SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2001

23 May 2001

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 2001

The Committee presents its Sixth Report of 2001 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Customs Tariff Amendment Bill (No. 2) 2001

Electoral and Referendum Amendment Bill (No. 1) 2001

Excise Tariff Amendment Bill (No. 1) 2001

Migration Legislation Amendment Bill (No. 1) 2001
(previous citation: Migration Legislation Amendment Bill (No. 2) 2000)

Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001

Roads to Recovery Act 2000

Customs Tariff Amendment Bill (No. 2) 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2001*, in which it made various comments. The Treasurer has responded to those comments in a letter dated 23 April 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Treasurer's response are discussed below.

Extract from Alert Digest No. 4 of 2001

This bill was introduced into the House of Representatives on 8 March 2001 by the Minister for the Arts and the Centenary of Federation. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Customs Tariff Act 1995* to:

- increase the customs duty on aviation turbine fuel (avtur) from 13 May 2000;
- increase the rate of customs duty on alcoholic beverages, as contained in chapter 22 of the Customs Tariff, to offset the removal of the 37% wholesale sales tax from 1 July 2000;
- introduce a three-tiered duty structure for beer based on alcohol content from 1 July 2000;
- introduce a new duty structure for mixed alcoholic beverages from 1 July 2000;
- create a new category of alcoholic beverages subject to the wine equalisation tax from 1 July 2000 in line with rates applying to other spirits;
- reduce the customs duty on leaded and unleaded petrol, diesel and potential fuel substitutes by 6.656 cents per litre from 1 July 2000; and
- reduce the rate of duty on leaded and unleaded petrol, diesel fuel and other petroleum products by 1.5 cents per litre, and by a proportional amount for other fuels with effect from 2 March 2001.

Retrospective commencement
Subclauses 2(2) and (3)

Item 1 in Schedule 1 to this bill proposes to increase the rate of duty on aviation kerosene to fund airport regulation activities by the ACCC. Subclause 2(2) provides that this amendment is taken to have commenced on 13 May 2000.

The items contained in Part 2 of Schedule 1 to the bill proposes to introduce a new tariff structure and duty rates for imported alcohol and alcoholic beverages to give effect to certain tax reform measures. Subclause 2(3) provides that these amendments are taken to have commenced on 1 July 2000.

Each of the proposed changes has been tabled as a Customs Tariff proposal, and it is usual for such proposals to be introduced in legislation which operates retrospectively. While the Committee is generally prepared to accept the need for some retrospectivity in these circumstances, there has been a delay of between 8 and 10 months in the introduction of these provisions. The Explanatory Memorandum does not provide any explanation for this delay. The Committee, therefore, **seeks the Minister's advice** as to the reason for the delay in incorporating these Tariff proposals in legislation.

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

Relevant extract from the response from the Treasurer

I am informed that the Senate Standing Committee for the Scrutiny of Bills has sought advice in relation to these Bills; I apologise for the delay in responding.

The Committee has noted that each of the proposed changes has been tabled as an Excise or Customs tariff proposal, and it is usual for such proposals to be introduced in legislation which operates retrospectively. The Committee has commented that while it is generally prepared to accept the need for some retrospectivity in these circumstances, there has been a delay of between 8 and 10 months in the introduction of these provisions. The Committee has commented that the Explanatory Memorandum in each case does not provide any explanation for this delay. The Committee, therefore, has sought advice as to the reason for the delay in incorporating these Tariff proposals in legislation in each case.

Section 114 of the *Excise Act 1901* and Section 224 of the *Customs Act 1901* are similar and relevantly provide that no legal proceedings against anything done for the protection of the revenue in relation to an excise tariff alteration (or customs tariff alteration) proposed in the Parliament shall be commenced before the close of

the session in which that tariff alteration is proposed or before the expiration of 12 months after the alteration is proposed, whichever first occurs. By longstanding practice, these sections have been used as the underlying basis to allow collection of amounts of revenue in excess of (or for that matter, below) the duty rates imposed by the *Excise Tariff Act 1921* or the *Customs Tariff Act 1995* at any particular time where a tariff proposal has been introduced in the Parliament.

These provisions do not trespass unduly on the personal rights of licensed excise manufacturers or of importers. They in fact, set a period of time during which an existing course of action is barred. These sections are designed to prevent Courts from considering a matter for a certain time period until Parliament has had adequate opportunity to retrospectively authorise altered duty rates. If it does, then the matter retroactively disappears. Should the Parliament not pass ratifying legislation within the period specified, there is no barrier to the parties affected then exercising their legal rights.

In relation to timing of the measures, I note that "House of Representatives Practice" (1997 Edition; pp 402-3) comments in relation to ratification of excise and tariff proposals:

"A customs tariff amendment bill or an excise tariff amendment bill, as the case may be, is usually introduced at an appropriate time to consolidate most of the outstanding proposals introduced into the House. These bills are retrospective in operation, in respect of each proposal, to the date on which collection commenced."

In these circumstances, the length of the period between the introduction of the tariff proposal and the corresponding amendment bill is not defined. Moreover, it is not material to the timing of exercise of rights of excise manufacturers or importers affected by the altered rates in the proposal.

I trust these comments are of assistance to the Committee.

The Committee thanks the Treasurer for this response.

Electoral and Referendum Amendment Bill (No. 1) 2001

Introduction

The Committee dealt with this bill in *Alert Digest No.4 of 2001*, in which it made various comments. The Special Minister of State has responded to those comments in a letter dated 1 May 2001. A copy of the letter (excluding attachments) is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 4 of 2001

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

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

- improve identification provisions for persons enrolling or voting from overseas;
- provide for the rejection, with review rights, of applications for enrolment from persons who have changed their names to something 'inappropriate';
- authorise the provision of certain electronic lists to candidates, members of the House of Representatives, the Senate, and registered political parties;
- allow for the amendment or withdrawal of Group Voting Tickets (GVT) or Individual Voting Tickets (IVT) under certain circumstances up until the closing time for the lodgement of such statements;
- improve provisions for the return of Senate nomination deposits; substitution of candidates in bulk nominations; management of multiple declaration votes; initialling of ballot papers; display of GVT and IVT information; and abbreviations for registered party names; and
- provide the Australian Electoral Commission (AEC) with the power to review the continuing eligibility of registered political parties.

The bill also contains transitional provisions.

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

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

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

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

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

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

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

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

- why the bill should not limit the exercise of these powers in some way, or better define them; and

- whether the AEC will be required to produce any criteria or guidelines governing how the powers are to be exercised fairly, consistently and with certainty for those affected.

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

Relevant extract from the response from the Minister

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

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

The Committee has advised that it:

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

The Committee seeks the Minister's advice as to:

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

As stated above, proposed sections 93A and 98A of the CEA will allow DROs or AEOs to refuse to add a person's name to the electoral roll if it is inappropriate. The sections specifically provide that a DRO or AEO may refuse on the basis that the person's name is fictitious, frivolous**,** offensive, obscene, is not the name by which the person is usually known or is not written in the alphabet used for the English language. However, as these categories may not cover all circumstances in which a name that is inappropriate for inclusion on the electoral roll has been adopted,

subsection (3), which provides that a DRO or AEO can refuse to include a name if it is contrary to the public interest, has been included. This subsection is not meant to provide the AEC with unlimited power to refuse genuine names but to ensure that the AEC has the ability, where appropriate, to refuse to include inappropriate names on the electoral roll.

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

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

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

The inclusion of the "contrary to the public interest" provision in these sections is meant to allow the AEC the ability to protect the integrity of the electoral process and ensure that it is not brought into disrepute. The electoral roll is not an appropriate forum for people to obtain free publicity for the cause they espouse or the businesses that they run. This is more appropriately done through advertising, the publicising of political platforms or the distribution of how-to-vote material. The roll, and the electoral process as whole, is not the appropriate place for people to be able to denigrate the actions of certain organisations and people.

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

The AEC's decisions have to be defensible:

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

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

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

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

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

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

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

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

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

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

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

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

Excise Tariff Amendment Bill (No. 1) 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2001*, in which it made various comments. The Treasurer has responded to those comments in a letter dated 23 April 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Treasurer's response are discussed below.

Extract from Alert Digest No. 4 of 2001

This bill was introduced into the House of Representatives on 8 March 2001 by the Parliamentary Secretary to the Minister for the Arts and the Centenary of Federation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Excise Tariff Act 1921* to:

- increase the rate of excise duty on aviation kerosene, known as avtur, by 0.036 cents per litre to fund airport regulation activities by the ACCC with effect from 13 May 2000;
- increase the rate of excise duty on alcoholic beverages to offset the removal of the 37% wholesale sales tax from 1 July 2000;
- introduce a three-tiered duty rate structure for beer, based on alcohol content from 1 July 2000;
- impose an excise duty on alcoholic beverages not previously covered, such as designer drinks and coolers, and not subject to the Wine Equalisation Tax from 1 July 2000;
- impose a new duty structure for mixed alcoholic beverages in line with rates applying to other spirits from 1 July 2000;
- reduce excise duties on leaded and unleaded petrol, diesel and potential fuel substitutes from 1 July 2000;
- vary the expression of the excise rate for petroleum based oils and lubricants and their synthetic equivalents from two decimal places to five decimal places to ensure that the indexation applies correctly to the products from 31 January 2001;

- allow for set offs of customs duty which have been previously paid on petroleum product against excise liabilities where the product is used in further excise manufacture in Australia from 1 January 2001; and
- reduce excise duty by 1.5 cents per litre for leaded and unleaded petrol, diesel and other petroleum products that attract equivalent rates of duty. Duty on aviation fuels and on petroleum products attracting concessional rates is also reduced by a proportional amount from 2 March 2001.

Retrospective commencement
Subclauses 2(2) and (3)

Item 1 in Schedule 1 to this bill proposes to increase the rate of excise on aviation kerosene to fund airport regulation activities by the ACCC. Subclause 2(2) provides that this amendment is taken to have commenced on 13 May 2000.

The items in Part 2 of Schedule 1 to the bill incorporate a number of changes to excise duty on alcoholic beverages arising out of tax reform policy. In general terms, the rate of excise is increased to offset the removal of the 37% wholesale sales tax; a three-tiered duty rate structure for beer (based on alcoholic content) is introduced; and certain alcoholic beverages which were previously non-excisable (for example, designer drinks and coolers) are brought to excise. Subclause 2(3) provides that these amendments are taken to have commenced on 1 July 2000.

Each of the proposed changes has been tabled as an Excise Tariff proposal, and it is usual for such proposals to be introduced in legislation which operates retrospectively. While the Committee is generally prepared to accept the need for some retrospectivity in these circumstances, there has been a delay of between 8 and 10 months in the introduction of these provisions. The Explanatory Memorandum does not provide any explanation for this delay. The Committee, therefore, **seeks the Minister's advice** as to the reason for the delay in incorporating these Tariff proposals in legislation.

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

Relevant extract from the response from the Treasurer

> I am informed that the Senate Standing Committee for the Scrutiny of Bills has sought advice in relation to these Bills; I apologise for the delay in responding.

The Committee has noted that each of the proposed changes has been tabled as an Excise or Customs tariff proposal, and it is usual for such proposals to be introduced in legislation which operates retrospectively. The Committee has commented that while it is generally prepared to accept the need for some retrospectivity in these circumstances, there has been a delay of between 8 and 10 months in the introduction of these provisions. The Committee has commented that the Explanatory Memorandum in each case does not provide any explanation for this delay. The Committee, therefore, has sought advice as to the reason for the delay in incorporating these Tariff proposals in legislation in each case.

Section 114 of the *Excise Act 1901* and Section 224 of the *Customs Act 1901* are similar and relevantly provide that no legal proceedings against anything done for the protection of the revenue in relation to an excise tariff alteration (or customs tariff alteration) proposed in the Parliament shall be commenced before the close of the session in which that tariff alteration is proposed or before the expiration of 12 months after the alteration is proposed, whichever first occurs. By longstanding practice, these sections have been used as the underlying basis to allow collection of amounts of revenue in excess of (or for that matter, below) the duty rates imposed by the *Excise Tariff Act 1921* or the *Customs Tariff Act 1995* at any particular time where a tariff proposal has been introduced in the Parliament.

These provisions do not trespass unduly on the personal rights of licensed excise manufacturers or of importers. They in fact, set a period of time during which an existing course of action is barred. These sections are designed to prevent Courts from considering a matter for a certain time period until Parliament has had adequate opportunity to retrospectively authorise altered duty rates. If it does, then the matter retroactively disappears. Should the Parliament not pass ratifying legislation within the period specified, there is no barrier to the parties affected then exercising their legal rights.

In relation to timing of the measures, I note that "House of Representatives Practice" (1997 Edition; pp 402-3) comments in relation to ratification of excise and tariff proposals:

"A customs tariff amendment bill or an excise tariff amendment bill, as the case may be, is usually introduced at an appropriate time to consolidate most of the outstanding proposals introduced into the House. These bills are retrospective in operation, in respect of each proposal, to the date on which collection commenced."

In these circumstances, the length of the period between the introduction of the tariff proposal and the corresponding amendment bill is not defined. Moreover, it is not material to the timing of exercise of rights of excise manufacturers or importers affected by the altered rates in the proposal.

I trust these comments are of assistance to the Committee.

The Committee thanks the Treasurer for this response.

Migration Legislation Amendment Bill (No. 1) 2001
(previous citation: Migration Legislation Amendment Bill (No. 2) 2000)

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2000*, in which it made various comments. The Minister for Immigration and Multicultural Affairs responded to those comments in a letter dated 13 April 2000.

In its *Second Report of 2001*, the Committee sought further advice from the Minister in relation to retrospective application. The Minister has responded to those comments in a letter dated 18 April 2001. A copy of the letter is attached to this report. An extract from the *Second Report of 2001* and relevant parts of the Minister's further response are discussed below.

Extract from Alert Digest No. 4 of 2000

This bill was introduced into the House of Representatives on 14 March 2000 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the following Acts:

Migration Act 1958 in relation to judicial review of visa related matters to:

- prohibit class actions in migration litigation; and to
- limit those persons who may commence and continue proceedings in the courts.

Migration Act 1958 and *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* to:

- clarify the scope of the Minister's power to set aside non-adverse decisions of the delegate or the Administrative Appeals Tribunal in relation to the "character test" and to substitute the Minister's own adverse decision;
- rectify an omission from the Act which allows for the consequential cancellation of visas, so that they also apply where a person's visa is cancelled; and
- correct three misdescribed amendments of the Act.

The bill also proposes a number of technical corrections and rectifications to the *Migration Act 1958*; the *Migration Legislation Amendment Act (No 1) 1998*; and the *Migration Legislation Amendment (Migration Agents) Act 1999*.

Retrospective application
Subclause 2(4) and Schedule 2, Part 1

A number of the amendments proposed in Part 1 of Schedule 2 to this bill concern section 501A of the *Migration Act 1958*. By virtue of subclause 2(4), these amendments are to be taken to have commenced on 1 June 1999, immediately after the commencement of item 23 of Schedule 1 to the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (the Character and Conduct Act).

The Minister's Second Reading Speech states that the amendments to section 501A are intended to "clarify the original policy intention" behind the Character and Conduct Act, and "to put it beyond doubt that the Minister can, in the national interest, substitute his or her own section 501 decision for that of a delegate or the Administrative Appeals Tribunal".

Given the period of retrospectivity involved, and the history of Parliamentary consideration of the Character and Conduct Act, the Committee **seeks the Minister's advice** on how the doubts about the operation of section 501A arose and whether the proposed retrospective application of these amendments is likely to affect any existing or proposed litigation.

With regard to section 501A itself, the Committee remains concerned at its potential use as a device for administrative convenience, and notes the observation of the Administrative Appeals Tribunal that "if the Minister were to exercise the powers in proposed ss 501A and 501B more than infrequently the integrity of the Tribunal's decision-making process and public confidence in the independence of the Tribunal may be undermined".[1]

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

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[1] Quoted in Senate Legal and Constitutional Legislation Committee, Report on Legislation Referred to the Committee: *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997*, March 1998, p 23.

Relevant extract from the response from the Minister dated 13 April 2000

Part 1 of Schedule 2 to the Bill amends section 501A of the *Migration Act 1958* ("the Act") and paragraph 33(1)(c) of Schedule 1 to the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* ("the Character Act").

Subclause 2(4) of the Bill provides that these amendments are to be taken to have commenced on 1 June 1999, immediately after the commencement of item 23 of Schedule 1 to the Character Act.

Given the period of retrospectivity involved, the Committee believes that the amendments may trespass unduly on personal rights and liberties. The Committee has sought my advice on how doubts about the operation of section 501A arose and whether the proposed retrospective application of these amendments is likely to affect any existing or proposed litigation**.**

However, before dealing with the Committee's specific concerns, I note that these amendments do not represent a policy change from that which was considered by the Parliament during deliberation of the Character Act. The amendments serve to remove uncertainties in the interpretation of section 501A and ensure that the Parliament's intent is given full effect in the legislation.

Operation of section 501A

Paragraph 501A(1)(c) and Paragraph 33(1)(c)

Currently, paragraph 501A(1)(c) suggests that the AAT has a power to *grant* a visa when reviewing a subsection 501(1) decision of a delegate when in fact it does not have such a power.

Section 501(1) only confers a power to *refuse to grant* a visa to a person, or not to refuse to grant a visa, depending on whether the original decision-maker is satisfied that the person passes the character test in subsection 501(6). In other words, subsection 501(1) does not confer a power to actually grant a visa - that power is contained in section 65 of the Act.

Under paragraph 500(1)(b) of the Act, the AAT may review a delegate's subsection 501(1) decision to refuse to grant a visa. However, the AAT's jurisdiction to review a subsection 501(1) decision does not include a power to actually grant a visa.

The proposed amendment to paragraph 501A(1)(c) removes any suggestion that the AAT has a power to grant a visa when a reviewing a delegate's subsection 501(1) decision.

The amendment will also ensure that the AAT's non-adverse subsection 501(1) decision can be set aside in the national interest under section 501A. This is within the original policy settings of the Character Act which inserted provisions, like section 501A, into the Act in order to enhance the Government's ability to effectively deal with non-citizens who are not of good character.

Subsection 501A(1)

Section 501A gives me the power to intervene where a delegate or the AAT has made a decision not to exercise the power in section 501. Under section 501, a delegate may refuse to grant a visa or to cancel a visa if satisfied that the person does not pass the character test in subsection 501(6).

It is reasonably clear from the terms of subsections 501A(2) and (3) that the power in section 501A is intended to be available to set aside decisions made by a delegate or the AAT that a person has passed the character test under section 501. If this was not the case, the only decisions that could be set aside under section 501A would be those where a delegate or the AAT has already reached the view that the person does not pass the character test.

In spite of this, there is some uncertainty as to whether the power in section 501A, as currently drafted, is available to set aside a non-adverse section 501 decision of a delegate or the AAT where that decision was reached because the person was found to have passed the character test.

The proposed amendment to subsection 501A(1) is intended to put it beyond doubt that I can intervene under section 501A where a delegate or the AAT makes a decision not to exercise the power in section 501 because:

- he or she is satisfied that the person passes the character test; or
- he or she is not satisfied that the person passes the character test but exercises his or her discretion not to refuse to grant the visa or to cancel the visa.

New subsection 501A(4A)

As Parliament was told during the second reading debate for the Character Act, the policy intention behind section 501A is that it should be possible, in the national interest, to set aside an AAT section 501 decision which is at odds with community standards and expectations.

However, as currently drafted, section 501A does not fully achieve the original policy intention because it does not give me the power to intervene where the AAT has set aside a delegate's section 501 decision and remitted the matter for reconsideration in accordance with directions. As it stands, section 501A only gives me the power to intervene after the section 65 delegate has decided to actually grant the visa.

Proposed new subsection 501A(4A) gives effect to the original policy intention by ensuring that section 501A allows me to intervene at any point after a non-adverse decision under subsection 501(1) has been made by a delegate or the AAT whether the intervention occurs immediately or after a decision to grant has been made.

Whether the retrospective application of these amendments is likely to affect existing or proposed litigation

The retrospective commencement of the provisions in Part 1 of Schedule 2 to the Bill is not likely to affect existing or proposed litigation. This is because the amendments seek to clarify, rather than change, the original policy intention behind section 501A.

Exercise of the power in section 501A

I note the Committee's concern about the use of the power in section 501A. However, the proposed amendments to section 501A are technical amendments only which give legislative effect to the original policy intention of the legislation and put beyond doubt my powers in this area. This was fully described in both my second reading speech on 30 October 1997, when I originally introduced the Character Act in the House of Representatives, and in the explanatory memorandum for that Act.

The Committee thanks the Minister for this response which suggests that the amendments to section 501A are technical in nature, and clarify the original policy intent.

It seems that the law as it exists is unclear. Under the current provisions, it seems that the Minister may intervene to overturn a decision by the AAT to refuse to grant a visa on character grounds. However, it is arguable that the Minister cannot intervene to overturn a decision by the AAT to grant a visa to an applicant of good character. In addition, where the AAT remits a matter to a delegate for reconsideration, it seems the Minister cannot intervene until after the delegate makes a decision to actually grant the visa. It is not clear whether this uncertainty is as a result of legal advice received by the Minister, or as a result of comments made by a court or tribunal.

The amendments proposed in this bill address this uncertainty by apparently giving the Minister a complete discretion to intervene at any point after a favourable decision is made by a delegate or the AAT. While the law is clarified, it is clarified by once again increasing the discretion available to the Minister. The Committee, therefore, **seeks the Minister's further advice** as to whether the effect of these amendments will be to disadvantage persons seeking review, and whether the amendments have been proposed in response to legal advice or judicial or tribunal comment.

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

Relevant extract from the further response from the Minister dated 18 April 2001

The Committee has sought my further advice as to whether the effect of the amendments to section 501A of the *Migration Act 1958* will be to disadvantage persons seeking review, and whether the amendments have been proposed in response to legal advice or judicial or tribunal comment.

I reiterate that these amendments do not represent a policy change from that which was considered by the Parliament during deliberation of the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (the Character Act). The amendments will remove possible uncertainties in the interpretation of section 501A and ensure that the Parliament's intent is given full effect in the legislation.

As currently drafted section 501A could be interpreted as implying that the Administrative Appeals Tribunal has the capacity to grant a visa. This is not the case, as the power to grant visas found at section 65 of the Migration Act is held only by the Minister and by those persons to whom the Minister has delegated that power.

The AAT does not have any power to make a decision to grant a visa. In the circumstances of section 501A it can only review a decision to refuse to grant a visa, or to cancel a visa, on character grounds.

The proposed amendments will not increase the discretion currently available to a Minister to over-turn decisions made by the AAT or a delegate that a person has passed the character test. Section 501A already provides that, where he or she believes it in the national interest, the Minister may set aside an AAT decision which is at odds with community standards and expectations.

The amendments proposed have been put forward on the basis of legal advice that it was not "beyond doubt" that the operation of section 501A intended by the Parliament has been achieved by its current construction.

Since introduction of this Bill the construction of section 501A has been given judicial consideration by the Federal Court.

In the case of LAM *v* Minister for Immigration and Multicultural Affairs [2000] FCA 1226 the Court favoured the construction put forward by my Counsel. In his judgement Justice Lehane commented that:

> *"24. The consequences of a literal interpretation (of section 501A) can, in my view, properly be described as absurd...*
> *25. The question is not easy, and it is one on which minds might well differ. In my view, the literal construction proposed by the applicant does indeed produce a result so absurd, and so at odds with the apparent object of the provision, that an available construction which would avoid those difficulties is to be preferred .... That, which is the sense for which the Minister contends, is the sense in which, in my view, the expression "a decision to grant a visa" may and should be read."*

Although this provides authority for future favourable judicial interpretation of section 501A I consider it appropriate for the Parliament to resolve any doubt about its operation through making the amendments proposed.

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

The Committee thanks the Minister for this further response.

Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2001*, in which it made various comments. The Parliamentary Secretary to Cabinet has responded to those comments in a letter dated 23 April 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Parliamentary Secretary's response are discussed below.

Extract from Alert Digest No. 4 of 2001

This bill was introduced into the Senate on 8 March 2001 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Prime Minister]

The bill proposes to amend five Acts within the Prime Minister's portfolio to provide for the application of the Criminal Code. The bill is largely intended to preserve the existing meaning and operation of the provisions, although in some cases it is intended to change the provisions to ensure that they comply with the broader policy underlying the Code.

In addition, the Bill also makes certain amendments consequential to the expected passage of the Law and Justice Legislation (Application of Criminal Code) Bill 2000, re-numbers sections of the *Ombudsman Act 1976* and removes gender specific language in the *Royal Commission Act 1902*.

Strict liability offences
Schedule 1, items 5, 13, 15, 20, 22, 26

This bill amends various offence and related provisions in legislation administered by the Prime Minister's portfolio to provide for the application of the Criminal Code. The Explanatory Memorandum observes that the bill "is largely intended to preserve the existing meaning and operation of the provisions, although in some cases it is intended to change the provisions to ensure that they comply with the broader policy underlying the Code". Specifically, the bill seeks to 'clarify' whether certain provisions create offences of strict liability.

The Committee notes that, in some cases, the effect of this bill will be to change the nature of some provisions. The Committee, therefore, **seeks the Minister's advice** as to whether this bill converts an offence which was previously not one of strict liability into a strict liability offence.

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

Relevant extract from the response from the Minister

I refer to the Scrutiny of Bills *Alert Digest No. 4 of 2001* in which your Committee sought the Prime Minister's advice regarding whether the Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001 converts any offence which was not previously one of strict liability into a strict liability offence. The Prime Minister has asked me to reply on his behalf.

As noted in the *Alert Digest*, the Bill declares that a number of offences within the Prime Minister's portfolio are strict liability offences. I can confirm, on behalf of the Prime Minister, that the Bill is not intended to convert any offence which was not previously one of strict liability into a strict liability offence. It is considered that the offences in question are currently strict liability offences for the reasons set out below, and that the Bill simply preserves their current meaning and operation.

The effect of section 6.1 of the Criminal Code is that offence provisions must expressly state whether they create strict liability offences. In the absence of such a statement, the offence provision will be interpreted as requiring the prosecution to prove a fault element on the part of the defendant.

Few offence provisions in Commonwealth legislation, including the Prime Minister's portfolio legislation, comply with this section at present. As a result, officers of the Department of the Prime Minister and Cabinet needed to consider which, if any, offence provisions in the Prime Minister's portfolio legislation create strict liability offences. This process was carried out in consultation with the Attorney-General's Department and affected portfolio agencies.

It was not possible to locate any specific judicial consideration of the issue and the various Explanatory Memoranda for the offence provisions were silent on the point. The principles of interpretation used by the courts over time to identify strict liability offences have also been inconsistently developed and applied. The process of identifying any existing strict liability offences therefore necessarily involved an element of judgement.

As a starting point, officers of the Department noted the statements of Brennan J in *He Kaw Teh v R (1985)* 157 CLR 523 to the effect that a fault element is an essential element of every statutory offence unless it is excluded expressly or by necessary implication having regard to the language of the statute and its subject matter.

Officers of the Department also took into account a number of other factors.

First of all, they considered whether the offence provisions expressly provided for, or necessarily implied, a fault element. A fault element is a clear indication that an offence is not one of strict liability. None of the offence provisions in question expressly provided for a fault element. Some of the provisions made it an offence to 'refuse' to comply with notices, provide information or documents etc. It was noted that the word 'refuse' could be interpreted as implying some fault element but, having regard to other factors noted below, it was considered that the offences in question were intended to be ones of strict liability.

Secondly, they considered the size of the penalty for the offences. On the advice of the Attorney-General's Department, they took the view that strict liability principles would not ordinarily apply where an offence carries a penalty of more than 6 months' imprisonment. None of the offences in question carry a penalty of more than 6 months' imprisonment. Some of the offences in question are punishable by a pecuniary penalty only.

Thirdly, officers considered the presence of defences, particularly the defence of reasonable excuse. The presence of such a defence is one indication that the prosecution does not need to prove a fault element because they balance the public interest in the efficient prosecution of offences with the need to provide a defence for persons whose contravention of the offence is excusable. All bar one of the offences in question attracts a defence of reasonable excuse.

Last of all, officers considered the subject matter of the offences themselves. Each of the offences in question relates broadly to a failure to give evidence to a statutory officer or inquiry. It is considered that these types of broad regulatory offences are offences for which the application of strict liability is appropriate.

When these factors were considered together, it could be clearly inferred that the offences in question were currently strict liability offences.

The *Alert Digest* notes that the Explanatory Memorandum states that the Bill is intended to change some provisions so that they comply with the broader policy underlying the Code. This statement refers to other items of the Bill, such as those that ensure that the prosecution bears the legal burden of proof in relation to certain defences. The statement does not refer to the items dealing with strict liability offences.

I hope that this advice clarifies the matter to the satisfaction of the Committee.

The Committee thanks the Minister for this response.

Roads to Recovery Act 2000

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 18 of 2000*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 3 April 2001.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 21 December 2000), the response from the Minister may nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 18 of 2000

This bill was introduced into the House of Representatives on 30 November 2000 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to appropriate money for the Roads to Recovery Program, which provides additional funding for local roads in rural, regional and metropolitan areas. The funds are to be provided in the form of grants to local government bodies for expenditure on roads.

The bill provides a mechanism for specifying the funding to be received by each local government body over the life of the program and the conditions on which the funds are provided. The Explanatory Memorandum lists the local government bodies to be funded and the grants payable over the life of the program.

Tabling in one house of the Parliament
Clause 3

Clause 3 of this bill defines a 'tabled list' as "the funding allocation list that was tabled in the House of Representatives in relation to the Bill for this Act". With reference to this provision, the Explanatory Memorandum states that the 'tabled list' is "the list attached to this Explanatory Memorandum".

The usual procedure whenever documents are to be tabled is to require that they be tabled in each House of the Parliament. This is recognised elsewhere in this bill – for example, clause 10 requires that an annual report on the operation of the Act "be tabled in each House of the Parliament".

The Committee, therefore, **seeks the Minister's advice** on the reason for providing that the tabled list be the list tabled in only one House.

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

Relevant extract from the response from the Minister

I regret the delay in replying.

I acknowledge the point made in the Scrutiny of Bills Alert Digest No. 18 of 2000. It would undoubtedly have been better to have made reference in the bill to tabling in both Houses, but this was merely an oversight and does not reflect a trend towards tabling in the House alone.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

RECEIVED
27 APR 2001
Senate Standing C'ttee
for the Scrutiny of Bills

TREASURER

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23 APR 2001

Senator B. Cooney
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
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Dear Senator Cooney

EXCISE TARIFF AMENDMENT BILL (No.1) 2001 and CUSTOMS TARIFF AMENDMENT BILL (No.2) 2001

I am informed that the Senate Standing Committee for the Scrutiny of Bills has sought advice in relation to these Bills, I apologise for the delay in responding.

The Committee has noted that each of the proposed changes has been tabled as an Excise or Customs tariff proposal, and it is usual for such proposals to be introduced in legislation which operates retrospectively. The Committee has commented that while it is generally prepared to accept the need for some retrospectivity in these circumstances, there has been a delay of between 8 and 10 months in the introduction of these provisions. The Committee has commented that the Explanatory Memorandum in each case does not provide any explanation for this delay. The Committee, therefore, has sought advice as to the reason for the delay in incorporating these Tariff proposals in legislation in each case.

Section 114 of the *Excise Act 1901* and Section 224 of the *Customs Act 1901* are similar and relevantly provide that no legal proceedings against anything done for the protection of the revenue in relation to an excise tariff alteration (or customs tariff alteration) proposed in the Parliament shall be commenced before the close of the session in which that tariff alteration is proposed or before the expiration of 12 months after the alteration is proposed, whichever first occurs. By longstanding practice, these sections have been used as the underlying basis to allow collection of amounts of revenue in excess of (or for that matter, below) the duty rates imposed by the *Excise Tariff Act 1921* or the *Customs Tariff Act 1995* at any particular time where a tariff proposal has been introduced in the Parliament.

These provisions do not trespass unduly on the personal rights of licensed excise manufacturers or of importers. They in fact, set a period of time during which an existing course of action is barred. These sections are designed to prevent Courts from considering a matter for a certain time period until Parliament has had adequate opportunity to retrospectively authorise altered duty rates. If it does, then the matter retroactively disappears. Should the Parliament not pass ratifying legislation within the period specified, there is no barrier to the parties affected then exercising their legal rights.

In relation to timing of the measures, I note that "House of Representatives Practice" (1997 Edition; pp402-3) comments in relation to ratification of excise and tariff proposals:

"A customs tariff amendment bill or an excise tariff amendment bill, as the case may be, is usually introduced at an appropriate time to consolidate most of the outstanding proposals introduced into the House. These bills are retrospective in operation, in respect of each proposal, to the date on which collection commenced. "

In these circumstances, the length of the period between the introduction of the tariff proposal and the corresponding amendment bill is not defined. Moreover, it is not material to the timing of exercise of rights of excise manufacturers or importers affected by the altered rates in the proposal.

I trust these comments are of assistance to the Committee.

Yours sincerely

PETER COSTELLO

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

1 MAY 2001

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

Dear Senator Cooney

Alert Digest No. 4 of 2001 of the Senate Standing Committee for the Scrutiny of Bills discusses proposed new subsections 93A and 98A of the *Commonwealth Electoral Act 1918* (the CEA) which are contained in the Electoral and Referendum Amendment Bill (No. 1) 2001.

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

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

The Committee has advised that it:

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

The Committee seeks the Minister's advice as to:

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

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

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

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

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

The inclusion of the "contrary to the public interest" provision in these sections is meant to allow the AEC the ability to protect the integrity of the electoral process and ensure that it is not brought into disrepute. The electoral roll is not an appropriate forum for people to obtain free publicity for the cause they espouse or the businesses that they run. This is more appropriately done through advertising, the publicising of political platforms or the distribution of how-to-vote material. The roll, and the electoral process as whole, is not the appropriate place for people to be able to denigrate the actions of certain organisations and people.

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

The AEC's decisions have to be defensible:

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

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

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

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

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

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

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

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

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

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

Yours sincerely

ERIC ABETZ

The Hon. Philip Ruddock MP
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Senator B Cooney
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Senate Standing Committee for the Scrutiny of Bills
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18 APR 2001

Dear Senator Cooney

MIGRATION LEGISLATION AMENDMENT BILL (No. 1) 2001

I refer to the letter of 1 March 2001 from Mr James Warmenhoven, Secretary to the Committee, to my Senior Adviser referring to the comments contained in the Scrutiny of Bills Second Report of 2001 concerning the Migration Legislation Amendment Bill (No. 1) 2001 ("the Bill").

The Committee has sought my further advice as to whether the effect of the amendments to section 501A of the *Migration Act 1958* will be to disadvantage persons seeking review, and whether the amendments have been proposed in response to legal advice or judicial or tribunal comment.

I reiterate that these amendments do not represent a policy change from that which was considered by the Parliament during deliberation of the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (the Character Act). The amendments will remove possible uncertainties in the interpretation of section 501A and ensure that the Parliament's intent is given full effect in the legislation.

As currently drafted section 501A could be interpreted as implying that the Administrative Appeals Tribunal has the capacity to grant a visa. This is not the case, as the power to grant visas found at section 65 of the Migration Act is held only by the Minister and by those persons to whom the Minister has delegated that power.

The AAT does not have any power to make a decision to grant a visa. In the circumstances of section 501A it can only review a decision to refuse to grant a visa, or to cancel a visa, on character grounds.

The proposed amendments will not increase the discretion currently available to a Minister to over-turn decisions made by the AAT or a delegate that a person has passed the character test. Section 501A already provides that, where he or she believes it in the national interest, the Minister may set aside an AAT decision which is at odds with community standards and expectations.

The amendments proposed have been put forward on the basis of legal advice that it was not "beyond doubt" that the operation of section 501A intended by the Parliament has been achieved by its current construction.

Since introduction of this Bill the construction of section 501A has been given judicial consideration by the Federal Court.

In the case of LAM v Minister for Immigration and Multicultural Affairs [2000] FCA 1226 the Court favoured the construction put forward by my Counsel. In his judgement Justice Lehane commented that:

> *"24. The consequences of a literal interpretation (of section 501A) can, in my view, properly be described as absurd...*
> *25. The question is not easy, and it is one on which minds might well differ. In my view, the literal construction proposed by the applicant does indeed produce a result so absurd, and so at odds with the apparent object of the provision, that an available construction which would avoid those difficulties is to be preferred.... That, which is the sense for which the Minister contends, is the sense in which, in my view, the expression "a decision to grant a visa" may and should be read."*

Although this provides authority for future favourable judicial interpretation of section 501A I consider it appropriate for the Parliament to resolve any doubt about its operation through making the amendments proposed.

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

Yours sincerely

Philip Ruddock

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23 APR 2001

Senator Barney Cooney
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Dear Senator Cooney

I refer to the Scrutiny of Bills *Alert Digest No.4 of 2001* in which your Committee sought the Prime Minister's advice regarding whether the Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001 converts any offence which was not previously one of strict liability into a strict liability offence. The Prime Minister has asked me to reply on his behalf.

As noted in the *Alert Digest*, the Bill declares that a number of offences within the Prime Minister's portfolio are strict liability offences. I can confirm, on behalf of the Prime Minister, that the Bill is not intended to convert any offence which was not previously one of strict liability into a strict liability offence. It is considered that the offences in question are currently strict liability offences for the reasons set out below, and that the Bill simply preserves their current meaning and operation.

The effect of section 6.1 of the Criminal Code is that offence provisions must expressly state whether they create strict liability offences. In the absence of such a statement, the offence provision will be interpreted as requiring the prosecution to prove a fault element on the part of the defendant.

Few offence provisions in Commonwealth legislation, including the Prime Minister's portfolio legislation, comply with this section at present. As a result, officers of the Department of the Prime Minister and Cabinet needed to consider which, if any, offence provisions in the Prime Minister's portfolio legislation create strict liability offences. This process was carried out in consultation with the Attorney-General's Department and affected portfolio agencies.

It was not possible to locate any specific judicial consideration of the issue and the various Explanatory Memoranda for the offence provisions were silent on the point. The principles of interpretation used by the courts over time to identify strict liability offences have also been inconsistently developed and applied. The process of identifying any existing strict liability offences therefore necessarily involved an element of judgement.

As a starting point, officers of the Department noted the statements of Brennan J in *He Kaw Teh v R* (1985) 157 CLR 523 to the effect that a fault element is an essential element of every statutory offence unless it is excluded expressly or by necessary implication having regard to the language of the statute and its subject matter.

Officers of the Department also took into account a number of other factors.

First of all, they considered whether the offence provisions expressly provided for, or necessarily implied, a fault element. A fault element is a clear indication that an offence is not one of strict liability. None of the offence provisions in question expressly provided for a fault element. Some of the provisions made it an offence to 'refuse' to comply with notices, provide information or documents etc. It was noted that the word 'refuse' could be interpreted as implying some fault element but, having regard to other factors noted below, it was considered that the offences in question were intended to be ones of strict liability.

Secondly, they considered the size of the penalty for the offences. On the advice of the Attorney-General's Department, they took the view that strict liability principles would not ordinarily apply where an offence carries a penalty of more than 6 months' imprisonment. None of the offences in question carry a penalty of more than 6 months' imprisonment. Some of the offences in question are punishable by a pecuniary penalty only.

Thirdly, officers considered the presence of defences, particularly the defence of reasonable excuse. The presence of such a defence is one indication that the prosecution does not need to prove a fault element because they balance the public interest in the efficient prosecution of offences with the need to provide a defence for persons whose contravention of the offence is excusable. All bar one of the offences in question attracts a defence of reasonable excuse.

Last of all, officers considered the subject matter of the offences themselves. Each of the offences in question relates broadly to a failure to give evidence to a statutory officer or inquiry. It is considered that these types of broad regulatory offences are offences for which the application of strict liability is appropriate.

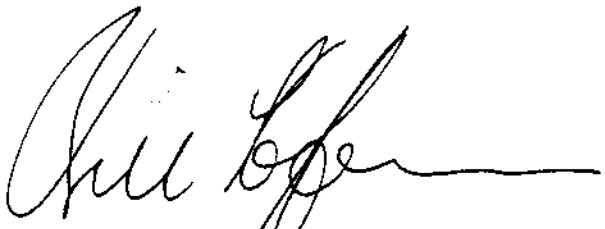
When these factors were considered together, it could be clearly inferred that the offences in question were currently strict liability offences.

The *Alert Digest* notes that the Explanatory Memorandum states that the Bill is intended to change some provisions so that they comply with the broader policy underlying the Code. This statement refers to other items of the Bill, such as those that ensure that the

prosecution bears the legal burden of proof in relation to certain defences. The statement does not refer to the items dealing with strict liability offences.

I hope that this advice clarifies the matter to the satisfaction of the Committee.

Yours sincerely



BILL HEFFERNAN

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

- 3 APR 2001

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

Dear Senator Cooney

On 7 December 2000, the Secretary to the Standing Committee for the Scrutiny of Bills wrote to my Senior Adviser seeking a response from me on a point about the then *Roads to Recovery* Bill. I regret the delay in replying.

I acknowledge the point made in the Scrutiny of Bills Alert Digest No.18 of 2000. It would undoubtedly have been better to have made reference in the Bill to tabling in both Houses, but this was merely an oversight and does not reflect a trend towards tabling in the House alone.

Yours sincerely

JOHN ANDERSON

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