SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TWELFTH REPORT

OF

2001

19 September 2001

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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

TWELFTH REPORT OF 2001

The Committee presents its Twelfth 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:

Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001

Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001

Trade Practices Amendment (Telecommunications) Bill 2001

Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) 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 Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 27 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 27 June 2001 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend 20 Acts within the Agriculture, Fisheries and Forestry portfolio to reflect the application of the *Criminal Code* to existing offence provisions from 15 December 2001 by:

- applying the *Criminal Code* to all offence-creating and related provisions in portfolio legislation;
- deleting references in portfolio legislation to some general offence provisions in the *Crimes Act 1914* which duplicate provisions of the *Criminal Code* and replacing them with references to equivalent *Criminal Code* provisions where appropriate;
- applying strict liability to individual offences or specified physical elements of offences where appropriate;
- reconstructing provisions in order to clarify physical elements of conduct, circumstance and result and to clarify defences;
- removing or replacing inappropriate fault elements; and
- repealing some offence-creating provisions, which duplicate the general offence provisions in the *Criminal Code*.

Strict liability offences
Various provisions

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

The Explanatory Memorandum observes that the amendments proposed in the bill are intended to ensure that, when Chapter 2 of the *Criminal Code* is applied to all Commonwealth criminal offences, "the relevant offences continue to have much the same meaning and operate in much the same way as they do at present". The Minister's Second Reading Speech notes that "it is not proposed to create any new strict liability offences in this Bill".

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

> Alert Digest No 9 of 2001 indicated that the Committee sought my advice on whether there were any specific examples in the legislation proposed to be amended by the Bill of offences which previously were not strict liability offences but which would be converted into strict liability offences should the Bill be enacted. I am pleased to provide this response to the Committee.
>
> The intention behind the strict liability amendments made by the Bill is to preserve the status quo in relation to strict liability. As such, the only provisions which the Bill identifies as attracting strict liability are provisions that are judged to be presently of a strict liability character.
>
> As the Committee would be aware, very few Commonwealth criminal offences expressly state at present whether they are offences of strict liability. It follows that this important matter must be settled by judicial interpretation in almost all instances. In the absence of specific judicial interpretation, the line areas of this Department have been guided by advice from the Attorney-General's Department in determining in each instance whether Parliament originally intended that the criminal offence

concerned be one of strict liability. All offences that expressly contained a fault element of any nature, or that necessary implied a fault element, were clearly not to be regarded as strict liability offences.

The next step was to ensure that strict liability did not apply where the relevant penalty is sufficiently high to indicate that Parliament intended that the offences be fault based. Consistently with the approach taken with offence provisions in other portfolios, the view has been taken that, as a general rule, offences that prescribe a penalty of imprisonment of more than six months ought not to be regarded as strict liability offences.

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. Secondly, the nature of each offence was relevant. Offences that are wholly regulatory in nature are examples of offences where it can be inferred that Parliament intended that strict liability should apply. Common examples of such regulatory offences in the AFFA portfolio include those concerning failure to comply with reporting or record keeping requirements and failure to comply with conditions of permits or licences.

All of these factors were taken into account as a matrix in assessing individual criminal offences for strict liability. I can assure the Committee that the offences to which strict liability is applied by the Bill are limited to those where it can clearly be inferred that Parliament intended that strict liability would apply.

Thank you for providing me with the opportunity to comment on the concerns raised by the Committee.

The Committee thanks the Minister for this response.

Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2001*, in which it made various comments. The Minister for Education, Training and Youth Affairs has responded to those comments in a letter dated 14 September 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. 10 of 2001

This bill was introduced into the House of Representatives on 8 August 2001 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

The bill proposes to amend the *Higher Education Funding Act 1988* and the *Student Assistance Act 1973* to reflect the application of the *Criminal Code Act 1995* from 15 December 2001. In general terms, the bill:

- clarifies that the *Criminal Code* applies to offence provisions within portfolio legislation;
- clarifies the physical and fault elements of offences;
- amends portfolio legislation to remove unnecessary duplication of the general offence provisions in the *Criminal Code*; and
- amends certain offence provisions to expressly provide that they are offences of strict liability.

Strict liability offences
Various provisions

The effect of this bill is to include, in legislation administered within the Education, Training and Youth Affairs portfolio, a number of offences which are specified as offences of strict liability. An offence is one of strict liability where it provides that a person may be punished for doing something, or failing to do something, whether or not they have a guilty intent. The Committee is usually concerned at the imposition of strict liability and is currently inquiring generally into the issue.

The Explanatory Memorandum states that these particular amendments are intended to ensure that when Chapter 2 of the *Criminal Code* is applied to all Commonwealth criminal offences, from 15 December 2001, "the relevant offences continue to have the same meaning and to operate in the same manner as they do at present".

The Committee has considered a number of bills which make similar provision for legislation administered within other portfolio areas. With regard to this bill, the Committee **seeks the Minister's advice** as to whether any of its provisions converts an offence which previously was not one of strict liability into such an offence.

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

Relevant extract from the response from the Minister

As stated in the Alert Digest, the Bill proposes to amend certain offence provisions in the *Higher Education Funding Act 1988* (HEFA) and the *Student Assistance Act 1973* (SAA) to expressly provide that they are strict liability offences. This is made necessary because section 6.1 of the *Criminal Code* provides that a criminal offence is one of strict liability only if it is expressly so stated. If an offence is not expressly stated to be one of strict liability, then it will be interpreted to be a fault-based offence and the prosecution will need to prove fault.

The Bill will amend only those criminal offence provisions that are considered to be presently of a strict liability character. The intention behind the strict liability amendments is to preserve the status quo in relation to strict liability, and ensure that the strict liability offence provisions operate in the same manner as they were originally intended by the Parliament.

In consultation with the Attorney-General's Department, determination of whether a criminal offence is a strict liability offence involved a consideration of a number of factors such as the penalty imposed, the nature of the offence, and the presence of an express defence.

The proposed amendments to subsection 78(4) of HEFA, subsections 12ZU(4), 42(5), and section 357 of the SAA concern failure to comply with requirements relating to obtaining or disclosing information, and record-keeping requirements under or for the purposes of the respective Acts. The offences under these provisions prescribe two-year maximum penalties.

The Minister for Justice and Customs has developed a policy to the effect that where an offence prescribes a penalty of more than 6 months, the general rule would be for the offence to be excluded from consideration of strict liability. However, because the offences that are the subject of the relevant amendments are wholly regulatory, it was determined that strict liability should apply. This determination is based on the view of Barwick CJ in *Cameron v Holt* (1980) 142 CLR 342 at 346, that offences

that are wholly regulatory in nature are the clearest examples of offences where it can be readily inferred that the Parliament intended that guilty intent should not be part of the prescription of the offence**.**

The presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved. Some criminal offence provisions in HEFA and the SAA are not being amended to expressly identify them as strict liability offences. Examples of these are section 53 of HEFA and section 385 of the SAA which provide for reasonableness as a defence, and sections 42, 49 and 347 of the SAA which express the defence of reasonable excuse.

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

The Committee thanks the Minister for this response.

Trade Practices Amendment (Telecommunications) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2001*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 14 September 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. 10 of 2001

This bill was introduced into the House of Representatives on 9 August 2001 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Trade Practices Act 1974* to streamline the telecommunications access regime. Specific provisions encourage commercial negotiation and the expedition of the resolution of access disputes notified to the Australian Competition and Consumer Commission.

The bill also contains application and transitional provisions.

Limiting the rights of parties to arbitration
Proposed new section 152DOA

Item 19 of Schedule 1 to this bill proposes to insert a new section 152DOA in the *Trade Practices Act 1974*. This new section specifies the matters to which the Australian Competition Tribunal may have regard when it is conducting a review of a determination of the Australian Competition and Consumer Commission (ACCC) in arbitrating a telecommunications access dispute. At present, review by the Tribunal is a re-arbitration of the dispute, and the Tribunal may have regard to any information, documents or evidence which it considers relevant, whether or not those matters were before the ACCC in the course of making its initial determination. Proposed new section 152DOA will, in effect, limit the Tribunal to consideration of information, documents or evidence which were before the ACCC initially.

Referring to this provision, the Explanatory Memorandum (at pp 13-14) states that determinations by the ACCC "involve a lengthy and complex hearing process" and that restricting the material which the Tribunal may consider "will ensure that the Tribunal process involves a review of the Commission's decision, rather than a complete re-arbitration of the dispute". The Explanatory Memorandum goes on to observe that:

Although this option should reduce delay in the review of Commission decisions, it will reduce the extent of Tribunal review. On balance, it is considered that the limitations on the review are justified on the basis of the length and depth of the Commission's arbitration process.

Given that this provision will reduce the extent of Tribunal review, the Committee **seeks the Minister's advice** as to how the existing review processes have been abused and whether the Tribunal has been consulted about the proposed changes.

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

The Committee has already noted provisions in the Explanatory Memorandum that justify the proposed limitations on bringing evidence to the Tribunal 'on the basis of the length and depth of the Commission's arbitration process.' However, the Committee has sought advice particularly on how the existing review processes have been abused and whether the Tribunal has been consulted about the proposed changes.

In October 2000, the Tribunal commenced its only reviews of final determinations made by the Australian Competition and Consumer Commission (ACCC) under Part XIC. The two determinations that are subject to review relate to access to the Public Switched Telephone Network (PSTN) for the period concluding on 30 June 2001. The PSTN disputes commenced in December 1998 and February 1999 and the review are unlikely to be finalised before late 2002, 18 months after the agreement concluded.

The proposed amendment would apply to future Tribunal hearings, rather than the existing review of final determinations with respect to the PSTN. The lengthy process of the ACCC, already noted in the Explanatory Memorandum, will be replicated in future Tribunal hearings if there is no limitation on the evidence brought before it. The resulting delay would have the potential to cause continued investor uncertainty and advantage incumbent owners of infrastructure. While there is no direct evidence that the first stages of the Tribunal hearings have been abused, the proposed amendment will remove the potential for procedural abuse in the future.

The Tribunal is an independent statutory tribunal whose primary role is to reconsider certain matters on which the ACCC has made a decision. The Tribunal does not have a role in providing policy advice to the Government and has not been consulted in relation to the proposal to limit the evidence available to it in reviewing a decision of the ACCC.

The Committee thanks the Minister for this response which indicates that there is "no direct evidence that the first stages of the Tribunal hearings have been abused" but that the proposed amendment "will remove the potential for abuse".

The Minister's response notes that current Tribunal hearings regarding access to the Public Switched Telephone Network were commenced in October 2000, but are unlikely to be completed until late in 2002 – 18 months after the relevant access arrangements will have expired. The reasons for this delay are not clear. Specifically, it is not clear whether the Tribunal is simply in the process of developing its hearing procedures, or whether it has been asked by the parties to consider significant quantities of new material (and whether any such material assists the Tribunal in its ultimate decision), or whether there are other reasons for the delay.

Given that there is no evidence that the hearings have been abused, the Committee **seeks the Minister's further advice** as to whether the Tribunal, in its current hearings, has been asked to consider significant quantities of material not originally put before the ACCC, and whether any comment has been made during the course of the hearings as to the value of such new material.

Pending the Minister's further advice, 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.

Imposing limits on judicial review
Proposed new sections 152DPA and 152DR

Items 20 and 21 of Schedule 1 to this bill propose to insert new sections 152DPA and 152DR in the *Trade Practices Act 1974*. Each of these sections makes provision for review by the Federal Court of a decision of the Australian Competition Tribunal in the arbitration of an access dispute.

Under proposed section 152DPA, where a party seeks review under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act), the Federal Court is not permitted to make an order staying or otherwise affecting the operation or implementation of the Tribunal's decision. This is contrary to the normal practice when a judicial decision is taken on appeal – ie, that no action is taken on that decision until the outcome of the appeal is determined. This section also expressly removes the application of those sections of the ADJR Act which enable a judge to stay the operation of a decision pending the hearing of a review.

New section 152DR similarly prohibits the Federal Court from making any order staying or otherwise affecting the operation of a Tribunal decision when an aggrieved party has appealed to the Court (rather than sought judicial review under the ADJR Act as contemplated under proposed section 152DPA).

The Explanatory Memorandum (at page 14) seeks to justify these proposals in general terms by noting that section 152DNB of the Trade Practices Act already provides that a party who receives an unfavourable determination from the ACCC cannot have that decision stayed by the Federal Court – these proposals will simply extend this prohibition on staying final determinations to determinations of the Tribunal. In so doing, they will ensure the consistent operation of Part XIC of the Act.

Noting this, the Committee **seeks the Minister's advice** as to:

- the effect on the rights of the parties where an ACCC access determination is not stayed as a result of section 152DNB but then later overturned by the Tribunal, and, in particular, how a party is compensated for any economic disadvantage that it may suffer because such a determination is not stayed;
- whether any other Commonwealth legislation permits a determination or other order to operate even though it is subject to review;
- whether the Federal Court was consulted or notified about this reduction in its jurisdiction; and
- why these provisions are necessary.

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

Relevant extract from the response from the Minister

The Committee also sought views in relation to the issues addressed below, dealing with proposed limitations on powers to stay decisions of the Tribunal.

- There is a minimal impact on parties that are unable to have a decision stayed by the Federal Court. If a decision of the ACCC is not stayed as a result of section 152DNB, and the decision is later varied by the Tribunal, the decision of the Tribunal will take effect from when it is made. However, the Tribunal has the same powers as the ACCC, including powers to backdate the effect of a final determination. Accordingly, the Tribunal can vary the determination, with retrospective effect.
- As provided in the Explanatory Memorandum, the ability to stay a decision for the duration of a review is already removed in relation to decisions of the ACCC, pursuant to section 152DNB. A similar limitation also exists pursuant to section 151AQA in relation to a decision of the ACCC to issue a competition notice under Part XIB. Clause 57 of Schedule 6 of the *Broadcasting Service Act 1992* also limits the power to stay specified decisions of the Australian Broadcasting Authority in relation to datacasting licences, for a period of greater than three months.
- The Federal Court is vested with the judicial power of the Commonwealth and is independent of the executive arm of government. The Federal Court was not consulted in relation to the proposal to limit the powers to stay decisions of the Tribunal.
- This provision will remove any incentive to seek judicial review of a decision of the Tribunal for the purpose of delaying the operation of the decision. As noted in the Explanatory Memorandum, this will provide a consistent approach between the operation of decisions of the ACCC and the Tribunal.

I hope that information provided in this letter adequately addresses the Committee's concerns with the Bill.

The Committee thanks the Minister for this response which indicates that these provisions are intended to "remove any incentive to seek judicial review of a decision of the Tribunal for the purpose of delaying the operation of the decision".

While these provisions will have this effect, they will also affect the rights of those who seek judicial review of a Tribunal decision <u>for any other purpose</u>. Such provisions are contrary to the principles and traditions of our judicial system which see judicial review and due process as fundamental rights, not incentives, and which traditionally provide that decisions about rights are not enforceable while they are reviewable.

For this reason, 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.

Barney Cooney
Chairman

HON WARREN TRUSS MP
Minister for Agriculture, Fisheries and Forestry

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

27 AUG 2001

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

Dear Senator Cooney

I refer to the letter dated 9 August 2001 from the Committee concerning the Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001. Alert Digest No 9 of 2001 indicated that the Committee sought my advice on whether there were any specific examples in the legislation proposed to be amended by the Bill of offences which previously were not strict liability offences but which would be converted into strict liability offences should the Bill be enacted. I am pleased to provide this response to the Committee.

The intention behind the strict liability amendments made by the Bill is to preserve the status quo in relation to strict liability. As such, the only provisions which the Bill identifies as attracting strict liability are provisions that are judged to be presently of a strict liability character.

As the Committee would be aware, very few Commonwealth criminal offences expressly state at present whether they are offences of strict liability. It follows that this important matter must be settled by judicial interpretation in almost all instances. In the absence of specific judicial interpretation, the line areas of this Department have been guided by advice from the Attorney-General's Department in determining in each instance whether Parliament originally intended that the criminal offence concerned be one of strict liability. All offences that expressly contained a fault element of any nature, or that necessary implied a fault element, were clearly not to be regarded as strict liability offences.

The next step was to ensure that strict liability did not apply where the relevant penalty is sufficiently high to indicate that Parliament intended that the offences be fault based. Consistently with the approach taken with offence provisions in other portfolios, the view has been taken that, as a general rule, offences that prescribe a penalty of imprisonment of more than six months ought not to be regarded as strict liability offences.

1901-2001
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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. Secondly, the nature of each offence was relevant. Offences that are wholly regulatory in nature are examples of offences where it can be inferred that Parliament intended that strict liability should apply. Common examples of such regulatory offences in the AFFA portfolio include those concerning failure to comply with reporting or record keeping requirements and failure to comply with conditions of permits or licences.

All of these factors were taken into account as a matrix in assessing individual criminal offences for strict liability. I can assure the Committee that the offences to which strict liability is applied by the Bill are limited to those where it can clearly be inferred that Parliament intended that strict liability would apply.

Thank you for providing me with the opportunity to comment on the concerns raised by the Committee.

Yours sincerely

WARREN TRUSS

The Hon. Dr David Kemp MP
Minister for Education, Training and Youth Affairs

14 SEP 2001

RECEIVED

17 SEP 2001

Senate Committee for the Scrutiny of Bills

Senator Barney Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
SG-49
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 23 August 2001 from the Committee Secretary concerning the Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001 (the Bill).

The Committee Secretary referred to comments of the Committee in Alert Digest No.10 of 2001. As stated in the Alert Digest, the Bill proposes to amend certain offence provisions in the *Higher Education Funding Act 1988* (HEFA) and the *Student Assistance Act 1973* (SAA) to expressly provide that they are strict liability offences. This is made necessary because section 6.1 of the *Criminal Code* provides that a criminal offence is one of strict liability only if it is expressly so stated. If an offence is not expressly stated to be one of strict liability, then it will be interpreted to be a fault-based offence and the prosecution will need to prove fault.

The Bill will amend only those criminal offence provisions that are considered to be presently of a strict liability character. The intention behind the strict liability amendments is to preserve the status quo in relation to strict liability, and ensure that the strict liability offence provisions operate in the same manner as they were originally intended by the Parliament.

In consultation with the Attorney-General's Department, determination of whether a criminal offence is a strict liability offence involved a consideration of a number of factors such as the penalty imposed, the nature of the offence, and the presence of an express defence.

The proposed amendments to subsection 78(4) of HEFA, subsections 12ZU(4), 42(5), and section 357 of the SAA concern failure to comply with requirements relating to obtaining or disclosing information, and record-keeping requirements under or for the purposes of the respective Acts. The offences under these provisions prescribe two-year maximum penalties.

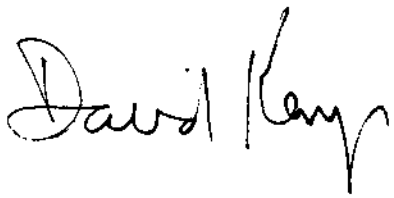
The Minister for Justice and Customs has developed a policy to the effect that where an offence prescribes a penalty of more than 6 months, the general rule would be for the offence to be excluded from consideration of strict liability. However, because the offences that are the subject of the

relevant amendments are wholly regulatory, it was determined that strict liability should apply. This determination is based on the view of Barwick CJ in *Cameron v Holt* (1980) 142 CLR 342 at 346, that offences that are wholly regulatory in nature are the clearest examples of offences where it can be readily inferred that the Parliament intended that guilty intent should not be part of the prescription of the offence.

The presence of an express defence, and in particular a defence of reasonable excuse, is a good indicator that fault need not be proved. Some criminal offence provisions in HEFA and the SAA are not being amended to expressly identify them as strict liability offences. Examples of these are section 53 of HEFA and section 385 of the SAA which provide for reasonableness as a defence, and sections 42, 49 and 347 of the SAA which express the defence of reasonable excuse.

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

Yours sincerely



DAVID KEMP

SENATOR THE HON RICHARD ALSTON
Minister for Communications, Information Technology and the Arts
Deputy Leader of the Government in the Senate

RECEIVED
17 SEP 2001
Senate Standing C'ttee for the Scrutiny of Bills

14 SEP 2001

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

Dear Chairman

I refer to the Scrutiny of Bills Alert Digest No. 10 of 2001, particularly the matter relating to the Trade Practices Amendment (Telecommunications) Bill 2001. The Committee sought advice with respect to proposed amendments to limit rights to bring evidence before the Australian Competition Tribunal (Tribunal) and impose limits on powers to stay decisions of the Tribunal.

Limiting Evidence Available to the Tribunal
Proposed new section 152DOA

The Committee has already noted provisions in the Explanatory Memorandum that justify the proposed limitations on bringing evidence to the Tribunal 'on the basis of the length and depth of the Commission's arbitration process.' However, the Committee has sought advice particularly on how the existing review processes have been abused and whether the Tribunal has been consulted about the proposed changes.

In October 2000, the Tribunal commenced its only reviews of final determinations made by the Australian Competition and Consumer Commission (ACCC) under Part XIC. The two determinations that are subject to review relate to access to the Public Switched Telephone Network (PSTN) for the period concluding on 30 June 2001. The PSTN disputes commenced in December 1998 and February 1999 and the review are unlikely to be finalised before late 2002, 18 months after the agreement concluded.

The proposed amendment would apply to future Tribunal hearings, rather than the existing review of final determinations with respect to the PSTN. The lengthy process of the ACCC, already noted in the Explanatory Memorandum, will be replicated in future Tribunal hearings if there is no limitation on the evidence brought before it. The resulting delay would have the potential to cause continued investor uncertainty and advantage incumbent owners of infrastructure. While there is no direct evidence that the first stages of the Tribunal hearings have been abused, the proposed amendment will remove the potential for procedural abuse in the future.

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The Tribunal is an independent statutory tribunal whose primary role is to reconsider certain matters on which the ACCC has made a decision. The Tribunal does not have a role in providing policy advice to the Government and has not been consulted in relation to the proposal to limit the evidence available to it in reviewing a decision of the ACCC.

Limits on Powers to Stay Decisions of the Tribunal
Proposed new sections 152DPA and 125DR

The Committee also sought views in relation to the issues addressed below, dealing with proposed limitations on powers to stay decisions of the Tribunal.

- There is a minimal impact on parties that are unable to have a decision stayed by the Federal Court. If a decision of the ACCC is not stayed as a result of section 152DNB, and the decision is later varied by the Tribunal, the decision of the Tribunal will take effect from when it is made. However, the Tribunal has the same powers as the ACCC, including powers to backdate the effect of a final determination. Accordingly, the Tribunal can vary the determination, with retrospective effect.

- As provided in the Explanatory Memorandum, the ability to stay a decision for the duration of a review is already removed in relation to decisions of the ACCC, pursuant to section 152DNB. A similar limitation also exists pursuant to section 151AQA in relation to a decision of the ACCC to issue a competition notice under Part XIB. Clause 57 of Schedule 6 of the *Broadcasting Service Act 1992* also limits the power to stay specified decisions of the Australian Broadcasting Authority in relation to datacasting licences, for a period of greater than three months.

- The Federal Court is vested with the judicial power of the Commonwealth and is independent of the executive arm of government. The Federal Court was not consulted in relation to the proposal to limit the powers to stay decisions of the Tribunal.

- This provision will remove any incentive to seek judicial review of a decision of the Tribunal for the purpose of delaying the operation of the decision. As noted in the Explanatory Memorandum, this will provide a consistent approach between the operation of decisions of the ACCC and the Tribunal.

I hope that information provided in this letter adequately addresses the Committee's concerns with the Bill.

Yours sincerely

RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts