SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

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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

NINTH REPORT OF 2001

The Committee presents its Ninth 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:

Administrative Review Tribunal Bill 2000

Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000

Copyright Amendment (Parallel Importation) Bill 2001

Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001
(previous citation: Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000

Financial Services Reform Bill 2001

Financial Services Reform (Consequential Provisions) Bill 2001

Great Barrier Marine Park Amendment Act 2001

New Business Tax System (Capital Allowances) Act 2001

Taxation Laws Amendment Bill (No. 2) 2001

Taxation Laws Amendment (Superannuation Contributions) Act 2001
(previous citation: Taxation Laws Amendment (Superannuation) Bill 2000)

Therapeutic Goods Amendment (Medical Devices) Bill 2001

Administrative Review Tribunal Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2000*, in which it made various comments.

The Attorney-General has responded to the Committee's comments in a letter dated 6 August 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

This bill was negatived in the Senate on 26 February 2001. However, several government amendments were made during debate on the bill in the House of Representatives on 8 December 2000 which addressed the concerns raised by the Committee.

Extract from Alert Digest No. 10 of 2000

This bill was introduced into the House of Representatives on 28 June 2000 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill seeks to give effect to a recommendation of the Administrative Review Council for the establishment of a single Commonwealth merits review tribunal. The bill proposes to establish a new Administrative Review Tribunal to replace the existing Administrative Appeals Tribunal, Social Security Appeals Tribunal, Migration Review Tribunal and Refugee Review Tribunal. The function of the new Tribunal will be to review administrative decisions on their merits.

The Tribunal will consist of a President, executive members, senior members and other members and will be constituted in Divisions. These Divisions are based on the jurisdictions of the existing specialist tribunals. This divisional structure is intended to ensure that the Tribunal retains the benefits of the specialist review tribunals, including the ability to develop flexible, cost-effective and non-legalistic procedures that are appropriate for, and tailored to, the types of decisions that they may review.

The bill also re-establishes the Administrative Review Council, which was originally established by the *Administrative Appeals Tribunal Act 1975*. The main functions of the Council will continue to be reviewing and monitoring developments in the Commonwealth administrative law system and making recommendations for improvements to the system.

Commencement
Subclause 2(3)

Subclause 2(2) of this bill states that Parts 4 to 10 (which deal with the review of decisions by the newly constituted Administrative Review Tribunal) are to commence on Proclamation. However this is qualified by subclause 2(3) which states that Parts 4 to 10 are to commence no later than 12 months after Assent.

This is a departure from the usual 6 month period referred to in *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel. That Drafting Instruction states that an explanation should be provided whenever a period longer than 6 months after assent is chosen.

The Explanatory Memorandum accompanying the bill restates the effect of subclauses 2(2) and (3) but provides no further explanation. In these circumstances, the Committee **seeks the advice of the Attorney-General** as to why this bill has departed from the approach to commencement set out in *Drafting Instruction No 2 of 1989*.

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

Relevant extract from the response from the Attorney-General

> In response to the Committee's concerns, subclause 2(3) of the ART Bill was amended in the House to provide that the default commencement date for Parts 4 to 10 of the ART Bill be 6 months rather than 12 months.

The Committee thanks the Attorney-General for this response, and for the amendment made in the House.

Wide power of delegation
Subclauses 50(1) and (4)

Subclause 50(1)

Subclause 50(1) of this bill permits the President of the new Administrative Review Tribunal to delegate "all or any of his or her powers and functions" under the Act (other than certain specified non-delegable powers and functions, and certain specified powers and functions that may only be delegated to an executive member). These powers may be delegated to "a member, the Chief Executive Officer, staff or a consultant".

On its face, this provision would seem to authorise broad powers and functions to be delegated to a wide class of potential recipients. The Explanatory Memorandum does not elaborate on the need for a provision of this width, but notes that, in exercising his or her powers and functions under the bill, whether delegable or not, the President is expected, where appropriate, to consult with relevant executive members and other members of the Tribunal.

A number of matters are not clear. For example, it is not clear whether this provision could enable the delegation of any decision-making or review powers. It is unclear whether staff or consultants who exercise delegated powers will have to comply with any of the requirements or duties imposed on the President, or will have to possess any of the qualifications or attributes required of the President. A delegation to 'staff or consultants' would seem to comprehend a possible exercise of power by virtually anyone in the organisation, including junior employees or consultants appointed for a short term.

Subclause 50(4)

Similar concerns arise in relation to the power of delegation under subclause 50(4). Under paragraph 65(1)(d), the executive member appointed to the Division within which a first-tier decision was made must decide whether or not to grant leave for review of that decision. Subclause 50(4) authorises executive members to delegate this power to another member appointed or assigned to the executive member's Division.

With regard to this provision, the Explanatory Memorandum states that the executive member is "expected to exercise great care" in deciding to whom to delegate this power, and that "it would rarely be appropriate to delegate the function to a member who constituted, or was part of, the Tribunal that made a first-tier decision in relation to which second-tier review is sought".

Arguably, the issue of a decision-maker possibly being invited to consider an application to review his or her own decision is a matter that should be addressed in the bill itself, rather than in the Explanatory Memorandum.

Committee concerns

Given the apparent breadth of the powers that might be delegated under subsection 50(1), and the apparent width of the class of potential delegates, the Committee **seeks the advice of the Attorney-General** as to whether any decision-making or review powers might be delegated under the bill, and why the class of potential delegates should not be limited in some way.

Given the possibility that a decision-maker may be delegated to consider an application to review his or her own decision under subsection 50(4), the Committee **seeks the advice of the Attorney-General** as to why the appropriateness of this possibility is not dealt with in the bill itself.

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

Subclause 50(1) of the ART Bill and proposed new subsection 378A(4) of the Migration Act (Schedule 14, item 195 of the ART (CTP) Bill)

The Committee expressed concern that subclause 50(1) of the ART Bill, and the proposed new subsection 378A(4) of the Migration Act 1954, might allow for the delegation of 'decision-making or review powers'.

Given the nature of the powers that are expressly non-delegable, or only delegable to executive members (see subclauses 50(2) and (3)), and the location of the clause in Part 3 of the Bill (which is about the 'Administration of the Tribunal'), it is likely that clause 50 would be interpreted as providing for the delegation of administrative powers and functions only. However, to avoid doubt, a new subclause 50(1A) was inserted in the House. This new subclause provides that the powers and functions that the President may delegate under subclause (1) do not include powers and functions that the President has in his or her capacity as a member of the Tribunal constituted under:

- Division 2 of Part 5 (which is about the constitution of the Tribunal for the purpose of reviewing a decision); or

- clause 163 (which, among other things, applies Division 2 of Part 5 to the performance of related Tribunal functions).

A corresponding amendment to the ART (CTP) Bill amended proposed new subsection 378A(4) of the Migration Act to the same effect.

Subclause 50(1) of the ART Bill and proposed new subsections 378A(1) and (2) of the Migration Act (Schedule 14, item 195 of the ART (CTP) Bill

The Committee expressed concern about the width of the class of persons to whom the President or executive member may delegate their functions and powers under subclause 50(1) of the ART Bill and the proposed new subsections 378A(1) and (2) of the Migration Act.

Subclause 50(1) was amended in the House to exclude consultants from the class of persons to whom the President may delegate his or her powers and functions. A corresponding amendment to the ART (CTP) Bill amended new subsection 378A(1) of the Migration Act to the same effect.

Subclause 50(4) and paragraph 65(1)(d) of the ART Bill

Subclause 50(4) previously provided that an executive member may delegate the power to determine whether to grant leave for a second-tier review to a member appointed or assigned to the executive member's Division. The explanatory memorandum to the Bill noted (at paragraph 132) that executive members were expected to exercise great care in deciding to whom to delegate this power, and that 'it would rarely be appropriate to delegate the function to a member who constituted, or was part of, the Tribunal that made a first-tier decision in relation to which second-tier review is sought'.

The Committee suggested that the appropriateness of such a delegation should be dealt with in the Bill itself. Subclause 50(4) has been amended so as to preclude an executive member from delegating his or her power under paragraph 65(1)(d) to a member who was a member of the Tribunal at any stage during the conduct of the review of the first-tier decision in relation to which second-tier review is sought.

The Committee thanks the Attorney-General for this response and for the amendments made in the House.

Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2000*, in which it made various comments.

The Attorney-General has responded to the Committee's comments in a letter dated 6 August 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

This bill was negatived in the Senate on 26 February 2001. However, several government amendments were made during debate in the House of Representatives on 8 December 2000 which addressed the concerns raised by the Committee.

Extract from Alert Digest No. 15 of 2000

This bill was introduced into the House of Representatives on 12 October 2000 by the Attorney-General. [Portfolio responsibility: Attorney-General]

Consequent upon the introduction of the Administrative Review Tribunal Bill 2000, this bill proposes consequential and transitional amendments to Acts that confer jurisdiction on the Administrative Appeals Tribunal (AAT), the Social Security Appeals Tribunal (SSAT), the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT). Jurisdiction to review decisions is currently conferred on these tribunals by various Acts. This bill amends these Acts so that they confer jurisdiction on the new Tribunal.

The bill contains 18 Schedules. Schedule 1 amends 179 Acts to replace references to the AAT with references to the proposed Administrative Review Tribunal (ART).

Schedule 2 amends 135 Acts to replace references to the *Administrative Appeals Tribunal Act 1975* (*AAT Act*) with references to the ART Bill.

Schedule 3 makes consequential amendments to various Acts to take account of differences between the legislation providing for review by the existing tribunals and the ART Bill.

Schedule 4 makes consequential amendments to the *Australian Security Intelligence Organisation Act 1979*, and Schedule 5 adds a new Schedule to that Act which sets out modifications of the ART Bill applicable for the purposes of review of security assessments made under that Act.

Schedule 6 makes consequential amendments to the *Taxation Administration Act 1953*, and Schedule 7 adds a new Schedule to that Act which sets out modifications of the ART Bill applicable for the purposes of review of certain decisions made under that Act.

Schedule 8 makes consequential amendments to the *Veterans' Entitlements Act 1986*, and Schedule 9 adds a new Schedule to that Act which sets out modifications of the ART Bill applicable for the purposes of review of certain decisions made under that Act.

Schedule 10 makes consequential amendments to the *Social Security Act 1991* and the *Social Security (Administration) Act 1999*, and Schedule 11 replaces Schedule 3 to the Social Security (Administration) Act with a new Schedule which sets out modifications of the ART Bill applicable for the purposes of review of certain decisions made under that Act.

Schedule 12 makes consequential amendments to the *A New Tax System (Family Assistance) (Administration) Act 1999*, and Schedule 13 adds a new Schedule to that Act which sets out modifications of the ART Bill applicable for the purposes of review of certain decisions made under that Act.

Schedule 14 makes consequential amendments to the *Migration Act 1958*, the *Australian Citizenship Act 1948* and the *Immigration (Guardianship of Children) Act 1946*.

Transitional provisions are set out in Schedule 15 (which provides for the transition from the AAT to the ART); Schedule 16 (which provides for the transition from the MRT and RRT to the ART); and Schedule 17 (which provides for the transition from the SSAT to the ART).

Schedule 18 amends the *Federal Court of Australia Act 1976* in its application to certain specified matters coming before the Federal Court from a tribunal or authority (other than a court) constituted by, or including amongst its members, a judge.

Henry VIII clause
Paragraph 6(1)(a)

Paragraph 6(1)(a) of this bill will permit the making of regulations which amend primary legislation. This is clearly a delegation of legislative power and is usually a matter of concern to the Committee.

In the case of this provision, the Explanatory Memorandum observes that it will "ensure that any necessary consequential amendments that are inadvertently not provided for in the bill can be made without the need for the enactment of another Act".

The Committee appreciates the possibility that the bill may have inadvertently overlooked, for example, a reference to the Administrative Appeals Tribunal in another Act, and that that other Act may subsequently need to be amended.

However, the Committee notes that this bill deals with more than such technical matters. It makes substantive amendments to a number of other Acts (including the *Australian Security Intelligence Organisation Act 1979*, the *Taxation Administration Act 1953*, the *Social Security Act 1991*, the *Veterans' Entitlements Act 1986*, the *A New Tax System (Family Assistance) (Administration) Act 1999* and the *Migration Act 1958*. These amendments modify the ART Bill as it applies for the purposes of review of certain decisions made under those Acts.

The Committee would be concerned if paragraph 6(1)(a) could be used to authorise regulations to further modify the application of the ART Bill in relation to these (or other) Acts.

The Committee notes that the previous practice of making minor or technical amendments in Statute Law (Miscellaneous Provisions) Acts is no longer pursued following concerns that such omnibus bills might be used to make non-technical or substantive amendments.

In principle, subordinate legislation should not be permitted to amend primary legislation. The Committee, therefore, **seeks the advice of the Attorney-General** as to how the operation of paragraph 6(1)(a) can be restricted to effect changes of only a minor or technical nature.

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

Relevant extract from the response from the Attorney-General

The Committee sought my advice as to whether the operation of paragraph 6(1)(a) of the ART (CTP) Bill can be restricted to effect changes of only a minor or technical nature.

A power to make regulations that can amend Acts is required so that any necessary consequential amendments that are inadvertently not provided for in this Bill can be made without the need for the enactment of another Act.

As noted in paragraph 15 of the explanatory memorandum to the Bill, similar provision was made by subsection 14(5) of the *Public Employment (Consequential and Transitional) Amendment Act 1999* (the cognate Act to the *Public Service Act 1999)* which, like the ART (CTP) Bill, made amendments to a very large number of Acts.

The power in clause 6 is expressly restricted to the making of regulations that:

- make amendments consequential on the enactment of the ART Bill and the repeals and amendments made by the Schedules to the ART (CTP) Bill; or

- are of a transitional or saving nature arising from the transition from the *Administrative Appeals Tribunal Act 1975* to the ART Bill or from the repeals and amendments made by the Schedules to the ART (CTP) Bill, or by consequential regulations.

The regulation-making power in paragraph 6(1)(a) is already restrictive and can only be used to effect minor and technical changes.

I trust that the above advice is of assistance to the Committee.

The Committee thanks the Attorney-General for this response which indicates that the power to make regulations which may amend the primary Act is restricted to regulations which are consequential or transitional in nature.

While this is a convenient method for making such technical amendments, the Committee remains concerned wherever subordinate legislation is permitted to amend primary legislation. It would be wrong if the approach adopted in this bill were to become a more widely accepted practice.

Wide power of delegation
Schedule 14, item 195

Item 195 of Schedule 14 to this bill proposes to insert new section 378A in the *Migration Act 1958*. This section will grant the President and the IRD executive member of the new Administrative Review Tribunal the power to delegate all or any of their powers and functions under Part 5 of the Act to an IRD member, the Chief Executive Officer, staff or a consultant.

In *Alert Digest No 10. of 2000*, the Committee considered a power of delegation in subclauses 50(1) and (4) of the Administrative Review Tribunal Bill 2000. This power, which was expressed in similar terms to proposed new section 378A, raised a number of issues which are also relevant to this section.

First, the Committee notes proposed new subsection 378A(3), which contains a limitation on the delegation of any power to give directions. Notwithstanding this, it is not clear whether proposed new section 378A enables the delegation of any decision-making or review powers. If such powers may be delegated, it is not clear what restrictions are placed on the ability to delegate. For example, it is not clear whether the IRD executive member may delegate his or her power to grant leave for review of a decision, and, if so, whether that power may be delegated to the ART member who actually made that decision.

Secondly, it is unclear whether staff or consultants who exercise delegated powers will have to comply with any of the requirements or duties imposed on the President or IRD executive member, or will have to possess any of the qualifications or attributes required of those office-holders.

Thirdly, a delegation to 'staff or consultants' would seem to comprehend a possible exercise of power by virtually anyone in the organisation, including junior employees or consultants appointed for a short term.

Given the apparent breadth of the powers that might be delegated under proposed new section 378A of the *Migration Act 1958*, and the apparent width of the class of potential delegates, the Committee **seeks the advice of the Attorney-General** as to whether any decision-making or review powers or powers to grant leave to review might be delegated under this provision, and why the class of potential delegates should not be limited in some way.

Pending the Attorney's advice, the Committee draws Senators' attention to this provision, as it 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 Attorney-General

Subclause 50(1) of the ART Bill and proposed new subsection 378A(4) of the Migration Act (Schedule 14, item 195 of the ART (CTP) Bill)

The Committee expressed concern that subclause 50(1) of the ART Bill, and the proposed new subsection 378A(4) of the Migration Act 1954, might allow for the delegation of 'decision-making or review powers'.

Given the nature of the powers that are expressly non-delegable, or only delegable to executive members (see subclauses 50(2) and (3)), and the location of the clause in Part 3 of the Bill (which is about the 'Administration of the Tribunal'), it is likely that clause 50 would be interpreted as providing for the delegation of administrative powers and functions only. However, to avoid doubt, a new subclause 50(1A) was inserted in the House. This new subclause provides that the powers and functions that the President may delegate under subclause (1) do not include powers and functions that the President has in his or her capacity as a member of the Tribunal constituted under:

- Division 2 of Part 5 (which is about the constitution of the Tribunal for the purpose of reviewing a decision); or
- clause 163 (which, among other things, applies Division 2 of Part 5 to the performance of related Tribunal functions).

A corresponding amendment to the ART (CTP) Bill amended proposed new subsection 378A(4) of the Migration Act to the same effect.

Subclause 50(1) of the ART Bill and proposed new subsections 378A(1) and (2) of the Migration Act (Schedule 14, item 195 of the ART (CTP) Bill

The Committee expressed concern about the width of the class of persons to whom the President or executive member may delegate their functions and powers under subclause 50(1) of the ART Bill and the proposed new subsections 378A(1) and (2) of the Migration Act.

Subclause 50(1) was amended in the House to exclude consultants from the class of persons to whom the President may delegate his or her powers and functions. A corresponding amendment to the ART (CTP) Bill amended new subsection 378A(1) of the Migration Act to the same effect.

The Committee thanks the Attorney-General for this response and for the amendments made in the House.

Copyright Amendment (Parallel Importation) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2001*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 14 May 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 3 of 2001

This bill was introduced into the House of Representatives on 28 February 2001 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Copyright Act 1968* to enable parallel importation and subsequent commercial distribution of computer software products, including interactive computer games, books, periodical publications (such as journals and magazines) and sheet music.

The bill includes provisions to:

- ensure that copyright owners are not disadvantaged in bringing infringement actions in relation to parallel imported material;
- ensure that trademark assignments cannot be used to defeat the parallel importation that would otherwise be permitted in relation to computer products, sound recordings and books and related items; and
- make minor amendments and corrections in relation to the communication to the public of works and other subject matter using electronic networks.

The bill also proposes amendments designed to overcome errors or misdescriptions arising from amendments made in the *Copyright Amendment (Digital Agenda) Act 2000*.

Commencement
Subclause 2(2)

Schedule 2 to this bill makes provision for the parallel importation of books, periodicals and sheet music. Subclause 2(2) permits the amendments made in this Schedule to commence 12 months after Assent.

This is a departure from the practice set out in *Drafting Instruction No. 2 of 1989* issued by the Office of Parliamentary Counsel. This provides that, as a general rule, where a clause provides for commencement after assent, the preferred period should not be longer than 6 months. The *Drafting Instruction* goes on to state that, where a longer period is chosen "Departments should explain the reason for this in the Explanatory Memorandum".

The Explanatory Memorandum accompanying this bill provides no explanation for the adoption of a longer period for the commencement of the relevant provisions in Schedule 2. The Committee, therefore, **seeks the Minister's advice** as to why these provisions may not commence until 12 months after Assent.

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

Relevant extract from the response from the Attorney-General

> The Committee asks my advice as to the reason for including a provision in the Bill that would delay commencement of Schedule 2 for one year after the Bill receives Royal Assent. The amendments set out in Schedule 2 would allow the parallel importation of printed books, periodical publications and sheet music. This would be a significant change to the current position where, in general, the parallel importation of books from abroad is permitted only where there is a failure to meet availability deadlines after the book is published. Recognising the importance of these amendments for the publishing industry, the Intellectual Property and Competition Review Committee in its 'Review of intellectual property legislation under the Competition Principles Agreement' recommended that Australian publishers be given a one-year transition period to assist them to understand and adjust to the new legal environment in which they will be operating. In particular, the Committee considered it important that the publishing industry be given time for contractual arrangements to be reviewed. The Government accepts that recommendation.
>
> I do not consider that the proposed one-year delay to the commencement of Schedule 2 is excessive. You may recall that the commencement of certain amendments contained in the *Copyright Amendment Act (No. 1) 1998* was delayed for 18 months for the similar purpose of giving business time to adjust to changes to copyright law dealing with parallel importation. Those amendments restricted the

right of copyright owners to control parallel imports by means of copyright material included in the packaging and labelling of imported goods.

I thank the Committee for its examination of the Bill and hope my response provides the clarification requested.

The Committee thanks the Attorney-General for this response.

Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001

(previous citation: Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 1 of 2001*, in which it made various comments. The Minister for Justice and Customs responded to those comments in a letter dated 26 March 2001.

In its *Fourth Report of 2001*, the Committee sought further advice regarding the status of Customs guidelines and whether 'stale' infringement notices would be removed from the record after a period of time. The Minister further responded in a letter dated 8 June 2001.

In its *Seventh Report of 2001*, the Committee sought further advice as to whether proposed Customs guidelines would be purely administrative in character and whether any guidelines or standards would be issued covering the use that may be made of infringement notices both during and after the 10 year period.

The Minister has further responded in a letter dated 7 August 2001. Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 20 July 2001), 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 *Seventh Report of 2001* and relevant parts of the Minister's response are discussed below.

Extract from Seventh Report of 2001

This bill was introduced into the House of Representatives on 6 December 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Justice and Customs]

Part of a package of three bills in relation to the management and processing of cargo, the bill proposes to amend the *Customs Act 1901* and *Customs Administration Act 1985* to modernise the way in which Customs manages the movement of cargo into and out of Australia.

The bill creates the legal framework for an electronic business environment for cargo management; establishes a new approach to compliance management that recognises that 'one size doesn't fit all'; and improves controls over cargo and its movement where there has been a failure to comply with regulatory requirements.

The bill also repeals the *Import Processing Charges Act 1997*.

Search and entry provisions
Proposed new Subdivision J of Division 1 of Part XII

Part 5 of Schedule 1 to the bill inserts a number of provisions which repeal the existing 'audit' powers in the Customs Act, and replaces them with new 'monitoring powers'. In his Second Reading Speech, the Minister observes that these provisions "have been drafted in accordance with the Fourth Report of the Senate Standing Committee for the Scrutiny of Bills dated 6 April 2000 which examined entry and search provisions in Commonwealth legislation".

Specifically the bill provides that:

- only Customs officers authorised by the CEO will be able to exercise the powers of monitoring officers, and such officers must be suitably qualified and have the ability and experience to exercise those powers (proposed subsection 214AC(2));
- authorised officers must carry an identity card at all times while exercising monitoring powers (proposed section 4C)
- the primary means of entry to premises for monitoring purposes is through consent, which must be given and withdrawn in writing (proposed section 214AE);
- entry may also be pursuant to a warrant issued by a magistrate (proposed section 214AF);
- a monitoring officer may give an occupier notice of intended entry, but this is optional (proposed section 214AD);
- a monitoring officer may ask an occupier who has consented to entry to answer questions or provide reasonable assistance – a refusal will not constitute an offence (proposed subsections 214AH(1) and 214AI(1));
- a monitoring officer who enters premises under warrant may require an occupier to answer questions and provide reasonable assistance – a refusal will be an offence of strict liability (proposed subsections 214AH(2) and 214AI(3) and (4));

- the powers exercisable by monitoring officers include:
- the current power to inspect and make copies of documents, as well as 'records';
- the power to inspect, examine, count, measure, weigh, gauge, test or analyse, and take samples;
- the power to take equipment or material on to premises;
- the power to undertake systems audits to check the ability of computer-based system to accurately generate or record information or documents;
- the power to operate electronic equipment used to store records and documents used in the communication of information to Customs and to copy relevant records and documents; and
- the power to search premises.

- in entering premises and exercising monitoring powers, an officer may use such force as is necessary and reasonable in the circumstances, but only against things – there is no power to use force against persons (proposed subsection 214AC(3))
- where a monitoring officer finds evidence of the commission of a Customs-related offence, that officer has the power to secure that evidence until a warrant to seize can be obtained – the power to secure evidence lapses after 72 hours if a warrant to seize has not been obtained; and
- Customs must pay reasonable compensation where damage is caused to equipment or data as a result of carelessness in its operation of that equipment.

The Committee notes that many of these changes draw on principles set out in its *Fourth Report of 2000*, and thanks the Minister for having regard to those principles. However, some principles do not seem to have been addressed in the bill. The Committee, therefore, **seeks Minister's advice** as to whether the legislation or operational procedures should provide for:

- an occupier to be informed of his or her rights and responsibilities, and given an opportunity to have independent third party present, where a search occurs under warrant;
- the situation of officers exercising monitoring powers and finding evidence of an offence that is not a Customs-related offence; and
- whether Customs intends reporting annually to the Parliament on the exercise of its monitoring powers.

Relevant extract from the response from the Minister dated 26 March 2001

Rights and responsibilities under a monitoring warrant

The Committee asked whether the legislation or operational procedures should provide for an occupier to be informed of his or her rights and responsibilities and given an opportunity to have an independent third party present, where a search occurs under a warrant.

The Bill proposes two methods for monitoring compliance - either with the consent of the occupier or under a 'monitoring warrant'. The preferred means of entry is with the consent of the occupier. Under the Government's policy in respect of criminal law matters, 'monitoring warrants' have traditionally been employed where search powers are primarily necessary to monitor compliance with legislative requirements, rather than for the investigation of a specific offence.

The monitoring powers proposed are for the purpose of assessing compliance with Australian Customs Service (Customs)-related laws, the correctness of information communicated to Customs, and whether the record keeping, accounting and computing systems accurately record or generate that information. The power to search is included in the monitoring powers in accordance with similar schemes in Commonwealth legislation. It might be necessary to exercise this power, for example, to search for documents or records on the premises that relate to the communication of information to Customs.

It is proposed that an occupier would not be prevented from having a third party present during a search of premises if requested. This principle would apply whether monitoring powers are exercised with the consent of the occupier or under a warrant. This approach reflects Customs current practice.

Customs is currently developing guidelines on the administrative aspects of the exercise of monitoring powers proposed in the Bill. The purpose of the guidelines is to provide a framework for Customs officers to administer specific elements of the legislation. The guidelines will include informing occupiers of their rights and responsibilities, regardless of whether the monitoring powers are exercised with the consent of the occupier or under a monitoring warrant. Rights such as the privilege against self-incrimination would be included in this notification.

Evidence of an offence that is not a Customs-related law

The Committee has sought advice on the situation of officers exercising monitoring powers and finding evidence of an offence that is not a Customs-related offence.

While the purpose of exercising monitoring powers is to assess compliance in a self-assessment environment with Customs-related laws, a monitoring officer may find a thing that the officer believes on reasonable grounds affords evidence of the commission of an offence against a Customs-related law and may be lost, destroyed or tampered with. In such circumstances, monitoring officers will be able to secure evidence of the commission of an offence against a Customs-related law for 72 hours or until a seizure warrant is obtained.

Customs-related law is defined in new section 4B (item 11 of Schedule 1 of the Bill) to include the *Customs Act 1901* (the Customs Act), the *Excise Act 1901* and any

other Act, or regulations in so far as they relate to the importation or exportation of goods, where the importation or exportation is subject to compliance with any condition or restriction or is subject to any tax, duty, levy or charge (however described). This broad definition of Customs-related law acknowledges that Customs performs import and export related compliance monitoring on behalf of other Commonwealth agencies, such as the Australian Quarantine and Inspection Service (AQIS), the Australian Taxation Office (ATO) and other permit issuing agencies.

Where a monitoring officer finds evidence of the commission of an offence against a law that is *not* a Customs-related law the monitoring officer may inform another relevant agency, usually the police. Customs officers are permitted to disclose this type of information to other agencies under section 16 of the *Customs Administration Act 1985*.

Reporting to the Parliament

The Committee has sought advice on whether Customs intends reporting annually to the Parliament on the exercise of its monitoring powers.

It is proposed to continue the current practice of reporting statistical information on the result of compliance activities undertaken by Customs in the Annual Report of the Australian Customs Service. This information is reported quantitatively.

The Committee thanks the Minister for this response and notes that Customs is currently developing guidelines which, among other things, are to make provision for informing occupiers of their rights and responsibilities. While the development of such guidelines is important, they would seem to be essentially administrative documents, and their scope and legal effect is unclear.

For example, if the guidelines as issued fail to provide that occupiers be informed of their rights and responsibilities, or if such a provision were included but later removed from the guidelines, it is unclear what effect this would have on the rights of occupiers. The remedies available to an occupier if Customs officers fail to observe such a guideline are also unclear, as is whether the guidelines are to be tabled in the Parliament, or disallowable, or otherwise made publicly available for scrutiny.

Rights and liberties are too significant to be left to administrative documents. The Committee, therefore, **seeks the Minister's further advice** as to the status of the Customs guidelines, and why information about the rights and responsibilities of occupiers when their premises are to be searched should not be dealt with in the bill itself rather than in guidelines.

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 8 June 2001

The Committee has sought my advice as to the status of Customs guidelines for administering monitoring powers and why information about the rights and responsibilities of occupiers when their premises are to be searched should not be dealt with in the Bill itself rather than in the guidelines.

When performing a function or exercising a power under a law of Customs, officers of the Australian Customs Service are subject to the directions of the Chief Executive Officer of Customs (the CEO) pursuant to subsection 4(4) of the *Customs Administration Act 1985*. The guidelines being developed for the administration of the monitoring powers proposed in the Bill will be approved by the CEO and have the status of directions under that provision. Any failure to comply with such directions would render the officer in breach of the Australian Public Service Code of Conduct as set out in section 13 of the *Public Service Act 1999* and subject to disciplinary action under section 15 of that Act.

While it is intended that the guidelines be publicly available, they will not be disallowable instruments. As well as the provision of information about rights and responsibilities, the guidelines will cover purely administrative matters, such as the internal Customs process to be followed before applying for a monitoring warrant, the classification of officers who should apply for monitoring warrants and procedures for obtaining informed consent to exercise monitoring powers where a warrant is not considered appropriate. These administrative matters are not of a kind that would warrant the parliamentary scrutiny required of disallowable instruments.

I note, however, the Committee's concerns in relation to non-compliance with the direction in the guidelines to inform an occupier of premises of their rights during the exercise of monitoring powers. While the Government considers that the rights of the occupier under the monitoring powers provisions would be unaffected by a failure to notify of their existence, we acknowledge that a failure to notify may result in a person acting in a way that is not in their own interests because he or she does not know that those rights exist.

To address this possibility, I propose to move Government amendments to the Bill to require monitoring officers to inform occupiers of premises of their rights and responsibilities under new Subdivision J of Division 1 of Part XII of the *Customs Act 1901* (the Act) before seeking consent to enter premises and exercise monitoring powers or entering premises under a monitoring warrant.

The Committee thanks the Minister for this further response and for the amendment foreshadowed, which takes account of one the most important recommendations made by the Committee in its *Fourth Report of 2000* and which greatly advances the protection of rights in these circumstances.

In his response, the Minister notes that the proposed Customs guidelines will cover administrative matters (such as internal procedures to be followed before applying for a warrant) as well as other matters. Guidelines which cover matters which are purely administrative in nature are often not subject to parliamentary scrutiny. However, guidelines which are quasi-legislative in character are usually subject to parliamentary scrutiny.

The Committee **would appreciate the Minister's further advice** as to whether the proposed Customs guidelines will be purely administrative in character, and, if not, whether any quasi-legislative guidelines might be issued separately, be tabled and be subject to parliamentary scrutiny.

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

Relevant extract from the further response from the Minister dated 7 August 2001

I am writing in response to additional matters, relating to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act* 2001 [previously the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001 (the Bill)] raised by the Senate Standing Committee for the Scrutiny of Bills in its Seventh Report of 2001.

The Committee has sought my further advice on whether the guidelines for the monitoring powers will be purely administrative in character. Since the Committee considered the Bill, the Government agreed to amend it to require the Australian Customs Service (Customs) to formally notify occupiers of premises of their rights and obligations before monitoring powers exercised on those premises. I consider, in light of this, there is no longer any need for guidelines to be tabled in Parliament as the notification to occupiers will have the same effect. Manuals for Customs officers will be amended to address the administration process.

The Committee thanks the Minister for this further response and acknowledges the amendment to provide that occupiers be notified of their rights and obligations before monitoring powers are exercised on their premises. This greatly advances the protection of rights and the Committee would value the Minister's support in encouraging the more widespread adoption of such a protection.

However, while the right to be notified is dealt with in the Act itself, many other aspects of the exercise of entry powers will be dealt with in guidelines. It remains unclear whether these guidelines will be purely administrative, or may be quasi-legislative, in character, and to what extent they will be subject to parliamentary scrutiny.

Strict liability offences
Proposed new sections 243SA, 243SB, 243T, 243U and 243V

Item 5 of Schedule 2 to the bill proposes to insert in the *Customs Act 1901* new sections 243SA (which deals with the failure to answer questions), 243SB (which deals with the failure to produce books and records), 243T (which deals with making false or misleading statements resulting in the loss of duty), 243U (which deals with false or misleading statements not resulting in the loss of duty) and 243V (which deals with false or misleading statements in cargo reports or outturn reports).

In each case, these new sections create offences of strict liability. Under a strict liability offence, a person may be punished for doing something, or failing to do something, whether or not they have a guilty intent.

These strict liability offences are accompanied by a penalty regime which introduces the option of issuing an infringement notice, to the value of 20% of the penalty that would have been payable if a prosecution had been commenced. Payment of this penalty extinguishes Customs' right to prosecute. However, prosecutions may be commenced where Customs believes it can be proved that a person intended to breach the law.

The Explanatory Memorandum seeks to justify this approach in the following terms:

[T]he mischief intended to be addressed in the legislation is (for the most part) either the late or inaccurate reporting of information to Customs. If this information is received either late or inaccurately, Customs cannot perform its community service obligations of analysing information about incoming cargo so as to ensure that prohibited goods such as drugs are kept out of the country, or that the correct amount of duty and taxes is paid as a result of the importation or export-

ation of goods. The intention of the communicator is therefore irrelevant. The critical outcome is the quality of the information …

As the offences can be characterised as being technical or regulatory in nature, it is appropriate in the circumstances for there to be an infringement notice/strict liability penalty regime in place.

Where a person is charged with a strict liability offence, the prosecution does not have to prove intent. This invites consideration of the defences available to those charged with such offences. At common law, there is a defence of honest and reasonable mistake of fact. The Criminal Code makes available defences such as mistake of fact, intervening conduct or event, duress, sudden or extraordinary emergency and self-defence.

In addition to these defences, the bill provides two further defences where a person is charged with an offence under proposed section 243T (false or misleading statements resulting in the loss of duty). These additional defences are:

- voluntary disclosure of false or misleading statements – where this occurs before the issue of a monitoring notice, and is made in writing, and where any additional duty is paid or any refund or drawback is repaid; and

- genuine uncertainty as to the accuracy or completeness of the information included in a statement made to Customs which has duty implications (this defence is in similar terms to the existing section 234V in the *Customs Act 1901*) – the Explanatory Memorandum states that this defence acknowledges that "sometimes not all relevant information in relation to goods is available" to owners or their agents and where the doubtful or incomplete information is identified, and reasons given for the uncertainty, no penalty should apply.

The defence of voluntary disclosure is also made available to a person charged with an offence under proposed section 243U (false or misleading statements not resulting in a loss of duty), but not the defence of genuine uncertainty. The Explanatory Memorandum notes that strict liability has been introduced in this situation "to improve the quality of information received by Customs. This data is used for trade statistics and border control purposes and any inaccuracy in that data impinges on Customs' ability to perform its functions in these areas effectively".

No further specific defences are made available to a person charged with making false or misleading statements in cargo reports or outturn reports (under proposed section 243V).

The Committee recognises that creating offences of strict liability may be acceptable in some circumstances. However, it is not clear why a failure to answer questions or produce records should be a strict liability offence in a Customs context, when it is not a strict liability offence in many other similar contexts (see for example, *Agricultural and Veterinary Chemicals Code 1994* s 144; *Industrial Chemicals (Notification and Assessment) Act 1989* s 88; *Health Insurance Commission Act 1973* s 8R).

In creating these strict liability offences (which, arguably, impose greater burdens on persons charged) it is also not clear whether the substantive penalties have been reviewed for the offences when prosecuted. In this regard, the Committee draws attention to its *Eighth Report of 1998* which dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information.

In addition, it is not clear why the defence of genuine uncertainty should be applicable to statements which result in a loss of duty, but not to statements which result in no loss of duty, or to statements in cargo or outturn reports.

Finally, where a matter is dealt with under the infringement notice scheme, it is not clear whether an offence will be recorded against the person concerned. The Committee, therefore, **seeks the Minister's advice** on these four issues.

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 dated 26 March 2001

Strict liability

The Committee has sought further explanation as to why failure to answer questions or produce records should be strict liability offences in a Customs context.

Strict liability offence regimes are common across jurisdictions to encourage compliance with regulatory requirements ranging from speeding offences to not being able to substantiate entitlement to diesel fuel rebate. The approach in this Bill reflects overall Government policy on strict liability. Strict liability is a deliberate (and necessary) policy to catch inadvertent errors, because otherwise the self-assessment regime would be seriously undermined by people failing to take sufficient care. In accordance with criminal law policy, the penalties for these offences are relatively modest.

While the conduct that is the subject of each offence may not appear significant when viewed in isolation, there are significant consequences for the community where the regulatory framework is breached. There is significant risk to revenue if imports or exports are inaccurately reported, as well as to the community if prohibited imports such as narcotics and weapons are not stopped at the border. The proposed controls and sanctions are designed around early identification and intervention of high-risk cargo.

The Government believes that these risks, that is the risk to the community and to the revenue, justify the introduction of strict liability offences for breaches of the regulatory mechanisms designed to reduce those risks.

Strict liability offences also lend themselves to using infringement notices to impose a lesser penalty administratively rather than prosecuting in court in the first instance. Infringement notices are justified by the efficiency and cost savings they provide and as low-key means of applying sanctions to unacceptable performance.

Failure to answer questions

Customs uses risk assessment to fulfil its border protection and revenue collection responsibilities. The information provided to Customs is the basis of the risk assessment. Failure to provide information affects a Customs officer's ability to conduct a proper risk assessment, in the same way that false or misleading information also impedes proper risk assessment. Consequently, inaccurate risk assessments can allow prohibited imports, such as narcotics and weapons into the community. Risk assessments in 'real time' audits are especially important, where risk assessment is conducted immediately the cargo arrives. Delays in the risk assessment can hinder the release of cargo.

While the Committee has provided examples of offences for failure to answer questions that are not offences of strict liability, there are also examples of strict liability offences in Commonwealth legislation for failing to answer questions. In section 70A of the *Quarantine Act 1908* a quarantine officer may ask questions where the officer is searching, examining or entitled to search or examine goods. The context of the Quarantine offence is similar to the Customs context - that is the search and examination of goods in a controlled environment. The *Trade Marks Act 1995* also has a strict liability offence for failing to answer questions that a person is lawfully required to answer (section 154 refers).

It also should be noted that when questions are asked during the exercise of monitoring powers, the Bill proposes that there will be only a strict liability offence for failing to answer a question put to a person where the monitoring officer enters those premises under a monitoring warrant.

Where a monitoring officer enters premises with the *consent* of the occupier, the occupier is not obliged to answer any questions put to them by the monitoring officer. A person who is asked a question they are required to answer may exercise their privilege against self-incrimination.

Failure to produce documents or records

The reporting of information to Customs is primarily done electronically. To assess the correctness of information communicated by, or on behalf of, a person to Customs it is necessary for Customs to be able to examine the documents or records

that formed the basis of information supplied to Customs. While Customs assesses compliance by both 'real time' and post transaction audits, access to source documents and records is especially important in post transaction audits where information provided is treated, at first instance, as true and correct. The strict liability offence for failing to produce records is necessary to underpin Customs self-assessment regime.

There are strict liability offences in other Commonwealth legislation for failing to produce documents or records. In section 50 of the *Excise Act 1901,* manufacturers must keep records and on demand produce them to the requesting officer. In section 164AC of the Customs Act failure to produce records where there is an audit of diesel fuel rebate applications results in a penalty equal to the amount of the rebate applied for and not substantiated. The *Quarantine Act 1908* also has a strict liability offence for failing to produce documents requested by a Quarantine officer (section 38 refers).

Where documents or records are required to be produced under proposed sections 240AA and 240AC of the Customs Act, there must be period of at least 14 days from the day of notice within which to produce. It is proposed that, in most cases the time period for production will be 14 days and, when the documents are overseas, 16 days. Therefore the penalties cannot be imposed for failure to produce documents or records until after the period specified in the notice to produce the documents or records has expired. Additionally a person who is asked to produce a document or record may exercise their privilege against self-incrimination.

The defences in the *Criminal Code*, as it applies to the Customs Act, will be available for the offences of strict liability introduced by the Bill.

In view of the above it is considered appropriate that failing to answer questions and failing to produce documents or records be strict liability offences.

Penalties

The Committee asked whether the substantive penalties have been reviewed for the offences when prosecuted.

The strict liability offence and infringement notice system proposed in the Bill was developed in consultation with the Attorney-General's Department.

The penalty levels for each strict liability offence in the Bill were settled with the Criminal Law Branch of the Attorney-General's Department in accordance with Commonwealth Criminal Law policy.

Defence of genuine uncertainty

The Committee has sought further explanation why the defence of genuine uncertainty should be applicable to statements that result in a loss of duty, but not to statements which result in no loss of duty or to statements in cargo or outturn reports.

Currently section 243V of the Customs Act allows people to avoid an administrative penalty for a false or misleading statement resulting in an underpayment of duty by stating their uncertainty as to the correctness of the information at the time of

lodging the import entry. This procedure is known throughout Customs and the importing community as 'amber line'.

The retention of this facility as a defence to new section 243T of the Customs Act is a legacy of the current penalty regime. Nowhere else in Commonwealth legislation does a similar defence exist for corresponding offences for false and misleading statements - section 243T is a special case. The defence is available for an offence against new section 243T to ensure that the scope of the new offence is not wider than that of the current administrative penalty provision.

The defence is considered appropriate for false or misleading statements resulting in a loss of duty because the penalty for such statements is directly related to the amount of duty short paid. The greater the short payment, the greater the penalty - with no upper limit. New sections 243U and 243V (for false or misleading statements not resulting in a loss of duty and in cargo and outturn reports), on the other hand, have maximum penalties of 50 penalty units.

The 'real time' context of cargo and outturn reporting is another factor that makes this defence unsuited to false or misleading statements in cargo and outturn reports. In the case of entries there is an opportunity to 'settle-up' the correct amount of duty after verifying information about which the communicator was initially uncertain. In contrast, Customs must be able to rely on the accuracy of the information in cargo and outturn reports at first instance to make sound decisions in relation to the release of cargo upon arrival in Australia. There is no opportunity to remedy the situation, for example, of illicit drugs being delivered into home consumption on the basis of a false or misleading statement made in a cargo report.

As Customs risk assessment of cargo is dependent on timely and accurate reporting, there is no scope for the defence of uncertainty to apply to this offence. The preferred outcome is that any uncertainty is addressed before the report is made.

There are other reasons for not extending the defence to false or misleading statements not resulting in a loss of duty (particularly in relation to exports). These include:

- In most cases exporters should know exactly what goods they are sending out of the country as they are in possession of those goods before they leave, unlike importers who often require clarification on the exact nature of the goods arriving;

- Where it is known that an exporter will not be able to ascertain particular information until after the goods are exported (for example the exact quantity of bulk commodities may not be known until after they are loaded onto a ship), section 114B of the Customs Act allows a person to apply for confirming exporter status;

- the delay of export cargo for clarification purposes may lead to those goods not being shipped as clearance cannot be issued until clarification is made - a risk not present for imported cargo.

Recording of offences

The Committee asked where a matter is dealt with under an infringement notice, whether an offence will be recorded against the person concerned.

New section 243ZB of the Customs Act provides that where the penalty specified in the infringement notice is paid any liability for the offence is discharged. It also provides that further proceedings cannot be taken for the offence and that the person is not regarded as having being convicted of the offence. These provisions will not allow an offence to be recorded against a person where a matter is dealt with entirely under the infringement notice scheme.

Customs will, however, keep an administrative record of the number and nature of infringement notices served on a person. The purpose of this record will be to assist in deciding whether to issue an infringement notice, prosecute, or do nothing, on any future commission of a strict liability offence.

If you have any further queries on any of the above issues, please do not hesitate to contact me or my office.

The Committee thanks the Minister for this response which indicates that no offence will be recorded against a person where a matter is dealt with entirely under the infringement notice scheme. However, the Committee notes that Customs proposes to keep an administrative record of the number and nature of infringement notices issued – apparently for an indefinite period. The Committee **seeks the Minister's further advice** as to whether 'stale' infringement notices are to be removed from this record after a period of time (in the same manner as the 'spent convictions' scheme operates under the Crimes Act).

Relevant extract from the further response from the Minister dated 8 June 2001

In my letter of 26 March I advised the Committee that no offence will be recorded against a person where a matter is dealt with entirely under the infringement notice scheme, but that an administrative record of decisions taken in respect of infringement notices would be kept. The Committee sought further advice as to whether 'stale' infringement notices would be removed after a period of time from the record (in the same manner as the 'spent convictions' scheme in the *Crimes Act 1914* [the Crimes Act]).

Apart from the general requirement to keep records of how decisions are made, the rationale for keeping an administrative record of decisions under the proposed penalty regime in the Bill, is to provide the CEO with relevant information in deciding whether to serve an infringement notice, prosecute or do nothing in the event of a breach of a strict liability offence. It provides a mechanism to gauge what is the most appropriate response to non-compliance in a particular case.

The establishment of an administrative equivalent to the spent convictions scheme in the Crimes Act for stale infringement notices is considered inappropriate because:

- any recording or disclosure of information would be subject to the confidentiality requirements of section 16 *Customs Administration Act 1985;*

- standard archiving procedures result in files over 10 years old not being readily available; and
- the circumstances in which the record is to be taken into account, if the offence the subject of the recorded infringement notice had been the subject of a conviction, would be exempt from the spent convictions provisions by virtue of paragraph 85ZZH(a) of the Crimes Act. Law enforcement agencies are exempted from the 'spent convictions' in the Crimes Act (the Australian Customs Service is defined as a law enforcement agency, section 85ZL refers).

In Alert Digest No. 4 of 2001 the Committee sought my advice as to whether amendments made to the Bill in the House of Representatives create new strict liability offences, and if so, why it is appropriate that these offences are offences of strict liability.

All of the Principal Act offence provisions to which the amendments mentioned by the Committee relate are provisions relating to the regulatory control over goods for export. The relevant offences relate to:

- failure to enter goods for export (proposed subsection 113(1));
- loading goods for export without an authority to deal (proposed section 115);
- failure to communicate a submanifest as required by proposed section 117A;
- allowing a ship or aircraft to depart without a Certificate of Clearance having been issued (proposed section 118);
- using an Accredited Client Export Approval Number (ACEAN) that relates to more than one consignment (proposed section 114BA);
- delivering goods, other than excluded goods, to a person at a wharf or airport for export without entering them and providing the person particulars of the authority to deal or, if the goods are not required to be entered, providing the person with particulars of the goods or the goods (proposed section 114E); and
- failing to notify Customs where goods are released from a warehouse for export (proposed new section 102A).

The offence in new section 114BA relates to using the same ACEAN for more than one export consignment. The integrity of the periodic reporting system for exports is dependent upon accredited clients properly acquitting their goods exported using an ACEAN in their periodic declaration. Using a single ACEAN in respect of more than one consignment of goods for export will significantly undermine the acquittal process.

The strict liability offences proposed in sections 102A, 114E and 117A are new offences for breaches of the various new exporting reporting obligations in relation to goods for export. As detailed in Chapter 5 of the revised explanatory memorandum, the export reporting obligations are designed to enable Customs more effectively to perform its roles of:

- preventing the export of prohibited goods;
- monitoring compliance with the GST law in relation to the GST-status of supplies of goods for export; and
- ensuring that goods with outstanding duty liability are not diverted into the domestic market.

These offences are designed to improve Customs ability to track the movement of all goods for export and in particular to avoid diversion of goods with outstanding duty liabilities into the domestic market. The diversion of such goods into the domestic market causes significant loss of government revenue and commercial disadvantage to legitimate operators.

The proscribed conduct in proposed sections 113, 115 and 118 of the Act relates to the unauthorised movement of goods for export and is currently the subject of fault based offences in the existing export control provisions of the Act. These offences are to be made offences of strict liability and, in the case of sections 115 and 118, the penalty will be reduced to 60 penalty units in accordance with criminal law policy. (The current penalties for offences against sections 115 and 118 are $10,000 and $50,000, respectively.)

As stated in my letter of 26 March 2001, while the conduct that is the subject of each of the proposed strict liability offences may not appear significant when viewed in isolation, there are significant consequences for the community where the regulatory framework is breached. The Government believes that the risk to the revenue of diversion, the commercial disadvantage to legitimate operators, and the risk of prohibited goods being exported undetected, justify the introduction of strict liability offences for breaches of the regulatory mechanisms designed to reduce those risks. Strict liability is a deliberate (and necessary) policy to catch inadvertent errors, because otherwise the self-assessment regime would be seriously undermined by people failing to take sufficient care. In accordance with criminal law policy, the penalties for these offences are relatively modest.

If you have any further queries on any of the above issues, please do not hesitate to contact me or my office.

The Committee thanks the Minister for this further response and notes the proposed operation of the infringement notice scheme.

Given that an administrative record of decisions under this scheme will be kept for some time, and (though not readily available) may be used more than 10 years later, the Committee **would appreciate the Minister's further advice** as to whether any guidelines or standards will be issued covering the use that may be made of infringement notices both during and after the 10 year period.

Pending the Minister's further advice, the Committee continues to draw 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 further response from the Minister dated 7 August 2001

The Committee also seeks my advice whether any guidelines or standards will be issued covering the use that is to be made of the administrative record of infringement notices that have previously been served.

I draw the Committees attention to a Government amendment that was made to the Bill by the Senate in response to a recommendation of the Senate Legal and Constitutional Legislation Committee - new section 243XA. Section 243XA requires the Chief Executive Officer of Customs (the CEO) to make guidelines on the administration of Division 5 of the Bill - the infringement notice scheme for specified strict liability offences. Section 243XA also provides that those guidelines are a disallowable instrument for the purpose of section 46A of the *Acts Interpretation Act 1901*. The guidelines will contain matters for consideration by the CEO in determining whether an infringement notice is appropriate in the circumstances.

Although the content of the guidelines for the administration of the infringement notice scheme for the strict liability offences is yet to be finalised, that part of the guidelines relating to a person's compliance history will contain information on the relevance of old infringement notices in determining whether an infringement notice should be served for a later offence. Appropriate weight will be given to the frequency and age of those old notices.

If you have any further queries on any of the above issues please do not hesitate to contact my office.

The Committee thanks the Minister for this further response which indicates that these guidelines will be disallowable.

Financial Services Reform Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation has responded to those comments in a letter dated 7 August 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 6 of 2001

This bill was introduced into the House of Representatives on 5 April 2001 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

Further to the package of legislation passed in 1999 to reform the regulation of Australia's financial system, this bill proposes amendments to the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* to:

- introduce a single licensing regime for all financial sales, advice and dealings;
- establish a consistent and comparable financial product disclosure and conduct regulatory framework for all financial service providers; and
- create a streamlined regulatory regime for financial markets and clearing and settlement facilities, through amendments to be proposed.

The bill also makes consequential and technical amendments to the proposed *Australian Securities and Investments Commission Act 2001* and proposed *Corporations Act 2001*, and provisions to authorise the recording of telephone calls relating to takeover bids.

Commencement
Subclause 2(6)

By virtue of subclause 2(6), many of the provisions of this bill may not commence until 12 months after Assent. This is a departure from *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel, which states that, as a general rule, where a clause provides for commencement after Assent, the preferred period should not be longer than 6 months. The *Drafting Instruction* goes on to state that, where a longer period is chosen, "Departments should explain the reason for this in the Explanatory Memorandum".

The Explanatory Memorandum accompanying this bill provides no reason for this extended commencement period. The Committee, therefore, **seeks the Minister's advice** as to why the usual six month period is not appropriate to the commencement of this bill.

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

Relevant extract from the response from the Minister

The comments in the Scrutiny of Bills Alert Digest No. 6 of 2001 regarding the FSR Bill relate to the commencement provision, a number of offences of strict liability and the reversal of the onus of proof in relation to insider trading offences.

Commencement (Subclause 2(6))

The Committee has noted that subclause 2(6) would allow for the possibility that many of the provisions of the FSR Bill may not commence until 12 months after Assent. It has sought advice as to why the usual six month period for commencement was not appropriate to the commencement of this Bill.

The new federal system of corporate regulation commenced on 15 July this year. The *Corporations Act 2001* (the Corporations Act) and related legislation is the product of Commonwealth, State and Territory co-operation in response to the High Court's decision last year in *The Queen v Hughes.* It is supported by referrals of power by the States to the Commonwealth and places the federal system of corporate regulation on a secure constitutional foundation.

As the FSR Bill proposes amendments to the Corporations Act and related legislation, it was necessary to ensure that the new federal system of corporate regulation was fully operational prior to commencement of the FSR Bill, and in particular that it was supported by a valid referral of State legislative powers to the Commonwealth. In view of uncertainty surrounding the progress of these matters and to allow time for the full implementation of the new federal system, a period of up to twelve months, as opposed to the usual six month period, was considered appropriate to the commencement of the FSR Bill.

The Government has indicated that it is working towards a 1 October 2001 commencement for the FSR reforms.

The Committee thanks the Minister for this response.

Strict liability offences
Proposed new sections 952C, 952E, 952G, 952I, 952J, 993B, 993C, 993D, 1021C, 1021E, 1021H, 1021M, 1021O

A number of the provisions in this bill create offences of strict liability. Under a strict liability offence, a person may be punished for doing something, or failing to do something, whether or not they have a guilty intent. In other words, someone is held legally liable for their conduct irrespective of their moral responsibility. Such offences are rare in traditional criminal law, but seem to have become excessive and more common as statutory offences have developed.

While the Explanatory Memorandum briefly mentions the fact that certain provisions of this bill create offences of strict liability, it does not provide a detailed explanation as to why offences of this order should be offences of strict liability. The Committee, therefore, **seeks the Minister's advice** on this issue.

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

Strict Liability Offences

The Committee has drawn attention to a number of the provisions in the FSR Bill that create offences of strict liability and has sought a more detailed explanation of the rationale for the application of strict liability.

The provisions on which the Committee has sought additional information fall into a number of categories each of which is discussed below in more detail. However, in general the application of strict liability in the FSR Bill has been based on a careful consideration of each offence and, in particular, has taken into account the important consumer protection subject matter of the FSR Bill and the need to ensure that providers of financial services comply with certain obligations placed on them by the FSR Bill. In many cases these provisions relate to offences that are essentially regulatory in character. I also note the availability for these offences of the defence of mistake of fact under section 9.2 of the *Criminal Code.*

Proposed sections 952C and 1021C (see paragraphs 12.79-12.80 and 14.194 of the EM)

These offences concern the failure by providers of financial services to provide certain disclosure documents or statements to clients. The FSR Bill provides for a strict liability offence with a pecuniary only penalty of 50 penalty units as well as a fault element or ordinary offence with a higher penalty that could include imprisonment. Therefore, contraventions where the necessary fault elements can be

shown will be prosecuted under the 'ordinary' offence, contraventions that take the form of a simple omission to provide a document or statement and are regulatory in nature will be able to be prosecuted under the strict liability offence.

The rationale for including a strict liability offence is based on the subject matter of the offence. In the context of the provision of financial services to retail clients, the giving of certain disclosure documents is an important element of the consumer protection regime implemented by the FSR Bill and it is, therefore, appropriate to apply an element of strict liability to these offences. It should also be noted that this offence only applies to a limited class of people such as financial services licensees and their authorised representatives.

Proposed sections 952E and 1021E (see paragraphs 12.87-12.91 and 14.197-14.198 of the EM)

These offences relate to the provision of defective disclosure documents or statements by those people who prepare them (Generally under the FSR Bill a document or statement is defective if it contains a misleading or deceptive statement or it omits a required statement. The statement or omission must also be materially adverse from the point of view of a reasonable person considering whether to be provided with the financial service).

The offences aim to ensure that those people who prepare documents take reasonable steps to ensure the accuracy of the information contained in them.

It should be noted that strict liability in these offences only applies to the circumstance that the document is defective, fault elements continue to apply to other elements of the offence such as the actual giving of the document or statement to another person.

A wide ranging defence is available to these offences, that is, that the defendant took reasonable steps to ensure that the disclosure document or statement would not be defective. It should be noted that a comparable existing section of the Corporations Act (section 731) also contains an element of 'reasonableness'.

This arrangement of providing a defence of 'reasonable steps' and applying strict liability is necessary to ensure that preparers of documents and statements take reasonable steps to ensure that the information contained in them is not materially misleading or deceptive. These documents will then be relied on by consumers in making decisions about the acquisition of financial services and products.

Proposed sections 952I, 952J and 1021H (see paragraphs 12.98-12.100 and 14.201-14.202 of the EM)

The offences in these proposed sections relate to a failure by a person who prepares disclosure documents or statements to ensure that they comply with certain formal requirements in the FSR Bill. These requirements include ensuring that the documents or statements have the correct title and are appropriately dated.

The provision of this information is important to consumers who need to be able to ascertain, for example, the purpose of the particular document or statement. The offences are regulatory in nature and, therefore, contain a low pecuniary only penalty and have strict liability applying to the circumstance that the document of statement does not comply with these formal requirements. However, fault elements continue

to apply to the conduct of actually giving or authorising the use of the document or statement.

Proposed sections 993B, 993C, 993D, 10210 (see paragraphs 13.50-13.52 and 14.188 of the EM)

The offences created by these proposed sections relate to the handling of money provided by clients to financial services licensees and product issuers or sellers. As such, these provisions are important to ensuring the safekeeping of clients' money. Examples of these requirements include payment of the money into an account with an Australian ADI and that the money must be paid into such an account on the day on which it is received or the next business day.

The approach taken to these offences is to have an ordinary offence to which fault elements apply with a higher penalty that could include a substantial period of imprisonment. This type of offence is appropriate where the necessary fault elements can be established.

A strict liability offence is also provided. This provides a suitable offence for contraventions relating to technical contraventions of requirements of the FSR Bill. These offences would, therefore, be of a regulatory nature and are necessary to ensure the appropriate handling of client money by licensees and other people as a part of the consumer protection framework that the FSR Bill puts in place.

The Committee thanks the Minister for this response.

Reversal of the onus of proof
Proposed new section 1043M

Proposed new section 1043M of the *Corporations Act 2001* would impose an evidential burden on a defendant charged with an offence against proposed new section 1043A to establish a defence to that charge.

The Explanatory Memorandum does not appear to discuss this provision, and the Committee, therefore, **seeks the Minister's advice** as to why the defendant should bear an onus of proof in relation to this 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

Reversal of the Onus of Proof (proposed section 1043M)

A key policy objective of the FSR Bill is to introduce a harmonised regulatory regime for all financial products, service providers and markets. Existing insider provisions, contained in Chapters 7 and 8 of the *Corporations Act 2001,* and in the *Superannuation Industry Supervision Act 1993,* are not entirely consistent in their application to different financial products. The FSR Bill therefore proposes to consolidate the different sets of insider trading provisions and apply them to cover all financial products that are traded on a market. Subject to these changes, the insider trading provisions reflect the policy of the current provisions. I also note that the insider trading provisions are currently the subject of a report that is being prepared by the Companies and Securities Advisory Committee (CASAC).

The Committee has drawn attention to proposed section 1043M, which provides defences to prosecutions for insider trading under proposed section 1043A. Proposed section 1043M would impose an evidential burden on a defendant to establish a defence. It is based upon and largely duplicates existing insider trading provisions contained in the Corporations Act (see for example section 1002T). It, therefore, does not alter the established policy of the existing provisions, which is for the defendant to bear the onus of proof in these circumstances. To do otherwise would amount to a substantial change to current arrangements applying to insider trading offences.

The Committee thanks the Minister for this response.

Financial Services Reform (Consequential Provisions) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation has responded to those comments in a letter dated 7 August 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 7 of 2001

This bill was introduced into the House of Representatives on 7 June 2001 by the Minister representing the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

Part of a package of bills to complement the Financial Services Reform Bill 2001, the bill proposes consequential amendments to 26 Acts and proposed Acts to provide for the transition to the new financial services regulatory regime.

The bill also proposes the repeal of the *Insurance (Agents and Brokers) Act 1984*; and the repeal of the proposed *Corporations (Futures Organisations Levies) Act 2001* and the proposed *Corporations (Securities Exchanges Levies) Act 2001* two years after the commencement of Schedule 1 to the proposed *Financial Services Reform Act 2001*.

No review of decisions
Schedule 1, item 1

Item 1 in Schedule 1 to this bill provides that certain decisions are not decisions to which the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) applies.

The Explanatory Memorandum simply notes that these amendments will ensure that decisions of the Securities Exchanges Guarantee Corporation under Part 7.5 of the *Corporations Act 2001* (which deal with compensation arrangements), and decisions by the Minister under Division 1 of Part 7.4 of the Corporations Act (dealing with the 15 percent voting power limitation on prescribed market and clearing and settlement facility licensees) will not be subject to review under the ADJR Act.

The Committee **seeks the Minister's advice** as to why these particular decisions should not be subject to review under the ADJR Act.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The comments in the Scrutiny of Bills Alert Digest No. 7 of 2001 regarding this Bill relate to decisions that are not subject to review under the *Administrative Decisions (Judicial Review) Act 1977* and a number of offences of strict liability.

Item 1 of Schedule 1 of the FSR (CP) Bill provides that amendments to the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) will ensure that:

- decisions by the Minister under proposed Division 1 of Part 7.4 of the Corporations Act (the 15 per cent voting power limitation on prescribed market and clearing and settlement facility licensees); and

- decisions of the Securities Exchanges Guarantee Corporation (the SEGC) under, proposed Part 7.5 of the Corporations Act (compensation arrangements)

will not subject to review under the ADJR Act.

The reason for exempting decisions of the SEGC under proposed Part 7.5 of the Corporations Act from the application of the ADJR Act are:

- the SEGC is a wholly owned subsidiary of the Australian Stock Exchange Limited and is responsible for administering the National Guarantee Fund under current Part 7.10 of the current Corporations Act, and will continue to do so under proposed Division 4 of Part 7.5 which is to be inserted in the Corporations Act by the FSR Bill;

- it thus operates in a commercial environment and its activities might be unduly constrained by requirements of judicial review of its decision-making;

- adverse decisions by the SEGC on claims against the National Guarantee Fund will continue to be reviewable in the Federal Court and the State and Territory Supreme Courts (proposed section 888H);

  - in addition, brokers may challenge the SEGC when it seeks to enforce its right of subrogation (under proposed section 892F) because the SEGC only has the rights and remedies of the claimant.

The reason for exempting decisions by the Minister under proposed Division 1 of Part 7.4 of the Corporations Act from the application of the ADJR Act is that administrative review of decisions by a Minister that an acquisition is, or is not, in the national interest is inappropriate.

The national interest test is included in, among other provisions, proposed section 851B which relates to the granting of an application to hold more than 15% voting power in a prescribed market or CS (clearing and settlement) facility licensee.

This approach is consistent with the approach taken in relation to comparable decisions under the *Foreign Acquisitions and Takeovers Act 1975* (see paragraph (h), Schedule 1 to the ADJR Act).

The Committee thanks the Minister for this response which indicates that Securities Exchanges Guarantee Corporation (SEGC) compensation decisions under proposed Part 7.5 of the Corporations Act should not be reviewable because the SEGC operates in a commercial environment and its activities "might be unduly constrained" by the imposition of review requirements. Given this, the Committee **seeks the Minister's further advice** as to what remedies are available to a claimant who is dissatisfied with a compensation decision made by the SEGC.

Pending the Minister's further advice, the Committee continues to draw Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Strict liability offences
Schedule 1, various items

Among other things, Schedule 1 to this bill proposes to amend the *Australian Securities and Investment Commission Act 2001*. A number of these amendments will create offences of strict liability. These amendments are found in items 32, 36, 39, 43, 47, 49, 66, 83, 123, 132, 134, 136, 138-141, 158, 161, 162, 164, 166, 168, 172, 190-192, 200, 208 and 215 of that Schedule.

Item 8 in Schedule 1 ensures that the *Criminal Code* applies to that Act. It may therefore be assumed that the above amendments simply restate the existing law. The Committee **seeks the Treasurer's confirmation** that this bill will create no new offences of strict liability.

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

Relevant extract from the response from the Minister

> The Committee has drawn attention to a number of provisions in the FSR (CP) Bill that create offences of strict liability, and has sought confirmation that the FSR (CP) Bill will create no new offences of strict liability.
>
> The amendments in the FSR (CP) Bill that create offences of strict liability relate to existing offences in the Australian Securities and Investments Commission Act 2001, they do not create new strict liability offences. These amendments were necessary as part of the process of Criminal Code harmonisation of existing offences which is made necessary by section 6.1 of the *Criminal Code*, which states that a criminal offence is a strict liability offence only if express provision is made to that effect. The intention behind the strict liability amendments made by the FSR (CP) Bill is to preserve the status quo in relation to strict liability. It is important to note that such amendments are only made to offences which are judged to be presently of a strict liability character. The offences to which strict liability is applied by the FSR (CP) Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply.
>
> As the Committee would be aware, a number of factors are taken into account in determining whether an offence is one of strict liability, including whether the provision expressly or by implication contains a fault element, the penalty that applies, the presence of an express defence and the nature of the offence.

The Committee thanks the Minister for this response.

Great Barrier Reef Marine Park Amendment Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 6 of 2001*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 26 June 2001.

A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 21 June 2001), the response from the Minister may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 6 of 2001

This bill was introduced into the Senate on 5 April 2001 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill proposes to amend the *Great Barrier Reef Marine Park Act 1975* to:

- clarify the reference of geographic coordinates to the Australian Geodetic Datum;
- increase the penalties for the discharge of oil and other hazardous materials into the Great Barrier Reef Marine Park ("the Marine Park");
- increase the penalties for illegal fishing in the Marine Park;
- create a new offence for the negligent operation of vessels in the Marine Park;
- establish specific offences for ships operating in zones contrary to the provisions of a zoning plan and for ships operating in a zone contrary to the conditions of a permission;
- create a new strict liability offence for persons who enter a zone contrary to the provisions of a zoning plan;
- make provision for the declaration of, or adjustment of, compulsory pilotage areas by means of Regulations; and

- provide that regulations are not inconsistent with a zoning plan if they further regulate or prohibit an activity which is permitted under a zoning plan.

The bill also contains application provisions.

Strict liability offences
Proposed new subsections 38A(3), 38CB(2), 38J(1C), 38M(3), 38MA(2), 38MA(4) and 38MC(3)

A number of provisions to be inserted by this bill create offences of strict liability. While the Explanatory Memorandum explains the effect of imposing strict liability for a criminal offence, it does not explain why it is necessary that it be imposed in the circumstances set out.

In addition, the Explanatory Memorandum indicates that the offences created by new sections 38CB, 38J, 38M, 38MA and 38MC impose liability if the offender has failed to exercise reasonable care (or intended to commit the relevant act). This is not borne out by the provisions themselves, which, in stating that they create offences of strict liability, do not oblige the prosecution to prove any mental state on the part of the accused.

The Committee, therefore, **seeks the Minister's advice** as to whether the Explanatory Memorandum and the bill are consistent on the issue of strict liability, and why it is appropriate that strict liability be imposed in relation to the nominated offences.

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

Relevant extract from the response from the Minister

> The Bill inserts a number of new subsections into the *Great Barrier Reef Marine Park Act 1975* ("the Act") which create offences of strict liability (see subsections 38A(3), 38CB(2), 38J(1C), 38M(3), 38MA(2), 38MA(4) and 38MC(3)). In relation to these subsections, the Committee has noted that whilst the Explanatory Memorandum explains the effect of imposing strict liability for criminal offences, it does not explain why it is necessary in the circumstances set out.
>
> The Committee has indicated that these provisions 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. Further, the Committee has sought my advice on whether the Explanatory Memorandum and the Bill are consistent on the issue of

strict liability, and why it is appropriate that strict liability be imposed in the circumstances set out in the Bill.

(a) Subsection 38A(3)

Subsection 38A(2) provides that a person is guilty of an offence if the person uses or enters a zone for a purpose other than a purpose that is permitted under the zoning plan. Subsection (3) goes on to state that an offence under subsection (2) is an offence of strict liability.

Strict liability is defined in subsection 6.1(1) of the *Criminal Code* as follows:

> "If a law that creates an offence provides that the offence is an offence of strict liability:
> (a) there are no fault elements for any of the physical elements of the offence; and
> (b) the defence of mistake of fact under section 9.2 is available."

The *Criminal Code* provides that strict liability must be identified expressly, otherwise a fault element will apply automatically (see sections 5.6 and 6.1 of the *Criminal Code).* The effect of section 6.1 of the *Criminal Code* is that offence provisions must expressly state that they create strict liability offences. This is the effect of subsection 38A(3).

Strict liability has been used in section 38A to create a two tiered offence. The first tier (subsection 38A(1)) requires proof of fault (the fault elements being intention or negligence). The second tier (subsections 38A(2) and (3)) is an offence of strict liability, and as such, requires no proof of fault.

This alternative approach enables the prosecution to distinguish between illegal activities which result in relatively minor impacts and those which impact severely on the World Heritage values of the Great Barrier Reef Marine Park. Further, in circumstances where the fault elements may be difficult to prove, the strict liability provision further enables the prosecution of persons whose actions have had an adverse impact on the environment. Given the national and international significance of the Great Barrier Reef, it is believed that such provisions are justified.

(b) Subsections 38CB(2) and 38MA(2)

Both of these provisions state that strict liability applies to paragraph (1)(a). Paragraph (1)(a) relates to the use and entry into zones for specific activities (that is, fishing in the case of section 38CB and the operation of a ship in the case of section 38MA) contrary to the provisions of a zoning plan.

Subsection 6.1(2) of the Criminal Code recognises that strict liability can be isolated to a particular element of the offence. This is because the fault elements that are required to be proved for other elements of the offence are more critical to a person's culpability. The effect of using strict liability for a particular element of an offence is so that the prosecution does not have to prove that element of the offence (in this instance, the provisions of a zoning plan for the purposes of paragraph (1)(a)).

The use of strict liability in paragraph (1)(a) of the above subsections is not inconsistent with the wording of the Explanatory Memorandum, as proof of fault (that is, intention or negligence) is still required for the other elements of the offence.

Further, the prosecution still has the legal burden of proving the remaining elements of the offence.

The use of strict liability as the fault element for part of an offence has been used in other Commonwealth environmental legislation, such as the *Environment Protection and Biodiversity Conservation Act 1999.* Section 254 of this Act uses strict liability to establish a particular element of the offence, however, fault elements otherwise need to be established.

(c) Subsections 38J(1C), 38M(3), 38MA(4) and 38MC(3)

All of these provisions state that strict liability applies to a previous subsection. When strict liability is used in relation to the whole offence, although no proof of fault is required, the defence of mistake of fact is still available pursuant to section 9.2 of the *Criminal Code.* Further, strict liability is used as a second tier offence. This enables the prosecution to proceed against a person pursuant to the fault based provisions (where proof of intention or negligence is required), or pursuant to the strict liability provisions where no fault elements are required to be proved. The fault based provisions do not overlap with the strict liability provisions, therefore, there is no conflict in the degree of fault which is required for both provisions. The strict liability offence provisions attract significantly lower maximum penalties.

The effect of subsection 38J(1C) is to create an offence of strict liability for persons who discharge waste in the Marine Park. This was considered necessary given the devastating effect that an oil spill or the discharge of other hazardous material would have on the environmental and cultural values of the Great Barrier Reef and World Heritage Area. The use of strict liability for the discharge of oil and other hazardous materials in the Marine Park also gives the Act a greater parity with other marine pollution legislation. For example, sections 9 and 21 of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 create offences for both masters and owners of ships for discharges into the sea.

The effect of subsections 38M(3) and 38MA(4) is to make it an offence of strict liability for owners and operators who operate a ship in a zone contrary to the provisions of the zoning plan that relate to the zone. Once again, given the potentially devastating impact on the Marine Park of a grounding or collision, the strict liability aspect of this offence is considered necessary.

The effect of subsection 38MC(3) is to make it an offence of strict liability for owners and operators who operate a vessel in the Marine Park, in circumstances where that operation results in, or is likely to result in, damage to the Marine Park. An example of the adverse impact on the Great Barrier Reef that can result from the negligent operation of a ship, was recently highlighted when a Malaysian cargo ship, the *Bunga Teratai Satu,* ran aground on Sudbury Reef near Cairns. This incident highlighted the need for the Act to be strengthened, and justifies the strict liability provision.

It is considered that the requirement of a mental element in the above provisions would not alter the potential effect of the act on the environment if the provisions are contravened, nor aid in the education of the public. The use of strict liability offences in this regard is considered a necessary measure in order to protect and conserve the world heritage values of the Marine Park.

Further, none of these provisions are inconsistent with the wording contained in the Explanatory Memorandum, as the strict liability components of these offences is the

second tier of the offence. All the provisions listed above (that is sections 38J(1), 38M, 38MA, and 38MC) are two tiered offences. Whilst the first tier requires proof of fault (that is intention or negligence), and impose liability if the offender has failed to exercise reasonable care, the second tier, as a strict liability offence, does not require proof of fault.

This two tiered approach was developed in consultation with the Attorney-General's Department. As stated above, this alternative approach enables the prosecution to distinguish between illegal activities which result in relatively minor impacts and those which impact severely on the World Heritage values of the Great Barrier Reef Marine Park. Further, in circumstances where the fault elements may be difficult to prove, the strict liability provision further enables the prosecution of persons whose actions have had an adverse impact on the environment. Given the national and international significance of the Great Barrier Reef, it is believed that such provisions are justified.

The Committee thanks the Minister for this response and observes that this bill has now been enacted.

Notwithstanding this, the Committee notes that, under the two-tiered approach adopted, the use of strict liability offences enables the prosecution of persons "in circumstances where the fault elements may be difficult to prove". There is a danger that strict liability provisions may be included in legislation simply to facilitate prosecution, and that the prosecutor is given a discretion to decide whether to seek a higher penalty by proving all the elements of an offence, or to seek a lesser penalty by proving only the less onerous elements of the offence. It is arguable that such an approach gives prosecutors an excessive discretion.

Liability for negligent acts
Proposed new subsections 38CC(2) and 38MB(2)

Proposed new subsections 38CC(2) and 38MB(2) of the Principal Act will impose liability for acts committed negligently, rather than intentionally. In relation to these provisions, the Explanatory Memorandum simply notes that the relevant fault element is negligence, but does not explain why this is an appropriate fault element in these circumstances. The Committee, therefore, **seeks the Minister's advice** as to why negligence is an appropriate fault element for these offences.

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

Relevant extract from the response from the Minister

The Bill also inserts new subsections 38CC(2) and 38MB(2), which impose liability for acts committed negligently in relation to particular offences. In relation to these subsections, the Committee has noted that the Explanatory Memorandum does not explain why negligence is the appropriate fault element in these circumstances, and has sought advice in this regard. Further, the Committee indicates that these provisions 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.

> Negligence is defined in section 5.5 of the *Criminal Code* as follows:
> "A person is negligent with respect to a physical element of an offence if his or her conduct involves:
> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
> (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence."

Both of the above subsections state that the fault element for paragraph (1)(d) is negligence. Paragraph (1)(d) applies to conduct which contravenes the conditions of a permission for fishing (in the case of subsection 38CC(2)) and the conditions of a permission for the operation of a ship (in the case of subsection 38MB(2)). Although negligence is expressly stated to apply to paragraph (1)(d), section 5.6 of the *Criminal Code* applies the appropriate fault element to any of the remaining physical elements of the offences for which no fault element has been specified (for example, by virtue of subsection 5.6(1) of the *Criminal Code*, the fault element for paragraph (1)(c) is intention). This means that negligence is not the only fault element which is required to be proved. However, because of the operation of the *Criminal Code*, negligence is the only fault element which needs to be expressly stated.

Negligence, as a fault element for these subsections, was developed in consultation with the Attorney-General's Department. Although negligence is rarely used as a fault element in Commonwealth offences, its use is justified given the potentially adverse impact on the environment of the Great Barrier Reef Marine Park and World Heritage Area that may result from fishing or shipping contrary to the conditions of a permission. An example of the environmental damage that can result from the negligent operation of a ship is the recent grounding of the *Bunga Teratai Satu* on Sudbury Reef near Cairns.

I trust the above adequately addresses the matters raised.

The Committee thanks the Minister for this response.

New Business Tax System (Capital Allowances) Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 7 of 2001*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 27 July 2001.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 30 June 2001), the response from the Assistant Treasurer 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. 7 of 2001

This bill was introduced into the House of Representatives on 24 May 2001 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1997* to introduce a simplified and more neutral Uniform Capital Allowance System (UCAS) that will replace the existing separate capital allowance regimes. The proposals will simplify the tax law by streamlining the tax treatment of depreciating assets (with certain assets excluded), and will apply to all taxpayers, except those small businesses participating in the Simplified Tax System.

Retrospective commencement
Subclause 2(3) and Schedule 3

Schedule 3 to this bill amends the *Income Tax Assessment Act 1997* with regard to plant acquired from an associate. Subclause 2(3) will permit these amendments to commence retrospectively on 9 May 2001, and item 3 of that Schedule provides that the amendments apply from 10am on that date.

In his Second Reading Speech, the Minister states that these provisions are intended "to prevent taxpayers obtaining artificially accelerated deductions in circumstances where they acquire assets from an associate or where the end user of the asset does not change" (under, for example, a sale and lease-back arrangement). In these circumstances, the new owner or the continuing end user "must use the same depreciation method as the previous holder". To limit artificial deductions, the amendments are to commence retrospectively from 9 May 2001 "as announced by the Treasurer". The Minister concludes that this "is principally a revenue protection measure". However, neither the Explanatory Memorandum nor the Second Reading Speech discusses any potential adverse effect of the retrospective commencement.

The Committee notes that this legislation, though retrospective in operation, has been introduced within 6 months of the date of its announcement. The Committee also notes that the legislation is intended to prevent the use of artificial changes in the ownership of equipment to achieve accelerated deductions. However, the Committee **seeks the Treasurer's advice** as to the effect of the bill's retrospective commencement and, in particular, whether anyone will be adversely affected by this.

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

Relevant extract from the response from the Assistant Treasurer

The Committee sought the advice of the Treasurer as to the effect of the retrospective commencement of Schedule 3 relating to second hand plant. The Treasurer has asked me to respond.

The amendments in question prevent acceleration of depreciation deductions where depreciating assets change hands, but only between associates or where the end user of the assets does not change. In these cases, the fact that the assets have changed hands should not have any substantial effect on the rate of deductions for depreciating assets. The rules do not disadvantage taxpayers compared to the treatment they would have had without the transfer of the asset, so a continuing end user or an associate enjoys the same rate of depreciation as if the asset had not changed hands.

The rules require the new owner to use the same depreciation method as the previous owner. Where the diminishing value method is used, the same effective life must be used as that which the previous owner used, while the same remaining effective life can be used where the prime cost method is used. Where the end-user does not

change and taxpayers are unable to obtain the relevant information, the diminishing value method and the Commissioner's safe harbour effective life is to be used.

The legislation detailing the rules was released as an exposure draft by the Government on 9 May 2001 and was announced to take effect from that time. The rules only apply to taxpayers who acquire assets after the announcement and are aimed at protecting the revenue.

The Committee thanks the Assistant Treasurer for this response.

Taxation Laws Amendment Bill (No. 2) 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2001*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 27 June 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 7 of 2001

This bill was introduced into the House of Representatives on 7 June 2001 by the Minister representing the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Fringe Benefits Tax Assessment Act 1986* to exempt from fringe benefits tax (FBT) certain free public transport provided to police officers, and to provide for consistent application of FBT to nominated State and Territory bodies;
- *Income Tax Assessment Act 1936* to allow all resident companies to transfer genuine share premiums and capital redemption reserves to their share capital account without tainting that account provided certain criteria are satisfied, and to correct certain anomalies in the dividend imputation provisions that apply to life insurance companies;
- *Fringe Benefits Tax Assessment Act 1986*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Sales Tax (Exemptions and Classifications) Act 1992* to extend the taxation treatment currently given to public benevolent institutions to charitable institutions whose principal activity is promoting the prevention or control of disease in humans; and
- *Income Tax Assessment Act 1936* and the *Income Tax Rates Act 1986* to decrease the upper limit of the shading-in range for trustees of certain resident deceased estates, to increase the existing monthly allowance of tax-free threshold, and to replace a superseded term in the definition of 'separate net income' in respect of dependent rebates.

Retrospective application
Schedule 3

The amendments proposed in Schedule 3 to this bill will (by virtue of proposed new subsection 160AQKAE(9) of the *Income Tax Assessment Act 1936)* apply from 4 May 1999. The Explanatory Memorandum states that these amendments are necessary to "correct certain anomalies in the dividend imputation provisions that apply to life assurance companies".

These amendments were announced in a Press Release issued by the Assistant Treasurer on 4 May 1999. This Schedule is, therefore, another example of 'legislation by press release'. In this regard, the Committee notes the terms of the Senate Resolution of 8 November 1988, that where there has been an announcement of an intention to introduce a bill to amend taxation law, and no bill is introduced or made available in draft form within 6 calendar months of the date of that announcement then, subject to any further resolution, "the Senate shall amend the bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill."

This bill has been introduced a considerable time after the 6 months referred to in the above resolution. The Committee, therefore, **seeks the Minister's advice** as to the applicability of the Senate Resolution of 8 November 1988 to the commencement date of this bill.

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 Assistant Treasurer

I refer to the concerns expressed by the Senate Standing Committee for the Scrutiny of Bills in Alert Digest No 7 of 2001 dated 20 June 2001 concerning the retrospective application of Schedule 3 to Taxation Laws Amendment Bill (No 2) 2001.

By way of background, the amendments in Schedule 3 to the Bill close a loophole in the dividend imputation provisions that apply to life insurance companies. As noted in the Explanatory Memorandum, the amendments prevent life insurance companies from inappropriately generating franking credits by deliberately overfranking the payment of dividends and applying the resulting franking dividends tax to offset a company tax liability. By doing so, life insurance companies could avoid the reduction in available franking credits to take account of the amounts attributable to

the statutory funds of the life insurance companies. Franking credits and debits should be reduced by 80% to take into account that there is a limit on the portion of statutory fund income that can be distributed to shareholders because of various prudential requirements.

When the announcement was made, a scheme trying to exploit this loophole or anomaly had recently been exposed. It was important to announce the closure of the loophole as soon as possible after the scheme had been discovered to prevent further exploitation. In fact, the announcement seems to have had the desired effect, with no life insurance companies entering into such a scheme since the announcement was made.

If the closure of the loophole had been deferred, the result would have been that some companies would have received the full benefit of the contrived arrangements, give an undue advantage to those companies and resulting in a significant cost to revenue.

The amendments also include a transitional rule that will provide an alternative treatment in certain circumstances where a franking deficit tax or deficit deferral tax liability arose before 4 May 1999. The transitional rule should overcome concerns about the possible retrospective effect of the amendments. The rule protects companies which had commenced a scheme to exploit the loophole but had not completed that scheme. Companies are effectively placed in the position they would have been in had they never entered into the scheme to exploit the loophole.

However, the development of the transitional rules was a complex exercise taking a good deal of time, there was considerable pressure on drafting and Australian Taxation Office resources. This delayed development of the necessary legislation.

I trust this information will be of assistance to you.

The Committee thanks the Assistant Treasurer for this response and notes the operation of the transitional provision.

Taxation Laws Amendment (Superannuation Contributions) Act 2001

(previous citation: Taxation Laws Amendment (Superannuation Contributions) Bill 2000)

Introduction

The Committee initially dealt with the bill for this Act in *Alert Digests Nos. 13 and 14 of 2000*, in which it made various comments. The Assistant Treasurer responded to those comments in a letter dated 31 October 2000 and the Committee reported on the bill in its *Fifteenth Report of 2000*

In its *Alert Digest No. 2 of 2001*, the Committee drew attention to a Senate amendment made on 8 February 2001 during debate in Committee of the Whole. The effect of this amendment was to increase the retrospective application of the bill. The Committee sought advice from the Minister as to whether the Government proposed to accept this amendment. The Assistant Treasurer has responded to the Committee in a letter dated 26 June 2001.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 18 July 2001), the Assistant Treasurer's response may, nevertheless, be of interest to Senators.

A copy of the letter is attached to this report. An extract from *Alert Digest No. 2 of 2001* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 2 of 2001

The Committee considered this bill in *Alert Digests Nos. 13 and 14 of 2000*. In *Digest No. 13*, the Committee discussed Item 11 in Schedule 1 to the bill. This item provided that certain amendments were to apply from 30 June 2000, being the date on which the Assistant Treasurer had announced those amendments in a media release. The Committee commented that, while this constituted an example of 'legislation by press release', the bill had been introduced well within the six-month period referred to in the Senate resolution of 8 November 1988 and the Committee made no further comment on this provision.

On 8 February 2001, the Senate in Committee amended Item 11 in Schedule 1 to provide that:

- the amendment made by item 3 of that Schedule applied to contributions made after 4pm (by legal time in the Australian Capital Territory) on 19 May 1999; and
- the amendments made by items 1, 2 and 4 and Part 2 of that Schedule applied to contributions made after 4pm (by legal time in the Australian Capital Territory) on 30 June 2000.

The amendment made by item 3 in Schedule 1 concerns deductions for contributions to superannuation funds made by employers for the benefit of eligible employees. The amendment is intended to clarify the meaning of the term 'eligible employee' to ensure that a person cannot be an eligible employee of themselves if they are employed by an entity controlled by themselves.

In moving the amendment, Senator Allison stated that "making this measure retrospective to 19 May 1999 is more appropriate than either the government's proposal or the ALP's amendment that we have just voted on. We locate that date at the time when the tax commissioner put out a detailed statement making it very clear that the tax office, following a review of aggressively marketed employee benefit arrangements, had concluded that there were clear attempts to frustrate the law and that they would be defeated" (Senate, *Parliamentary Debates*, Proof Hansard, 8 February 2001, p 21554)

The Committee notes that the effect of this amendment, if enacted, would be to increase the period of retrospective operation of this provision by an additional period of more than 12 months. The Committee **seeks the advice of the Minister** as to whether the Government proposes to accept this amendment.

Relevant extract from the response from the Assistant Treasurer

> In Alert Digest No. 2 of 2001 the Committee sought the Minister's advice about whether the Government intended to accept the Senate amendment to make retrospective one measure contained in the *Taxation Laws Amendment (Superannuation Contributions) Bill 2000.*
>
> The amendment made by the Senate proposed a retrospective start date for the measure which clarifies the meaning of the term 'eligible employee' in section 82AAA of the *Income Tax Assessment Act 1936.*
>
> The Government rejected this amendment in the House of Representatives on 24 May 2001.

Such an amendment was unnecessary. The Commissioner of Taxation has advised that controlling interest superannuation schemes are not effective under current law, and that this view is supported by senior counsel.

I trust this has been of assistance to you.

The Committee thanks the Assistant Treasurer for this response.

Therapeutic Goods Amendment (Medical Devices) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2001*, in which it made various comments. The Parliamentary Secretary to the Minister for Health and Aged Care has responded to those comments in a letter dated 24 May 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. 5 of 2001

This bill was introduced into the House of Representatives on 29 March 2001 by the Minister for the Arts and the Centenary of Federation. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Therapeutic Goods Act 1989* to introduce a new medical device regulatory system to harmonise Australian requirements for quality, safety and performance with recommendations of the medical devices Global Harmonisation Task Force. These recommendations are based on the requirements of the European Community.

Features of the new system include specified criteria for safety and performance with which the devices must conform; increased use of internationally recognised standards for devices; a risk-based classification of medical devices; conformity assessment procedures; increased emphasis on post-market activities; and a new electronic lodgement system for 'inclusion' (instead of registration or listing) of medical devices on the Australian Register of Therapeutic Goods.

The bill also contains transitional arrangements for devices currently on the Register to meet the new requirements, and for some specified new devices.

Abrogation of the privilege against self-incrimination
Proposed new sections 41JC and 41JJ

This bill proposes to insert new sections 41JC and 41JJ in the Principal Act. Each of these provisions will abrogate the privilege against self-incrimination for a person who provides information under proposed new sections 41JB and 41JG. However, in the case of an individual, the information or documents given, and anything obtained as a direct or indirect consequence, will not be admissible in evidence in criminal proceedings against that individual (other than proceedings for providing false and misleading information or documents).

The Committee has generally been prepared to accept that provisions containing such a use/derivative use immunity strike a reasonable balance between the need to obtain information and the protection of personal rights. However, in each of these proposed sections the privilege against self-incrimination is abrogated in relation to "a person", but the immunity is confined to information provided by "an individual". The Explanatory Memorandum does not indicate the reason for this departure from the usual drafting practice. The Committee, therefore, **seeks the Minister's advice** as to the reason for limiting the protection afforded by these two sections to 'individuals'.

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 Parliamentary Secretary

> Thank you for your letter of 5 April 2001 to the Minister for Health and Aged Care, the Hon Dr Michael Wooldridge MP, concerning comments contained in the Scrutiny of Bills Alert Digest No. 5 of 2001 regarding the Therapeutic Goods Amendment (Medical Devices) Bill 2001. As Parliamentary Secretary with executive responsibility for the Therapeutic Goods Administration (TGA), I am responding on behalf of the Government.
>
> I note that the Standing Committee for the Scrutiny of Bills accepts the explanation for the delayed implementation of Schedule 2 to the Bill.
>
> The Committee sought advice as to why, in proposed new sections 41JC and 41JJ in Schedule 1 of the Bill, the privilege against self-incrimination is abrogated in relation to "a person", but the immunity providing for inadmissibility in evidence in criminal proceedings (except proceedings for providing false and misleading information), is confined to information provided by "an individual".

The Attorney-General's Department advise that the provision in the Bill reflects the position at common law. At common law, a body corporate is not entitled to claim the privilege against self-incrimination. This follows a decision of the High Court in EPA v Caltex (1993) 178 CLR 477, which was affirmed by the Full Federal Court in TPC v Abbco Ice Works (1994) 123 ALR 503.

Accordingly, sub-sections 41JC(1) and 41JJ(1) of the Bill abrogate the privilege against self-incrimination with respect to persons generally. The term "person" encompasses individuals (i.e. natural persons) and bodies corporate. Therefore, these sub-sections provide for the statutory abrogation of the privilege with respect to individuals, and reflect the common law position that bodies corporate cannot claim the privilege. Sub-sections 41JC(2) and 41JJ(2) provide for the standard use/derivative use immunity, but only for individuals, to compensate for the statutory abrogation of the privilege. The immunity should not be conferred on persons generally, which would include bodies corporate, because bodies corporate are not entitled to the protection afforded by the privilege in the first place.

The provisions in the Bill are modelled on section 31F of the *Therapeutic Goods Act 1989*, inserted by the *Therapeutic Goods Amendment Act (No. 3) 2000*, passed by Parliament late last year. Other relevant legislative precedents adopting a similar approach are section 123 of the *Education Service for Overseas Students Act 2000* (also passed by Parliament late last year), sub-section 60(3) of the *Airports Act 1996* and sub-section 26(3) of the *Financial Sector (Shareholdings) Act 1998.*

Thank you again for your comments and interest in this matter.

The Committee thanks the Parliamentary Secretary for this response.

Barney Cooney
Chairman

The Hon Daryl Williams AM QC MP

Attorney-General

00/4150

- 6 AUG 2001

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

Dear Senator Cooney

I refer to the Committee's consideration of the Administrative Review Tribunal Bill 2000 (ART Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000 (ART (CTP) Bill) as contained in Scrutiny of Bills *Alert Digest* No. 10 of 2000 (16 August 2000) and No. 15 of 2000 (1 November 2000).

Several Government amendments, meeting most of the concerns raised by the Committee, were made to the ART legislation before it passed the House of Representatives on 8 December 2000.

As you know, the Senate rejected both Bills on 26 February 2001. I am currently exploring, with interested parties, options for amendment to the legislation. The Government remains committed to the passage of the Bills.

In response to the Committee's requests, I provide the following advice.

Commencement

Subclause 2(3) of the ART Bill

In response to the Committee's concerns, subclause 2(3) of the ART Bill was amended in the House to provide that the default commencement date for Parts 4 to 10 of the ART Bill be 6 months rather than 12 months.

Delegation

Subclause 50(1) of the ART Bill and proposed new subsection 378A(4) of the Migration Act (Schedule 14, item 195 of the ART (CTP) Bill)

The Committee expressed concern that subclause 50(1) of the ART Bill, and the proposed new subsection 378A(4) of the *Migration Act 1954*, might allow for the delegation of 'decision-making or review powers'.

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Given the nature of the powers that are expressly non-delegable, or only delegable to executive members (see subclauses 50(2) and (3)), and the location of the clause in Part 3 of the Bill (which is about the 'Administration of the Tribunal'), it is likely that clause 50 would be interpreted as providing for the delegation of administrative powers and functions only. However, to avoid doubt, a new subclause 50(1A) was inserted in the House. This new subclause provides that the powers and functions that the President may delegate under subclause (1) do not include powers and functions that the President has in his or her capacity as a member of the Tribunal constituted under:

- Division 2 of Part 5 (which is about the constitution of the Tribunal for the purpose of reviewing a decision); or

- clause 163 (which, among other things, applies Division 2 of Part 5 to the performance of related Tribunal functions).

A corresponding amendment to the ART (CTP) Bill amended proposed new subsection 378A(4) of the Migration Act to the same effect.

Subclause 50(1) of the ART Bill and proposed new subsections 378A(1) and (2) of the Migration Act (Schedule 14, item 195 of the ART (CTP) Bill

The Committee expressed concern about the width of the class of persons to whom the President or executive member may delegate their functions and powers under subclause 50(1) of the ART Bill and the proposed new subsections 378A(1) and (2) of the Migration Act.

Subclause 50(1) was amended in the House to exclude consultants from the class of persons to whom the President may delegate his or her powers and functions. A corresponding amendment to the ART (CTP) Bill amended new subsection 378A(1) of the Migration Act to the same effect.

Subclause 50(4) and paragraph 65(1)(d) of the ART Bill

Subclause 50(4) previously provided that an executive member may delegate the power to determine whether to grant leave for a second-tier review to a member appointed or assigned to the executive member's Division. The explanatory memorandum to the Bill noted (at paragraph 132) that executive members were expected to exercise great care in deciding to whom to delegate this power, and that 'it would rarely be appropriate to delegate the function to a member who constituted, or was part of, the Tribunal that made a first-tier decision in relation to which second-tier review is sought'.

The Committee suggested that the appropriateness of such a delegation should be dealt with in the Bill itself. Subclause 50(4) has been amended so as to preclude an executive member from delegating his or her power under paragraph 65(1)(d) to a member who was a member of the Tribunal at any stage during the conduct of the review of the first-tier decision in relation to which second-tier review is sought.

'Henry VIII' clause

Paragraph 6(1)(a) of the ART (CTP) Bill

The Committee sought my advice as to whether the operation of paragraph 6(1)(a) of the ART (CTP) Bill can be restricted to effect changes of only a minor or technical nature.

A power to make regulations that can amend Acts is required so that any necessary consequential amendments that are inadvertently not provided for in this Bill can be made without the need for the enactment of another Act.

As noted in paragraph 15 of the explanatory memorandum to the Bill, similar provision was made by subsection 14(5) of the *Public Employment (Consequential and Transitional) Amendment Act 1999* (the cognate Act to the *Public Service Act 1999*) which, like the ART (CTP) Bill, made amendments to a very large number of Acts.

The power in clause 6 is expressly restricted to the making of regulations that:

- make amendments consequential on the enactment of the ART Bill and the repeals and amendments made by the Schedules to the ART (CTP) Bill; or

- are of a transitional or saving nature arising from the transition from the *Administrative Appeals Tribunal Act 1975* to the ART Bill or from the repeals and amendments made by the Schedules to the ART (CTP) Bill, or by consequential regulations.

The regulation-making power in paragraph 6(1)(a) is already restrictive and can only be used to effect minor and technical changes.

I trust that the above advice is of assistance to the Committee.

Yours sincerely

Daryl Williams

DARYL WILLIAMS

The Hon Daryl Williams AM QC MP

Attorney-General

00/7458 ISL RG

14 MAY 2001

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

Dear Senator Cooney

I refer to your letter of 8 March 2001 advising me of the Committee's comments on the Copyright Amendment (Parallel Importation) Bill 2001 as contained in the Scrutiny of Bills Alert Digest No. 3 of 2001.

The Committee asks my advice as to the reason for including a provision in the Bill that would delay commencement of Schedule 2 for one year after the Bill receives Royal Assent. The amendments set out in Schedule 2 would allow the parallel importation of printed books, periodical publications and sheet music. This would be a significant change to the current position where, in general, the parallel importation of books from abroad is permitted only where there is a failure to meet availability deadlines after the book is published. Recognising the importance of these amendments for the publishing industry, the Intellectual Property and Competition Review Committee in its 'Review of intellectual property legislation under the Competition Principles Agreement' recommended that Australian publishers be given a one-year transition period to assist them to understand and adjust to the new legal environment in which they will be operating. In particular, the Committee considered it important that the publishing industry be given time for contractual arrangements to be reviewed. The Government accepts that recommendation.

I do not consider that the proposed one-year delay to the commencement of Schedule 2 is excessive. You may recall that the commencement of certain amendments contained in the *Copyright Amendment Act (No. 1) 1998* was delayed for 18 months for the similar purpose of giving business time to adjust to changes to copyright law dealing with parallel importation. Those amendments restricted the right of copyright owners to control parallel imports by means of copyright material included in the packaging and labelling of imported goods.

I thank the Committee for its examination of the Bill and hope my response provides the clarification requested.

Yours sincerely

Daryl Williams

DARYL WILLIAMS

SENATOR THE HON. CHRISTOPHER ELLISON
Minister for Justice and Customs
Senator for Western Australia

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- 7 AUG 2001

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

Dear Senator Cooney Barney,

I am writing in response to additional matters, relating to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* [previously the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001 (the Bill)] raised by the Senate Standing Committee for the Scrutiny of Bills in its Seventh Report of 2001.

The Committee has sought my further advice on whether the guidelines for the monitoring powers will be purely administrative in character. Since the Committee considered the Bill, the Government agreed to amend it to require the Australian Customs Service (Customs) to formally notify occupiers of premises of their rights and obligations before monitoring powers exercised on those premises. I consider, in light of this, there is no longer any need for guidelines to be tabled in Parliament as the notification to occupiers will have the same effect. Manuals for Customs officers will be amended to address the administration process.

The Committee also seeks my advice whether any guidelines or standards will be issued covering the use that is to be made of the administrative record of infringement notices that have previously been served.

I draw the Committees attention to a Government amendment that was made to the Bill by the Senate in response to a recommendation of the Senate Legal and Constitutional Legislation Committee – new section 243XA. Section 243XA requires the Chief Executive Officer of Customs (the CEO) to make guidelines on the administration of Division 5 of the Bill – the infringement notice scheme for specified strict liability offences. Section 243XA also provides that those guidelines are a disallowable instrument for the purpose of section 46A of the *Acts Interpretation Act 1901*. The guidelines will contain matters for consideration by the CEO in determining whether an infringement notice is appropriate in the circumstances.

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Although the content of the guidelines for the administration of the infringement notice scheme for the strict liability offences is yet to be finalised, that part of the guidelines relating to a person's compliance history will contain information on the relevance of old infringement notices in determining whether an infringement notice should be served for a later offence. Appropriate weight will be given to the frequency and age of those old notices.

If you have any further queries on any of the above issues please do not hesitate to contact my office.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

07 AUG 2001

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Senator Barney Cooney
Chairman
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Dear Senator Cooney

FINANCIAL SERVICES REFORM BILL 2001

I refer to comments contained in the Scrutiny of Bills Alert Digests No. 6 and No. 7 of 2001 regarding the Financial Services Reform Bill 2001 and the Financial Services Reform (Consequential Provisions) Bill 2001. In these comments the Committee sought my advice regarding a number of provisions in these Bills.

Please find enclosed some comments on the matters raised by the Committee. I trust that this information will be of assistance to the Committee.

Yours sincerely,

FINANCIAL SERVICES REFORM BILL 2001 (FSR BILL)

The comments in the Scrutiny of Bills Alert Digest No. 6 of 2001 regarding the FSR Bill relate to the commencement provision, a number of offences of strict liability and the reversal of the onus of proof in relation to insider trading offences.

Commencement (Subclause 2(6))

The Committee has noted that subclause 2(6) would allow for the possibility that many of the provisions of the FSR Bill may not commence until 12 months after Assent. It has sought advice as to why the usual six month period for commencement was not appropriate to the commencement of this Bill.

The new federal system of corporate regulation commenced on 15 July this year. The *Corporations Act 2001* (the Corporations Act) and related legislation is the product of Commonwealth, State and Territory co-operation in response to the High Court's decision last year in *The Queen v Hughes*. It is supported by referrals of power by the States to the Commonwealth and places the federal system of corporate regulation on a secure constitutional foundation.

As the FSR Bill proposes amendments to the Corporations Act and related legislation, it was necessary to ensure that the new federal system of corporate regulation was fully operational prior to commencement of the FSR Bill, and in particular that it was supported by a valid referral of State legislative powers to the Commonwealth. In view of uncertainty surrounding the progress of these matters and to allow time for the full implementation of the new federal system, a period of up to twelve months, as opposed to the usual six month period, was considered appropriate to the commencement of the FSR Bill.

The Government has indicated that it is working towards a 1 October 2001 commencement for the FSR reforms.

Strict Liability Offences

The Committee has drawn attention to a number of the provisions in the FSR Bill that create offences of strict liability and has sought a more detailed explanation of the rationale for the application of strict liability.

The provisions on which the Committee has sought additional information fall into a number of categories each of which is discussed below in more detail. However, in general the application of strict liability in the FSR Bill has been based on a careful consideration of each offence and, in particular, has taken into account the important consumer protection subject matter of the FSR Bill and the need to ensure that providers of financial services comply with certain obligations placed on them by the FSR Bill. In many cases these provisions relate to offences that are essentially regulatory in character. I also note the availability for these offences of the defence of mistake of fact under section 9.2 of the *Criminal Code*.

Proposed sections 952C and 1021C (see paragraphs 12.79-12.80 and 14.194 of the EM)

These offences concern the failure by providers of financial services to provide certain disclosure documents or statements to clients. The FSR Bill provides for a strict liability offence with a pecuniary only penalty of 50 penalty units as well as a fault element or ordinary offence with a higher penalty that could include imprisonment. Therefore, contraventions where the necessary fault elements can be shown will be prosecuted under the 'ordinary' offence, contraventions that take the form of a simple omission to provide a document or statement and are regulatory in nature will be able to be prosecuted under the strict liability offence.

The rationale for including a strict liability offence is based on the subject matter of the offence. In the context of the provision of financial services to retail clients, the giving of certain disclosure documents is an important element of the consumer protection regime implemented by the FSR Bill and it is, therefore, appropriate to apply an element of strict liability to these offences. It should also be noted that this offence only applies to a limited class of people such as financial services licensees and their authorised representatives.

Proposed sections 952E and 1021E (see paragraphs 12.87-12.91 and 14.197-14.198 of the EM)

These offences relate to the provision of defective disclosure documents or statements by those people who prepare them (Generally under the FSR Bill a document or statement is defective if it contains a misleading or deceptive statement or it omits a required statement. The statement or omission must also be materially adverse from the point of view of a reasonable person considering whether to be provided with the financial service).

The offences aim to ensure that those people who prepare documents take reasonable steps to ensure the accuracy of the information contained in them.

It should be noted that strict liability in these offences only applies to the circumstance that the document is defective, fault elements continue to apply to other elements of the offence such as the actual giving of the document or statement to another person.

A wide ranging defence is available to these offences, that is, that the defendant took reasonable steps to ensure that the disclosure document or statement would not be defective. It should be noted that a comparable existing section of the Corporations Act (section 731) also contains an element of 'reasonableness'.

This arrangement of providing a defence of 'reasonable steps' and applying strict liability is necessary to ensure that preparers of documents and statements take reasonable steps to ensure that the information contained in them is not materially misleading or deceptive. These documents will then be relied on by consumers in making decisions about the acquisition of financial services and products.

Proposed sections 952I, 952J and 1021H (see paragraphs 12.98-12.100 and 14.201-14.202 of the EM)

The offences in these proposed sections relate to a failure by a person who prepares disclosure documents or statements to ensure that they comply with certain formal

requirements in the FSR Bill. These requirements include ensuring that the documents or statements have the correct title and are appropriately dated.

The provision of this information is important to consumers who need to be able to ascertain, for example, the purpose of the particular document or statement. The offences are regulatory in nature and, therefore, contain a low pecuniary only penalty and have strict liability applying to the circumstance that the document of statement does not comply with these formal requirements. However, fault elements continue to apply to the conduct of actually giving or authorising the use of the document or statement.

Proposed sections 993B, 993C, 993D, 1021O (see paragraphs 13.50-13.52 and 14.188 of the EM)

The offences created by these proposed sections relate to the handling of money provided by clients to financial services licensees and product issuers or sellers. As such, these provisions are important to ensuring the safekeeping of clients' money. Examples of these requirements include payment of the money into an account with an Australian ADI and that the money must be paid into such an account on the day on which it is received or the next business day.

The approach taken to these offences is to have an ordinary offence to which fault elements apply with a higher penalty that could include a substantial period of imprisonment. This type of offence is appropriate where the necessary fault elements can be established.

A strict liability offence is also provided. This provides a suitable offence for contraventions relating to technical contraventions of requirements of the FSR Bill. These offences would, therefore, be of a regulatory nature and are necessary to ensure the appropriate handling of client money by licensees and other people as a part of the consumer protection framework that the FSR Bill puts in place.

Reversal of the Onus of Proof (proposed section 1043M)

A key policy objective of the FSR Bill is to introduce a harmonised regulatory regime for all financial products, service providers and markets. Existing insider provisions, contained in Chapters 7 and 8 of the *Corporations Act 2001*, and in the *Superannuation Industry Supervision Act 1993*, are not entirely consistent in their application to different financial products. The FSR Bill therefore proposes to consolidate the different sets of insider trading provisions and apply them to cover all financial products that are traded on a market. Subject to these changes, the insider trading provisions reflect the policy of the current provisions. I also note that the insider trading provisions are currently the subject of a report that is being prepared by the Companies and Securities Advisory Committee (CASAC).

The Committee has drawn attention to proposed section 1043M, which provides defences to prosecutions for insider trading under proposed section 1043A. Proposed section 1043M would impose an evidential burden on a defendant to establish a defence. It is based upon and largely duplicates existing insider trading provisions contained in the Corporations Act (see for example section 1002T). It, therefore, does not alter the established policy of the existing provisions, which is for the defendant to bear the onus of

proof in these circumstances. To do otherwise would amount to a substantial change to current arrangements applying to insider trading offences.

FINANCIAL SERVICES REFORM (CONSEQUENTIAL PROVISIONS) BILL 2001 (FSR (CP) BILL)

The comments in the Scrutiny of Bills Alert Digest No. 7 of 2001 regarding this Bill relate to decisions that are not subject to review under the *Administrative Decisions (Judicial Review) Act 1977* and a number of offences of strict liability.

No review of decisions (Schedule 1, Item 1)

Item 1 of Schedule 1 of the FSR (CP) Bill provides that amendments to the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) will ensure that:

- decisions by the Minister under proposed Division 1 of Part 7.4 of the Corporations Act (the 15 per cent voting power limitation on prescribed market and clearing and settlement facility licensees); and

- decisions of the Securities Exchanges Guarantee Corporation (the SEGC) under proposed Part 7.5 of the Corporations Act (compensation arrangements)

will not subject to review under the ADJR Act.

The reason for exempting decisions of the SEGC under proposed Part 7.5 of the Corporations Act from the application of the ADJR Act are:

- the SEGC is a wholly owned subsidiary of the Australian Stock Exchange Limited and is responsible for administering the National Guarantee Fund under current Part 7.10 of the current Corporations Act, and will continue to do so under proposed Division 4 of Part 7.5 which is to be inserted in the Corporations Act by the FSR Bill;

    - it thus operates in a commercial environment and its activities might be unduly constrained by requirements of judicial review of its decision-making;

- adverse decisions by the SEGC on claims against the National Guarantee Fund will continue to be reviewable in the Federal Court and the State and Territory Supreme Courts (proposed section 888H);

    - in addition, brokers may challenge the SEGC when it seeks to enforce its right of subrogation (under proposed section 892F) because the SEGC only has the rights and remedies of the claimant.

The reason for exempting decisions by the Minister under proposed Division 1 of Part 7.4 of the Corporations Act from the application of the ADJR Act is that administrative review of decisions by a Minister that an acquisition is, or is not, in the national interest is inappropriate.

The national interest test is included in, among other provisions, proposed section 851B which relates to the granting of an application to hold more than 15% voting power in a prescribed market or CS (clearing and settlement) facility licensee.

This approach is consistent with the approach taken in relation to comparable decisions under the *Foreign Acquisitions and Takeovers Act 1975* (see paragraph (h), Schedule 1 to the ADJR Act).

Strict Liability Offences (Schedule 1 – various items)

The Committee has drawn attention to a number of provisions in the FSR (CP) Bill that create offences of strict liability, and has sought confirmation that the FSR (CP) Bill will create no new offences of strict liability.

The amendments in the FSR (CP) Bill that create offences of strict liability relate to existing offences in the Australian Securities and Investments Commission Act 2001, they do not create new strict liability offences . These amendments were necessary as part of the process of Criminal Code harmonisation of existing offences which is made necessary by section 6.1 of the *Criminal Code*, which states that a criminal offence is a strict liability offence only if express provision is made to that effect. The intention behind the strict liability amendments made by the FSR (CP) Bill is to preserve the status quo in relation to strict liability. It is important to note that such amendments are only made to offences which are judged to be presently of a strict liability character. The offences to which strict liability is applied by the FSR (CP) Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply.

As the Committee would be aware, a number of factors are taken into account in determining whether an offence is one of strict liability, including whether the provision expressly or by implication contains a fault element, the penalty that applies, the presence of an express defence and the nature of the offence.

Senator the Hon Robert Hill

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

26 JUN 2001

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

Dear Senator Cooney

I refer to the Committee's letter of 24 May 2001 referring to certain matters raised in the Alert Digest No. 6 of 2001 (23 May 2001) concerning the *Great Barrier Reef Marine Park Amendment Bill* 2001 ("the Bill").

The Committee has sought advice on the following issues which the Committee indicates may be in breach of principle 1(a)(i) of the Committee's terms of reference: new offences of strict liability and the use of "negligence" as a fault element.

1. **Strict Liability**

The Bill inserts a number of new subsections into the *Great Barrier Reef Marine Park Act* 1975 ("the Act") which create offences of strict liability (see subsections 38A(3), 38CB(2), 38J(1C), 38M(3), 38MA(2), 38MA(4) and 38MC(3)). In relation to these subsections, the Committee has noted that whilst the Explanatory Memorandum explains the effect of imposing strict liability for criminal offences, it does not explain why it is necessary in the circumstances set out.

The Committee has indicated that these provisions 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. Further, the Committee has sought my advice on whether the Explanatory Memorandum and the Bill are consistent on the issue of strict liability, and why it is appropriate that strict liability be imposed in the circumstances set out in the Bill.

(a) Subsection 38A(3)

Subsection 38A(2) provides that a person is guilty of an offence if the person uses or enters a zone for a purpose other than a purpose that is permitted under the zoning plan. Subsection (3) goes on to state that an offence under subsection (2) is an offence of strict liability.

Strict liability is defined in subsection 6.1(1) of the *Criminal Code* as follows:

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"If a law that creates an offence provides that the offence is an offence of strict liability:
(a) there are no fault elements for any of the physical elements of the offence; and
(b) the defence of mistake of fact under section 9.2 is available."

The *Criminal Code* provides that strict liability must be identified expressly, otherwise a fault element will apply automatically (see sections 5.6 and 6.1 of the *Criminal Code*). The effect of section 6.1 of the *Criminal Code* is that offence provisions must expressly state that they create strict liability offences. This is the effect of subsection 38A(3).

Strict liability has been used in section 38A to create a two tiered offence. The first tier (subsection 38A(1)) requires proof of fault (the fault elements being intention or negligence). The second tier (subsections 38A(2) and (3)) is an offence of strict liability, and as such, requires no proof of fault.

This alternative approach enables the prosecution to distinguish between illegal activities which result in relatively minor impacts and those which impact severely on the World Heritage values of the Great Barrier Reef Marine Park. Further, in circumstances where the fault elements may be difficult to prove, the strict liability provision further enables the prosecution of persons whose actions have had an adverse impact on the environment. Given the national and international significance of the Great Barrier Reef, it is believed that such provisions are justified.

(b) Subsections 38CB(2) and 38MA(2)

Both of these provisions state that strict liability applies to paragraph (1)(a). Paragraph (1)(a) relates to the use and entry into zones for specific activities (that is, fishing in the case of section 38CB and the operation of a ship in the case of section 38MA) contrary to the provisions of a zoning plan.

Subsection 6.1(2) of the *Criminal* Code recognises that strict liability can be isolated to a particular element of the offence. This is because the fault elements that are required to be proved for other elements of the offence are more critical to a person's culpability. The effect of using strict liability for a particular element of an offence is so that the prosecution does not have to prove that element of the offence (in this instance, the provisions of a zoning plan for the purposes of paragraph (1)(a)).

The use of strict liability in paragraph (1)(a) of the above subsections is not inconsistent with the wording of the Explanatory Memorandum, as proof of fault (that is, intention or negligence) is still required for the other elements of the offence. Further, the prosecution still has the legal burden of proving the remaining elements of the offence.

The use of strict liability as the fault element for part of an offence has been used in other Commonwealth environmental legislation, such as the *Environment Protection and Biodiversity Conservation Act* 1999. Section 254 of this Act uses strict liability to establish a particular element of the offence, however, fault elements otherwise need to be established.

(c) Subsections 38J(1C), 38M(3), 38MA(4) and 38MC(3)

All of these provisions state that strict liability applies to a previous subsection. When strict liability is used in relation to the whole offence, although no proof of fault is required, the defence of mistake of fact is still available pursuant to section 9.2 of the *Criminal Code*. Further, strict liability is used as a second tier offence. This enables the prosecution to proceed against a person pursuant to the fault based provisions (where proof of intention or negligence is required), or pursuant to the strict liability provisions where no fault elements are required to be proved. The fault based provisions do not overlap with the strict liability provisions, therefore, there is no conflict in the degree of fault which is required for both provisions. The strict liability offence provisions attract significantly lower maximum penalties.

The effect of subsection 38J(1C) is to create an offence of strict liability for persons who discharge waste in the Marine Park. This was considered necessary given the devastating effect that an oil spill or the discharge of other hazardous material would have on the environmental and cultural values of the Great Barrier Reef and World Heritage Area. The use of strict liability for the discharge of oil and other hazardous materials in the Marine Park also gives the Act a greater parity with other marine pollution legislation. For example, sections 9 and 21 of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 create offences for both masters and owners of ships for discharges into the sea.

The effect of subsections 38M(3) and 38MA(4) is to make it an offence of strict liability for owners and operators who operate a ship in a zone contrary to the provisions of the zoning plan that relate to the zone. Once again, given the potentially devastating impact on the Marine Park of a grounding or collision, the strict liability aspect of this offence is considered necessary.

The effect of subsection 38MC(3) is to make it an offence of strict liability for owners and operators who operate a vessel in the Marine Park, in circumstances where that operation results in, or is likely to result in, damage to the Marine Park. An example of the adverse impact on the Great Barrier Reef that can result from the negligent operation of a ship, was recently highlighted when a Malaysian cargo ship, the *Bunga Teratai Satu*, ran aground on Sudbury Reef near Cairns. This incident highlighted the need for the Act to be strengthened, and justifies the strict liability provision.

It is considered that the requirement of a mental element in the above provisions would not alter the potential effect of the act on the environment if the provisions are contravened, nor aid in the education of the public. The use of strict liability offences in this regard is considered a necessary measure in order to protect and conserve the world heritage values of the Marine Park.

Further, none of these provisions are inconsistent with the wording contained in the Explanatory Memorandum, as the strict liability components of these offences is the

second tier of the offence. All the provisions listed above (that is sections 38J(1), 38M, 38MA, and 38MC) are two tiered offences. Whilst the first tier requires proof of fault (that is intention or negligence), and impose liability if the offender has failed to exercise reasonable care, the second tier, as a strict liability offence, does not require proof of fault.

This two tiered approach was developed in consultation with the Attorney-General's Department. As stated above, this alternative approach enables the prosecution to distinguish between illegal activities which result in relatively minor impacts and those which impact severely on the World Heritage values of the Great Barrier Reef Marine Park. Further, in circumstances where the fault elements may be difficult to prove, the strict liability provision further enables the prosecution of persons whose actions have had an adverse impact on the environment. Given the national and international significance of the Great Barrier Reef, it is believed that such provisions are justified.

2. The use of "negligence" as a fault element

The Bill also inserts new subsections 38CC(2) and 38MB(2), which impose liability for acts committed negligently in relation to particular offences. In relation to these subsections, the Committee has noted that the Explanatory Memorandum does not explain why negligence is the appropriate fault element in these circumstances, and has sought advice in this regard. Further, the Committee indicates that these provisions 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.

Negligence is defined in section 5.5 of the *Criminal Code* as follows:

> "A person is negligent with respect to a physical element of an offence if his or her conduct involves:
> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
> (b) such a high risk that the physical element exists or will exist;
> that the conduct merits criminal punishment for the offence."

Both of the above subsections state that the fault element for paragraph (1)(d) is negligence. Paragraph (1)(d) applies to conduct which contravenes the conditions of a permission for fishing (in the case of subsection 38CC(2)) and the conditions of a permission for the operation of a ship (in the case of subsection 38MB(2)). Although negligence is expressly stated to apply to paragraph (1)(d), section 5.6 of the *Criminal Code* applies the appropriate fault element to any of the remaining physical elements of the offences for which no fault element has been specified (for example, by virtue of subsection 5.6(1) of the *Criminal Code*, the fault element for paragraph (1)(c) is intention). This means that negligence is not the only fault element which is required to be proved. However, because of the operation of the *Criminal Code*, negligence is the only fault element which needs to be expressly stated.

Negligence, as a fault element for these subsections, was developed in consultation with the Attorney-General's Department. Although negligence is rarely used as a fault element in Commonwealth offences, its use is justified given the potentially adverse impact on the environment of the Great Barrier Reef Marine Park and World Heritage Area that may result from fishing or shipping contrary to the conditions of a permission. An example of the environmental damage that can result from the negligent operation of a ship is the recent grounding of the *Bunga Teratai Satu* on Sudbury Reef near Cairns.

I trust the above adequately addresses the matters raised.

Yours sincerely

Robert Hill

ASSISTANT TREASURER
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27 JUL 2001

Senator B Cooney
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Dear Senator Cooney

The Committee sought the advice of the Treasurer as to the effect of the retrospective commencement of Schedule 3 of the *New Business Tax System (Capital Allowances) Act 2001*, relating to second hand plant. The Treasurer has asked me to respond.

The amendments in question prevent acceleration of depreciation deductions where depreciating assets change hands, but only between associates or where the end user of the assets does not change. In these cases, the fact that the assets have changed hands should not have any substantial effect on the rate of deductions for depreciating assets. The rules do not disadvantage taxpayers compared to the treatment they would have had without the transfer of the asset, so a continuing end user or an associate enjoys the same rate of depreciation as if the asset had not changed hands.

The rules require the new owner to use the same depreciation method as the previous owner. Where the diminishing value method is used, the same effective life must be used as that which the previous owner used, while the same remaining effective life can be used where the prime cost method is used. Where the end-user does not change and taxpayers are unable to obtain the relevant information, the diminishing value method and the Commissioner's safe harbour effective life is to be used.

The legislation detailing the rules was released as an exposure draft by the Government on 9 May 2001 and was announced to take effect from that time. The rules only apply to taxpayers who acquire assets after the announcement and are aimed at protecting the revenue.

Yours sincerely

ROD KEMP

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27 JUN 2001

Senator B Cooney
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Dear Senator Cooney

I refer to the concerns expressed by the Senate Standing Committee for the Scrutiny of Bills in Alert Digest No 7 of 2001 dated 20 June 2001 concerning the retrospective application of Schedule 3 to Taxation Laws Amendment Bill (No 2) 2001.

By way of background, the amendments in Schedule 3 to the Bill close a loophole in the dividend imputation provisions that apply to life insurance companies. As noted in the Explanatory Memorandum, the amendments prevent life insurance companies from inappropriately generating franking credits by deliberately overfranking the payment of dividends and applying the resulting franking dividends tax to offset a company tax liability. By doing so, life insurance companies could avoid the reduction in available franking credits to take account of the amounts attributable to the statutory funds of the life insurance companies. Franking credits and debits should be reduced by 80% to take into account that there is a limit on the portion of statutory fund income that can be distributed to shareholders because of various prudential requirements.

When the announcement was made, a scheme trying to exploit this loophole or anomaly had recently been exposed. It was important to announce the closure of the loophole as soon as possible after the scheme had been discovered to prevent further exploitation. In fact, the announcement seems to have had the desired effect, with no life insurance companies entering into such a scheme since the announcement was made.

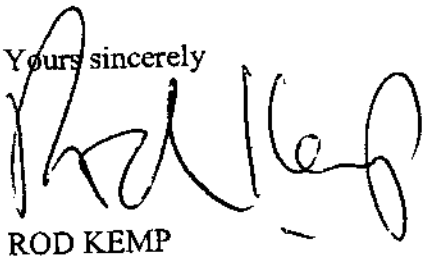
If the closure of the loophole had been deferred, the result would have been that some companies would have received the full benefit of the contrived arrangements, give an undue advantage to those companies and resulting in a significant cost to revenue.

The amendments also include a transitional rule that will provide an alternative treatment in certain circumstances where a franking deficit tax or deficit deferral tax liability arose before 4 May 1999. The transitional rule should overcome concerns about the possible retrospective effect of the amendments. The rule protects companies which had commenced a scheme to exploit the loophole but had not completed that scheme. Companies are effectively placed in the position they would have been in had they never entered into the scheme to exploit the loophole.

However, the development of the transitional rules was a complex exercise taking a good deal of time, there was considerable pressure on drafting and Australian Taxation Office resources. This delayed development of the necessary legislation.

I trust this information will be of assistance to you.

Yours sincerely



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26 JUN 2001

Dear Senator Cooney

In Alert Digest No. 2 of 2001 the Committee sought the Minister's advice about whether the Government intended to accept the Senate amendment to make retrospective one measure contained in the *Taxation Laws Amendment (Superannuation Contributions) Bill 2000.*

The amendment made by the Senate proposed a retrospective start date for the measure which clarifies the meaning of the term 'eligible employee' in section 82AAA of the *Income Tax Assessment Act 1936.*

The Government rejected this amendment in the House of Representatives on 24 May 2001.

Such an amendment was unnecessary. The Commissioner of Taxation has advised that controlling interest superannuation schemes are not effective under current law, and that this view is supported by senior counsel.

I trust this has been of assistance to you.

Yours sincerely

Rod Kemp

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Senator B. Cooney
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Dear Senator Cooney

Thank you for your letter of 5 April 2001 to the Minister for Health and Aged Care, the Hon Dr Michael Wooldridge MP, concerning comments contained in the Scrutiny of Bills Alert Digest No. 5 of 2001 regarding the Therapeutic Goods Amendment (Medical Devices) Bill 2001. As Parliamentary Secretary with executive responsibility for the Therapeutic Goods Administration (TGA), I am responding on behalf of the Government.

I note that the Standing Committee for the Scrutiny of Bills accepts the explanation for the delayed implementation of Schedule 2 to the Bill.

The Committee sought advice as to why, in proposed new sections 41JC and 41JJ in Schedule 1 of the Bill, the privilege against self-incrimination is abrogated in relation to "a person", but the immunity providing for inadmissibility in evidence in criminal proceedings (except proceedings for providing false and misleading information), is confined to information provided by "an individual".

The Attorney-General's Department advise that the provision in the Bill reflects the position at common law. At common law, a body corporate is not entitled to claim the privilege against self-incrimination. This follows a decision of the High Court in EPA v Caltex (1993) 178 CLR 477, which was affirmed by the Full Federal Court in TPC v Abbco Ice Works (1994) 123 ALR 503.

Representing the Northern Territory
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Deputy Leader of the National Party of Australia
in the Senate

Accordingly, sub-sections 41JC(1) and 41JJ(1) of the Bill abrogate the privilege against self-incrimination with respect to persons generally. The term "person" encompasses individuals (i.e. natural persons) and bodies corporate. Therefore, these sub-sections provide for the statutory abrogation of the privilege with respect to individuals, and reflect the common law position that bodies corporate cannot claim the privilege. Sub-sections 41JC(2) and 41JJ(2) provide for the standard use/derivative use immunity, but only for individuals, to compensate for the statutory abrogation of the privilege. The immunity should not be conferred on persons generally, which would include bodies corporate, because bodies corporate are not entitled to the protection afforded by the privilege in the first place.

The provisions in the Bill are modelled on section 31F of the *Therapeutic Goods Act 1989*, inserted by the *Therapeutic Goods Amendment Act (No. 3) 2000*, passed by Parliament late last year. Other relevant legislative precedents adopting a similar approach are section 123 of the *Education Service for Overseas Students Act 2000* (also passed by Parliament late last year), sub-section 60(3) of the *Airports Act 1996* and sub-section 26(3) of the *Financial Sector (Shareholdings) Act 1998*.

Thank you again for your comments and interest in this matter.

Yours sincerely

GRANT TAMBLING 24/5/01.