in the Minister. The terms of reference for the Committee require that it draw such diminution in Parliamentary oversight to the attention of the Senate.

The Committee continues to draw Senators' attention to the provision, as it may be considered to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Strict liability

Schedule 1, items 5, 7, 12, 14, 16, 18, 20, 22, 24, 26, 28, 32, 39, 41, 44, 46, 50, 52, 57, 59, 61, 63, 64, 66, 71, 73, 75, 77, 80 and 82

A very great number of items in Schedule 1 would create offences to at least one element of which strict liability applies. The items are 5, 7, 12, 14, 16, 18, 20, 22, 24, 26, 28, 32, 39, 41, 44, 46, 50, 52, 57, 59, 61, 63, 64, 66, 71, 73, 75, 77, 80 and 82. The Committee notes that in respect of some of these offences, the maximum penalty is seven years imprisonment and 420 penalty units.

The Committee notes the reference on pages 25 – 26 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, February 2004 (the Guide), that in preparing legislation under which strict or absolute liability is imposed, agencies should familiarize themselves with the Committee's *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. In particular, the Guide refers to the following principles from the Committee's Sixth Report which accord with the Government's approach to such provisions:

- 'strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or rigid formula';
- 'strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ... appears to be a reasonable maximum'; and
- 'strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation.'
- The Guide goes on to advise that '[i]f the explanatory memorandum to a Bill is not considered to provide adequate explanation for any use of strict or absolute liability, the Committee will seek an explanation from the responsible Minister.'

The explanatory memorandum makes no reference to the principles set out in the Guide or the Committee's Sixth Report, and while stating the effect of the proposed amendments, gives no explanation or justification for these apparent departures from those principles. The Committee **seeks the Minister's advice** as to the justification for the imposition of strict liability in these cases.

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

Relevant extract from the response from the Minister

The Committee seeks advice as to the justification for the imposition of strict liability for elements of the offences against sections 15A, 15C, 17B, 18A, 20A, 24A, 27A and 27C of the EPBC Act.

While no direct reference is given in the Explanatory Memorandum to either the Committee's Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, these documents were taken into account in framing the strict liability provisions.

The Committee points to the principle on page 284 of its report that (subject to other relevant principles) "strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance those relating to ... the environment". The Attorney-General's Department's guidelines for the application of strict and absolute liability offences also advise that it may usefully be applied in a regulatory context relating to the protection of the environment. The relevant offence provisions of the EPBC Act form part of a fundamental environmental regulatory regime that is aimed at protecting matters of national environmental significance. The application of strict liability to elements of these offences is considered appropriate for ensuring the maintenance of the integrity of the regulatory regime of the EPBC Act.

The imposition of strict liability to elements of offences is also consistent with the Committee's principle stated on page 285 of the Committee's report that "strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent". The experience of the Department of the Environment and Heritage, as confirmed by the Commonwealth Director of Public Prosecutions, is that the requirement to prove a mental element (for example, that a person knew or was reckless as to the fact that a species is a listed threatened species) is a substantial impediment to proving these offences. Accordingly, it has proved extremely difficult to prosecute these fault provisions, such as in cases involving the killing of a Grey Nurse Shark or the shooting of sea birds from commercial fishing boats.

Strict liability in these circumstances is further warranted on the grounds of its consistency with the Committee's principle that "strict liability may be appropriate to overcome the 'knowledge of law' problem, where a physical element of the offence expressly incorporates a reference to a legislative provision".

My Department was advised by the Commonwealth Director of Public Prosecutions that the structure of these offence provisions raised a “knowledge of law” issue. In order to establish an offence under the EPBC Act it is necessary to show that the action results or will result in a significant impact on, for example, a listed threatened species and that the person was reckless as to this circumstance. In order to prove recklessness the prosecution must show, as part of the requirement under subsection 5.4 of the Criminal Code, that the person was aware of a substantial risk that the circumstance exists or will exist. This entails, establishing for example, that a defendant was reckless that a bird was in fact a species that was on the list of threatened species, which necessarily involves proving a level of awareness of the legislation under which the bird is deemed to be a listed threatened species.

If strict liability was not applied to this element of the offence relating to the species being a listed species, then the prosecution would have to show this awareness that the species is listed. Unless strict liability is applied to this element of the offence in clause 18A, and corresponding amendments are made to clauses 15A, 15C, 17B, 20A, 24A, 27A and 27C, relating to the other protected matters under the EPBC Act, the provisions would be rendered virtually unenforceable. This would give rise to a situation that the Committee has noted, would be potentially damaging to the credibility of the legal system (see the Committee’s report page 265). These amendments ensure that the offence provisions are workable, as originally intended by Parliament.

The strict liability offences will apply to a person who takes an action that has, will have, or is likely to have a significant impact on a listed threatened species, or other matter protected by Part 3 of the EPBC Act which is consistent with the Committee’s principle stated on page 285 of the Committee’s report that “strict liability should depend as far as possible on the actions ... of those who are actually liable for the offence”.

It is important to note that these amendments only apply strict liability to these specific elements of the offences in clauses 15A, 15C, 17B, 18A, 20A, 24A, 27A and 27C. Accordingly, fault elements will continue to apply in relation to the existence of facts including that an action has, will have or is likely to have a significant impact on a species or area under Part 3 of the EPBC Act.

In addition, the defence of honest and reasonable mistake of fact under section 9.2 of the Criminal Code remains available to a potential defendant in relation to the elements of offences to which strict liability relates and in accordance with the Committee’s Basic Principles provided at pages 283-284 of the Committee’s report. Also in accordance with section 6.1 of the Criminal Code, the amendments that involve strict liability expressly state that it is an offence of strict liability.

The Committee also noted the principle stated on page 284 of the Committee’s report that “strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ... appears to be a reasonable maximum.” The application of strict liability to elements of these offences, certain of which

include a maximum penalty of seven years imprisonment and 420 penalty units, is appropriate for the reasons set out above and given that the commission of such offences will result in direct and serious impacts on elements of the environment which are of national and international importance.

The Committee thanks the Minister for this detailed response. The Committee is pleased to note that consideration was given to the principles expressed in the Committee's *Sixth Report of 2002: Application of Strict Liability Offence in Commonwealth Legislation* and to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing these strict liability offences. The Committee's expectation is that such consideration will be explicitly reflected in the explanatory memorandum and that any deviations to these principles will also be appropriately explained and justified in the explanatory memorandum.

Strict liability Schedule 1, item 291

Item 291 of Schedule 1 would insert a new section 142B into the *Environment Protection and Biodiversity Conservation Act 1999*, which creates a strict liability offence of breaching conditions attached to an approval granted under Part 9 of the Act of 1999. In this case, the explanatory memorandum states, on page 39, that 'the intent of this provision is to enable enforcement of breaches of approval conditions, in particular minor technical breaches such as the failure to prepare and submit for approval an environmental management plan, which are difficult to enforce under the civil penalty and criminal provisions in sections 142 and 142A of the 1999 Act.' The explanatory memorandum offers no justification for the imposition of strict liability in this case. The Committee notes again the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and in its *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, and **seeks the Minister's advice** as to the justification for the application of strict liability in this case.

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

Relevant extract from the response from the Minister

The Committee seeks advice as to the justification for the imposition of strict liability for an offence against the proposed clause 142B of the EPBC Act.

While no direct reference is given in the Explanatory Memorandum to either the Committee's Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, these documents were taken into account in drafting clause 142B.

Clause 142B of the EPBC Act forms part of a fundamental environmental regulatory regime that is aimed at protecting matters of national environmental significance. The application of strict liability to this offence is considered appropriate for ensuring the maintenance of the integrity of the regulatory regime of the EPBC Act, in accordance with the Committee's report and the Attorney-General's Department's guidelines for the application of strict and absolute liability offences.

Strict liability will provide a necessary and adequate deterrent for breaches of this regulatory provision. Such offences need to be dealt with expeditiously to ensure public confidence in the regulatory regime. Strict liability is justified where a person agrees to conditions attached to an approval and where public confidence in the merit of such an instrument may be significantly undermined by a person's failure to comply with them.

The associated pecuniary penalty provision applicable to this strict liability offence is set at 60 penalty units which is consistent with the Committee's basic principle stated on page 284 of the Committee's report that "strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units . . . appears to be a reasonable maximum".

The Committee thanks the Minister for this detailed response. The Committee is pleased to note that consideration was given to the principles expressed in the Committee's *Sixth Report of 2002: Application of Strict Liability Offence in Commonwealth Legislation* and to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing these strict liability offences. The Committee's expectation is that such consideration will be explicitly reflected in the explanatory memorandum and that any deviations to these principles will also be appropriately explained and justified in the explanatory memorandum.

Strict liability

Schedule 1, items 591 and 595

Items 591 and 595 of Schedule 1 would insert new subsections 354A(2), (4) and (7), and new subsection 355A(2) into the *Environment Protection and Biodiversity Conservation Act 1999*, each of which create offences of strict liability and to which a maximum penalty of 2 years imprisonment or 1,000 penalty units or both applies. The explanatory memorandum, at paragraphs 377 and 380, merely states that the item ‘sets out where strict liability applies for each offence’, but does not seek to justify this departure from the general rule of criminal liability being based on intentional acts. The Committee notes again the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and in its *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, in particular the expectation that ‘strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ... appears to be a reasonable maximum’. The Committee **seeks the Minister’s advice** as to the justification for the departure from accepted principles in this case.

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

Relevant extract from the response from the Minister

The Committee seeks advice as to the justification for the imposition of strict liability for the proposed new subsections 354A(2), (4) and (7), and the proposed new subsection 355A(2) of the EPBC Act.

While no direct reference is given in the Explanatory Memorandum to either the Committee’s Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, these papers were taken into account in drafting each of these new subsections.

The proposed new subsections form part of an environmental regulatory regime that is aimed at protecting the environment in a Commonwealth reserve. The application of strict liability to one physical element of these offences is considered appropriate for ensuring the maintenance of the integrity of the regulatory regime of the EPBC Act. This application is in accordance with the Committee’s report that “strict liability

may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance those relating to ...the environment” and the Attorney-General’s Department’s guidelines for the application of strict and absolute liability offences.

If strict liability did not apply to the relevant element of these offences the prosecution would have to prove that a person who took a prohibited action in a Commonwealth reserve knew or was reckless as to the fact that the area is a Commonwealth reserve. The experience of the Director of National Parks, as confirmed by the Commonwealth Director of Public Prosecutions, is that the requirement to prove such a mental element, would be a substantial impediment to proving these offences thereby significantly detracting from their deterrent effect. Accordingly, the imposition of strict liability in these circumstances is consistent with the Committee’s principle stated on page 285 of the Committee’s report that “strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent”.

Strict liability in these circumstances is further warranted on the grounds of its consistency with the Committee’s principle that “strict liability may be appropriate to overcome the ‘knowledge of law’ problem, where a physical element of the offence expressly incorporates a reference to a legislative provision”. Unless strict liability is applied to these elements of the offences in the proposed new subsections 354A(2), (4) and (7), and the proposed new subsection 355A(2), the provisions would be rendered virtually unenforceable as the onus would otherwise fall to the prosecution to prove the applicable fault element under the Criminal Code - ie that a defendant was reckless that an area was in fact a Commonwealth reserve, which necessarily involves proving a level of awareness of the legislation under which the area is declared to be a Commonwealth reserve. As noted by the Committee this would give rise to a situation that would be potentially damaging to the credibility of the legal system (see the Committee’s report page 265). These amendments ensure that the offence provisions are workable, as originally intended by Parliament.

It is important to note that these amendments only apply strict liability to the specific element of the offences in new subsections 354A(2), (4) and (7), and 355A(2), which deal with the circumstance that a prohibited action was taken in a Commonwealth reserve. Fault elements will continue to apply in relation to the other physical elements of the offences, such as that a person carries on mining operations. In addition, the defence of honest and reasonable mistake of fact under section 9.2 of the Criminal Code remains available to a potential defendant in relation to the elements of offences to which strict liability relates and in accordance with the Committee’s Basic Principles provided at pages 283-284 of the Committee’s report. Also in accordance with section 6.1 of the Criminal Code, the amendments that involve strict liability expressly state that it is an offence of strict liability.

The strict liability elements of the offences will apply to the persons who take actions in Commonwealth reserves which is consistent with the Committee’s principle stated on page 285 of the Committee’s report that “strict liability should depend as far as possible on the actions ... of those who are actually liable for the an offence”.

The Committee also noted the principle stated on page 284 of the Committee's report that "strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ... appears to be a reasonable maximum." The application of strict liability to elements of these offences is appropriate for the reasons set out above and given that the commission of such offences will result in direct and serious impacts on elements of the environment which are of national importance.

The Committee thanks the Minister for this detailed response. The Committee is pleased to note that consideration was given to the principles expressed in the Committee's *Sixth Report of 2002: Application of Strict Liability Offence in Commonwealth Legislation* and to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing these strict liability offences. The Committee's expectation is that such consideration will be explicitly reflected in the explanatory memorandum and that any deviations to these principles will also be appropriately explained and justified in the explanatory memorandum.

Legislative Instruments Act—exemptions Schedule 1, items 354 and 358

Section 183 of the *Environment Protection and Biodiversity Conservation Act 1999* requires the Minister, by instrument published in the Gazette, to establish a list of threatening processes that are key threatening processes. Proposed new subsection 184(1), to be inserted by item 354 of Schedule 1 of this bill, clarifies that such an instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA). Proposed new subsection 184(2), to be inserted by item 358 of Schedule 1, provides that the sunseting regime contained in Part 6 of the LIA does not apply to an instrument made under subsection 184(1). The Committee expects that the justification for exemptions from the LIA will be set out in the explanatory memorandum to the bill. In this case, the explanatory memorandum, at paragraph 176, merely repeats the substance of the new subsection, but gives no reason for its insertion. The Committee **seeks the Minister's advice** as to the justification for this exemption.

Pending the Minister's advice, the Committee draws Senators' attention to the 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 Committee seeks advice as to the justification for exemptions from the *Legislative Instruments Act 2003* (LIA) for legislative instruments made under section 184 of the EPBC Act which provide for amendments to be made to the lists of threatened species, threatened ecological communities and key threatening processes. The instruments making these amendments are already subject to an exemption from the sunset provisions of the LIA as provided for by Item 15, section 54 of the LIA because sunset listings would remove the protection of the EPBC Act from, for example, plants and animals which are critically endangered.

The new subsection 184(2) is therefore a statement of what is currently the situation in relation to exemptions under the LIA.

The Committee thanks the Minister for this response and notes that it would have been helpful if this clarification had been included in paragraph 176 of the explanatory memorandum.

Legislative Instruments Act—declaration Schedule 1, items 391 and 466

Items 391 and 466 of Schedule 1 would insert new subsections 208A(2) and 265(2) respectively into the Principal Act, both of which state that an instrument made under subsection 208A(1) or 265(1) respectively 'is not a legislative instrument'. Office of Parliamentary Counsel Drafting Direction No. 3.8 advises, on page 7, that where an instrument is being exempted from the Legislative Instruments Act, the explanatory memorandum should include an explanation of this and give a detailed explanation of the justification for that exemption.

The Committee notes that in this case, the explanatory memorandum, at paragraphs 214 and 247 respectively, merely repeats the substance of the subsections. Neither paragraph provides a reason for the respective subsection. It appears in both cases that the instruments referred to are administrative in character and that the respective subsections are for information only. The Committee **seeks the Minister's advice** whether these subsections have been included for information only.

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

The Committee seeks advice whether proposed subsections 208A(2) and 265(2), which state that an instrument made under subsection 208A(1) or subsection 265(1) is not a legislative instrument, are included for information only. Advice from the Attorney-General's Department was that the instruments made under subsections 208A(1), 222A(1), 245(1) and 265(1) are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. As such the statements in new subsections 208A(2), 222A(2), 245(2) and 265(2) are for information only.

The Committee thanks the Minister for this response.

Excluding merits review Schedule 1, items 415, 448 and 465

Items 415, 448 and 465 of Schedule 1 would insert new subsections 221A(2), 243A(2) and 263A(2) into the *Environment Protection and Biodiversity Conservation Act 1999*. The effect of each of those subsections is to remove the current provision for merits review by the Administrative Appeals Tribunal for decisions made personally by the Minister in relation to permits of various types.

Since its establishment, the Committee has consistently drawn attention to provisions which explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee would expect to see the justification for any section which appears to reduce merits review. In this case, the explanatory memorandum, at paragraphs 222, 238 and 246, merely states that this ‘leaves the merits of these important decisions to be dealt with by the Government.’ The Committee **seeks the Minister’s advice** as to the justification for this apparent reduction in merit review.

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 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

The Committee seeks advice as to the justification for the apparent reduction in merit review which would result from these amendments.

Merits review in relation to decisions made by delegates under the EPBC Act is being preserved. The Administrative Appeals Tribunal (AAT) will have the same jurisdiction as it currently does in relation to any decisions made by public servants as delegates of the Minister.

However, many of the decisions taken under the EPBC Act require careful balancing of competing interests and judgements. An example is the declaration that the Southern Bluefin Tuna Fishery is an approved Wildlife Trade Operation under the EPBC Act. The continued operation of the Southern Bluefin Tuna export industry, which is worth \$300 million per annum is dependant on decisions made under the EPBC Act. The continued operation of the Fishery involves complex and sensitive conservation, economic, social and international considerations.

The Government considers that where decisions are sufficiently important to be taken by the Minister as an elected representative, those judgments should not be able to be overturned by an unelected tribunal such as the AAT.

The Government is not removing any appeal rights in relation to judicial review or reducing the extended standing provisions provided by the EPBC Act. Anyone affected by a particular decision will still be able to appeal that decision under the *Administrative Decisions (Judicial Review) Act 1977*.

The Committee thanks the Minister for this response. The Committee notes that merit review by the Administrative Appeals Tribunal is preserved for decisions made by delegates of the Minister and that anyone affected by a particular decision will still be able to appeal that decision under the *Administrative Decisions (Judicial Review) Act 1977*. However, the Committee remains concerned at the removal of this avenue of review for decisions that ‘require careful balancing of competing interests and judgements’ and which involve ‘complex and sensitive conservation, economic, social and international considerations. The Committee finds the explanation that such important and complex decisions ‘should not be able to be overturned by an unelected tribunal such as the AAT’ obscure.

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

Search and seizure

Schedule 1

Item 835 of Schedule 1 to this bill inserts a new Schedule 1 into the *Environment Protection and Biodiversity Conservation Act 1999* which would provide for the detention of suspected non-citizen offenders suspected of committing an offence, searching and screening detainees and carrying out identification tests on detainees. The explanatory memorandum states, on page 95, that the Government’s ability to enforce the Act in Australia’s maritime jurisdiction and non self-governing Territories and to protect Commonwealth reserves such as Ashmore Reef National Nature Reserve is limited because the *Migration Act 1958* prevents authorised officers from bringing non-citizens suspected of committing offences against the Act into the migration zone. The explanatory memorandum also states that the Schedule mirrors the provisions contained in the *Migration Act 1958* for dealing with the detention of unauthorised non-citizens, and the provisions of the *Fisheries Management Act 1991* providing for detention of foreign fishers suspected of offences against that Act.

The Committee has a long standing concern about the appropriateness of conferring police powers on persons other than police officers and the appropriateness of applying a power to search persons under arrest to persons under detention. As a

minimum, the Committee expects the explanatory memorandum to provide a detailed justification for applying such powers in the proposed circumstances and an assurance that appropriate protocols or safeguards are to be implemented and an explanation of the nature of such protocols or safeguards.

Search without warrant Schedule 1, item 633

Item 633 of Schedule 1 would insert a new paragraph 406(1)(ba) into the *Environment Protection and Biodiversity Conservation Act 1999*, under which an authorised officer who boards a vessel is empowered, without warrant, to search a person on the vessel and the person's clothing. The explanatory memorandum, at paragraph 417, seeks to justify this provision on the basis that it is 'required as a consequence of the inclusion of Schedule 1 in' the *Environment Protection and Biodiversity Conservation Act 1999*.

The Committee notes that proposed new section 406A provides conditions for the conduct of searches under paragraph 406(1)(a) which include a requirement that searches are to be conducted by an authorised officer of the same sex as the subject, a prohibition on the removal of a subject's clothing and the requirement that an authorised officer use no more force or impose on the subject of the search no greater indignity than is necessary to conduct the search. These conditions are consistent with those set out in the model provisions set out in the *Crimes Act 1914*.

Notwithstanding these conditions, the Committee considers that there is a risk that the provisions may be regarded as trespassing on the personal rights and liberties of people who are subject to a search under paragraph 406(1)(ba). The Committee notes that new paragraph 406(1)(ba) does not distinguish between a 'frisk search' or an 'ordinary search' as defined in sections 413(3) and 414(3) of the *Environment Protection and Biodiversity Conservation Act 1999*. It is therefore unclear what the degree of incursion on personal rights and liberties might be. The Committee **seeks the Minister's advice** as to the nature of the search provided for in paragraph 406(1)(ba) and whether the type of search could be specified within the proposed paragraph.

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

Relevant extract from the response from the Minister

The Committee seeks advice as to the nature of the search provided for in the proposed new paragraph 406(1)(ba) of the EPBC Act and whether the type of search could be specified within the proposed paragraph.

The proposed new paragraph 406(1)(ba) of the EPBC Act will allow officers at sea to search for items which may constitute evidence or may endanger other persons. These powers will prevent the possibility of people on board suspected illegal foreign vessels from concealing evidence or dangerous items on their person (or throwing them overboard) and from bringing them into detention facilities, which would put detainees and officers at risk.

As the Committee noted, new paragraph 406(1)(ba) will be subject to new section 406A which contains appropriate limitations on the manner in which searches may be carried out under new paragraph 406(1)(ba). Those limitations include that searches are to be conducted by an authorized officer of the same sex as the subject; officers are prohibited from removing, or requiring the subject, to remove any of the subject's clothing; and that officers are to use no more force or impose on the subject of the search no greater indignity than is necessary to conduct the search.

These searches are necessary to ensure the safety of persons on vessels boarded under section 403 and other people (such as officers or interpreters) and also to ensure that illegal foreign vessel offences can be fully investigated. Searches can be conducted under these provisions to find a weapon or other thing capable of being used to inflict bodily injury or evidence of an offence.

As the Committee has noted, subsections 413(3) and 414(3) of the EPBC Act contain definitions of a "frisk search" and an "ordinary search" respectively. The limitations in section 406A of the Bill are such that the nature of the search under paragraph 406(1)(ba) is essentially the equivalent of a "frisk search", as defined under subsection 413(3) of the EPBC Act, by a person of the same sex, and it is considered unnecessary to specify the type of search in new paragraph 406(1)(ba), which is appropriately limited by new section 406A of the Bill.

The Committee thanks the Minister for this response. The Committee notes the Minister's clarification that a search under paragraph 406(1)(ba) is essentially the equivalent of a "frisk search" as defined under subsection 413(3) of the Act. However, unlike the Minister, the Committee considers it desirable that the nature of a personal search be clearly defined, particularly where the Act makes a distinction between the types of searches permitted in particular circumstances.

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.

Search without warrant Schedule 1, item 835

Clause 8 of the new Schedule 1 to the Environment Protection Act would provide for an authorised officer to detain a person if the authorised officer has reasonable grounds to believe that the person is not an Australian citizen or resident and was on a foreign vessel when it was used or otherwise involved in the commission of an offence against the Act, the regulations or section 6 of the Crimes Act. Clause 15 of the new Schedule 1 would permit an ‘approved officer’ (as referred to in clauses 6 and 7) to conduct, without warrant, a search of a detainee and a detainee’s clothing and any property under the detainee’s immediate control to find out whether a weapon or evidence of a crime is concealed about the person of the detainee.

The Committee notes that clause 15 does not distinguish between a ‘frisk search’ or an ‘ordinary search’ as defined in sections 413(3) and 414(3) of the *Environment Protection and Biodiversity Conservation Act 1999*. The Committee **seeks the Minister’s advice** as to the nature of the search provided for in clause 15 and whether the type of search could be specified within the proposed clause. The Committee also notes that subsection 252(1) of the *Migration Act 1958*, on which clause 15 is modelled, provides some limitation on the circumstances in which a person may be searched without warrant. The Committee **seeks the Minister’s advice** whether the exercise of the search powers in Clause 15 might also be limited to circumstances where an authorised officer has reasonable grounds to believe that the detainee has a weapon or evidence concealed about his/her person.

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

Relevant extract from the response from the Minister

The Committee seeks advice as to the nature of the search provided for in clause 15 of the proposed new Schedule 1 and whether the type of search could be specified within the proposed clause. The Committee also seeks advice on whether the exercise of the search powers in clause 15 might also be limited to circumstances where an authorised officer has reasonable grounds to believe that the detainee has a weapon or evidence concealed about his/her person.

The detention power under clause 8 of Schedule 1 is necessary for officers to effectively investigate and prosecute offences against the EPBC Act by non-citizens

outside Australia. Many of these offences occur a significant distance from the coastline and without the capacity to detain foreign offenders on suspicion of an offence, the Australian Government would have little or no chance to effectively investigate offences. This is because there are difficulties and safety risks in obtaining evidence at sea. These include, for example, the relative availability of interpreters and risks involved with conducting searches of the boat, charts and logbooks in open and sometimes turbulent waters.

In addition, lengthy investigations into the activities of each boat could be time consuming and would waste expensive patrol time unnecessarily, with the consequence that less illegal foreign vessels could be apprehended. The Australian Government would effectively be put in a position where it was unable to take action against foreign offenders who are contravening the EPBC Act.

New Schedule 1 provides for persons in environment detention to be treated consistently with persons in immigration detention, as people under environment detention and other people under immigration detention may be held in the same location. The Schedule also facilitates the seamless transfer of detainees from environment detention to immigration detention where the period of environment detention expires and pending their removal from Australia, with one set of rules applying to the detainee's entire period of detention.

As the Committee notes, clause 15 of the new Schedule 1 would permit an 'approved officer' to conduct a search of a detainee, a detainee's clothing and any property under the detainee's immediate control without a warrant. New clause 15 contains appropriate limitations on the manner in which searches may be carried out, including that searches are to be conducted by an approved officer of the same sex as the detainee; officers are prohibited from removing, or requiring the detainee, to remove any of the detainee's clothing; and that officers are to use no more force or impose on the subject of the search no greater indignity than is necessary to conduct the search.

The power to conduct searches under clause 15 of new Schedule 1 is necessary to ensure the safety of detainees and other people (such as authorised officers or interpreters) and also to ensure that suspected offences can be fully investigated. Searches can be conducted under these provisions to find a weapon or other thing capable of being used to inflict bodily injury or evidence of an offence.

New clause 15 will provide a consistent approach in immigration facilities, where people under environment detention and other people under immigration detention may be held in the same location. It is essential that the personal safety of detainees, detention officers and officers in these premises are not compromised by different security standards and that good order in detention facilities is maintained.

The limitations in clause 15 of new Schedule 1 of the Bill are such that the nature of the search is essentially the equivalent of a "frisk search", as defined under subsection 413(3) of the EPBC Act, by a person of the same sex.

The search power in clause 15 of Schedule 1 of the Bill mirrors clause 15 of Schedule 1A of the *Fisheries Management Act 1991*, which in turn is modelled on section 252 of the *Migration Act 1958*. Consistency is essential to providing a consistent detention and search regime between the EPBC Act and Migration Act, and fisheries legislation. It will facilitate seamless transfer of detainees from environment detention to immigration detention with one set of rules applying to the detainee's entire period of detention. It is not necessary or appropriate to specify the type of search in clause 15 of new Schedule 1 of the Bill, which contains sufficient safeguards to ensure that all searches are conducted in an appropriate manner. In addition, consistent with clause 15 of Schedule 1A of the *Fisheries Management Act 1991*, the exercise of the search powers in Clause 15 need not also be limited to circumstances where an authorised officer has reasonable grounds to believe that the detainee has a weapon or evidence concealed about his or her person.

The Committee thanks the Minister for this detailed response. While the Committee notes the Minister's statements regarding the need for consistency of approach, the Committee reiterates its preference for the nature of the personal search to be explicitly stated and that the exercise of the power be further limited by the formation of a belief on reasonable grounds.

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.

Search without warrant Clause 17

Proposed Clause 17 of the new Schedule 1 to the Environment Protection Act would allow approved officers to conduct strip searches on detainees in certain circumstances. The Committee notes the statement in the explanatory memorandum that the clause 'corresponds closely to section 252A of the *Migration Act 1958*' and notes that clause 18, which sets out the rules for conducting a strip search also closely corresponds to section 252B of the Migration Act. The Committee also notes the assurance on page 98 of the explanatory memorandum that these rules will 'ensure strip searches are conducted in a way that will protect the dignity of the detainee as much as possible while still allowing strip searches in very limited circumstances to ensure the safety of the detainee and other people.'

However, the Committee notes that no justification or reasons are provided in the explanatory memorandum for the application of strip search provisions in this context. The Committee considers that the power of strip search represents a significant trespass on personal rights and liberties and should only be conferred in exceptional and specific circumstances. Proposals for the inclusion of such powers in legislation should be accompanied by detailed explanation and justification in the explanatory memorandum and appropriate safeguards.

In this context, the Committee notes that it expressed concerns over the terms of what is now section 252A of the Migration Act in its consideration of the Migration Legislation Amendment (Immigration Detainees) Bill 2001 in *Alert Digest No. 6 of 2001* and of the Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001 in *Alert Digest No. 9 of 2001*. The Committee expressed concern about the appropriateness of using powers given to police officers to search people under arrest as precedents for the search of people in immigration detention. However, the Committee noted that the then Minister for Immigration and Multicultural Affairs and the Attorney-General had developed and agreed a *Draft Protocol for Strip Search of Immigration Detainees* and that this was expected to be incorporated into written directions issued pursuant to section 499 of the Migration Act. The Committee noted that this draft protocol would provide greater safeguards in the authorisation and conduct of strip searches.

The Committee **seeks the Minister's advice** as to justification for the inclusion of the power to conduct strip searches in this context and whether appropriate protocols have been developed for the authorisation and conduct of such searches under the *Environment Protection and Biodiversity Conservation Act 1999*.

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

Relevant extract from the response from the Minister

The Committee seeks advice as to justification for the inclusion of the power to conduct strip searches of detainees without a warrant in certain circumstances and whether appropriate protocols have been developed for the authorisation and conduct of such searches.

The power to conduct strip searches under clause 17 of the proposed new Schedule 1 is considered to be a measure of last resort and is subject to appropriate authorisation

and strict safeguards. High level authorisation for each strip search must be obtained from either the Secretary, one of the Deputy Secretaries, or the Director of National Parks of the Australian Government Department of the Environment and Heritage or a magistrate.

A strip search may only be authorised in circumstances where there are reasonable grounds to suspect that the detainee is hiding a weapon or other thing capable of inflicting bodily injury or being used to escape from detention. In these circumstances, it is essential that the detainee be appropriately searched to ensure both their safety and the safety of other people in the detention facility.

Strip searches are subject to very strict requirements aimed at protecting the welfare and dignity of the detainee. A strip search may only be carried out by a specially authorised officer of the same sex as the detainee.

This Bill does not authorise the search of body cavities and ensures that no more clothing is removed than is necessary to recover hidden items. In practice, this means that strip searches could involve no more than the removal of a jacket or the detainee's shoes and socks.

These provisions are consistent with the corresponding provisions in the *Migration Act 1958* and the *Fisheries Management Act 1991*. New Schedule 1 will provide a consistent approach in immigration facilities, where people under environment detention and other people under immigration detention may be held in the same location. It is important that environment detainees should be subject to the same level of searching and screening procedures as other detainees that may be housed in the same facility.

My Department will be working closely with the Department of Immigration and Multicultural Affairs to establish the mechanisms and protocols needed to implement the amendments.

It is considered highly unlikely that it would ever be necessary to conduct strip searches of environment detainees. I understand that under the powers in the Migration Act no adult has been strip searched since January 2003 and no minor has ever been strip searched.

The Committee thanks the Minister for this response and notes that the Department of the Environment and Heritage will be working closely with the Department of Immigration and Multicultural Affairs to establish the mechanisms and protocols needed to implement the amendments. The Committee **seeks the Minister's further advice** as to whether provision is to be made for these mechanisms and protocols to be tabled in Parliament, as is the case under the *Migration Act 1958*.

The Committee notes with concern the Minister's statement that it is considered highly unlikely that it would ever be necessary to conduct strip searches of environment detainees. The Committee considers that the lack of a demonstrated need for provisions of this type calls into question the justification offered for the inclusion of such an intrusive power.

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.

Exercise of legislative power Schedule 2, Part 2, subitem 4(2)

Subitem 4(2) of Part 2 of Schedule 2 to this bill would permit the Minister to determine that particular amendments made by Schedule 1 to this bill are to apply to proposals made to the Minister before the commencement of that Schedule, subject to such modifications as the Minister determines. Subitem 4(4) then provides that such a determination 'is a legislative instrument, but section 42 of the *Legislative Instruments Act 2003* [which provides for the disallowance of legislative instruments by resolution of either House of the Parliament] does not apply' to it.

As a consequence, the Minister's exercise of delegated legislative power, by making a determination under subitem 4(2), is not subject to any effective oversight by the Parliament. Paragraph 622 of the explanatory memorandum merely re-states the effect of subitem 4(2), but gives no explanation for this delegation of legislative power not being subject to disallowance. The Committee **seeks the Minister's advice** as to the reasons for this exercise of delegated legislative power not being subject to disallowance in this instance.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee seeks advice as to the reasons for this exercise of delegated legislative power not being subject to disallowance.

Under the subitem the Minister may determine in writing that Parts 7, 8 and 9 and section 170A of the amended EPBC Act are to apply in relation to an action, subject to such modifications of Part 7 and Division 3 of Part 8 of the amended EPBC Act as are specified in the determination. The provision further provides that the determination must not increase, or have the effect of increasing, the maximum penalty for any offence; or widen, or have the effect of widening, the scope of any offence.

The purpose of this provision is to provide the Minister with the ability to transfer a proposed action, that is in the process of being considered for assessment, from the existing assessment and approval processes to the new processes set out in the amending Bill (once the amendments come into force). The Minister is given the ability to modify Part 7 and Division 3 of Part 8 in order to ensure that when an action is transferred from one process to another the statutory timeframes can be met; and that any steps that are potentially missed (such as consultation) can be reinstated. In other words, the provision is intended to ensure a smooth, certain and transparent transfer from one process to the other. If the instrument were subject to disallowance there would be considerable uncertainty and potential for delay.

The Committee thanks the Minister for this response and notes that it would have been helpful if this explanation had been included in the explanatory memorandum to the bill.

Medibank Private Sale Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2006*. The Minister for Finance and Administration responded to the Committee's comments in a letter dated 20 November 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 13 of 2006

Introduced into the House of Representatives on 18 October 2006
Portfolio: Finance and Administration

Background

This bill amends the *Health Insurance Commission (Reform and Separation of Functions) Act 1997* and the *National Health Act 1953*, to provide for the conversion of Medibank Private from a 'not for profit' company to a 'for profit' company and to provide for the sale of the Commonwealth's equity in the company.

The bill provides for exemptions from the *Corporations Act 2001* and other legislation in relation to the conduct of the sale, provides for Medibank Private Limited, and any holding company, to remain an Australian company for a period of 5 years following the sale, and limits individual share ownership to 15 per cent for five years.

Schedule 3 to the bill makes consequential amendments to the *Commonwealth Borrowing Levy Act 1987*, the *Health Insurance Commission (Reform and Separation of Functions) Act 1997* and the *Remuneration Tribunal Act 1973*, which will come into effect when the sale of the Commonwealth's equity in Medibank Private has been finalised.

Commencement

Schedule 3

Item 3 in the Table to subclause 2(1) of this bill provides for the amendments proposed in Schedule 3 to commence on the day on which, in the opinion of the Minister for Finance, all the shares in Medibank Private Ltd are held by persons other than the Commonwealth or a wholly-owned Commonwealth company. That day is described as the designated sale day. Schedule 3 provides that the levy imposed on borrowing by the *Commonwealth Borrowing Levy Act 1987*, and the *Remuneration Tribunal Act 1973* do not apply after the date of sale. Schedule 3 also ensures that sections of the *Corporations Act 2001* apply to Medibank Private Limited after the finalisation of the sale. While the bill contains provisions to authorise and facilitate the sale of shares in Medibank Private Ltd, there is no provision in this bill which would require the sale of all the shares. Therefore Schedule 3 may never commence. The Committee has a long standing concern with provisions that do not commence until an uncertain event occurs. Such provisions make it difficult for readers to determine whether the provisions in question have commenced. The Committee prefers to see a time limit imposed on such provisions and **seeks the Minister's advice** whether some appropriate time frame might be applied in this case.

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

Relevant extract from the response from the Minister

The Scrutiny of Bills Alert Digest No. 13 of 2006 of 8 November 2006 queries the operation of Schedule 3 of the Bill, and whether some specific timeframe might be applied to the operation of that Schedule. This is on the basis of concerns that there is no provision in the Bill that requires the sale of all the shares in Medibank Private Limited (MPL), which is the trigger for the operation of Schedule 3. The Committee has also expressed concern that provisions "that do not commence until an uncertain event occurs" make it difficult for readers to determine whether the provisions in Schedule 3 have commenced.

As noted by the Committee, Schedule 3 of the Bill amends three Acts: the *Commonwealth Borrowing Levy Act 1987*; the *Health Insurance Commission (Reform and Separation of Functions) Act 1997*; and the *Remuneration Tribunal Act 1973*.

The effect of the amendment to the *Commonwealth Borrowing Levy Act 1987* is that Medibank Private Limited will not be bound, after Schedule 3 of the Bill commences, to pay levy under the Commonwealth Borrowing Levy Act 1987 on borrowings undertaken before Schedule 3 of the Bill commences. The effect of the amendment to the *Health Insurance Commission (Reform and Separation of Functions) Act 1997* is to repeal section 45 of that Act. That section modifies the application of certain provisions of the *Corporations Act 2001* in relation to MPL. The effect of the amendment to the *Remuneration Tribunal Act 1973* is that the remuneration of the Managing Director of MPL will no longer be determined under that Act after Schedule 3 of the Bill commences.

As noted by the Committee, under the Bill, Schedule 3 commences on the ‘designated sale day’, which is the day on which the Minister for Finance and Administration (the Minister) declares that all shares in MPL are held by persons other than the Commonwealth or a wholly-owned Commonwealth company. However, the Committee has queried whether a specific commencement date could be applied to Schedule 3, in part to enable a clear understanding of when the relevant provisions commence.

Essentially, it is not appropriate that the provisions included in Schedule 3 commence at a specific date that could be either before or after the Commonwealth has sold all its equity in MPL. For example, MPL should continue to be liable to pay levy under the *Commonwealth Borrowing Levy Act 1987* until it ceases to be a wholly owned Commonwealth company, but not after that time. Further, the timing of the sale cannot currently be fixed with certainty. The Government has announced its intention that the sale of the Commonwealth’s equity in MPL will take place in 2008. However, the precise timing will be determined closer to the sale, including to enable relevant market conditions at that time to be considered. This will assist the Government in structuring the sale so as to optimise outcomes in the context of the Government’s sale objectives. Accordingly, the Bill recognises that the timing of the sale is a matter best to be determined by the Minister.

The Committee seeks advice whether “some appropriate time frame might be applied” to the commencement of Schedule 3 of the Bill. In my view, fixing a time frame for the commencement of Schedule 3 in such a fashion could result in the amendments in Schedule 3 (that are consequential to the sale having occurred) coming into effect before the sale is finalised. Such a result would, in my view, be arbitrary, inconsistent with the Government’s policy position and could inappropriately constrain the conduct of the sale process, preventing the Commonwealth from optimising the outcomes against the Government’s sale objectives.

The Committee also comments that, if provisions in an Act do not commence until an uncertain event occurs, it may be difficult for readers to determine whether the provision in question have commenced. Under clause 3 (3) of the Bill, the Minister's declaration of the designated sale day is a legislative instrument. Under the *Legislative Instruments Act 2003*, a legislative instrument is not effective until registered under that Act. In the circumstances, I consider that concerns based on any difficulty in determining whether Schedule 3 has commenced are unnecessary.

The Committee thanks the Minister for this response. The long-standing position of the Committee is that it is properly the role of the Parliament to determine the date upon which legislation ought to commence. Where it is not possible to specify a particular date, the Committee considers that the Parliament should set a defined period of time during which legislation might commence.

Provisions such as the one contained in this bill remove that role from the Parliament and place it in the hands of the Executive. The terms of reference for the Committee require that it draw such diminution in Parliamentary oversight to the attention of the Senate.

Legislative Instruments Act — exemptions
Schedule 2, subitems 5(4) and 5(5)

Subitem 5(4) of Schedule 2 would permit the Minister for Finance to make a written determination setting out the rules for a Medibank Private sale scheme, but subitem 5(5) would declare that such a determination, despite being a legislative instrument, is not disallowable, because section 42 of the *Legislative Instruments Act 2003* does not apply to it. The explanatory memorandum, at paragraph 72, seeks to justify this denial of effective Parliamentary scrutiny by observing first, that the determination is in effect a direction by the Minister to Medibank Private companies, and therefore already exempt from disallowance under item 41 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*, and secondly that the determination will deal with action to be taken by the Commonwealth itself. The Committee notes that item 41 of the table in subsection 44(2) provides that Ministerial directions to any person or body are not subject to disallowance. The Committee **seeks the Minister's clarification** of the nature of the rules to be determined under subitem 5(4) and the extent to which they could be regarded to be a Ministerial direction.

Pending the Minister's advice, the Committee draws Senators' attention to the 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 Committee has also sought clarification of the nature of the rules that might be determined under subitem 5(4) of Schedule 2 of the Bill, and the extent to which such rules could be regarded as a Ministerial direction to Medibank Private companies. Such directions, as the Committee notes, are not disallowable instruments because of item 41 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*. I note that the Committee did not make further comment on similar provisions in the *Telstra (Transition to Full Private Ownership) Bill 2005*, but has drawn the provision to Senators' attention in respect of the MPL Bill.

As noted above, the Government has indicated that the sale of its equity in Medibank Private Limited will take place in 2008. At this stage, it is not possible to indicate what rules may need to be made under subitem 5(4), or whether any rules will need to be made. However, it is envisaged that any rules that are made will amount to Ministerial directions to Medibank Private companies and therefore will fall within the exception to disallowance under the *Legislative Instruments Act 2003*.

I trust that this addresses the issues raised by the Committee.

The Committee thanks the Minister for this response. The Committee notes the Minister's statement that it is not possible to indicate what rules, if any, may need to be made under subitem 5(4). The Committee also notes the Minister's confidence that any rules that are made will amount to Ministerial directions and will therefore fall within the exception to disallowance under item 41 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*. However, in the absence of any clarification as to the nature of the proposed rules, the Committee is unable to determine whether such rules would indeed fall within the exemption.

The Committee continues to draw Senators' attention to the 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.

Robert Ray
Chair



SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia
Manager of Government Business in the Senate

File No: 06/6572

MC: 06/19052

RECEIVED

28 NOV 2006

Senate Standing C'ttee
for the Scrutiny of Bills

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

27 NOV 2006

Dear Senator

Scrutiny of Bills Digest No 13 included comments on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 and the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006.

I enclose my response to the comments for inclusion in the next Alert Digest. I hope that the additional information will assist the Committee.

The action officer for this matter in the Attorney-General's Department is Bruce Bannerman who can be contacted on 6250 6210.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

Abrogation of privilege against self-incrimination

The Committee has raised the question whether clauses 48 (which requires reporting entities to provide compliance reports), 150 (which requires persons to answer questions and produce documents), 169 (which requires persons to comply with written notices to provide information or documents) and 205 (which requires persons to comply with notices to produce) unduly trespass on personal rights and liberties. This is because the provisions abrogate the privilege against self incrimination and only provide direct use immunity and not derivative use immunity. The Committee notes that the explanatory memorandum seeks to justify the lack of derivative use immunity in clauses 48 and 150 but not in clauses 169 and 205.

The justification for the exclusion of derivative use immunity is the same for all four provisions. The granting of derivative use immunity would unacceptably hinder the effective investigation and the prosecution of offences under the AML/CTF Bill. As noted in the *Report on Review of the Derivative Use Immunity Reforms* by John Kluver in May 1997 at page 46, former Chief Justice Mason supported the view that direct use immunity was a satisfactory balance between public and private interests where it was provided in the Corporations Law. A correction will be made to the explanatory memorandum for clauses 169 and 205.

Strict Liability

A correction will be made to the explanatory memorandum, adding additional justifications as recommended by the Committee in the following terms.

Sub-clause 53(2) (Failure to report cross border movements of physical currency)

The physical elements of the offence in sub-clause 53(1) are set out in paragraphs (a), (b) and (c). Sub-clause 53(2) provides that the fault element for paragraph 53(1)(c) is strict liability. This means that the prosecution will only have to prove the physical aspect of this element (ie that the report required by clause 53 has not been provided).

In the absence of sub-clause 53(2), the prosecution would have to prove that the defendant was 'reckless' in failing to provide the report required by clause 53.

Strict liability is provided because paragraph 53(1)(c) involves a 'knowledge of law' issue. This is one of the justifications indicated in the Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* at 285:

'strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply'

The defence of reasonable mistake of fact will still be available for this physical element.

Sub-clause 55(2) (Reports about cross border movements of physical currency)

Sub-clause 55(2) applies strict liability to the offence at sub-clause 55(1). A person commits an offence if the person receives not less than \$10 000 in physical currency moved to the person from outside Australia and a report under clause 53 has not been made, and a report in respect of the receipt is not given in accordance with this clause before the end of 5 business days.

The physical elements of the offence in sub-clause 55(1) are set out in paragraphs (a), (b), (c) and (d). Sub-clause 55(2) provides that strict liability applies to the elements in paragraphs 55(1)(c) and (d). This means that the prosecution will not have to prove any fault element for the physical elements in paragraph 55(1)(c) and (d).

If sub-clause 55(1) was not a strict liability offence as provided in sub-clause 55(2), the prosecution would have to prove that:

- (c) the person knew or was reckless as to whether a report has been made in accordance with clause 53, and
- (d) that they knew or were reckless as to whether they had to make a report in respect of receipt of the physical currency in accordance with this clause within 5 business days.

The fault element in relation to paragraph (c) would then rest on matters solely within the defendant's knowledge.

Strict liability has been applied to the element in paragraph (d) to overcome the problem of the prosecution needing to prove that the defendant had knowledge of the clause under which he or she was required to provide a report.

This is consistent with the justifications for strict liability indicated by Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* at 285:

'strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply'

The defence of mistake of fact under section 9.2 of the *Criminal Code* is available in relation to these elements, as stated in section 6.1 of the *Criminal Code*.

Sub-clause 61(5) (Interference with notices affixed by customs officers)

Sub-clause 61(5) provides that the offence in sub-clause 61(3) is one of strict liability. The offence created by sub-clause 61(3) relates to conduct which results in interference with, removal of, or the defacement of a notice about reporting obligations.

A convicted person does not face imprisonment and a fine is capped at 50 penalty units which is under the threshold suggested by the Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* Committee at 284.

Compliance with the requirement to display these notices ensures that passengers entering or leaving Australia have notice of their obligations to declare the physical carriage of currency. Any person who defaces these signs significantly affects the operation of these provisions. Strict liability is an effective deterrent.

The defence of mistake of fact under section 9.2 of the *Criminal Code* is available in relation to the physical element, as stated in section 6.1 of the *Criminal Code*.

Sub-clause 62(4) (Failure to respond to notice to report)

The physical elements of the offence in sub-clause 62(3) are set out in paragraphs (a), (b) and (c). Sub-clause 62(4) means that the prosecution will not have to prove any fault element for the physical elements in paragraphs 62(3)(a)-(c).

If this was not a strict liability offence, the prosecution would have to prove that the person intentionally failed to provide a copy of a notice to travellers on board a ship or aircraft travelling to Australia.

Strict liability is justified for the circumstance element of the offence (paragraph 62(3)(a)) because of the 'knowledge of law' difficulty. This is consistent with the possible justifications for strict liability indicated by Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* at 285:

'strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply'

The defence of mistake of fact under section 9.2 of the *Criminal Code* is available in relation to that physical element, as stated in section 6.1 of the *Criminal Code*.

The penalty is a fine rather than imprisonment and is capped at 50 penalty units which is under the threshold suggested by the Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* Committee at 284.

Strict liability is consistent with the regulatory nature of the offence, and is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences. This is particularly important because compliance with this provision ensures that all passengers entering Australia are given notice of their obligations under sub-clause 53(2) to report the transfer of currency of more than \$10 000 AUD into Australia.

Sub-clause 66(4) should be deleted. Its inclusion in Division 3 was a drafting oversight.

Sub-clauses 74(3) (Providing remittance services when unregistered), 74(5) (Repeated failure to respond to notice to report), 74(7) (More than one repeated failure to respond to notice to report), 74(9) (Providing remittance services when unregistered where previously convicted of this offence)

If paragraphs 74(2)(b) and (c) were not strict liability, the prosecution would need to prove that a person intentionally failed to register on the Register of Providers of Remittance Services, which would require proof that the defendant was aware of his or her obligations under sub-clause 74(1), and was then reckless as to his or her obligation.

Strict liability in this instance is necessary in order to overcome this 'knowledge of law' difficulty. This is consistent with the justifications for strict liability indicated by Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation Committee at the Scrutiny of Bills Committee* at 285:

'strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply'

Sub-clause 74(5) provides that strict liability applies to paragraphs 74(4)(b) and (c). See the above comment on sub-clause 74(3) concerning strict liability for some of the physical elements of the offences at sub-clause 74(2). In addition to the justification provided under sub-clause 74(3), strict liability is further justified in relation to the sub-clause 74(4) offence by the fact that the element in paragraph (d) requires that the AUSTRAC CEO has previously given a direction under sub-clause 191(2) or accepted an undertaking under clause 197. The defendant accordingly has been put on notice about the possibility of the contravention.

Sub-clause 74(6) provides a further aggravated offence where the elements of the offence in sub-clause 74(4) apply and the AUSTRAC CEO has, on more than one occasion, previously given a direction to the person or has previously accepted an undertaking from the person.

Sub-clause 74(7) provides that strict liability applies to paragraphs 74(6)(b) and 74(6)(c). In addition to the justification provided under sub-clause 74(3), strict liability is further justified for sub-clause 74(7) by the fact that the element in paragraph 74(6)(d) requires that the AUSTRAC CEO has previously given a direction under sub-clause 191(2) or accepted an undertaking under sub-clause 197. The element in paragraph 74(6)(e) requires that this was not the first occasion that the AUSTRAC CEO has issued such a direction or accepted such an undertaking referred to in paragraph 74(6)(e). The defendant accordingly has been put on notice on more than once occasion about the possibility of contravention.

Sub-clause 74(8) provides for a further aggravated offence where the elements of the offence in sub-clause 74(1) apply and the person has been previously convicted of an offence against sub-clauses 74(2), (4) or (6). In addition to the justification provided under sub-clause 74(3), strict liability is further justified for sub-clause 74(8) by the fact that paragraph 8(d) requires that the defendant has been previously convicted of an offence against (2), (4) or (6) or that an order has been made against the person under section 19B of the *Crimes Act 1914* in respect of one of those offences. This indicates that the defendant has been put on notice of the possibility of contravention.

In relation to all of the above offences, the defence of mistake of fact under section 9.2 of the *Criminal Code* is available for that physical element (section 6.1 of the *Criminal Code*). Also see the explanatory memorandum on sub-clauses 74(11) and 74(12) for additional defences for criminal proceedings for an offence against sub-clauses 74(2), (4), (6) or (8) or in civil penalty proceedings for a contravention of sub-clause 74(1).

Sub-clause 66(5) (Electronic funds transfer instructions – only one institution involved in the transfer)

If paragraph 66(4)(b) was not strict liability, the prosecution would have to prove that a person intentionally failed to obtain complete payer information before performing the actions in paragraphs 66(2)(a) or (b), or intentionally failed to comply with a request by the AUSTRAC CEO in the manner specified in paragraphs 66(3)(c) and (d), in circumstances in which sub-paragraphs 66(3)(a)(i) or (ii) applied. To prove this, it would be necessary to prove that the defendant was aware of his or her obligations under sub-clause 66(2) or 66(3), and was then reckless as to his or her obligation.

Strict liability in this instance is necessary to overcome this ‘knowledge of law’ difficulty. This is consistent with the possible justifications for strict liability indicated by the Scrutiny of Bills Committee. Report 6/2002 of the Senate Standing Committee of the Scrutiny of Bills: *Application of Absolute and Strict Liability Offences in the Commonwealth Legislation* at 285:

‘strict liability may be appropriate to overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision; in such cases the defence of mistake of fact should apply’

The defence of mistake of fact under section 9.2 of the *Criminal Code* is available in relation to that physical element, as stated in section 6.1 of the *Criminal Code*.

Legislative Instruments Act

Neither of the instruments referred to in sub-clauses 75(3) and 191(6) are legislative in character. Subclauses 75(3) and 191(6) are merely declaratory and intended to provide clarification for readers.

Absolute Liability

Sub-clauses 136(4) (Providing false or misleading information) and 137(3) (Producing false or misleading documents)

These provisions relate to the offences of providing false or misleading information (clause 136) and producing false or misleading documents (clause 137).

The application of absolute liability means that no fault element applies to the physical element for paragraphs 136(1)(c) and 137(1)(c), and that a defence of mistake of fact is unavailable.

The application of absolute liability was included to overcome the ‘knowledge of law’ issue for these elements.

Sub-clauses 139(2) (Providing a designated service using a false customer name or customer anonymity), 140(2) (Receiving a designated service using a false customer name or customer anonymity) and 141(2) (Receiving a designated service without disclosing names by which a person is commonly known)

Sub-clauses 139(2), 140(2), and 141(2), apply absolute liability to an element of the offences in sub-clauses 139(1), 140(1) and 141(1) respectively. Similarly, provisions in sub-clauses 139(4) and 140(4) apply absolute liability to the same element of the respective offences in sub-clauses 139(3) and 140(3).

The application of absolute liability means that no fault element applies to the physical elements in relation to paragraphs 139(1)(d), 140(1)(c) and 141(1)(e) and that a defence of mistake of fact is unavailable.

The application of absolute liability was included to overcome the 'knowledge of law' issue in relation to these elements.



SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia
Manager of Government Business in the Senate

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27 NOV 2006

Senate Standing Committee
for the Scrutiny of Bills

Ministerial No: 90957

20 NOV 2006

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

Dear Senator Ray *Robert*,

I refer to the Committee's Alert Digest No. 13 dated 8 November 2006, dealing with the Customs Legislation Amendment (New Zealand Rules of Origin) Bill 2006 (the Bill), in which you seek my advice on the prescription of matters in legislative instruments or other writing contained in subsection 153ZIB(6) of the proposed Bill. The Committee also raised a concern about the reference in the Bill to section 49A of the *Acts Interpretation Act 1901*.

The Bill amends the *Customs Act 1901* (the Customs Act) to implement amendments to article 3 of the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA).

This proposed subsection 153ZIB(6) is consistent with the provisions contained in subsections 153YA(5) and 153ZA(5) of the Customs Act, which relate to the implementation of the Australia-United States Free Trade Agreement and the Thailand-Australia Free Trade Agreement respectively.

Also consistently with previous free trade agreement implementation, the purpose of this provision is to allow the relevant regulations implementing the product specific rules of origin to refer to the general accounting principles of the relevant country as in force from time to time. This obviates the need to amend the relevant regulations each time these principles are amended.

At this stage, it is not necessary to use this provision to refer to any other instrument or other writing in order to implement the amendments to ANZCERTA. However, should the ANZCERTA be further amended and require the use of the provision in the future, its general nature would allow for more seamless implementation of such amendments without having to also amend the Customs Act. In addition, any necessary amendments to the regulations would still be subject to parliamentary scrutiny.

Arrangements are currently under way to correct the Explanatory Memorandum to the Bill, omitting the reference to section 49A of the *Acts Interpretation Act 1901*, and substituting it with section 14 of the *Legislative Instruments Act 2003*. This incorrect reference was an unfortunate oversight during the preparation of the Explanatory Memorandum and I thank the Committee for bringing this to my attention.

Should the Committee require any further clarification about these matters, I would be pleased to assist.

Yours sincerely

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

CHRIS ELLISON
Senator for Western Australia



FAXED
27.11.06

SENATOR THE HON HELEN COONAN

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

27 NOV 2006

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

RECEIVED

27 NOV 2006

Senate Standing C'ttee
for the Scrutiny of Bills


Dear Senator Ray

Alert Digest 12/06 – Datacasting Transmitter Licence Fees Bill 2006

I write in response to the Committee's invitation to respond to matters raised in the Scrutiny of Bills Alert Digest No.12 of 2006 (18 October 2006) concerning clause 9 of the Datacasting Transmitter Licence Fees Bill 2006 (the Bill).

The Bill closely mirrors the provisions of the *Television Licence Fees Act 1964*. Clause 9 of the Bill uses words very similar to those in section 7 of the *Television Licence Fees Act*.

Clause 9 is intended to ensure that the earnings of subsidiary companies and other related entities of the licensee can be included in the calculation of the annual licence fee payable by a channel A datacasting transmitter licensee, in the same way that section 7 of the *Television Licence Fees Act* operates in relation to commercial television broadcasting licensees.

Procedures for collecting licence fees for a channel A licence are provided in amendments to the *Broadcasting Services Act 1992* (BSA) and the *Radiocommunications Act 1992* (RA) by the Broadcasting Services Amendment (Collection of Datacasting Transmitter Licence Fees) Bill 2006. These procedures will be subject to an application to the Administrative Appeals Tribunal (AAT) in the same way that the procedures relating to collection of commercial television broadcasting licence fees are already.

Section 205A of the BSA (as amended) will provide that the definition of "licence fee" will include a fee imposed under section 7 of the *Datacasting Transmitter Licence Fees Act 2006*.

New paragraphs 109A(1)(ba) and 109A(1)(bb) of the RA will provide that it is a condition of a channel A datacasting transmitter licence that the licensee will meet all obligations to pay amounts of datacasting transmitter licence fees, and that the licensee will comply with the requirements of section 205BA of the BSA.

New Section 205BA will require a channel A licence holder to:

- keep financial accounts in relation to the transmission of matter by transmitters operating under the licence;
- give ACMA an audited balance sheet and audited profit and loss account in relation to the transmission of matter by transmitters operating under the licence; and
- provide ACMA with a statutory declaration stating the gross earnings in relation to the licence during the financial year.

Subsection 205C(1) of the BSA (as amended) will provide that a channel A datacasting transmitter licensee must pay a licence fee and inform ACMA as to the manner in which that fee was determined. Under subsection 205C(2), where ACMA is of the opinion that the licence fee due is not the same as the amount paid, ACMA must give notice to the licensee of the method by which it determined the discrepancy in the licence fee due.

Under section 204 of the BSA, the licensee can make an application to the AAT in relation to a decision by ACMA to issue a notice under s 205C(2).

I trust this information is of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Helen Coonan', with a long horizontal flourish extending to the right.

HELEN COONAN



THE HON BRUCE BILLSON MP
Minister for Veterans' Affairs
Minister Assisting the Minister for Defence

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28 NOV 2006

Senate Standing C'ttee
for the Scrutiny of Bills

28 NOV 2006

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

Dear Senator,

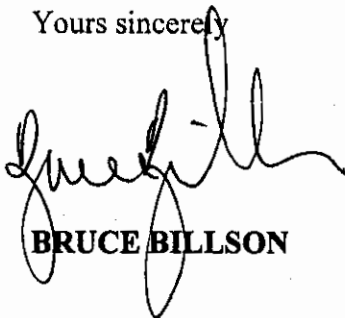
Thank you for your report on the Defence Legislation Amendment Bill 2006.

I have noted your comments on the Commencement on Proclamation. As you have commented, the amendments must commence on 1 October 2007, if not before on Proclamation.

I have also noted your comments on the Constitution of the Military Jury and am pleased to report that for the Class 1, most serious offences, I have instigated a specific amendment to meet the civilian practice referred to in your letter.

Thank you for your assistance.

Yours sincerely



BRUCE BILLSON



SENATOR THE HON IAN CAMPBELL
Minister for the Environment and Heritage
Senator for Western Australia

RECEIVED

13 NOV 2006

Senate Standing C'ttee
for the Scrutiny of Bills

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

10 NOV 2006

Dear Senator Ray

Robert,

I am writing in response to the letter of 19 October 2006 from the Secretary of the Senate Scrutiny of Bills Committee presenting me with an opportunity to provide a response to the comments contained in the Scrutiny of Bills Alert Digest No. 12 of 2006 concerning the Environment and Heritage Legislation Amendment Bill (No. 1) 2006 (EHLA Bill).

My response to the comments made by the Scrutiny of Bills Committee is set out in the attached document. As can be seen from the response, careful consideration was given to existing guidelines and precedents in framing the EHLA Bill. The Bill also includes appropriate limitations and leaves open defence options to ensure that the application of the penalty and enforcement provisions cannot be applied in a manner which would unduly trespass on personal rights and liberties.

It needs to be recognised that a primary objective of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is to protect matters of national environmental significance. Many of the amendments contained in the EHLA Bill are aimed at addressing the shortcomings in the current EPBC Act which prevent environment and heritage which is of national importance being protected as intended by Parliament. The framing of the commencement provisions, penalty offence and enforcement provisions, exemptions from the *Legislative Instruments Act 2003*, and limiting merits review are based on the recognition that special requirements are required to ensure the integrity of the regulatory regime which has been put in place to protect Australia's most valuable environmental and heritage assets.

Thank you for the opportunity to respond to the comments made by the Committee.

Yours sincerely

IAN CAMPBELL



Canberra
Parliament House, Canberra ACT 2600
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Perth
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**Senate Standing Committee for the Scrutiny of Bills Alert Digest No.12 of 2006 –
Environment and Heritage Legislation Amendment Bill (No. 1) 2006**

**Response by Senator The Hon Ian Campbell, Minister for the Environment and
Heritage**

Commencement

Schedule 1, items 3, 8, 10, 12, 14

The Committee seeks advice as to the reasons for the five-year delay in commencement for the proposed amendments which remove the statutory basis for the Register of the National Estate from the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and make amendments consequential to this removal in the EPBC Act and the *Australian Heritage Council Act 2003*.

The Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment establishes that the Australian Government's involvement in heritage matters should focus on World Heritage properties and places of national significance. The EPBC Act was amended in 2003 to include provisions relating to the listing and protection of National Heritage places and, in addition, similar provisions relating to Commonwealth heritage places were introduced in recognition of the Australian Government's responsibility to protect the heritage values of places it owns or controls.

Since this time many heritage places have been added to the National Heritage and Commonwealth Heritage Lists. Most of these places were listed on the Register of the National Estate along with many other places that are of State or local heritage significance.

The commencement period of five years for the amendments takes into account consultations with government and non-government stakeholders. These consultations indicated that amendment of the statutes of other jurisdictions that refer directly or indirectly to the Register of the National Estate, and development of heritage listing programmes in states and territories to pick up suitable places in the Register that are not already in state or territory heritage lists, could usefully precede repeal of the Register. However, the tasks involved would require a reasonable time.

Item 550 was referred to in the commencement provisions to ensure that the delayed commencement of a heritage related matter was linked to the commencement of amendments relating to other heritage related matters.

Commencement

Schedule 1, items 781 and 782

The Committee seeks advice regarding the degree of certainty surrounding the commencement of alternative means of protecting heritage places on "freehold land" within the Territories of Cocos (Keeling) Island and Christmas Island and whether the EHLA Bill might be amended to set a time limit for commencement.

The proposed amendment is to remove, from the definition of Commonwealth Area, those areas within the Territories of Cocos (Keeling) Island and Christmas Island where a person holds a freehold interest in the land. This recognises that alternative means to the Commonwealth Heritage List can be put in place to ensure the ongoing protection of heritage places on "freehold land" in the Cocos Keeling Islands and Christmas Island. For heritage property owners in these territories, it will have the effect of replacing Commonwealth heritage protection with state heritage protection. This will result in owners of heritage places on freehold land being treated in a similar fashion to owners of heritage places on freehold land in other parts of Australia.

To ensure there is no gap in protection for the Commonwealth Heritage places in the Christmas Island Territory and the Territory of Cocos (Keeling) Islands, special commencement provisions were applied.

The *Cocos (Keeling) Islands Act 1995* and *Christmas Island Act 1958* provide the legislative basis for the Territories administrative, legislative and judicial systems. The *Territories Law Reform Act 1992* amended these two Acts to apply certain Commonwealth laws and the laws of the State of Western Australia. The *Applied Laws (Implementation) Ordinance 1992* for each Territory, however effectively removed the *Heritage of Western Australia Act 1990* from those Western Australian Acts that apply within the Territories.

It is proposed that the amendments will commence when the *Heritage of Western Australia Act 1990* starts to be applied in Christmas Island Territory and the Territory of Cocos (Keeling) Islands. Amendments to the *Applied Laws (Implementation) Ordinance 1992* for each Territory are necessary for this to occur. My Department is liaising with the Department of Transport and Regional Services with a view to ensuring that these changes will be made within a timely fashion. Before the necessary amendments can be made to the *Applied Laws (Implementation) Ordinance 1992*, negotiations with the Western Australian Government on the administrative arrangements relating to the application of the Western Australian legislation must be finalised, consultation with the Indian Ocean Territories Shire Councils and other relevant stakeholders undertaken and any necessary listing processes in relation to the heritage properties concerned commenced. It is not possible to give a definitive date for completion of these processes at this stage.

Strict liability

Schedule 1, items 5, 7, 12, 14, 16, 18, 20, 22, 24, 26, 28, 32, 39, 41, 44, 46, 50, 52, 57, 59, 61, 63, 64, 66, 71, 73, 75, 77, 80 and 82

The Committee seeks advice as to the justification for the imposition of strict liability for elements of the offences against sections 15A, 15C, 17B, 18A, 20A, 24A, 27A and 27C of the EPBC Act.

While no direct reference is given in the Explanatory Memorandum to either the Committee's Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, these documents were taken into account in framing the strict liability provisions.

The Committee points to the principle on page 284 of its report that (subject to other relevant principles) "strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance those relating to ... the environment". The Attorney-General's Department's guidelines for the application of strict and absolute liability offences also advise that it may usefully be applied in a regulatory context relating to the protection of the environment. The relevant offence provisions of the EPBC Act form part of a fundamental environmental regulatory regime that is aimed at protecting matters of national environmental significance. The application of strict liability to elements of these offences is considered appropriate for ensuring the maintenance of the integrity of the regulatory regime of the EPBC Act.

The imposition of strict liability to elements of offences is also consistent with the Committee's principle stated on page 285 of the Committee's report that "strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent". The experience of the Department of the Environment and Heritage, as confirmed by the Commonwealth Director of Public Prosecutions, is that the requirement to prove a mental element (for example, that a person knew or was reckless as to the fact that a species is a listed threatened species) is a substantial impediment to proving these offences. Accordingly, it has proved

extremely difficult to prosecute these fault provisions, such as in cases involving the killing of a Grey Nurse Shark or the shooting of sea birds from commercial fishing boats.

Strict liability in these circumstances is further warranted on the grounds of its consistency with the Committee's principle that "strict liability may be appropriate to overcome the 'knowledge of law' problem, where a physical element of the offence expressly incorporates a reference to a legislative provision".

My Department was advised by the Commonwealth Director of Public Prosecutions that the structure of these offence provisions raised a "knowledge of law" issue. In order to establish an offence under the EPBC Act it is necessary to show that the action results or will result in a significant impact on, for example, a listed threatened species and that the person was reckless as to this circumstance. In order to prove recklessness the prosecution must show, as part of the requirement under subsection 5.4 of the Criminal Code, that the person was aware of a substantial risk that the circumstance exists or will exist. This entails, establishing for example, that a defendant was reckless that a bird was in fact a species that was on the list of threatened species, which necessarily involves proving a level of awareness of the legislation under which the bird is deemed to be a listed threatened species.

If strict liability was not applied to this element of the offence relating to the species being a listed species, then the prosecution would have to show this awareness that the species is listed. Unless strict liability is applied to this element of the offence in clause 18A, and corresponding amendments are made to clauses 15A, 15C, 17B, 20A, 24A, 27A and 27C, relating to the other protected matters under the EPBC Act, the provisions would be rendered virtually unenforceable. This would give rise to a situation that the Committee has noted, would be potentially damaging to the credibility of the legal system (see the Committee's report page 265). These amendments ensure that the offence provisions are workable, as originally intended by Parliament.

The strict liability offences will apply to a person who takes an action that has, will have, or is likely to have a significant impact on a listed threatened species, or other matter protected by Part 3 of the EPBC Act which is consistent with the Committee's principle stated on page 285 of the Committee's report that "strict liability should depend as far as possible on the actions ... of those who are actually liable for the offence".

It is important to note that these amendments only apply strict liability to these specific elements of the offences in clauses 15A, 15C, 17B, 18A, 20A, 24A, 27A and 27C. Accordingly, fault elements will continue to apply in relation to the existence of facts including that an action has, will have or is likely to have a significant impact on a species or area under Part 3 of the EPBC Act.

In addition, the defence of honest and reasonable mistake of fact under section 9.2 of the Criminal Code remains available to a potential defendant in relation to the elements of offences to which strict liability relates and in accordance with the Committee's Basic Principles provided at pages 283-284 of the Committee's report. Also in accordance with section 6.1 of the Criminal Code, the amendments that involve strict liability expressly state that it is an offence of strict liability.

The Committee also noted the principle stated on page 284 of the Committee's report that "strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ... appears to be a reasonable maximum." The application of strict liability to elements of these offences, certain of which include a maximum penalty of seven years imprisonment and 420 penalty units, is appropriate for the reasons set out above and given that the commission of such offences will result in direct and serious impacts on elements of the environment which are of national and international importance.

Strict liability

Schedule 1, item 291

The Committee seeks advice as to the justification for the imposition of strict liability for an offence against the proposed clause 142B of the EPBC Act.

While no direct reference is given in the Explanatory Memorandum to either the Committee's Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, these documents were taken into account in drafting clause 142B.

Clause 142B of the EPBC Act forms part of a fundamental environmental regulatory regime that is aimed at protecting matters of national environmental significance. The application of strict liability to this offence is considered appropriate for ensuring the maintenance of the integrity of the regulatory regime of the EPBC Act, in accordance with the Committee's report and the Attorney-General's Department's guidelines for the application of strict and absolute liability offences.

Strict liability will provide a necessary and adequate deterrent for breaches of this regulatory provision. Such offences need to be dealt with expeditiously to ensure public confidence in the regulatory regime. Strict liability is justified where a person agrees to conditions attached to an approval and where public confidence in the merit of such an instrument may be significantly undermined by a person's failure to comply with them.

The associated pecuniary penalty provision applicable to this strict liability offence is set at 60 penalty units which is consistent with the Committee's basic principle stated on page 284 of the Committee's report that "strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ... appears to be a reasonable maximum".

Strict liability

Schedule 1, items 591 and 595

The Committee seeks advice as to the justification for the imposition of strict liability for the proposed new subsections 354A(2), (4) and (7), and the proposed new subsection 355A(2) of the EPBC Act.

While no direct reference is given in the Explanatory Memorandum to either the Committee's Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, these papers were taken into account in drafting each of these new subsections.

The proposed new subsections form part of an environmental regulatory regime that is aimed at protecting the environment in a Commonwealth reserve. The application of strict liability to one physical element of these offences is considered appropriate for ensuring the maintenance of the integrity of the regulatory regime of the EPBC Act. This application is in accordance with the Committee's report that "strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance those relating to...the environment" and the Attorney-General's Department's guidelines for the application of strict and absolute liability offences.

If strict liability did not apply to the relevant element of these offences the prosecution would have to prove that a person who took a prohibited action in a Commonwealth reserve knew or was reckless as to the fact that the area is a Commonwealth reserve. The experience of the Director of

National Parks, as confirmed by the Commonwealth Director of Public Prosecutions, is that the requirement to prove such a mental element, would be a substantial impediment to proving these offences thereby significantly detracting from their deterrent effect. Accordingly, the imposition of strict liability in these circumstances is consistent with the Committee's principle stated on page 285 of the Committee's report that "strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent".

Strict liability in these circumstances is further warranted on the grounds of its consistency with the Committee's principle that "strict liability may be appropriate to overcome the 'knowledge of law' problem, where a physical element of the offence expressly incorporates a reference to a legislative provision". Unless strict liability is applied to these elements of the offences in the proposed new subsections 354A(2), (4) and (7), and the proposed new subsection 355A(2), the provisions would be rendered virtually unenforceable as the onus would otherwise fall to the prosecution to prove the applicable fault element under the Criminal Code – ie that a defendant was reckless that an area was in fact a Commonwealth reserve, which necessarily involves proving a level of awareness of the legislation under which the area is declared to be a Commonwealth reserve. As noted by the Committee this would give rise to a situation that would be potentially damaging to the credibility of the legal system (see the Committee's report page 265). These amendments ensure that the offence provisions are workable, as originally intended by Parliament.

It is important to note that these amendments only apply strict liability to the specific element of the offences in new subsections 354A(2), (4) and (7), and 355A(2), which deal with the circumstance that a prohibited action was taken in a Commonwealth reserve. Fault elements will continue to apply in relation to the other physical elements of the offences, such as that a person carries on mining operations. In addition, the defence of honest and reasonable mistake of fact under section 9.2 of the Criminal Code remains available to a potential defendant in relation to the elements of offences to which strict liability relates and in accordance with the Committee's Basic Principles provided at pages 283-284 of the Committee's report. Also in accordance with section 6.1 of the Criminal Code, the amendments that involve strict liability expressly state that it is an offence of strict liability.

The strict liability elements of the offences will apply to the persons who take actions in Commonwealth reserves which is consistent with the Committee's principle stated on page 285 of the Committee's report that "strict liability should depend as far as possible on the actions ... of those who are actually liable for the an offence".

The Committee also noted the principle stated on page 284 of the Committee's report that "strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ... appears to be a reasonable maximum." The application of strict liability to elements of these offences is appropriate for the reasons set out above and given that the commission of such offences will result in direct and serious impacts on elements of the environment which are of national importance.

Legislative Instruments Act - exemptions Schedule 1, items 354 and 358

The Committee seeks advice as to the justification for exemptions from the *Legislative Instruments Act 2003* (LIA) for legislative instruments made under section 184 of the EPBC Act which provide for amendments to be made to the lists of threatened species, threatened ecological communities and key threatening processes. The instruments making these amendments are already subject to an exemption from the sunset provisions of the LIA as provided for by Item 15, section 54 of the LIA because sunset listings would remove the protection of the EPBC Act from, for example, plants and animals which are critically endangered.

The new subsection 184(2) is therefore a statement of what is currently the situation in relation to exemptions under the LIA.

Legislative Instruments Act - declarations

Schedule 1, items 391 and 466

The Committee seeks advice whether proposed subsections 208A(2) and 265(2), which state that an instrument made under subsection 208A(1) or subsection 265(1) is not a legislative instrument, are included for information only. Advice from the Attorney-General's Department was that the instruments made under subsections 208A(1), 222A(1), 245(1) and 265(1) are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. As such the statements in new subsections 208A(2), 222A(2), 245(2) and 265(2) are for information only.

Excluding merits review

Schedule 1, items 415, 448 and 465

The Committee seeks advice as to the justification for the apparent reduction in merit review which would result from these amendments.

Merits review in relation to decisions made by delegates under the EPBC Act is being preserved. The Administrative Appeals Tribunal (AAT) will have the same jurisdiction as it currently does in relation to any decisions made by public servants as delegates of the Minister.

However, many of the decisions taken under the EPBC Act require careful balancing of competing interests and judgements. An example is the declaration that the Southern Bluefin Tuna Fishery is an approved Wildlife Trade Operation under the EPBC Act. The continued operation of the Southern Bluefin Tuna export industry, which is worth \$300 million per annum is dependant on decisions made under the EPBC Act. The continued operation of the Fishery involves complex and sensitive conservation, economic, social and international considerations.

The Government considers that where decisions are sufficiently important to be taken by the Minister as an elected representative, those judgments should not be able to be overturned by an unelected tribunal such as the AAT.

The Government is not removing any appeal rights in relation to judicial review or reducing the extended standing provisions provided by the EPBC Act. Anyone affected by a particular decision will still be able to appeal that decision under the *Administrative Decisions (Judicial Review) Act 1977*.

Search without warrant

Schedule 1, item 633

The Committee seeks advice as to the nature of the search provided for in the proposed new paragraph 406(1)(ba) of the EPBC Act and whether the type of search could be specified within the proposed paragraph.

The proposed new paragraph 406(1)(ba) of the EPBC Act will allow officers at sea to search for items which may constitute evidence or may endanger other persons. These powers will prevent the possibility of people on board suspected illegal foreign vessels from concealing evidence or dangerous items on their person (or throwing them overboard) and from bringing them into detention facilities, which would put detainees and officers at risk.

As the Committee noted, new paragraph 406(1)(ba) will be subject to new section 406A which contains appropriate limitations on the manner in which searches may be carried out under new paragraph 406(1)(ba). Those limitations include that searches are to be conducted by an authorised

officer of the same sex as the subject; officers are prohibited from removing, or requiring the subject, to remove any of the subject's clothing; and that officers are to use no more force or impose on the subject of the search no greater indignity than is necessary to conduct the search.

These searches are necessary to ensure the safety of persons on vessels boarded under section 403 and other people (such as officers or interpreters) and also to ensure that illegal foreign vessel offences can be fully investigated. Searches can be conducted under these provisions to find a weapon or other thing capable of being used to inflict bodily injury or evidence of an offence.

As the Committee has noted, subsections 413(3) and 414(3) of the EPBC Act contain definitions of a "frisk search" and an "ordinary search" respectively. The limitations in section 406A of the Bill are such that the nature of the search under paragraph 406(1)(ba) is essentially the equivalent of a "frisk search", as defined under subsection 413(3) of the EPBC Act, by a person of the same sex, and it is considered unnecessary to specify the type of search in new paragraph 406(1)(ba), which is appropriately limited by new section 406A of the Bill.

Search without warrant

Schedule 1, item 835

The Committee seeks advice as to the nature of the search provided for in clause 15 of the proposed new Schedule 1 and whether the type of search could be specified within the proposed clause. The Committee also seeks advice on whether the exercise of the search powers in clause 15 might also be limited to circumstances where an authorised officer has reasonable grounds to believe that the detainee has a weapon or evidence concealed about his/her person.

The detention power under clause 8 of Schedule 1 is necessary for officers to effectively investigate and prosecute offences against the EPBC Act by non-citizens outside Australia. Many of these offences occur a significant distance from the coastline and without the capacity to detain foreign offenders on suspicion of an offence, the Australian Government would have little or no chance to effectively investigate offences. This is because there are difficulties and safety risks in obtaining evidence at sea. These include, for example, the relative availability of interpreters and risks involved with conducting searches of the boat, charts and logbooks in open and sometimes turbulent waters.

In addition, lengthy investigations into the activities of each boat could be time consuming and would waste expensive patrol time unnecessarily, with the consequence that less illegal foreign vessels could be apprehended. The Australian Government would effectively be put in a position where it was unable to take action against foreign offenders who are contravening the EPBC Act.

New Schedule 1 provides for persons in environment detention to be treated consistently with persons in immigration detention, as people under environment detention and other people under immigration detention may be held in the same location. The Schedule also facilitates the seamless transfer of detainees from environment detention to immigration detention where the period of environment detention expires and pending their removal from Australia, with one set of rules applying to the detainee's entire period of detention.

As the Committee notes, clause 15 of the new Schedule 1 would permit an 'approved officer' to conduct a search of a detainee, a detainee's clothing and any property under the detainee's immediate control without a warrant. New clause 15 contains appropriate limitations on the manner in which searches may be carried out, including that searches are to be conducted by an approved officer of the same sex as the detainee; officers are prohibited from removing, or requiring the detainee, to remove any of the detainee's clothing; and that officers are to use no more force or impose on the subject of the search no greater indignity than is necessary to conduct the search.

The power to conduct searches under clause 15 of new Schedule 1 is necessary to ensure the safety of detainees and other people (such as authorised officers or interpreters) and also to ensure that suspected offences can be fully investigated. Searches can be conducted under these provisions to find a weapon or other thing capable of being used to inflict bodily injury or evidence of an offence.

New clause 15 will provide a consistent approach in immigration facilities, where people under environment detention and other people under immigration detention may be held in the same location. It is essential that the personal safety of detainees, detention officers and officers in these premises are not compromised by different security standards and that good order in detention facilities is maintained.

The limitations in clause 15 of new Schedule 1 of the Bill are such that the nature of the search is essentially the equivalent of a "frisk search", as defined under subsection 413(3) of the EPBC Act, by a person of the same sex.

The search power in clause 15 of Schedule 1 of the Bill mirrors clause 15 of Schedule 1A of the *Fisheries Management Act 1991*, which in turn is modelled on section 252 of the *Migration Act 1958*. Consistency is essential to providing a consistent detention and search regime between the EPBC Act and Migration Act, and fisheries legislation. It will facilitate seamless transfer of detainees from environment detention to immigration detention with one set of rules applying to the detainee's entire period of detention. It is not necessary or appropriate to specify the type of search in clause 15 of new Schedule 1 of the Bill, which contains sufficient safeguards to ensure that all searches are conducted in an appropriate manner. In addition, consistent with clause 15 of Schedule 1A of the *Fisheries Management Act 1991*, the exercise of the search powers in Clause 15 need not also be limited to circumstances where an authorised officer has reasonable grounds to believe that the detainee has a weapon or evidence concealed about his or her person.

Search without warrant

Clause 17

The Committee seeks advice as to justification for the inclusion of the power to conduct strip searches of detainees without a warrant in certain circumstances and whether appropriate protocols have been developed for the authorisation and conduct of such searches.

The power to conduct strip searches under clause 17 of the proposed new Schedule 1 is considered to be a measure of last resort and is subject to appropriate authorisation and strict safeguards. High level authorisation for each strip search must be obtained from either the Secretary, one of the Deputy Secretaries, or the Director of National Parks of the Australian Government Department of the Environment and Heritage or a magistrate.

A strip search may only be authorised in circumstances where there are reasonable grounds to suspect that the detainee is hiding a weapon or other thing capable of inflicting bodily injury or being used to escape from detention. In these circumstances, it is essential that the detainee be appropriately searched to ensure both their safety and the safety of other people in the detention facility.

Strip searches are subject to very strict requirements aimed at protecting the welfare and dignity of the detainee. A strip search may only be carried out by a specially authorised officer of the same sex as the detainee.

This Bill does not authorise the search of body cavities and ensures that no more clothing is removed than is necessary to recover hidden items. In practice, this means that strip searches could involve no more than the removal of a jacket or the detainee's shoes and socks.

These provisions are consistent with the corresponding provisions in the *Migration Act 1958* and the *Fisheries Management Act 1991*. New Schedule 1 will provide a consistent approach in immigration facilities, where people under environment detention and other people under immigration detention may be held in the same location. It is important that environment detainees should be subject to the same level of searching and screening procedures as other detainees that may be housed in the same facility.

My Department will be working closely with the Department of Immigration and Multicultural Affairs to establish the mechanisms and protocols needed to implement the amendments.

It is considered highly unlikely that it would ever be necessary to conduct strip searches of environment detainees. I understand that under the powers in the Migration Act no adult has been strip searched since January 2003 and no minor has ever been strip searched.

Exercise of legislative power

Schedule 2, Part 2, subitem 4(2)

The Committee seeks advice as to the reasons for this exercise of delegated legislative power not being subject to disallowance.

Under the subitem the Minister may determine in writing that Parts 7, 8 and 9 and section 170A of the amended EPBC Act are to apply in relation to an action, subject to such modifications of Part 7 and Division 3 of Part 8 of the amended EPBC Act as are specified in the determination. The provision further provides that the determination must not increase, or have the effect of increasing, the maximum penalty for any offence; or widen, or have the effect of widening, the scope of any offence.

The purpose of this provision is to provide the Minister with the ability to transfer a proposed action, that is in the process of being considered for assessment, from the existing assessment and approval processes to the new processes set out in the amending Bill (once the amendments come into force). The Minister is given the ability to modify Part 7 and Division 3 of Part 8 in order to ensure that when an action is transferred from one process to another the statutory timeframes can be met; and that any steps that are potentially missed (such as consultation) can be reinstated. In other words, the provision is intended to ensure a smooth, certain and transparent transfer from one process to the other. If the instrument were subject to disallowance there would be considerable uncertainty and potential for delay.



SENATOR THE HON NICK MINCHIN

Minister for Finance and Administration
Leader of the Government in the Senate

20 NOV 2006

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

RECEIVED
20 NOV 2006
Senate Standing C'ttee
for the Scrutiny of Bills

Dear Robert,

I am responding to issues raised by the Standing Committee for the Scrutiny of Bills (the Committee), concerning the *Medibank Private Sale Bill 2006* (the Bill). Specifically, the Committee has sought my advice in relation to the operation of Schedule 3, and subitems 5(4) and (5), of the Bill.

The Scrutiny of Bills Alert Digest No.13 of 2006 of 8 November 2006 queries the operation of Schedule 3 of the Bill, and whether some specific timeframe might be applied to the operation of that Schedule. This is on the basis of concerns that there is no provision in the Bill that requires the sale of all the shares in Medibank Private Limited (MPL), which is the trigger for the operation of Schedule 3. The Committee has also expressed concern that provisions "that do not commence until an uncertain event occurs" make it difficult for readers to determine whether the provisions in Schedule 3 have commenced.

As noted by the Committee, Schedule 3 of the Bill amends three Acts: the *Commonwealth Borrowing Levy Act 1987*; the *Health Insurance Commission (Reform and Separation of Functions) Act 1997*; and the *Remuneration Tribunal Act 1973*.

The effect of the amendment to the *Commonwealth Borrowing Levy Act 1987* is that Medibank Private Limited will not be bound, after Schedule 3 of the Bill commences, to pay levy under the *Commonwealth Borrowing Levy Act 1987* on borrowings undertaken before Schedule 3 of the Bill

commences. The effect of the amendment to the *Health Insurance Commission (Reform and Separation of Functions) Act 1997* is to repeal section 45 of that Act. That section modifies the application of certain provisions of the *Corporations Act 2001* in relation to MPL. The effect of the amendment to the *Remuneration Tribunal Act 1973* is that the remuneration of the Managing Director of MPL will no longer be determined under that Act after Schedule 3 of the Bill commences.

As noted by the Committee, under the Bill, Schedule 3 commences on the 'designated sale day', which is the day on which the Minister for Finance and Administration (the Minister) declares that all shares in MPL are held by persons other than the Commonwealth or a wholly-owned Commonwealth company. However, the Committee has queried whether a specific commencement date could be applied to Schedule 3, in part to enable a clear understanding of when the relevant provisions commence.

Essentially, it is not appropriate that the provisions included in Schedule 3 commence at a specific date that could be either before or after the Commonwealth has sold all its equity in MPL. For example, MPL should continue to be liable to pay levy under the *Commonwealth Borrowing Levy Act 1987* until it ceases to be a wholly owned Commonwealth company, but not after that time. Further, the timing of the sale cannot currently be fixed with certainty. The Government has announced its intention that the sale of the Commonwealth's equity in MPL will take place in 2008. However, the precise timing will be determined closer to the sale, including to enable relevant market conditions at that time to be considered. This will assist the Government in structuring the sale so as to optimise outcomes in the context of the Government's sale objectives. Accordingly, the Bill recognises that the timing of the sale is a matter best to be determined by the Minister.

The Committee seeks advice whether "some appropriate time frame might be applied" to the commencement of Schedule 3 of the Bill. In my view, fixing a time frame for the commencement of Schedule 3 in such a fashion could result in the amendments in Schedule 3 (that are consequential to the sale having occurred) coming into effect before the sale is finalised. Such a result would, in my view, be arbitrary, inconsistent with the Government's policy position and could inappropriately constrain the conduct of the sale process, preventing the Commonwealth from optimising the outcomes against the Government's sale objectives.

The Committee also comments that, if provisions in an Act do not commence until an uncertain event occurs, it may be difficult for readers to determine

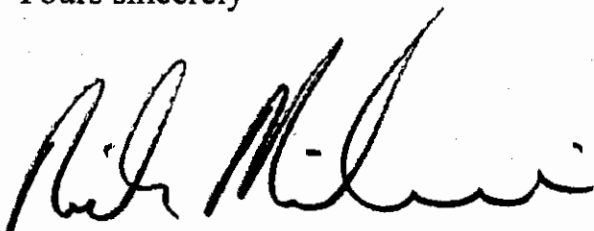
whether the provision in question have commenced. Under clause 3 (3) of the Bill, the Minister's declaration of the designated sale day is a legislative instrument. Under the *Legislative Instruments Act 2003*, a legislative instrument is not effective until registered under that Act. In the circumstances, I consider that concerns based on any difficulty in determining whether Schedule 3 has commenced are unnecessary.

The Committee has also sought clarification of the nature of the rules that might be determined under subitem 5(4) of Schedule 2 of the Bill, and the extent to which such rules could be regarded as a Ministerial direction to Medibank Private companies. Such directions, as the Committee notes, are not disallowable instruments because of item 41 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*. I note that the Committee did not make further comment on similar provisions in the *Telstra (Transition to Full Private Ownership) Bill 2005*, but has drawn the provision to Senators' attention in respect of the MPL Bill.

As noted above, the Government has indicated that the sale of its equity in Medibank Private Limited will take place in 2008. At this stage, it is not possible to indicate what rules may need to be made under subitem 5(4), or whether any rules will need to be made. However, it is envisaged that any rules that are made will amount to Ministerial directions to Medibank Private companies and therefore will fall within the exception to disallowance under the *Legislative Instruments Act 2003*.

I trust that this addresses the issues raised by the Committee.

Yours sincerely

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

Nick Minchin