SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2001

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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

TENTH REPORT OF 2001

The Committee presents its Tenth 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:

Environment and Heritage Legislation Amendment Bill (No. 2) 2000 [2001]

Financial Sector (Collection of Data) Bill 2001

International Maritime Conventions Legislation Amendment Bill 2001

Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000

Environment and Heritage Legislation Amendment Bill (No. 2) 2000 [2001]

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2001*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 20 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. 8 of 2001

This bill was introduced into the Senate on 7 December 2000 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

In conjunction with other complementary legislation, the bill proposes to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the Principal Act) to:

- establish a Commonwealth heritage regime focussed on matters of national significance and Commonwealth responsibility;
- establish a National Heritage List using a process of community consultation, expert advice and ministerial responsibility; and to protect and manage places on the National Heritage List; and
- establish a Commonwealth Heritage List of Commonwealth areas of national significance using a process of community consultation, expert advice and ministerial responsibility; advise Commonwealth agencies on actions in relation to places on the Commonwealth Heritage List; and to provide for the management of places on the list.

The bill also contains transitional provisions in relation to places included in the current Register of the National Estate, including the Interim List, and kept under the *Australian Heritage Commission Act 1975*.

The bill was previously considered by the Committee in *Alert Digest No. 1 of 2001* in which it made no comment. After the publication of that *Digest*, the following issue has come to the Committee's attention.

Insufficient Parliamentary scrutiny of heritage principles
Proposed new sections 324W and 341W

Among other things, the bill proposes to insert new sections 324W and 341W in the Principal Act. Subsection 324W(1) requires the Minister to make principles for managing national heritage and to publish those principles in the *Gazette*. Subsection 324W(2) states that the regulations may prescribe obligations to implement or give effect to these principles. Subsection 324W(3) states that a person must comply with the regulations to the extent that they impose obligations on the person.

Subsections (1), (2) and (3) of proposed new section 341W set up a similar scheme for the making and publishing of principles for managing Commonwealth heritage.

While the management principles in each case must be published, they are not subject to Parliamentary scrutiny. It may be suggested that such principles do not need to be subject to Parliamentary scrutiny as they are unlikely to be legislative in character. Support for this view might be found in subsection (2) of each provision, which permits the making of regulations by which the principles may be implemented or given effect. Such regulations would be subject to Parliamentary scrutiny.

However, there is nothing to prevent any such regulations being expressed in the broadest possible terms. For example, a regulation might simply state that a person or State or Territory government must comply with the relevant management principles. Such a broad regulation would leave the principles made under subsection (1) as the source of detailed regulation of matters relating to Commonwealth or national heritage.

In such a situation, the principles themselves would come to have legislative effect, but not be subject to Parliamentary scrutiny. The Committee, therefore, **seeks the Minister's advice** as to why the principles made under proposed new subsections 324W(1) and 341W(1) should not be subject to Parliamentary scrutiny.

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

Relevant extract from the response from the Minister

> I refer to the Scrutiny of Bills Alert Digest No. 8 of 2001, particularly the matter relating to the Environment and Heritage Legislation Amendment Bill (No. 2) 2000.

The Committee sought my advice as to why the principles made under proposed new section 324W(1) and 341W(1) should not be subject to Parliamentary scrutiny.

I consider that the setting of management principles by notice in the Gazette is a straightforward and practical way of dealing with a device that is essentially technical in nature. I expect the principles will be based on recognised heritage management benchmarks such as the long-standing and widely accepted Burra Charter for the management of historic heritage.

You will note that proposed new subsection 324W(2) provides that regulations may prescribe obligations or give effect to the national heritage management principles. As your Committee points out, such regulations will be subject to Parliamentary scrutiny. Implementation of the principles in this way is therefore subject to Parliamentary scrutiny.

Your Committee cites an example of a regulation that simply states that a person must comply with the relevant management principles. You argue that this would allow the principles themselves to have legislative effect without Parliamentary scrutiny. However, as indicated above, such a regulation is itself subject to Parliamentary scrutiny. In addition, the *Acts Interpretation Act 1901* (section 49) deals with the making of regulations which purport to incorporate by reference another instrument as in force from time to time.

For the above reasons, I do not believe that the principles themselves should be subject to Parliamentary scrutiny. It is sufficient that any regulations giving effect to the principles will be subject to Parliamentary scrutiny.

The Committee thanks the Minister for this response and notes the burden placed on the Senate's Regulations and Ordinances Committee to ensure proper scrutiny of those regulations made under the legislation.

Proposed section 324W authorises the making of national heritage management principles, and the making of regulations which "may prescribe obligations to implement or give effect to" those principles. The management principles are not subject to Parliamentary scrutiny, but the regulations which implement or give effect to the principles are.

Under such a scheme, there is a danger that a regulation may give effect to a principle, or a group of principles, and those principles may later be changed without the Parliament having an opportunity to scrutinise that change. For example, a regulation may prescribe an obligation to implement Principle No 1 in a set of principles – arguably, this obligation will continue no matter how often that principle may be changed.

The Committee notes that section 49A of the *Acts Interpretation Act 1901* provides that regulations may not 'apply, adopt or incorporate' any extrinsic material as in force from time to time unless a contrary intention appears. As a matter of interpretation, it is not clear whether regulations which prescribe an obligation to give effect to a principle 'apply, adopt or incorporate' that principle within the meaning of the Acts Interpretation Act. In any event, adequate Parliamentary scrutiny should not depend on statutory interpretation.

The national heritage may include places which are on private or indigenous land. Principles for managing the national heritage are matters of significance which would seem to be quasi-legislative in nature. In order to ensure adequate Parliamentary scrutiny of changes in management principles, the Committee **seeks the Minister's further advice** as to whether the regulations which implement the principles will be amended whenever the principles are amended. The Committee also **seeks the Minister's further advice** as to how the management principles will apply on private and indigenous land, particularly where they are inconsistent with land owners' other statutory responsibilities under Federal, State, Territory or local government legislation.

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

Financial Sector (Collection of Data) 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 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.

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]

Introduced with the Financial Sector (Collection of Data—Consequential and Transitional Provisions) Bill 2001, the bill proposes the transfer of the administration of the *Financial Corporations Act 1974* from the Reserve Bank of Australia (RBA) to the Australian Prudential Regulation Authority (APRA). The bill aims to:

- modernise and increase the relevance of data collections;
- harmonise and increase the flexibility of data-collections and publishing regimes; and
- institute a central repository for the collection of financial data.

The bill also applies the *Criminal Code Act 1995* to all offences against this proposed Act.

Commencement
Subclause 2(3)

Subclause 2(3) of this bill states that Part 2 will not necessarily 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 many of the provisions in 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

I refer to the Committee's request for advice of 23 May in the Alert Digest of 23 May regarding certain issues relating to the Financial Sector (Collection of Data) Bill 2001. Specifically, the Committee has asked for advice on the commencement of Part 2 and the choice of strict liability for certain offences.

Commencement of Part 2

As you know, Part 2 of the Financial Sector (Collection of Data) Bill 2001 proposes that the Australian Prudential Regulation Authority (APRA) will act as a single Government collection agency for the financial sector. The Financial Sector (Collection of Data—Consequential and Transitional Provisions) Bill 2001 will repeal the *Financial Corporations Act 1974* and replaced by the *Financial Sector (Collection of Data) Act 2001*.

As a result of this change, the responsibility for data collection and associated matters for registered corporations will be transferred from the Reserve Bank of Australia (RBA) to APRA. The legislation sets out that Part 2 commences on proclamation or twelve months after the Bill receives Royal Assent, whichever occurs first. A maximum period of twelve months, rather than six months was considered necessary to provide adequate time for the systems to be put in place to transfer the data collection and other responsibilities from the RBA to APRA.

Importantly, it will also provide industry sufficient lead-time to adapt to the new requirements.

The repeal of the Financial Corporations Act does not commence until the commencement of Part 2 of the *Financial Sector (Collection of Data) Act 2001*.

The Committee thanks the Minister for this response.

Strict liability offences
Subclauses 9(10), 13(11), 14(4) and 17(10)

Subclauses 9(10), 13(11), 14(4) and 17(10) specify that various offences created by other provisions in the bill are offences of strict liability. In general terms, these offences involve the provision of information or documents to the Australian Prudential Regulation Authority (APRA).

In his Second Reading Speech, the Minister addresses the imposition of strict liability by observing that the offences relate to the time at which information is to be provided to APRA; that late lodgement of returns can "seriously compromise APRA's ability to supervise effectively", and that, in the case of "minor inadvertent infringements", a system of administrative penalties in lieu of prosecution has been introduced by Division 3 of Part 3 of the bill. While strict liability offences are often included with an administrative penalty regime, the Committee notes that subclause 21(2) of this bill gives APRA an unfettered discretion to withdraw an infringement notice, and to proceed to prosecute a financial institution through the courts.

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.

In the circumstances contemplated by this bill, it remains unclear why strict liability is appropriate for the offences referred to above. The Committee, therefore, **seeks the Minister's advice** as to why strict liability has been imposed for 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

Strict Liability Offences

As identified in the Alert Digest, the Financial Sector (Collection of Data) Bill 2001 proposes that an offence of strict liability is imposed for contraventions of certain provisions, namely, subclauses 9(10),13(11),14(4) and 17(10) refer).

The Alert Digest refers to my Second Reading Speech, which states

> "...the Minister addresses the imposition of strict liability by observing that the offences relate to the time at which information is to be provided to APRA; that late lodgment of returns can "seriously compromise APRA's ability to supervise effectively", and that, in the case of "minor inadvertent infringements", a system of administrative penalties in lieu of prosecution has been introduced by Division 3 of Part 3 of the bill."

The legislation applies Chapter 2 of the Criminal Code to all of the offences against the *Financial Sector (Collection of Data) Act 2001* which provides that strict liability must be identified expressly. It is important to note that the offences identified in the Alert Digest are judged to be of a strict liability character.

The regulatory nature of this legislation and the central importance of the obligation on registrable corporations to give APRA the documents referred to in subsection 9(5), suggests that the conduct element in the offences in subclauses 9(1), 9(2) and 9(6) should be strict liability offences, rather than attracting the default element of intention, under the Criminal Code.

It is also considered that for regulatory offences relating to a 'failure to act' (eg failure to lodge documents or provide information or comply with a direction), it is appropriate that the legislation imposes strict liability. This is the case for subclauses 13(11),14(4) and 17(10).

The case for strict liability partly rests on the argument that it would be very difficult to prove that an offence was 'intentional' or 'reckless', as would be required if the offence were one of fault liability. Strict liability allows efficient prosecution of offences where the seriousness of the breach warrants action by APRA. This is essential for APRA in executing its role both as a prudential regulator and a central repository of financial sector information.

Further factors suggesting the appropriateness of strict liability in this Bill are the nature and quantum of the penalty - the maximum penalty for the offences are pecuniary and relatively low. In drafting these amendments, the Attorney-General's Department was consulted and advised that the changes did not conflict with the general principles of criminal law policy.

I also note that the Criminal Code provides for a defence of "reasonable mistake" in relation to strict liability offences. The presence of an express defence is a good indicator that fault need not be proved. It is accepted that the provision of such a broadly-based defence creates an equitable public interest balance between the need for efficient prosecution of offences and the need to provide a defence to persons who are caught by an offence provision in circumstances where the apparent contravention is excusable, and is sufficient grounds for the imposition of strict liability.

Importantly, the *Financial Sector Legislation Amendment Act (No.1) 2000* recognised the appropriateness of strict liability in relation to a large number of offences contained in the *Superannuation Industry (Supervision) Act 1993.* Of particular relevance, the failure by a trustee of a superannuation fund to lodge an annual return was converted from a fault liability offence to a two tier (fault and strict liability) offence.

Subclause 21(2) of the Bill provides that APRA may withdraw an infringement notice served on a person. I consider that an open discretion is appropriate, as it will allow the withdrawal of an infringement notice (to the benefit of the relevant

financial institution) in a range of appropriate circumstances. This provision assists APRA's intended approach to enforcement of the provisions contained in the Financial Sector (Collection of Data) Bill involving persuasion in the first instance, an administrative penalty for a contravention of certain provisions and as a last measure referral to the Director of Public Prosecutions. Notwithstanding this approach, to ensure an effective and flexible regime, it is important that APRA retain the option of prosecution in the first instance.

These considerations were all taken into account in assessing each individual criminal offence for strict liability.

Thank you for your interest in this matter.

The Committee thanks the Minister for this response. The Committee is currently inquiring generally into the issue of strict liability offences.

International Maritime Conventions Legislation Amendment 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 Transport and Regional Services has responded to those comments in a letter dated 28 July 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 4 April 2001 by the Minister for the Arts and the Centenary of Federation. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend the following Acts:

- *Limitation of Liability for Maritime Claims Act 1989*, to implement the Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims (1996 Liability Protocol) which increases liability limits and provides a simpler method for future increases;
- *Protection of the Sea (Powers of Intervention) Act 1981*, to revise the list of substances in respect of which intervention action can be taken by the Australian Maritime Safety Authority;
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, in relation to removing the requirement to include the text of conventions; the disposal of garbage; altering incident reporting requirements; amending the definition of "inspector" to include Australian Federal Police officers; discharging of waste from a ship to a reception facility; and offence and penalty provisions; and
- *Submarine Cables and Pipelines Protection Act 1963*, to reflect the terminology of the 1984 United Nations Convention on the Law of the Sea (instead of the superseded 1958 Convention on the High Seas).

The bill also makes consequential amendments to the *Admiralty Act 1988* and *Navigation Act 1912* as a result of the implementation of the 1996 Liability Protocol.

Strict liability offences
New subsections 9(1B), 10(3), 21(1B), 26AB(3), 26BC(2A), 26D(3), 26F(3), 26FA(4), 26FB(2), 26FC(5) and 26FD(4)

This bill proposes to insert a number of provisions in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983.* Some of these provisions will impose strict liability for criminal offences. The Explanatory Memorandum seeks to justify this imposition of strict liability by noting that the intent underlying these provisions is "to discourage careless non-compliance, as well as negligent and reckless breaches".

However, strict liability will apply in much wider circumstances than merely 'careless non-compliance'. Irrespective of how careful an offender may have been, strict liability may be imposed once the elements of such an offence are proved. The Committee is concerned about a tendency to declare offences to be offences of strict liability, and **seeks the Minister's advice** as to why strict liability is appropriate for the offences created by these provisions. The Committee also **seeks the Minister's advice** as to the distinction between 'careless non-compliance' and 'negligence'.

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 Minister

I regret the delay in replying.

In Alert Digest No. 6 of 2001 (23 May 2001), the Committee sought my advice as to why strict liability is appropriate for a number of provisions to be inserted into the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* by Schedule 3 of the Bill. The Explanatory Memorandum for the Bill states that strict liability is imposed to discourage careless non-compliance as well as negligent and reckless breaches. The Committee has sought my advice as to the difference between 'careless non-compliance' and 'negligence'.

I will firstly deal with the Committee's second question. There is, of course, little or no difference between 'careless non-compliance' and 'negligence'. The intention of the relevant amendments would have been clearer if the Explanatory Memorandum had said that strict liability was being imposed to discourage careless non-compliance as well as intentional (rather than negligent) and reckless breaches.

You will note that the strict liability offences in new subsections 9(1B), 10(3), 21(1B), 26AB(3), 26BC(2A), 26D(3) and 26F(3) are redrafts of existing offences that are absolute liability offences. These offences apply where there is a discharge of, for example, oil from a ship. The new offences have been recast as part of the

Government's policy to harmonise all offences with requirements of the *Criminal Code Act 1995*. The main difference between the current provisions and the new provisions is that the new provisions will be offences of strict liability. The maximum penalty applying to these new strict liability offences will be reduced to 500 penalty units (equivalent to $55,000). This contrasts with the current maximum penalty which is $200,000 (except in the case of existing section 26AB where the maximum penalty is $250,000).

The other strict liability offences in the Bill, each of which attract a maximum penalty of 50 penalty units, are new offences relating to garbage record books, the shipboard waste management plan and placards required to be carried on a ship setting out requirements for disposal of garbage.

In addition, the Bill explicitly provides for offences where, for example, a discharge of oil from a ship into the sea is the result of a person's negligent or reckless conduct. An offence in this case will attract a higher maximum penalty of 2,000 penalty units.

In all cases, the strict liability offences in the Bill are directed only at the master or owner of a ship. Such a person can be expected to be fully aware of the requirements of the legislation and the need to avoid, as far as possible, pollution of the marine environment. Because of the significant economic and environmental impact that this pollution can cause, it is important to discourage careless non-compliance as well as intentional and reckless conduct.

I trust the above advice addresses your concerns satisfactorily.

The Committee thanks the Minister for this response. The Committee is currently inquiring generally into the issue of strict liability offences.

Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2001*, in which it made various comments. The Minister for Employment, Workplace Relations and Small Business responded to those comments in a letter dated 30 March 2001.

In its *Seventh Report of 2001*, the Committee sought the Minister's further advice regarding retrospective application. The Minister has responded in a letter dated 20 August 2001. A copy of the letter is attached to this report. An extract from the *Seventh Report* and relevant parts of the Minister's further response are discussed below.

Extract from Seventh Report of 2001

This bill was introduced into the House of Representatives on 7 December 2000 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business]

Schedule 1 to the bill proposes to amend the *Industrial Chemicals (Notification and Assessment) Act 1989* to streamline and improve the operation of the National Industrial Chemicals Notification and Assessment Scheme by amending the definition of synthetic polymers of low concern; improving the secondary notification procedures for existing chemicals; and making other minor and technical corrections.

Schedule 2 proposes to amend the *Safety, Rehabilitation and Compensation Act 1988* in relation to the operation of the Commonwealth workers' compensation scheme, including the streamlining and updating of various provisions and the making of minor technical, policy and consequential amendments.

Schedule 3 proposes to amend the following Acts:

Equal Opportunity for Women in the Workplace Act 1999 to correct a technical anomaly arising from an omission in the Act;

Income Tax Assessment Act 1936 to authorise provision of taxation information to Comcare as well as to the Safety, Rehabilitation and Compensation Commission;

National Occupational Health and Safety Commission Act 1985 to reflect the name change of the Australian Chamber of Commerce and Industry; and the

Occupational Health and Safety (Commonwealth Employment) Act 1991 to make consequential amendments in relation to the collection of premiums.

Consistent with section 4AB of the *Crimes Act 1914*, the bill also converts certain penalties currently expressed in monetary terms into penalty units.

Retrospective application
Schedule 2, Part 4

The amendment proposed in Part 4 of Schedule 2 to the bill will add a new subsection 27(3) to the *Safety, Rehabilitation and Compensation Act 1988*. This new subsection will prevent any person who suffered a permanent impairment prior to 1 December 1988 from claiming compensation for non-economic loss, unless they had lodged an application for compensation before the date on which this bill was introduced into the Parliament.

The Explanatory Memorandum states that the proposed amendment "clarifies that an employee who suffered a permanent impairment prior to the commencement date should not receive compensation under section 27 of the SRC Act because such an employee would not have been entitled to receive compensation for non-economic loss under the previous legislation (the 1971 Act)".

While the EM asserts that the bill "clarifies" the law, the fact that some people were still, at the date of the introduction of the bill, apparently making claims for compensation for non-economic loss in respect of impairments which were suffered before 1 December 1988, indicates that the new provision is intended to have some substantive effect, and this effect operates retrospectively. Given this, the Committee **seeks the Minister's advice** as to how many claimants are likely to be affected by this amendment, what notice those claimants have received concerning the introduction of the amendment, and why the amendment will not operate in a more conventional manner from the date that the bill is passed.

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

Relevant extract from the response from the Minister dated 30 March 2001

Section 27 of the SRC Act currently provides for the payment of compensation for non-economic loss for a permanent impairment where compensation is payable in respect of the injury under section 24 of the Act.

The new subsection will clarify the operation of section 27 to expressly exclude a permanent impairment which arose before 1 December 1988, unless the claim was lodged prior to the Bill's introduction (7 December 2000).

On 1 December 1988, the operative provisions of the SRC Act commenced. The SRC Act contains transitional provisions to ensure that compensation will be payable under the Act to employees who had an entitlement to compensation under the previous legislation (1912, 1930 and 1971 Acts). However, it was never intended that the entitlements of employees injured prior to 1 December 1988 would be extended. As there was no entitlement to non-economic loss payments for permanent impairment under the previous legislation, it follows that it was not intended that employees injured prior to the commencement of the SRC Act would have an entitlement to the non-economic loss compensation arising from section 27. However, it has been held by the Federal court that the SRC Act, as drafted, does allow for such compensation.

The aim of the Bill therefore is to return the operation of the Act to its original intention.

The Committee sought advice on three aspects of the proposed amendment.

Number of claimants likely to be affected

There are 4 "determining authorities" determining claims of this type under the SRC Act - the Australian Defence Force (ADF), Australia Post, Telstra and Comcare.

The ADF has by far the largest number of claims received of this type. The past pattern of claims for permanent impairment (which might attract a payment for non-economic loss) where the permanent impairment arose prior to the commencement of the SRC Act is as follows:

When claim received	**Number of claims received**
July 97 - June 98	1211
July 98 - June 99	1225
July 99 - June 00	1061
July 00 - June 01	439
Introduction of Bill to early March 2001	247

There appears to be an overall downward trend in the lodgement of ADF claims - not surprisingly given that such claims only relate to permanent impairments which arose before 1 December 1988. However, there tend be significant time lags between injury and lodgement of ADF claims generally, so this trend may not remain consistent in the next few years.

At Australia Post there have been only 2 such claims determined since 1 July 1998 - it would therefore be reasonable to anticipate that no more than a handful of such claimants might be affected by the proposed change.

Telstra has had between 150 - 160 such claims over the last 3 years with 10 from the date of introduction of the Bill to early March 2001.

Finally Comcare has received an average of 97 per year over the last 3 years, with 12 such claims lodged with Comcare from the date of introduction of the Bill to early March 2001.

Notice to claimants about the introduction of the Bill

No notice could have been forwarded to claimants prior to the introduction of the Bill as those who would have been affected would be those who hadn't yet lodged a claim. If they hadn't lodged a claim then it is difficult to see how the determining authorities would know who to notify. In relation to those who lodge a claim after the introduction of the Bill, Comcare will issue a jurisdictional policy advice to determining authorities requesting that they advise claimants whose claim for permanent impairment is accepted, that the Bill is presently before the Parliament and that payments for economic loss should not be determined, pending the outcome of the Bill. Other compensation in respect of an accepted permanent impairment will be unaffected.

Retrospective operation

The Committee observed that the effect of the Bill "operates retrospectively". This is because the proposed section applies to claims lodged after the date of introduction of the Bill. The committee asked why the amendment will not operate in a "more conventional manner" from the date the Bill is passed.

The reason for the proposed provision operating from the date of introduction is to preclude what might be expected to be speculative claims being made during the "window of opportunity" between introduction and passage. Given that the purpose of the amendment is to return the interpretation of the Act to that originally intended, it would be counterproductive to create the incentive for the lodgement of claims which, in the Government's view, ought not to be available. In addition it must be remembered that the amendment only relates to a permanent impairment (not the injury giving rise to the impairment but the actual impairment itself) which arose before December 1988. In other words any such potential claimant has had the permanent impairment for more than 12 years but has not yet made a claim. It might be considered that there has been a reasonable amount of time for any person to make a claim.

The practice of legislation providing for a changed state of affairs commencing after introduction is not unprecedented and is, for example, common in the area of taxation legislation. Such a practice in relation to taxation legislation is recognised by the Senate. Resolution 23 of 8 November 1988 provides that where the Government has announced its intention to introduce legislation to amend taxation law and a bill to do so is not introduced into the Parliament or made available by way of publication of a draft bill within 6 months of the announcement, the Senate shall amend any such bill to provide for *commencement no earlier than introduction* (emphasis added) or the date of publication of the draft bill.

I trust that this information assists the Committee in its consideration of the SRCOLA Bill.

The Committee thanks the Minister for this response which seems to suggest that this bill does not remove rights retrospectively, but rather prevents certain claimants from accruing rights which previous legislation had not intended to confer on them. The Committee **would appreciate the Minister's confirmation** that this is the effect of the bill.

Relevant extract from the further response from the Minister dated 20 August 2001

In Alert Digest No. 1 of 2001, the Senate Standing Committee for the Scrutiny of Bills commented on Part 4 of Schedule 2 to the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000 (the SRCOLA Bill). I responded to the issues raised by the Committee on 30 March 2001.

In its Seventh Report of 2001, the Committee referred to my response and asked for further information. The Report states that my "….response seems to suggest that this bill does not remove rights retrospectively, but rather prevents certain claimants from accruing rights which previous legislation had not intended to confer on them". The Committee wished my confirmation that this is the effect of the SRCOLA Bill.

As I noted in my original response to the Committee, the intention of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) was to preserve but not extend entitlements to compensation which had arisen under previous legislation. The previous legislation did not provide for compensation for non-economic loss for permanent impairments. Thus the Committee is correct in its description of the amendment as dealing with "rights which previous legislation had not intended to confer".

The Federal Court has interpreted the SRC Act as having a different effect from that intended, namely that the SRC Act presently provides for a substantive right to payment for non-economic loss for a permanent impairment arising before 1 December 1988 (under the previous legislation). The purpose of the Bill in this regard is to remedy that interpretation and thus bring the meaning of the Act, and the rights that it confers, back to its original intention and back to the original intention and effects of the previous legislation.

Retrospectivity in relation to the removal of this right is only in relation to the gap in time between introduction of the legislation and its commencement. This should not be regarded as oppressive, given that an impairment giving rise to the right would have to have arisen before 1 December 1988. That is, the claimants have had more than 12 years to exercise the right but had not yet done so when the Bill was introduced. Further, as I pointed out in my original response, retrospectivity to the date of introduction rather than commencement of legislation is certainly not without precedent and is justified in this case to avoid a rush of speculative claims.

I trust that this assists the Committee in its deliberations.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

Senator the Hon Robert Hill

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

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

Dear Senator Cooney

I refer to the Scrutiny of Bills Alert Digest No. 8 of 2001, particularly the matter relating to the Environment and Heritage Legislation Amendment Bill (No. 2) 2000. The Committee sought my advice as to why the principles made under proposed new section 324W(1) and 341W(1) should not be subject to Parliamentary scrutiny.

I consider that the setting of management principles by notice in the Gazette is a straightforward and practical way of dealing with a device that is essentially technical in nature. I expect the principles will be based on recognised heritage management benchmarks such as the long-standing and widely accepted Burra Charter for the management of historic heritage.

You will note that proposed new subsection 324W(2) provides that regulations may prescribe obligations or give effect to the national heritage management principles. As your Committee points out, such regulations will be subject to Parliamentary scrutiny. Implementation of the principles in this way is therefore subject to Parliamentary scrutiny.

Your Committee cites an example of a regulation that simply states that a person must comply with the relevant management principles. You argue that this would allow the principles themselves to have legislative effect without Parliamentary scrutiny. However, as indicated above, such a regulation is itself subject to Parliamentary scrutiny. In addition, the *Acts Interpretation Act 1901* (section 49) deals with the making of regulations which purport to incorporate by reference another instrument as in force from time to time.

For the above reasons, I do not believe that the principles themselves should be subject to Parliamentary scrutiny. It is sufficient that any regulations giving effect to the principles will be subject to Parliamentary scrutiny.

Yours sincerely

Robert Hill

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RECEIVED
30 JUN 2001
Senate Standing C'ttee
for the Scrutiny of Bills

26 JUN 2001

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The HON. **Joe Hockey** MP
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Dear Senator Cooney

I refer to the Committee's request for advice of 23 May in the Alert Digest of 23 May regarding certain issues relating to the Financial Sector (Collection of Data) Bill 2001. Specifically, the Committee has asked for advice on the commencement of Part 2 and the choice of strict liability for certain offences.

Commencement of Part 2

As you know, Part 2 of the Financial Sector (Collection of Data) Bill 2001 proposes that the Australian Prudential Regulation Authority (APRA) will act as a single Government collection agency for the financial sector. The Financial Sector (Collection of Data — Consequential and Transitional Provisions) Bill 2001 will repeal the *Financial Corporations Act 1974* and replaced by the *Financial Sector (Collection of Data) Act 2001*.

As a result of this change, the responsibility for data collection and associated matters for registered corporations will be transferred from the Reserve Bank of Australia (RBA) to APRA. The legislation sets out that Part 2 commences on proclamation or twelve months after the Bill receives Royal Assent, whichever occurs first. A maximum period of twelve months, rather than six months was considered necessary to provide adequate time for the systems to be put in place to transfer the data collection and other responsibilities from the RBA to APRA.

Importantly, it will also provide industry sufficient lead-time to adapt to the new requirements.

The repeal of the Financial Corporations Act does not commence until the commencement of Part 2 of the *Financial Sector (Collection of Data) Act 2001*.

Strict Liability Offences

As identified in the Alert Digest, the Financial Sector (Collection of Data) Bill 2001 proposes that an offence of strict liability is imposed for contraventions of certain provisions, namely, subclauses 9(10), 13(11), 14(4) and 17(10) refer).

The Alert Digest refers to my Second Reading Speech, which states

1901-2001

> "...the Minister addresses the imposition of strict liability by observing that the offences relate to the time at which information is to be provided to APRA; that late lodgment of returns can "seriously compromise APRA's ability to supervise effectively", and that, in the case of "minor inadvertent infringements", a system of administrative penalties in lieu of prosecution has been introduced by Division 3 of Part 3 of the bill."

The legislation applies Chapter 2 of the Criminal Code to all of the offences against the *Financial Sector (Collection of Data) Act 2001* which provides that strict liability must be identified expressly. It is important to note that the offences identified in the Alert Digest are judged to be of a strict liability character.

The regulatory nature of this legislation and the central importance of the obligation on registrable corporations to give APRA the documents referred to in subsection 9(5), suggests that the conduct element in the offences in subclauses 9(1), 9(2) and 9(6) should be strict liability offences, rather than attracting the default element of intention, under the Criminal Code.

It is also considered that for regulatory offences relating to a 'failure to act' (eg failure to lodge documents or provide information or comply with a direction), it is appropriate that the legislation imposes strict liability. This is the case for subclauses 13(11), 14(4) and 17(10).

The case for strict liability partly rests on the argument that it would be very difficult to prove that an offence was 'intentional' or 'reckless', as would be required if the offence were one of fault liability. Strict liability allows efficient prosecution of offences where the seriousness of the breach warrants action by APRA. This is essential for APRA in executing its role both as a prudential regulator and a central repository of financial sector information.

Further factors suggesting the appropriateness of strict liability in this Bill are the nature and quantum of the penalty — the maximum penalty for the offences are pecuniary and relatively low. In drafting these amendments, the Attorney-General's Department was consulted and advised that the changes did not conflict with the general principles of criminal law policy.

I also note that the Criminal Code provides for a defence of "reasonable mistake" in relation to strict liability offences. The presence of an express defence is a good indicator that fault need not be proved. It is accepted that the provision of such a broadly-based defence creates an equitable public interest balance between the need for efficient prosecution of offences and the need to provide a defence to persons who are caught by an offence provision in circumstances where the apparent contravention is excusable, and is sufficient grounds for the imposition of strict liability.

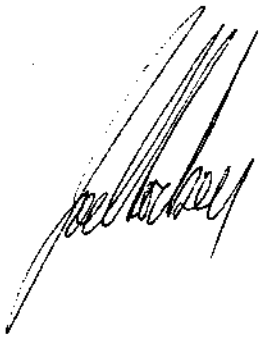
Importantly, the *Financial Sector Legislation Amendment Act (No.1) 2000* recognised the appropriateness of strict liability in relation to a large number of offences contained in the *Superannuation Industry (Supervision) Act 1993*. Of particular relevance, the failure by a trustee of a superannuation fund to lodge an annual return was converted from a fault liability offence to a two tier (fault and strict liability) offence.

Subclause 21(2) of the Bill provides that APRA may withdraw an infringement notice served on a person. I consider that an open discretion is appropriate, as it will allow the withdrawal of an infringement notice (to the benefit of the relevant financial institution) in a range of appropriate circumstances. This provision assists APRA's intended approach to enforcement of the provisions contained in the Financial Sector (Collection of Data) Bill involving persuasion in the first instance, an administrative penalty for a contravention of certain provisions and as a last measure referral to the Director of Public Prosecutions. Notwithstanding this approach, to ensure an effective and flexible regime, it is important that APRA retain the option of prosecution in the first instance.

These considerations were all taken into account in assessing each individual criminal offence for strict liability.

Thank you for your interest in this matter.

Yours sincerely



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

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

28 JUL 2001

Dear Senator Cooney

I refer to the letter of 24 May 2001 from Mr James Warmenhoven, the Secretary of the Standing Committee for the Scrutiny of Bills (the Committee), concerning the International Maritime Conventions Legislation Amendment Bill 2001 (the Bill). I regret the delay in replying.

In Alert Digest No. 6 of 2001 (23 May 2001), the Committee sought my advice as to why strict liability is appropriate for a number of provisions to be inserted into the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* by Schedule 3 of the Bill. The Explanatory Memorandum for the Bill states that strict liability is imposed to discourage careless non-compliance as well as negligent and reckless breaches. The Committee has sought my advice as to the difference between 'careless non-compliance' and 'negligence'.

I will firstly deal with the Committee's second question. There is, of course, little or no difference between 'careless non-compliance' and 'negligence'. The intention of the relevant amendments would have been clearer if the Explanatory Memorandum had said that strict liability was being imposed to discourage careless non-compliance as well as intentional (rather than negligent) and reckless breaches.

You will note that the strict liability offences in new subsections 9(1B), 10(3), 21(1B), 26AB(3), 26BC(2A), 26D(3) and 26F(3) are redrafts of existing offences that are absolute liability offences. These offences apply where there is a discharge of, for example, oil from a ship. The new offences have been recast as part of the Government's policy to harmonise all offences with requirements of the *Criminal Code Act 1995*. The main difference between the current provisions and the new provisions is that the new provisions will be offences of strict liability. The maximum penalty applying to these new strict liability offences will be reduced to 500 penalty units (equivalent to $55,000). This contrasts with the current maximum penalty which is $200,000 (except in the case of existing section 26AB where the maximum penalty is $250,000).

The other strict liability offences in the Bill, each of which attract a maximum penalty of 50 penalty units, are new offences relating to garbage record books, the shipboard waste management plan and placards required to be carried on a ship setting out requirements for disposal of garbage.

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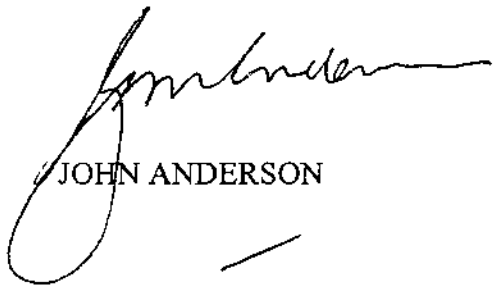
In addition, the Bill explicitly provides for offences where, for example, a discharge of oil from a ship into the sea is the result of a person's negligent or reckless conduct. An offence in this case will attract a higher maximum penalty of 2,000 penalty units.

In all cases, the strict liability offences in the Bill are directed only at the master or owner of a ship. Such a person can be expected to be fully aware of the requirements of the legislation and the need to avoid, as far as possible, pollution of the marine environment. Because of the significant economic and environmental impact that this pollution can cause, it is important to discourage careless non-compliance as well as intentional and reckless conduct.

I trust the above advice addresses your concerns satisfactorily.

Yours sincerely



JOHN ANDERSON

THE HON TONY ABBOTT MP
MINISTER FOR EMPLOYMENT, WORKPLACE RELATIONS AND SMALL BUSINESS

PARLIAMENT HOUSE
CANBERRA ACT 2600

20 AUG 2001

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

Dear Senator Cooney

In Alert Digest No. 1 of 2001, the Senate Standing Committee for the Scrutiny of Bills commented on Part 4 of Schedule 2 to the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000 (the SRCOLA Bill). I responded to the issues raised by the Committee on 30 March 2001.

In its Seventh Report of 2001, the Committee referred to my response and asked for further information. The Report states that my ".....response seems to suggest that this bill does not remove rights retrospectively, but rather prevents certain claimants from accruing rights which previous legislation had not intended to confer on them". The Committee wished my confirmation that this is the effect of the SRCOLA Bill.

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Retrospectivity in relation to the removal of this right is only in relation to the gap in time

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between introduction of the legislation and its commencement. This should not be regarded as oppressive, given that an impairment giving rise to the right would have to have arisen before 1 December 1988. That is, the claimants have had more than 12 years to exercise the right but had not yet done so when the Bill was introduced. Further, as I pointed out in my original response, retrospectivity to the date of introduction rather than commencement of legislation is certainly not without precedent and is justified in this case to avoid a rush of speculative claims.

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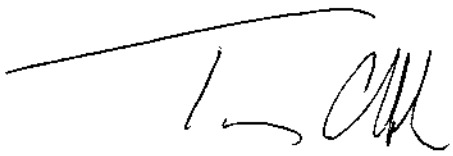

TONY ABBOTT