SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTH REPORT

OF

2002

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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

FOURTH REPORT OF 2002

The Committee presents its Fourth Report of 2002 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:

Border Security Legislation Amendment Bill 2002

Coal Industry Repeal (Validation of Proclamation) Act 2002

Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002

Financial Corporations (Transfer of Assets and Liabilities) Amendment Bill 2002

Financial Services Reform Act 2001

Financial Services Reform (Consequential Provisions) Act 2001

Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]

Suppression of the Financing of Terrorism Bill 2002

Telecommunications Interception Legislation Amendment Bill 2002

Border Security Legislation Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 19 April 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. 3 of 2002

This bill was introduced into the House of Representatives on 12 March 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Customs Act 1901*, the *Customs Administration Act 1985*, the *Fisheries Management Act 1991*, the *Migration Act 1958* and the *Evidence Act 1995* to:

- increase Customs powers at airports by allowing Customs officers to patrol airports, increasing the restricted areas in which unauthorised entry is prohibited and by allowing officers to remove people from those restricted areas;
- require employers of people who work in restricted areas of the airport to provide information about those people to Customs; and the issuers of security identification cards, which are issued to most people who work at airports, to provide information about the people to whom they have issued security identification cards;
- require goods that are in transit through Australia to be reported to Customs; allow in-transit goods to be examined; and allow certain in-transit goods to be seized;
- require mail to be electronically reported to Customs as part of a cargo report;

- require certain airlines and shipping operators to report passengers and crew to Customs and the Department of Immigration and Multicultural and Indigenous Affairs by electronic means;
- require certain airlines to provide Customs with access to their computer reservation systems;
- allow the Australian Fisheries Management Authority to disclose vessel monitoring system data to Customs under the Fisheries Management Act;
- allow the Chief Executive Officer of Customs to authorise a person to perform the functions of a Customs officer by reference to their position or office even if that position or office does not exist at the time of making the authorisation;
- tighten provisions allowing the Chief Executive Officer of Customs to authorise the carriage of approved firearms and personal defence equipment by Customs officers for the safe exercise of powers conferred under the Customs Act and other Acts;
- restore the power to arrest persons who assault, resist, molest, obstruct or intimidate a Customs officer in the course of his or her duties, which was inadvertently removed by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*;
- include the Australian Bureau of Criminal Intelligence as a Commonwealth agency for the purposes of section 16 of the Customs Administration Act; and
- provide that certain undeclared dutiable goods found in the unaccompanied personal and household effects of a person are forfeited goods.

The bill also contains a saving provision.

Strict liability offences
Various provisions

A number of amendments proposed by this bill will create criminal offences of strict liability. These provisions include proposed new subsections 64AB(3AE), 64ACD(2) and 213A(6) of the *Customs Act 1901*, and proposed new section 245N of the *Migration Act 1958*.

Proposed subsection 64AB(3) of the *Customs Act 1901* concerns the provision to Customs of a report where cargo is intended to be kept on board a ship or aircraft for on-shipment outside Australia. Proposed section 64ACD of the *Customs Act 1901* concerns the provision to Customs of a report of passengers and crew on ships or aircraft arriving in Australia from overseas. Proposed section 245N of the *Migration Act 1958* concerns the provision of a similar report to the Department of Immigration and Multicultural and Indigenous Affairs. Proposed section 213A of the *Customs Act 1901* concerns the provision to Customs of information about restricted area employees.

In each case, the Explanatory Memorandum merely notes the fact that these provisions create offences of strict liability, but provides no reason for this departure from the normal practice – ie that criminal liability should be imposed only on someone who acts intentionally or recklessly. The Committee, therefore**, seeks the Attorney-General's advice** as to why these provisions create offences of strict liability.

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

Relevant extract from the response from the Minister

I refer to the Scrutiny of Bills Alert Digest No. 3 of 2002, particularly the matters relating to the Border Security Legislation Amendment Bill 2002 ("the Border Security Bill"). Specifically, the Committee has asked for advice on the creation of criminal offences of strict liability, and the reason for introducing amendments to section 189A of the *Customs Act 1901* ("the Act") and their effect, if any, on safeguards previously established in relation to the carriage of firearms by Customs officers.

Creation of criminal offences of strict liability

Proposed new subsections 64AB(3AE), 64ACD(3) and 213A(6) of the Act, and proposed new section 245N(3) of the *Migration Act 1958* will create criminal offences of strict liability. The provisions relate to a failure to provide a cargo report of in-transit cargo, a report of passengers and crew, or information about people working in restricted areas.

Strict liability offence regimes are common across jurisdictions to encourage compliance with regulatory requirements ranging from speeding offences to not being able to substantiate entitlement to diesel fuel rebate. Strict liability offences are appropriate in a regulatory context because there is a legitimate expectation that persons to whom regulatory requirements apply will take care to ensure compliance. The approach in this Bill reflects overall Government policy on strict liability. Strict

liability is a deliberate (and necessary) policy to ensure that Customs has access to information critical to protection of Australia's border. The penalties for these offences are relatively modest. The pecuniary penalties involved range from a maximum of 30 penalty units to a maximum of 60 penalty units. No term of imprisonment is imposed in relation to any of the offences.

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

Customs uses risk assessment to fulfil its border protection and revenue collection responsibilities. The information provided to Customs is the basis of the risk assessment. This information is provided to Customs by the report of cargo and the report of passengers and crew on ships and aircraft. Failure to provide information affects a Customs officer's ability to conduct a proper risk assessment, in the same way that false or misleading information also impedes proper risk assessment. Consequently, inaccurate risk assessments can allow prohibited imports, such as narcotics and weapons, illegally into the community and the capacity to monitor the movement of goods on behalf of other countries, or as required by international agreement, is limited.

The Government believes that the risks to the community justify the introduction of strict liability offences for breaches of the regulatory mechanisms designed to reduce those risks.

The defences in the *Criminal Code*, as it applies to the Customs Act, will be available for the offences of strict liability introduced by the Border Security Bill. This includes the defence of mistake of fact.

Failure to provide report of in-transit cargo

Where imported cargo is intended to be discharged in Australia that cargo is required to be reported to Customs. In the case of cargo to be discharged from a vessel, the report is to be made to Customs not later than 48 hours before the ship's arrival at the port if its journey from the last port outside Australia is likely to take 48 hours or more. If the journey is likely to take less than 48 hours, the report must be provided not later than 24 hours before its arrival. In the case of cargo to be discharged from an aircraft, if the report is made by document the report must be made within three hours after the arrival of the aircraft at the first Australian airport and if it is to be made by computer, it must be made at least two hours before the arrival of the aircraft in Australia.

If a report of cargo intended to be discharged is not made to Customs, while there is no offence provision, Customs can refuse to grant permission to unship the goods. However, since in-transit goods are not going to be landed in Australia, this sanction is not available where an operator fails to make a cargo report. Where no report is made, goods that may pose a risk to the community or may be used as part of a terrorist threat may be illegally discharged and enter Australia. Similarly, the cargo in Australian ports cannot be monitored on behalf of other countries or as required by international agreements.

Strict liability offences for the reporting of cargo to be discharged in Australia will be introduced to the Customs Act as a result of amendments by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* ("the ITM Act") (which are yet to commence).

Failure to provide report of crew and passengers

This proposal seeks to require operators of ships and aircraft arriving from a place outside Australia to provide Customs and the Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") with an advance report of passenger and crew information.

Advance passenger and crew information means information collected by an airline from a passenger or crew member at check-in and forwarded to the border control agency in the destination country. The information consists of: Name; Date of Birth; Sex; Travel Document (Passport) number; and Issuing Authority. These data elements are contained in any passport and will be required when the passenger arrives in Australia.

The reporting of information to Customs is primarily done electronically. The Chief Executive Officer ("CEO") of Customs will approve an electronic system for each operator. As a fallback mechanism in the event that the approved system is not working for whatever reason, the operator may report by another electronic means eg, fax or email, or may report by document. Operators will therefore have a variety of means by which to comply with the obligation to report.

It is a difficult and complicated process to identify the high-risk passenger or crew member. Advanced passenger and crew information facilitates the pre-arrival risk management capability for border control agencies. Such a requirement will significantly enhance Customs and DIMIA's ability to conduct checks on the passengers and crew arriving in Australia and identify, prior to arrival, persons who may be likely to import prohibited goods or breach other Commonwealth laws, including those against terrorism. This proposal is consistent with developments in the USA, UK and Canada.

This proposal to include a strict liability offence for failing to provide advance reports of passenger and crew, is consistent with offences that apply to other electronic reporting requirements within the Customs Act that are applicable to air and sea cargo. Further, existing section 64AC of the Customs Act requires a passenger and crew report to be given to Customs and it is an offence not to provide such a report. Prior to the commencement of the *Criminal Code*, the passenger and crew reporting requirements were strict liability provisions and (once amended by the ITM Act) will again be strict liability. There is therefore no departure from the existing position.

In view of the foregoing it is considered appropriate that failing to provide an advance report of passengers and crew should be a strict liability offence.

Failure to provide information about people working in restricted areas

In accordance with the provisions of the *Air Navigation Regulations 1947* most people working at international airports in Australia with access to restricted areas require a security clearance and wear an Aviation Security Identification Card ("ASIC") indicating that they have been security cleared. Under these Regulations employers are authorised to issue such identification cards to their employees.

However, not all employees of retail businesses located within the restricted areas of an international airport are required to have an Aviation Security Identification Card.

The presence of these people in the restricted or sterile area of international airports can pose a threat to the integrity and security of the border. There are many examples, both in Australia and overseas, of such employees acting in concert with passengers and/or crew members to import or export prohibited goods.

Under this proposal employers of persons working within restricted areas but not issued with ASICs, will be required to provide information to Customs. This information must be provided to an authorised officer and consists of the name and address of the person, the person's date and place of birth and other information prescribed by the regulations. It will be a strict liability offence for an employer to fail to provide this information.

The *Quarantine Act 1908* has a strict liability offence for failing to produce documents requested by a Quarantine officer (section 38 refers). Under section 50 of the *Excise Act 1901*, manufacturers must keep records and on demand produce them to the requesting officer.

Under this proposal the employer will have seven days from the employment of a person who will work in a restricted area, to provide the information to an authorised Customs officer.

In view of the above, and given the regulatory nature of the provision, it is considered appropriate that failing to provide information about people working in restricted areas should be a strict liability offence.

The Committee thanks the Minister for this response.

Rights and liberties and the carrying of firearms
Proposed new subsection 89A(1)

Proposed new subsection 189A(1) of the *Customs Act 1901*, to be inserted by item 1 of Schedule 10 to this bill, makes provision for officers of Customs to carry firearms.

Section 189A was originally inserted into the *Customs Act 1901* by the *Border Protection Legislation Amendment Act 1999*. The Committee expressed some concerns about that provision in *Alert Digest No. 15 of 1999*. In its *Eighteenth Report of 1999*, the Committee was satisfied with the response it received to its concerns.

The Explanatory Memorandum states that the purpose of these amendments is "to tighten the various provisions and accommodate the various circumstances where the CEO considers it appropriate for an officer to be issued with personal defence equipment and firearms". It is therefore proposed that:

- firearms be issuable to Customs officers to enable the safe exercise of powers conferred on them under the Customs Act and any other Act;
- firearms continue to be issued to enable the boarding of either a foreign or Australian ship that has been chased; and
- the restriction that only the commander of a Customs vessel issue firearms to officers under his or her command be removed – under the amendments, firearms will now be issued by an authorised arms issuing officer.

In responding to the Committee's concerns in *Alert Digest No. 15 of 1999*, the Minister for Immigration and Multicultural Affairs emphasised the safeguards to be introduced to ensure that the risks involved in the use of weapons in these circumstances by persons other than trained police officers were kept to a minimum. The Committee **seeks the Attorney-General's advice** as to the reason for now introducing these amendments, and their effect, if any, on the safeguards previously referred to.

Pending the Attorney's response, 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 proposed amendments to the Act and the *Customs Regulations 1926* ("the Regulations") consolidate and tighten the Chief Executive Officer's powers to authorise the carriage of firearms and personal defence equipment by Customs officers.
>
> These amendments do not seek to expand the current powers of Customs officers or the circumstances in which officers carry approved firearms, they will however permit increased use of personal defence equipment. These amendments will not in any way obviate the safeguards previously established, which ensure that the risks involved in the use of weapons will be kept to a minimum.
>
> *Current legislation*
>
> Currently both the Act and the Regulations allow the CEO of Customs to authorise the carriage of firearms and personal defence equipment. Section 189A of the Act specifically allows Customs officers in Customs vessels to carry firearms and

personal defence equipment but (subsection 189A(4)) also recognises the powers given to the CEO under regulation 194.

Regulation 194 allows the CEO of Customs to authorise the carriage of firearms by any officer. The use of this regulation has been limited to circumstances where Customs officers on patrol in remote areas carry firearms for protection from wildlife such as wild buffalo, feral pigs and crocodiles.

These amendments will consolidate the powers into a single legislative framework. The amendments will also provide for Customs officers to carry firearms and personal defence equipment when carrying out functions under other Commonwealth Acts such as the *Migration Act 1958*, the *Quarantine Act 1908*, the *Fisheries Management Act 1991* and the *Environment Protection and Biodiversity Conservation Act 1999*.

The amendments will also permit Customs officers to use personal defence equipment as defined in subsection 189A(5) of the Act in specific operational circumstances, for example when executing a search warrant.

It is more effective and efficient to have a single system within Customs legislation, which deals with the carriage of firearms and personal defence equipment. If the proposal is accepted then Customs Regulation 194 would be repealed.

Safeguards

Consistent with the position outlined by the Minister for Immigration and Multicultural Affairs in 1999, Customs has established safeguards for the carriage of firearms and personal defence equipment. This has been done with the assistance of the Australian Federal Police ("AFP").

All Customs marine officers now undergo rigorous training in the use of force as prescribed by the AFP. This training is based on conflict de-escalation and conflict management. These matters are documented in the Customs National Marine Unit Manual "*Operational Safety and General Instructions*". Along with the new training procedures, new systems have been developed for the management and control of firearms as well as for items of personal defence equipment in accordance with CEO Direction No.1 of 2000, which was issued by the CEO under subsection 189A(2) of the Act.

Based on these experiences Customs is proposing to extend this legislative regime for the control and management of firearms and personal defence equipment to the remaining circumstances where such equipment is used. These changes will not trespass unduly on personal rights and liberties. The intention is to consolidate but not expand existing powers.

I trust this advice addresses the Committee's concerns satisfactorily.

The Committee thanks the Minister for this response.

Coal Industry Repeal (Validation of Proclamation) Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 2 of 2002*, in which it made various comments. The Minister for Industry, Tourism and Resources has responded to those comments in a letter dated 21 March 2001.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 4 April 2002) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 2 of 2002

This bill was introduced into the House of Representatives on 20 February 2002 by the Minister for Industry, Tourism and Resources. [Portfolio responsibility: Industry, Tourism and Resources]

The bill proposes to validate the commencement of the *Coal Industry Repeal Act 2001* on 1 January 2002 as intended by the Proclamation signed by the Governor-General in Executive Council on 20 December 2001. This validation is necessary as a result of the failure to gazette the Proclamation before 1 January 2002. The validation of the 1 January 2002 commencement date will also validate all actions taken on the assumption that the Act commenced on that date.

Retrospective commencement
Subclause 2(1)

Subclause 2(1) of this bill provides that clauses 3, 4 and 5 are to commence retrospectively on 31 December 2001. The Explanatory Memorandum states that the purpose of these provisions is to validate a purported Proclamation which, as a result of an oversight, was not published in the *Gazette* until 1 February 2002. This oversight was previously noted by the Committee in *Alert Digest No. 1 of 2002* in which it sought further advice from the Minister.

Any person who might have been affected by the Proclamation has, apparently, acted as if it were valid. It seems, therefore, that the retrospective commencement of the Act will not act to disadvantage any person. The Committee **seeks the Minister's confirmation** that no-one will be disadvantaged by the Act's retrospective commencement.

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

Relevant extract from the response from the Minister

Thank you for your letter of 14 March 2002 concerning the Coal Industry Repeal (Validation of Proclamation) Bill 2002 (the Bill), which has now been passed by Parliament.

As I explained in my response to the Committee's comments in *Alert Digest* 1/02, the Bill aims to correct an administrative oversight, namely the omission to Gazette, prior to 1 January 2002, the Governor-General's Proclamation setting the commencement date of the *Coal Industry Repeal Act 2001* (the Act) at 1 January 2002. The Act implements, for the Commonwealth's part, the dissolution of the Joint Coal Board and its replacement by Coal Services Pty Ltd.

Based on feedback from NSW, legal and other advice, I understand that those affected acted as if the Proclamation was valid. When the omission was realised, my Department worked with the NSW Government and Coal Services Pty Ltd to develop a remedy that did not disadvantage those affected and which provided them with the confidence to continue to act as if the Proclamation was valid.

These parties fully supported the approach encompassed in the Bill. I understand that Coal Services Pty Ltd's consideration also took into account the need for a solution that did not disadvantage its owners – who represent employers and employee's in the NSW coal industry – its management and its staff. As such, I consider that the interests of all those affected have been taken into account, wither directly or indirectly, and that no one should be disadvantaged by the retrospective commencement provisions of the Bill.

The Committee thanks the Minister for this response.

Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 1 of 2002*, in which it made various comments. The Attorney-General responded to those comments in a letter dated 8 March 2002.

In its *Second Report of 2002*, the Committee sought further advice from the Attorney-General in relation to retrospectivity. The Attorney-General responded in a letter dated 15 March 2002.

In its *Third Report of 2002*, the Committee sought an assurance from the Attorney-General that the bill will not be used as a precedent for the retrospective creation of criminal offences in other circumstances. The Attorney-General has responded in a letter dated 4 April 2002.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 4 April 2002) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report.

An extract from the *Third Report* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 1 of 2002

This bill was introduced into the House of Representatives on 13 February 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend:

- the *Criminal Code Act 1995* to add new offences relating to the sending of dangerous, threatening and hoax material through the post or similar services; and
- the *Crimes Act 1914* to replace existing outdated postal offences.

The bill proposes that federal offences cover the use of all postal and other like services, not just Australia Post as at present. The bill also increases the penalties for the offences of sending threatening, dangerous or hoax material through postal and similar services to more appropriate levels which reflect the harm that can be caused by material.

Legislation by press release
Schedule 1

Schedule 1 to this bill proposes to amend the Criminal Code by creating a new offence dealing with the use of the post to send hoax material. These amendments are expressed to commence at 2pm on 16 October 2001, thus retrospectively creating a criminal offence. The justification given for this retrospectivity (as set out in the Explanatory Memorandum) is that this is the time and date at which the Prime Minister publicly announced that he would introduce such provisions.

Notwithstanding the seriousness of the conduct at which this bill is directed, the retrospective creation of a criminal offence is similarly a serious matter. The bill itself is a very clear example of "legislation by press release" – a practice which the Committee has consistently brought to the attention of Senators. As the Committee has previously noted, "the fact that a proposal to legislate has been announced is no justification for treating that proposal as if it were enacted legislation".

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 Attorney-General dated 8 March 2002

> The Committee observed that the retrospective creation of a criminal offence is a serious matter and further stated that the announcement of a proposal to legislate provides no justification for treating that proposal as if it were enacted legislation. The Government agrees that the retrospective creation of an offence is a serious matter. However, in the case of the new hoax offence there are exceptional circumstances justifying retrospectivity. During October 2001, hoaxes were causing significant concern and disruption. Following the terrorist attacks of 11 September 2001, police investigated over 3000 incidents involving suspicious packages of which over 1000 involved anthrax hoaxes. As a result of these hoaxes, mail centres and offices had to be decontaminated, security measures enhanced and emergency services diverted from other duties. These false alarms cost the community both in

terms of unnecessary use of public resources and in terms of increased fear and anxiety.

As stated in the Explanatory Memorandum, it was necessary to ensure that such conduct was adequately deterred in the period before the resumption of Parliament. The Prime Minister's announcement of 16 October 2001 provided this deterrence. The Prime Minister's announcement was in very clear terms, and received immediate, widespread publicity. The amendments operate only from the time of that announcement.

It has been accepted that amendments to taxation law may apply retrospectively where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and the Bill is introduced within 6 months after the date of the announcement (Senate Resolution of 8 November 1988). The new hoax offence was introduced within 4 months after the date of the Prime Minister's announcement.

An additional consideration is that there is no circumstance in which the perpetration of a hoax that a dangerous or harmful thing has been sent could be considered a legitimate activity in which a person was entitled to engage pending these amendments. The amendments do not retrospectively abrogate a legitimate right or entitlement. For all these reasons, the retrospective application of these amendments is not considered to contravene fundamental principles of fairness or due process.

The Committee thanks the Attorney-General for this response which acknowledges that the retrospective creation of an offence is a serious matter. Specifically, the Attorney draws attention to the apparently analogous practice of legislation by press release when retrospectively amending taxation law, and states that there are no circumstances in which perpetrating a hoax "could be considered a legitimate activity" and that, therefore, the amendments "do not retrospectively abrogate a legitimate right or entitlement".

The Committee has often expressed concern at the prevalence of 'legislation by press release' in amendments to taxation law. Taxation law is concerned with financial arrangements, and appropriate behaviour in relation to them. Imprecision in the commencement of amendments may have behavioural and financial consequences. Taxation law is essentially regulatory in nature. However, these amendments propose to retrospectively create criminal offences – a much more serious issue when considering the merits of retrospectivity. The practices developed for amending taxation law are not an appropriate precedent for amendments which go to criminal responsibility.

In addition, while it is undeniable that perpetrating a hoax cannot be considered a 'legitimate' activity, what this bill proposes to do is retrospectively declare it to be 'criminal' activity – again, a different, and more serious, issue of principle. Not every 'illegitimate' activity is 'criminal' activity. Declaring something 'illegitimate', and then retrospectively declaring it to be a crime, would seem to establish an unfortunate and undesirable precedent. A crime may be created by a simple announcement. The Committee **asks the Attorney-General** to reconsider these provisions so that, before they become law, they can be adequately scrutinised by both the House of Representatives and the Senate.

For these reasons, the Committee continues to draw 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 Attorney-General dated 15 March 2002

> I wish to reiterate that the terms of the anti-hoax offence and its retrospectivity were very clearly foreshadowed by the Prime Minister on 16 October 2001. The new offence is very similar to the existing Crimes Act 1914 offence, with complete overlap in most circumstances that are likely to arise. I also note that the Prosecution Policy of the Commonwealth, and the public interest test that it incorporates, will apply to any proposed prosecution of this offence.

The Committee thanks the Attorney-General for this further response, but reiterates its concern at the use of retrospectivity in the creation of criminal offences. Ultimately, this is an issue best left for resolution by the Senate. The Committee **seeks the Attorney-General's assurance** that these provisions will not be used as a precedent for the retrospective creation of criminal offences in other circumstances.

Given the seriousness with which it views the retrospective creation of criminal liability, the Committee continues to draw 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 Attorney-General dated 4 April 2002

> I can assure the Committee that the Government will not use this Bill as a precedent for the retrospective creation of criminal offences. As stated in the Explanatory Memorandum to the Bill, the Government does not lightly pursue retrospective criminal laws. An offence would only be made retrospective after careful consideration on a case by case basis and only where there are special circumstances necessitating retrospectivity, as there were in relation to the new hoax offence.

The Committee thanks the Attorney-General for this further response.

Financial Corporations (Transfer of Assets and Liabilities) Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. The Parliamentary Secretary to the Treasurer has responded to those comments in a letter dated 23 April 2002. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Parliamentary Secretary's response are discussed below.

Extract from Alert Digest No. 3 of 2002

This bill was introduced into the Senate on 12 March 2002 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Financial Corporations (Transfer of Assets and Liabilities) Act 1993* to extend the sunset clause, from 30 June 2001 to 30 June 2003, for foreign banks obtaining a banking authority in order to be eligible for concessional tax treatment when transferring assets and liabilities. The bill also extends the deadline to effect any subsequent transfer of assets and liabilities from 30 June 2004 to 30 June 2006.

Retrospective commencement
Clause 2

By virtue of clause 2 of this bill, all of its provisions will commence retrospectively on 1 July 2001. It appears from the Explanatory Memorandum that these provisions will not prejudice any person, but this is by no means clear. The Committee, therefore, **seeks the Treasurer's confirmation** that the bill's retrospective commencement will not act to the disadvantage of any person.

Pending the Treasurer's confirmation, the Committee draws Senators' attention to this bill 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 Parliamentary Secretary

The retrospective application of clause 2 of the bill extends the sunset clause from 1 July 2001 until June 2003 for banks obtaining a banking authority in order to be eligible for concessional tax treatment when transferring assets and liabilities. The effect of the retrospective commencement of clause 2 is to the advantage of foreign banks by extending the tax concession to foreign bank branches transferring their assets and liabilities.

I have been advised that there will be no increased tax burden or a reduction of banking services due to the commencement of clause 2. I have also been advised that foreign banks changing to a branch structure will allow foreign banks to conduct their business with a more efficient operating structure and provides a consumer protection benefit of foreign banks operating with a branch structure having to comply with a greater range of prudential requirements than a subsidiary.

In summary, it is considered that there will be no disadvantage created by the retrospective commencement of clause 2 of the Financial Corporations (Transfer of Assets and Liabilities) Amendment Bill 2002.

The Committee thanks the Parliamentary Secretary for this response.

Financial Services Reform Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 6 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation responded to those comments in a letter dated 7 August 2001. The response was reported in the Committee's *Ninth Report of 2001*.

In its *Alert Digest No. 11 of 2001*, the Committee sought advice regarding an amendment made to proposed new section 854B. The Parliamentary Secretary to the Treasurer has responded in a letter dated 13 May 2002.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 27 September 2001) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from the *Alert Digest No. 11 of 2001* and relevant parts of the Parliamentary Secretary's response are discussed below.

Amendment commented on in Alert Digest No. 11 of 2001

Henry VIII clause
Proposed new section 854B

This bill proposes a number of amendments to the law relating to financial services and markets. The Committee considered the bill in *Alert Digest No. 6 of 2001* in which it sought the Minister's advice in relation to certain matters, and has reported on that advice in its *Ninth Report of 2001*.

On 22 and 23 August 2001, the Senate agreed to amend the bill. Most of these amendments raised no issues within the Committee's terms of reference. However, amendment (36) proposes to insert a new section 854B in the *Corporations Act 2001*. This provision states that regulations may exempt a person or class of persons from the provisions of the relevant Part of the Act, or provide that that Part applies as if specified provisions "were omitted, modified or varied as specified in the regulations".

This provision would seem to authorise the modification of the application of primary legislation by regulation. In the absence of an explanation, the Committee **seeks the Minister's advice** as to why it is appropriate that regulations are able to affect the operation of primary legislation in these circumstances.

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

Relevant extract from the response from the Parliamentary Secretary

You have also requested information on section 854B. This section contains a regulation making power which enables exemption and modifications to be made to the application of Part 7.4 of the *Corporations Act 2001* (limits on involvement with licensees), to allow flexibility in applying the provisions in this Part. As you would be aware, Part 7.4 contains a range of measures that relate to limits on control of certain licensees, a requirement that those involved in markets and clearing and settlement facilities be fit and proper and also record keeping requirements.

The regulation making power was primarily inserted to ensure that in the case of limits on control, the provisions did not prevent licensees structuring their businesses in ways which would, on the face of the legislation, be prohibited and which would on every occasion require a ministerial decision. The particular circumstance contemplated was where the licence is held by a wholly owned subsidiary company. The explanatory memorandum to the amendment indicates that the regulation making power is only intended to be used in exceptional circumstances.

I trust this information will be of assistance to you.

The Committee thanks the Parliamentary Secretary for this response.

Financial Services Reform (Consequential Provisions) Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 7 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation responded to those comments in a letter dated 7 August 2001.

In its *Ninth Report of 2001*, the Committee sought further advice from the Minister in relation to no review of decisions. The Parliamentary Secretary to the Treasurer has responded in a letter dated 13 May 2002.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 27 September 2001) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from the *Ninth Report of 2001* and relevant parts of the Parliamentary Secretary's response are discussed below.

Extract from Alert Digest No. 7 of 2001

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

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

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

No review of decisions
Schedule 1, item 1

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

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

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

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

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

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

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

- decisions by the Minister under proposed Division 1 of Part 7.4 of the Corporations Act (the 15 per cent voting power limitation on prescribed market and clearing and settlement facility licensees); and
- decisions of the Securities Exchanges Guarantee Corporation (the SEGC) under, proposed Part 7.5 of the Corporations Act (compensation arrangements)

will not subject to review under the ADJR Act.

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

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

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

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

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

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

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

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

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

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

Relevant extract from the further response from the Parliamentary Secretary dated 13 May 2002

Thank you for your letter of 8 February 2002 to my adviser Ms Melissa Baldwin concerning provisions in the *Financial Services Reform Act 2001. I* apologise for the delay in responding.

Your letter requests information as to what remedies are available to a claimant who is dissatisfied with a compensation decision made by the Securities Exchange Guarantee Corporation (SEGC).

Section 888H of the *Financial Services Reform Act 2001* provides that where the SEGC has disallowed a claim, the claimant may bring proceedings in the Federal Court or a state or territory supreme court to establish a claim if the claim has been disallowed. The provision also provides that if the SEGC has not decided the claim within a reasonable period the claimant may bring proceedings in the Federal Court or a state or territory supreme court to establish the claim. Section 888H includes a time limit, provisions relating to costs and the declarations the court may make.

The Committee thanks the Parliamentary Secretary for this further response.

Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. Pending a response from the Attorney-General, the Committee received a briefing on 1 May 2002 from representatives of the Attorney-General's Department in relation to the Criminal Code Amendment (Espionage and Related Offences) Bill 2002, the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and the Suppression of the Financing of Terrorism Bill 2002. A summary of that briefing is set out below and the proof transcript is attached to this Report.

The Attorney-General has responded to the comments of the Committee in a letter dated 14 May 2002. Unfortunately the letter was not received in time for the Committee to give it full detailed consideration. However, a copy of the letter is attached to this Report for the information of Senators.

Following the extract from Alert Digest No. 3 and the relevant parts of the Attorney-General's response is a summary of the evidence provided to this Committee and the Legal and Constitutional Legislation Committee.

Extract from Alert Digest No. 3 of 2002

This bill was introduced into the House of Representatives on 13 March 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

This bill is identical in content to the Security Legislation Amendment (Terrorism) Bill 2002, which was introduced into the House of Representatives on 12 March 2002 by the Attorney-General. The former bill was discharged from the House of Representatives *Notice Paper* on 13 March 2002 and re-introduced later on 13 March 2002.

The bill proposes to:

- amend the *Criminal Code Act 1995* (the Criminal Code) to combat terrorism by ensuring that there are criminal offences to deal with terrorism and membership of a terrorist organisation, or other links to a terrorist organisation, may be an offence;

- insert a series of new terrorism offences into the Criminal Code, all of which carry a penalty of life imprisonment;

- include a regime for the Attorney-General to proscribe an organisation that has a specified terrorist connection or that has endangered, or is likely to endanger, the security or integrity of the Commonwealth, and to make membership or other specified links with such an organisation an offence;

- replace the treason offence in the *Crimes Act 1914* with a new offence, framed in accordance with contemporary drafting practice and the standard approach under the Criminal Code; and

- propose amendments to the *Australian Protective Service Act 1987* and the *Crimes (Aviation) Act 1991* to ensure that Australian Protective Service has powers to deal with terrorist related offences, and to exercise the aircraft security officer function on intra-state flights.

General comment

This bill is part of a legislative package designed to strengthen Australia's counter terrorism capabilities. While the bill expressly concerns terrorist acts, it also enables the Attorney-General to proscribe organisations that (in his or her opinion) are "likely to endanger" Australia's security or integrity. The bill would penalise a person who has "taken steps" to become a member of such an organisation and imposes legal burdens on defendants to disprove matters. On its face, the bill seems to introduce considerable scope for discretion in the criminal law. The Committee **intends to seek a briefing and invite comment** on the provisions of this bill and other bills in the legislative package.

Absolute liability offences
Proposed new subsections 101.2(2), 101.4(2) and 101.5(2)

Among other things, this bill proposes to insert three new provisions in the *Criminal Code*. Proposed new subsections 101.2(2), 101.4(2) and 101.5(2) will create criminal offences of absolute liability.

The Explanatory Memorandum seeks to justify this very considerable departure from the general principle that criminal liability should depend on the accused having acted intentionally or recklessly in the following terms (in relation to proposed subsection 101.2(2)):

Proposed subsection 101.2(2) provides that absolute liability applies to the provision or receipt of training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act. This means that, as long as the person's provision or receipt of the training was voluntary, the person's mental state is not relevant … Absolute liability is appropriate where fault is required to be proven in relation to another element or other elements of the offence, and there is no legitimate ground for the person to allow a situation to occur where the absolute liability element occurs. In this case, a person who provides or receives training in the making or use of firearms, explosives or weapons should be on notice that this should not be done if there is any possibility of this being connected to a terrorist act. The person must avoid this possibility arising, and if they cannot, they should not provide or receive the training.

While the Committee has no wish to support the provision of terrorist training or activities, it seems that criminal liability is being imposed here on the basis of 'possible connections': if the provision of training is possibly connected to a terrorist act then a person commits an offence; if the possession of a thing is possibly connected with a terrorist act then a person commits an offence. These amendments would seem to widen the scope for criminal liability alarmingly.

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 Attorney-General

The Committee indicated it had concerns regarding the creation of offences of absolute liability in proposed sections 101.2, 101.4 and 101.5. In particular, the Committee commented that it seems that criminal liability is being imposed on the basis of possible terrorist connections.

I can assure the Committee that the proposed offences do not impose criminal liability merely on the basis of possible connections to terrorist acts. The prosecution will be required to prove beyond reasonable doubt that the "training", "thing" or "document" is in fact connected with preparation for, the engagement of a person in, or assistance in, a terrorist act.

However, the application of absolute liability means that the prosecution will not have to prove that the defendant knew that the training, thing or document was connected with a terrorist act. Instead, it will be a defence to a prosecution for an offence against subsections 101.2(1), 101.4(1) or 101.5(1) if the defendant proves that he or she was not reckless with respect to the fact that the training, thing or document was connected with a terrorist act. In other words, the application of absolute liability and the availability of the defence have the effect of shifting the onus of proof in relation to the defendant's mental state from the prosecution to the defendant.

I appreciate that this is a departure from the general principle that the prosecution is required to prove fault on the part of the defendant. However, as demonstrated by the

events of 11 September 2001, terrorist activities can cause enormous loss of life and devastate communities. In these circumstances, the Government considers that special measures to ensure the effective prosecution of persons connected to terrorist activities are justified. I note that this approach is consistent with the United Kingdom *Terrorism Act 2000,* which imposes criminal liability on a similar basis.

The Committee thanks the Attorney-General for this response. This issue is best left for resolution of the Senate as a whole.

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

Summary of evidence provided to the Senate Legal and Constitutional Legislation Committee

The Report of the Legal and Constitutional Legislation Committee on this bill noted that this Committee had drawn attention to these provisions as they may be considered to trespass unduly on personal rights and liberties. The Report concluded that this emphasised the seriousness of the issue.

The Report advised that these provisions raised significant concern in submissions and hearings, particularly because of the high penalties and the fact that no terrorist act need be committed. Many submissions noted that absolute liability offences have traditionally been minor or regulatory in nature. A number of submissions argued that the provisions were in beach of several international conventions which provide for a right of presumed innocence.

The Report concluded that these concerns should be addressed, especially in light of the maximum penalty of life imprisonment and the fact the the offences are broadly defined. The Report therefore recommended that the absolute liability elements in these offences should be removed, but that recklessness as to a result should be enough for a conviction, with the onus of proof on the prosecution.

Creation of criminal liability by declaration
Proposed new sections 102.2 and 102.4

Proposed new section 102.2 of the *Criminal Code* will permit the Attorney-General, by written declaration, to declare an organisation to be a proscribed organisation. Proposed new section 102.4 then creates various criminal offences relating to the activities of a proscribed organisation. It may therefore be said that the Attorney-General effectively creates criminal liability by the making of a declaration under new section 102.2.

The Explanatory Memorandum suggests that the lawfulness of the Attorney-General's decision making process and reasoning under section 102.2 is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. However, it is arguable that the exercise of the Attorney's discretion is more of a legislative function than an administrative one, and that it should be subject to Parliamentary scrutiny rather than consideration under the ADJR Act. The Committee, therefore **seeks the advice of the Attorney** as to why section 102.2 declarations are not subject to Parliamentary scrutiny.

Pending the Attorney's response, the Committee draws Senators' attention to these provisions as they may be considered to insufficiently subject the exercise of delegated 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 Attorney-General

> The Committee sought my advice as to why proscribed organisations declarations made under proposed new section 101.2 of the Criminal Code are not subject to Parliamentary scrutiny. A declaration could only be made under section 102.2 if the Attorney-General has an objective, reasonable, basis for concluding that the organisation or a member has committed a terrorism offence, that the proscription will give effect to a United Nations Security Council decision that the organisation is an international terrorist organisation or that the organisation is likely to endanger the security or integrity of the Commonwealth or another country. It is appropriate that this decision be made by the Attorney-General because it concerns the security and safety of Australians, which is one of the Government's primary responsibilities.
>
> The Attorney-General's decision to declare an organisation to be a proscribed organisation is open to judicial review on the full range of grounds under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). These grounds include failure to accord natural justice, failure to consider a relevant matter and

unreasonableness. The ADJR Act provides a specific avenue for proscribed organisations to seek an independent review of the Attorney's decision.

The Committee thanks the Attorney-General for this response. This issue is best left for resolution of the Senate as a whole.

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

Summary of evidence provided to the Senate Legal and Constitutional Legislation Committee

The Report of the Legal and Constitutional Affairs Legislation Committee on this bill noted that these provisions raised the most concerns in submissions and public hearings. In relation to this Committee's concerns about the insufficient exercise of delegated legislative power to Parliamentary scrutiny, the following points were made:

- the Attorney-General's power may be delegated to any Minister, even the most junior;
- judicial review under the Administrative Decisions (Judicial Review) Act is inadequate because it is not a review of the merits of a decision, review is available only on narrow grounds, and courts have been reluctant to review decisions based on national security;
- some submissions suggest that a court should decide if an organisation should be proscribed;
- review of the merits of proscription by the Courts was also suggested;
- a sunset clause on proscriptions was also suggested, followed by a review; and
- other submissions advocated Parliamentary involvement, either by disallowance of the Attorney-General's declarations or by determining proscriptions itself.

The Report noted that this Committee had raised the option of Parliamentary scrutiny of proscriptions. It then recommended that the present proscription provisions not proceed. It did not, however, expressly conclude or recommend that Parliament be involved in proscription procedures. It recommended merely that new procedures be developed within certain criteria.

Strict liability offence
Proposed new subsection 102.4(2)

Proposed new subsection 102.4(2) of the *Criminal Code* will create an offence of strict liability. The Explanatory Memorandum seeks to justify this on the basis that "it is not legitimate to be a member of, or have links with, an organisation of a kind that could be proscribed." This justification appears to beg the question of when strict criminal liability should be imposed, and to confuse some form of "moral" legitimacy with conduct that is contrary to the law. The Committee, therefore, **seeks the Attorney's advice** as to why a person should be strictly liable for an offence under subsection 102.4

Pending the Attorney's response, 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 Attorney-General

The Committee also sought my advice as to why a person should be strictly liable for an offence against proposed section 102.4 of the *Criminal Code*. Under proposed subsection 102.4(2), strict liability applies to the circumstance that the organisation is a proscribed organisation. The application of strict liability to this element of the offence means that the prosecution will not have to prove that the defendant knew that the organisation had been declared to be a proscribed organisation. However, it will be a defence to a prosecution for an offence against subsection 102.4(1) if the defendant proves that he or she neither knew nor was reckless as to the existence of the grounds for proscribing the organisation. Likewise, a person who moves immediately to cease to be a member of an organisation after it has been proscribed also has a defence.

The application of strict liability and the availability of the defence in proposed subsection 102.4(3) will ensure that the commission of the offence depends on the defendant's awareness of the fact that the organisation is involved in terrorist activities or is a threat to national security rather than on the defendant's awareness of the fact that the organisation has been declared to be a proscribed organisation. If the prosecution was required to prove that the defendant knew that an organisation

had been declared to be a proscribed organisation, defendants with knowledge of the terrorist activities of an organisation would be able to escape liability by demonstrating they were not aware of the organisation's proscription.

The Committee thanks the Attorney-General for this response. This issue is best left for resolution of the Senate as a whole.

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

Evidence provided to Scrutiny of Bills Committee

On 1 May 2002, the Committee was briefed by officers of the Attorney-General's Department on the following bills, two of which are part of the terrorism package of bills with one relating to espionage:

- Criminal Code Amendment (Espionage and Related Offences) Bill 2002
- Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]
- Suppression of the Financing of Terrorism Bill 2002

The proof transcript of the briefing is attached as an appendix to this Report. Below is a short summary of the issues raised at the briefing.

- Liability being determined by the Attorney-General's proscription of an organisation, described as a discretionary and subjective act by a political officer of the day;
- the contrast of these provisions with the more usual characteristic of specific and precise criteria for absolute and strict liability offences;
- adverse continuing consequences, in particular, of an early decision to declare and the difficulty that this raised in terms of judicial principles;
- no express provision for compensation if a proscription is revoked;
- subjective determinations based on present value judgments determining a criminal consequence;

- whether absolute and strict liability is necessary, given that this constrains the ability of people to defend themselves;
- the relevant powers in the legislation were unusual and exceptional;
- nothing to indicate that the intention of the legislation would be prejudiced by granting to defendants the traditional and full defences;
- instances where the life imprisonment penalty provisions appeared harsh or unjust;
- the fact that, in relation to absolute liability, a defendant can only defend a charge by going under oath, which removes the right to stand mute and subjects the accused to cross-examination;
- strict liability should usually be applied only for penalties less than imprisonment;
- whether general defences in the Criminal Code which apply across Commonwealth offences provide adequate safeguards;
- whether special defences for absolute and strict liability in the Criminal Code provide adequate safeguards;
- that the regime of absolute and strict liability with severe punishment does not appear to apply anywhere else in Commonwealth legislation;
- whether such a regime is essential to achieve the objects of the legislation; and
- the proportionality of the penalties, including possible anomalies.

Suppression of the Financing of Terrorism Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made comments in regard to strict liability offences.

The Committee received a briefing on 1 May 2002 from representatives of the Attorney-General's Department in relation to this bill and the Criminal Code Amendment (Espionage and Related Offences) Bill 2002 and the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2].

The Committee has also received a response from the Attorney-General dated 14 May 2002. Unfortunately the letter was not received in time for the Committee to give it full detailed consideration. However, a copy of the letter is attached to this Report for the information of Senators.

Following the extract from Alert Digest No. 3 and the relevant parts of the Attorney-General's response is a summary of the evidence provided to this Committee and the Legal and Constitutional Legislation Committee.

Extract from Alert Digest No. 3 of 2002

This bill was introduced into the House of Representatives on 12 March 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Criminal Code Act 1995* (Criminal Code), the *Financial Transactions Reports Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987* and the *Charter of the United Nations Act 1945* to enhance the Commonwealth's counter terrorism legislative framework by:

- creating an offence directed at those who provide or collect funds with the intention that they be used to facilitate terrorist activities;
- requiring cash dealers to report transactions that are suspected to relate to terrorist activities;

- enabling the Director of the Australian Transaction Reports and Analysis Centre, the Australian Federal Police Commissioner and the Director-General of Security to disclose financial transaction reports information directly to foreign countries, foreign law enforcement agencies and foreign intelligence agencies; and

- introducing higher penalty offences for providing assets to, or dealing in assets of, persons and entities engaged in terrorist activities.

The measures in the bill implement obligations under United Nations Security Council Resolution 1373 and the International Convention for the Suppression of the Financing of Terrorism.

Strict liability offences
Proposed new subsections 20(2) and 21(2)

Proposed new subsections 20(2) and 21(2) of the *Charter of the United Nations Act 1945*, to be inserted by Schedule 3 to this bill will create offences of strict liability. In relation to subsection 20(2), the Explanatory Memorandum seeks to justify the imposition of strict liability as "necessary to ensure that a defendant who uses or deals with an asset which he or she knows to be a freezable asset cannot escape liability by demonstrating that they were not aware that the use or dealing was not in accordance with a notice under section 22".

In relation to subsection 21(2), the Explanatory Memorandum seeks to justify the imposition of strict liability as "necessary to ensure that a defendant who makes an asset available to a person whom he or she knows to be a proscribed person cannot escape liability by demonstrating that they were not aware that the making available of the asset was not in accordance with a notice under section 22".

Notwithstanding this explanation, 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 Attorney-General

> The Committee expressed concern about the imposition of strict liability in relation to the offences in proposed new subsections 20(1) and 21(1) of the *Charter of the United Nations Act 1945,* to be inserted by Schedule 3 to the Bill. Proposed subsections 20(1) and 21(1) would make it an offence to use or deal with the assets of proscribed persons and entities involved in terrorist activities or to make assets

available to those persons or entities, unless the dealing is permitted by a written notice issued by the Minister for Foreign Affairs under proposed section 22.

Strict liability would apply only to the fact that the use of, dealing with, or making available of, the asset is not in accordance with a notice under section 22. The default fault elements set out in section 5.6 of the *Criminal Code* would apply to the other elements of the offences. The application of the default fault elements in section 5.6 of the *Criminal Code* to an offence against subsection 20(1) means that in order to commit the offence a person would have to *intend* to use or deal with the asset and be *reckless* as to whether the asset is a freezable asset. Likewise, in order to commit an offence against subsection 21(1), a person would have to *intend* to make an asset available to a person or entity and be *reckless* as to whether the person or entity is a proscribed person or entity.

The application of strict liability to the circumstance that the dealing with the asset is not in accordance with a notice under section 22 is necessary to ensure that the offences can be effectively prosecuted. Generally, a defendant who holds a freezable asset would only become aware of the existence of a notice permitting a dealing with the asset if he or she is advised by the owner of the asset that a notice has been issued. Consequently, if the prosecution was required to prove not only that the defendant was aware that the asset was a freezable asset but also that he or she was aware that a particular dealing with the asset was not in accordance with a notice under section 22, defendants would be able to avoid liability by demonstrating that they did not turn their minds to the question of whether there was a notice permitting the dealing.

The imposition of strict liability will ensure that a person who holds an asset which he or she knows to be a freezable asset will be required to ascertain that a dealing with the asset is permitted by a notice given under section 22 before allowing the dealing to occur. A person who acts in the mistaken but reasonable belief that a dealing is in accordance with a notice would be able to rely on the defence of mistake of fact under section 9.2 of the Criminal Code.

The Committee thanks the Attorney-General for this response. This issue is best left for resolution of the Senate as a whole.

The Committee's comments in response to evidence provided to the Scrutiny of Bills Committee and the Senate Legal and Constitutional Legislation Committee

The Report of the Legal and Constitutional Affairs Legislation Committee on this bill addressed the issue of the element of intent in relation to financing of terrorism offences, and recommended that the bill include such an element. That Committee concluded that sufficient reasons had not been put forward to justify the exclusion of specific intent, particularly as the provisions were based on United Nations instruments which include that element.

Telecommunications Interception Legislation Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*. On 14 May, the Committee received a letter from the Attorney-General in relation to telephone interceptions.

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

Extract from Alert Digest No. 3 of 2002

This bill was introduced into the House of Representatives on 12 March 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Telecommunications (Interception) Act 1979* to:

- legislatively clarify the application of the Act to telecommunications services;
- include offences constituted by conduct involving acts of terrorism as offences in relation to which a telecommunications interception warrant may be sought;
- include child pornography related and serious arson offences as offences in relation to which a telecommunications interception warrant may be sought;
- extend the purposes for which lawfully obtained information may be communicated and used;
- include the Royal Commission into Police Corruption as an eligible authority for the purposes of the Act to permit the Commission to receive relevant intercepted information in certain circumstances;
- correct a number of unforeseen consequences of the *Telecommunications (Interception) Legislation Amendment Act 2000*;
- clarify the operation of warrants authorising entry onto premises issued under section 48;

- reflect the merger of the Queensland Crime Commission and Criminal Justice Commission to form the Crime and Misconduct Commission; and
- effect a number of minor corrections to the Act, including amending definitions, headings and references to State legislation.

The bill also amends the *Customs Act 1901* to enable Federal Magistrates to be nominated to be judges for the purposes of the listening device provisions of the Act, consistent with the position under the *Telecommunications (Interception) Act 1979* and *Australian Federal Police Act 1979*.

Telephone interceptions
Schedule 2, item 21

By virtue of the amendment proposed in item 21 of Schedule 2 to this bill, the Royal Commission into Police Corruption, established by the Governor of Western Australia, is to become another eligible authority for the purposes of the Principal Act. While it is no doubt proper to allow that Commission and members of its staff to intercept telephone calls and other communications, this represents yet another extension of the operation of this Act.

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 Attorney-General

> The Committee drew to the attention of Senators, the amendments to give the Western Australian Royal Commission into Police Corruption eligible authority status under the *Telecommunications (Interception) Act 1979*. The Committee mentioned that these provisions might be considered to trespass unduly on personal rights and liberties, in breach of principle I (a)(I) of the Committee's terms of reference.
>
> The proposed amendments will give the Western Australian Royal Commission into Police Corruption access to intercepted material collected by other agencies but not allow interception in its own right. I do not agree that this access, in a whole of government sense, would be considered to unduly trespass on a person's rights and liberties. The function of investigating police corruption in WA is not a new function nor is access to intercepted information for this purpose a departure from the existing policy of the Act. The policy of the Act is that intercepted information can be used

for purposes connected with the investigation of police corruption. This is illustrated by the existing inclusion of the Wood Royal Commission into the New South Wales Police Service as an eligible authority. The Western Australian Royal Commission into Police Corruption's function is an integral part of the anticorruption machinery in Western Australia. That function would be inhibited if the Royal Commission could not have access to such information.

The Committee thanks the Attorney-General for this response.

Barney Cooney
Chairman

COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Reference: Provisions of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002 and related bills

WEDNESDAY, 1 MAY 2002

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SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Wednesday, 1 May 2002

Members: Senator Cooney *(Chair)*, Senator Crane *(Deputy Chair)*, Senators Crossin, Ferris, Mason and Murray

Senators in attendance: Senators Cooney and Murray

Terms of reference for the inquiry:

For inquiry into and report on:

(a) Provisions of the Criminal Code Amendment (Espionage and related offences) Bill 2002

(b) Security Legislation Amendment (Terrorism) Bill 2002 [No.2]

(c) Suppression of the Financing of Terrorism Bill 2002

WITNESSES

Committee met at 3.49 p.m.

ALDERSON, Mr Karl John Richard, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

LOWE, Ms Jamie, Senior Legal Officer, Information and Security Law Division, Attorney General's Department

McINTOSH, Ms Susan Mary, Principal Legal Officer, Security Law and Justice Branch, Attorney-General's Department

Mr Alderson—The terrorism package that was introduced in parliament consists of six bills, five of which were introduced initially, and a sixth, the ASIO bill, that was introduced a few days later. What we colloquially refer to as the main bill, the Security Legislation Amendment (Terrorism) Bill, principally does three things. It creates offences directed at terrorism and contains the definition of terrorism on which a number of provisions hang. It contains, as part of the terrorism package, proscribed organisations provisions that confer a power on the Attorney-General to proscribe an organisation if certain objective criteria relating to the terrorism connections of that organisation are met; and it contains a new treason offence to replace the existing Crimes Act treason offence, incorporating a new limb. I can speak more on that if you wish.

The second bill is the Suppression of the Financing of Terrorism Bill, which creates a financing of terrorism offence that fits closely with the terrorism offences in the main bill. It contains some provisions to facilitate exchange of financial transactions reports material between jurisdictions, and it also brings into the act some provisions in the charter of the United Nations regulations. Those were the asset freezing provisions which were done in very urgent circumstances following September 11. As part of this package, the government proposes that key provisions governing the asset freeze be moved to primary legislation.

The Criminal Code Amendment (Suppression of Terrorist Bombings) Bill contains offences to implement an international convention relating to terrorist bombings. There is a customs border protection bill, which contains a range of provisions, principally relating to access to information in certain circumstances. The Telecommunications Interception Legislation Amendment Bill is principally directed at clarifying the borderline between where search warrants apply to an email on a computer system and where telecommunications interception rules apply. As I mentioned, the sixth bill is the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill, which confers the 48-hour detention power in limited circumstances for intelligence gathering by the Australian Security Intelligence Organisation.

The espionage bill is separate from the terrorism package, and the government has made it quite clear that it comes from a separate context and, in fact, had been introduced into parliament last year before the parliament was prorogued. My colleague Ms Lowe has the principal responsibility for that bill.

The last comment I would make is that there are two key themes running through the terrorism package. Firstly, there is the implementation of Australia's obligations under international treaties—in particular, the terrorist bombing and terrorist financing conventions

reflected in the bills bearing those two names—and mechanisms to encourage international cooperation and effective international efforts to deal with terrorist activity. Secondly, there is a focus on setting up mechanisms that will allow terrorist organisations to be stopped and potential terrorist activity to be stopped before that terrorist activity has actually taken place.

That preventative objective is reflected in a couple of areas: firstly, in terms of the capacity to freeze terrorist assets; secondly, in terms of the capacity to shut down an organisation, or at least its operations within Australia, through the proscribed organisations mechanism; and, thirdly, through the fact that the creation of offences directed at terrorism provides a better mechanism for police to intervene and investigate offences that may be about to occur. That is all I propose to say by way of introduction.

CHAIR—Senator Murray, would you like to ask some questions?

Senator MURRAY—Yes. It seems to me that, with regard to strict and absolute liability provisions in this proposed legislation, the physical aspect of liability is determined by a discretionary and subjective act, which is the Attorney-General's proscription of an organisation. Because the legislation, quite properly—because I do not think you can—does not define terrorism—

Mr Alderson—The legislation does contain a definition of terrorism, albeit a broad one.

Senator MURRAY—Yes, it does, but it does not define it in every specific circumstance; that is what I meant by that. Once that determination on a discretionary and, I suppose, almost unilateral basis is established by a political officer of the government of the day, then it follows through to the liabilities expressed. I think that in the subjective origin—whether wrong or right in people's determination—of that lies concern about establishing the physical matter. In contrast, if we refer back to the more mundane things that we have been dealing with today, the physical origin is mostly objective: your car is going too fast, you have not put in the paperwork, you failed to wear your badge—whatever the issue is, it is much more specific and precise. What do you say in reaction to that kind of observation?

Mr Alderson—Those concerns about the question of subjectivity were certainly taken into account in the way that the legislation was framed and there are a couple of things to note. One is the requirement in the legislation that the proscription has to be based on reasonable grounds. That, in part, is not only a prospective direction to the Attorney-General as to the way that the decision is to be made but it also sets up a basis for judicial review of a decision to ensure that a proper decision making process is being followed and that in fact it was a reasonable exercise of the discretion to conclude that those grounds applied. So that is the first thing to note: the incorporation of the satisfied on reasonable grounds test, which is certainly a more objective and a stronger hurdle than some of the international models for proscribed organisations provisions.

The second thing to note is that for a person to be convicted of an offence the usual court processes have to be followed. If it were alleged that 'this organisation has been proscribed and this person was financing it or a member of it' and so forth, the normal set of processes would apply where police had to investigate that, DPP make a decision whether to prosecute and a court finds the person guilty of that beyond reasonable doubt. Included within that is a defence

that, if the person was unaware of, to use a shorthand phrase, the terrorist connections of the organisation, they have a defence to the offence.

Senator MURRAY—But there may be no terrorist connections of the organisation. To use some of the existing examples, what if you had an Attorney-General who made a decision that an organisation was terrorist and then two decades later people said, 'Don't be ridiculous. They weren't terrorists at all, they were freedom fighters—quite rightly.' Do you see what I am saying to you? They can be quite legitimately terrorist, don't misunderstand me, but there may be some about which, on looking back, you think, 'They weren't really.' The consequence of the decision to declare a terrorist organisation is a whole flow of events which constrain the courts' abilities to deal with it, constrain the individuals' rights and so on and so forth. It is that physical determination early on, against the parameter of value judgments and information which the Attorney-General receives, which is difficult to easily grasp, I think, in terms of prior judicial principles when we come to this sort of matter.

Mr Alderson—To grapple with the kind of issue that you are identifying, there are a couple of features of the bill that are designed to deal with it. The first is that there is a requirement on the Attorney-General to revoke a proscription if the objective grounds for proscription cease to apply. So, as you say, if over time there were cause for a reassessment, there is a requirement in there to revoke. There would also be the possibility for a person to make representations, to say to the Attorney-General, 'You have this revocation power and the circumstances exist for you to exercise it.'

Senator MURRAY—Is there any capacity to compensate the person if they were proscribed and detrimentally affected and later on they were un-proscribed?

Mr Alderson—I guess that is dealt with in the same way that is generally the case with the criminal law—

Senator MURRAY—In other words, no compensation.

Mr Alderson—If there is a civil claim for negligence, that would be made out, or the Commonwealth's ex gratia payment mechanisms under the financial management and accountability. But you are right, there is no separate provision for compensation in this provision. The second thing I was going to say was that, because of that defence, if you can demonstrate to the court on the balance of probabilities that you were unaware of any—say you were prosecuted for financing an organisation. If you can demonstrate to the court on the balance of probabilities that you were unaware of the terrorist connections of the organisation that make up the grounds for proscription then you are not guilty of the offence.

Senator MURRAY—The difficulty people concerned about this legislation are highlighting is that the person concerned might be well aware of the connections of the organisation, absolutely aware; they just do not agree that it is a terrorist organisation. As you know, examples have been used. It might be Fretilin, or the ANC 30 years ago. There are those sorts of examples. So the decision by the Attorney-General against his or her value set at the time and his or her information available at the time will determine a criminal consequence, but based on a subjective physical determination.

Mr Alderson—I would only add to that that the legislation builds on the notion of subjectivity by requiring the reasonable grounds and requires revocation if the assessment changes. In addition to that, ultimately these issues about freedom fighter-terrorist are extremely difficult issues. So the way this is designed is that really if you are talking about an organisation that is engaging in acts of violence and property destruction to pursue its ends then that is brought within—

Senator MURRAY—Such as Fretilin or the French resistance against Vichy and all that sort of thing.

Mr Alderson—Then there is built on the prerequisites a political assessment that can be made.

Senator MURRAY—Let us go back. The prime purpose of government is to be able to determine which organisations it is going to declare terrorist and have powers to deal with it. It is not essential to the pursuit of that aim for the abilities of someone to defend themselves to be unnecessarily proscribed. Really my question to you is: leave everything intact if you are going to do that. Is it still necessary, given that we all have to accept that it must be a subjective process that starts it, that you surely do not need in all the circumstances to go in with absolute and strict liability? What you have done is you have commenced a subjective determination, which may be right or wrong. I accept that. We may agree 100 per cent sometimes and 90 per cent other times. But you constrain the ability of an individual to defend themselves.

Mr Alderson—The contention that I would be putting forward is that at the end of this process you have a proper criminal trial where the issues of fact and intent will be assessed in court. In accordance with the usual approach, the facts of whether the person was directing the organisation, funding, a member or so forth and the fact that it was proscribed would both have to be proven beyond reasonable doubt.

Senator MURRAY—But the main fact does not have to be proven. That is whether it is, in fact, a terrorist organisation.

Mr Alderson—That is correct. You are quite right.

Senator MURRAY—That is the problem. If you cannot challenge the very basis under which it is determined, then you are severely affecting the defence of a person because they might not agree with a basic supposition. They might say, 'Hey, we are an environmental organisation' or 'We are trying to free the East Timorese.' I am using those examples deliberately because the Al-Qaeda thing is easy to determine. Aren't you just going that step too far by so limiting the ability of peoples to defend themselves when you have already stacked it against them by saying, 'This is proscribed organisation and these are the horrendous penalties that face you'?

Mr Alderson—There are three things. The first is the question: how can a person assert that this is not really a terrorist organisation? There are really two routes to do that. The first is that, under the Administrative Decisions Judicial Review Act, which will apply in full to this legislation so that you can challenge the validity of the decision, the basis for doing that is strengthened by the requirement for objective grounds. Certainly in the white-collar crime

context, that notion of a criminal trial being suspended while an administrative decision is challenged under the ADJR Act is quite a common one. So that would be the normal way a court would stay a prosecution while the judicial review issue was worked through and a verdict reached on that. Secondly, a person can directly bring the question into the criminal trial through their access to the defence that they were unaware of the terrorist connection.

Senator MURRAY—No, but they can be aware of it. The point I am saying is that they are aware of it. They might just disagree that there were terrorists.

Mr Alderson—If their disagreement is based on saying that the—

Senator MURRAY—See, your absolute liability and strict liability provisions give the judge no discretion in those areas.

Mr Alderson—They have the effect of removing the onus, essentially. The rationale for that is that, if a person claims, 'I did not know about the proscription,' that might too readily lend itself as a loophole in the legislation. That would undermine the attempt to firmly shut down the operations of the organisation. But if the person says, 'Look, the assessment about this organisation is incorrect,' the onus is reversed, but they have the opportunity to bring that question into the trial.

Senator MURRAY—Or they may even be innocently within an organisation which is terrorist. For instance, they might know about the organisation; they might participate in it fully. But the proscription and subsequent evidence may find that things were going on. An environmental organisation might be blowing up nuclear reactors, a fact which they were not acquainted with.

Mr Alderson—If they can show that, at all material times, they were unacquainted with the terrorist connections of the organisation—and I am paraphrasing because some of these defences are set out in (a), (c), (d)— and they can show on the balance of probabilities that they were unaware, then they have that defence. A second defence that is in there is that, if following the proscription, they take immediate steps to cease to be a member of the organisation, that is also a defence. So, if they wake up and read the paper and say, 'Oh, this friendly community organisation is said by the government to be a terrorist group and has been proscribed,' they have the opportunity to immediately cease their membership and then not come within the ambit of the offences.

Senator MURRAY—You know where I am going with this. It is essentially this. If you give great exceptional, unusual and discretionary powers to a political officer of a government of the day, you at least want to give whoever is charged as a result of that the maximum ability under the law to defend themselves.

Mr Alderson—This is premised on the basis that all those issues can be addressed in the criminal trial, and that the full process of jury trial and so forth will apply, but—

Senator MURRAY—Because what strict liability and absolute liability do, and we all know it, is lessen somewhat your defence.

Mr Alderson—They are used here in an unusual way.

Senator MURRAY—But that is the way they are used any time, because you do not have to prove mens rea.

Mr Alderson—Normally, if an offence is made strict liability full stop, the way that both the terrorism offences and the proscribed organisation offence works is that absolute liability and the Criminal Code framework is used as a mechanism to reverse the onus of proof and say, 'Well, the question of whether you were aware is still part of the criminal trial but it is something for the defendant to establish on the balance of probabilities, rather than for the prosecution to prove beyond reasonable doubt.' The rationale for that is that, if a person could simply assert they had no knowledge and fold their arms, it would be very difficult for the prosecution and a significant loophole in the use of this power to really deal with a terrorist organisation.

Senator MURRAY—But surely that is good. I do not think any of us—either your side of the table or ours, or in the general community—deny that these are exceptional powers to give a political office or a government. They are very unusual, exceptional powers. Nothing I have heard so far indicates to me that a government's intention would be seriously undermined by enabling a defendant to have the full and traditional ability to defend themselves at law. What strict liability and absolute liability do in these circumstances, however qualified, is limit that—either somewhat or to a considerable extent. If you took away those strict liability and absolute liability provisions, certainly you make the job of prosecution harder but it does not destroy the intention, which is to declare organisations terrorist, to close down their moneymaking and organisational abilities and to stop them operating. It does not interfere with that at all.

Mr Alderson—It does strengthen the approach if you can say, 'If you know absolutely nothing about what is going on and you are completely oblivious to what is going on, you are not caught in the net—but, really, if you have suspicions, if you think that maybe the organisation has this connection or what have you, the onus is on you and you really should be terminating your membership. You should not be putting any money into this organisation, because we have used this special power to say this organisation is not acceptable and is being shut down.' So, from that day, there is a greater onus to underpin the exercise of this power.

CHAIR—Following on from what Senator Murray says, have you looked at proposed section 101.4? This is on possessing things for which you get life. If you read the following as a scenario: I ring up on my mobile phone somebody in a country where terrorism is being prepared and give them a tip as to how they might go about things, at this table now, and then Senator Murray says, 'Can I have a lend of your mobile phone straight after?', he is in a bit of trouble, isn't he?

Mr Alderson—If he is unaware of the connection between the mobile phone and the terrorism, then he will not come within the terms of the offence. Obviously, my previous comments were specifically directed to the proscribed organisation but there is some overlap in the issues. The work that the absolute liability does here is to reverse the onus and say that it is for the defendant to establish that they were unaware of the terrorist connection. But also, because that is a part of the trial as framed by these provisions, both the police in investigating

and the DPP in putting together a prosecution will obviously have to look at these issues and say, 'Well, was the person unaware?'

CHAIR—If you look at 101.4, they will come along and grab me and I will say 'Yes, that is a fair cop' or whatever you say these days. I am sure you do not say that, but you know what I mean. They say, 'This was a thing that was used in connection with the preparation of, or assistance in, a terrorist act.' Mr Alderson, the only evidence the DPP needs is that from me and, say, from you or from Ms McIntosh saying, 'Yes, I saw Senator Murray take the phone from Senator Cooney straight after.' He is liable for imprisonment for life.

Mr Alderson—Two extra things would come into what you have outlined, Senator Cooney. The first is that the prosecution would have to prove beyond reasonable doubt that the phone was in fact used in connection with the terrorist act.

CHAIR—I have done that; I have confessed. I have said it is a fair cop, so that is proved. The second point is proved because I have proved that. I have said, 'Oh, yes, you have got me.' So they have proved that. Then the evidence is that Senator Murray has the phone. That is all they need prove and he is in jail for life.

Mr Alderson—Senator Murray would have the opportunity to say, 'Well, I was just passed the phone. I was not part of this network. I was not part of this organisation. I was unaware of the terrorist connection.' This is a lesser point because in this situation I am contending that you would not be guilty of the offence. In addition, of course, there is the public interest test for the DPP as to whether to prosecute. Also, the penalty for a person who does come within it and who was aware of the terrorist connection is a maximum only, allowing the court to make an assessment.

CHAIR—But it is absolute liability. So the only way he can prove it is to go under oath—which takes away his right to stand mute—and then he is subject to cross-examination. You ask, 'How well do you know Senator Cooney?' The person says, 'I must confess I have known him for some years now.' You would then ask, 'Has he come around to your room?' The person says, 'Yes. He has been around to my room.' You say, 'You did not know this was a thing used in the assistance of a terrorist act?' He has been called by the prosecutor to give that evidence and he has. You say, 'Now, Senator Murray, you say that you knew nothing about it.' As someone who is accused, you are in real trouble, aren't you?

The penalty is life. Any penalty is pretty grim, but life. He cannot deny that it was a thing used 'in connection with the preparation for the engagement of a person or assistance in a terrorist act' because I have confessed to it and that is that. If you go to 101.5, it is the same thing. Say he collected a document from me. It was a document that I made out perhaps in some foreign language. I would not have been able to do that, but say I could write a foreign language, I could have written off in a foreign language that he did not understand. If he collected it, again, he would get a second life sentence on the one day.

Senator MURRAY—Doesn't that breach the basic principle we fleshed out today? We were told by a number of witnesses in submissions that strict liability is really intended to apply for anything less than imprisonment. Here we have got both strict and absolute liability applying where you really have got a serious penalty.

Mr Alderson—Yes. This is in accordance with what I was saying this morning. There are different bases. Certainly the more common categories are the low penalty offences. This falls within the alternate rationales of the seriousness of the consequences.

Senator MURRAY—I hate to use a pun in circumstances like this, but isn't this overkill?

Mr Alderson—It has not been thought so, for example, by the British parliament. This has been framed consistent with the way the British terrorism offences work, for example, and is really a response to the seriousness.

Senator MURRAY—But we have no history or record of their long, unfortunate interaction with terrorism on their soil.

Mr Alderson—Certainly, but I guess it is in part taking account of the experience of the way to have a strong mechanism, one that is designed to really guard as strongly as possible against terrorism, subject to having a criminal trial where the factual basis must be proven beyond reasonable doubt and where there is a full opportunity for the defendant to raise their lack of culpability.

CHAIR—We have been told in other committees that nobody can point to—at this stage, and I know we have got to be prepared to understand that—any present threat of terrorism in Australia, against Australians anyhow. In another committee I asked people from the community. They said they had had opportunities to talk to people from various communities within the overall community and none of them saw any signs of terrorism. England was the country that gave us the Diplock courts and the wrong judgments in the Birmingham Six and all that sort of stuff. Do we really want to compare ourselves to them?

Mr Alderson—In terms of your question about the terrorist threat, the main thing is that this is really an attempt to set up the mechanisms to give the investigatory powers, to have the sanctions and to have the intelligence gathering powers to do what is possible to prevent an equivalent to September 11.

Senator MURRAY—The point I was making to you earlier is you can leave all that framework in but you have now got to the stage where somebody is in court defending themselves and you have taken away the common law defences, which have applied to people from time immemorial in our system, based on an original subjective assessment—maybe on good judgment, maybe not—by a political officer of the government of the day. It just does not seem to be a necessary part of the whole intention. As I said to you earlier, you want to proscribe the organisation, stop it operating and close up on its members, and you can do all that, but those who land up in court should have the opportunity to defend themselves.

Mr Alderson—On that question of defences, I am realising that this is a point that I failed to raise before the other committee. There are general defences in the Criminal Code that do apply across the board to Commonwealth offences and some special defences for strict and absolute liability, which are really designed to ameliorate some of the potential injustices that can arise with strict and absolute liability. They are the defences of intervening conduct or event, duress, sudden and extraordinary emergency, self-defence, and lawful authority. So there is also a set of

general defences, not specifically in this bill but under Commonwealth legislation generally. The broader question you are raising is a fundamental philosophical discussion.

Senator MURRAY—No, it is more than that. What you are suggesting breaches the principles that you have already established on the following basis: it establishes a regime of absolute and strict liability in circumstances where there is a very severe punishment. To my knowledge, it does not apply elsewhere in Commonwealth legislation. Maybe you can correct me, but I do not think so. Secondly, you intend to breach it having had no experience of any kind—nothing—to justify breaching it. Thirdly, you offer it up in circumstances where it is not essential to the achievement of the government's objective, which is to proscribe organisations and to close them down.

Mr Alderson—The view that I have put forward in terms of shutting down an organisation to put the onus on people to cease to finance the organisation, to cease to be members and so forth, is a central part of how this is meant to work. I should also say that—lest, in explaining the rationale of this legislation, I am seen to be disregarding the kinds of points you are making—obviously the kinds of issues you are raising are receiving close consideration in the examination of this legislation going forward. But, in weighing the balance, the argument for maintaining this kind of approach is really in trying to have the strongest possible framework consistent with someone having the normal due process of law and subject to the other police discretions, prosecutorial and sentencing discretions that are built into the system, to say that the nature of a proscription is that once it is done you ought to be guarding against any involvement in this organisation, that it is really off limits and is something nobody should be dealing with.

Senator MURRAY—Yes. If I can encapsulate it in a different way: my reading of both community and the political class as a whole is that there is no disagreement with the need to significantly improve our ability to close down terrorist organisations in the true meaning of the word. But there is a great fear that there will be unintended consequences: that the wrong kind of organisations will be closed down and that injustices will be delivered to individuals. It seems to me in what you have said so far and in my understanding of the legislation, that the strict and absolute liability regime for a person who actually lands up in court adds not much to the main objective of the government, but for an individual it puts up quite considerable barriers to them conducting a defence in the normal way we would expect when facing life imprisonment.

Mr Alderson—There is probably not much more I can add.

Senator MURRAY—I did not think you could. I respect the fact that you have to argue for your bill, but I wanted you to clearly understand the point I wanted to get across.

Senator COONEY—Remember Martin Bryant? He shot about 30 people. He would not be caught by any of this, would he?

Mr Alderson—I do not want to give a definitive legal view on that but my commonsense view is no, and that is quite deliberate in that in dealing with a Martin Bryant it would, firstly, be properly dealt with as a murder trial. This is not only about the degree of damage; it is about the underlying context of terrorist organisations, mechanisms to deal with the financing of them

and having offences tailor made to the terrorism context. You are quite right in saying that and my understanding, too, would be that this would not apply to a Martin Bryant.

CHAIR—If I was a racist and did terrible damage to someone's house, then I would not be covered by it either because I have not done it for a political, religious or ideological cause, I have done it because I am just a rat and a racist.

Mr Alderson—I would say that a racist person defacing a house would be very unlikely to be dealt with under these provisions. In fact, it would not be dealt with under these provisions. Obviously if you escalate up the scale to a group of racists engaging in serious destruction, there would still be a significant question as to whether it would be pursued under these kinds of provisions, but I could not say that legally, in that more serious escalated context, it would not fall within this.

CHAIR—Take the person who was recently convicted in Melbourne for shooting a security guard. He would not give his name for a while, then we found out who he was. He might be a terrorist because he did that with the intention of advancing a religious cause, so he might be caught by this but Martin Bryant would not. Knight was his name. And a person who, for a political cause, cut down some telephone wires could get life for committing a terrorist act, but if it was young hoons going around the suburbs belting people up and cutting the telephone lines to the house, they do not get anywhere near life. I am not sure what the penalties are but I do not think it is anywhere near life. Has the department thought about the proportionality of that?

Mr Alderson—It certainly has. Firstly, I would query whether cutting a telephone line would come within this, in that, in the context of this being terrorism, you are talking about serious disruption of an electronic system including, in the examples it gives, an essential public utility, essential government services or a financial system. I would contend that cutting a telephone line would not come within that. It is really directed more at, say, a serious hacking attack on a computer system that is regulating the financial system or a hospital or something like that.

CHAIR—Can I go through that with you? Action falls within the subsection if it:

> (e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
> (i) an information system; or
> (ii) a telecommunications system ...

A 'telecommunications system' must be the wires that bring your telephone—

Mr Alderson—I think the key word, though, is 'system', in that it is more than just a line, it is the serious disruption of the system. Secondly, in response to your question, it is an unavoidable aspect of framing offences that there will be conduct that will fall within more than one offence. A course of conduct that involves a sexual assault that is hitting the victim, that is threatening the victim, is really only one course of conduct but it will come within four or five different offences under state law, and those may have different maximum penalties, depending on which aspect of the conduct you are looking at.

This is saying that, at the moment, a terrorist act—a September 11—of flying a plane into Parliament House will include the offence of damaging Commonwealth property, which may be

10 years; it will include killing people, which would carry life; it will include a whole range of offences. The principle on which this is based is that if it comes within the definition of terrorism, then we need to think of it and be able to deal with it in this broader terrorist context.

CHAIR—Conventional crime is covered in state law. The Commonwealth could be seen as making a claim for a lot of the offences that up till now have been dealt with at a state level. I do not want you to comment on that but—

Mr Alderson—There is a quite conscious intention to enable the Commonwealth to deal with terrorist acts, based on the premise that, if you are talking about terrorist attacks on Sydney and Melbourne, we ought not to be viewing them as purely state matters. There is a national issue there.

CHAIR—Let us say you are the judge and a person is charged with causing damage to the telecommunications system—or two or three people cut down a series of telephone poles. You might charge them with a Commonwealth offence and a state offence. Let us say there was a provision for training and it was a Commonwealth offence under clause 101.2. What would the judge say? Insofar as it is a state offence, the onus is on the prosecution and they have to establish each element of the defence. But insofar as it is a Commonwealth offence all the prosecutor has to do is establish that this person provided training. If you think he has committed this Commonwealth offence, this is the law you apply. If you think he has committed a state offence, this is the law you apply.

What is a jury going to do? This is all very interesting and all very clear. There are different onuses and different issues to keep in mind. The jury is told, 'This is what absolute liability means: it does not really matter what this person intended or whether he or she reasonably mistook the state of affairs, or had a reasonable belief that the facts were different from what they were. That does not mean a thing, because this is absolute liability. There is also an element of strict liability amongst these offences and that does not quite mean what absolute liability means. Strict liability means that the evil does not have to be intentional, as long as the evil was done. But if you think he or she had a reasonable belief in the facts, which would have exculpated him or her, then it is excused. Now we come to the next issue, which is intent. I will describe that to you.' What is a jury going to do with all this?

Mr Alderson—I honestly do not see a problem there, because I envisage that the prosecution of these terrorism offences will be very rare. They will raise the same issues in principle as already must be faced in a far larger number of, for example, drug trafficking cases, where it is very commonly the case that you have a Commonwealth drug importation offence and a state drug sale offence. There are mechanisms to allow the state or the Commonwealth DPP to take those forward in tandem for them to be dealt with in court. In those drug offences there are provisions about deeming and onuses, and quantities of drugs and how you prove those. These are issues that already must be faced in a far larger number of cases dealing with drugs and fraud and other matters.

CHAIR—But they are going to have to apply different tests to almost the very same offence.

Mr Alderson—I do not know about it being almost the same offence in that they are directed at different things, because an important component of the Commonwealth terrorism offences is

this terrorist component and you have to prove the facts relating to the terrorism act, which would be quite distinct from any state issue of murder, property damage or so forth. So there will be different sets of issues. But, by the same token, if you were to prosecute together a state murder charge and the Commonwealth terrorism charge, the evidence and the issues to do with a person's mental state would come out first in the prosecution case for the murder and in the defence for the terrorism charge. In a way, that highlights the fact that in the course of the trial there is going to be evidence from both the prosecution and the defence about the person's mental state.

I might say that the double jeopardy provisions in the Crimes Act will also be applicable. If you are talking about different aspects of the same conduct, you do not have a double jeopardy situation. I think the test that the court applies is: is the essence of the culpability in each case the same? The double jeopardy principle that is provided for in common law and under the Crimes Act is that you cannot be punished twice for what is in essence the same conduct.

CHAIR—This would give the police a good bargaining tool, wouldn't it? The police could say, 'We have found you here with some explosives. We think that you have got these explosives and you have made use of the explosives for terrorist purposes.' If you were to plead guilty to a crime that did not include terrorism, you would save yourself a few years.

Mr Alderson—What I would say about that is that, firstly, the police would be giving themselves a lot of work to do. If we are talking about someone possessing explosives, for the police to add to their job the task of showing the political, religious and ideological cause, the intent to engage in serious property damage as read in a terrorist context or the intent to engage in serious harm, then that is a lot of extra hurdles they are adding. Secondly, both the police and the prosecution have proper internal processes for making these decisions in an accountable way and ultimately there is public exposure, when the matter comes to trial, as to whether it has been done in a legitimate way. There has been evidence, I think, from the AFP to the other committee on this issue, that police just would not deal with someone merely in possession of explosives as a terrorism kind of offence; you need this other terrorism context.

CHAIR—How quickly did the authorities get out of the block when the Communist Party Dissolution Act was passed in 1950?

Mr Alderson—I must admit that, although I have looked at the act and the case, I am not familiar with the other events surrounding that, other than to say that the Communist Party Dissolution Act was an act of a very different character to the legislation that is currently before the parliament.

CHAIR—But I think it was in the same sort of context. There is legitimate concern, like there was with communism at the time, but it is used to gather all sorts of powers. I was saying earlier that the classic example is the Salem witch hunts. I do not believe that they were witches, though perhaps they were. I do not know whether I believe in witches, for that matter. But with great conscience and with great aplomb they hung a few people because they were witches. That was because of the mood of the time.

I am not sure how this was put together but I suggest—and you might not want to answer this—that this is legislation that has been written at the suggestion of our investigative and

policing agents such as ASIO, ASIS, DSD and probably the Federal Police. It seems to me that everybody got together and said, 'We will put this in, yes. We will drop this in. Absolute liability, yes, put that in there. Make it life,' and bang, it is all put into the computer and then it comes out as legislation. Is that unfair?

Mr Alderson—Yes, I think it is. To give an example, in the consultation process within government the Privacy Commissioner, for example, was involved. You may or may not agree with all of the things in the legislation, but the way that it was developed included an examination of the foreign models, both existing and proposed, and a reading of what was proposed against our existing institutional and legal framework. I think that is quite a key thing in terms of the accountabilities that are there for the police and the prosecutors and the openness of our court system as well as the consultation process, which involved competing considerations—the rights issues, the privacy considerations and so forth.

CHAIR—Senator Murray, did you want to ask some further questions?

Senator MURRAY—I had a wicked thought.

CHAIR—Let us hear it.

Senator MURRAY—On Monday the *Australian* published an interesting set of articles on mental illness. One of their remarks was that over 18 per cent of Australians have a significant mental illness, including depression and all sorts of things. The wicked thought that went through my mind was that you might expect that one in five of our attorneys-general would have a significant mental illness, and I wonder if their state of mind matters when they proscribe an organisation.

It goes back to the discretion of somebody who is elected as a politician to declare organisations and then, to that organisation, you attach great powers. For somebody like me, coming from southern Africa, I know what those kinds of things lead to in the wrong hands—we have had this discussion before. If you can think of any of the ratbag loony parties at the extremes of our political spectrum and imagine that for some reason they attain parliamentary power and they had an Attorney-General with this legislation in their hands, would you really want that to happen? This provision gives great power. You know it does; I know it does. I just say to you that, if you are going to give great power, you must protect the individual who faces that great power when they are before the courts of the land. In terms of this inquiry, your absolute and strict liability provisions double up the difficulties.

Mr Alderson—On the comment about an Attorney-General from the extreme or labouring under some impairment, firstly, we would say that there is an aspect of confidence in our legal and political systems and in the robustness of the institutions we have. On top of that, what locks in the accountability is the availability of judicial review. In issuing remedies against administrative decisions by Commonwealth officers, there is, effectively, the constitutional entrenchment of that in the part dealing with the judiciary. So a decision that cannot be justified by reference to objective facts about terrorism will be amenable to that judicial review process. There is also the requirement for the decision to be gazetted and notified in newspapers which, again, puts it in the public sphere and allows the appropriate debate about that.

CHAIR—Corporate crime could become very severe, and I suppose drug importation could become even worse than it is. Even the wrong use of the Internet and the electronic system in Australia could become severe. Now that we have brought in absolute and strict liability at the terrorism level, why should we not bring it in at that level too? They are very heavy vices that we want to get rid of. If it is all right for terrorism, why should it not be all right for that?

Mr Alderson—Again, I suppose there is a consciousness that the events of September 11 are just so dramatically different to anything that occurs in the normal criminal context that there is a strong rationale for a very different approach and that is the reason why these have not been framed as more general Commonwealth provisions to deal with serious crime but have been limited to this terrorist context. It is on quite a different plane, but the issues with organised drug crime and so forth have been dealt with in different ways. Obviously there was legislation last year addressing those kinds of issues.

CHAIR—The telecommunications intercept act starts off by saying that you should not intercept telecommunication intercourse, but a number of particular bodies are excepted and that keeps expanding. There has been this legislative troop over the years but, in any event, I understand what you say.

Senator MURRAY—The difficulty for me is that, in dealing with a genuine problem which does need addressing, it seems to me that the construction of legislation increases the potential for injustice to occur: unintended consequences and organisations proclaimed that should not be. Injustices occur where individuals are not able to defend themselves as they would normally. If rebuttal of that is either 'trust us', namely the government, or 'trust the robustness of our political and public institutions', you have to look behind that.

Let us take one key institution. The investigatory authorities include the police. Right now in my state of Western Australia we have got a royal commission into police corruption. You just had one in New South Wales; you just had one before that in Queensland. There is a core of corruption in our police force that you will never get rid of. That is not a robust institution. An institution has to be very careful to keep an eye on it because the majority of police are very good. Policemen and policewomen cannot get rid of that minority who, since the start of Federation, have been in there rorting and abusing their police powers. That is why you keep having these royal commissions. Let us step back a little further. You talk about the robustness of our political institutions. In my state of Western Australia, we have had two former premiers and a former deputy premier jailed, and right through the country politicians of all kinds have been jailed. So there is a percentage of politicians who are corrupt and criminal.

You see the point I am making: in every institution there is a core or a percentage, however small, of people who are capable of doing the wrong thing. Now you have produced legislation which gives immense discretionary power and investigatory power and all sorts of other powers to people in a good cause. You learnt the abilities of people caught up in that to protect or defend themselves. So the philosophical underpinning and expectations that you present have to be challenged. You know very well, as a trained and very capable legal mind, that the reason our common law has been developed like this is that we have found over centuries that you need to protect yourself against the minority who abuse power and who act contrary to the interests of the individual. Never mind all of the other issues to do with the bills. I cannot see why in that environment, when somebody is before the courts facing life imprisonment, you

want to strap them down further with absolute and strict liability provisions. I just cannot understand that.

Mr Alderson—The fact that we have premiers and deputy premiers jailed in this country is positive testament to the strength of our system.

Senator MURRAY—It is a good thing; I agree. But say one of them had been the Attorney-General, who was proscribing an organisation. You might find that out later and jail him.

Mr Alderson—Again, I have been through the mechanisms designed to deal with that but, on a more philosophical level, just briefly—this is more a matter of personal interest, having done some study of the history of the NSW Police and their legal regulation—there was a time back in the '60s when the NSW Police had virtually no formal powers and yet abuse of the citizenry and misconduct was rife. There has been a Commonwealth and state process over the last 30 years of putting things on the statute book—having powers and accountability spelt out in legislation—that has helped bring some of these things out into the open and avoid this more closed door system about which you rightly express concern.

Senator MURRAY—But the one in 100 corrupt cops—never mind the other 99 who are good—you just cannot get rid of. It might be the person doing the investigation, as Senator Cooney says, verballing you over the fact that you chopped down a few telephone wires and were a member of organisation which has been proscribed. The politician who, 10 years on, might be jailed for corrupt behaviour, is the one who was the attorney-general at the time. You cannot—either you as a legislation designer or us as legislators—design a system against those few who will use power improperly or act improperly and, therefore, you have to design the system to protect them against that occasional injustice, miscarriage of justice or denial of justice. What you are doing here is not doing that. You have mentioned a number of protections—yes, I acknowledge that, and I give you the respect you need—but here you are still limiting the ability of somebody who faces a life imprisonment to defend themselves. Even a soldier at war does not face life imprisonment, under the Geneva convention. You could have done the most terrible things but, if you are a soldier, you do not face that.

Mr Alderson—Yes, there is probably not much further I can—

CHAIR—Would it be fair to say that the Security Legislation Amendment (Terrorism) Bill 2002 and related bills extend almost exponentially the offences for which people can be arrested?

Mr Alderson—No, I would not agree, Senator, that it was an exponential increase. I would say that, in practical terms, it is a very small increase. As has been pointed out, in many of the cases you would have a lesser and probably less appropriate offence. In any case, if a person does engage in serious property damage or serious harm interfering with an electronic system, there will be another offence already. What this does is say that, if it has the terrorism context, it is dealt with as terrorism. That also links to these other provisions about shutting down the organisation, freezing assets and so forth, but I do not think there would be that many people whom there would be no basis to arrest at present.

The one category that really is a new category of people who could be prosecuted for offences under this but probably cannot be prosecuted at present is that of those who assist an organisation, for example, by financing it, knowing that the organisation is engaged in terrorist acts but not providing that funding for a specific terrorist act. The limit on aiding and abetting conspiracy is that, to be guilty of those offences, you would need to have provided the funds for that bombing over there whereas, under this legislation, if there is that broader terrorist connection—if you are funding an organisation that is engaging in terrorism but you are not giving them money to do that specific bombing—then you are caught. That is really the main category.

CHAIR—But authorities could arrest you for providing training in the use of firearms without doing more than just simply saying, 'This is a terrorist organisation, we are going to arrest you,' or if you direct the activities of an organisation or you possess a thing. Indeed, you might be arrested and held and the proceedings are not taken against you. There is a whole series of circumstances under which the authorities can arrest you, even if they do not proceed.

Mr Alderson—But you must have reasonable grounds to suspect that terrorist connection to arrest and, ultimately, you must prove it beyond reasonable doubt to convict.

CHAIR—I am not talking about conviction, just to arrest and to have a person in custody for a few days.

Mr Alderson—You would need evidence of that terrorist connection to arrest. My hope is that through (a) the preventive powers of this legislation, (b) effective national approaches and (c) good grace, we do not end up with a multitude of terrorism offences in this country.

CHAIR—What you do is swear out an affidavit—'I suspect that this person may do this'—and, in fact, nothing might ever happen. That is all you need do. The judge signs off and, bang, he is arrested, and that is the end of the matter. You let him go a week later, but you have achieved your purpose.

Mr Alderson—But, again, whether you have terrorism offences or other offences, you also need warrant issuers—magistrates and so forth—who take their job seriously.

CHAIR—Yes, but they just go on the affidavit. If the proceedings were not continued, the magistrate is not going to even know what happened to the warrant he issued.

Mr Alderson—But if you go by way of arrest by warrant, there is that decision. If, for a Commonwealth offence, you detain a person, then beyond four hours you need an extension. That has got to go back to a magistrate or, in limited cases, to a justice of the peace. Then, beyond that, there is a bail determination to be made.

CHAIR—Under the ASIO Act they have a right to hold them for 48 hours, haven't they?

Mr Alderson—I am talking about the arrest for a criminal offence. The ASIO powers are a separate category where, for intelligence gathering purposes, there is that distinct power to detain.

CHAIR—You are right, in talking about the power of arrest, that there is the four hours. That is absolutely correct; I was intending that. I was also intending to ask you about the power of ASIO, because under this terrorism act they can now arrest in respect of many matters that they could not before. In fact, they could not arrest before.

Mr Alderson—I do not want to seem semantic, but ASIO cannot arrest for these offences. What can happen is that if you go through the hoops of the Attorney-General meeting the criteria and then the prescribed authority, who is a magistrate or AAT member, meeting the criteria, then ASIO can question the person and they are held there. But the actual arrest has to still be done by police.

CHAIR—But they can hold them.

Mr Alderson—They can hold them.

CHAIR—I am sorry, I am putting this badly. It is proper that you go through the semantics because they are important. ASIO can now investigate these offences.

Mr Alderson—No: I am sorry, Senator, that is neither the intention nor the case.

CHAIR—If I can explain what I mean, I would have thought this would enable ASIO to put people under surveillance for these matters on the basis that they might be involved or might intend to be involved in these matters.

Mr Alderson—A very important distinction is maintained, which is that the nature of ASIO's role under its legislation remains the same; it is not being given a new role in investigating criminal offences—that remains with the police. But in relation to the ASIO bill, the rationale and the way it works is that there are some cases where stopping a plane going into a building, or what have you, is so serious that we are going to put the police at bay and say, 'Getting evidence of a possible offence is secondary here. What we must do first is give ASIO an additional power to perform their normal role in gathering intelligence.' And that has got a preventive objection, so we say, 'Put the police at bay while we see if we can stop something happening.' ASIO's powers are limited to its intelligence gathering function and it is being given no role to arrest people or to investigate criminal offences.

CHAIR—For some reason, I thought that they had power to obtain the detention of people for up to 48 hours.

Mr Alderson—That is quite correct. I am saying that both in the legislation and the objective there is a conceptual distinction that they do have that 48-hour detention power—

Senator MURRAY—That is for a different purpose.

Mr Alderson—Yes. It is built in as a quite distinct step before the criminal investigation.

CHAIR—What I am trying to say—and I am not saying it very well—is that ASIO just cannot, I would imagine, gather information at large. There has got to be some sort of

framework that you gather information and intelligence about. Hopefully, you are not gathering intelligence because you are going to a football match.

Mr Alderson—That is right.

CHAIR—I would not have thought they would have power to do that.

Mr Alderson—No.

CHAIR—But this new raft of legislation would extend the sorts of areas that ASIO can investigate, I would have thought. That is all I am saying.

Mr Alderson—I do not think it extends the areas in that, if there were someone planning to bomb a building in Australia or to blow up a vehicle or what have you, ASIO would already have the function and the duty to see what it could do to find out about it, report to the government and see what could be done to prevent it. ASIO would already have that. But it is being given an additional tool to achieve that existing objective which is subject to prerequisites, the 48 hours—

CHAIR—You have made the point well. I just think that—with the ability of the Attorney to declare things, to proscribe organisations and use things that could be used as evidence—to suggest that we are now committing an offence under this bill, that would enlarge the area than which ASIO could look at, but I do take your point. Do you want to say something about the suppression of—

Mr Alderson—Espionage?

CHAIR—Espionage, yes.

Ms Low—The espionage bill is aimed at achieving two things. The first is strengthening Australia's espionage laws and the second is modifying the language of some offences in part VII of the Crimes Act for the purpose of insertion into the Criminal Code. I note that there is one issue that was raised in the *Bills Digest* regarding the reversal of onus of proof in regard to the soundings offence. I can advise you that a response to that issue has been prepared and is currently with the Attorney. The Attorney is overseas at the moment, as you would be aware, so there might be some delay in getting that response to you but that was an issue that has been raised by this committee.

CHAIR—What is a sounding?

Ms Low—It is actually a very technical thing. It is basically taking soundings or details of things regarding the ocean, so it includes the tide, the depth of ocean and the ocean floor.

CHAIR—This is not quite so savage in terms of reversals of onus and things like that.

Ms Low—No, I do not think so at all.

CHAIR—It is almost a pure bill.

Ms Low—I like to think so.

CHAIR—I wonder why that is.

Senator MURRAY—It is a softer touch.

CHAIR—Yes. We go in for only 25 years imprisonment instead of life. I do not think there are any provisions as to absolute liability in this and no provisions as to strict liability.

Ms Low—No. That is right.

CHAIR—'Security or defence', it used to be 'security or safety', didn't it?

Ms Low—It used to be 'safety or defence'; that is right.

Senator COONEY—'Security' might be wider or narrower than 'safety' but, in any event, that is it. The only other thing we should ask you is: it makes it an offence to help people against overseas countries that we are friendly with, does it not?

Ms Low—It creates an offence whereby, if you communicate security or defence information to another country for the purposes of advantaging that country, you are potentially liable for an espionage offence.

Senator COONEY—What I was thinking about was if you were advantaging one of our allies.

Ms Low—It does not distinguish between allies or friendly or nonfriendly countries.

Senator MURRAY—So it is a broad definition of treason, is it not?

Ms Low—Basically, it is treason in nonwar times, which is why it has the lesser penalty.

Senator MURRAY—It is advantaging a foreign country in terms of your own country's security.

Ms Low—That is right.

Senator COONEY—It leaves the judge with the discretion to go in camera, does it?

Ms Low—That is right.

Senator COONEY—This does not seem quite as worrying as some of the other bills. That is because you wrote it.

Ms Low—Absolutely.

Mr Alderson—I would like to thank the committee. I have participated in a number of these briefings and find them to be extremely valuable as an opportunity to talk through some of these issues in some detail.

Senator MURRAY—Yes. It is a different style from other committees.

Senator COONEY—I would like to thank you. You have come down whenever we have wanted and you have elucidated things terrifically. It is a worrying set of bills. I would have loved to have seen how they were prepared. Thank you, Ms Low, for coming down. Are you going to come again?

Ms Low—Any time the espionage bill pops up, I usually appear.

Senator COONEY—You have the broad sweep of criminal law, whatever we want: white-collar crime, drugs, espionage and what have you—terrific. Thank you to *Hansard* for working all the way through and putting up with the phone lines from Perth.

Committee adjourned at 5.12 p.m.

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

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

Dear Senator Cooney

I refer to the Scrutiny of Bills Alert Digest No. 3 of 2002, particularly the matters relating to the Border Security Legislation Amendment Bill 2002 ("the Border Security Bill"). Specifically, the Committee has asked for advice on the creation of criminal offences of strict liability, and the reason for introducing amendments to section 189A of the *Customs Act 1901* ("the Act") and their effect, if any, on safeguards previously established in relation to the carriage of firearms by Customs officers.

Creation of criminal offences of strict liability

Proposed new subsections 64AB(3AE), 64ACD(3) and 213A(6) of the Act, and proposed new section 245N(3) of the *Migration Act 1958* will create criminal offences of strict liability. The provisions relate to a failure to provide a cargo report of in-transit cargo, a report of passengers and crew, or information about people working in restricted areas.

Strict liability offence regimes are common across jurisdictions to encourage compliance with regulatory requirements ranging from speeding offences to not being able to substantiate entitlement to diesel fuel rebate. Strict liability offences are appropriate in a regulatory context because there is a legitimate expectation that persons to whom regulatory requirements apply will take care to ensure compliance. The approach in this Bill reflects overall Government policy on strict liability. Strict liability is a deliberate (and necessary) policy to ensure that Customs has access to information critical to protection of Australia's border. The penalties for these offences are relatively modest. The pecuniary penalties involved range from a maximum of 30 penalty units to a maximum of 60 penalty units. No term of imprisonment is imposed in relation to any of the offences.

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

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Customs uses risk assessment to fulfil its border protection and revenue collection responsibilities. The information provided to Customs is the basis of the risk assessment. This information is provided to Customs by the report of cargo and the report of passengers and crew on ships and aircraft. Failure to provide information affects a Customs officer's ability to conduct a proper risk assessment, in the same way that false or misleading information also impedes proper risk assessment. Consequently, inaccurate risk assessments can allow prohibited imports, such as narcotics and weapons, illegally into the community and the capacity to monitor the movement of goods on behalf of other countries, or as required by international agreement, is limited.

The Government believes that the risks to the community justify the introduction of strict liability offences for breaches of the regulatory mechanisms designed to reduce those risks.

The defences in the *Criminal Code*, as it applies to the Customs Act, will be available for the offences of strict liability introduced by the Border Security Bill. This includes the defence of mistake of fact.

Failure to provide report of in-transit cargo

Where imported cargo is intended to be discharged in Australia that cargo is required to be reported to Customs. In the case of cargo to be discharged from a vessel, the report is to be made to Customs not later than 48 hours before the ship's arrival at the port if its journey from the last port outside Australia is likely to take 48 hours or more. If the journey is likely to take less than 48 hours, the report must be provided not later than 24 hours before its arrival. In the case of cargo to be discharged from an aircraft, if the report is made by document the report must be made within three hours after the arrival of the aircraft at the first Australian airport and if it is to be made by computer, it must be made at least two hours before the arrival of the aircraft in Australia.

If a report of cargo intended to be discharged is not made to Customs, while there is no offence provision, Customs can refuse to grant permission to unship the goods. However, since in-transit goods are not going to be landed in Australia, this sanction is not available where an operator fails to make a cargo report. Where no report is made, goods that may pose a risk to the community or may be used as part of a terrorist threat may be illegally discharged and enter Australia. Similarly, the cargo in Australian ports cannot be monitored on behalf of other countries or as required by international agreements.

Strict liability offences for the reporting of cargo to be discharged in Australia will be introduced to the Customs Act as a result of amendments by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* ("the ITM Act") (which are yet to commence).

Failure to provide report of crew and passengers

This proposal seeks to require operators of ships and aircraft arriving from a place outside Australia to provide Customs and the Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") with an advance report of passenger and crew information.

Advance passenger and crew information means information collected by an airline from a passenger or crew member at check-in and forwarded to the border control agency in the destination country. The information consists of: Name; Date of Birth; Sex; Travel Document (Passport) number; and Issuing Authority. These data elements are contained in any passport and will be required when the passenger arrives in Australia.

The reporting of information to Customs is primarily done electronically. The Chief Executive Officer ("CEO") of Customs will approve an electronic system for each operator. As a fallback mechanism in the event that the approved system is not working for whatever reason, the operator may report by another electronic means eg, fax or email, or may report by document. Operators will therefore have a variety of means by which to comply with the obligation to report.

It is a difficult and complicated process to identify the high-risk passenger or crew member. Advanced passenger and crew information facilitates the pre-arrival risk management capability for border control agencies. Such a requirement will significantly enhance Customs and DIMIA's ability to conduct checks on the passengers and crew arriving in Australia and identify, prior to arrival, persons who may be likely to import prohibited goods or breach other Commonwealth laws, including those against terrorism. This proposal is consistent with developments in the USA, UK and Canada.

This proposal to include a strict liability offence for failing to provide advance reports of passenger and crew, is consistent with offences that apply to other electronic reporting requirements within the Customs Act that are applicable to air and sea cargo. Further, existing section 64AC of the Customs Act requires a passenger and crew report to be given to Customs and it is an offence not to provide such a report. Prior to the commencement of the *Criminal Code*, the passenger and crew reporting requirements were strict liability provisions and (once amended by the ITM Act) will again be strict liability. There is therefore no departure from the existing position.

In view of the foregoing it is considered appropriate that failing to provide an advance report of passengers and crew should be a strict liability offence.

Failure to provide information about people working in restricted areas

In accordance with the provisions of the *Air Navigation Regulations 1947* most people working at international airports in Australia with access to restricted areas require a security clearance and wear an Aviation Security Identification Card ("ASIC") indicating that they have been security cleared. Under these Regulations employers are authorised to issue such identification cards to their employees. However, not all

employees of retail businesses located within the restricted areas of an international airport are required to have an Aviation Security Identification Card.

The presence of these people in the restricted or sterile area of international airports can pose a threat to the integrity and security of the border. There are many examples, both in Australia and overseas, of such employees acting in concert with passengers and/or crew members to import or export prohibited goods.

Under this proposal employers of persons working within restricted areas but not issued with ASICs, will be required to provide information to Customs. This information must be provided to an authorised officer and consists of the name and address of the person, the person's date and place of birth and other information prescribed by the regulations. It will be a strict liability offence for an employer to fail to provide this information.

The *Quarantine Act 1908* has a strict liability offence for failing to produce documents requested by a Quarantine officer (section 38 refers). Under section 50 of the *Excise Act 1901*, manufacturers must keep records and on demand produce them to the requesting officer.

Under this proposal the employer will have seven days from the employment of a person who will work in a restricted area, to provide the information to an authorised Customs officer.

In view of the above, and given the regulatory nature of the provision, it is considered appropriate that failing to provide information about people working in restricted areas should be a strict liability offence.

Rights and liberties and the carrying of firearms

The proposed amendments to the Act and the *Customs Regulations 1926* ("the Regulations") consolidate and tighten the Chief Executive Officer's powers to authorise the carriage of firearms and personal defence equipment by Customs officers.

These amendments do not seek to expand the current powers of Customs officers or the circumstances in which officers carry approved firearms, they will however permit increased use of personal defence equipment. These amendments will not in any way obviate the safeguards previously established, which ensure that the risks involved in the use of weapons will be kept to a minimum.

Current legislation

Currently both the Act and the Regulations allow the CEO of Customs to authorise the carriage of firearms and personal defence equipment. Section 189A of the Act specifically allows Customs officers in Customs vessels to carry firearms and personal defence equipment but (subsection 189A(4)) also recognises the powers given to the CEO under regulation 194.

Regulation 194 allows the CEO of Customs to authorise the carriage of firearms by any officer. The use of this regulation has been limited to circumstances where Customs officers on patrol in remote areas carry firearms for protection from wildlife such as wild buffalo, feral pigs and crocodiles.

These amendments will consolidate the powers into a single legislative framework. The amendments will also provide for Customs officers to carry firearms and personal defence equipment when carrying out functions under other Commonwealth Acts such as the *Migration Act 1958*, the *Quarantine Act 1908*, the *Fisheries Management Act 1991* and the *Environment Protection and Biodiversity Conservation Act 1999*.

The amendments will also permit Customs officers to use personal defence equipment as defined in subsection 189A(5) of the Act in specific operational circumstances, for example when executing a search warrant.

It is more effective and efficient to have a single system within Customs legislation, which deals with the carriage of firearms and personal defence equipment. If the proposal is accepted then Customs Regulation 194 would be repealed.

Safeguards

Consistent with the position outlined by the Minister for Immigration and Multicultural Affairs in 1999, Customs has established safeguards for the carriage of firearms and personal defence equipment. This has been done with the assistance of the Australian Federal Police ("AFP").

All Customs marine officers now undergo rigorous training in the use of force as prescribed by the AFP. This training is based on conflict de-escalation and conflict management. These matters are documented in the Customs National Marine Unit Manual "*Operational Safety and General Instructions*". Along with the new training procedures, new systems have been developed for the management and control of firearms as well as for items of personal defence equipment in accordance with CEO Direction No.1 of 2000, which was issued by the CEO under subsection 189A(2) of the Act.

Based on these experiences Customs is proposing to extend this legislative regime for the control and management of firearms and personal defence equipment to the remaining circumstances where such equipment is used. These changes will not trespass unduly on personal rights and liberties. The intention is to consolidate but not expand existing powers.

I trust this advice addresses the Committee's concerns satisfactorily.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

19 APR 2002

The Hon Ian Macfarlane MP
Minister for Industry, Tourism and Resources

PARLIAMENT HOUSE
CANBERRA ACT 2600

21 MAR 2002

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 14 March 2002 concerning the Coal Industry Repeal (Validation of Proclamation) Bill 2002 (the Bill), which has now been passed by Parliament.

As I explained in my response to the Committee's comments in *Alert Digest* 1/02, the Bill aims to correct an administrative oversight, namely the omission to Gazette, prior to 1 January 2002, the Governor-General's Proclamation setting the commencement date of the *Coal Industry Repeal Act 2001* (the Act) at 1 January 2002. The Act implements, for the Commonwealth's part, the dissolution of the Joint Coal Board and its replacement by Coal Services Pty Ltd.

Based on feedback from NSW, legal and other advice, I understand that those affected acted as if the Proclamation was valid. When the omission was realised, my Department worked with the NSW Government and Coal Services Pty Ltd to develop a remedy that did not disadvantage those affected and which provided them with the confidence to continue to act as if the Proclamation was valid.

These parties fully supported the approach encompassed in the Bill. I understand that Coal Services Pty Ltd's consideration also took into account the need for a solution that did not disadvantage its owners - who represent employers and employees in the NSW coal industry - its management and its staff. As such, I consider that the interests of all those affected have been taken into account, either directly or indirectly, and that no one should be disadvantaged by the retrospective commencement provisions of the Bill.

Yours sincerely

Ian Macfarlane

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ATTORNEY-GENERAL
THE HON. DARYL WILLIAMS AM QC MP

File 02/1404 CRJ
Min 02/217072 CRJ

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

- 4 APR 2002

Dear Senator Cooney

I refer to the Scrutiny of Bills *Third Report of 2002* in which your Committee sought my assurance that the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002 will not be used as a precedent for the retrospective creation of criminal offences in other circumstances.

I can assure the Committee that the Government will not use this Bill as a precedent for the retrospective creation of criminal offences. As stated in the Explanatory Memorandum to the Bill, the Government does not lightly pursue retrospective criminal laws. An offence would only be made retrospective after careful consideration on a case by case basis and only where there are special circumstances necessitating retrospectivity, as there were in relation to the new hoax offence.

Yours sincerely

Daryl Williams

DARYL WILLIAMS

PARLIAMENTARY SECRETARY
TO THE TREASURER
MANAGER OF GOVERNMENT
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Senator the Hon Ian Campbell

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23 APR 2002

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

Dear Senator Cooney

I refer to the Committee's request for advice in the *Alert Digest No.3 of 2002* (20 March 2002) regarding certain issues relating to the Financial Corporations (Transfer of Assets and Liabilities) Amendment Bill 2002. Specifically, the Committee has asked for advice on the retrospective commencement of clause 2 of the bill not acting to the disadvantage of any person.

The retrospective application of clause 2 of the bill extends the sunset clause from 1 July 2001 until June 2003 for banks obtaining a banking authority in order to be eligible for concessional tax treatment when transferring assets and liabilities. The effect of the retrospective commencement of clause 2 is to the advantage of foreign banks by extending the tax concession to foreign bank branches transferring their assets and liabilities.

I have been advised that there will be no increased tax burden or a reduction of banking services due to the commencement of clause 2. I have also been advised that foreign banks changing to a branch structure will allow foreign banks to conduct their business with a more efficient operating structure and provides a consumer protection benefit of foreign banks operating with a branch structure having to comply with a greater range of prudential requirements than a subsidiary.

In summary, it is considered that there will be no disadvantage created by the retrospective commencement of clause 2 of the Financial Corporations (Transfer of Assets and Liabilities) Amendment Bill 2002.

Yours sincerely

IAN CAMPBELL

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13 MAY 2002

Mr J. Warmenhoven
Secretary
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Mr Warmenhoven

Thank you for your letter of 8 February 2002 to my adviser Ms Melissa Baldwin concerning provisions in the *Financial Services Reform Act 2001*. I apologise for the delay in responding.

Your letter requests information as to what remedies are available to a claimant who is dissatisfied with a compensation decision made by the Securities Exchange Guarantee Corporation (SEGC).

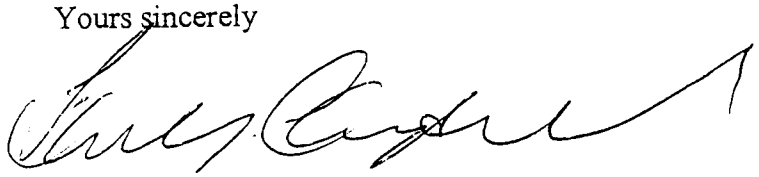
Section 888H of the *Financial Services Reform Act 2001* provides that where the SEGC has disallowed a claim, the claimant may bring proceedings in the Federal Court or a state or territory supreme court to establish a claim if the claim has been disallowed. The provision also provides that if the SEGC has not decided the claim within a reasonable period the claimant may bring proceedings in the Federal Court or a state or territory supreme court to establish the claim. Section 888H includes a time limit, provisions relating to costs and the declarations the court may make.

You have also requested information on section 854B. This section contains a regulation making power which enables exemption and modifications to be made to the application of Part 7.4 of the *Corporations Act 2001* (limits on involvement with licensees) to allow flexibility in applying the provisions in this Part. As you would be aware, Part 7.4 contains a range of measures that relate to limits on control of certain licensees, a requirement that those involved in markets and clearing and settlement facilities be fit and proper and also record keeping requirements.

The regulation making power was primarily inserted to ensure that in the case of limits on control, the provisions did not prevent licensees structuring their businesses in ways which would, on the face of the legislation, be prohibited and which would on every occasion require a ministerial decision. The particular circumstance contemplated was where the licence is held by a wholly owned subsidiary company. The explanatory memorandum to the amendment indicates that the regulation making power is only intended to be used in exceptional circumstances.

I trust this information will be of assistance to you.

Yours sincerely



IAN CAMPBELL

ATTORNEY-GENERAL
THE HON. DARYL WILLIAMS AM QC MP

14 MAY 2002

File 02/2565
Min 02/217068

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

Dear Senator Cooney

I refer to the Scrutiny of Bills *Alert Digest No. 3 of 2002* in which your Committee sought my advice on aspects of the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, the Security Legislation Amendment (Terrorism) Bill 2002 [No.2], the Suppression of the Financing of Terrorism Bill 2002 and the Telecommunications Interception Legislation Amendment Bill 2002.

Security Legislation Amendment (Terrorism) Bill 2002 [No.2]

Absolute liability offences

The Committee indicated it had concerns regarding the creation of offences of absolute liability in proposed sections 101.2, 101.4 and 101.5. In particular, the Committee commented that it seems that criminal liability is being imposed on the basis of possible terrorist connections.

I can assure the Committee that the proposed offences do not impose criminal liability merely on the basis of possible connections to terrorist acts. The prosecution will be required to prove beyond reasonable doubt that the "training", "thing" or "document" is in fact connected with preparation for, the engagement of a person in, or assistance in, a terrorist act.

However, the application of absolute liability means that the prosecution will not have to prove that the defendant knew that the training, thing or document was connected with a terrorist act. Instead, it will be a defence to a prosecution for an offence against subsections 101.2(1), 101.4(1) or 101.5(1) if the defendant proves that he or she was not reckless with respect to the fact that the training, thing or document was connected with a terrorist act. In other words, the application of absolute liability and the availability of the defence have the effect of shifting the onus of proof in relation to the defendant's mental state from the prosecution to the defendant.

I appreciate that this is a departure from the general principle that the prosecution is required to prove fault on the part of the defendant. However, as demonstrated by the events of 11 September 2001, terrorist activities can cause enormous loss of life and devastate

communities. In these circumstances, the Government considers that special measures to ensure the effective prosecution of persons connected to terrorist activities are justified. I note that this approach is consistent with the United Kingdom *Terrorism Act 2000*, which imposes criminal liability on a similar basis.

Creation of criminal liability by declaration

The Committee sought my advice as to why proscribed organisations declarations made under proposed new section 102.2 of the Criminal Code are not subject to Parliamentary scrutiny. A declaration could only be made under section 102.2 if the Attorney-General has an objective, reasonable, basis for concluding that the organisation or a member has committed a terrorism offence, that the proscription will give effect to a United Nations Security Council decision that the organisation is an international terrorist organisation or that the organisation is likely to endanger the security or integrity of the Commonwealth or another country. It is appropriate that this decision be made by the Attorney-General because it concerns the security and safety of Australians, which is one of the Government's primary responsibilities.

The Attorney-General's decision to declare an organisation to be a proscribed organisation is open to judicial review on the full range of grounds under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). These grounds include failure to accord natural justice, failure to consider a relevant matter and unreasonableness. The ADJR Act provides a specific avenue for proscribed organisations to seek an independent review of the Attorney's decision.

Strict liability offence

The Committee also sought my advice as to why a person should be strictly liable for an offence against proposed section 102.4 of the *Criminal Code*. Under proposed subsection 102.4(2), strict liability applies to the circumstance that the organisation is a proscribed organisation. The application of strict liability to this element of the offence means that the prosecution will not have to prove that the defendant knew that the organisation had been declared to be a proscribed organisation. However, it will be a defence to a prosecution for an offence against subsection 102.4(1) if the defendant proves that he or she neither knew nor was reckless as to the existence of the grounds for proscribing the organisation. Likewise, a person who moves immediately to cease to be a member of an organisation after it has been proscribed also has a defence.

The application of strict liability and the availability of the defence in proposed subsection 102.4(3) will ensure that the commission of the offence depends on the defendant's awareness of the fact that the organisation is involved in terrorist activities or is a threat to national security rather than on the defendant's awareness of the fact that the organisation has been declared to be a proscribed organisation. If the prosecution was required to prove that the defendant knew that an organisation had been declared to be a proscribed organisation, defendants with knowledge of the terrorist activities of an organisation would be able to escape liability by demonstrating they were not aware of the organisation's proscription.

Suppression of the Financing of Terrorism Bill 2002

Strict liability offences

The Committee expressed concern about the imposition of strict liability in relation to the offences in proposed new subsections 20(1) and 21(1) of the *Charter of the United Nations Act 1945*, to be inserted by Schedule 3 to the Bill. Proposed subsections 20(1) and 21(1)

would make it an offence to use or deal with the assets of proscribed persons and entities involved in terrorist activities or to make assets available to those persons or entities, unless the dealing is permitted by a written notice issued by the Minister for Foreign Affairs under proposed section 22.

Strict liability would apply only to the fact that the use of, dealing with, or making available of, the asset is not in accordance with a notice under section 22. The default fault elements set out in section 5.6 of the *Criminal Code* would apply to the other elements of the offences. The application of the default fault elements in section 5.6 of the *Criminal Code* to an offence against subsection 20(1) means that in order to commit the offence a person would have to *intend* to use or deal with the asset and be *reckless* as to whether the asset is a freezable asset. Likewise, in order to commit an offence against subsection 21(1), a person would have to *intend* to make an asset available to a person or entity and be *reckless* as to whether the person or entity is a proscribed person or entity.

The application of strict liability to the circumstance that the dealing with the asset is not in accordance with a notice under section 22 is necessary to ensure that the offences can be effectively prosecuted. Generally, a defendant who holds a freezable asset would only become aware of the existence of a notice permitting a dealing with the asset if he or she is advised by the owner of the asset that a notice has been issued. Consequently, if the prosecution was required to prove not only that the defendant was aware that the asset was a freezable asset but also that he or she was aware that a particular dealing with the asset was not in accordance with a notice under section 22, defendants would be able to avoid liability by demonstrating that they did not turn their minds to the question of whether there was a notice permitting the dealing.

The imposition of strict liability will ensure that a person who holds an asset which he or she knows to be a freezable asset will be required to ascertain that a dealing with the asset is permitted by a notice given under section 22 before allowing the dealing to occur. A person who acts in the mistaken but reasonable belief that a dealing is in accordance with a notice would be able to rely on the defence of mistake of fact under section 9.2 of the Criminal Code.

Telecommunications Interception Legislation Amendment Bill 2002

Telephone interceptions

The Committee drew to the attention of Senators, the amendments to give the Western Australian Royal Commission into Police Corruption eligible authority status under the *Telecommunications (Interception) Act 1979*. The Committee mentioned that these provisions might be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(I) of the Committee's terms of reference.

The proposed amendments will give the Western Australian Royal Commission into Police Corruption access to intercepted material collected by other agencies but not allow interception in its own right. I do not agree that this access, in a whole of government sense, would be considered to unduly trespass on a person's rights and liberties. The function of investigating police corruption in WA is not a new function nor is access to intercepted information for this purpose a departure from the existing policy of the Act. The policy of the Act is that intercepted information can be used for purposes connected with the investigation of police corruption. This is illustrated by the existing inclusion of the Wood Royal Commission into the New South Wales Police Service as an eligible authority. The Western

Australian Royal Commission into Police Corruption's function is an integral part of the anti-corruption machinery in Western Australia. That function would be inhibited if the Royal Commission could not have access to such information.

Yours sincerely

Daryl Williams

DARYL WILLIAMS