SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

ELEVENTH 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

ELEVENTH REPORT OF 2001

The Committee presents its Eleventh 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:

Fair Prices and Better Access for All (Petroleum) Bill 2001

General Insurance Reform Bill 2001

Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001

Reconciliation and Aboriginal and Torres Strait Islander Affairs Legislation Amendment (Application of Criminal Code) Bill 2001

Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001

Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 3) 2001

Fair Prices and Better Access for All (Petroleum) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2001*, in which it made various comments. Senator Schacht has responded to those comments in a letter received on 28 August 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Senator's response are discussed below.

Extract from Alert Digest No. 8 of 2001

This bill was introduced into the Senate on 19 June 2001 by Senator Schacht as a Private Senator's bill.

The bill proposes to enable franchisees in the petroleum sector to purchase fuels for re-sale from a variety of sources. Under the bill, franchisees will be entitled to secure up to 50% of their fuel supplies from sources other than their principal branded supplier. Franchisees using this option will receive ACCC protection as the bill makes all future contracts between those covered by the Oilcode subject to section 47 of the *Trade Practices Act 1974*.

This bill is almost identical to a bill introduced in the House of Representatives on 30 August 1999 by Mr Fitzgibbon, and on which the Committee commented in *Alert Digest No. 14 of 1999*. The following comments echo those in that *Digest*.

Rights and liberties and contracts and compensation
Clauses 5 and 8 and Schedule 1

This bill is intended to secure improved competition in the wholesale petroleum market, and to help create an environment of fairer pricing and better access to fuel supplies in the retail petroleum market. The bill seeks to achieve this by giving service station operators the opportunity to "shop around for their fuel". Specifically, the bill will allow franchisees to buy up to half of their fuel from suppliers other than those nominated in their franchise agreement.

The bill, therefore, proposes to intervene in legally binding contractual arrangements between franchisors and franchisees. The only circumstance in which provision is made for compensation involves persons who suffer loss or damage through a contravention of the bill – no provision is made for compensation as a result of the operation of the bill and its effect on rights under those existing contractual arrangements.

Further, by deeming certain (future) conduct to have breached section 47 of the *Trade Practices Act 1974*, and thus be the subject of the penalties provided by the Act, the bill may, in effect, require a defendant to prove certain matters and so reverse the onus of proof in penalty proceedings.

The Committee is concerned that, under the bill, facts may be deemed in such a way that a person is liable to pay a statutory penalty, even though this is a matter which a court would normally decide. The Committee would appreciate **advice as to whether the Senator sponsoring the bill** has any concerns that its deeming provision may intrude on the exercise of the judicial function.

In summary, while the bill expressly confers rights on franchisees, it may also affect the rights and liberties of franchisors. Given these considerations, the Committee **seeks the advice of the Senator sponsoring the bill** as to the reason for intervening in existing franchise contracts; whether compensation should be made available to those who suffer loss as a result of that intervention; and whether the bill will require a defendant to affirmatively prove certain matters if he or she wishes to avoid a statutory penalty.

Pending the Senator'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 Senator

I thank you for the opportunity to respond to the concerns raised by the Committee in relation to this legislation.

The intention of the Bill is that if proclaimed the arrangements would operate prospectively only, and would only impact on future contractual relationships and future rights.

With respect to section 47 of the Trade Practices Act, it can be said to be legitimate for the legislature to determine – for the purpose of that section – what activities will and will not constitute breaches of that provision.

All non-prescribed matters would of course remain matters for the courts, and would be subject to the procedures laid out in the Act.

This is not inconsistent with the manner in which the Commonwealth has prescribed what constitutes a 'service' under Part IIIA of the Act.

My colleague Mr Fitzgibbon MP, responded to a similar question asked by Senator at the time the Bill was referred to the Senate Economics Reference Committee.

I trust this clarifies the issues being considered by the Committee in relation this Bill.

The Committee thanks the Senator for this response.

General Insurance Reform Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation has responded to those comments in a letter dated 27 August 2001. Although this bill was passed by the Senate, with amendments, on 27 August 2001, the Minister's response 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. 9 of 2001

This bill was introduced into the House of Representatives on 28 June 2001 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Insurance Act 1973* to introduce a revised regulatory framework for general insurers which will bring the general insurance supervisory regime into line with the supervisory regime for authorised deposit-taking institutions and life insurers.

The bill also contains transitional provisions and makes consequential amendments to the *Australian Prudential Regulation Authority Act 1998*; *Australian Securities and Investments Commission Act 2001*; *Corporations Act 2001*; *Financial Sector (Collection of Data) Act 2001*; *Financial Transactions Reports Acts 1988*; *Insurance Acquisitions and Takeovers Act 1991*; and *Seafarers Rehabilitation and Compensation Act 1992.*

Non disallowable determinations
Proposed new section 7

Item 21 of Schedule 1 to the bill proposes to insert a new section 7 in the *Insurance Act 1973*. This section will permit the Australian Prudential Regulation Authority (APRA) to issue a determination that "all or specified provisions of [that] Act do not apply to a person". This provision appears to allow APRA to exercise a legislative function, but does not subject the exercise of that function to Parliamentary scrutiny by, for example, ensuring that such determinations are disallowable instruments. The Committee therefore, **seeks the Minister's advice** as to why section 7 determinations are not subject to Parliamentary scrutiny.

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

Relevant extract from the response from the Minister

The Australian Prudential Regulation Authority (APRA) needs to be an independent and operationally autonomous regulator to ensure the financial safety of policyholders. The International Association of Insurance Supervisors (IAIS) noted that an insurance supervisor must be organised so that it is able to accomplish its primary task, i.e. to maintain efficient, fair, safe and stable insurance markets for the benefit and protection of policyholders. It should at any time be able to carry out this task efficiently in accordance with the IAIS Insurance Core Principles. In particular the core principles state that the insurance supervisor should be operationally independent and accountable in the exercising of its functions and powers. Consistent with this approach, determinations under section 7 that provisions of the Act do not apply should not be disallowable by the Parliament.

In this respect, section 7 is consistent with section 11 of the *Banking Act 1959* (the Banking Act) and powers under section 37 of the existing *Insurance Act 1973* (the Insurance Act).

Determinations that certain provisions of the Act do not apply, allows flexibility and allow APRA to respond very quickly and continuously to developments in financial products or the system, as a whole, or where there may be prudential or other concerns about an institution. Recent events in the insurance industry demonstrate that events in financial markets can move unpredictably and with great speed, and that the regulatory environment must respond quickly, and with certainty, to these changes. It is therefore crucial that APRA be able to respond with certainty in the making of exemptions, and also in relation to their revocation or variation (for example, to impose additional conditions) where necessary.

Furthermore, a determination under section 7 could contain commercial-in-confidence information about an individual general insurer which should not be made public. On this basis it is considered that it is not appropriate for a determination under section 7 to be a disallowable instrument.

The Committee thanks the Minister for this response which states that the Australian Prudential Regulation Authority (APRA) "needs to be an independent and operationally autonomous regulator to ensure the financial safety of policyholders".

In permitting APRA to issue determinations that "all or specified provisions of the Act do not apply to a person" the Act appears to permit APRA to exercise a legislative function. It is difficult to see how Parliamentary scrutiny of such determinations would imperil the financial safety of policyholders.

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

Inappropriate delegation of legislative power
Proposed new sections 7A, 14, 20

The bill also proposes to insert new sections 7A, 14 and 20 in the *Insurance Act 1973*. These provisions would impose criminal liability on a person who fails to comply with either a determination made, or a condition imposed, by APRA. These provisions also appear to give APRA power to create criminal liability, without reference to the Parliament. The Committee, therefore, **seeks the Minister's advice** as to why this delegation of legislative power is appropriate and whether a person affected has any review rights.

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

> It is important that APRA be able to impose conditions on authorities and exclusions, to ensure that there is a degree of flexibility so APRA can respond appropriately to particular cases and circumstances. These conditions will need to be enforceable. However, revocation of an authority or exemption on account of the breach of a condition may be a disproportionate response, as well as being complicated procedure and not always in the interests of policyholders. Accordingly, it has been decided that the appropriate course is to attach criminal penalties to breaches of such conditions.

Decisions relating to whether criminal liability should be imposed on those who fail to comply with a condition imposed by APRA are necessary for an effective prudential enforcement regime. While it is true that such decisions have direct implications for the commercial interests of the parties concerned, the broader consequences of such decisions for policyholders and the financial system as a whole are also of concern.

The most competent authority in Australia to assess these implications will be APRA, which is required under its legislation to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality. It would be undesirable to have APRA's decisions in this critical area altered by another body that is unlikely to have the same degree of specific competence or interest and expertise in the public interest dimension of the financial system. For example, there may be times when decisions relating to whether a breach of authorisation conditions form part of a broader intervention strategy to resolve a substantial prudential concern, and maximum certainty of outcome will be highly desirable.

That said, decisions relating to the imposition of criminal liability for those who fail to comply with a determination made, or a condition imposed by APRA will still be subject to judicial review under the *Administrative Decision (Judicial Review) Act 1977*. Taking this into account, together with the wider concerns outlined above, judicial review is seen as providing an appropriate balance between private and public protections in this case.

The Committee thanks the Minister for this response which indicates that the imposition of criminal liability for failure to comply with a condition imposed by APRA is necessary for "an effective prudential enforcement regime". This is a matter best left for determination by the Senate as a whole.

The Committee continues to draw Senators' attention to these provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Strict liability offences
Proposed new sections 7A, 9(1), 10(1), 10(2), 14, 20

The offences created by proposed new sections 7A, 9(1), 10(1) and (2), 14 and 20 of the *Insurance Act 1973* are stated to be offences of strict liability. However, the Explanatory Memorandum provides no reasons for the imposition of this form of criminal liability. The Committee, therefore, **seeks the Minister's advice** as to why strict liability has been applied to 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

An effective enforcement regime is crucial for APRA as a prudential regulator in fulfilling its roles and responsibilities. The experience of APRA, and previously the ISC, is that many fault liability offence provisions are virtually unenforceable, particularly in circumstances where the conduct that contravenes an offence provision involves a failure to act. The requirement to prove a mental element is a substantial impediment to proving such offences, due to the fact that evidence of intention or recklessness is often difficult to obtain, in the absence of admissions (ie, confessions) or independent evidence. This in turn reduces the effectiveness of using the prospect of prosecutions as a deterrent to imprudent behaviour or an incentive to negotiate a rectification plan.

Although the equivalent provisions in the Banking Act are fault liability provisions, the move to strict liability is consistent with consumer protection measures contained in the *Corporations Act 1989* and the *Managed Investments Act 1998* and with recent changes to the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

It is vital that the new provisions are enforceable, otherwise the introduction of these provisions will be undermined. APRA's standing would be tarnished if the situation were to arise where we are unable to achieve successful criminal prosecutions under the Insurance Act. It would only take a single widely publicised instance of APRA's inability to prosecute to seriously erode public confidence in the insurance system.

In adopting a regime of strict liability for these provisions, rather than a fault liability regime as is currently the case under the Banking Act, there is a misunderstanding that offences identified as attracting strict liability will lead to a reversal in the onus of proof. Such offences will still require the prosecution to prove the elements of the offence beyond reasonable doubt. It will be open to a defendant to raise defences and to bear an evidential burden only as to their existence. The prosecution must then disprove the existence of any defence beyond reasonable doubt.

As the burden of proof on a defendant is an evidential burden, the defendant will only have to point to evidence that suggests a reasonable possibility that the defence applies. This is a considerably lower standard of proof than for the prosecution.

In addition, it is important to note that under clause 9.2 of the Criminal Code, it will still be a defence to establish that there was a reasonable mistake as to fact. Accordingly, strict liability is not the same as absolute liability.

Proposed subsections 9(1), 10(1) and 10(2)

Proposed subsections 9(1), 10(1) and 10(2) have the same effect as section 21 of the current Insurance Act, in that they provide that certain natural persons (other than Lloyd's underwriters), and unauthorised bodies corporate, cannot carry on insurance

business. However, consistent with the objective to harmonise regulatory requirements across APRA regulated institutions, where possible, existing provisions in the Insurance Act are proposed to be repealed and replaced by provisions modelled, to the extent possible, on provisions in the Banking Act. Accordingly, section 21 will be repealed and replaced with sections 9 and 10 that have been modelled on sections 7 and 8 of the Banking Act.

The nature of the offences remains consistent with current section 21 of the Insurance Act, that is, strict liability (see *Treasury Legislation Amendment (Application of Criminal Code) Act (No. I) 2001,* Schedule 1, Item 11). There will therefore be no change in the nature of these offences.

These provisions aim to protect the interests of policyholders. Should a person or institution be undertaking insurance business without an authority, and consequently without being subject to prudential supervision, the interests of the public are jeopardised. Policyholders of these enterprises, many unknowingly, will not be protected by the supervisory regime that applies to the general insurance industry. This exposes these policyholders to a greater risk of loss.

Recently, APRA has pursued approximately seven cases of businesses carrying on insurance business without an appropriate authority. Whether or not APRA undertakes enforcement action under these provisions, the provisions themselves should serve as a deterrent to those who may attempt to avoid prudential supervision. The benefits of prudential regulation are well recognised, and only those persons able to comply with minimum standards in relation to capital, risk management and the like should be entitled to enter the market in order to ensure the protection of policyholders.

Proposed sections 7A, 14 and 20

Sections 7 and 7A are new provisions that have been modelled on section 11 of the Banking Act. Section 7 will be used, for example, in relation to the grandfathering of current section 37 companies. A breach of a determination in force under subsection 7(1) results in an offence of strict liability under section 7A.

Currently, some small insurers may be exempted from certain requirements of the Insurance Act via section 37. Exemptions under section 37 are only available where an insurer undertakes a restricted class or classes of insurance business for the benefit of a limited group of (natural) persons and in circumstances where annual premium does not exceed a specified amount (the amount is currently set at $1. 5 million). Typically these insurers are exempt from the solvency and some reporting requirements of the Insurance Act.

A breach of current subsection 37(6) is a strict liability offence (see *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 1) 2001,* Schedule 1, Item 15). Accordingly, in this situation there will be no change to the nature of a relevant offence.

Section 14 has been modelled subsection 9(6) of the Banking Act. While APRA has the power to impose conditions on the authorisation of an insurer under the current paragraph 29(1)(f) of the Insurance Act, a breach of such a condition does not constitute an offence under the Insurance Act. A breach would however be a trigger for other enforcement action such as an investigation under Part V of the Insurance Act. Therefore in order to strengthen the enforcement regime and ensure the Regulator has several types of enforcement tools available for use in different

circumstances, and to harmonise the regulatory regimes applying to APRA regulated entities, this provision has been modelled on the Banking Act, which does include a penalty provision.

Section 20 has been modelled on subsection 1lAA(5) of the Banking Act. There is no equivalent provision in the Insurance Act, since it does not currently extend to NOHCs. Again, in order to harmonise the regulatory regimes applying to APRA regulated entities, this provision has been modelled on the Banking Act, which does include a penalty provision.

The Committee thanks the Minister for this response which indicates that strict liability provisions have been imposed to ensure "the effectiveness of using the prospect of prosecutions as a deterrent to imprudent behaviour or an incentive to negotiate a rectification plan".

The Committee notes that the equivalent provisions in the Banking Act are fault liability provisions. Whether it is appropriate that the provisions in this bill now be designated as strict liability provisions is a matter best left for determination by the Senate as a whole.

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.

Non-reviewable discretions
Proposed new sections 15 and 21

The bill proposes to insert new sections 15 and 21 in the *Insurance Act 1973*. Each of these sections gives APRA a discretion to revoke an authorisation previously granted. The exercise of these discretions is apparently not subject to external merits review by the Administrative Appeals Tribunal despite the fact that the exercise of other discretions is stated to be subject to such review, by specifying that Part VI of the Act applies. The Committee, therefore, **seeks the Minister's advice** as to why the exercise of discretions under proposed sections 15 and 21 are not subject to merits review.

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

Relevant extract from the response from the Minister

Decisions relating to who may and may not engage in insurance business may have serious consequences for policyholders, the insurance industry and the financial system as a whole. While it is true that such decisions have direct implications for the commercial interests of the parties concerned, the broader consequences of such decisions for policyholders could be profound.

The most competent authority in Australia to assess these implications will be APRA, which is required under its legislation to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality. It would be undesirable to have APRA's decisions in this critical area altered by another body that is unlikely to have the same level of specific competence or interest and expertise in the public interest dimension of the financial system. For example, there may be times when decisions relating to the revocation of authorities form part of a broader intervention strategy to resolve a substantial prudential concern and maximum certainty of outcome will be highly desirable.

These decisions should also not be subject to merits review for the following reasons:

- these decisions are financial decisions with a significant public interest element;
- APRA supervises the financial soundness of institutions and decisions of a prudential nature need to be made to protect policyholder interests;
- these prudential decisions arise from the need to take rapid and decisive action against an insurer to restore or maintain policyholders and investor confidence in the market;
- a decision to revoke an authority may be accompanied by a direction for the insurer to divest itself of relevant insurance business, which of necessity will be a complicated process, and the existence of merits review (with consequent delay) may frustrate this process, making it difficult to put in place arrangements with transferee insurers, and result in uncertainty for policyholders;
- The Financial System Inquiry, at Recommendation 33, supported the view that prudential decisions should not be subject to administrative review. In the handling of a financial crisis, APRA needs to be independent of executive government and possess strong regulatory powers to ensure that it can act very quickly to prevent contagion effects in the financial system.

Administrative review would curtail rapid action being taken by APRA to resolve a financial crisis.

However decisions relating to the revocation of an authority will, nevertheless, be subject to the Treasurer's agreement. In addition, such decisions are also subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. Moreover, in the case of revocation of an authority, where the prospect of private loss is more immediate, grounds for revocation are clearly specified in the Bill as a guard against arbitrary decision making and to guide such review. Taking this into account, together with the wider concerns outlined above, judicial review is seen as providing an appropriate balance between private and public protections in this case.

The Committee thanks the Minister for this response. Whether these discretions should be reviewable is a matter best left for determination by the Senate as a whole.

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

Abrogation of the privilege against self-incrimination
Proposed new section 49D

The bill proposes to insert a new section 49D in the *Insurance Act 1973*. This section will abrogate the privilege against self-incrimination for a person providing information under proposed new sections 49 and 49A (which impose a duty on auditors and actuaries of general insurers to provide information to APRA).

Subsection 49D(2) provides that any information given is not admissible in evidence in proceedings against the person (other than a proceeding in respect of the falsity of the information) if, before giving the information, the person claims that giving the information might tend to incriminate him or her, and giving the information might in fact tend to incriminate him or her.

While subsection 49D(2) does limit the circumstances in which incriminating information may be used in evidence, any information derived from that incriminating information is not protected. The Committee, therefore, **seeks the Minister's advice** as to why proposed subsection 49D(2) makes no provision for derivative use immunity.

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

Proposed section 49D of the Insurance Act has been modelled on section 16B of the Banking Act. In particular, proposed subsection 49D(2) of the Insurance Act is similar in terms to subsection 16B(6) of the Banking Act. In 1998, the Scrutiny of Bills Committee specifically referred to subsection 16B(6) of the Banking Act noting that it was "in a form which the Committee has previously been prepared to accept" (Alert Digest No. 4 of 1998). Accordingly, since the proposed section 49D of the Insurance Act has been modeled on section 16B the Banking Act, which has been accepted by the Committee, it is not clear why there should be any difference between the approaches adopted.

In addition, the issue of derivative use immunity has recently been considered in the context of the SIS Act. Section 287 of the SIS Act overrides the privilege against self-incrimination in relation to information required to be produced to the Regulator under Part 25, where Part 25 is concerned with compulsory information-gathering powers in the context of an inspection. The Part 25 powers apply to accountants and actuaries as they are "relevant persons".

Amendments were made by the *Financial Sector Legislation Amendment Act (No. 1)* 2000, to remove derivative use immunity from section 287 of the SIS Act. The effect of this amendment was to prevent a person subject to investigation under the SIS Act from claiming privilege in respect of the production of books ('use immunity'), or any information, document or other evidence obtained as a direct or indirect consequence of that person making an oral statement or signing a record of interview ('derivative use immunity').

This amendment was made since it was recognised that the experience of the former ISC, and now APRA, is that these immunities make it exceptionally difficult to pursue prosecutions under the SIS Act. Given the strong growth in superannuation savings, and the increasingly important role they play in ensuring that people make adequate provision for their income in retirement, it was considered that removal of these immunities was warranted in order to allow the Regulator to more effectively prosecute persons who contravene the SIS Act.

Similar changes were also made to the Corporations Law and the *Australian Securities and Investments Commission Act 1989* in 1992 following

recommendations by the Parliamentary Joint Committee on Corporations and Securities.

In the context of general insurance, the ability to prosecute persons who contravene the Insurance Act is also of considerable importance. It ensures APRA is able to appropriately protect the interests of policyholders.

Accordingly, Parliament has explicitly recognised, through amendments to section 287 of the SIS Act, that the ability of the Regulator to effectively prosecute persons is paramount. Therefore it is considered necessary that there be no provision for derivative use immunity in the General Insurance Reform Bill 2001.

The Committee thanks the Minister for this response. In its *Seventh Report of 2001*, in relation to the National Crime Authority Amendment Bill 2000, the Committee observed that the abrogation of the privilege against self-incrimination and the loss of derivative use immunity had been the subject of considerable comment in previous Committee reports, and remains a matter of concern for the Committee. It involves striking an appropriate balance between the rights of the individual and the interests of the community. It is an issue best left for resolution by the Senate as whole.

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

Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2001*, in which it made various comments. The bill contains provisions which are similar to those removed from the Migration Legislation Amendment (Immigration Detainees) Bill 2001 on 21 June 2001, on which the Committee commented in *Alert Digest No. 6 of 2001*, and to which the Minister responded in a letter dated 25 June 2001.

The Minister for Immigration and Multicultural Affairs has responded to the comments in *Alert Digest No. 9 of 2001* in a letter dated 23 August 2001. A copy of the letter is attached to this report. Also attached for information is a copy of the Minister's earlier response dated 25 June 2001.

An extract from *Alert Digest No. 9 of 2001* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 9 of 2001

This bill was introduced into the House of Representatives on 27 June 2001 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to introduce a power to strip search immigration detainees and to apply search powers in State and Territory legislation to immigration detainees held in a State or Territory prison or remand centre. The measures proposed are intended to address the increasing incidence of weapons and other objects found in detention facilities, and inappropriate behaviour by detainees, that might lead to personal injuries and damage to property.

Inappropriate delegation of legislative power
Proposed new sections 7A, 14, 20

The provisions of this bill are similar to certain provisions in a bill introduced into the House of Representatives on 5 April (the Migration Legislation Amendment (Immigration Detainees) Bill 2001) and on which the Committee commented in *Alert Digest No. 6 of 2001*. On 25 June the Committee received a briefing on the provisions of this bill as well as a response from the Minister for Immigration and Multicultural Affairs.

On 21 June a number of provisions of concern to the Committee were removed from the earlier bill. These provisions have now been changed and included in this bill.

The provisions in the earlier bill which were of concern to the Committee included:

- a series of provisions enabling an authorised officer, without warrant, to conduct a 'strip search' of a person in immigration detention to determine whether that detainee possess a weapon or other thing capable of being used to inflict bodily injury or facilitate an escape; and

- a provision which applied, as Commonwealth law, those State or Territory laws which conferred a power to search persons serving a sentence or being held on remand to a person held in immigration detention in a State or Territory prison.

The changes made by the current bill to the provisions previously introduced are:

- new paragraph 252A(3)(a) and subsection (6) which place some limits on those who may authorise 'strip searches' – essentially a strip search may be conducted only if it is authorised by the Secretary of the Department or an SES Band 3 employee in the Department; and
- new paragraph 252B(1)(h), which seeks to ensure that a 'strip search' of an adult must be conducted "in the presence of another person (if any) nominated by the detainee" – although this protection is weakened somewhat by new subsection 252B(4) which states that a 'strip search' will not be prevented by a detainee's refusal, failure or inability to nominate such a person.

In addition a *Draft Protocol for Strip Search of Immigration Detainees* has been developed and agreed between the Minister for Immigration and Multicultural Affairs and the Attorney-General. This *Draft Protocol* provides the principles and essential operating guidelines for those who authorise a strip search, those who conduct it, and those who are subject to it.

While these changes provide greater safeguards in the authorisation and conduct of strip searches, the Committee remains concerned about the use of powers given to police officers to search people under arrest as precedents for the search of people in immigration detention. The Committee also remains concerned about the application of State and Territory laws as Commonwealth laws without the Parliament having an opportunity to consider those laws.

The Committee notes that the *Draft Protocol* is expected to be incorporated into written directions issued pursuant to section 499 of the *Migration Act 1958*. The Committee **seeks the Minister's advice** as to whether the Protocol or directions will be disallowable.

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

Relevant extract from the response from the Minister dated 23 August 2001

The Committee seeks my advice as to whether the proposed *Draft Protocol for Strip Search of Immigration Detainees* ("the Draft Protocol"), or the directions which the Draft Protocol is proposed to be incorporated into, will be disallowable.

The Bill was introduced in the House of Representatives on 27 June 2001. It promotes the safety and security of immigration detention facilities by:

- introducing a power to strip search immigration detainees; and
- applying search powers in State and Territory legislation to immigration detainees held in a State or Territory prison or remand centre.

The Bill also contains a number of safeguards to ensure that the powers contained in it are exercised reasonably and with restraint. The Committee has already noted provisions in the Bill placing limits on who can authorise a strip search and to provide for the presence, during a search, of another person (if any) nominated by the detainee.

In response to discussions with the Opposition, Government amendments are proposed to further enhance the legislative safeguards in the Bill. The proposed new amendments will:

- provide that a strip search of an immigration detainee, who is at least 10 years old but under 18 years old, must be authorised by order of a magistrate; and

- clarify on what basis an officer may form a suspicion on reasonable grounds that there is hidden on a detainee, in his or her clothing or in a thing in his or her possession, a weapon or other thing capable of being used:

  - to inflict bodily injury; or
  - to help the detainee, or any other detainee, to escape from immigration detention.

The amendments will also introduce a power to "screen" detainees by having them pass through a metal detector or other similar device. This power is required as part of the process by which an officer may form a reasonable suspicion that a detainee has a weapon or other thing hidden on his or her person.

The Draft Protocol provides operational guidelines for the exercise of the strip search power in new section 252A. It was developed and settled in conjunction with the Attorney-General and tabled in the House of Representatives on 27 June 2001.

As the Committee noted, the Draft Protocol will be incorporated into written directions pursuant to section 499 of the *Migration Act 1958* ("the Act"). Such directions allow me to specify more precisely how persons exercising a power or function under the Act should exercise their discretion. The Act imposes a duty on officers to comply with such directions.

It has never been appropriate for a direction issued under section 499 of the Act to be a disallowable instrument because of its administrative nature. However, while a section 499 direction is not disallowable, the Act provides that it must be tabled in both Houses of the Parliament within 15 sitting days of that House after it is made.

In addition, the Draft Protocol contains provisions that will require the tabling of a statement twice per year in each House of the Parliament providing summary information on the number of strip searches. This will give additional Parliamentary scrutiny to the use of the strip search power.

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

The Committee thanks the Minister for this response.

Reconciliation and Aboriginal and Torres Strait Islander Affairs Legislation Amendment (Application of Criminal Code) 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 Reconciliation and Aboriginal and Torres Strait Islander Affairs has responded to those comments in a letter dated 22 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 6 June 2001 by the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs. [Portfolio responsibility: Reconciliation and Aboriginal and Torres Strait Islander Affairs]

The bill proposes to amend seven Acts within the Reconciliation and Aboriginal and Torres Strait Islander Affairs portfolio to reflect the application of the *Criminal Code Act 1995* to existing offence provisions from 15 December 2001.

Schedule 1 to the bill amends existing offence provisions under various Commonwealth Acts to:

- apply the *Criminal Code* to all offences;
- clarify whether certain offence provisions create offences of strict liability;
- clarify the physical and fault elements for certain offences, including removing and replacing inappropriate fault elements where necessary;
- ensure that the defendant bears only an evidential burden of proof in relation to offences;
- remove parts of offence provisions which duplicate the general offence provisions in the Criminal Code; and
- replace references to certain general offence provisions in the *Crimes Act 1914* with references to the equivalent provisions of the *Criminal Code*.

Schedule 2 removes gender specific language in the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978, Aboriginal Councils and Associations Act 1976* and the *Aboriginal Land Rights (Northern Territory) Act 1976.*

Strict liability offences
Various provisions

The effect of this bill is to include in legislation within the Reconciliation and Aboriginal and Torres Strait Islander Affairs portfolio a number of offences which are specified as being offences of strict liability.

The Minister's Second Reading Speech notes that this bill "does not change the current law and does not create any new strict or absolute liability offences". In similar terms, the Committee **seeks the Minister's confirmation** that the bill does not convert an offence which previously was not an offence of strict liability into a strict liability offence.

Pending the Minister's confirmation, 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 Bill proposes to amend a number of existing criminal offences within the Reconciliation and Aboriginal and Torres Strait Islander Affairs Portfolio to expressly provide that they are offences of strict liability. This 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 converse will also apply, namely that any offence which is not expressly stated to be an offence of strict liability will be interpreted to be a fault-based offence. The intention behind the strict liability amendments proposed by the Bill is to preserve the status quo in relation to strict liability.
>
> In determining whether a particular offence is currently one of strict liability, a number of factors have been considered. Firstly, all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration. Secondly, offences where the relevant penalty was sufficiently high - either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment - were excluded as they indicate that Parliament intended that the offences be fault-based. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration. Thirdly, the presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved, and that the offence may be one of strict

liability. Finally, the nature of the offence was considered and where the offences are wholly regulatory in nature it can be inferred that Parliament intended that strict liability should apply, eg. failure to comply with reporting or record-keeping requirements.

These factors were all taken into account in assessing each criminal offence for strict liability. The offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply. The Bill creates no new offences of strict liability.

The Committee thanks the Minister for this response.

Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 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 received on 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. 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]

The bill proposes amendments to 17 Acts within the Treasury portfolio to reflect the application of the *Criminal Code Act 1995* to existing offence provisions from 15 December 2001. This includes the restating of defences separately from offences, identifying the evidential burden in relation to an offence and the converting of penalties from a dollar amount to penalty units.

Some consequential amendments are also proposed for provisions of the *Trade Practices Act 1974* that are administered by the Minister for Communications, Information Technology and the Arts.

Strict liability offences
Various provisions

The effect of this bill is to make consequential amendments to further offence provisions in legislation administered by the Treasurer to reflect the application of the *Criminal Code* to existing offence provisions from 15 December 2001.

The Minister's Second Reading Speech concludes with the observation that the bill "does not change the criminal law" but "ensures that the current law is maintained following application of the *Criminal Code Act* to Commonwealth legislation". The Committee notes this assurance, and **seeks the Minister's confirmation** that the bill does not have the effect of converting an offence which previously was not a strict liability offence into such an 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

As identified in the Alert Digest, the Bill proposes to amend a number of existing criminal offences within the Treasurer's portfolio to expressly provide that they are offences of strict liability. This 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 converse will also apply, namely that any offence which is not expressly stated to be an offence of strict liability will be interpreted, to be a fault-based offence. The intention behind the strict liability amendments made by the 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 that are judged to be presently of a strict liability character, thus maintaining the status quo.

The operation of strict liability in Commonwealth criminal offences is uncertain and haphazard because the principles used by courts over time to identify strict liability offences have been inconsistently developed and applied. As a result of inconsistent judicial interpretation, some uncertainty will inevitably exist whether some individual criminal offences - and in particular those which have never been prosecuted - are offences of strict liability.

Only a handful of Commonwealth criminal offences expressly state whether they are offences of strict liability, and it follows that this important matter must be settled by judicial interpretation in almost all instances. In the absence of specific judicial interpretation, it has been necessary for Treasury officers, in conjunction with officers of the Attorney General's Department, to determine in each instance whether Parliament originally intended that the subject criminal offence be one of strict liability. This process has also been undertaken in consultation with a senior officer of the Commonwealth Director of Public Prosecutions.

In determining whether an individual offence is one of strict liability, a process was followed of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The reasons are detailed in the attached policy document produced by the Attorney-General's Department. The process began with the primary position established by the High Court in. R *v He Kaw Teh (1984-85) 157 CLR 523,* which was stated by Brennan J at 566:

> "It is now firmly established that mens rea is an essential element in every statutory offence unless having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

Accordingly all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to exclude all offences where the relevant penalty is sufficiently high - either in terms of the pecuniary penalty or the prescribed maximum term of

imprisonment - to indicate that Parliament intended that the offences be fault-based. Judicial interpretation on this point was broadly examined and found to be applied in an inconsistent manner. A policy was therefore developed to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months. Courts have generally presumed that Parliament would not want strict liability if the consequences of conviction are likely to involve imprisonment. If the maximum penalty for an offence is 6 months imprisonment and the offence is stated to be a strict liability offence, the reality is that courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than 6 months, and therefore the policy of a maximum penalty of 6 months has been set as a benchmark. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration.

Two other significant considerations weighed in the consideration of individual criminal offence provisions. First, the presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved. It is accepted that the provision of a broadly-based defence (such as a defence of reasonable excuse) 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.

The remaining major consideration utilised in the examination of criminal offences for strict liability is the nature of each offence. Offences that are wholly regulatory in nature are the clearest example of offences where it can be readily inferred that Parliament intended that strict liability should apply. This view is based upon the view of Barwick CJ in *Cameron v Dolt* (1980) 142 CLR 342 at 346, where he stated that the presumption of fault would be displaced:

> " . . , if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

Common examples of wholly regulatory offences in the Treasurer's portfolio include those concerning failure to comply with reporting or record-keeping requirements.

These factors were all taken into account as a matrix in assessing each individual criminal offence for strict liability. You can be assured that the offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply.

The Committee thanks the Minister for this response.

Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 3) 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation has responded to those comments in a letter received on 17 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. 9 of 2001

This bill was introduced into the House of Representatives on 28 June 2001 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend 5 Acts to reflect the application of the *Criminal Code Act 1995* to existing offence provisions from 15 December 2001. The amendments will:

- specify the physical elements of an offence and corresponding fault elements where they vary from those specified in the *Criminal Code*;
- specify that an offence, or part of an offence, is one of strict or absolute liability; and
- clarify the operation of defences by relocating them separately from the elements that constitute the offence itself.

Strict liability offences
Various provisions

As noted above, the purpose of this bill is to include in legislation administered within parts of the Treasury portfolio, a number of offences which are specified as offences of strict liability.

The Minister's Second Reading Speech notes that the bill "does not change the criminal law. Rather it ensures that the current law is maintained following application of the *Criminal Code Act* to Commonwealth legislation".

The Committee has recently examined a number of similar bills from other portfolio areas and has received an explanation of the policy adopted to ensure that the existing meaning and operation of offence provisions is preserved. Given this, the Committee **seeks the advice of the Minister** as to whether there are any specific examples in this legislation of an offence which previously was not one of strict liability which would be converted into such an offence by the bill.

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

As identified in the Alert Digest, the Bill proposes to amend a number of existing criminal offences within the Treasurer's portfolio to expressly provide that they are offences of strict liability. This 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 converse will also apply, namely that any offence which is not expressly stated to be an offence of strict liability will be interpreted, to be a fault-based offence. The intention behind the strict liability amendments made by the 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 that are judged to be presently of a strict liability character, thus maintaining the status quo.

The operation of strict liability in Commonwealth criminal offences is uncertain and haphazard because the principles used by courts over time to identify strict liability offences have been inconsistently developed and applied. As a result of inconsistent judicial interpretation, some uncertainty will inevitably exist whether some individual criminal offences - and in particular those which have never been prosecuted - are offences of strict liability.

Only a handful of Commonwealth criminal offences expressly state whether they are offences of strict liability, and it follows that this important matter must be settled by judicial interpretation in almost all instances. In the absence of specific judicial interpretation, it has been necessary for Treasury officers, in conjunction with officers of the Attorney General's Department, to determine in each instance whether Parliament originally intended that the subject criminal offence be one of strict liability. This process has also been undertaken in consultation with a senior officer of the Commonwealth Director of Public Prosecutions.

In determining whether an individual offence is one of strict liability, a process was followed of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The reasons are detailed in the attached policy document produced by the Attorney-General's Department. The process began with the primary position established by the High Court in. R *v He Kaw Teh (1984-85) 157 CLR 523*, which was stated by Brennan J at 566:

> "It is now firmly established that mens rea is an essential element in every statutory offence unless having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

Accordingly all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to exclude all offences where the relevant penalty is sufficiently high - either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment - to indicate that Parliament intended that the offences be fault-based. Judicial interpretation on this point was broadly examined and found to be applied in an inconsistent manner. A policy was therefore developed to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months. Courts have generally presumed that Parliament would not want strict liability if the consequences of conviction are likely to involve imprisonment. If the maximum penalty for an offence is 6 months imprisonment and the offence is stated to be a strict liability offence, the reality is that courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than 6 months, and therefore the policy of a maximum penalty of 6 months has been set as a benchmark. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration.

Two other significant considerations weighed in the consideration of individual criminal offence provisions. First, the presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need mot be proved, It is accepted that the provision of a broadly-based defence (such as a defence of reasonable excuse) 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.

The remaining major consideration utilised in the examination of criminal offences for strict liability is the nature of each offence. Offences that are wholly regulatory in nature are the clearest example of offences where it can be readily inferred that Parliament intended that strict liability should apply. This view is based upon the view of Barwick CJ in *Cameron v Dolt* (1980) 142 CLR 342 at 346, where he stated that the presumption of fault would be displaced:

> " . . , if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

Common examples of wholly regulatory offences in the Treasurer's portfolio include those concerning failure to comply with reporting or record-keeping requirements.

These factors were all taken into account as a matrix in assessing each individual criminal offence for strict liability. You can be assured that the offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

AUSTRALIA

CHRIS SCHACHT
LABOR SENATOR FOR SOUTH AUSTRALIA
SHADOW MINISTER FOR VETERANS' AFFAIRS

RECEIVED
28 AUG 2001
Senate Standing C'ttee
for the Scrutiny of Bills

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

Dear Senator Cooney,

I refer to the letter from Mr Warmenoven of 28 June 2001, and have the following comments to make with respect to the **Fair Prices and Better Access for All (Petroleum) Bill 2001**.

I thank you for the opportunity to respond to the concerns raised by the Committee in relation to this legislation.

The intention of the Bill is that if proclaimed the arrangements would operate prospectively only, and would only impact on future contractual relationships and future rights.

With respect to section 47 of the Trade Practices Act, it can be said to be legitimate for the legislature to determine – for the purpose of that section – what activities will and will not constitute breaches of that provision.

All non-prescribed matters would of course remain matters for the courts, and would be subject to the procedures laid out in the Act.

This is not inconsistent with the manner in which the Commonwealth has prescribed what constitutes a 'service' under Part IIIA of the Act.

My colleague Mr Fitzgibbon MP, responded to a similar question asked by Senator at the time the Bill was referred to the Senate Economics Reference Committee.

I trust this clarifies the issues being considered by the Committee in relation this Bill.

Sincerely,

Senator C. Schacht

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Senator B Cooney
Chairman of the Committee
Standing Committee for the Scrutiny of Bills
Parliament House
Canberra Act 2600

27 AUG 2001

Dear Senator Cooney

Please find attached my response to the comments made in the Scrutiny of Bills Alert Digest No. 9 of 2001 (8 August 2001) concerning the General Insurance Reform Bill 2001.

The response considers all the issues raised including non-disallowable determinations, inappropriate delegation of legislative power, strict liability offences, non-reviewable discretions and abrogation of the privilege against self-incrimination.

I trust that this response will be satisfactory. As requested, I am providing a copy of this letter to the Committee Secretary.

Regards,

Response to Standing Committee for the Scrutiny of Bills (Alert Digest No. 9 of 2001)

Non disallowable determinations
Proposed new section 7

The Australian Prudential Regulation Authority (APRA) needs to be an independent and operationally autonomous regulator to ensure the financial safety of policyholders. The International Association of Insurance Supervisors (IAIS) noted that an insurance supervisor must be organised so that it is able to accomplish its primary task, i.e. to maintain efficient, fair, safe and stable insurance markets for the benefit and protection of policyholders. It should at any time be able to carry out this task efficiently in accordance with the IAIS Insurance Core Principles. In particular the core principles state that the insurance supervisor should be operationally independent and accountable in the exercising of its functions and powers. Consistent with this approach, determinations under section 7 that provisions of the Act do not apply should not be disallowable by the Parliament.

In this respect, section 7 is consistent with section 11 of the *Banking Act 1959* (the Banking Act) and powers under section 37 of the existing *Insurance Act 1973* (the Insurance Act).

Determinations that certain provisions of the Act do not apply, allows flexibility and allow APRA to respond very quickly and continuously to developments in financial products or the system, as a whole, or where there may be prudential or other concerns about an institution. Recent events in the insurance industry demonstrate that events in financial markets can move unpredictably and with great speed, and that the regulatory environment must respond quickly, and with certainty, to these changes. It is therefore crucial that APRA be able to respond with certainty in the making of exemptions, and also in relation to their revocation or variation (for example, to impose additional conditions) where necessary.

Furthermore, a determination under section 7 could contain commercial-in-confidence information about an individual general insurer which should not be made public. On this basis it is considered that it is not appropriate for a determination under section 7 to be a disallowable instrument.

Inappropriate delegation of legislative power
Proposed new sections 7A, 14, 20

It is important that APRA be able to impose conditions on authorities and exclusions, to ensure that there is a degree of flexibility so APRA can respond appropriately to particular cases and circumstances. These conditions will need to be enforceable. However, revocation of an authority or exemption on account of the breach of a condition may be a disproportionate response, as well as being complicated procedure and not always in the interests of policyholders. Accordingly, it has been decided that the appropriate course is to attach criminal penalties to breaches of such conditions.

Decisions relating to whether criminal liability should be imposed on those who fail to comply with a condition imposed by APRA are necessary for an effective prudential enforcement regime. While it is true that such decisions have direct implications for the commercial interests of the parties concerned, the broader consequences of such decisions for policyholders and the financial system as a whole are also of concern.

The most competent authority in Australia to assess these implications will be APRA, which is required under its legislation to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality. It would be undesirable to have APRA's decisions in this critical area altered by another body that is unlikely to have the same degree of specific competence or interest and expertise in the public interest dimension of the financial system. For example, there may be times when decisions relating to whether a breach of authorisation conditions form part of a broader intervention strategy to resolve a substantial prudential concern, and maximum certainty of outcome will be highly desirable.

That said, decisions relating to the imposition of criminal liability for those who fail to comply with a determination made, or a condition imposed by APRA will still be subject to judicial review under the *Administrative Decision (Judicial Review) Act 1977*. Taking this into account, together with the wider concerns outlined above, judicial review is seen as providing an appropriate balance between private and public protections in this case.

Strict liability Offences
Proposed new sections 7A, 9(1), 10(1), 10(2), 14, 20

An effective enforcement regime is crucial for APRA as a prudential regulator in fulfilling its roles and responsibilities. The experience of APRA, and previously the ISC, is that many fault liability offence provisions are virtually unenforceable, particularly in circumstances where the conduct that contravenes an offence provision involves a failure to act. The requirement to prove a mental element is a substantial impediment to proving such offences, due to the fact that evidence of intention or recklessness is often difficult to obtain, in the absence of admissions (ie, confessions) or independent evidence. This in turn reduces the effectiveness of using the prospect of prosecutions as a deterrent to imprudent behaviour or an incentive to negotiate a rectification plan.

Although the equivalent provisions in the Banking Act are fault liability provisions, the move to strict liability is consistent with consumer protection measures contained in the *Corporations Act 1989* and the *Managed Investments Act 1998* and with recent changes to the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

It is vital that the new provisions are enforceable, otherwise the introduction of these provisions will be undermined. APRA's standing would be tarnished if the situation were to arise where we are unable to achieve successful criminal prosecutions under the Insurance Act. It would only take a single widely publicised instance of APRA's inability to prosecute to seriously erode public confidence in the insurance system.

In adopting a regime of strict liability for these provisions, rather than a fault liability regime as is currently the case under the Banking Act, there is a misunderstanding that offences identified as attracting strict liability will lead to a reversal in the onus of proof. Such offences will still require the prosecution to prove the elements of the offence beyond reasonable doubt. It will be open to a defendant to raise defences and to bear an evidential burden only as to their existence. The prosecution must then disprove the existence of any defence beyond reasonable doubt.

As the burden of proof on a defendant is an evidential burden, the defendant will only have to point to evidence that suggests a reasonable possibility that the defence applies. This is a considerably lower standard of proof than for the prosecution.

In addition, it is important to note that under clause 9.2 of the Criminal Code, it will still be a defence to establish that there was a reasonable mistake as to fact. Accordingly, strict liability is not the same as absolute liability.

Proposed subsections 9(1), 10(1) and 10(2)

Proposed subsections 9(1), 10(1) and 10(2) have the same effect as section 21 of the current Insurance Act, in that they provide that certain natural persons (other than Lloyd's underwriters), and unauthorised bodies corporate, cannot carry on insurance business. However, consistent with the objective to harmonise regulatory requirements across APRA regulated institutions, where possible, existing provisions in the Insurance Act are proposed to be repealed and replaced by provisions modelled, to the extent possible, on provisions in the Banking Act. Accordingly, section 21 will be repealed and replaced with sections 9 and 10 that have been modelled on sections 7 and 8 of the Banking Act.

The nature of the offences remains consistent with current section 21 of the Insurance Act, that is, strict liability (see *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 1) 2001*, Schedule 1, Item 11). There will therefore be no change in the nature of these offences.

These provisions aim to protect the interests of policyholders. Should a person or institution be undertaking insurance business without an authority, and consequently without being subject to prudential supervision, the interests of the public are jeopardised. Policyholders of these enterprises, many unknowingly, will not be protected by the supervisory regime that applies to the general insurance industry. This exposes these policyholders to a greater risk of loss.

Recently, APRA has pursued approximately seven cases of businesses carrying on insurance business without an appropriate authority. Whether or not APRA undertakes enforcement action under these provisions, the provisions themselves should serve as a deterrent to those who may attempt to avoid prudential supervision. The benefits of prudential regulation are well recognised, and only those persons able to comply with minimum standards in relation to capital, risk management and the like should be entitled to enter the market in order to ensure the protection of policyholders.

Proposed sections 7A, 14 and 20

Sections 7 and 7A are new provisions that have been modelled on section 11 of the Banking Act. Section 7 will be used, for example, in relation to the grandfathering of current section 37 companies. A breach of a determination in force under subsection 7(1) results in an offence of strict liability under section 7A.

Currently, some small insurers may be exempted from certain requirements of the Insurance Act via section 37. Exemptions under section 37 are only available where an insurer undertakes a restricted class or classes of insurance business for the benefit of a limited group of (natural) persons and in circumstances where annual premium does not exceed a specified amount (the amount is currently set at $1. 5 million). Typically these insurers are exempt from the solvency and some reporting requirements of the Insurance Act.

A breach of current subsection 37(6) is a strict liability offence (see *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 1) 2001,* Schedule 1, Item 15). Accordingly, in this situation there will be no change to the nature of a relevant offence.

Section 14 has been modelled subsection 9(6) of the Banking Act. While APRA has the power to impose conditions on the authorisation of an insurer under the current paragraph 29(1)(f) of the Insurance Act, a breach of such a condition does not constitute an offence under the Insurance Act. A breach would however be a trigger for other enforcement action such as an investigation under Part V of the Insurance Act. Therefore in order to strengthen the enforcement regime and ensure the Regulator has several types of enforcement tools available for use in different circumstances, and to harmonise the regulatory regimes applying to APRA regulated entities, this provision has been modelled on the Banking Act, which does include a penalty provision.

Section 20 has been modelled on subsection 11AA(5) of the Banking Act. There is no equivalent provision in the Insurance Act, since it does not currently extend to NOHCs. Again, in order to harmonise the regulatory regimes applying to APRA regulated entities, this provision has been modelled on the Banking Act, which does include a penalty provision.

Non-reviewable discretions
Proposed new sections 15 and 21

Decisions relating to who may and may not engage in insurance business may have serious consequences for policyholders, the insurance industry and the financial system as a whole. While it is true that such decisions have direct implications for the commercial interests of the parties concerned, the broader consequences of such decisions for policyholders could be profound.

The most competent authority in Australia to assess these implications will be APRA, which is required under its legislation to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality. It would be

undesirable to have APRA's decisions in this critical area altered by another body that is unlikely to have the same level of specific competence or interest and expertise in the public interest dimension of the financial system. For example, there may be times when decisions relating to the revocation of authorities form part of a broader intervention strategy to resolve a substantial prudential concern and maximum certainty of outcome will be highly desirable.

These decisions should also not be subject to merits review for the following reasons:

- these decisions are financial decisions with a significant public interest element;
- APRA supervises the financial soundness of institutions and decisions of a prudential nature need to be made to protect policyholder interests;
- these prudential decisions arise from the need to take rapid and decisive action against an insuer to restore or maintain policyholders and investor confidence in the market;
- a decision to revoke an authority may be accompanied by a direction for the insurer to divest itself of relevant insurance business, which of necessity will be a complicated process, and the existence of merits review (with consequent delay) may frustrate this process, making it difficult to put in place arrangements with transferee insurers, and result in uncertainty for policyholders;
- The Financial System Inquiry, at Recommendation 33, supported the view that prudential decisions should not be subject to administrative review. In the handling of a financial crisis, APRA needs to be independent of executive government and possess strong regulatory powers to ensure that it can act very quickly to prevent contagion effects in the financial system. Administrative review would curtail rapid action being taken by APRA to resolve a financial crisis.

However decisions relating to the revocation of an authority will, nevertheless, be subject to the Treasurer's agreement. In addition, such decisions are also subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. Moreover, in the case of revocation of an authority, where the prospect of private loss is more immediate, grounds for revocation are clearly specified in the Bill as a guard against arbitrary decision making and to guide such review. Taking this into account, together with the wider concerns outlined above, judicial review is seen as providing an appropriate balance between private and public protections in this case.

Abrogation of the priviledge against self-incrimination
Proposed new section 49D

Proposed section 49D of the Insurance Act has been modelled on section 16B of the Banking Act. In particular, proposed subsection 49D(2) of the Insurance Act is similar in terms to subsection 16B(6) of the Banking Act. In 1998, the Scrutiny of Bills Committee specifically referred to subsection 16B(6) of the Banking Act noting that it was "in a form which the Committee has previously been prepared to accept"

(Alert Digest No. 4 of 1998). Accordingly, since the proposed section 49D of the Insurance Act has been modeled on section 16B the Banking Act, which has been accepted by the Committee, it is not clear why there should be any difference between the approaches adopted.

In addition, the issue of derivative use immunity has recently been considered in the context of the SIS Act. Section 287 of the SIS Act overrides the privilege against self-incrimination in relation to information required to be produced to the Regulator under Part 25, where Part 25 is concerned with compulsory information-gathering powers in the context of an inspection. The Part 25 powers apply to accountants and actuaries as they are "relevant persons".

Amendments were made by the *Financial Sector Legislation Amendment Act (No. 1) 2000*, to remove derivative use immunity from section 287 of the SIS Act. The effect of this amendment was to prevent a person subject to investigation under the SIS Act from claiming privilege in respect of the production of books ('use immunity'), or any information, document or other evidence obtained as a direct or indirect consequence of that person making an oral statement or signing a record of interview ('derivative use immunity').

This amendment was made since it was recognised that the experience of the former ISC, and now APRA, is that these immunities make it exceptionally difficult to pursue prosecutions under the SIS Act. Given the strong growth in superannuation savings, and the increasingly important role they play in ensuring that people make adequate provision for their income in retirement, it was considered that removal of these immunities was warranted in order to allow the Regulator to more effectively prosecute persons who contravene the SIS Act.

Similar changes were also made to the Corporations Law and the *Australian Securities and Investments Commission Act 1989* in 1992 following recommendations by the Parliamentary Joint Committee on Corporations and Securities.

In the context of general insurance, the ability to prosecute persons who contravene the Insurance Act is also of considerable importance. It ensures APRA is able to appropriately protect the interests of policyholders.

Accordingly, Parliament has explicitly recognised, through amendments to section 287 of the SIS Act, that the ability of the Regulator to effectively prosecute persons is paramount. Therefore it is considered necessary that there be no provision for derivative use immunity in the General Insurance Reform Bill 2001.

The Hon. Philip Ruddock MP
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Senator Barney Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

Dear Senator Cooney,

I refer to advice in the *Senate Standing Committee for the Scrutiny of Bills Alert Digest No.6 of 2001* of 23 May 2001 that provisions in the proposed new sections 252A, 252B and 252F of the *Migration Legislation Amendment (Immigration Detainees) Bill 2001* (the Bill) raise a number of issues relating to:

- the strip search of immigration detainees, including the rules for conduct of such a search (new section 252B) which are based on existing provisions in the *Crimes Act 1914* (section 3ZI) where police officers are authorised to search people under arrest; and

- the application of State/Territory law conferring a power to search persons serving sentences or being held in prison or on remand to immigration detainees in a prison or remand centre of a State or Territory as though it were a law of the Commonwealth (new section 252F).

The Committee voices concerns about the appropriateness of:

- conferring police powers on persons other than police officers;

- applying a power to search persons under arrest to persons in immigration detention; and

- applying State and Territory search laws as laws of the Commonwealth without the Commonwealth Parliament having an opportunity to consider those laws.

In the Committee's view, provisions 252A, 252B and 252F 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.

As you would be aware, the *Migration Legislation Amendment (Immigration Detainees) Bill 2001* (the Bill) introduced into Parliament on 5 April 2001. It was passed by the House of Representatives on 21 June 2001. Government

amendments were passed by the House removing from the Bill those provisions which propose to:

- introduce a power to strip search immigration detainees; and
- apply search powers in state and territory legislation to immigration detainees held in a state or territory prison or remand centre.

Those provisions will be placed in the new *Migration Legislation Amendment (Immigration Detainees) Bill (No.2) 2001* (Bill No.2) which I propose to introduce to the Parliament during the week commencing 25 June 2001. Bill No.2 includes two further measures regarding authorisations of a strip search and the right of a detainee to nominate another person to be present during the conduct of a strip search.

The provisions of concern to the Committee have been placed in Bill No.2.

Following discussions with the Opposition, the proposed new provisions governing the rules for conduct of a strip search will provide that:

- a strip search must be authorised by the Secretary of my Department, by an officer at the level of SES Band 3, such as the Deputy Secretary, or an officer temporarily assigned such duties; and
- a detainee has the right to nominate another person to be present during the conduct of the strip search if that person is readily available at the same place as the detainee and willing to attend the strip search within a reasonable time.

Below is a summary of my response to the Committee's concerns. A detailed briefing is provided in an attachment to this letter.

At the outset, I wish to stress that the proposed power to strip search a detainee is very much a measure of last resort. It is not a power to be used lightly nor routinely.

Proposed section 252A of Bill No.2 and section 3ZH of the Crimes Act

In drafting the proposed strip search provisions in Bill No.2, it was essential to incorporate minimum safeguards. Relevant provisions in the Crimes Act were examined, considered an appropriate model upon which to draw, and ensured consistency with existing Commonwealth law.

The proposed section 252A of Bill No.2 relates to the power to conduct a strip search. It draws upon the framework of section 3ZH of the Crimes Act which sets out the grounds on which a strip search may be conducted, who may conduct the search, and who may authorise it. The detail of section 252A, however, was drafted specifically and appropriately for an immigration detention environment which is administrative, not criminal or correctional, in nature.

The Commonwealth Parliament has previously enacted legislation enabling persons not arrested or charged to be subject to external searches by

persons other than police officers. The *Customs Act 1901* at Subdivisions B and D of Division 1B covers an external search (that is, a search of the body and anything worn by the person, but not an internal or body cavity search) in a customs environment. Under those provisions, an authorised Customs or detention officer may conduct an external search of a customs detainee and it is not required that the person being searched first be arrested or charged nor that a police officer conduct or authorise the search.

In the drafting of Bill No.2, therefore, we also drew on the provisions of the Customs Act. I note, however, that Customs' search powers are much wider than that anticipated in Bill No.2, and include the power to conduct body cavity searches.

Proposed section 252B of Bill No.2 and section 3ZI of the Crimes Act

Section 3ZI of the Crimes Act sets out the rules for conduct of a strip search. It provides measures to ensure that the dignity and privacy of the person being searched are respected as far as it is practicable to do so. Gender and age issues are also covered, whereby a same-sex search is required and special provisions exist for the search of a minor who is at least 10 but under 18.

It was the rules and universal principles regarding the respect of an individual's dignity and privacy, and concerns for gender and age, identified in section 3ZI of the Crimes Act, which closely informed the drafting of the proposed section 252B of Bill No.2. There is, as a result, strong reason for the similarities between them.

The requirement in section 3ZI of independent authorisation by a magistrate in relation to a minor who is at least 10 was not pursued in Bill No.2 for sound reason. Given the remote location of many immigration detention facilities and the need to respond quickly (for example, in cases of potential self-harm), the good order and security of those facilities and the safety of other detainees, staff and visitors could be put at risk if a search warrant had first to be obtained from a magistrate.

Safeguards

The proposed new strip search power in Bill No.2 is accompanied by a hierarchy of safeguards to ensure it is not misused, officers are accountable for its use, and detainees' personal rights and liberties are not unduly trespassed upon. These safeguards include the following.

- Rules for conduct of a strip search are set out at the proposed section 252B of Bill No.2. As already noted, section 3ZI of the Crimes Act provided a useful and, I believe, appropriate source for Bill No.2. The rules were shaped, however, for an immigration detention environment and widened to provide additional protection for immigration detainees.

- The *Draft Protocol for Strip Search of Immigration Detainees* was developed in consultation with the Attorney-General's Department and has been agreed between myself and the Attorney-General. It

provides the principles and essential operating guidelines for those who authorise a strip search, those who conduct it, and those who are to undergo such a search. It aims to ensure strip searches are conducted in a professional manner and officers operate according to the guidelines and remain accountable for their actions. Proposed amendments to Bill No.2, as noted above, are reflected in the revised version of the Draft Protocol, a copy of which is attached.

- The letter and spirit of the Draft Protocol is expected to be incorporated into written directions pursuant to section 499 of the *Migration Act 1958* (Migration Act). Such a direction is binding on officers.

- The Draft Protocol will be further articulated and expanded in the Department's Migration Series Instructions and Operational Orders.

- Detainees have the right to take any grievances, complaints or allegations about any aspect of their detention to DIMA or the service provider. They also have the right– and already avail themselves of this right – to apply to the Commonwealth Ombudsman or the Human Rights and Equal Opportunity Commission. This right is provided for in the Commonwealth Acts which establish those bodies.

Application of State/Territory search laws as laws of the Commonwealth

Regarding the Committee's concern about the application of State and Territory search laws as laws of the Commonwealth without the Commonwealth Parliament having an opportunity to consider those laws, I make the following points:

- State/Territory search powers to be applied are already in existence and are therefore open to scrutiny;

- the alternative of reproducing in the Migration Act the search powers of all eight State/Territory jurisdictions would be cumbersome and, to maintain consistency, would require amendments to the Migration Act each time a State/Territory law were changed;

- maintaining the status quo is neither appropriate nor practical: for example, having two sets of search powers operating in State/Territory correctional facilities has the potential for the incorrect search power to be applied to an immigration detainee; and

- relevant State/Territory legislation, supporting regulations and operational procedures relating to search powers contain some safeguards to protect the dignity of those held in the correctional facilities and to guard against misuse. These safeguards will also apply to immigration detainees held in State/Territory correctional facilities.

Consideration is also being given to including matters relating to the proposed

section 252F in memoranda of understanding being developed by my Department and relevant State/Territory authorities, which govern the transfer and maintenance of immigration detainees in correctional facilities. Such matters include reporting procedures when strip searches are conducted on immigration detainees held in those facilities and the application of minimum safeguards for all such detainees.

Summary

In co-ordinating the drafting of sections 252A, 252B and 252F and compiling the *Draft Protocol for Strip Search of Immigration Detainees*, we took account of privacy and dignity issues relating to immigration detainees. The requirement to balance a number of competing demands to achieve a lawful, manageable, and effective outcome necessarily shaped that drafting.

The proposed provisions at sections 252A, 252B and 252F of Bill No.2, the Draft Protocol, section 499 directions, and other safeguards underpinning the provisions provide adequate assurance that detainees' rights and liberties will be protected as far as practicable. Such protection is provided within the context of the Department's mandate to ensure its immigration detention facilities are safe and secure places for all detainees, visitors and staff within them.

I am happy for the Department to appear before the Committee to provide further briefing on the Bills.

Yours sincerely

Philip Ruddock

25 JUN 2001

ATTACHMENT

Senate Standing Committee for the Scrutiny of Bills

Migration Amendment Legislation (Immigration Detainees) Bill (No.2) 2001 (Bill No.2)

The Government takes the responsibility for the care of all persons in immigration detention facilities as a serious commitment.

It is of concern, therefore, that actions of some immigration detainees have endangered or have the potential to endanger other detainees, staff and visitors, have caused considerable damage to Commonwealth property, and are detrimental to the good order and security of the detention facilities. Such actions have included violent protests, burning of buildings, mass escapes, assaults on detainees and officers, and other forms of inappropriate behaviour. Detainees have also been known to hide on their person weapons or things which can be used for self-harm, to injure others, or to assist in escape. These items may be concealed by the detainees themselves or at the instigation of other detainees.

Examples of this behaviour include the following.

- Curtin IRPC: 9 June 2000 – a mass break out occurred of approximately 260 detainees. A small group attempted to violently force their way through a police line where ten were arrested; and
- Woomera IRPC: 24-28 August 2000 – a series of demonstrations was held by a group of about 100 detainees and included rocks being thrown at ACM staff. A demonstration on 26 August escalated into violence and included detainees throwing rocks and other missiles at ACM staff. On 28 August 2000, ACM attempted to remove a group of detainees identified as participating in rioting the night before. Other detainees attacked ACM staff, throwing rocks and using bedposts and slingshots as weapons. Six buildings were set on fire and totally destroyed including the dining, recreation and education facilities. Estimated cost of the damage was around $1 million. Forty-one ACM and APS staff were injured; four required hospital treatment. No DIMA staff or detainees were hurt;
- Port Hedland: 21January 2001 – 180 detainees rioted. Detainees battered police with bricks and steel pipes;
- Port Hedland: 11 and 26 May 2001 – as a result of the riot on 11 May, 22 detainees have been charged with various offences under the Crimes Act 1914;
- Woomera: 7-8 June 2001 – riots occurred and Commonwealth property was damaged; one ACM officer was injured. AFP is currently investigating the incidents;

- Woomera: 9 June 2001 – seven detainees escaped from Woomera; all seven have been re-captured and charged with escape from lawful custody.

A tranche of new powers, including those contained in Bill No.2, is currently under consideration to provide a proper and lawful basis for the more effective management of immigration detention facilities and those within them who engage in this kind of behaviour. The proposed strip search provisions in Bill No.2 reflect the need to provide a sound legislative framework which:

- recognises the need for my Department, in furtherance of the duty of care owed to, and its responsibilities for the safety and security of, all immigration detainees, to lawfully conduct strip searches of detainees if and when the circumstances require it;
- provides the Department with the powers to meet its obligations with regard to managing and maintaining the good order and security of detention facilities;
- reflects community expectations of the preservation of the dignity and privacy entitlements of detainees;
- provides legislative safeguards for the rights of detainees undergoing a strip search; and
- provides appropriate levels of protection for officers in the execution of their duties.

Most importantly, the proposed power to strip search a detainee is a measure of last resort. It is not a power that will be used lightly nor as a routine procedure.

The immigration environment

Similarities between Bill No.2 and existing legislation such as the *Crimes Act 1914* (Crimes Act) and the *Customs Act 1901* (Customs Act) are reasonable and appropriate. Variations to suit their particular purpose, however, are also valid.

The immigration detention, criminal, customs and correctional facility environments all involve persons who have been detained under relevant Commonwealth or State/Territory laws and all rely on lawful search powers for various purposes. Legislation relating to those search powers and relevant safeguards have been tailored to take account of the unique characteristics of each environment and, consequently, range from:

- body cavity or internal searches (customs, criminal and correctional facility environments); to
- strip or external searches (customs, criminal and correctional facility environments); and
- frisk searches (customs, criminal, correctional facility and immigration detention environments).

The immigration detention environment, however, has some characteristics

different to the customs, criminal and correctional facility environments. These include:

- the duty of care the Government has for immigration detainees, which extends to ensuring the safety and welfare of all immigration detainees in the immigration detention environment;
- the requirement to provide administrative detention and the desire to do so in a low to medium security setting;
- the unprecedented increase over the last two years in the number of detainees and the expectation that numbers will not fall, indeed may increase, over the foreseeable future;
- the need to accommodate in the one facility men, women, children, single persons and family units from a variety of cultural, ethnic and linguistic backgrounds;
- provision of a community-like atmosphere for the detainees;
- variation in the periods of time detainees may spend in detention, which cannot be determined at the outset and which, in some instances, is in the hands of the detainees' themselves while they pursue review, litigation and international complaints and/or while they remain uncooperative in providing information which would facilitate their removal from Australia; and
- the change in the nature of the detainee population, and the complex dilemmas and challenges confronting us as a result, including inappropriate and sometimes violent and threatening behaviour by some detainees.

The legislation seeks to provide enhanced powers to discourage and, where necessary, to manage more effectively inappropriate behaviour and to ensure the safety of all persons within detention centres. In drafting that legislation, the context and specific requirements of the immigration detention environment and the outcomes we need achieve were principal influences and necessary guides. Where appropriate, existing legislation provided a model for our drafting.

Existing search power

The new strip search power proposed in the Bill augments the frisk or pat-down search power currently available at section 252 of the *Migration Act 1958* (Migration Act). A search under section 252 is limited in its capacity. It does not empower an authorised officer to:

- remove any of the person's clothing, or to require a person to remove any of his or her clothing (subsection 252(5)); nor
- require the production of any thing found, as a result of that search, to be carried on the body of the detainee or in his or her clothing to determine whether it is, or contains, a weapon or thing which could be used to inflict bodily injury or assist in escape.

For the purposes of such a search, 'person' includes a person who has been detained in Australia.

These limitations hinder efforts to detect weapons fashioned from materials obtained within immigration detention centres, and place all persons in those centres in danger.

Proposed new section 252A of Bill No.2 and section 3ZH of the Crimes Act

Section 3ZH of the Crimes Act sets out the grounds on which a strip search may be conducted, who may be searched, who may conduct the search, and who may authorise it. A person who is to be strip searched must first be arrested by a police officer; and in the case of a minor who is at least 10 but under 18, the strip search may only be conducted if the person has been arrested and charged or if a magistrate orders that the strip search be conducted.

While there are similarities between the provisions of section 3ZH and proposed section 252A of Bill No.2, there are also clear and valid differences which reflect the need to provide legislative guidelines specifically for an immigration detention environment. For the purposes of Bill No.2, therefore:

- a strip search is conducted while the detainee is in immigration detention;
- when the power is enlivened, an officer must suspect on reasonable grounds that there is hidden on the detainee a weapon or other thing capable of being used to inflict bodily injury or to help a detainee to escape; and the same officer must also have a reasonable suspicion that it is necessary to conduct a strip search to recover the weapon or other thing;
- the senior officer approving the strip search must be satisfied that there are reasonable grounds for conducting the search;
- the definition of an 'authorised officer' for the purposes of conducting the strip search accords with the definition in the Migration Act.

  Under sub-section 5(1) of the Migration Act, an 'authorised officer' means an officer authorised in writing by me or the Secretary of my Department for the purposes of conducting a strip search under new section 252A; and
- the person approving the conduct of the search is one of a group of officers who are senior employees in my Department and who are identified at sections 252A(3)(c) and 252A(8) of Bill No.2.

  The proposed amendment to these sections in Bill No.2 restricts this group to the very senior employees in the central office of my Department, *viz.* the Secretary, an officer with a classification of SES Band 3, such as the Deputy Secretary, or officers who have been temporarily assigned those duties.

Similar provisions exist in the Customs Act. Under that Act (s.4), an external search means:

"a search of the body of, and of anything worn by, the person to:

(a) determine whether the person is carrying any prohibited goods; and

(b) to recover any such goods;

but does not include an internal examination of the person's body."

Relevant provisions in the Customs Act clearly and appropriately provide for a customs, not a criminal, environment where:

- a Customs officer or a detention officer, authorised by the Chief Executive Officer of Customs, may conduct an external search of a customs detainee; and
- it is not required that the person being searched first be arrested or charged nor that a police officer conduct or authorise the search.

I note that Customs' search powers are much wider than that anticipated in Bill No.2 and include the power to conduct internal or body cavity searches.

Section 252B of the Bill and section 3ZI of the Crimes Act

Section 3ZI of the Crimes Act sets out the rules for conduct of a strip search. It provides measures to ensure that the dignity and privacy of the person being searched are respected as far as it is practicable to do so. Gender and age issues are also covered, whereby a same-sex search is required and special provisions exist for the search of a minor who is at least 10.

It was the rules and universal principles regarding the respect of an individual's dignity and privacy, and concerns for gender and age, identified in section 3ZI of the Crimes Act, which closely informed the drafting of section 252B of the Bill. There is, as a result, strong reason for the similarities between the two sections.

There are also some differences, such as the requirement in section 3ZI of the Crimes Act for independent authorisation by a magistrate in relation to a minor who is at least 10. This was not pursued in Bill No.2 for sound reasons.

- Given the remote location of many immigration detention facilities and the need to respond quickly, the good order and security of the detention facilities could be put at risk if a search warrant had first to be obtained from a magistrate.
- In particular, where the detainee has hidden on his or her person or in his or her clothing a weapon or thing which could be used to inflict bodily injury, the longer it takes to commence the conduct of a search, the greater the potential for the detainee to self-harm or to harm other detainees or staff.

Safeguards

The proposed new strip search powers in the Bill are accompanied by a hierarchy of safeguards to provide clear guidelines; accountability by those conducting and authorising the search; scrutiny of the processes; transparency through reporting requirements by my Department to me, and by me to the

Parliament; and a measure of protection for detainees so that their personal rights and liberties are not unduly trespassed upon. These safeguards include the following.

Rules for conduct of a strip search

These are set out at section 252B of the Bill. As mentioned above, the rules were informed by the Crimes Act rules for conduct of a strip search (section 3ZI). Some of the rules at section 252B, however, were shaped for an immigration detention environment and provide protection for the detainee and the officer authorised to conduct the search.

- The strip search must not be conducted in the presence or view of a person who is of the opposite sex to the detainee (paragraph 252B(1)(d)). Exceptions to this rule occur where:

  (a) a minor is at least 10, in which case, a person of the opposite sex may be present if that person is a parent or guardian or another person capable of representing the detainee's interests and to whose presence at the search the detainee has no objection (sub-section 252B(2)); or

  (b) the authorised officer conducting the search considers it necessary to do so with the assistance of another person and that person is a medical officer and a medical officer of the same sex as the detainee is not available within a reasonable time (subsection 252B(5)) or

  (c) a detainee has nominated another person to be present during the conduct of the strip search (subsection 252B(3)).

- Bill No.2 includes an additional requirement at paragraph 252B(1)(h) which provides that, where the detainee is at least 18 and is not incapable of managing his or her affairs, a strip search must be conducted in the presence of another person (if any) nominated by the detainee if that person is readily available at the same place as the detainee and willing to attend the strip search within a reasonable time.

  Subject to new sub-section 252(4), however, the conduct of a strip search will not be prevented if a detainee declines or fails to nominate a person under paragraph 252B(1)(h) within a reasonable time, or is unable to nominate a person who is readily available at the same place as the detainee and willing to attend the strip search within a reasonable time.

Draft Protocol for Strip Search of Immigration Detainees

This Draft Protocol (copy attached) was developed by my Department in consultation with the Attorney-General's Department and has been agreed between myself and the Attorney-General. It provides the principles and essential operating guidelines:

- for those who authorise a strip search of immigration detainees, those who conduct it; and those who must undergo the search;

- to ensure that strip searches are conducted in a skilled and professional manner; and
- to ensure officers operate according to the guidelines and remain accountable for their actions.

The Draft Protocol was designed:

- to reflect a reasonable balance between preserving a detainee's dignity and right to privacy;
- to protect the Australian community, the detainee community, and staff involved in managing the detainee community; and
- to ensure the general safety of officers performing strip search functions under the proposed amendments to the Migration Act.

Notable guidelines in the Draft Protocol wherein the rights of immigration detainees are taken into account include the following.

- A detainee must be provided with written information in a language that he or she understands explaining the effect of proposed sections 252A and 252B and setting out the detainee's rights under law with regard to the strip search. If it is practicable in the circumstances and if required, an interpreter must be provided for the detainee. If a detainee is illiterate or has difficulties reading, an interpreter will be provided. Access to this interpreter may be by telephone.
- Officers authorised to approve a strip search must undertake training.
- Officers authorised to conduct a strip search must undertake a training program. If an officer does not satisfactorily complete the program, he or she will not be authorised to conduct a strip search. The training program is to include sections on:
    - legislative requirements,
    - civil rights and liberties,
    - grounds, pre-conditions, and procedures for conducting a strip search,
    - role of officers involved in conducting a strip search,
    - procedures relating to items retained during a search, and
    - record keeping reporting.
- An accurate record of, and information about, all strip searches must be maintained in accordance with the *Privacy Act 1988*.
- All instances of strip searches are to be reported to the Secretary and to the Minister.

<u>Section 499 direction</u>

The letter and the spirit of the Draft Protocol will be incorporated into written directions pursuant to section 499 of the Migration Act. Such a direction is binding on officers.

Departmental operating procedures

The Draft Protocol will be further articulated and expanded in the Department's Migration Series Instructions and Operational Orders.

Complaints mechanisms

My Department and the detention services provider are committed to ensuring that detention operations remain as transparent as possible and detainee grievances are resolved as quickly as possible. Through the Immigration Detention Standards, detainees have the right to take any grievances, complaints or allegations about any aspect of their detention to my Department or the detention services provider. This will include the conduct of a strip search. They also have the right – and already avail themselves of this right – to apply to the Commonwealth Ombudsman or the Human Rights and Equal Opportunity Commission. This right is provided for in the Commonwealth Acts which establish those bodies.

The application of State/Territory search laws as laws of the Commonwealth

Proposed section 252F of Bill No.2 seeks to clarify the legal situation with respect to search powers for immigration detainees held in State/Territory prisons or remand centres. It will put beyond doubt that, if States or Territories accept immigration detainees in prisons or remand centres, State/Territory laws apply in relation to search powers of those individuals. This will ensure that State/Territory authorities are able to apply search powers consistently to all those being held in their correctional facilities so that the order and security of the prison or remand centre are not compromised or undermined. For example,

- correctional facilities operate in a higher risk environment and involve such activities as drug use, contraband and violence. Search powers appropriate to that environment, therefore, are required. The security and good order of State/Territory correctional facilities could be put at risk if search powers available to correctional facility authorities could not lawfully be applied to immigration detainees held in those facilities;
- maintaining the status quo (that is, managing the operation of two search power regimes in State/Territory correctional facilities – one under the Migration Act, the other under relevant State/Territory law) poses administrative problems and may result in the wrong search powers being applied to immigration detainees or State/Territory authorities declining to hold immigration detainees in correctional facilities.

The Committee has raised concerns about the appropriateness of applying State/Territory search laws as laws of the Commonwealth without the Commonwealth Parliament having an opportunity to consider those laws.

State/Territory search powers to be applied, however, are already in existence. The alternative of reproducing in the Migration Act the search powers of all eight State/Territory jurisdictions would be cumbersome and would require the Migration Act to be amended each time a State/Territory law were changed in

order to maintain consistency.

Relevant State/Territory legislation, supporting regulations and operational procedures relating to search powers contain some safeguards to protect the dignity of the inmates and to guard against misuse. These safeguards will also apply to immigration detainees held in State/Territory correctional facilities.

In addition to these safeguards, my Department is developing memoranda of understanding (MOU) with relevant State/Territory authorities governing the transfer and maintenance of immigration detainees in State/Territory correctional facilities. My Department will seek to ensure that these MOUs cover search powers, including appropriate reporting mechanisms when strip searches are conducted on such immigration detainees and the application of minimum safeguards. It is also the intention to include in the MOUs the requirement that State/Territory correctional authorities notify the Department of any changes to their search powers to ensure the Department remains aware of laws which apply to this group of immigration detainees.

Summary

During 2000, the Department was presented with new challenges in managing a significantly larger immigration detainee population and a high level of non-compliance by some detainees. Major disturbances at Woomera, Curtin and Port Hedland Immigration and Reception Processing Centres have demonstrated that existing powers under the Migration Act associated with the management of immigration detainees is insufficient to deal with incidents of such magnitude and character.

The new powers in the *Migration Legislation Amendment (Immigration Detainees) Bill (No.2) 2001* are part of the legislative framework currently under consideration, which seeks to deter inappropriate behaviour by immigration detainees, and provide a proper, lawful and accountable basis for the effective management of those in immigration detention.

While co-ordinating the drafting of proposed sections 252A, 252B and 252F and compiling the Draft Protocol, we took account of privacy and dignity issues relating to immigration detainees. The drafting was necessarily shaped, however, by the requirement to balance a number of competing demands to achieve a lawful, manageable, and effective outcome, including:

- upholding the Department's duty of care to, and its responsibilities for the safety and security of, all immigration detainees;
- the particular nature of the immigration detention environment and the need for lawful powers relevant to that environment;
- managing and maintaining the good order and security of immigration detention facilities, including effectively managing those detainees who pose a high risk to others within those facilities;
- meeting community expectations of the preservation of the dignity and privacy entitlements of detainees;
- providing legislative safeguards for the rights of detainees who are to

undergo a strip search; and

- providing appropriate levels of protection for officers in the execution of their duties.

The proposed provisions at sections 252A, 252B and 252F, the Draft Protocol, and anticipated directions, instructions and procedures underpinning the provisions provide adequate assurance that the rights and liberties of individual detainees will be protected as far as it is practicable to do so. Such protection is provided within the context of the Department's mandate to ensure its immigration detention facilities are safe and secure places for all detainees, visitors and staff within them.

25th June 2001

DRAFT PROTOCOL FOR
STRIP SEARCH OF IMMIGRATION DETAINEES

NOT INCLUDED

DOCUMENT TABLED IN
HOUSE OF REPRESENTATIVES ON 27 JUNE 2001

The Hon. Philip Ruddock MP
Minister for Immigration and Multicultural Affairs
Minister for Reconciliation and Aboriginal and
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Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 9 August 2001 from Mr James Warmenhoven, Secretary to the Committee, to my Senior Adviser referring to the comments contained in the Scrutiny of Bills Alert Digest No. 9 of 2001 (8 August 2001) concerning the Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001 ("the Bill").

The Committee seeks my advice as to whether the proposed *Draft Protocol for Strip Search of Immigration Detainees* ("the Draft Protocol"), or the directions which the Draft Protocol is proposed to be incorporated into, will be disallowable.

The Bill was introduced in the House of Representatives on 27 June 2001. It promotes the safety and security of immigration detention facilities by:

- introducing a power to strip search immigration detainees; and
- applying search powers in State and Territory legislation to immigration detainees held in a State or Territory prison or remand centre.

The Bill also contains a number of safeguards to ensure that the powers contained in it are exercised reasonably and with restraint. The Committee has already noted provisions in the Bill placing limits on who can authorise a strip search and to provide for the presence, during a search, of another person (if any) nominated by the detainee.

In response to discussions with the Opposition, Government amendments are proposed to further enhance the legislative safeguards in the Bill. The proposed new amendments will:

- provide that a strip search of an immigration detainee, who is at least 10 years old but under 18 years old, must be authorised by order of a magistrate; and
- clarify on what basis an officer may form a suspicion on reasonable grounds that there is hidden on a detainee, in his or her clothing or in a thing in his or her possession, a weapon or other thing capable of being used:
  - to inflict bodily injury; or
  - to help the detainee, or any other detainee, to escape from immigration detention.

The amendments will also introduce a power to "screen" detainees by having them pass through a metal detector or other similar device. This power is required as part of the process by which an officer may form a reasonable suspicion that a detainee has a weapon or other thing hidden on his or her person.

The Draft Protocol provides operational guidelines for the exercise of the strip search power in new section 252A. It was developed and settled in conjunction with the Attorney-General and tabled in the House of Representatives on 27 June 2001.

As the Committee noted, the Draft Protocol will be incorporated into written directions pursuant to section 499 of the *Migration Act 1958* ("the Act"). Such directions allow me to specify more precisely how persons exercising a power or function under the Act should exercise their discretion. The Act imposes a duty on officers to comply with such directions.

It has never been appropriate for a direction issued under section 499 of the Act to be a disallowable instrument because of its administrative nature. However, while a section 499 direction is not disallowable, the Act provides that it must be tabled in both Houses of the Parliament within 15 sitting days of that House after it is made.

In addition, the Draft Protocol contains provisions that will require the tabling of a statement twice per year in each House of the Parliament providing summary information on the number of strip searches. This will give additional Parliamentary scrutiny to the use of the strip search power.

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

Yours sincerely

Philip Ruddock

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Senator Barney Cooney
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Dear Senator Cooney

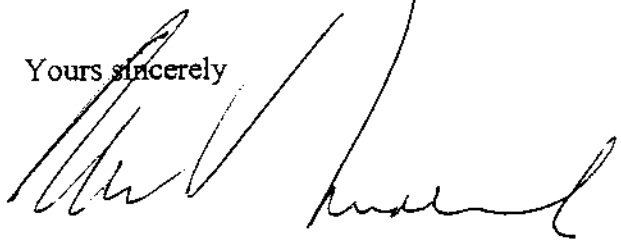
I refer to your letter of 21 June 2001 enclosing a copy of the Committee's Alert Digest No. 7 of 2001, and inviting my response to the Committee's comments in relation to the *Reconciliation and Aboriginal and Torres Strait Islander Affairs Legislation Amendment (Application of Criminal Code) Bill 2001* (the Bill). The Committee has sought confirmation that the Bill does not convert an offence which previously was not an offence of strict liability into a strict liability offence.

The Bill proposes to amend a number of existing criminal offences within the Reconciliation and Aboriginal and Torres Strait Islander Affairs Portfolio to expressly provide that they are offences of strict liability. This 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 converse will also apply, namely that any offence which is not expressly stated to be an offence of strict liability will be interpreted to be a fault-based offence. The intention behind the strict liability amendments proposed by the Bill is to preserve the status quo in relation to strict liability.

In determining whether a particular offence is currently one of strict liability, a number of factors have been considered. Firstly, all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration. Secondly, offences where the relevant penalty was sufficiently high - either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment - were excluded as they indicate that Parliament intended that the offences be fault-based. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration. Thirdly, the presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved, and that the offence may be one of strict liability. Finally, the nature of the offence was considered and where the offences are wholly regulatory in nature it can be inferred that Parliament intended that strict liability should apply, eg. failure to comply with reporting or record-keeping requirements.

These factors were all taken into account in assessing each criminal offence for strict liability. The offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply. The Bill creates no new offences of strict liability.

Yours sincerely



Philip Ruddock

22 AUG 2001

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Dear Senator Cooney

I refer to the letter of 24 May 2001 from the Committee Secretary concerning the Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001. The letter identified the Alert Digest reference to the Bill and invited a response to the matter raised by the Committee, namely the Bill's application of strict liability to certain Treasury portfolio criminal offence provisions.

As identified in the Alert Digest, the Bill proposes to amend a number of existing criminal offences within the Treasurer's portfolio to expressly provide that they are offences of strict liability. This 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 converse will also apply, namely that any offence which is not expressly stated to be an offence of strict liability will be interpreted to be a fault-based offence. The intention behind the strict liability amendments made by the 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 that are judged to be presently of a strict liability character, thus maintaining the status quo.

The operation of strict liability in Commonwealth criminal offences is uncertain and haphazard because the principles used by courts over time to identify strict liability offences have been inconsistently developed and applied. As a result of inconsistent judicial interpretation, some uncertainty will inevitably exist whether some individual criminal offences – and in particular those which have never been prosecuted – are offences of strict liability.

Only a handful of Commonwealth criminal offences expressly state whether they are offences of strict liability, and it follows that this important matter must be settled by judicial interpretation in almost all instances. In the absence of specific judicial interpretation, it has been necessary for Treasury officers, in conjunction with officers of the Attorney-General's Department, to determine in each instance whether Parliament originally intended that the subject criminal offence be one of strict liability. This process

has also been undertaken in consultation with a senior officer of the Commonwealth Director of Public Prosecutions.

In determining whether an individual offence is one of strict liability, a process was followed of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The reasons are detailed in the attached policy document produced by the Attorney-General's Department. The process began with the primary position established by the High Court in *R v He Kaw Teh* (1984-85) 157 CLR 523, which was stated by Brennan J at 566:

> "It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

Accordingly all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to exclude all offences where the relevant penalty is sufficiently high – either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment – to indicate that Parliament intended that the offences be fault-based. Judicial interpretation on this point was broadly examined and found to be applied in an inconsistent manner. A policy was therefore developed to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months. Courts have generally presumed that Parliament would not want strict liability if the consequences of conviction are likely to involve imprisonment. If the maximum penalty for an offence is 6 months imprisonment and the offence is stated to be a strict liability offence, the reality is that courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than 6 months, and therefore the policy of a maximum penalty of 6 months has been set as a benchmark. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration.

Two other significant considerations weighed in the consideration of individual criminal offence provisions. First, the presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved. It is accepted that the provision of a broadly-based defence (such as a defence of reasonable excuse) 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.

The remaining major consideration utilised in the examination of criminal offences for strict liability is the nature of each offence. Offences that are wholly regulatory in nature are the clearest example of offences where it can be readily inferred that Parliament intended that strict liability should apply. This view is based upon the view of Barwick CJ in *Cameron v*

Holt (1980) 142 CLR 342 at 346, where he stated that the presumption of fault would be displaced:

> " ... if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

Common examples of wholly regulatory offences in the Treasurer's portfolio include those concerning failure to comply with reporting or record-keeping requirements.

These factors were all taken into account as a matrix in assessing each individual criminal offence for strict liability. You can be assured that the offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply.

Yours sincerely

cc. James Warmenhoven, Secretary, Senate Scrutiny of Bills Committee.

STRICT LIABILITY - PREFERRED APPROACH TO HARMONISATION

The *Criminal Code* harmonisation exercise has focused attention on where strict liability exists or does not exist in current offences.

Under the common law, if strict liability applies the prosecution does not have to prove fault on the part of the defendant. Fault includes intention if it is with respect to conduct and recklessness where it is with respect to a circumstance in which conduct occurs or a result of conduct. Under strict liability the defendant can raise the defence of honest and reasonable mistake of fact. The defendant will activate the defence if he or she can point to or adduce evidence that he or she made a relevant mistake of fact. If that occurs, then the prosecution bears the onus to prove beyond reasonable doubt that there was no mistake (*Proudman v Dayman* (1941) 67 CLR 536).

Under the existing law the legislature and the courts have not always been clear about where strict liability applies. Brent Fisse, in *Howards Criminal Law* (5th Edition), has concluded at p.536:

> " Whatever else may be said of judicial interpretation of regulatory statutes in the last century, it cannot be called consistent."

The *Criminal Code* addresses this concern by providing that strict liability must be identified expressly, otherwise a fault element will apply automatically (ss 5.6 and 6.1).Section 6.1 recognises that strict liability may be applied to all or specified physical elements of an offence. Many offences will have one element which requires proof of fault, another where strict liability applies. For example, if making a statement which is false and misleading were to be the physical element of the offence and it were proposed that strict liability apply, the most sensible way to do it would be to let the rule in ss 5.6(1) to operate and automatically provide that the act of making a statement is intentional and that strict liability should apply to the physical element that the statement was not correct.

The *Criminal Code* harmonisation exercise is designed to ensure old offences operate in the way they were intended by the Parliament when they have operated prior to the commencement of the Code, not just in a way which is preferred by the agencies or those who represent the interests of defendants. However, with the *Criminal Code* harmonisation Bills it is open to the Government and Parliament to clarify its intention where there is uncertainty. It is important that Parliament is given a very clear indication in the Explanatory Memorandum where it is proposed that strict liability apply but there is doubt about the existing law. This paper is designed to set a bench-mark beyond which there will need to be additional Government approval and a special explanation in the Explanatory Memorandum. It is critical that this be done if the harmonisation process is to have credibility and not create confusion for prosecutors, defence counsel and the courts. It is therefore very important to identify offences involving doubt about the requirement of proof of fault early in the process.

A reasonable benchmark

1. **There is a strong presumption that proof of fault is required. This can be displaced, but not easily, even with 'regulatory statutes'.**

   The High Court emphasises this point in *Cameron v Holt* (1980) 142 CLR 342 at 346 and *He Kaw Teh v R* (1985) 157 CLR 523. The principle of course has its origin in the landmark *Woolmington v Director of Public Prosecutions* [1935] AC 462. *Cameron v Holt* concerned a social security false and misleading statement offence with a maximum penalty of 6 months imprisonment / $500 fine. Mason J noted that in his view the penalty was "by no means small." It was not an indictable offence, it involved protecting the revenue and concerned wrongdoing that is not always easy to detect and punish, yet the High Court required proof of fault. In *He Kaw Teh v R* Gibbs CJ said at 528 there "has been a tendency in Australia to regard this presumption as only a weak one, at least in the case of modern regulatory statutes: *Proudman v Dayman*; *Bergin v Stack*. However, the principle in *Sherras v De Rutzen* has more recently been reaffirmed ....in this Court: *Cameron v Holt*."

2. **The language of the statute.**

   Fault may be inferred simply from the way the wrongful conduct is described, for example the words 'possess', 'calculate', 'allow' and 'permit' have all been held to imply proof of fault is necessary . However, many offences say nothing that assists. For the presumption of proof of fault to be overturned there must be something. The most meaningful indicators are:

   (a) Implicit in the wording of other offences in the same provision

   Where a fault element is not expressed in the offence, or where fault is expressed in one offence, but not in an adjacent offence in the same statute, courts are more likely to accept that strict liability is meant to apply.

   (b) Use of the term 'without reasonable excuse' or some other express defence which implies fault need not be proved

   The reference to 'without reasonable excuse' is taken to indicate that the legislature only wanted the general defences and mistake of fact to apply, not proof of fault. However, where the penalty is significant and/or there are other indicators that fault should apply, the court will not conclude that the presumption is over-turned simply by use of the words 'without reasonable excuse'. This happened in *He Kaw Teh-v-R* . Even Wilson J, who was the only judge prepared to find that strict liability applied to the offence in that case, concluded at 557 that he "found such phrases inconclusive. It may readily be said that the legislature, having expressly placed an

onus on an accused person in these paragraphs, supplies a clear inference that in para (b) where the words do not appear, the legislature intended the onus of proof to remain on the prosecution."

Other defences of this nature are that the acts "were not knowingly performed" or "the defendant exercised due diligence". An example of the operation of defences in this way is *R v Harris* (1999) 150 FLR 281 at 287-88 which concerned the offence at subsection 129(2) of the *Health Insurance Act 1973* which has a maximum penalty of 5 years imprisonment.

(c) Penalty - 6 months imprisonment or less

Imprisonment is the indicator of the seriousness of the offence and the courts presume Parliament would not want strict liability if the consequences of conviction are 'penal' - likely to involve imprisonment. A maximum penalty of 6 months imprisonment was considered to be sufficient indication of seriousness in *Cameron v Holt* (Barwick CJ at 345) and that the respected commentator Colin Howard QC was saying much the same things many years ago in his book *Strict Responsibility* (1963). He noted that strict liability should only apply to offences punishable by nothing more than a small fine or even a substantial fine providing that imprisonment is not an alternative. He suggested that it was only appropriate for summary offences which in 1963 did not include offences where imprisonment was likely (it was indictable if the maximum penalty was more than 6 months imprisonment).

There are some examples where strict liability was held to apply to a corporate regulation offence where the maximum penalty was as high as 5 years imprisonment. In *Von Lieven v Stewart* (1990) 21 NSWLR at 61 Handley JA of the NSW Supreme Court made the surprising statement that "While the penalties under s.174 for principal offenders are heavy - a fine of up to $20,000 or imprisonment for 5 years, or both, in my opinion the offences are not strictly criminal in nature at all." Notwithstanding Handley JA's assertions to the contrary, this is clearly at odds with the comments of the High Court in *Cameron v Holt* and *He Kaw Teh*. It is also inconsistent with *Aberfoyle v Western Metals Ltd* [1998] 744 FCA where Finkelstein J said the offence at s.698 which provides for a maximum penalty of 6 months imprisonment / $500 fine in relation to false and misleading matters in a statement to shareholders concerning takeovers is not truly of a "criminal character." He said the penalty imposed for a contravention is slight when compared to other penalties that are imposed for a contravention of other provisions of the *Corporations Law*. The decision is therefore consistent with the view that other offences in the *Corporations Law* with higher penalties (the maximum of these being 5 years) would be treated differently.

Where the penalty is only monetary it is more difficult to make a judgment. In 1980 $100,000 was considered to be a very heavy penalty and a factor in favour of

requiring the prosecution to prove fault which was outweighed by other considerations such as the consumer protection nature of Part V of the *Trade Practices Act 1974* and the construction of the relevant provisions (*Darwin Bakery Pty Ltd v Sully* (1981) 36 ALR 371). Under that Act penalties of $40,000 (individual) and $200,000 (body corporate) have been held to be acceptable. The Act in that case covers a wide range of businesses, from corner stores and cottage manufacturing to national retailers and mass producers of goods. It is reasonable to assume the court will take into account the industry which is being regulated to make a judgment on this. If it were an offence likely to be committed by a welfare recipient a penalty of $5,000 could be considered to be a significant penalty and implies fault (in *Cameron v Holt* which was also in 1980 it was thought that $500 was a considerable monetary penalty for such an offence). On the other hand, if the offence was only likely to be committed by a large multinational company $100,000 might now be considered to be a more acceptable threshold.

There are of course notable examples where Parliament has provided for strict liability in relation to quite serious offences which have significant penalties of imprisonment. This is the case with some State driving and environmental offences. Where this has occurred the statute makes it clear that strict liability applies.

In view of the above, an appropriate general benchmark is that strict liability should not apply to offences which have a maximum penalty of more than 6 months imprisonment. This is because:

- People convicted of such offences are almost invariably not imprisoned. Only people who have committed such offences on a number of occasions have a chance of being imprisoned. It is therefore artificial to provide as a general rule that fault must be proved in these cases, but not where the maximum penalty is only a fine.

- The High Court has presumed fault must be proved in *Cameron v Holt* where the maximum penalty for the offence was 6 months imprisonment. However the case concerned someone who made a false statement to obtain a welfare benefit and the High Court did not specifically say what level of penalty would be appropriate as a general benchmark. There is evidence that those convicted of welfare offences may be more vulnerable to being imprisoned than those in breach of other offences. Indeed the Federal Prisoners Database as in February 2000 shows that there are 38 people in prison for Social Security offences (which now has a maximum penalty of 12 months imprisonment) and none in relation to the minor *Corporations Law* offences. The DPP advises that no one has been imprisoned as a result of its prosecution of minor *Corporations Law* offences since its computer records started in 1991. It is very unusual for a person to be imprisoned for an offence with a maximum penalty of 6 months imprisonment.

It is important to stress that penalty is an important consideration but it is not the only consideration. The language of the statute may suggest strict liability or indeed in some cases absolute liability may apply to offences which have much higher penalties.

3. **Subject matter: regulation of social or industrial conditions (health and safety/consumer protection/driving offences) where physical injury to a person or something of special value is involved (particularly where the penalty is monetary and not too large, 'regulatory' as opposed to 'penal').**

Subject matter alone is not enough. The language of the statute must also suggest that fault is not required. In *Cameron v Holt* (1980) 142 CLR 342 Barwick CJ said at 346 the presumption would only be displaced "if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

There would appear to be reasonably consistent authority for this description of the subject matter in the cases and relevant texts. (For example, see Dawson J in *He Kaw Teh v R* at 595. Less helpful descriptions have been used, such as suggesting strict liability should not apply in relation to activity which is not regarded as being a real social evil, or likely to result in stigma or obloquy, or as being 'truly criminal'. All these considerations have been mentioned in the cases but are unhelpful to the harmonisation task because they are vague concepts. While a single judge of the Victorian Supreme Court on 20 March 1985 suggested the regulation of companies was on the subject matter list (*Poyser v Commissioner of Corporate Affairs* (1985) 3 ACLC 584 at 588) and preferred a restrictive interpretation of *Cameron v Holt*, the High Court reaffirmed *Cameron v Holt* in unambiguous terms a few months later in *He Kaw Teh* on 1 July 1985. It is noted that the regulation of companies is not included on the subject matter list in either *Cameron v Holt* (see at 350) or *He Kaw Teh*. The regulation of corporations has nothing to do with public safety matters mentioned in those cases. *Poyser* was in fact decided primarily on the construction of the offence and it was an offence which had a maximum penalty of 12 months imprisonment (it is just beyond the proposed benchmark). *Cameron v Holt* is also notable because it also excludes 'protecting the public revenue' as a broad category to which strict liability might apply. Note Mason J at p.348. It should also be remembered the purpose of the offence in *Cameron v Holt* was clearly about protecting public monies and only had a maximum penalty of 6 months imprisonment/$500.

4. Certain specific elements of offences which the prosecution would not otherwise be required to prove under the existing law

Subsections 6.1(2) and 6.2(2) of the *Criminal Code* provide that strict liability or absolute liability may be isolated to a particular element of the offence. There will be cases where this is appropriate even though the penalties involve significant terms of

imprisonment. This is because fault is required to be proved in relation to other elements that are more critical to the person's culpability and the existing law does not require intention or knowledge about the particular element.

An example of this which is important to in Commonwealth offences is the jurisdictional element of the offence. If a person steals Commonwealth property it is not, and should not be, for the prosecution to prove the person knew he or she was specifically stealing Commonwealth property. In that case it is appropriate for absolute liability to apply to that element of the offence because even a mistake about who owned the property (which is a defence with strict liability) should not be relevant.

Another example concerns contraventions which can involve an omission. Sometimes the wording of the offence is such that under the *Criminal Code* the court might expect the prosecution to prove the defendant knew the details of the regulations being contravened. While there is a general principle that a person can be criminally responsible for an offence even if he or she is mistaken about or ignorant of the requirements of the law (subsection 9.3(1) of the *Criminal Code*) there is provision that an Act may expressly or impliedly provide to the contrary or that the ignorance or mistake can negate a fault element (subsection 9.3(2)). Unless there is a specified fault element concerning the omission, it is necessary in such cases to provide for strict liability in relation to the 'knowledge of requirements' element of the offence to make many Commonwealth regulatory offences to work in the way they were intended. This existing position is discussed in *R v Taib; exparte Director of Public Prosecutions* (1998) 158 ALR 744 at 745 where Pincus JA of the Queensland Court of Appeal concluded that it was appropriate for the rule to operate in this way in relation to offences with higher penalties (in that case a maximum of 2 years imprisonment).

5. Enforcement implications

This is at best a supplementary consideration. Brent Fisse notes in *Howards Criminal Law* (5th Edition) at 531 "Feasibility of enforcement is also difficult to assess. A claim that an offence will prove unworkable if interpreted as requiring proof of subjective fault is hard to substantiate in the absence of empirical inquiry and is likely to depend on contentious questions of allocation of police resources and choice of enforcement methods."

However the enforcement implications are mentioned in and rejected on the facts in *He Kaw Teh-v-R* , but are accepted as a consideration amongst others in cases like *Poyser* and the English case *Lim Chin Aik-v-R* [1963] AC 160 where it was said:

> " It is pertinent also to enquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly .... which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him and it cannot

be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

He Kaw Teh v R is a good example of how logically scrambled this criteria can become. If there was ever an area that is a significant problem for the community and difficult to enforce it is drug trafficking. However, all the Justices of the High Court except Wilson J did not seriously entertain it to be a consideration in an offence with such a high penalty. Enforcement is also a problem with welfare fraud, yet it did not enter the equation in *Cameron v Holt* which concerned least significant fraud related offence with a maximum penalty of 6 months imprisonment /$500 fine. The problem with the enforcement ground is that if the social impact of the crime becomes more serious then a more serious punishment is warranted. If the penalty involves imprisonment it is more likely that the requirement of fault will be inferred.

At the end of the day, if enforcement is a problem then the court will be looking for a lead from the Parliament in the language of the offence to provide relief to those enforcing the law. One only has to look at the number of inference and reverse onus provisions in the Commonwealth statute book to realise that the Parliament is prepared to include these provisions when it can be persuaded it is necessary. Arguments about problems with the enforceability of offences can be raised with almost any offence. We suggest that an argument based on enforceability alone may be one that can in appropriate cases be used to persuade Parliament to specify strict liability, but it is not one that on its own that is likely to be accepted by the High Court under the existing law. If an agency is concerned about enforceability, it can always push for specification of strict liability in relation to a particular element of the offence or the whole offence, but it would need to be stated in the Explanatory Memorandum that doing so would probably change the existing law. There would also need to be Government approval of adjustments of this nature.

An alternative approach

A solution that has been used in some legislation which applies the Code is to provide for a lower penalty strict liability offence paired with another that requires proof of intention or some other fault element. For example, the *Environmental Protection and Biodiversity Conservation Act 1999* has an offence s.254 for the reckless killing or injuring certain marine species with a maximum penalty of 2 years imprisonment/$110,000 fine) together with another at s.254A with a maximum penalty of $55,000 fine. It should be noted that even if there was one offence based on s.254A and the maximum penalty was 2 years imprisonment, the courts would probably only sentence the person to imprisonment if the prosecution could show the defendant had intended or was reckless with respect to the death or injury. This will be a suitable solution in cases where a significant penalty differential is appropriate and it is workable from an enforcement perspective.

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Criminal Law Division
Attorney-General's Department
10 April 2000

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Dear Senator Cooney

I refer to the letter of 9 August 2001 from the Committee Secretary concerning the Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 3) 2001. The letter identified the Alert Digest reference to the Bill and invited a response to the matter raised by the Committee, namely the Bill's application of strict liability to certain Treasury portfolio criminal offence provisions.

As identified in the Alert Digest, the Bill proposes to amend a number of existing criminal offences within the Treasurer's portfolio to expressly provide that they are offences of strict liability. This 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 converse will also apply, namely that any offence which is not expressly stated to be an offence of strict liability will be interpreted to be a fault-based offence. The intention behind the strict liability amendments made by the 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 that are judged to be presently of a strict liability character, thus maintaining the status quo.

The operation of strict liability in Commonwealth criminal offences is uncertain and haphazard because the principles used by courts over time to identify strict liability offences have been inconsistently developed and applied. As a result of inconsistent judicial interpretation, some uncertainty will inevitably exist whether some individual criminal offences – and in particular those which have never been prosecuted – are offences of strict liability.

Only a handful of Commonwealth criminal offences expressly state whether they are offences of strict liability, and it follows that this important matter must be settled by judicial interpretation in almost all instances. In the absence of specific judicial interpretation, it has been necessary for Treasury officers, in conjunction with officers of the Attorney-General's Department, to determine in each instance whether Parliament originally intended that the subject criminal offence be one of strict liability. This process

has also been undertaken in consultation with a senior officer of the Commonwealth Director of Public Prosecutions.

In determining whether an individual offence is one of strict liability, a process was followed of excluding all offences where strict liability could not apply for any one or more of a number of reasons. The reasons are detailed in the attached policy document produced by the Attorney-General's Department. The process began with the primary position established by the High Court in *R v He Kaw Teh* (1984-85) 157 CLR 523, which was stated by Brennan J at 566:

> "It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

Accordingly all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration.

The next step was to exclude all offences where the relevant penalty is sufficiently high – either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment – to indicate that Parliament intended that the offences be fault-based. Judicial interpretation on this point was broadly examined and found to be applied in an inconsistent manner. A policy was therefore developed to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months. Courts have generally presumed that Parliament would not want strict liability if the consequences of conviction are likely to involve imprisonment. If the maximum penalty for an offence is 6 months imprisonment and the offence is stated to be a strict liability offence, the reality is that courts would be very unlikely to impose any term of imprisonment. This cannot be said to be the case where the maximum penalty of imprisonment is more than 6 months, and therefore the policy of a maximum penalty of 6 months has been set as a benchmark. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration.

Two other significant considerations weighed in the consideration of individual criminal offence provisions. First, the presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved. It is accepted that the provision of a broadly-based defence (such as a defence of reasonable excuse) 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.

The remaining major consideration utilised in the examination of criminal offences for strict liability is the nature of each offence. Offences that are wholly regulatory in nature are the clearest example of offences where it can be readily inferred that Parliament intended that strict liability should apply. This view is based upon the view of Barwick CJ in *Cameron v*

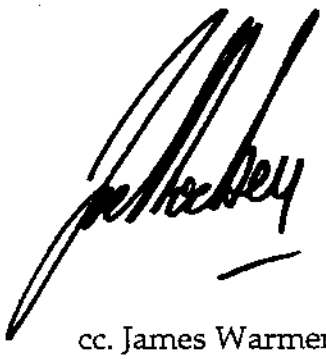
Holt (1980) 142 CLR 342 at 346, where he stated that the presumption of fault would be displaced:

> " ... if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

Common examples of wholly regulatory offences in the Treasurer's portfolio include those concerning failure to comply with reporting or record-keeping requirements.

These factors were all taken into account as a matrix in assessing each individual criminal offence for strict liability. You can be assured that the offences to which strict liability is applied by the Bill are limited to those where it can be clearly inferred that Parliament intended that strict liability would apply.

Yours sincerely



cc. James Warmenhoven, Secretary, Senate Scrutiny of Bills Committee.

20 AUG 2001

STRICT LIABILITY - PREFERRED APPROACH TO HARMONISATION

The *Criminal Code* harmonisation exercise has focused attention on where strict liability exists or does not exist in current offences.

Under the common law, if strict liability applies the prosecution does not have to prove fault on the part of the defendant. Fault includes intention if it is with respect to conduct and recklessness where it is with respect to a circumstance in which conduct occurs or a result of conduct. Under strict liability the defendant can raise the defence of honest and reasonable mistake of fact. The defendant will activate the defence if he or she can point to or adduce evidence that he or she made a relevant mistake of fact. If that occurs, then the prosecution bears the onus to prove beyond reasonable doubt that there was no mistake (*Proudman v Dayman* (1941) 67 CLR 536).

Under the existing law the legislature and the courts have not always been clear about where strict liability applies. Brent Fisse, in *Howards Criminal Law* (5th Edition), has concluded at p.536:

> " Whatever else may be said of judicial interpretation of regulatory statutes in the last century, it cannot be called consistent."

The *Criminal Code* addresses this concern by providing that strict liability must be identified expressly, otherwise a fault element will apply automatically (ss 5.6 and 6.1).Section 6.1 recognises that strict liability may be applied to all or specified physical elements of an offence. Many offences will have one element which requires proof of fault, another where strict liability applies. For example, if making a statement which is false and misleading were to be the physical element of the offence and it were proposed that strict liability apply, the most sensible way to do it would be to let the rule in ss 5.6(1) to operate and automatically provide that the act of making a statement is intentional and that strict liability should apply to the physical element that the statement was not correct.

The *Criminal Code* harmonisation exercise is designed to ensure old offences operate in the way they were intended by the Parliament when they have operated prior to the commencement of the Code, not just in a way which is preferred by the agencies or those who represent the interests of defendants. However, with the *Criminal Code* harmonisation Bills it is open to the Government and Parliament to clarify its intention where there is uncertainty. It is important that Parliament is given a very clear indication in the Explanatory Memorandum where it is proposed that strict liability apply but there is doubt about the existing law. This paper is designed to set a bench-mark beyond which there will need to be additional Government approval and a special explanation in the Explanatory Memorandum. It is critical that this be done if the harmonisation process is to have credibility and not create confusion for prosecutors, defence counsel and the courts. It is therefore very important to identify offences involving doubt about the requirement of proof of fault early in the process.

A reasonable benchmark

1. **There is a strong presumption that proof of fault is required. This can be displaced, but not easily, even with 'regulatory statutes'.**

   The High Court emphasises this point in *Cameron v Holt* (1980) 142 CLR 342 at 346 and *He Kaw Teh v R* (1985) 157 CLR 523. The principle of course has its origin in the landmark *Woolmington v Director of Public Prosecutions* [1935] AC 462. *Cameron v Holt* concerned a social security false and misleading statement offence with a maximum penalty of 6 months imprisonment / $500 fine. Mason J noted that in his view the penalty was "by no means small." It was not an indictable offence, it involved protecting the revenue and concerned wrongdoing that is not always easy to detect and punish, yet the High Court required proof of fault. In *He Kaw Teh v R* Gibbs CJ said at 528 there "has been a tendency in Australia to regard this presumption as only a weak one, at least in the case of modern regulatory statutes: *Proudman v Dayman*; *Bergin v Stack*. However, the principle in *Sherras v De Rutzen* has more recently been reaffirmed ....in this Court: *Cameron v Holt*."

2. **The language of the statute.**

   Fault may be inferred simply from the way the wrongful conduct is described, for example the words 'possess', 'calculate', 'allow' and 'permit' have all been held to imply proof of fault is necessary . However, many offences say nothing that assists. For the presumption of proof of fault to be overturned there must be something. The most meaningful indicators are:

   (a) Implicit in the wording of other offences in the same provision

   Where a fault element is not expressed in the offence, or where fault is expressed in one offence, but not in an adjacent offence in the same statute, courts are more likely to accept that strict liability is meant to apply.

   (b) Use of the term 'without reasonable excuse' or some other express defence which implies fault need not be proved

   The reference to 'without reasonable excuse' is taken to indicate that the legislature only wanted the general defences and mistake of fact to apply, not proof of fault. However, where the penalty is significant and/or there are other indicators that fault should apply, the court will not conclude that the presumption is over-turned simply by use of the words 'without reasonable excuse'. This happened in *He Kaw Teh-v-R* . Even Wilson J, who was the only judge prepared to find that strict liability applied to the offence in that case, concluded at 557 that he "found such phrases inconclusive. It may readily be said that the legislature, having expressly placed an

onus on an accused person in these paragraphs, supplies a clear inference that in para (b) where the words do not appear, the legislature intended the onus of proof to remain on the prosecution."

Other defences of this nature are that the acts "were not knowingly performed" or "the defendant exercised due diligence". An example of the operation of defences in this way is *R v Harris* (1999) 150 FLR 281 at 287-88 which concerned the offence at subsection 129(2) of the *Health Insurance Act 1973* which has a maximum penalty of 5 years imprisonment.

(c) Penalty - 6 months imprisonment or less

Imprisonment is the indicator of the seriousness of the offence and the courts presume Parliament would not want strict liability if the consequences of conviction are 'penal' - likely to involve imprisonment. A maximum penalty of 6 months imprisonment was considered to be sufficient indication of seriousness in *Cameron v Holt* (Barwick CJ at 345) and that the respected commentator Colin Howard QC was saying much the same things many years ago in his book *Strict Responsibility* (1963). He noted that strict liability should only apply to offences punishable by nothing more than a small fine or even a substantial fine providing that imprisonment is not an alternative. He suggested that it was only appropriate for summary offences which in 1963 did not include offences where imprisonment was likely (it was indictable if the maximum penalty was more than 6 months imprisonment).

There are some examples where strict liability was held to apply to a corporate regulation offence where the maximum penalty was as high as 5 years imprisonment. In *Von Lieven v Stewart* (1990) 21 NSWLR at 61 Handley JA of the NSW Supreme Court made the surprising statement that "While the penalties under s.174 for principal offenders are heavy - a fine of up to $20,000 or imprisonment for 5 years, or both, in my opinion the offences are not strictly criminal in nature at all." Notwithstanding Handley JA's assertions to the contrary, this is clearly at odds with the comments of the High Court in *Cameron v Holt* and *He Kaw Teh.* It is also inconsistent with *Aberfoyle v Western Metals Ltd* [1998] 744 FCA where Finkelstein J said the offence at s.698 which provides for a maximum penalty of 6 months imprisonment / $500 fine in relation to false and misleading matters in a statement to shareholders concerning takeovers is not truly of a "criminal character." He said the penalty imposed for a contravention is slight when compared to other penalties that are imposed for a contravention of other provisions of the *Corporations Law*. The decision is therefore consistent with the view that other offences in the *Corporations Law* with higher penalties (the maximum of these being 5 years) would be treated differently.

Where the penalty is only monetary it is more difficult to make a judgment. In 1980 $100,000 was considered to be a very heavy penalty and a factor in favour of

requiring the prosecution to prove fault which was outweighed by other considerations such as the consumer protection nature of Part V of the *Trade Practices Act 1974* and the construction of the relevant provisions (*Darwin Bakery Pty Ltd v Sully* (1981) 36 ALR 371). Under that Act penalties of $40,000 (individual) and $200,000 (body corporate) have been held to be acceptable. The Act in that case covers a wide range of businesses, from corner stores and cottage manufacturing to national retailers and mass producers of goods. It is reasonable to assume the court will take into account the industry which is being regulated to make a judgment on this. If it were an offence likely to be committed by a welfare recipient a penalty of $5,000 could be considered to be a significant penalty and implies fault (in *Cameron v Holt* which was also in 1980 it was thought that $500 was a considerable monetary penalty for such an offence). On the other hand, if the offence was only likely to be committed by a large multinational company $100,000 might now be considered to be a more acceptable threshold.

There are of course notable examples where Parliament has provided for strict liability in relation to quite serious offences which have significant penalties of imprisonment. This is the case with some State driving and environmental offences. Where this has occurred the statute makes it clear that strict liability applies.

In view of the above, an appropriate general benchmark is that strict liability should not apply to offences which have a maximum penalty of more than 6 months imprisonment. This is because:

- People convicted of such offences are almost invariably not imprisoned. Only people who have committed such offences on a number of occasions have a chance of being imprisoned. It is therefore artificial to provide as a general rule that fault must be proved in these cases, but not where the maximum penalty is only a fine.

- The High Court has presumed fault must be proved in *Cameron v Holt* where the maximum penalty for the offence was 6 months imprisonment. However the case concerned someone who made a false statement to obtain a welfare benefit and the High Court did not specifically say what level of penalty would be appropriate as a general benchmark. There is evidence that those convicted of welfare offences may be more vulnerable to being imprisoned than those in breach of other offences. Indeed the Federal Prisoners Database as in February 2000 shows that there are 38 people in prison for Social Security offences (which now has a maximum penalty of 12 months imprisonment) and none in relation to the minor *Corporations Law* offences. The DPP advises that no one has been imprisoned as a result of its prosecution of minor *Corporations Law* offences since its computer records started in 1991. It is very unusual for a person to be imprisoned for an offence with a maximum penalty of 6 months imprisonment.

It is important to stress that penalty is an important consideration but it is not the only consideration. The language of the statute may suggest strict liability or indeed in some cases absolute liability may apply to offences which have much higher penalties.

3. **Subject matter: regulation of social or industrial conditions (health and safety/consumer protection/driving offences) where physical injury to a person or something of special value is involved (particularly where the penalty is monetary and not too large, 'regulatory' as opposed to 'penal').**

Subject matter alone is not enough. The language of the statute must also suggest that fault is not required. In *Cameron v Holt* (1980) 142 CLR 342 Barwick CJ said at 346 the presumption would only be displaced "if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

There would appear to be reasonably consistent authority for this description of the subject matter in the cases and relevant texts. (For example, see Dawson J in *He Kaw Teh v R* at 595. Less helpful descriptions have been used, such as suggesting strict liability should not apply in relation to activity which is not regarded as being a real social evil, or likely to result in stigma or obloquy, or as being 'truly criminal'. All these considerations have been mentioned in the cases but are unhelpful to the harmonisation task because they are vague concepts. While a single judge of the Victorian Supreme Court on 20 March 1985 suggested the regulation of companies was on the subject matter list (*Poyser v Commissioner of Corporate Affairs* (1985) 3 ACLC 584 at 588) and preferred a restrictive interpretation of *Cameron v Holt*, the High Court reaffirmed *Cameron v Holt* in unambiguous terms a few months later in *He Kaw Teh* on 1 July 1985. It is noted that the regulation of companies is not included on the subject matter list in either *Cameron v Holt* (see at 350) or *He Kaw Teh*. The regulation of corporations has nothing to do with public safety matters mentioned in those cases. *Poyser* was in fact decided primarily on the construction of the offence and it was an offence which had a maximum penalty of 12 months imprisonment (it is just beyond the proposed benchmark). *Cameron v Holt* is also notable because it also excludes 'protecting the public revenue' as a broad category to which strict liability might apply. Note Mason J at p.348. It should also be remembered the purpose of the offence in *Cameron v Holt* was clearly about protecting public monies and only had a maximum penalty of 6 months imprisonment/$500.

4. **Certain specific elements of offences which the prosecution would not otherwise be required to prove under the existing law**

Subsections 6.1(2) and 6.2(2) of the *Criminal Code* provide that strict liability or absolute liability may be isolated to a particular element of the offence. There will be cases where this is appropriate even though the penalties involve significant terms of

imprisonment. This is because fault is required to be proved in relation to other elements that are more critical to the person's culpability and the existing law does not require intention or knowledge about the particular element.

An example of this which is important to in Commonwealth offences is the jurisdictional element of the offence. If a person steals Commonwealth property it is not, and should not be, for the prosecution to prove the person knew he or she was specifically stealing Commonwealth property. In that case it is appropriate for absolute liability to apply to that element of the offence because even a mistake about who owned the property (which is a defence with strict liability) should not be relevant.

Another example concerns contraventions which can involve an omission. Sometimes the wording of the offence is such that under the *Criminal Code* the court might expect the prosecution to prove the defendant knew the details of the regulations being contravened. While there is a general principle that a person can be criminally responsible for an offence even if he or she is mistaken about or ignorant of the requirements of the law (subsection 9.3(1) of the *Criminal Code*) there is provision that an Act may expressly or impliedly provide to the contrary or that the ignorance or mistake can negate a fault element (subsection 9.3(2)). Unless there is a specified fault element concerning the omission, it is necessary in such cases to provide for strict liability in relation to the 'knowledge of requirements' element of the offence to make many Commonwealth regulatory offences to work in the way they were intended. This existing position is discussed in *R v Taib; exparte Director of Public Prosecutions* (1998) 158 ALR 744 at 745 where Pincus JA of the Queensland Court of Appeal concluded that it was appropriate for the rule to operate in this way in relation to offences with higher penalties (in that case a maximum of 2 years imprisonment).

5. Enforcement implications

This is at best a supplementary consideration. Brent Fisse notes in *Howards Criminal Law* (5th Edition) at 531 "Feasibility of enforcement is also difficult to assess. A claim that an offence will prove unworkable if interpreted as requiring proof of subjective fault is hard to substantiate in the absence of empirical inquiry and is likely to depend on contentious questions of allocation of police resources and choice of enforcement methods."

However the enforcement implications are mentioned in and rejected on the facts in *He Kaw Teh-v-R* , but are accepted as a consideration amongst others in cases like *Poyser* and the English case *Lim Chin Aik-v-R* [1963] AC 160 where it was said:

> " It is pertinent also to enquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly .... which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him and it cannot

be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

He Kaw Teh v R is a good example of how logically scrambled this criteria can become. If there was ever an area that is a significant problem for the community and difficult to enforce it is drug trafficking. However, all the Justices of the High Court except Wilson J did not seriously entertain it to be a consideration in an offence with such a high penalty. Enforcement is also a problem with welfare fraud, yet it did not enter the equation in *Cameron v Holt* which concerned least significant fraud related offence with a maximum penalty of 6 months imprisonment /$500 fine. The problem with the enforcement ground is that if the social impact of the crime becomes more serious then a more serious punishment is warranted. If the penalty involves imprisonment it is more likely that the requirement of fault will be inferred.

At the end of the day, if enforcement is a problem then the court will be looking for a lead from the Parliament in the language of the offence to provide relief to those enforcing the law. One only has to look at the number of inference and reverse onus provisions in the Commonwealth statute book to realise that the Parliament is prepared to include these provisions when it can be persuaded it is necessary. Arguments about problems with the enforceability of offences can be raised with almost any offence. We suggest that an argument based on enforceability alone may be one that can in appropriate cases be used to persuade Parliament to specify strict liability, but it is not one that on its own that is likely to be accepted by the High Court under the existing law. If an agency is concerned about enforceability, it can always push for specification of strict liability in relation to a particular element of the offence or the whole offence, but it would need to be stated in the Explanatory Memorandum that doing so would probably change the existing law. There would also need to be Government approval of adjustments of this nature.

An alternative approach

A solution that has been used in some legislation which applies the Code is to provide for a lower penalty strict liability offence paired with another that requires proof of intention or some other fault element. For example, the *Environmental Protection and Biodiversity Conservation Act 1999* has an offence s.254 for the reckless killing or injuring certain marine species with a maximum penalty of 2 years imprisonment/$110,000 fine) together with another at s.254A with a maximum penalty of $55,000 fine. It should be noted that even if there was one offence based on s.254A and the maximum penalty was 2 years imprisonment, the courts would probably only sentence the person to imprisonment if the prosecution could show the defendant had intended or was reckless with respect to the death or injury. This will be a suitable solution in cases where a significant penalty differential is appropriate and it is workable from an enforcement perspective.

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10 April 2000