CHAPTER 2

UNDUE TRESPASS ON PERSONAL RIGHTS AND LIBERTIES

Application of criterion set out in Standing Order 24(1)(a)(i)

2.1 Under Standing Order 24(1)(a)(i), the Committee is required to report on whether legislation trespasses unduly on personal rights and liberties. Legislation may trespass *unduly* on personal rights and liberties in a number of ways. For example, it might:

- have a retrospective and adverse effect on those to whom it applies;
- not only operate retrospectively, but its proposer (invariably the Government) might treat it as law before it is enacted – usually from the date the intention to legislate is made public; this is often referred to as **legislation by press release**;
- abrogate the common law right people have to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved;
- reverse the common law onus of proof and require people to prove their innocence when criminal proceedings are taken against them;
- impose strict liability on people when making a particular act or omission an offence;
- give authorities the power of search and seizure without requiring them to obtain a judicial warrant prior to exercising that power; or
- equip officers with oppressive powers.

2.2 Standing Order 24(1)(a)(i) may also apply in other circumstances, for example, where legislation directly affects fundamental entitlements such as the right to vote. It may apply where legislation increases certain powers of the Executive that may infringe rights, such as the right to privacy, for example, by allowing the more extensive use of tax file numbers. It may also apply where legislation provides for organisations other than the police force to exercise what are essentially police powers – usually where there is a perceived threat to public safety. Explanations and specific examples of each of these situations are detailed below.

Retrospectivity

2.3 Legislation has retrospective effect when it makes a law applicable to an act or omission that took place before the legislation was enacted. Criticism of this practice is longstanding. For example, in 1651, Thomas Hobbes in *Leviathan* observed that ‘No law, made after a Fact done, can make it a Crime’, and ‘Harme

inflicted for a Fact done before there was a Law that forbad it, is not Punishment, but an act of Hostility'[1].

2.4 Similarly, in 1765, Sir William Blackstone, in his *Commentaries*, referred to the vice of making laws but not publicly notifying those subject to them. He then went on to say:

> There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed*". But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.[2]

2.5 The Committee endorses the traditional view of retrospective legislation. Its approach is to draw attention to bills that seek to have an impact on a matter that has occurred prior to their enactment. It will comment adversely where such a bill has a detrimental effect on people. However, it will not comment adversely if:

- apart from the Commonwealth itself, the bill is for the benefit of those affected;
- the bill does no more than make a technical amendment or correct a drafting error; or
- the bill implements a tax or revenue measure in respect of which the relevant Minister has published a date from which the measure is to apply, and the publication took place prior to the date of application.[3]

2.6 In the Committee's view, where proposed legislation is to have retrospective effect, the explanatory memorandum should set out in detail the reasons retrospectivity is sought.

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1 Hobbes, T. *Leviathan*, as referred to by Toohey, J. in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 687.

2 Blackstone, W. *Commentaries on the Laws of England*, Book 1 (1965, Clarendon Press, Oxford), pp. 45-46 as referred to in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 534 per Mason, CJ.

3 The Parliament has generally accepted some retrospectivity in respect of tax and revenue measures so as to ensure that windfall profits may not be made between the time of an announcement and the enactment of legislation to implement that announcement. (*Odgers' Australian Senate Practice*, 11th Edition, p. 299).

2.7 During the 40th Parliament, retrospectivity remained one of the principal reasons for the Committee reporting on clauses in bills. Some examples of the Committee's approach to the issue are set out below.

Example: Border Protection (Validation and Enforcement Powers) Bill 2001

2.8 This bill was introduced into the House of Representatives on 18 September 2001[4] and sought to validate, from 27 August 2001, certain actions taken in relation to vessels carrying persons reasonably believed to be intending to enter Australia unlawfully. The bill specified that any such actions were lawful when they occurred and that no civil or criminal proceedings could be instituted or continued against the Commonwealth or others in respect of these actions.[5]

2.9 The Committee noted that the provisions sought to validate actions retrospectively, from 27 August 2001, but also that they sought to validate **any action** in relation to certain vessels, that is, the provision as expressed was very wide in scope. The Committee sought the Minister's advice as to: why the validation was expressed so widely; whether the effect would be to make lawful acts that were currently unlawful; whether the actions to be retrospectively validated must have complied with guidelines; and whether the phrase 'an intention to enter Australia' referred to Australian land or Australian territorial waters.

2.10 The Minister for Immigration and Multicultural and Indigenous Affairs responded that:

- in the Government's view all actions taken between 27 August 2001 and 27 September 2001 were, and always had been, lawful and that this position had been 'vindicated by the decision of the Full Federal Court in relation to issues surrounding the *MV Tampa'*;
- the Government believed that no Commonwealth official took improper action that would give rise to the grant of a remedy in a court of law;
- actions taken by naval personnel must be taken in accordance with established rules of engagement; and
- under the *Acts Interpretation Act 1901*, 'Australia' includes both the landmass and the territorial sea of Australia.[6]

2.11 The Committee thanked the Minister for this response but noted that, given no improper or unlawful actions had taken place, 'it would seem unnecessary to have legislated to retrospectively validate proper or lawful actions.' Notwithstanding that

4 Note: While this bill was introduced during the 39th Parliament, the Committee's report on the bill was not tabled until the 40th Parliament, thus its inclusion in this report.

5 Scrutiny of Bills Committee, *Alert Digest No. 13 of 2001,* p. 5.

6 Scrutiny of Bills Committee, *First Report of 2002*, pp. 12-13.

the bill had already been enacted, the Committee continued to draw these provisions to the attention of the Senate.

Example: Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002

2.12 The Committee dealt with this bill, which contained numerous provisions that were to commence retrospectively, in *Alert Digest No. 2 of 2002*. The Committee noted that the proposed retrospective amendments appeared to be technical in nature and/or beneficial to superannuants, but this was by no means clear from the explanatory memorandum. The Committee sought the Minister's advice whether the retrospective commencement of these provisions would detrimentally affect the rights of any person.

2.13 The Minister for Finance and Administration provided a detailed response to the Committee, outlining the effect of the various provisions and indicating that they would not have a detrimental effect on any person. The Committee thanked the Minister for this response, but noted that it was important that the explanatory memorandum accompanying a bill include appropriate detail and requested that the Minister arrange for the tabling of an additional explanatory memorandum setting out the material contained in the Minister's response.[7] The Minister indicated that he would 'be happy to arrange for the tabling of an additional explanatory memorandum setting out…[this material] when the Senate next considers the bill.'[8] On 26 June 2003, the Minister tabled an additional explanatory memorandum which provided supplementary information regarding these retrospective provisions.

Example: Intellectual Property Laws Amendment Bill 2002

2.14 This bill was introduced into the House of Representatives on 27 June 2002, but included provisions that sought to ensure that some of the amendments provided for in the bill were to apply from 1 April 2002. The Committee noted that it was not clear from the explanatory memorandum whether this retrospective application would adversely affect any person and sought advice from the Minister on this issue.

2.15 The Parliamentary Secretary to the Minister for Industry, Tourism and Resources advised the Committee that the amendments which were to apply retrospectively would replace current provisions in the *Patents Act 1990* with new disclosure requirements that would have significant benefits for applicants and patentees. As such, it was considered appropriate that the new requirements be implemented in a manner that would remove the need for any applicants or patentees to comply with the current, more onerous, arrangements. The Parliamentary Secretary emphasised that 'it is not expected that this will disadvantage any applicants or

7 Scrutiny of Bills Committee, *Fifth Report of 2002*, p. 236.

8 Scrutiny of Bills Committee, *First Report of 2003*, p. 31.

patentees because the amendments will be introducing an improved disclosure regime that imposes a significantly reduced burden on them.'[9]

2.16 In addition, the Parliamentary Secretary pointed out that the bill also provided that any information disclosed under the existing arrangements would be taken to have been disclosed under the new provisions, thus avoiding a situation whereby people would be required to disclose information on multiple occasions.[10] The Committee thanked the Parliamentary Secretary for this response, which addressed its concerns.

Example: Family Law Amendment Bill 2003

2.17 The Committee dealt with this bill in *Alert Digest No. 2 of 2003,* in which it commented on the fact that the amendments proposed by various items in Schedules 4, 5 and 7 of the bill would commence immediately after the commencement of Schedule 2 to the *Family Law Amendment Act 2000,* which commenced on 27 December 2000. The Committee noted that the explanatory memorandum did not indicate whether any of these amendments would adversely affect any person and sought advice from the Attorney-General on this point.

2.18 The Attorney-General provided a comprehensive response to the Committee,[11] indicating that the retrospective amendments contained in Schedules 4 and 7 to the bill were primarily aimed at correcting technical deficiencies in the Act to ensure that it operated as originally intended. The Attorney-General argued that, given these amendments corrected minor drafting issues which were not intended, it was 'appropriate that they be retrospective, otherwise there will potentially be anomalies in the way that parties to family law proceedings are treated.'[12]

2.19 In respect of the retrospective amendments in Schedule 5 of the bill, the Attorney-General indicated that the purpose of the proposed amendment to subsection 90F(1) of the *Family Law Act 1975* was to allow the court to consider the circumstances of a party to a marriage at the time that a financial agreement took effect, rather than when it was made. The existing provision required the court to consider the position of the parties at the time when the financial agreement was made. The Attorney-General advised that the proposed amendment would mean that 'if a party is unable to support himself/herself without Government income support, then the court may make a maintenance order, notwithstanding the agreement.'[13] He argued that retrospectivity was appropriate in the circumstances as:

> The Government's intention has always been to ensure that financial agreements can be set aside by the court in circumstances where the

9 Scrutiny of Bills Committee, *Fifth Report of 2003,* pp. 143-144.

10 ibid.

11 Scrutiny of Bills Committee, *Eighth Report of 2003,* pp. 189-193.

12 ibid. p. 192.

13 ibid. p. 191.

> consequence of the agreement is such that a party can only support themselves by relying upon the public purse notwithstanding that their spouse may well be able to make maintenance payments. The retrospective application of this section is expected to have a minimal impact. It is justified given the potential savings in income support.[14]

2.20 The Committee thanked the Attorney-General for his response and accepted that the retrospective amendments in Schedules 4 and 7 of the bill were, for the most part, correcting technical deficiencies, giving the court greater flexibility in enforcing orders, or were expected to be beneficial to family law clients. In respect of the amendment to subsection 90F(1) of the *Family Law Act 1975*, however, the Committee sought further advice from the Attorney-General regarding his assertion that this change was 'expected to have a minimal impact' and was 'justified given the potential savings in income support.'

2.21 The Attorney-General's further response was included in the Committee's *Tenth Report of 2003*. The Attorney-General advised that it would be impossible to quantify the number of people who might be affected by the amendment to subsection 90F(1) 'as there is no legislative requirement for registration of financial agreements.' The Attorney-General stressed, however, that:

- the only parties who would be affected are those who had made a financial agreement during this period and who, after the breakdown of their marriage, would need to rely on income support payments, but where the other party was in a position to provide spousal maintenance payments;
- the provision did not operate automatically to overturn existing agreements. It would only operate upon the application of a party to the marriage and where the court considered it appropriate; and
- the court would be able to take account of intervening circumstances, particularly the fact that parties may have acted to their detriment on the basis of the agreement.

2.22 The Attorney-General also reiterated that the Government's intention was always to ensure that financial agreements could be set aside by the court in circumstances where the consequences of the agreement was such that a party could only support themselves by relying upon the public purse, notwithstanding that their spouse may well be able to make maintenance payments. In the circumstances, the Committee made no further comment on the provision.

'Legislation by press release' and the six month rule

2.23 'Legislation by press release' occurs where a bill is not only retrospective, but is treated by its proposer (invariably the Government) as being the law from the time

14 ibid.

the intention to introduce it is made public. This intention is frequently announced by press release.

2.24 The Committee's practice is to draw attention to 'legislation by press release'. The fact that a proposal to legislate has been announced is no justification for treating that proposal as if it were enacted legislation. As the Committee has previously noted, 'publishing an intention to process a bill through Parliament does not convert its provisions into law; only the Parliament can do that'.[15]

2.25 As a general principle, the Committee disapproves of 'legislation by press release' for two reasons. Firstly, proposals are not enacted legislation and to treat them as such is to act outside the law. Secondly, when the legislation becomes an Act, the Act is drafted so that it operates retrospectively and therefore infringes the Committee's criteria. In its 1986-87 *Annual Report*, the Committee stated:

> the practice of 'legislation by press release' carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement. Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty. Persons such as lawyers and accountants who must advise their clients on the law are compelled to study the terms of the press release in an attempt to ascertain what the law is. As the Committee has noted on two occasions, one press release may be modified by subsequent press releases before the Minister's announcement is translated into law. The legislation when introduced may differ in significant details from the terms of the announcement. The Government may be unable to command a majority in the Senate to pass the legislation giving effect to the announcement or it may lose office before it has introduced the relevant legislation, leaving the new Government to decide whether to proceed with the proposed change to the law.[16]

2.26 The Committee has noticed that, since it made these comments, the use of 'legislation by press release' in most portfolio areas seems to have declined, although does still occur (as outlined in the below examples). Tax legislation, in particular, is still frequently applied retrospectively, with amendments made to apply from the date of their announcement, whether by press release or in the Budget. In 1988 the Senate passed a declaratory resolution to the effect that if more than six months elapse between a government announcement of a taxation proposal and the introduction or

15 Scrutiny of Bills Committee, *The Work of the Committee during the 37th Parliament*, p. 21.

16 Scrutiny of Bills Committee, *Annual Report 1986-87*, pp. 12-13.

publication of a bill, the Senate will amend the bill to reduce the period of retrospectivity to the time since the introduction or publication of the bill.[17]

2.27 Some examples of the Committee's approach to 'legislation by press release' during the 40th Parliament are set out below.

Example: Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002

2.28 This bill was introduced into the Parliament on 13 February 2002. Schedule 1 to the bill proposed to amend the *Criminal Code* by creating a new offence dealing with the use of the postal system to send hoax material and these amendments were to commence retrospectively, at 2pm on 16 October 2001. This was the time and date at which the Prime Minister had publicly announced that he would introduce such provisions.

2.29 In *Alert Digest No. 1 of 2002*, the Committee drew these provisions to the attention of the Senate, noting that:

> Notwithstanding the seriousness of the conduct at which this bill is directed, the retrospective creation of a criminal offence is similarly a serious matter. The bill itself is a very clear example of 'legislation by press release' – a practice which the Committee has consistently brought to the attention of Senators. As the Committee has previously noted, 'the fact that a proposal to legislate has been announced is no justification for treating that proposal as if it were enacted legislation'.[18]

2.30 The Attorney-General responded to the Committee on 8 March 2002, agreeing that 'the retrospective creation of an offence is a serious matter' but asserting that there were exceptional circumstances justifying the retrospectivity:

> During October 2001, hoaxes were causing significant concern and disruption. Following the terrorist attacks of 11 September 2001, police investigated over 3000 incidents involving suspicious packages of which over 1000 involved anthrax hoaxes. As a result of these hoaxes, mail centres and offices had to be decontaminated, security measures enhanced and emergency services diverted from other duties. These false alarms cost the community both in terms of unnecessary use of public resources and in terms of increased fear and anxiety.
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> As stated in the Explanatory Memorandum, it was necessary to ensure that such conduct was adequately deterred in the period before the resumption of Parliament. The Prime Minister's announcement of 16 October 2001 provided this deterrence. The Prime Minister's announcement was in very clear terms, and received immediate, widespread publicity. The amendments operate only from the time of that announcement.

17 *Odgers' Australian Senate Practice*, 11th Edition, p. 299.

18 Scrutiny of Bills Committee, *Alert Digest No. 1 of 2002*, p. 16.

> It has been accepted that amendments to taxation law may apply retrospectively where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and the Bill is introduced within 6 months after the date of the announcement (Senate Resolution of 8 November 1988). The new hoax offence was introduced within 4 months after the date of the Prime Minister's announcement.
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> An additional consideration is that there is no circumstance in which the perpetration of a hoax that a dangerous or harmful thing has been sent could be considered a legitimate activity in which a person was entitled to engage pending these amendments. The amendments do not retrospectively abrogate a legitimate right or entitlement. For all these reasons, the retrospective application of these amendments is not considered to contravene fundamental principles of fairness or due process.[19]

2.31 The Committee thanked the Attorney-General for this response and noted that:

> Taxation law is concerned with financial arrangements, and appropriate behaviour in relation to them. Imprecision in the commencement of amendments may have behavioural and financial consequences. Taxation law is essentially regulatory in nature. However, these amendments propose to retrospectively create criminal offences – a much more serious issue when considering the merits of retrospectivity. The practices developed for amending taxation law are not an appropriate precedent for amendments which go to criminal responsibility.
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> In addition, while it is undeniable that perpetrating a hoax cannot be considered a 'legitimate' activity, what this bill proposes to do is retrospectively declare it to be 'criminal' activity – again, a different, and more serious, issue of principle. Not every 'illegitimate' activity is 'criminal' activity. Declaring something 'illegitimate', and then retrospectively declaring it to be a crime, would seem to establish an unfortunate and undesirable precedent. A crime may be created by a simple announcement.[20]

2.32 The Committee asked the Attorney-General to reconsider these provisions. However, in a letter dated 15 March 2002, he declined to do so, reiterating the Government's position that the 'offence and its retrospectivity were very clearly foreshadowed by the Prime Minister on 16 October 2001.'[21]

2.33 The Committee thanked the Attorney-General for this further response, but reiterated its concern at the use of retrospectivity in the creation of criminal offences and sought the Attorney-General's assurance that these provisions would not be used as a precedent for the retrospective creation of criminal offences in other

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19 Scrutiny of Bills Committee, *Second Report of 2002,* p. 102.

20 ibid. p. 103.

21 Scrutiny of Bills Committee, *Third Report of 2002,* p. 121.

circumstances.[22] In a letter dated 4 April 2002, the Attorney-General assured the Committee that the Government would not use the bill as a precedent for the retrospective creation of criminal offences, noting that 'an offence would only be made retrospective after careful consideration on a case by case basis and only where there are special circumstances necessitating retrospectivity….'[23]

Example: Migration Amendment (Excision from Migration Zone) Bill 2001

2.34 The Migration Amendment (Excision from Migration Zone) Bill 2001 proposed to amend the *Migration Act 1958* to excise certain places, such as Christmas Island and the Cocos (Keeling) Islands, from the migration zone in relation to unlawful arrivals. The bill also proposed to prevent non-citizens, who entered Australia at one of these locations after the excise date and without a visa, from making a valid visa application, unless otherwise determined by the Minister on public interest grounds.

2.35 The Committee noted that item 2 of Schedule 1 of the bill specified dates and times for the excision of various offshore places from Australia's migration zone, a number of which were retrospective. However, the explanatory memorandum did not provide any advice as to why the specified dates and times had been chosen, nor whether this retrospectivity would disadvantage any person. The Committee sought the Minister's advice on this matter.

2.36 In his response, the Minister for Immigration and Multicultural and Indigenous Affairs, indicated that the Act:

- fulfilled a commitment made by the Prime Minister on 8 September 2001 to excise Christmas Island and Ashmore and Cartier Islands from the Australian migration zone from 2pm that day (refer to the media transcript available at http://www.pm.gov.au/media/Interview/2001/interview1223.cfm); and
- implemented a Government decision, announced by the Minister for Immigration and Multicultural and Indigenous Affairs on 17 September 2001, to excise the Cocos (Keeling) Islands from 12 noon that day (copy available at http://www.minister.immi.gov.au/media/media-releases/2001/r01160.htm).

2.37 In addition, the Minister advised that the "Act only affects those people who arrive at an 'excised offshore place' without lawful authority after the relevant date and time... It will not affect Australian citizens and others with lawful authority to enter or reside in an excised offshore place."[24]

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22 ibid.

23 Scrutiny of Bills Committee, *Fourth Report of 2002*, p. 160.

24 Scrutiny of Bills Committee, *First Report of 2002*, pp. 40-41.

2.38 The Committee thanked the Minister for this response but, not withstanding that the bill had already been passed by both Houses, indicated its continued concern with the possible effect of these provisions.

Abrogation of the privilege against self-incrimination

2.39 At common law, people can decline to answer a question on the grounds that their reply might tend to incriminate them. Legislation that interferes with this common law privilege trespasses on personal rights and liberties and causes the Committee considerable concern.

2.40 At the same time, however, the Committee is conscious of the Government's need to have sufficient information to enable it to properly carry out its duties to the community. Good administration in some circumstances might necessitate the obtaining of information that can only be obtained, or can best be obtained, by forcing someone to answer questions even though this means that he or she must provide information showing that he or she may be guilty of an offence. Those proposing a bill that affects or removes a person's right to silence usually do so on this basis.

2.41 The Committee does not see the privilege against self-incrimination as absolute. Before it accepts legislation that includes a provision affecting this privilege, however, the Committee must be convinced that the public benefit that will follow from its negation will decisively outweigh the resultant harm to the maintenance of civil rights.

2.42 One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. The Committee generally holds to the view that the interest of having Government properly informed can more easily prevail where the loss of a person's right to silence is balanced by a prohibition against both the direct and indirect use of the forced disclosure. The Committee is concerned to limit exceptions to the prohibition against such use. In principle, a forced disclosure should be available for use in criminal proceedings only when they are proceedings for giving false or misleading information in the statement that the person has been compelled to make.

Example: Proceeds of Crime Bill 2002

2.43 The Committee considered this bill in *Alert Digest No. 3 of 2002*, having commented on a similar bill of the same name in *Alert Digest No. 14 of 2001*. The Committee drew attention to several provisions that abrogated the privilege against self-incrimination:

- subclause 196(1), when read with paragraph 197(2)(a), had the effect of abrogating the privilege against self-incrimination for a person attending an examination under part 3-1 of the bill. The Committee noted that while clause 197 of the bill provided limits for the use of information or documents compelled from a person, it made no reference to information obtained as a result of the exercise of that compulsion. Furthermore, the explanatory

memorandum provided no explanation for why derivative use immunity was not provided for; and

- clause 271 of the bill abrogated the privilege against self-incrimination where information was compelled from a person against whom a production order was made. Clause 206 of the bill provided use immunity in respect of this information, however, it did not provide derivative use immunity. Furthermore, the explanatory memorandum provided no explanation for why derivative use immunity was not provided for.

2.44 The Committee sought advice from the Minister as to why derivative use immunity was not provided for in each of these circumstances.

2.45 In respect of a person attending an examination under part 3-1 of the bill, the Minister for Justice and Customs advised that derivative use immunity was not conferred:

> … as it creates a significant risk that any future criminal investigation or prosecution will be adversely affected by allegations that the evidential material was derived from the information provided in the examination. By claiming that the prosecution's evidence was derived from information or documents provided in an examination, and thus forcing the prosecution to prove the contrary, a well advised criminal can make it extremely difficult for a prosecution to succeed.[25]

2.46 In relation to information provided under a production order, the Minister indicated that the primary reason for not conferring derivative use immunity was that:

> the full scope of the immunity can never be accurately predicted in advance. Production orders are able to be used at all stages of an investigation, including at the preliminary stage, when no decision has been made as to whether criminal or confiscatory proceedings will be taken, and prior to a restraining order being sought. Granting derivative-use immunity in relation to documents provided at that stage may place future investigations or prosecutions in jeopardy.[26]

2.47 The Committee thanked the Minister for this response, but continued to draw these provisions to Senators' attention, on the basis that they could be considered to trespass *unduly* on personal rights and liberties. The Senate passed this bill on 23 September 2002, without amendment.[27]

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25 Scrutiny of Bills Committee, *Eighth Report of 2002*, pp. 336-337.

26 ibid. p. 337.

27 *Journals of the Senate*, No. 34, 23 September 2002, p. 796.

Example: Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

2.48 The Committee commented on provisions within this bill that would abrogate the privilege against self-incrimination for a person from whom a 'prescribed authority' had sought information under new subsection 34G(3*)* of the *Australian Security Intelligence Organisation Act 1979.* The Committee noted that proposed new subsection 34G(9) did not impose the usual limits on the circumstances in which information so provided was admissible in evidence in proceedings against the person who had been compelled to provide it:

> In general terms, any such information, or any document or thing produced, is not admissible in criminal proceedings other than proceedings for an offence against section 34G or a terrorism offence. This section also permits any information acquired indirectly from the information gained by the operation of subsection (8) to be used for any purpose whatever.[28]

2.49 The Committee noted that the explanatory memorandum sought to justify these provisions on the basis that the 'protection of the community from [the violence of terrorism] is, in this special case, considered to be more important than the privilege against self-incrimination.'[29] While acknowledging that the protection of the community from the violence of terrorism was of vital concern, the Committee sought the Attorney-General's advice as to why this could only be achieved by removing the long-standing protections of use and derivative use immunity.

2.50 The Attorney-General responded that the Government had amended the bill in the House of Representatives to provide that any information provided by a person under a warrant could only be used in proceedings against the person for an offence relating to the failure to provide information, records or things to a prescribed authority (and not in proceedings in respect of a terrorism offence as was initially proposed).

2.51 The Attorney-General indicated that the bill did not provide for derivative use immunity as:

> such information may be extremely useful in preventing terrorist offences or prosecuting terrorists. If derivative use immunity were available, the value of the information obtained during an investigation would be diminished. Also, it would be likely that potential arguments about how an investigative lead arose would prevent the authorities from pursuing valuable information that could prevent a terrorist attack or lead to the prosecution of a terrorist.[30]

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28 Scrutiny of Bills Committee, *Alert Digest No. 4 of 2002,* p. 10.

29 ibid.

30 Scrutiny of Bills Committee, *Twelfth Report of 2002,* p. 420.

2.52 The Committee thanked the Attorney-General for this response, noting that the original provision had been amended to restrict the circumstances in which self-incriminating evidence was admissible in proceedings against the person compelled to provide it. However, the continued absence of derivative use immunity led the Committee to conclude that the provisions may be considered to trespass on personal rights and liberties. The Committee left it to the Senate as a whole to weigh these breaches against the intended policy outcomes of the bill. This bill was laid aside by the House of Representatives on 13 December 2002.

Reversal of the onus of proof

2.53 At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence, the accused is not required to prove anything. Provisions in some legislation reverse this onus and require the person charged with an offence to prove, or disprove, some matter to establish his or her innocence (ie. impose a legal burden on that person) or require that person to point to evidence that suggests a reasonable possibility that the matter exists or does not exist (i.e. impose an evidential burden on the person). The Committee usually comments adversely on a bill that places the onus on an accused person to disprove one or more elements of the offence with which he or she is charged.

2.54 The Committee's general practice over the years has been to adopt the approach of the (then) Senate Standing Committee on Constitutional and Legal Affairs, as expressed in its report *The burden of proof in criminal proceedings.*[31] In that report the Constitutional and Legal Affairs Committee stated that it was of the opinion that:

> no policy considerations have been advanced which warrant an erosion of what must surely be one of the most fundamental rights of a citizen: the right not to be convicted of a crime until he [or she] has been proved guilty beyond reasonable doubt. While society has the role by means of its laws to protect itself, its institutions and the individual, the Committee is not convinced that placing a persuasive burden of proof on defendants plays an essential or irreplaceable part in that role.[32]

2.55 Reversal of the onus of proof may be applied to citizens in their individual capacity, or it may be applied to people in their official working capacity, for example, as a company director or CEO. The Australian Competition and Consumer Commission (ACCC) have argued that common law rights in relation to the onus of proof were developed to protect individuals and should not be automatically extended to protect companies:

> I think it is simply a basic fact that the whole jurisprudence that underlines the whole legal system was developed in the context of the rights of individual persons. When we turn to corporations, it does not seem to me

31 Parliamentary Paper No. 319/1982.

32 ibid, p. 47.

> that one should automatically assume that this jurisprudence translates into absolutely equivalent and identical rights…[33]

2.56 Nevertheless, the Committee has continued to bring provisions that reverse the onus of proof to the attention of the Senate, regardless of whether the reverse onus rests on people in their individual capacity or in their professional capacity. The Committee remains firmly of the view that reversing the onus of proof for persons in their individual capacity infringes well-established and fundamental personal legal rights, but the Committee notes the development over the last decade or more, of legal provisions that seek to get behind the 'corporate veil' by reversing the onus of proof for persons acting not as individuals but in an official organisational capacity, where the corporation might otherwise use the rights of the individual to protect the interests of the entity.

2.57 For example, during the 39th Parliament the Committee considered the Corporate Law Economic Reform Program Bill 1998, which reversed the onus of proof in a variety of circumstances, including making a misstatement in certain takeover and other offer documents; not proceeding with a publicly proposed bid; and making a misstatement in a prospectus or similar document.[34] The government argued that reversal of the onus of proof in these circumstances was appropriate as it was consistent with Corporations law more generally, was aimed at ensuring the integrity of the market, and sought to address the information imbalance between issuers of a prospectus and potential investors.[35] The Committee accepted the reversal of the onus of proof in these circumstances.

2.58 During the 40th Parliament, the Committee commented on provisions in four bills that reversed the onus of proof, all of which related to people acting in their individual capacity. Two examples are set out below.

Example: Criminal Code Amendment (Espionage and Related Offences) Bill 2002

2.59 This bill proposed to amend the *Crimes Act 1914*, the *Criminal Code Act 1995* and the *Australian Protective Services Act 1987* to establish new offences dealing with the protection of security and defence, in particular, offences relating to espionage and similar activities and soundings. In its *Alert Digest No. 3 of 2002*, the Committee commented on proposed new subsections 92.1(2) and (3) of the *Criminal Code*, to be inserted by this bill, which would reverse the burden of proof in a prosecution for an offence under subsection 92.1(1), which concerned the taking or recording of

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33 Senate Legal and Constitutional References Committee, *Inquiry into s.46 and s.50 of the Trade Practices Act 1974*, in additional comments by Senator Murray on behalf of the Australian Democrats, p. 37.

34 Scrutiny of Bills Committee, *Alert Digest No. 1 of 1999*, p. 32.

35 Scrutiny of Bills Committee, *Tenth Report of 1999*, pp. 237-238.

soundings. The Committee sought advice from the Attorney-General as to why the defendant should bear the burden of proving matters referred to in the provisions.

2.60 In his response, the Attorney-General indicated that the new provisions did not change the law, they merely modernised the language. He sought to justify the reversal of the onus of proof in these circumstances on the basis that:

> Commonwealth criminal law policy on reversing the onus of proof is that it should only be allowed in cases where the matters to be proved are peculiarly within the knowledge of the defendant and are difficult for the prosecution to disprove beyond a reasonable doubt. It must be peculiarly within the defendant's knowledge and therefore within his or her ability to prove or disprove. In the case of the taking or recording of soundings, it is not within the scope of the Commonwealth's capabilities to ascertain the necessity of soundings taken for the navigation of the vessel or for any purpose in which the vessel was lawfully engaged.[36]

2.61 The Committee thanked the Attorney-General for this response, noting the Government's view that a reversal of the onus of proof was appropriate in the circumstances. However, the Committee indicated that 'others may hold a different view' and left for the Senate as a whole the question of whether the provisions trespassed *unduly* on personal rights and liberties.[37]

2.62 Subsequently, the Attorney-General moved amendments in the House of Representatives which, among other things, removed the new offence relating to soundings and, as a consequence, the new reversal of the onus of proof provisions. The result of this was that the existing *Crimes Act 1914* provisions relating to soundings remained in force, including the reversal of the onus of proof.[38]

Example: Building and Construction Industry Improvement Bill 2003

2.63 The Committee dealt with this bill in *Alert Digest No. 15 of 2003,* drawing attention to clause 170 of the bill, which would reverse the onus of proof requiring a person or building association whose conduct was in question to prove that they did not carry out the conduct for a particular reason or with a particular intent. The Committee expressed concern that:

> in this case a person may have to disprove such elements [of an offence] based on an *allegation* that the conduct was or is being carried out for a particular reason or with a particular intent. The Committee is concerned that this lessens the basic cause that can give rise to proceedings under clause 227 where it will be *presumed* that the conduct was or is being

36 Scrutiny of Bills Committee, *Ninth Report of 2002,* p. 367.

37 ibid. p. 368.

38 Scrutiny of Bills Committee, *Alert Digest No. 9 of 2002,* p. 17.

> carried out for that reason or intent. The bill does not appear to provide for a reasonable defence in such instances.[39]

2.64 The Committee sought the Minister's advice as to the reason for the reversal of the onus of proof and for establishing that a person may have to disprove an allegation in proceedings under clause 227 of the bill.

2.65 The Minister for Employment and Workplace Relations responded that freedom of association provisions in the bill provided that certain conduct could not be engaged in for a prohibited reason, for example, because a person was a union member. Clause 170 provided that where a person was alleged to have engaged in conduct for a prohibited reason that would contravene a freedom of association provision, that person was presumed to have engaged in that conduct for a prohibited reason. The overall effect was to place the onus on the defendant to prove, on the balance of probabilities, that the conduct was not engaged in for a prohibited reason.

2.66 The Minister indicated that the rationale for clause 170 was that the reason or intention for a person's conduct would often be a matter solely within the knowledge of that person. Without the reversal of onus, it would often be extremely difficult for an applicant to establish that the conduct complained of was undertaken for a particular reason or intent. Removing this provision would severely limit many of the protections provided by the freedom of association provisions. The Minister further advised that the reversal of the onus of proof did not apply in interlocutory proceedings and that he believed clause 170 therefore 'strikes the appropriate balance between ensuring [freedom of association] protection and fairness for parties alleged to have breached the [freedom of association] provisions.'[40]

2.67 The Committee thanked the Minister for this response, noting that it would have been useful had this explanation been included in the explanatory memorandum.

Strict and absolute liability offences

2.68 An offence is one of strict liability where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. In other words, someone is held to be legally liable for their conduct irrespective of their moral responsibility. A person charged with a strict liability offence has recourse to a defence of mistake of fact.

2.69 An offence of absolute liability also provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. However, in the case of absolute liability offences, the defence of mistake of fact is unavailable.

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39 Scrutiny of Bills Committee, *Alert Digest No. 15 of 2003*, pp. 7-8.

40 Scrutiny of Bills Committee, *First Report of 2004*, pp. 17-18.

2.70 The Committee will draw the Senate's attention to provisions that create offences of strict or absolute liability and has expressed the view that, where a bill creates such an offence, the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

2.71 Some examples of bills imposing strict or absolute liability considered by the Committee during the 40th Parliament are provided below. In addition, the Committee produced a report specifically on the application of absolute and strict liability offences in Commonwealth legislation.[41] That report is discussed in detail in Chapter 7 of this report.

Example: Quarantine Amendment Bill 2002

2.72 This bill included several provisions that would impose strict liability in relation to certain aspects of criminal offences. In its *Alert Digest No. 3 of 2002*, the Committee noted that, in some instances, the explanatory memorandum described the effect of the imposition of strict liability but it did not provide a reason for the provisions. In respect of provisions in part 2 of Schedule 1 of the bill that sought to impose strict liability, the explanatory memorandum failed to provide any explanation at all. The Committee sought advice from the Minister about why strict liability was considered appropriate and why there was no reference in the explanatory memorandum to part 2 of Schedule 1 of the bill.

2.73 The Minister for Agriculture, Fisheries and Forestry provided a comprehensive response, outlining the rationale for the imposition of strict liability in respect of the relevant offences.[42] The Committee indicated that the explanation provided by the Minister appeared to indicate that the provisions 'are in accordance with the principles relating to strict liability contained in the Committee's *Sixth Report of 2002: The Application of Absolute and Strict Liability Offences in Commonwealth Legislation.'* However, the Committee went on to outline its expectations in respect of explanatory memoranda accompanying bills:

> … an Explanatory Memorandum should include a full explanation of the background to the bill and its intended effect. This is particularly the case where it includes provisions which may affect personal rights or parliamentary propriety. An Explanatory Memorandum should be more than a brief introduction followed by notes on clauses which largely reproduce the clauses themselves. The purpose of the Explanatory Memorandum is to assist parliamentarians during passage of the bill and to be a guide for those affected by its proposed provisions. It is therefore necessary for it to include all matters relevant to this purpose. This would

41 Scrutiny of Bills Committee, *Sixth Report of 2002. Application of Absolute and Strict Liability Offences in Commonwealth Legislation.*

42 Scrutiny of Bills Committee, *First Report of 2003*, pp. 19-22.

> usually include a substantial discussion of these issues in addition to the notes on clauses.[43]

Example: Security Legislation Amendment (Terrorism) Bill 2002 [No.2]

2.74 The Committee considered this bill, which was part of a legislative package designed to strengthen Australia's counter terrorism capabilities, in *Alert Digest No. 3 of 2002*. While the bill was expressly concerned with terrorist acts, it also enabled the Attorney-General to proscribe organisations that, in his or her opinion, were 'likely to endanger' Australia's security and integrity. The bill provided for penalties for persons who had 'taken steps' to become a member of such an organisation and imposed legal burdens on defendants to disprove matters. The Committee considered that, on its face, the bill appeared 'to introduce considerable scope for discretion in the criminal law' and sought a briefing and invited comment on the provisions of this and other bills in the legislative package.[44]

2.75 Among the items commented on by the Committee were a number of provisions to be inserted into the *Criminal Code* that created offences of strict or absolute criminal liability:

- proposed subsection 101.2(2) provided that absolute liability would apply to the provision or receipt of certain training that was connected with the preparation for, engagement in, or assistance in, a terrorist act;
- proposed subsection 101.4(2) provided that absolute liability would apply to the possession of a thing that was connected with the preparation for, engagement in, or assistance in, a terrorist act;
- proposed subsection 101.5(2) provided that absolute liability would apply to the collection or making of a document that was connected with the preparation for, engagement in, or assistance in, a terrorist act;
- proposed subsection 102.4(2) provided that strict liability would apply to the offence of having links to, or membership of, a proscribed organisation.

2.76 In drawing these absolute liability offences to the attention of the Senate, the Committee noted that:

> it seems that criminal liability is being imposed here on the basis of 'possible connections': if the provision of training is possibly connected to a terrorist act then a person commits an offence; if the possession of a thing is possibly connected with a terrorist act then a person commits an offence. These amendments would seem to widen the scope for criminal liability alarmingly.[45]

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43 ibid. p. 20.

44 Scrutiny of Bills Committee, *Alert Digest No. 3 of 2002*, p. 50.

45 Scrutiny of Bills Committee, *Alert Digest No. 3 of 2002*, pp. 50-51.

2.77 In response to the concerns raised by the Committee, the Attorney-General sought to assure the Committee that the proposed amendments would not impose criminal liability merely on the basis of a possible connection to terrorist acts. He advised that the prosecution would be required to prove beyond a reasonable doubt that the 'training', 'thing' or 'document' was **in fact** connected with a terrorist act. However, the application of absolute liability would mean that the prosecution did not have to prove that the defendant knew that the training, thing or document was connected to terrorism. The Attorney-General indicated that this departure from the common law presumption that fault must be proven for each physical element of an offence for a person to be guilty was justified given the consequences of terrorism as demonstrated by the events of 11 September 2001.[46] The Committee thanked the Attorney-General for this advice, but continued to draw these provisions to the attention of the Senate.

2.78 In respect of the strict liability offence contained in proposed new subsection 102.4(2) of the *Criminal Code*, which applied strict liability to the circumstance that an organisation was a proscribed organisation, the Committee noted that the explanatory memorandum sought to justify the imposition of strict liability on the basis that 'it is not legitimate to be a member of, or have links with, an organisation of a kind that could be proscribed.' The Committee noted that this justification "appears to beg the question of when strict criminal liability should be imposed, and to confuse some form of 'moral' legitimacy with conduct that is contrary to the law."[47] The Committee sought advice from the Attorney-General as to why strict liability should apply to an offence under subsection 102.4.

2.79 The Attorney-General responded that, while the application of strict liability to this element of the offence meant that the prosecution would not have to prove that a defendant knew that an organisation had been proscribed, it would be a defence if:

- the defendant proved that s/he neither knew nor was reckless as to the existence of the grounds for proscribing the organisation; or
- the person moved immediately to cease to be a member of an organisation after it was proscribed.

2.80 The Attorney-General asserted that the application of strict liability and the availability of the abovementioned defences would:

> ensure that the commission of the offence depends on the defendant's awareness of the fact that the organisation is involved in terrorist activities or is a threat to national security…. If the prosecution was required to prove that the defendant knew that an organisation had been declared to be a proscribed organisation, defendants with knowledge of the terrorist

46 Scrutiny of Bills Committee, *Fourth Report of 2002*, pp. 171-172.

47 Scrutiny of Bills Committee, *Alert Digest No. 3 of 2002*, p. 52.

> activities of an organisation would be able to escape liability by demonstrating they were not aware of the organisation's proscription. [48]

2.81 The Committee thanked the Attorney-General for this advice, but continued to draw this provision to the attention of the Senate. On 27 June 2002, the Senate agreed to amend this bill. These amendments, among other things, removed the provisions in respect of absolute and strict liability that the Committee commented on in *Alert Digest No. 3 of 2002* and its *Fourth Report of 2002.*[49]

Double jeopardy

2.82 Double jeopardy refers to the common law principle that a person who has previously been acquitted of an offence cannot be prosecuted again for the same conduct. The rationale behind the double jeopardy rule, was articulated by Black J in the United States Supreme Court in the case of *Green v United States* (1957) 355 US 184 at 187:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[50]

2.83 During the 40th Parliament, the Committee considered the Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Bill 2002, which sought to amend the *Criminal Code Act 1995* to insert new provisions criminalising the smuggling of persons and to create various offences, including cross-border firearms trafficking offences. It its *Alert Digest No. 16 of 2002*, the Committee commented on proposed new subsection 360.2(2) of the *Criminal Code*, to be inserted by this bill, which would impose absolute criminal liability on one element of the offence to be created by subsection 360.2(1), which related to cross border acquisition or disposal of firearms. The relevant element was that the accused had engaged in conduct that constitutes an offence against a State or Territory law relating to firearms.

2.84 The Committee noted that the explanatory memorandum observed that:

> absolute liability has been imposed in order to prevent the application of the default provision of the prosecution having to prove intention or recklessness. Since the Commonwealth offence is constituted (in part) by conduct which is an offence under State or Territory law – which includes

48 Scrutiny of Bills Committee, *Fourth Report of 2002*, pp. 175-176.

49 Scrutiny of Bills Committee, *Alert Digest No. 7 of 2002*, p. 55.

50 Black, J. cited in Johns. R. 'Double Jeopardy', *Briefing Paper No. 16/03*, NSW Parliamentary Library Research Service.

> any necessary mental element on the part of the accused – it is unnecessary to provide for any further mental element in the Commonwealth Offence.'[51]

2.85 The Committee suggested that the imposition of absolute liability in these circumstances was unexceptionable, but noted that:

> there does not appear to be any provision in the bill relating to the interaction between State and Territory laws on the one hand and the provision of this bill on the other. It is not clear, for instance, whether a person is liable to be prosecuted and convicted of an offence against a State or Territory firearm law, and might then be charged, for the second time, because his or her conduct included the interstate disposal of firearms.[52]

2.86 The Committee sought advice from the Minister in relation to this issue.

2.87 The Minister advised that the principle of double jeopardy, which exists in all Australian jurisdictions, would prohibit a person being prosecuted for an offence in circumstances where the person has already been tried for the activity constituting the offence:

> Section 4C of the *Crimes Act 1914* deals with the double jeopardy principle at the Commonwealth level. Subsection 4C(2) provides that where an act or omission constitutes an offence under both a law of the Commonwealth and a law of a State or Territory, and the person has been punished for the State or Territory offence, that person cannot be punished for the Commonwealth offence. Where the person is first prosecuted under the Commonwealth offence, the common law or relevant State or Territory laws on double jeopardy will apply.'[53]

2.88 The Committee thanked the Minister for this response, which addressed its concerns.

Powers of search and seizure without warrant

2.89 The Committee consistently draws the Senate's attention to provisions that allow search and seizure without the issue of a warrant. As a general rule, a power to enter premises without the consent of the occupier, or without a warrant, trespasses unduly on personal rights and liberties, and the Committee will draw such provisions to the Senate's attention. A provision giving an authority such a power will be acceptable only where the circumstances and gravity of the matter in question justify it being given.

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51 Scrutiny of Bills Committee, *Alert Digest No. 16 of 2002*, p. 7.

52 ibid.

53 Scrutiny of Bills Committee, *Second Report of 2003*, p. 61.

2.90 Further information on the Committee's views in respect of search and seizure without warrant can be found in the Committee's *Fourth Report of 2000 - Entry and Search Provisions in Commonwealth Legislation.*

Example: Transport Safety Investigation Bill 2002

2.91 This bill proposed to establish an updated aviation, marine and rail transport safety regime for Australia and included provisions that would permit the Executive Director of Transport Safety Investigation (or his or her delegate) to enter 'special premises' without a warrant and without the occupiers consent. The bill defined 'special premises' as an accident site or a vehicle.

2.92 The Committee was of the view that the power to enter an accident site without warrant appeared reasonable, but the power to enter vehicles appeared to be overly wide. The Committee sought the Minister's advice about the circumstances in which the power to enter vehicles would be exercised and about any safeguards in the legislation for its operation.[54]

2.93 The response from the Minister for Transport and Regional Services acknowledged that the powers in the bill allowing entry to vehicles 'may appear to be broader than some Commonwealth legislative provisions' but asserted that these broader powers were "justified by the 'no blame' future safety object of [Australian Transport Safety Bureau] investigations" and that the bill contained 'sufficient general safeguards to prevent an abuse of the power provided [for in the bill]'[55].

2.94 The Committee thanked the Minister for this response, but continued to express concern about the nature and extent of the power provided for by the bill. The Committee emphasised that 'the power to enter and search premises is exceptional and not to be granted as a matter of course' and drew the Minister's attention to the Committee's *Fourth Report of 2000 – Entry and Search Provisions in Commonwealth Legislation*, which provides a set of principles with which search and entry provisions should conform. The Committee also sought from the Minister a briefing by Departmental officers on these aspects of the bill.[56]

2.95 The Committee received a briefing from officers of the Australian Transport and Safety Bureau (ATSB) on 21 October 2002. The ATSB emphasised that the relevant powers in the bill related only to 'no blame' safety investigations that were recognised by international conventions. The officers also quoted the Committee's *Fourth Report of 2000*, which recommended that, in considering whether to provide for entry and search, Parliament should take into account proportionality between the object of the power and the degree of intrusion involved. They submitted that the balance of proportionality favoured the proposed provisions.

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54 Scrutiny of Bills Committee, *Alert Digest No. 6 of 2002*, p. 15.

55 Scrutiny of Bills Committee, *Twelfth Report of 2002*, pp. 426-427.

56 ibid. p. 428.

2.96 Nevertheless, in its *Thirteenth Report of 2002,* the Committee continued to express concern at the provisions. In particular, the Committee sought advice about the process of delegation by the Executive Director, noting that under the bill a delegate need have no specific training in accident safety investigation or in search and entry procedures. The Committee also remained concerned at the breadth of the power, noting that the search and entry provision applied to any vehicle, whether or not it was at the scene of an accident.

2.97 Following the briefing, the Committee concluded that the provisions of the bill failed to implement the following principles:

(a) criteria should be established to ensure delegates have proper qualifications and training;

(b) there should be a process whereby delegates must not only identify themselves, but also caution people affected as to their rights; and

(c) any entry and search powers not involving an accident where loss of life has occurred, or which involve a vehicle away from an accident site, should be subject to a reasonable grounds requirement.[57]

2.98 The Committee sought further advice from the Minister in respect of these matters.

2.99 In response, the Minister indicated that he would seek amendments to the bill and draft Transport Safety Investigation Regulations to address the concerns raised by the Committee.[58] The Committee concluded that the amendments to the bill and draft Regulations, as suggested by the Minister, 'will implement appropriate safeguards in relation to the search and entry provisions of the bill.' The Committee expressed their gratitude to the Minister for proposing the amendments 'which demonstrate a commitment to personal rights and liberties.'[59] The Senate debated and passed the relevant amendments on 26 March 2003.[60]

Example: Customs Legislation Amendment Bill (No. 1) 2002

2.100 The Committee considered this bill in *Alert Digest No. 6 of 2002.* Among other things, the Committee noted that proposed new sections 203CA and 203CB of the *Customs Act 1901,* to be inserted by this bill, would permit an authorised person to seize any goods (other than narcotic goods) on a ship or aircraft without a warrant, but subject to the requirement that the authorised person reasonably suspects the goods to be special forfeited goods. The Committee sought the Minister's confirmation that, in formulating these provisions, consideration was given to the Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation.*

57 Scrutiny of Bills Committee, *Thirteenth Report of 2002,* p. 457.

58 Scrutiny of Bills Committee, *Fourteenth Report of 2002,* pp. 488-489.

59 ibid. p. 490.

60 Senate, *Hansard,* 26 March 2003, pp. 10154-10164.

2.101 The Minister for Justice and Customs responded on 20 August 2002, indicating that because the Torres Strait Island Treaty provides for free movement of traditional inhabitants between places within the area covered by the Treaty (the Protected Zone), Customs does not have the normal opportunity to check the persons or goods entering or leaving a place in Australia. Instead, Customs officers are able to intercept such vessels wherever a Customs Officer locates them (e.g. while beached on an island or while at sea within the Protected Zone) and board the vessel without an entry warrant. Under the existing provisions, however, Customs officers could not exercise the power to seize special forfeited goods without a warrant in relation to the vessel.[61]

2.102 The Minister advised that had the vessel been required to go to an appointed port in accordance with the Customs Act, then a Customs officer would be able to seize such goods without a warrant. For this reason, the Government considered it appropriate that, where a Customs officer uncovers goods that the officer reasonably suspects are special forfeited goods on a relevant vessel in the Protected Zone, the officer be able to seize those goods without a warrant. The Minister went on to state that while consideration was given to the Committee's *Fourth Report of 2000* in drafting the amendments 'I believe that the special circumstances of boarding of vessels at sea in the Protected Zone warrant a departure from the principles contained in the Report.'[62]

2.103 The Committee thanked the Minister for this response but noted that the provisions remained a departure from the principles that the Committee considered should apply to Commonwealth search and seizure provisions, as set out in the Committee's *Fourth Report of 2000*. As such, the Committee continued to draw the provisions to the attention of the Senate, indicating that they might be considered to trespass *unduly* on personal rights and liberties. The bill was not amended to address the Committee's concern.

Issuing of warrants by non-judicial officers

2.104 The Committee rarely approves of provisions that give the power to issue warrants to legally unqualified or non-judicial officers, such as Justices of the Peace. During the 40th Parliament the Committee examined a private Senator's bill, the National Animal Welfare Bill 2003, which included a clause that would allow an inspector to apply for a warrant from a magistrate or Justice of the Peace. The Committee noted that a Justice of the Peace is not a judicial officer and sought the advice of the Senator in respect of this matter.[63]

2.105 The Senator responded that 'it is clear that the identification of a Justice of the Peace as a judicial officer is not correct and therefore needs to be amended.

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61 Scrutiny of Bills Committee, *Ninth Report of 2002*, pp. 374-375.

62 ibid. p. 375.

63 Scrutiny of Bills Committee, *Alert Digest No. 9 of 2003*, p. 10.

Accordingly…. clause 22 will be amended when the Bill is re-drafted or debated as per the direction of the Committee.'[64] The Committee thanked the Senator for this advice and for undertaking to amend the bill to address the Committee's concerns.

Search of persons

2.106 In *Alert Digest No. 7 of 2004,* the Committee commented on proposed new section 219ZJD of the *Customs Act 1901,* which was to be inserted by item 1 of Schedule 1 of the Customs Legislation Amendment (Airport, Port and Cargo Security) Bill 2004. The new section would permit a Customs officer to conduct either a frisk search or an ordinary search of a person whom the officer had detained on suspicion of having committed a serious offence against the Commonwealth.

2.107 The Committee cited the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* recommendation that any 'proposal for new powers to search persons, whether in the form of a frisk, ordinary or strip search, should have strong justification'[65] and noted that neither the second reading speech nor the explanatory memorandum provided such a justification. The Committee sought the Minister's advice regarding the 'strong justification' for these new powers.

2.108 The Minister for Justice and Customs sought to justify the provision on the grounds of officer safety and preventing the destruction of evidence:

> By the very nature of the serious offences that an officer will suspect that the person has committed in order to detain them, it is indeed possible that such a person who is seeking to depart Australia, in some cases illegally, may carry weapons or other dangerous items on their person. Without the ability to conduct a frisk or ordinary search in circumstances where the officer reasonably believes the person may have such items, the Customs officer is left unnecessarily exposed to possible injury.
>
> If the person is detained because an officer suspects on reasonable grounds that the person has committed, or is committing, a serious Commonwealth offence the proposed section 219ZJD also allows for the Customs officer to search for the purpose of preventing the concealment, loss or destruction of evidence that may assist in the prosecution of the detainee. Without the power to conduct a frisk or ordinary search evidence relevant to the commission of the offence may be lost.[66]

2.109 The Minister also advised that the provision did not represent a new type of power for Customs officers and that it was 'consistent with the search and seizure powers that Protective Services Officers can also exercise, where it is suspected that a protection services related offence has been committed.'[67]

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64 Scrutiny of Bills Committee, *Tenth Report of 2003,* p. 245.

65 Scrutiny of Bills Committee, *Alert Digest No. 7 of 2004,* p. 16.

66 Scrutiny of Bills Committee, *Ninth Report of 2004,* pp. 171-172.

67 ibid. p. 172.

2.110 The Committee thanked the Minister for this response, noting that it would have been helpful if this information had been included in the explanatory memorandum to the bill. Notwithstanding the information provided by the Minister, the Committee expressed continued concern that the provision might be considered to trespass on personal rights and liberties, but left it up to the Senate as a whole to determine if it did so *unduly*. The bill was not amended in respect of this matter.

Abrogation of the rules of natural justice

2.111 There is a common law presumption that the rules of natural justice, also known as procedural fairness, must be observed in exercising statutory power that could affect the rights or interests of individuals. The application of natural justice, among other things, involves decision-makers informing people of the case against them and providing them with a right to be heard.

2.112 During the 40th Parliament, the Committee considered the Migration Legislation Amendment Bill (No. 1) 2002, which included a proposed amendment that made it clear that the rules of natural justice would not apply to the making of a declaration by the Minister, under subsection 33(9) of the *Migration Act 1958,* that it is undesirable that a person, or a class of persons, travel to and enter or remain in Australia. The explanatory memorandum sought to justify this trespass on civil liberties in the following terms:

> The purpose of new section 33(11) is to ensure that, as originally intended, quick action can be taken to prevent the travel to, entry or stay in Australia of a special purpose visa holder whose entry or stay is not in Australia's interest. It also avoids the operational difficulties associated with an obligation to afford natural justice. In many cases, it is difficult or impossible to contact persons who may be the subject of subsection 33(9) (for example, a seafarer who has deserted his or her vessel and who cannot be located). In other cases, the reasons for making the declaration cannot be put to the person because of adverse intelligence reports or time constraints.[68]

2.113 The Committee indicated that the rules of natural justice had been developed over many years to ensure fairness in the application of the law and that it was "unusual to see them cast aside simply to avoid 'operational difficulties'." The Committee sought the advice of the Minister about the deficiencies in the existing provision and why such an extreme amendment was considered necessary to deal with them.[69]

2.114 The Minister for Immigration and Multicultural and Indigenous Affairs responded on 15 May 2002 and advised that the declaration referred to in subsection 33(9) of the *Migration Act 1958* related to holders of a class of temporary visas known

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68 Scrutiny of Bills Committee, *Alert Digest No. 3 of 2002*, p. 31.

69 ibid. pp. 31-32.

as special purpose visas, which were designed to provide lawful status to non-citizens to whom Australia's standard visa regime and immigration clearance processes are taken not to apply. For example, crew members of non-military ships and airlines, members of certain military forces, guests of Government, transit passengers from certain countries and members of the Royal Family. The impact of a declaration under subsection 33(9) of the *Migration Act 1958*, would be that the person(s) would no longer be the holder of a special purpose visa and would be subject to the normal Australian visa regime.

2.115 The Minister argued that the provision in the bill making it clear that the rules of natural justice would not apply to the making of a declaration under subsection 33(9), was 'necessary to ensure that quick action can be taken to protect the Australian community from persons who pose a threat to the safety of the community.' The amendment would also provide consistency under the Act between people who had their visa cancelled on character grounds (under section 501 of the Act), which was not subject to natural justice, and those who had their special purpose visa cancelled. The Minister also advised that, although the rules of natural justice would not apply, the person would still be able to apply for another substantive visa.[70]

2.116 In thanking the Minister for his response, the Committee accepted that there may be substantial reasons in this case to abrogate the rules of natural justice. The Committee noted, however, that the rules of natural justice are 'central to personal rights and should be excluded only in exceptional cases'. The Committee concluded that the 'absence of procedural fairness in these provisions is a breach of such rights', but left it to the Senate as a whole to decide whether, in the circumstances, the provisions *unduly* breached personal rights.[71] This bill lapsed at the end of the 40th Parliament.

Abrogation of common law rights of action

2.117 In *Alert Digest No. 3 of 2002*, the Committee commented on a provision within the Migration Legislation Amendment (Transitional Movement) Bill 2002, which would prohibit various rights of action from being pursued in any court against the Commonwealth, an officer of the Commonwealth or a person acting on behalf of the Commonwealth. The Committee noted that the explanatory memorandum provided no reason for this abrogation of common law rights and sought the Minister's advice on this matter.

2.118 The Minister for Immigration and Multicultural and Indigenous Affairs responded that the bar on legal proceedings was intended 'to limit the potential for future abuse of legal proceedings by persons seeking to frustrate the resolution of their

70 Scrutiny of Bills Committee, *Second Report of 2003*, pp. 65-66.

71 ibid. p. 66.

immigration status, removal or to obtain desirable migration outcomes.'[72] The Minister also advised that:

- the common law rights of action were not completely abrogated as a transitory person would still have the right of appeal to the High Court;
- the bar on taking action was limited to those matters set out in paragraphs 494AB(1)(a)-(d) of the *Migration Act 1958*; and
- in the Government's opinion, the proposed new section struck a balance between the rights of the individual and the interests of the wider Australian community.

2.119 The Committee thanked the Minister for this response and noted the advice that common law rights of action had not been completely extinguished. The Committee also noted the Minister's advice that the bar on legal action was intended to frustrate future abuse of proceedings but observed that 'courts and tribunals have long held powers to deal with frivolous or vexatious actions.'[73] The Committee continued to draw Senators' attention to the provision on the basis that it may be considered to trespass *unduly* on personal rights and liberties. The bill was passed with amendments, however these amendments did not address the Committee's concern about the abrogation of common law rights of action.

Oppressive powers

2.120 The Committee will usually comment unfavourably on legislation that makes people subject to 'oppressive' bureaucratic powers. During the 40th Parliament, the Committee considered provisions in several bills that might be considered to fall within this category.

Example: Proceeds of Crime Bill 2002

2.121 This bill proposed to establish a civil regime for the forfeiture of assets obtained as a result of criminal activity. This civil forfeiture regime would operate in addition to, and parallel with, the existing conviction-based regime.

2.122 The Committee noted that the bill seemed to authorise the removal of assets from a person's control simply because there was a reasonable suspicion that they were connected with serious criminal activity. Many long-established protections under the criminal law which, in general terms, were recognised in the existing *Proceeds of Crime Act 1987* had not been included in this bill because they were seen to be inconvenient or to hinder law enforcement. The Committee sought advice from the Minister as to how a person's property could be subject to a restraining order, or subsequent order, on the basis that it was related to the commission of an offence, notwithstanding that no person had been convicted of an offence.

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72 Scrutiny of Bills Committee, *Fifth Report of 2002*, p. 230.

73 ibid. p. 231.

2.123 The Minister for Justice and Customs responded that:

> Subclause 329(3) makes it clear that it is not necessary for a person to be convicted of a particular offence for property to be defined as the proceeds or instrument of that offence. As the Bill provides for civil-forfeiture of the proceeds (and in relation to terrorist offences, the instruments) of crime, it would be inconsistent to require a person to have been convicted of the offence of which the property is the proceeds or instrument.[74]

2.124 The Committee thanked the Minister for this response, but continued to draw Senators' attention to the provisions, on the basis that they may be considered to trespass *unduly* on personal rights and liberties. The bill was amended in the House of Representatives on 27 June 2002, however the agreed amendments did not address the issues raised by the Committee.

Example: Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

2.125 In *Alert Digest No. 4 of 2002*, the Committee commented on a new subsection to be inserted in the *Australian Security Intelligence Organisation Act 1979*, by item 24 of Schedule 1 of this bill, which would enable the Director-General of Security to seek the Attorney-General's consent to the issue of a warrant for the detention and questioning of a person on specified grounds. The Committee indicated that:

> These provisions seem to suggest that there is no need for anyone involved in seeking or issuing such a warrant to form a reasonable belief that the relevant person has committed any offence. Indeed that person is to be detained for the purpose of collecting intelligence, not for the purpose of having an offence investigated. A person might be detained, apparently for a number of consecutive periods of 48 hours, simply because he or she may be able to provide information about, for example, the possible future commission of an offence.
>
> In his Second Reading Speech, the Attorney-General justifies these provisions on the basis that it is 'necessary to enhance the powers of ASIO to investigate terrorism offences.' While terrorism provides obvious law enforcement challenges, these provisions allow what is, in effect, a new basis for detaining people who need not themselves be suspects and, in any event, are being detained for intelligence gathering rather than investigatory purposes.[75]

2.126 The Committee sought advice from the Attorney-General as to why this power was necessary and whether:

- the Australian Security Intelligence Organisation (ASIO) currently had the power to detain persons for questioning or the gathering of intelligence;

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74 Scrutiny of Bills Committee, *Eighth Report of 2002,* p. 338.

75 Scrutiny of Bills Committee, *Alert Digest No. 4 of 2002*, p. 7.

- any other Australian intelligence or investigatory body had such a power; and
- any other Australian law enforcement body had such a power.

2.127 The Attorney-General responded that:

- neither ASIO nor any other Australian intelligence agency or law enforcement body currently had the power to detain persons for questioning and gathering intelligence; and
- under the proposed provision, ASIO would not be given the power to arrest and detain people. Only the police would be authorised to take a person into custody and arrange the person's detention.[76]

2.128 The Attorney-General sought to justify the power on the basis that:

> The terrorist attacks on the United States on 11 September 2001 represented a profound shift in the international security environment. While there is no known specific threat to Australia, our profile as a terrorist target has risen. Our interests abroad also face a higher level of terrorist threat, as evidenced by the plan in Singapore to attack the Australian High Commission there. ASIO has advised that the heightened threat levels can be expected to remain for some years at least.
>
> We need to be well placed to respond to the new security environment in terms of our operational capabilities, infrastructure and legislative framework. ASIO is not currently empowered to obtain a warrant to question a person who may have information that is important in relation to a terrorist offence. Such a power will help ASIO uncover information before a terrorist offence is perpetrated so that it can be prevented.
>
> It should be noted that persons with information relevant to ASIO's investigation of terrorist activities may at any time voluntarily assist ASIO. Warrants would not be sought in relation to persons who are willing to volunteer any relevant information they may have.
>
> Warrants issued under the Bill will be warrants of last resort. The Attorney-General will not be able to consent to the Director-General's request for a warrant unless satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that relying on other methods of collecting that intelligence would be ineffective (paragraphs 34C(3)(a)&(b)).
>
> Further, a person may not be detained under a warrant unless the Attorney-General is also satisfied that the person:
>
> - may alert another person involved in a terrorism offence of the investigation;
> - may not appear before the prescribed authority; or

76 Scrutiny of Bills Committee, *Twelfth Report of 2002*, pp. 412-413.

- may destroy, damage or alter a record or thing that the person may be requested to produce (paragraph 34C(3)(c).[77]

2.129 The Committee thanked the Attorney-General for this response, noting that amendments had been made to the bill in the House of Representatives (to implement the Government's response to recommendations of the Senate Legal and Constitutional Legislation Committee and the Parliamentary Joint Committee on ASIO, ASIS and the DSD) and that the Attorney-General had explained the effect of the relevant provisions as amended. The Committee noted that the amendments 'improve safeguards in relation to the issue of warrants for detention and questioning' but concluded that the provisions, even with amendment, may continue to be seen to trespass *unduly* on personal rights and liberties. The Committee left it to the Senate as a whole to decide whether such breaches were considered acceptable when weighed against the policy objectives of the bill.[78]

2.130 In addition to commenting on provisions in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 allowing a person to be detained under warrant for questioning, the Committee also commented on provisions that:

- placed restrictions on a person so detained from contacting anyone, including a legal adviser; and
- allowed a person so detained to be strip searched under certain circumstances.

2.131 The Committee noted that these provisions appeared to subject persons detained for questioning to the same, if not greater, powers than are persons suspected of a criminal offence and indicated that:

> The protection of the community from terrorism is obviously a vital concern. However a community that fails to accord its citizens due process, and to protect their rights, even in extreme circumstances, runs the risk of becoming a community different in nature from that which currently exists.
>
> While the Attorney-General expresses his confidence that this bill 'recognises the need to maintain the balance between the security of the community and individual rights and to avoid the potential for abuse,' the Committee remains concerned about the potential for unintended consequences in such 'exceptional' legislation. [79]

2.132 The Committee sought the advice of the Attorney-General on the following matters:

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77 Scrutiny of Bills Committee, *Twelfth Report of 2002,* p. 413.

78 ibid. pp. 413-414.

79 Scrutiny of Bills Committee, *Alert Digest No. 4 of 2002,* p. 9.

- whether there were any other provisions in Australian criminal law that deny persons access to legal representation or the right to communicate with anyone;
- why it was considered appropriate that, what are essentially police powers (including detention and strip search), should be extended to organisations concerned with the collection of intelligence; and
- why the bill made no provision for detainees to be given written information about their rights and responsibilities in relation to a search (given the Committee's recommendation in its *Fourth Report of 2000* that, unless there are exceptional circumstances involving clear physical danger, such information should be provided).[80]

2.133 The Attorney-General responded that:

- both the *Crimes Act 1914* and the *Customs Act 1901* provide for a person who is under arrest or detained for the purposes of conducting an internal or external search to make contact with a person of their choice, such as a friend, relative or legal adviser. However both Acts define circumstances in which this may not occur;
- the Government had amended the bill in the House of Representatives to provide that all warrants must allow a detained person to contact an 'approved lawyer', ie. a lawyer of at least five-years standing who is approved by the Attorney-General after receiving an appropriate security clearance. However the ability of a detained adult to communicate with a lawyer may be delayed for 48 hours in certain circumstances;
- a person between the ages of 14 and 18 who is detained would have a right to contact an approved lawyer and to have a parent, guardian or other representative present;
- the bill did not grant ASIO police powers, such as the power to arrest and detain people or to conduct a strip search. Where a warrant required any police functions to be carried out, they must be done by a police officer; and
- the provisions that allowed the conduct of an ordinary search or a strip search were consistent with sections in the *Crimes Act 1914* that do not require that a person subject to a search be provided with written information as to their rights and responsibilities.[81]

2.134 The Committee thanked the Attorney-General for the comprehensive response that was provided addressing the Committee's questions and noted that the amendments made by the Government in the House of Representatives increased protections for persons in detention when compared to the earlier provisions. Nevertheless, the Committee concluded that the provisions may still be seen to

80 ibid.

81 Scrutiny of Bills Committee, *Twelfth Report of 2002*, pp. 416-418.

trespass *unduly* on personal rights and liberties and left it for the Senate as a whole to decide whether, on balance, the breaches were acceptable in light of the policy intentions of the bill. This bill was laid aside by the House of Representatives on 13 December 2002.

Limitation of liability for death or personal injury

2.135 In *Alert Digest No. 9 of 2002*, the Committee commented on a provision in the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 that would enable a corporation providing recreational services to exclude, restrict or modify the obligations, imposed by section 74 of the *Trade Practices Act 1974*, that services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for purpose. The Committee had initially commented in *Alert Digest No. 7 of 2002* on an incorrect version of this bill, which included a provision preventing a corporation 'from excluding, restricting or modifying its liability in cases where the corporation has been grossly negligent'. The Committee was particularly concerned that the revised version of the bill no longer included this provision, or a provision requiring the implementation of a 'reasonable risk management strategy', the effect of which was that:

> Under the Bill as passed by the House of Representatives, a corporation which provides recreational services will be permitted to completely exclude any liability for death or personal injury which it might otherwise have been under to those to whom it provides such recreational services, even though the death or personal injury is caused by the gross and wilful lack of care of those acting for the corporation. Furthermore, while the original version of the bill made the ability to exclude, restrict or modify liability subject to the implementation by the corporation of a "reasonable risk management strategy", this limitation has been omitted from the current version of the bill. Those corporations which provide recreational services may knowingly act in a way which is contrary to any reasonable means of managing the risks of the activity, but exclude their liability for any resultant death or personal injury suffered by their customers.[82]

2.136 The Committee sought the advice of the Treasurer on these aspects of the revised bill.

2.137 In response to the Committee's concerns, the Minister for Revenue and Assistant Treasurer advised that:

> …the contractual rights which consumers have by virtue of the Trade Practices Act (TPA) were not enacted with any specific intention that they might be used to provide remedies where consumers died or were injured as a result of a breach of a condition or warranty implied by the Act.
>
> The purpose of the Bill is to ensure that the object of the TPA is not subverted for an improper purpose. There is… a legitimate concern that the

82 Scrutiny of Bills Committee, *Alert Digest No. 9 of 2002*, p. 14.

> rights conferred by the Act might be misused to undermine the significant law reforms currently being undertaken by State and Territory Jurisdictions to rectify the defects which are apparent in existing common law regimes….the proposed section 68B is designed merely to underpin State and Territory reforms and ensure just outcomes for the community at large.

2.138 In considering the Minister's response, the Committee agreed that there was a need to balance consumer protection against allowing consumers to take responsibility for their own actions, but continued to express concern about the provision and the rationale used to justify its imposition. In particular, the Committee:

- indicated that the bill may result in uncertainty, particularly in relation to exclusion clauses that may be included in consumer contracts in reliance on the new provision, resulting in increased litigation, at least in the short term;
- sought further clarification from the Minister regarding the assertion that the Trade Practices Act was not intended to provide remedies where consumers died or sustained injury as a result of a breach of a condition or warranty implied by that Act. The Committee noted that other provisions of that Act provided for compensation for death or injury;
- sought additional advice from the Minister regarding the reference in her response to a 'perception that litigants [taking action under the Trade Practices Act] have abused their common law rights to sue for negligence and related causes of action'[83]; and
- indicated that measures aimed at requiring consumers to take more personal responsibility for their actions should be accompanied by appropriate safeguards, such as those provided for in the earlier version of this bill.

2.139 In a response to the Committee of 21 November 2002, the Minister acknowledged that there may be uncertainty resulting from the use of the exclusion clauses and that this had the potential to increase litigation, at least in the short term. However, the Minister indicated that in the Government's view 'the ultimate benefit of law reform currently being undertaken by the States and Territories, and supported by this bill, will considerably outweigh any short term consequences that might flow from the changes.'[84]

2.140 In respect of previous advice that the Trade Practices Act was not intended to provide remedies where consumers have died or were injured, the Minister indicated that, while there are provisions in that Act which are directed towards the prevention of death and injury:

> The amendments proposed by this Bill are designed to apply to provisions enacted in 1974. When the Trade Practices Act was enacted in 1974 it incorporated specific implied terms and conditions into all contracts. The

83 Scrutiny of Bills Committee, *Thirteenth Report of 2002*, p. 449.

84 Scrutiny of Bills Committee, *Fifteenth Report of 2002*, p. 524.

> Second Reading Speech for the original Bill indicated that "The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices... Legislation of this kind is concerned with economic considerations." (House of Representatives Hansard, 16 July 1974).
>
> From an examination of the background surrounding the introduction of the relevant provisions implying terms into contracts, it is clear that it was not the intent of those provisions of the Act to provide compensation where consumers died or were injured. The subsequent enactment of provisions elsewhere in the Act dealing with injury does not in any way change the rationale for the existence of these provisions.[85]

2.141 The Minister went on to argue that, because the relevant provision of the Trade Practices Act was not intended to provide remedies where consumers died or were injured, its use for this purpose was an abuse of the law.

2.142 In respect of the Committee's view that measures aimed at requiring consumers to take more personal responsibility for their actions should be accompanied by appropriate safeguards, the Minister indicated that:

> Given that the aim of the amendments proposed by the Government is to prevent the rights conferred by section 74 being used for an unintended purpose, the need for further qualifications is difficult to argue… Hence it is ultimately the role of the Courts to protect the rights of those who need to be protected, and the community is well served by the legal profession in ensuring that the interests of individuals are properly represented.[86]

2.143 The Committee thanked the Minister for this further response but continued to question the Minister's assertions about the initial intent of the Trade Practices Act, noting that:

> …economic loss may occur as a result of death or injury. Furthermore, the key sections 68 and 74, which were both included in the original Act (although subsequently amended), have the clear purpose of protecting consumers from defective, including negligent, services. The Committee therefore suggests that it has always been the intention of the Trade Practices Act to provide this protection…[87]

2.144 The Committee was also concerned about the Minister's assertion that it was difficult to argue that safeguards were required 'given that the aim of the amendments… is to prevent the rights conferred by section 74 being used for an unintended purpose…'. The Committee noted that an earlier version of the bill provided such safeguards. That is, the version commented on by the Committee in *Alert Digest No. 7 of 2002*, provided that a corporation could not exclude liability for

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85 ibid.

86 ibid. p. 525.

87 ibid.

its own gross negligence and that liability was also subject to the corporation implementing a 'reasonable risk management strategy.' As such, the Committee argued that such safeguards were, presumably, considered appropriate at one point in time.

2.145 On 12 December 2002, the Senate agreed to a number of amendments to the bill, aimed at addressing the issues raised by the Committee. However, the House of Representatives disagreed with these amendments and the Senate did not insist on them. The bill was subsequently passed without amendment.

Limiting the right of parties to arbitration

2.146 In *Alert Digest No. 10 of 2001*, (which fell within the 39th Parliament, but is included here as the Committee's deliberations on this bill continued into the 40th Parliament) the Committee commented on a provision in the Trade Practices Amendment (Telecommunications) Bill 2001 which would insert a new section 152DOA in the *Trade Practices Act 1974.* This new section specified the matters to which the Australian Competition Tribunal could have regard when conducting a review of a determination by the Australian Competition and Consumer Commission (ACCC) in arbitrating a telecommunications access dispute. The existing provision allowed the Tribunal to have regard to any information, documents or evidence that it considered relevant, whether or not those matters were before the ACCC when it made its initial determination. The proposed amendment would limit the Tribunal to consideration of information, documents or evidence that was before the ACCC initially.

2.147 The Committee noted from the explanatory memorandum that, although the proposed amendment would reduce delays in the review of ACCC decisions, it would also 'reduce the extent of Tribunal review'. The explanatory memorandum asserted that 'on balance, it is considered that the limitations on the review are justified on the basis of the length and depth of the Commission's arbitration process.'[88] In light of the proposed reduction in the extent of Tribunal review, the Committee sought the Minister's advice about how the existing review processes had been abused and whether the Tribunal had been consulted about the proposed changes.

2.148 The Minister for Communications, Information Technology and the Arts responded that the Tribunal had commenced two reviews of final determinations made by the ACCC under Part XIC of the *Trade Practices Act 1974* in October 2000 and that these reviews were unlikely to be finalised before late 2002. The Minister indicated that similar delays would be expected for future reviews if limits were not placed on the matters that could be considered by the Tribunal. While acknowledging that 'there is no direct evidence that the first stages of the Tribunal hearings have been

88 Scrutiny of Bills Committee, *Alert Digest No. 10 of 2001*, pp. 14-15.

abused' the Minister argued that the proposed amendment 'will remove the potential for procedural abuse in the future.'[89]

2.149 The Committee thanked the Minister for this response but sought further information about the reasons for the significant delays in finalising reviews by the Tribunal. In particular, whether the Tribunal had been asked to consider significant amounts of new information that had not been before the ACCC, and whether any comment had been made during the course of the hearings as to the value of such new material.[90] The Minister responded that some new evidence had been introduced, but that the extent of any new evidence was unknown as witness statements were still outstanding. The Minister also indicated that, due to the private nature of Tribunal hearings, no comments had been made on the value of the new material introduced to date and reiterated that the proposed amendment was concerned 'with removing the potential for procedural abuse in the future.'[91]

2.150 In thanking the Minister for this further response the Committee noted that:

> an amendment to procedural law, where there is no evidence of its abuse, in anticipation of its possible abuse at some time in the future, appears to represent a precedent which could become unfortunate if legislators were to start anticipating all possible breaches or abuses of the provisions of a law.[92]

2.151 The Committee sought further advice from the Minister as to the necessity of this approach in the circumstances covered by the bill.

2.152 The Minister for Communications, Information Technology and the Arts responded that the:

> amendments in the Act respond to particular circumstances experienced in the telecommunications access regime. There are strong concerns within the telecommunications industry that regulatory gaming in the arbitration process has produced substantial delay, to the detriment of the industry...There is a likelihood that regulatory gaming would also extend to Tribunal hearings of arbitration disputes.

2.153 The Minister cited a draft report by the Productivity Commission on Telecommunications Competition Regulation, which recognised the need to anticipate regulatory gaming:

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89 Scrutiny of Bills Committee, *Twelfth Report of 2001*, p. 563.

90 ibid. p. 564.

91 Scrutiny of Bills Committee, *Thirteenth Report of 2001*, p. 609.

92 ibid.

> Gaming permeates the operation of the regime, as parties strategically try to exploit the procedures to their advantage. An efficient regime must anticipate and counter such gaming.[93]

2.154 On this basis, the Minister considered that it was 'prudent to anticipate future procedural abuse and take appropriate regulatory action.'[94] The Committee thanked the Minister for this response, which addressed its concerns.

Use of tax file numbers

2.155 For a number of years the Committee has indicated its concern with the growing use of tax file numbers as identifiers in relation to matters unconnected with taxation. Such measures could be seen as trespassing on an individual's privacy. In raising concerns about the expanded use of tax file numbers, the Committee frequently cites the then Treasurer in the Parliament on 25 May 1988, when referring to the proposed introduction of the tax file number scheme:

> The only purpose of the file number will be to make it easier for the Tax Office to match information it receives about money earned and interest payments.
>
> This system is for the exclusive use of the Tax Office – it will simply allow the better use of information the Tax Office already receives.

2.156 During the 40th Parliament, the Committee considered the Higher Education Legislation Bill (No. 1) 2002, which included provisions to establish a scheme of Commonwealth loans to overseas-trained professionals undertaking bridging courses to enable them to meet professional entry requirements in Australia. The bill included a new section that required students seeking such a loan to provide their tax file number to the tertiary education institution involved. The Commonwealth was not liable to make such a loan if a student did not have a tax file number. The Committee acknowledged that the purpose of these provisions was 'undoubtedly to minimise the possibility for fraud in the administration of this and other education loan schemes' but noted that the tax file number scheme 'was introduced specifically and solely for the use of the Tax Office' and this bill represented yet another instance of its expanded use for unrelated purposes.[95]

2.157 The Minister for Education, Science and Training responded that:

- the provision of a tax file number did not breach the Committee's terms of reference as it was not a compulsory requirement – the consequence of not providing a tax file number was that the student would not be eligible to access the loan facility provided by the Commonwealth, however they could

93 Productivity Commission, Draft Report on Telecommunications Competition Regulation, as cited in Scrutiny of Bills Committee, *First Report of 2002*, p. 60.

94 ibid.

95 Scrutiny of Bills Committee, *Alert Digest No. 1 of 2002*, pp. 22-23.

continue to pay their tuition fees directly to the relevant higher education institution;

- requiring the provision of tax file numbers was consistent with arrangements that currently applied to the Higher Education Contribution Scheme and the Postgraduate Education Loan Scheme;
- tax file numbers were used by higher education institutions to advise the Tax Office of the amounts that students were deferring; and
- the *Higher Education Funding Act 1988* specifically prohibited institutions from requiring a student to provide their tax file number or from unauthorised use or disclosure of a student's tax file number for any purpose other than processing the deferred HECS amount.

2.158 The Committee thanked the Minister for this response and made no further comments.

Mandatory sentencing

2.159 During the 40th Parliament, the Committee considered a provision inserted in the *Migration Act 1958* by the Border Protection (Validation and Enforcement Powers) Bill 2001[96] that imposed mandatory minimum sentences for various 'people-smuggling' offences under the Act. The Committee noted that, in general, mandatory sentences limit the usual judicial discretion exercised when determining a proper sentence, given all the circumstances of a particular offence, and sought the Minister's advice as to why it was appropriate to give the Executive control by limiting judicial discretion in these circumstances. [97]

2.160 The Minister for Immigration and Multicultural and Indigenous Affairs responded that the Parliament created new people smuggling offences in 1999 that carried maximum penalties of 20 years imprisonment, but that the penalties imposed by the Courts had generally been much less than the available maximum penalty. The Minister indicated that 'this has not been a strong deterrent to persons who are participating in people smuggling and…[the new provisions] make it absolutely clear that Australia considers people smuggling to be a very serious offence.'[98]

2.161 The Committee thanked the Minister for this response but noted that mandatory sentencing raises a number of issues within the Committee's terms of reference and, notwithstanding that the bill had already been enacted, continued to draw these provisions to the attention of the Senate.

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96 Note: While this bill was introduced during the 39th Parliament, the Committee's report (*First Report of 2002)* on the bill was not tabled until the 40th Parliament, thus its inclusion in this report.

97 Scrutiny of Bills Committee, *Alert Digest No. 13 of 2001,* p. 8.

98 Scrutiny of Bills Committee, *First Report of 2002*, p. 16.

Voting rights of prisoners

2.162 In *Alert Digest No. 6 of 2004*, the Committee dealt with the Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004. Various provisions of the bill proposed to restrict the voting rights of prisoners. Under the provisions of the *Commonwealth Electoral Act 1918* that prevailed at that time, prisoners serving a sentence of imprisonment of five years or longer were not entitled to enrol to vote at a federal election. These amendments proposed to extend this restriction to **all** prisoners.

2.163 The voting rights of prisoners have been subject to considerable debate over the past two decades. Prior to 1983, the *Commonwealth Electoral Act 1918* denied the franchise to all those serving sentences for offences having a maximum penalty of imprisonment for one year or more. On the passage of the *Commonwealth Electoral Legislation Amendment Act 1983*, the franchise was extended so that prisoners were denied a vote only where they were convicted of an offence having a maximum penalty of five years imprisonment.

2.164 In a submission to the Joint Standing Committee on Electoral Matters, the Australian Electoral Commission (AEC) pointed out that this provision had led to difficulties both in practice and in principle. In practice, it was difficult to establish, with certainty, every case in which the maximum penalty was imprisonment for five years or more. And in principle, such a provision was potentially inequitable – 'a person serving an actual sentence of one month could be excluded from enrolment, while a person on a sentence of 59 months could be eligible, depending on the potential maximum sentence in each case'.

2.165 Therefore, the AEC submitted that a person should be denied a vote only where they were actually serving a sentence of five years or more. This approach was ultimately included in the Commonwealth Electoral Act by the *Electoral and Referendum Amendment Act 1995*.

2.166 However, the approach advocated by a majority of the Joint Standing Committee in 1994 went further than the AEC's proposal. In its report on *The 1993 Federal Election*, the Committee noted that it had previously recommended that enrolment and voting rights be granted to all prisoners, regardless of their sentence (unless convicted of treason or treachery):

> an offender once punished under the law should not incur the additional penalty of loss of the franchise. We also note that a principal aim of the modern criminal law is to rehabilitate offenders and orient them positively toward the society they will re-enter on their release. We consider that this process is assisted by a policy of encouraging offenders to observe their civil and political obligations.

2.167 In a dissenting report, then Opposition members stated:

> As our coalition colleagues on the committee in the 34th Parliament said when this proposal was last mooted, the concept of imprisonment – apart

> from any rehabilitation aspects – is one of deterrence, seeking by the denial of a wide range of freedoms to provide a disincentive to crime. A person having committed an offence against society is denied the privileges and freedoms of society of which one important one is the right to vote. The Committee's recommendation is therefore driven by a philosophical position with which we strongly disagree.

Committee consideration

2.168 In considering the Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004, the Committee noted that this proposed change to the voting rights of prisoners was originally proposed in the Electoral and Referendum Amendment Bill (No. 2) 1998, on which the Committee reported in its *Seventh Report of 1998,* and was again proposed in the Electoral Referendum Amendment (Roll Integrity and Other Measures) Bill 2002. The Committee reaffirmed the comments it made in its *Seventh Report of 1998*, which drew Senators' attention to the various arguments for and against further restricting voting rights for prisoners (as outlined above). The Committee also indicated that it 'considers that this may be a matter more appropriately dealt with at the time of sentencing.'[99] The Committee sought the Minister's advice on this issue.

2.169 The Special Minister of State responded that:

> The Government remains firmly of the view that people who commit offences against society, sufficient to warrant a prison term, should not, while they are serving that prison term, be entitled to vote and elect the leaders of the society whose laws they have disregarded.
>
> …the Government considers that it is more appropriate for the entitlement to vote in federal elections to be addressed in the Electoral Act rather than by judicial officers sentencing people under State and Territory legislation.[100]

2.170 The Committee thanked the Minister for this response but continued to express its concern about the provisions 'that have the possibility of dealing differently with voters depending on the nature of their sentence and the effectiveness of notification procedures in the various States and Territories.'[101] The Committee continued to draw these provisions to the attention of Senators on the basis that they may be considered to trespass *unduly* on personal rights and liberties.

2.171 In *Alert Digest No. 9 of 2004*, the Committee noted that there had been a number of amendments to this bill in the Senate. The amendments to items 6 and 7 of the bill provided that prisoners whose sentences covered the duration of a Parliament (ie. from the return of the writs for one election to the issuing of the writs for the next)

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99 Scrutiny of Bills Committee, *Alert Digest No. 6 of 2004,* p. 13.

100 Scrutiny of Bills Committee, *Seventh Report of 2004,* pp. 148-149.

101 ibid. p. 149.

were not entitled to have their name on the electoral roll. The bill had originally proposed that all prisoners were not entitled to have their name on the electoral roll. The Committee noted that this amendment did not appear to address the Committee's underlying concern about the possible differential treatment of voters.

2.172 The Committee noted that the revised provisions adversely and retrospectively affected the rights of certain prisoners, namely those serving custodial sentences shorter than 5 years, but longer than the period contemplated in the replacement amendment (approximately 3 years). The bill, incorporating these amendments, was passed by both Houses in June 2004.