SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

2001

26 September 2001

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT OF 2001

The Committee presents its Thirteenth 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:

Cybercrime Bill 2001

Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Bill 2001

Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001

Finance and Administration Legislation Amendment (Application of Criminal Code) Bill 2001

Financial Sector (Collection of Data) Bill 2001

Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Bill 2001

Innovation and Education Legislation Amendment Act (No. 2) 2001

Intelligence Services Bill 2001

Trade Practices Amendment (Telecommunications) Bill 2001

Cybercrime 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 Justice and Customs has responded to those comments in a letter dated 20 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. 9 of 2001

This bill was introduced into the House of Representatives on 27 June 2001 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Criminal Code Act 1995* (the *Criminal Code*) by adding a new Part 10.7, containing updated computer offences. These amendments are based on the Model Criminal Code *Damage and Computer Offences Report*, dated January 2001, which was developed through a Commonwealth, State and Territory cooperation model for national consistency. The bill repeals the offence provisions in Part VIA of the *Crimes Act 1914*.

The bill also amends the *Crimes Act 1914* and the *Customs Act 1901* to enhance investigation powers relating to the search and seizure of electronically stored data. These amendments take into account the draft Council of Europe Convention on Cybercrime.

The bill also makes consequential amendments to the *Australian Security Intelligence Organisation Act 1979*, the *Education Services for Overseas Students Act 2000* and the *Telecommunications (Interception) Act 1997*.

Absolute liability offences and jurisdiction
Proposed subsections 477.1(2), 477.2(2) 477.3(2), 478.1(2) and 478.2(2)

This bill proposes to insert a number of new provisions in the *Criminal Code.* Some of these provisions will create offences of absolute liability. By virtue of section 6.2 of the *Code*, where an absolute liability offence is created, the prosecution, in establishing liability, need not prove any aspect of fault on the part of the accused, and the defendant cannot plead mistake of fact.

The Explanatory Memorandum notes that the purpose of these subsections is to establish a necessary link with a head of power of the Parliament, and a consequent application of one or more of the Commonwealth jurisdictional connections set out elsewhere in the provision.

For example, proposed section 477.2 creates an offence of unauthorised modification of computer data to cause impairment. The offence is only committed where one of the Commonwealth jurisdictional elements in paragraph 477.2(1)(d) applies. These elements require, for example, that the data be held in a Commonwealth computer, or in a computer on behalf of the Commonwealth, or the data be modified by means of a telecommunications service, or by a Commonwealth computer. Proposed subsection 477.2(2) states that absolute liability applies to these jurisdictional connections.

The Explanatory Memorandum states that absolute liability applies to these elements because "if the prosecution was required to prove, for example, awareness on the part of the defendant that the modified data was held in a Commonwealth computer, many defendants would be able to escape liability by demonstrating that they did not even think about who owned the computer in which the data was held. The elements in paragraph 477.2(1)(d) are included merely to trigger Commonwealth jurisdiction and do not have any bearing on the gravity of the offence."

The provisions of the bill raise a number of questions. Given that absolute liability has been applied to offences to invoke jurisdiction, the Committee **seeks the Minister's advice** as to why the Commonwealth's power to make laws with respect to Commonwealth land has not been included as an additional jurisdictional element. Under the bill, it would seem that interference with data in a Commonwealth computer located on non-Commonwealth land would constitute an offence, but interference with data held in a non-Commonwealth computer located on Commonwealth land would not constitute an offence. Among other things, this raises the issue of why it is seen as necessary to protect Commonwealth computers and data as distinct from the computers and data of other people and organisations.

The Minister's Second Reading Speech observes that all the proposed offences "are supported by extended extra-territorial jurisdiction". The Committee **seeks the Minister's advice** as to how this extended extra-territorial jurisdiction will operate.

The Committee notes that a person commits an offence where (among other things) he or she "causes" the modification of data. The Committee **seeks the Minister's advice** as to whether this can apply to a person who opens (whether advertently or inadvertently) an attachment or program which then automatically modifies data on another computer.

Finally, the Committee **seeks the Minister's advice** on the circumstances which have given rise to the bill, and why the serious offences have been framed in the way set out in 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

First, the Committee queried why the Commonwealth's power to make laws with respect to Commonwealth land has not been included as an additional jurisdictional element. The offences have been framed so that they apply to conduct that affects data held in a Commonwealth computer or in a computer on behalf of the Commonwealth or that involves the use of a telecommunications service. As the Committee notes, these elements of the offences have been included in order to attract Commonwealth constitutional jurisdiction.

These particular Commonwealth jurisdictional connections were chosen because they have a clear relationship to the subject matter being regulated. The Commonwealth has an obvious interest in protecting Commonwealth data from unauthorised access, modification and impairment. A significant proportion of computer offences, including hacking and denial of service attacks, are committed by means of a telecommunications service. The jurisdictional connections in the Bill also reflect the jurisdictional elements in the existing offences in the *Crimes Act 1914*. In the unlikely event that data in a non-Commonwealth computer on Commonwealth land is the subject of interference, State computer offences would apply by virtue of section 4 of the *Commonwealth Places (Application of Laws) Act 1970*.

Second, the Committee sought my advice as to how the extended extra-territorial jurisdiction for the proposed offences will operate. Proposed section 476.3 applies Category A geographical jurisdiction as set out in section 15.1 of the Criminal Code, to the computer offences in the Bill. As explained in the Explanatory Memorandum, Category A geographical jurisdiction will be satisfied if (i) the conduct constituting the computer offence occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or an Australian ship; (ii) a result of the conduct occurs wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship; or (iii) at time of the alleged offence the person charged with the offence was an Australian citizen or body corporate. Where the conduct constituting

a computer offence occurs wholly in a foreign country and only a 'result' occurs in Australia, there is a defence available if there is no corresponding offence in that foreign country. However, that defence is not available if jurisdiction is to be exercised on the basis of the person's nationality.

As stated in the Explanatory Memorandum, this approach is broadly consistent with the draft Council of Europe Convention on Cybercrime, which recommends parties to the Convention establish jurisdiction over offences committed on board their ships or aircraft or by one of their nationals (Draft No. 25, Article 23). It is also consistent with the Model Criminal Code, which, although a model State and Territory code, also includes broad geographical jurisdiction for these offences.

Computer crime is often perpetrated remotely from where it has effect. The application of Category A jurisdiction would mean that, regardless of where conduct constituting an offence occurs, if the results of that conduct affect Australia the person responsible would generally be able to be prosecuted in Australia. For example, a person in the US who sends a virus over the Internet which impairs data in an Australian computer could be prosecuted here. In addition, an Australian citizen who travels to a country where hacking is not an offence and, while there, uses a laptop computer to hack into a computer in a third country would also be caught by the proposed jurisdiction.

Third, the Committee sought my advice as to whether the proposed offence of modification of restricted data to cause impairment can apply to a person who opens an attachment or program which then automatically modifies data on another computer. Subsection 476.2(3) of the Bill makes it clear that a person "causes" unauthorised modification if the person's conduct substantially contributes to it. Accordingly, unauthorised modification could be caused by a person opening a program which then automatically modifies data on the computer. However, in order to commit the offence of unauthorised modification of restricted data, the person would have to *intend* to cause the modification. Consequently, the offence would not apply to a person who inadvertently opened an attachment or program which automatically modified data.

Finally, the Committee inquired as to the circumstances which have given rise to the Bill and why the serious offences have been framed in the way set out in the Bill. The computer offences in the Bill are based on the January 2001 Model Criminal Code *Damage and Computer Offences Report* which was developed in consultation with the States and Territories. The new offences would replace the existing outdated computer offences, which were inserted into the *Crimes Act 1914* in 1989. The current provisions do not address impairment of electronic communications (eg, 'denial of service attacks'); damage to electronic data stored on devices such as computer disks or credit cards; trade in programs designed to enable a person to impair data or electronic communications or the unauthorised use of computers to commit serious crimes. The proposed new computer offences would counter these technology related developments in criminal activity and remedy the deficiencies in existing laws. The Bill is particularly timely given the significant increase in computer crime over the last couple of years, as the attached statistics on cybercrime published by the US CERT Coordination Centre demonstrate.

There are three serious offences proposed in the Bill. They cover unauthorised access, modification or impairment with intent to commit a serious offence, unauthorised modification of data to cause impairment and unauthorised impairment of electronic communications to or from a computer. The offences apply only to

unauthorised conduct and contain appropriate fault elements of intention and recklessness to ensure they do not catch innocuous activities.

Proposed section 477.1 is designed to cover the unauthorised use of computer technology to commit serious crimes such as fraud, stalking or sabotage. The offence is particularly targeted at situations where preparatory action is taken by a person but the intended offence is not completed. Linking the penalty for the preparatory offence to the offence the person was intending to commit ensures that there is parity between the penalties and is also consistent with the law of attempt.

Proposed section 477.2 applies where a person modifies computer data with the intention of impairing data or being reckless as to any such impairment. A maximum penalty of 10 years imprisonment would apply to the commission of the offence. This penalty caters for the significant disruption and financial loss that impairment of computer data can cause, as exemplified by the release of worms and viruses like "Code Red", "Love Bug" and "Melissa". The penalty is equivalent to the penalty for the existing computer offences (Crimes Act, paragraphs 76C(a) and 76E(a)) and damage to Commonwealth property offence (Crimes Act, section 29).

Proposed section 477.3 is designed to target tactics such as 'denial of service attacks', where an e-mail address or web site is inundated with a large volume of unwanted messages thus overloading and crashing the computer system. The 10 year maximum penalty for the offence recognises the importance of computer-facilitated communication and the considerable damage that can result if that communication is impaired. For example, the denial of service attacks launched against Internet companies Amazon.com, Yahoo, eBay and Buy.com in February this year made their web sites inaccessible for hours.

I hope that this information is of assistance to the Committee.

The Committee thanks the Minister for this detailed response.

Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2001*, in which it made various comments. The Minister for Employment, Workplace Relations and Small Business has responded to those comments in a letter dated 25 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. 11 of 2001

This bill was introduced into the House of Representatives on 23 August 2001 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business]

The bill proposes to amend 16 Acts within the Employment, Workplace Relations and Small Business portfolio to reflect the application of the *Criminal Code* with effect from 15 December 2001.

The main amendments:

- apply the *Criminal Code* to all offence-creating and related provisions within the portfolio;
- remove defences of lawful excuse and lawful authority specific to individual provisions, instead relying on the general defences of lawful authority and lawful excuse under the *Criminal Code*;
- better identify exceptions and defences;
- replace certain references to the *Crimes Act 1914* with references to provisions of the *Criminal Code* where appropriate;
- apply strict liability to individual offences or specified physical elements of offences where appropriate;
- reconstruct provisions in order to clarify physical elements of conduct, circumstance and result; and
- remove or replace inappropriate fault elements.

Strict liability offences
Various provisions

The effect of this bill is to include, in legislation administered within the Employment, Workplace Relations and Small Business 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 much 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

> 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 Employment, Workplace Relations and Small Business portfolio criminal offence provisions. The Committee has requested my specific advice as to whether any of the Bill's provisions convert an offence which previously was not one of strict liability to such an offence
>
> As identified in the *Alert Digest*, the Bill proposes to amend a number of existing criminal offences within the Employment, Workplace Relations and Small Business portfolio to expressly provide that they are offences of strict liability or that certain physical elements have strict liability attached. 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 *Alert Digest* refers to the Bill's Explanatory Memorandum, which relevantly states that these particular amendments are intended to ensure that when Chapter 2 of the *Criminal Code* is applied to all Commonwealth offences, from 15 December 2001, "the relevant offences continue to have much the same meaning and to operate in the same manner as they do at present".

I am advised by my Department that the strict liability amendments proposed by the Bill are intended to preserve the status quo - amendments are only proposed in relation to offence provisions judged to be presently of a strict liability character.

Only a handful of Commonwealth criminal offence provisions expressly state that they are offences of strict liability. Consequently, assessment of this issue in relation to a specific provision is usually a matter settled by judicial interpretation.

Where criminal offence provisions in portfolio legislation have not been the subject of specific judicial interpretation, officers within my Department have attempted to determine whether Parliament originally intended that a particular criminal offence provision attracts strict liability. I am advised by my Department that this exercise has been carried out in close consultation with the Criminal Justice Division of the Attorney-General's Department. Additionally, relevant portfolio agencies have been consulted.

I am further advised that the Criminal Justice Division facilitated this process by providing advice on the process to be followed by my Department to identify strict liability offences. One of the resources used in that process was the document entitled *Strict Liability - Preferred Approach to Harmonisation*, prepared by the Attorney-General's Department, which is at Attachment A to this letter.

Briefly, the first step in the process involved exclusion from consideration of all offences that expressly provided a fault element of any nature or necessarily implied a fault element. Second, 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. This approach was adopted in accordance with a policy position, formulated by the Attorney-General's Department, to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration.

The presence of an express defence, and in particular a defence of reasonable excuse, is apparently 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.

Sometimes it has been necessary to clarify that strict liability applies to certain elements of offences, particularly regulatory offences, so that they work in the way they were intended, for example where the particular physical element might involve a knowledge of a requirement under law.

The regulatory nature of any offence was an important consideration together with the subject matter of that regulation. For example, the presumption that fault is required can be displaced where the law intends to regulate social or industrial

conditions or where physical injury to something of special value (eg environmental protection) is involved.

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.

Common examples of wholly regulatory offences in the Employment, Workplace Relations and Small Business portfolio Bill include those concerning failure to comply with reporting or record-keeping requirements, failure to comply with notices, failure of registered organisations to provide certain information to members or electoral officials, failure of inspectors to return identity cards and failure to attend before a Registrar.

I am advised that these factors were all taken into account 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.

Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2001*, in which it made various comments. The Minister for Family and Community Services has responded to those comments in a letter dated 19 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. 11 of 2001

This bill was introduced into the Senate on 22 August 2001 by the Parliamentary Secretary to the Minister for Health and Aged Care. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend 15 Acts to make consequential amendments to certain offence provisions in legislation administered by the Minister for Family and Community Services and the Minister for Community Services to reflect the application of the *Criminal Code* with effect from 15 December 2001.

The main amendments:

- make offence-creating and related provisions in the Family and Community Services portfolio comply with the Code;
- apply strict liability or absolute liability to individual offences or specified physical elements of offences where necessary;
- remove the defences of lawful excuse and lawful authority that appear in certain provisions, instead placing reliance on the *Criminal Code's* general defence of lawful authority and lawful excuse;
- delete references to certain provisions of the *Crimes Act 1914* and replace them with references to the equivalent *Criminal Code* provisions; and
- reconstruct provisions in order to clarify physical elements of conduct, circumstance and result.

Strict liability offences
Various provisions

The effect of this bill is to include, in legislation administered within the Family and Community Services 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 operation 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

> The purpose of the Bill is to make consequential amendments to certain offence provisions in portfolio legislation to reflect the application of the *Criminal Code Act 1995* (the Code). The amendments are to ensure that the relevant offences continue to have the same meaning and operation as they do at present. As you are aware, this process is being undertaken by all portfolios and I note that your Committee has sought similar advice from relevant Ministers.
>
> As with other portfolios, the amendments apply strict liability only to those offences that are judged to be presently of a strict liability character, thus maintaining the status quo. In the absence of specific judicial interpretation, officers of the Department of Family and Community Services, in consultation with officers of the Director of Public Prosecutions and the Attorney-General's Department, have determined whether Parliament originally intended that the subject criminal offence be one of strict liability.
>
> In determining whether an individual offence is one of strict liability, the process followed by other portfolios was adopted whereby all offences where strict liability could not apply for any reason were excluded. Firstly, officers considered whether

the offence provisions expressly provided for, or necessarily implied, a fault element. None of the offence provisions in question expressly provided for a fault element.

Officers of the Department next excluded all offences where the relevant penalty was sufficiently high to indicate that Parliament intended that the offences be fault-based.

As judicial interpretation on this point seems inconsistent, an approach was adopted, in consultation with the Attorney-General's Department, to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months.

Similar to the consideration undertaken by other portfolios, officers from my Department had regard to two other significant considerations. First, the presence of an express defence, and in particular a defence of reasonable excuse, was accepted as a good indicator that fault need not be proved. Secondly, it was accepted that offences that are wholly regulatory in nature were clear examples where it could be readily inferred that Parliament intended that strict liability should apply.

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.

Finance and Administration Legislation Amendment (Application of Criminal Code) Bill 2001

Introduction

The Committee dealt with certain amendments to this bill in *Alert Digest No. 10 of 2001*, in which it made various comments. The Minister for Finance and Administration has responded to those comments in a letter dated 20 September 2001. A copy of the letter is attached to this report. An extract from the Amendments section of the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 10 of 2001

Strict and absolute liability offences
Various provisions

This bill proposes consequential amendments to a number of Acts administered within the Finance and Administration portfolio to reflect the application of the Criminal Code to existing offence provisions. The Committee considered the bill in *Alert Digest No. 6 of 2001* in which it made no comment.

On 8 August 2001, the House of Representatives amended the bill by inserting a new Schedule 1A. This Schedule makes provision in similar terms to offence provisions in two additional Acts: the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984*. In general terms, this new Schedule specifies that a number of offences are offences of strict and absolute liability.

With regard to this new Schedule, the Committee **seeks the Minister's advice** as to whether any of its provisions creates a new strict liability offence, or 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

In the Alert Digest the Senate Standing Committee for the Scrutiny of Bills noted that the Finance and Administration Legislation Amendment (Application of Criminal Code) Bill 2001 was amended by the insertion of a new Schedule 1A. The Committee noted that the Schedule specified that a number of offences in the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* were offences of strict and absolute liability.

In particular, the Committee requested, at page 20 of the Alert Digest No 10:

With regard to the new Schedule, the Committee seeks the Minister's advice as to whether any of its provisions creates a new strict liability offence, or converts an offence which previously was not one of strict liability into such an offence.

I trust my response will be of assistance to the Committee.

As identified in the Alert Digest No 10 of 2001, Schedule 1A to the Finance and Administration Legislation Amendment (Application of Criminal Code) Bill 2001 declares that a number of offences in legislation administered within the Finance and Administration portfolio by the Australian Electoral Commission (AEC) are offences of strict liability. These amendments are necessary to ensure that after the *Criminal Code* (the Code) comes into operation offences that could currently be interpreted as strict liability offences continue to be offences of strict liability. Section 6.1 of the *Criminal Code* states that a criminal offence is a strict liability offence only if express provision is made to that effect. If an offence is not specified to be one of strict liability, after the Code comes into operation a court would be required to interpret it as a fault offence and no longer as a strict liability 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.

In some instances the amendments involve a judgement about the likely effect of existing offences and whether they are presently of a strict liability character. This has been necessary in some instances as 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.

As few Commonwealth criminal offences expressly state whether they are offences of strict liability, in most instances whether an offence is currently one of strict liability must be settled by judicial interpretation. In the absence of specific judicial interpretation, it has been necessary for officers of the AEC to determine in each instance whether Parliament originally intended that the criminal offence be one of strict liability. This has been done in consultation with the Attorney-General's Department in each instance. In addition, the AEC sought the advice of the Director of Public Prosecutions in certain instances.

In determining whether an individual offence is one of strict liability, officers of the AEC, on the advice of the Attorney-General's Department, followed a process of excluding all offences where strict liability could not apply for any one or more of a number of reasons.

The first offences to be excluded were those that expressly provided a fault element of any nature (such as intentionally or recklessly) or necessarily implied a fault element. This exclusion was based on 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."

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. On the advice of the Attorney-General's Department it was decided 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.

In addition, the existence of an express defence to an offence and the nature of the offence itself were two other significant considerations taken into account in determining whether an offence was one of strict liability. 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 Finance and Administration portfolio include those concerning failure to comply with reporting or record-keeping requirements.

The above factors were all taken into account in assessing each individual criminal offence for strict liability. I confirm that the Bill only applies strict liability to offences where it can be clearly inferred that Parliament intended that strict liability

would apply. The Bill does not create any new offences of strict liability and does not convert any offence which previously was not one of strict liability into such an offence.

In relation to the one offence of absolute liability identified in the Bill, the same process was followed in assessing the offence as was outlined above for offences of strict liability. After this assessment, it was considered by officers of the AEC and the Attorney-General's Department that the offence contained no fault element, and may operate as an offence of strict liability. However, the offence provision also contained a defence which placed a legal burden on the defendant. Strict liability offences only attract a defence of mistake of fact, and the defence of mistake of fact places an evidential burden on the defendant, not a legal burden. Therefore, to state that the offence was an offence of strict liability would change the operation of the provision, as well as providing two defences to the offence rather than one.

To avoid the confusion that would be caused by stating that the offence was a strict liability offence, and to ensure that the provision will continue to operate after the application of the Criminal Code in the same manner as it did prior to the application of the Criminal Code, it was considered necessary to express the offence as an absolute liability offence.

I trust the above comments are of assistance to the Committee.

The Committee thanks the Minister for this response.

Financial Sector (Collection of Data) Bill 2001

Introduction

The Committee dealt with certain amendments to this bill in *Alert Digest No. 10 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation has responded to those comments in a letter dated 19 September 2001. A copy of the letter is attached to this report. An extract from the Amendments section of the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 10 of 2001

Commencement
Subclause 2(3)

The Committee considered this bill in *Alert Digest No. 6 of 2001* in which it made certain comments in relation to the bill's delayed commencement. Subclause 2(3) provided that the amendments proposed in Part 2 of the bill might commence 12 months after assent.

The Committee sought the Minister's advice as to the effect of *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel, which states that, as a general rule, where a clause provides for commencement after Assent, the preferred period should not be longer than 6 months. The *Drafting Instruction* goes on to state that, where a longer period is chosen, "Departments should explain the reason for this in the Explanatory Memorandum".

On 26 June 2001, the Minister advised that a 12 month period was necessary "to provide adequate time for the systems to be put in place to transfer the data collection and other responsibilities from the RBA to APRA" (see the Committee's *Tenth Report of 2001* at page 449).

On 8 August 2001, subclause 2(3) was amended in the House of Representatives to provide that Parts 2, 3 and 4 might all commence 12 months after assent. The Committee, therefore, **seeks the Minister's advice** as to whether the reason for the delayed commencement of Part 2 of the bill provided in his letter of 26 June similarly applies to the delayed commencement of Parts 3 and 4.

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

Relevant extract from the response from the Minister

You may recall that I wrote to you on 26 June to explain that it was considered necessary for Part 2 to commence within twelve months of Royal Assent so that industry and APRA had adequate time for systems to be put in place to transfer data collection and other responsibilities from the RBA to APRA. At that time, Parts 3 and 4 were due to commence on 1 July 2001 as industry and APRA already have systems in place to put into immediate effect the requirements of these Parts. However, as the Bill was not able to be debated and passed by 1 July, the commencement dates for Parts 3 and 4 needed to be changed.

To maintain consistency with the commencement of Part 2, the commencement dates for Parts 3 and 4 were amended to commence on Proclamation or within twelve months of the Bill receiving Royal Assent, whichever occurs first.

The Treasury is currently working with APRA in seeking a Proclamation date in early October for the commencement of Parts 3 and 4 of the Bill. This will ensure that these Parts are given effect within the preferred six month period as set out in *Drafting Instruction No. 2 of 1989* issued by the Office of Parliamentary Counsel.

Thank you for your interest in this matter.

The Committee thanks the Minister for this response which indicates that the commencement of Parts 3 and 4 of the bill was delayed to maintain consistency with the commencement of Part 2.

Notwithstanding this, the Committee notes the Minister's comment that "industry and APRA already have systems in place to put into immediate effect the requirements of [Parts 3 and 4]".

Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2001*, in which it made various comments. The Minister for Industry, Science and Resources has responded to those comments in a letter dated 25 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. 11 of 2001

This bill was introduced into the Senate on 22 August 2001 by the Parliamentary Secretary to the Minister for Health and Aged Care. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to amend 26 Acts within the Industry, Science and Resources portfolio to reflect the application of the *Criminal Code* with effect from 15 December 2001.

The main amendments:

- specify offences of strict liability in accordance with the *Criminal Code*;
- restructure offence provisions to include appropriate fault elements;
- restructure offence provisions to proscribe the actions of a person whose conduct causes damage, injury, destruction or obliteration of prescribed property;
- restructure criminal offence provisions containing a defence to avoid that defence being mistakenly interpreted as included among the elements of an offence;
- specify whether a defence places a legal or evidential burden on a defendant;
- restructure ancillary offence provisions so as to apply relevant ancillary provisions of the *Criminal Code*;
- extend the meaning of 'engaging in conduct' to include omissions;
- restructure offence provisions so as not to require knowledge of the law; and

- specify, in provisions which establish criminal responsibility for corporations, whether or not Part 2.5 of the *Criminal Code* (dealing with corporate criminal responsibility) is applicable.

Strict liability offences
Various provisions

The effect of this bill is to include, in legislation administered within the Industry, Science and Resources 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, "offences [will] operate in the same way after the *Criminal Code* comes into effect as they operate before the *Criminal Code* applies".

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

> The letter invited my response to the matter of the Bill's application of strict liability to certain Industry, Science and Resources portfolio criminal offence provisions.
>
> 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.
>
> In determining whether an offence provision was one of strict liability, my Department received advice from and consulted with the Attorney-General's Department.

Both the language of relevant statutes and nature of criminal offence provisions were taken into account, together with the reasons detailed in the attached Attorney-General's Department policy document (marked "A"). The process began with the primary position established by the High Court in *R v He Kaw Teh* (1984-85) 157 CLR 523, which is that there is a strong presumption that proof of fault is required in criminal offence creating provisions (per Brennan J at page 566).

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

Additionally, where the relevant penalty in criminal offence provisions was sufficiently high - either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment - then these too were excluded from consideration as strict liability provisions. As a general rule, offences that prescribed a penalty of imprisonment of more than 6 months were excluded from consideration.

The presence of an express defence, such as a defence of reasonable excuse, was also regarded as a good indicator that fault need not be proved.

These factors were all taken into account 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.

Innovation and Education Legislation Amendment Act (No. 2) 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 11 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 24 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.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 18 September 2001) the response from the Minister may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 11 of 2001

This bill was introduced into the House of Representatives on 22 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* to:

- increase the maximum amount of financial assistance payable to higher education institutions in 2001 to reflect revised estimates of planned expenditure under the Higher Education Workplace Reform Programme;
- increase the maximum amount of financial assistance payable to higher education institutions in 2002 and 2003 to reflect revised estimates of the Commonwealth's overall superannuation liability as a result of the Beneficiary Choice Programme in Victoria;
- create the Postgraduate education loan scheme;
- introduce a cap on the total amount of indebtedness that an individual is able to accrue in aggregate; and
- allow higher education institutions to accept electronic communications, including electronic signatures, and to elect to communicate electronically with students without seeking the student's agreement, provided students have access to the appropriate technology and services.

Extension of tax file number regime
Proposed new section 98E

This bill is in almost identical terms to the Innovation and Education Legislation Amendment Bill 2001 which was introduced in the House of Representatives on 5 April 2001, which was divided by the Senate on 29 June 2001, and on which the Committee commented in *Alert Digest No. 6 of 2001*.

As the Committee noted in that *Digest*, item 5 of Schedule 2 to this bill proposes to insert new section 98E in the *Higher Education Funding Act 1988*. This section will require postgraduate students under the proposed Postgraduate Education Loan Scheme to reveal their tax file numbers to the tertiary education institution at which they will be studying.

The purpose of this requirement is obviously to minimise the possibility for fraud in the administration of the new loans scheme. However, the requirement marks yet another step in the process of providing information ostensibly collected solely for taxation purposes to persons outside the Tax Office. The Committee again notes the words of the then Treasurer in the Parliament on 25 May 1988 when referring to the proposed introduction of the tax file number scheme:

> The only purpose of the file number will be to make it easier for the Tax Office to match information it receives about money earned and interest payments.

This system is for the exclusive and limited use of the Tax Office – it will simply allow the better use of information the Tax Office already receives.The Committee also notes the words of the then member for Kooyong in the Parliament on 21 December 1990, that "since the inception of the tax file number in 1988 as an identifying system, we have seen the gradual extension of that system to other areas by way of a process sometimes referred to as function creep".

As the Committee has previously noted, this process has continued and grown over a number of years, irrespective of the governing party of the day, and in spite of assurances that it would not occur. This provision represents yet another example of this process.

In recent times the Committee has drawn attention to this issue in relation to the Youth Allowance Consolidation Bill 1999 (*Alert Digest No. 2 of 1999*), the Social Security (Administration) Bill 1999 (*Alert Digest No. 9 of 1999*), the A New Tax System (Family Assistance) (Administration) Bill 1999 (*Alert Digest No. 9 of 1999*), the Social Security and Veterans' Entitlements Legislation Amendment (Private Trusts and Private Companies – Integrity of Means Testing) Bill 2000 (*Alert Digest No. 11 of 2000*), and the Child Support Legislation Amendment Bill (No 2) 2000 (*Alert Digest No. 12 of 2000*).

Given the increasing use of tax file numbers outside the tax system, the Committee **seeks the Minister's advice** as to whether all statutory provisions which require that a person's tax file number be disclosed should now be appended as a Schedule to the tax laws.

Pending the Minister's advice, the Committee draws Senators' attention to this 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

I would make the following comments on the Committee's report:

- The provision of Tax File Numbers (TFNs) by students who wish to participate in the PELS will not breach principle 1(a) (i) of the Committee's terms of reference as it is not a compulsory requirement for a student to quote their Tax File Number.

- The provision of TFNs for PELS is consistent with arrangements that currently apply to the Higher Education Contribution Scheme (HECS) and the Open Learning Deferred Payment Scheme (OLDPS).

- TFNs are used by higher education institutions to advise the Australian Taxation Office of the amount a student is deferring. Students begin repaying their debt when their repayment income reaches the minimum threshold for any particular year, which is $23,242 in the 2001-02 income year.

- Under the legislation, students have the right to choose not to quote a TFN, consistent with the Tax File Guidelines 1992 issued under the *Privacy Act 1988*. The consequence of not providing a TFN is that the student will not be eligible to access the loan facility provided by the Commonwealth. In these instances, students can continue to pay their tuition fees direct to the institution.

- Sections 52 and 53 of the *Higher Education Funding Act 1988* (HEFA) specifically prohibit institutions from requiring a student to provide their TFN or from unauthorised use or disclosure of a students' TFN for any purpose other than processing the deferred HECS amounts. Penalties are imposed for breaches.

Section 98E of HEFA (as amended by the *Innovation and Education Legislation Amendment Act (No.* 2) *2001*) has the effect of extending sections 52 and 53 of HEFA to PELS.

- Section 78 of HEFA provides for the imposition of penalties for the unauthorised recording or disclosure of a person's personal information. It also prohibits the provision of personal information to any Minister. New section 98K of HEFA has the effect of extending section 78 of HEFA to PELS.

- TFNs and the PELS loan request form documentation are to be retained by institutions until such time as the institution is satisfied that the calculation of a student's final semester debt has been completed, the student's account with the institution is finalised, and the ATO has been notified of the final semester debt. In keeping with the *Tax File Number Guidelines 1992*, issued by the Privacy Commissioner, any disposal of TFN information shall be by appropriate and secure means.

I trust that this information addresses the Committee's concerns.

The Committee thanks the Minister for this response.

Intelligence Services 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 Foreign Affairs has responded to those comments in a letter dated 9 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. 9 of 2001

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

Introduced with the Intelligence Services (Consequential Provisions) Bill 2001, this bill proposes a new framework for the oversight and accountability of intelligence services by:

- giving the Australian Secret Intelligence Service (ASIS) and Defence Signals Directorate (DSD) a statutory basis. Among other things, the new statutory provisions set out the DSD's functions in detail, establish an accountability regime which provides limited immunities to agencies; and imposes a statutory duty on agencies to respect the rights of Australians to privacy;
- expanding the role of the Inspector-General of Intelligence and Security through the conduct of retrospective audits of ASIS' compliance with ministerial authorisations; and
- establishing a new parliamentary committee to oversee the expenditure and administration of ASIS and the Australian Security Intelligence Organisation (ASIO), replacing the existing ASIO parliamentary committee.

Inappropriate delegation of legislative power
Clause 15

Clause 15 of this bill obliges the relevant Minister responsible for the Australian Secret Intelligence Service (ASIS) and the Defence Signals Directorate (DSD) to make written rules "regulating the communication and retention by the relevant agency of intelligence information concerning Australian persons". Under subclause 15(2), in making the rules, the Minister must have regard to the need to ensure that the privacy of Australian persons is preserved as far as is consistent with the proper performance by the agencies of their functions.

This rule-making power is apparently legislative in nature, but its exercise is not subject to Parliamentary scrutiny. The Committee, therefore, **seeks the Minister's advice** as to why the rules under clause 15 should not be 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

I am writing in response to your Committee's request for advice as to why the rules proposed under Clause 15 of the Intelligence Services Bill 2001 should not be subject to Parliamentary scrutiny. I understand that the Committee may consider the responsible Minister's making of the rules to insufficiently subject the exercise of legislative power to parliamentary scrutiny, and that this would be in breach of principle 1(a)(v) of the Committee's terms of reference.

Clause 15 obliges the relevant Ministers responsible for ASIS and DSD to make written rules regulating the communication of, and retention by, the relevant agency of intelligence information concerning Australian persons. Both ASIS and DSD currently have rules in place. The purpose of the rules is to provide a clear direction to those responsible for collecting and distributing intelligence information concerning Australian persons.

The current rules, and those envisaged under Clause 15, are based on the premise that the privacy of individuals should not be subject to intrusion by government other than in exceptional circumstances. The Rules provide clearly limited circumstances in which information about Australians can be collected and distributed. The rules operate as a safeguard for Australians and are intended to bind the collectors of information. The rules are designed to ensure that the foreign collection agencies act

lawfully, with propriety, and in accordance with the Government's commitment to privacy and civil liberties.

In terms of future Parliamentary scrutiny, the Joint Select Committee on the Intelligence Services, which tabled its report in Parliament on 27 August 2001, considered Clause 15 of the Intelligence Services Bill 2001. The Committee recommended (Recommendation 9) that a new subclause be added to Clause 15 of the Intelligence Services Bill 2001 to require that the Parliamentary Committee on ASIO and ASIS be briefed by the Inspector-General of Intelligence and Security (IGIS) on the privacy rules and any changes to their provisions. The Government intends to accept this recommendation and the Bill will be amended accordingly. Flowing from this recommendation it is anticipated that the Parliamentary Joint Committee will have access to the rules and be able to provide comment. In addition it should be noted that the Inspector-General of Intelligence and Security monitors the activities of all Australian intelligence and security agencies and reports on ASIS and DSD's compliance with the rules in a public report which is presented to the Parliament annually.

Given the nature of the rules, as outlined above, the recommendation of the Joint Select Committee on the Intelligence Services on the briefing of the proposed Parliamentary Joint Committee on the rules (which the Government will accept) and that Committee's access to the rules, I consider these measures should alleviate the potential concerns of the Standing Committee for the Scrutiny of Bills.

The Committee thanks the Minister for this response and notes that the rules under clause 15 will be subject to a measure of parliamentary scrutiny through the Joint Select Committee on the Intelligence Services.

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 responded to those comments in a letter dated 14 September 2001.

In it's *Twelfth Report of 2001*, the Committee sought further advice from the Minister in relation to limiting the rights of parties to arbitration. The Minister has responded in a letter dated 24 September 2001. A copy of the letter is attached to this report. An extract from the *Twelfth Report* 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 dated 14 September

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.

Relevant extract from the further response from the Minister dated 24 September 2001

> The Committee has sought further advice with respect to proposed amendments to limit rights to bring evidence before the Australian Competition Tribunal (Tribunal). In particular, the Committee has sought advice as to whether the Tribunal, in its current hearings, has been asked to consider significant quantities of material not originally put before the Australian Competition and Consumer Commission (ACCC) and whether any comment has been made during the course of the hearings as to the value of such new material.
>
> The ACCC has advised that witness statements in relation to the existing Tribunal hearings are not due until November 2001, but that Telstra has already introduced fresh evidence through its statement of issues in contention. The ACCC also expects that parties will use their existing rights to adduce further new evidence when filing witness statements in November. Due to the private nature of Tribunal hearings, no comment has been made on the value of the new material introduced to date. While there is no direct evidence of existing procedural abuse, the proposed amendment is concerned with removing the potential for procedural abuse in the future.
>
> I hope that information provided in this letter adequately addresses the Committee's concerns with the Bill.

The Committee thanks the Minister for this further response and notes that an amendment to procedural law, where there is no evidence of its abuse, in anticipation of its possible abuse at some time in the future, appears to represent a precedent which could become unfortunate if legislators were to start anticipating all possible breaches or abuses of the provisions of a law. The Committee, therefore, **seeks the Minister's further advice** as to the necessity for this approach in the circumstances covered by this bill.

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.

Barney Cooney
Chairman

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

01/2753 CRJ

20 SEP 2001

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

Dear Senator Cooney Barney,

I refer to the Scrutiny of Bills *Alert Digest No. 9 of 2001* in which your Committee sought my advice on various aspects of the Cybercrime Bill 2001 ("the Bill").

First, the Committee queried why the Commonwealth's power to make laws with respect to Commonwealth land has not been included as an additional jurisdictional element. The offences have been framed so that they apply to conduct that affects data held in a Commonwealth computer or in a computer on behalf of the Commonwealth or that involves the use of a telecommunications service. As the Committee notes, these elements of the offences have been included in order to attract Commonwealth constitutional jurisdiction.

These particular Commonwealth jurisdictional connections were chosen because they have a clear relationship to the subject matter being regulated. The Commonwealth has an obvious interest in protecting Commonwealth data from unauthorised access, modification and impairment. A significant proportion of computer offences, including hacking and denial of service attacks, are committed by means of a telecommunications service. The jurisdictional connections in the Bill also reflect the jurisdictional elements in the existing offences in the *Crimes Act 1914*. In the unlikely event that data in a non-Commonwealth computer on Commonwealth land is the subject of interference, State computer offences would apply by virtue of section 4 of the *Commonwealth Places (Application of Laws) Act 1970*.

Second, the Committee sought my advice as to how the extended extra-territorial jurisdiction for the proposed offences will operate. Proposed section 476.3 applies Category A geographical jurisdiction as set out in section 15.1 of the Criminal Code, to the computer offences in the Bill. As explained in the Explanatory Memorandum, Category A geographical jurisdiction will be satisfied if (i) the conduct constituting the computer offence occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or an Australian ship; (ii) a result of the conduct occurs wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship; or (iii) at time of the alleged offence the person charged with the offence was an Australian citizen or body corporate. Where the

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conduct constituting a computer offence occurs wholly in a foreign country and only a 'result' occurs in Australia, there is a defence available if there is no corresponding offence in that foreign country. However, that defence is not available if jurisdiction is to be exercised on the basis of the person's nationality.

As stated in the Explanatory Memorandum, this approach is broadly consistent with the draft Council of Europe Convention on Cybercrime, which recommends parties to the Convention establish jurisdiction over offences committed on board their ships or aircraft or by one of their nationals (Draft No. 25, Article 23). It is also consistent with the Model Criminal Code, which, although a model State and Territory code, also includes broad geographical jurisdiction for these offences.

Computer crime is often perpetrated remotely from where it has effect. The application of Category A jurisdiction would mean that, regardless of where conduct constituting an offence occurs, if the results of that conduct affect Australia the person responsible would generally be able to be prosecuted in Australia. For example, a person in the US who sends a virus over the Internet which impairs data in an Australian computer could be prosecuted here. In addition, an Australian citizen who travels to a country where hacking is not an offence and, while there, uses a laptop computer to hack into a computer in a third country would also be caught by the proposed jurisdiction.

Third, the Committee sought my advice as to whether the proposed offence of modification of restricted data to cause impairment can apply to a person who opens an attachment or program which then automatically modifies data on another computer. Subsection 476.2(3) of the Bill makes it clear that a person "causes" unauthorised modification if the person's conduct substantially contributes to it. Accordingly, unauthorised modification could be caused by a person opening a program which then automatically modifies data on the computer. However, in order to commit the offence of unauthorised modification of restricted data, the person would have to *intend* to cause the modification. Consequently, the offence would not apply to a person who inadvertently opened an attachment or program which automatically modified data.

Finally, the Committee inquired as to the circumstances which have given rise to the Bill and why the serious offences have been framed in the way set out in the Bill. The computer offences in the Bill are based on the January 2001 Model Criminal Code *Damage and Computer Offences Report* which was developed in consultation with the States and Territories. The new offences would replace the existing outdated computer offences, which were inserted into the *Crimes Act 1914* in 1989. The current provisions do not address impairment of electronic communications (eg, 'denial of service attacks'); damage to electronic data stored on devices such as computer disks or credit cards; trade in programs designed to enable a person to impair data or electronic communications or the unauthorised use of computers to commit serious crimes. The proposed new computer offences would counter these technology related developments in criminal activity and remedy the deficiencies in existing laws. The Bill is particularly timely given the significant increase in computer crime over the last couple of years, as the attached statistics on cybercrime published by the US CERT Coordination Centre demonstrate.

There are three serious offences proposed in the Bill. They cover unauthorised access, modification or impairment with intent to commit a serious offence, unauthorised modification of data to cause impairment and unauthorised impairment of electronic communications to or from a computer. The offences apply only to unauthorised conduct and

contain appropriate fault elements of intention and recklessness to ensure they do not catch innocuous activities.

Proposed section 477.1 is designed to cover the unauthorised use of computer technology to commit serious crimes such as fraud, stalking or sabotage. The offence is particularly targeted at situations where preparatory action is taken by a person but the intended offence is not completed. Linking the penalty for the preparatory offence to the offence the person was intending to commit ensures that there is parity between the penalties and is also consistent with the law of attempt.

Proposed section 477.2 applies where a person modifies computer data with the intention of impairing data or being reckless as to any such impairment. A maximum penalty of 10 years imprisonment would apply to the commission of the offence. This penalty caters for the significant disruption and financial loss that impairment of computer data can cause, as exemplified by the release of worms and viruses like "Code Red", "Love Bug" and "Melissa". The penalty is equivalent to the penalty for the existing computer offences (Crimes Act, paragraphs 76C(a) and 76E(a)) and damage to Commonwealth property offence (Crimes Act, section 29).

Proposed section 477.3 is designed to target tactics such as 'denial of service attacks', where an e-mail address or web site is inundated with a large volume of unwanted messages thus overloading and crashing the computer system. The 10 year maximum penalty for the offence recognises the importance of computer-facilitated communication and the considerable damage that can result if that communication is impaired. For example, the denial of service attacks launched against Internet companies Amazon.com, Yahoo, eBay and Buy.com in February this year made their web sites inaccessible for hours.

I hope that this information is of assistance to the Committee.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

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CERT/CC Statistics 1988-2001

The CERT/CC publishes statistics for:

- Number of incidents reported
- Vulnerabilities reported
- Security alerts published
- Security notes published
- Mail messages handled
- Hotline calls received

Number of incidents reported

1988-1989

Year	1988	1989
Incidents	6	132

1990-1999

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999*
Incidents	252	406	773	1,334	2,340	2,412	2,573	2,134	3,734	9,859

2000-2001

Year	2000	Q1,Q2, 2001
Incidents	21,756	15,476

Total incidents reported (1988-Q2, 2001): **63,187**

Vulnerabilities reported

1995-1999

Year	1995	1996	1997	1998	1999*
Vulnerabilities	171	345	311	262	417

2000-2001

Year	2000	Q1,Q2, 2001
Vulnerabilities	1,090	1,151

Total vulnerabilities reported (1995-Q2, 2001): **3,747**

Security alerts published

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INTERNET SECURITY ALLIANCE

1988-1989

Year	1988	1989
Advisories	1	7
Vendor Bulletins		
Summaries		
Totals	1	7

1990-1999

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	199
Advisories	12	23	21	19	15	18	27	28	13	1
Vendor Bulletins					2	10	20	16	13	
Summaries						3	6	6	8	
Totals	12	23	21	19	17	31	53	50	34	2

2000-2001

Year	2000	Q1,Q2, 2001
Advisories	22	15
Summaries	4	2
Totals	26	17

Total security alerts published (1988-Q2, 2001): **333**

Security notes published

1998-1999

Year	1998	1999
Incident notes	7	8
Vulnerablity notes	8	3
Total notes	15	11

2000-2001

Year	2000	Q1,Q2, 2001
Incident notes	10	6
Vulnerablity notes	47	127
Total notes	57	133

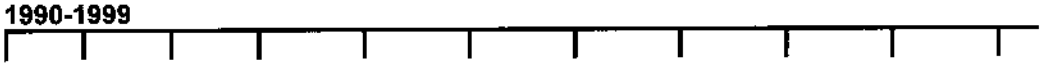
Total security notes published (1998-Q2, 2001): **216**

Mail messages handled

1988-1989

Year	1988	1989
Mail	539	2,869

1990-1999



Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1
Mail	4,448	9,629	14,463	21,267	29,580	32,084	31,268	39,626	41,871	34

2000-2001

Year	2000	Q1,Q2, 2001
Mail	56,365	39,181

Total mail messages handled (1988-Q2, 2001): **376,212**

Hotline calls received

1992-1999

Year	1992	1993	1994	1995	1996	1997	1998	1999
Calls	1,995	2,282	3,665	3,428	2,062	1,058	1,001	2,099

2000-2001

Year	2000	Q1,Q2, 2001
Calls	1,280+	712+

Total hotline calls received (1992-Q2, 2001): **19,992+**

Last updated July 18, 2001.

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

PARLIAMENT HOUSE
CANBERRA ACT 2600

25 SEP 2001

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 30 August 2001 from Mr James Warmenhoven, Secretary of the Senate Standing Committee for the Scrutiny of Bills, concerning the Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Bill 2001 (the Bill).

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 Employment, Workplace Relations and Small Business portfolio criminal offence provisions. The Committee has requested my specific advice as to whether any of the Bill's provisions convert an offence which previously was not one of strict liability to such an offence

As identified in the *Alert Digest*, the Bill proposes to amend a number of existing criminal offences within the Employment, Workplace Relations and Small Business portfolio to expressly provide that they are offences of strict liability or that certain physical elements have strict liability attached. 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 *Alert Digest* refers to the Bill's Explanatory Memorandum, which relevantly states that these particular amendments are intended to ensure that when Chapter 2 of the *Criminal Code* is applied to all Commonwealth offences, from 15 December 2001, "the relevant offences continue to have much the same meaning and to operate in the same manner as they do at present".

I am advised by my Department that the strict liability amendments proposed by the Bill are intended to preserve the status quo – amendments are only proposed in relation to offence provisions judged to be presently of a strict liability character.

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Only a handful of Commonwealth criminal offence provisions expressly state that they are offences of strict liability. Consequently, assessment of this issue in relation to a specific provision is usually a matter settled by judicial interpretation.

Where criminal offence provisions in portfolio legislation have not been the subject of specific judicial interpretation, officers within my Department have attempted to determine whether Parliament originally intended that a particular criminal offence provision attracts strict liability. I am advised by my Department that this exercise has been carried out in close consultation with the Criminal Justice Division of the Attorney-General's Department. Additionally, relevant portfolio agencies have been consulted.

I am further advised that the Criminal Justice Division facilitated this process by providing advice on the process to be followed by my Department to identify strict liability offences. One of the resources used in that process was the document entitled *Strict Liability – Preferred Approach to Harmonisation*, prepared by the Attorney-General's Department, which is at Attachment A to this letter.

Briefly, the first step in the process involved exclusion from consideration of all offences that expressly provided a fault element of any nature or necessarily implied a fault element. Second, 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. This approach was adopted in accordance with a policy position, formulated by the Attorney-General's Department, to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months. As a general rule, offences that prescribe a penalty of imprisonment of more than 6 months were excluded from consideration.

The presence of an express defence, and in particular a defence of reasonable excuse, is apparently 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.

Sometimes it has been necessary to clarify that strict liability applies to certain elements of offences, particularly regulatory offences, so that they work in the way they were intended, for example where the particular physical element might involve a knowledge of a requirement under law.

The regulatory nature of any offence was an important consideration together with the subject matter of that regulation. For example, the presumption that fault is required can be displaced where the law intends to regulate social or industrial conditions or where physical injury to something of special value (eg environmental protection) is involved.

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.

Common examples of wholly regulatory offences in the Employment, Workplace Relations and Small Business portfolio Bill include those concerning failure to comply with reporting or record-keeping requirements, failure to comply with notices, failure of registered organisations to provide certain information to members or electoral officials, failure of inspectors to return identity cards and failure to attend before a Registrar.

I am advised that these factors were all taken into account 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

TONY ABBOTT

STRICT LIABILITY - PREFERRED APPROACH TO HARMONISATION
(Advice of the Attorney-General's Department)

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 *Howard's 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.

Minister for Family and Community Services

MINISTER ASSISTING THE PRIME MINISTER FOR THE STATUS OF WOMEN
SENATOR THE HON AMANDA VANSTONE

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

Dear Senator Barney

I am writing in response to comments made by the Committee in its Alert Digest No. 11 of 2001 in relation to whether the Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001 (the Bill) converts any offence which was not previously one of strict liability into a strict liability offence.

The purpose of the Bill is to make consequential amendments to certain offence provisions in portfolio legislation to reflect the application of the *Criminal Code Act 1995* (the Code). The amendments are to ensure that the relevant offences continue to have the same meaning and operation as they do at present. As you are aware, this process is being undertaken by all portfolios and I note that your Committee has sought similar advice from relevant Ministers.

As with other portfolios, the amendments apply strict liability only to those offences that are judged to be presently of a strict liability character, thus maintaining the status quo. In the absence of specific judicial interpretation, officers of the Department of Family and Community Services, in consultation with officers of the Director of Public Prosecutions and the Attorney-General's Department, have determined whether Parliament originally intended that the subject criminal offence be one of strict liability.

In determining whether an individual offence is one of strict liability, the process followed by other portfolios was adopted whereby all offences where strict liability could not apply for any reason were excluded. Firstly, officers considered whether the offence provisions expressly provided for, or necessarily implied, a fault element. None of the offence provisions in question expressly provided for a fault element.

Officers of the Department next excluded all offences where the relevant penalty was sufficiently high to indicate that Parliament intended that the offences be fault-based.

Parliament House, Canberra ACT 2600 • Telephone (02) 6277 7560 • Fax (02) 6273 4122

As judicial interpretation on this point seems inconsistent, an approach was adopted, in consultation with the Attorney-General's Department, to the effect that strict liability should not apply to any offence that prescribed imprisonment for a term greater than 6 months.

Similar to the consideration undertaken by other portfolios, officers from my Department had regard to two other significant considerations. First, the presence of an express defence, and in particular a defence of reasonable excuse, was accepted as a good indicator that fault need not be proved. Secondly, it was accepted that offences that are wholly regulatory in nature were clear examples where it could be readily inferred that Parliament intended that strict liability should apply.

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

AMANDA VANSTONE

19 September 2001

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

MINISTER FOR FINANCE AND ADMINISTRATION

20 SEP 2001

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

Dear Senator Cooney

I refer to the letter sent to my Senior Adviser on 23 August 2001 by James Warmenhoven, drawing our attention to the Scrutiny of Bills Alert Digest No. 10 of 2001.

In the Alert Digest the Senate Standing Committee for the Scrutiny of Bills noted that the Finance and Administration Legislation Amendment (Application of Criminal Code) Bill 2001 was amended by the insertion of a new Schedule 1A. The Committee noted that the Schedule specified that a number of offences in the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* were offences of strict and absolute liability.

In particular, the Committee requested, at page 20 of the Alert Digest No 10:

> *With regard to the new Schedule, the Committee seeks the Minister's advice as to whether any of its provisions creates a new strict liability offence, or converts an offence which previously was not one of strict liability into such an offence.*

Please find my response at Attachment A. I trust it will be of assistance to the Committee.

Yours sincerely

JOHN FAHEY

Parliament House CANBERRA ACT 2600
Tel: 61-2-6277 7400 Fax: 61-2-6273 4110

Centenary of Federation
1901-2001

As identified in the Alert Digest No 10 of 2001, Schedule 1A to the Finance and Administration Legislation Amendment (Application of Criminal Code) Bill 2001 declares that a number of offences in legislation administered within the Finance and Administration portfolio by the Australian Electoral Commission (AEC) are offences of strict liability. These amendments are necessary to ensure that after the *Criminal Code* (the Code) comes into operation offences that could currently be interpreted as strict liability offences continue to be offences of strict liability. Section 6.1 of the *Criminal Code* states that a criminal offence is a strict liability offence only if express provision is made to that effect. If an offence is not specified to be one of strict liability, after the Code comes into operation a court would be required to interpret it as a fault offence and no longer as a strict liability 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.

In some instances the amendments involve a judgement about the likely effect of existing offences and whether they are presently of a strict liability character. This has been necessary in some instances as 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.

As few Commonwealth criminal offences expressly state whether they are offences of strict liability, in most instances whether an offence is currently one of strict liability must be settled by judicial interpretation. In the absence of specific judicial interpretation, it has been necessary for officers of the AEC to determine in each instance whether Parliament originally intended that the criminal offence be one of strict liability. This has been done in consultation with the Attorney-General's Department in each instance. In addition, the AEC sought the advice of the Director of Public Prosecutions in certain instances.

In determining whether an individual offence is one of strict liability, officers of the AEC, on the advice of the Attorney-General's Department, followed a process of excluding all offences where strict liability could not apply for any one or more of a number of reasons.

The first offences to be excluded were those that expressly provided a fault element of any nature (such as intentionally or recklessly) or necessarily implied a fault element. This exclusion was based on 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."

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. On the advice of the Attorney-General's Department it was decided 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.

In addition, the existence of an express defence to an offence and the nature of the offence itself were two other significant considerations taken into account in determining whether an offence was one of strict liability. 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 Finance and Administration portfolio include those concerning failure to comply with reporting or record-keeping requirements.

The above factors were all taken into account in assessing each individual criminal offence for strict liability. I confirm that the Bill only applies strict liability to offences where it can be clearly inferred that Parliament intended that strict liability would apply. The Bill does not create any new offences of strict liability and does not convert any offence which previously was not one of strict liability into such an offence.

In relation to the one offence of absolute liability identified in the Bill, the same process was followed in assessing the offence as was outlined above for offences of strict liability. After this assessment, it was considered by officers of the AEC and the Attorney-General's Department that the offence contained no fault element, and may

operate as an offence of strict liability. However, the offence provision also contained a defence which placed a legal burden on the defendant. Strict liability offences only attract a defence of mistake of fact, and the defence of mistake of fact places an evidential burden on the defendant, not a legal burden. Therefore, to state that the offence was an offence of strict liability would change the operation of the provision, as well as providing two defences to the offence rather than one.

To avoid the confusion that would be caused by stating that the offence was a strict liability offence, and to ensure that the provision will continue to operate after the application of the Criminal Code in the same manner as it did prior to the application of the Criminal Code, it was considered necessary to express the offence as an absolute liability offence.

I trust the above comments are of assistance to the Committee.

The HON. **Joe Hockey** MP
Minister for Financial Services & Regulation

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19 SEP 2001

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

Dear Senator Cooney

I refer to the Committee's request for advice in the *Alert Digest No.10 of 2001* (22 August 2001) regarding commencement date of Parts 3 and 4 of the Financial Sector (Collection of Data) Bill 2001.

You may recall that I wrote to you on 26 June to explain that it was considered necessary for Part 2 to commence within twelve months of Royal Assent so that industry and APRA had adequate time for systems to be put in place to transfer data collection and other responsibilities from the RBA to APRA. At that time, Parts 3 and 4 were due to commence on 1 July 2001 as industry and APRA already have systems in place to put into immediate effect the requirements of these Parts. However, as the Bill was not able to be debated and passed by 1 July, the commencement dates for Parts 3 and 4 needed to be changed.

To maintain consistency with the commencement of Part 2, the commencement dates for Parts 3 and 4 were amended to commence on Proclamation or within twelve months of the Bill receiving Royal Assent, whichever occurs first.

The Treasury is currently working with APRA in seeking a Proclamation date in early October for the commencement of Parts 3 and 4 of the Bill. This will ensure that these Parts are given effect within the preferred six month period as set out in *Drafting Instruction No 2 of 1989* issued by the Office of Parliamentary Counsel.

Thank you for your interest in this matter.

Yours sincerely

1901-2001

SENATOR THE HON NICK MINCHIN

Minister for Industry, Science and Resources

25 SEP 2001

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25 SEP 2001

Senate Standing C'ttee 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 Barney,

Thank you for the letter of 30 August 2001 from the Committee Secretary concerning the Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Bill 2001 (the Bill). The letter invited my response to the matter of the Bill's application of strict liability to certain Industry, Science and Resources portfolio criminal offence provisions.

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.

In determining whether an offence provision was one of strict liability, my Department received advice from and consulted with the Attorney-General's Department.

Both the language of relevant statutes and nature of criminal offence provisions were taken into account, together with the reasons detailed in the attached Attorney-General's Department policy document (marked "A"). The process began with the primary position established by the High Court in *R v He Kaw Teh* (1984-85) 157 CLR 523, which is that there is a strong presumption that proof of fault is required in criminal offence creating provisions (*per* Brennan J at page 566).

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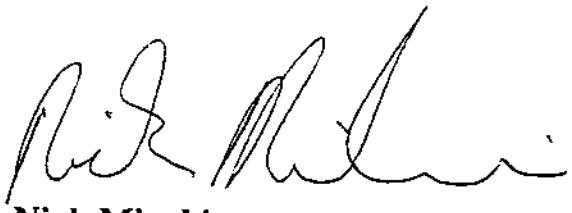
Accordingly all offences that expressly provided a fault element of any nature or necessarily implied a fault element were excluded from consideration as possible strict liability offences.

Additionally, where the relevant penalty in criminal offence provisions was sufficiently high – either in terms of the pecuniary penalty or the prescribed maximum term of imprisonment – then these too were excluded from consideration as strict liability provisions. As a general rule, offences that prescribed a penalty of imprisonment of more than 6 months were excluded from consideration.

The presence of an express defence, such as a defence of reasonable excuse, was also regarded as a good indicator that fault need not be proved.

These factors were all taken into account 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



Nick Minchin

ATTACHMENT A

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(2) 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.

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

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

24 SEP 2001

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25 SEP 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

Thank you for your letter of 30 August 2001, concerning comments made by the Committee in Alert Digest No. 11 of 2001 in relation to the Innovation and Education Legislation Amendment Bill (No. 2) 2001.

Specifically, the Committee expressed concern that use of the tax file number regime in relation to the new Postgraduate Education Loans Scheme (PELS) may trespass unduly on personal rights and liberties , in breach of principle 1(a)(i) of the Committee's terms of reference. I would make the following comments on the Committee's report:

- The provision of Tax File Numbers (TFNs) by students who wish to participate in the PELS will not breach principle 1(a) (i) of the Committee's terms of reference as it is not a compulsory requirement for a student to quote their Tax File Number.

- The provision of TFNs for PELS is consistent with arrangements that currently apply to the Higher Education Contribution Scheme (HECS) and the Open Learning Deferred Payment Scheme (OLDPS).

- TFNs are used by higher education institutions to advise the Australian Taxation Office of the amount a student is deferring. Students begin repaying their debt when their repayment income reaches the minimum threshold for any particular year, which is $23,242 in the 2001-02 income year.

- Under the legislation, students have the right to choose not to quote a TFN, consistent with the Tax File Guidelines 1992 issued under the *Privacy Act 1988*. The consequence of not providing a TFN is that the student will not be eligible to access the loan facility provided by the Commonwealth. In these instances, students can continue to pay their tuition fees direct to the institution.

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- Sections 52 and 53 of the *Higher Education Funding Act 1988* (HEFA) specifically prohibit institutions from requiring a student to provide their TFN or from unauthorised use or disclosure of a students' TFN for any purpose other than processing the deferred HECS amounts. Penalties are imposed for breaches. Section 98E of HEFA (as amended by the *Innovation and Education Legislation Amendment Act (No. 2) 2001*) has the effect of extending sections 52 and 53 of HEFA to PELS.

- Section 78 of HEFA provides for the imposition of penalties for the unauthorised recording or disclosure of a person's personal information. It also prohibits the provision of personal information to any Minister. New section 98K of HEFA has the effect of extending section 78 of HEFA to PELS.

- TFNs and the PELS loan request form documentation are to be retained by institutions until such time as the institution is satisfied that the calculation of a student's final semester debt has been completed, the student's account with the institution is finalised, and the ATO has been notified of the final semester debt. In keeping with the *Tax File Number Guidelines 1992*, issued by the Privacy Commissioner, any disposal of TFN information shall be by appropriate and secure means.

I trust that this information addresses the Committee's concerns.

Yours sincerely

DAVID KEMP

THE HON ALEXANDER DOWNER MP

MINISTER FOR FOREIGN AFFAIRS
PARLIAMENT HOUSE
CANBERRA ACT 2600

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

- 9 SEP 2001

Dear Senator Cooney

I am writing in response to your Committee's request for advice as to why the rules proposed under Clause 15 of the Intelligence Services Bill 2001 should not be subject to Parliamentary scrutiny. I understand that the Committee may consider the responsible Minister's making of the rules to insufficiently subject the exercise of legislative power to parliamentary scrutiny, and that this would be in breach of principle 1(a)(v) of the Committee's terms of reference.

Clause 15 obliges the relevant Ministers responsible for ASIS and DSD to make written rules regulating the communication of, and retention by, the relevant agency of intelligence information concerning Australian persons. Both ASIS and DSD currently have rules in place. The purpose of the rules is to provide a clear direction to those responsible for collecting and distributing intelligence information concerning Australian persons.

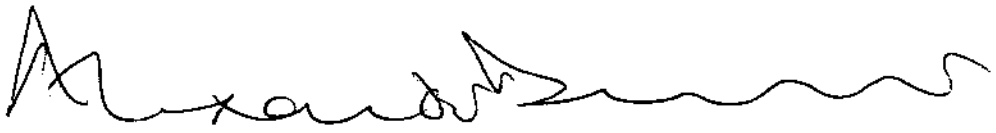
The current rules, and those envisaged under Clause 15, are based on the premise that the privacy of individuals should not be subject to intrusion by government other than in exceptional circumstances. The Rules provide clearly limited circumstances in which information about Australians can be collected and distributed. The rules operate as a safeguard for Australians and are intended to bind the collectors of information. The rules are designed to ensure that the foreign collection agencies act lawfully, with propriety, and in accordance with the Government's commitment to privacy and civil liberties.

In terms of future Parliamentary scrutiny, the Joint Select Committee on the Intelligence Services, which tabled its report in Parliament on 27 August 2001, considered Clause 15 of the Intelligence Services Bill 2001. The Committee recommended (Recommendation 9) that a new subclause be added to Clause 15 of the Intelligence Services Bill 2001 to require that the Parliamentary Committee on ASIO and ASIS be briefed by the Inspector-General of Intelligence and Security (IGIS) on the privacy rules and any changes to their provisions. The Government intends to accept this recommendation and the Bill will be amended accordingly. Flowing from this recommendation it is anticipated that the Parliamentary Joint Committee will have access to the rules and be able to provide comment. In addition it should be noted that

the Inspector-General of Intelligence and Security monitors the activities of all Australian intelligence and security agencies and reports on ASIS and DSD's compliance with the rules in a public report which is presented to the Parliament annually.

Given the nature of the rules, as outlined above, the recommendation of the Joint Select Committee on the Intelligence Services on the briefing of the proposed Parliamentary Joint Committee on the rules (which the Government will accept) and that Committee's access to the rules, I consider these measures should alleviate the potential concerns of the Standing Committee for the Scrutiny of Bills.

Yours sincerely



Alexander Downer

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

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

24 SEP 2001

Dear Chairman Barney.

I refer to the Senate Standing Committee for the Scrutiny of Bills Twelfth Report of 2001, particularly the matter relating to the Trade Practices Amendment (Telecommunications) Bill 2001.

The Committee has sought further advice with respect to proposed amendments to limit rights to bring evidence before the Australian Competition Tribunal (Tribunal). In particular, the Committee has sought advice as to whether the Tribunal, in its current hearings, has been asked to consider significant quantities of material not originally put before the Australian Competition and Consumer Commission (ACCC) and whether any comment has been made during the course of the hearings as to the value of such new material.

The ACCC has advised that witness statements in relation to the existing Tribunal hearings are not due until November 2001, but that Telstra has already introduced fresh evidence through its statement of issues in contention. The ACCC also expects that parties will use their existing rights to adduce further new evidence when filing witness statements in November. Due to the private nature of Tribunal hearings, no comment has been made on the value of the new material introduced to date. While there is no direct evidence of existing procedural abuse, the proposed amendment is concerned with removing the potential for procedural abuse in the future.

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

Yours sincerely

Richard Alston

RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts