SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTEENTH REPORT

OF

2002

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MEMBERS OF THE COMMITTEE

Senator J McLucas (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator T Crossin
Senator D Johnston
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

FIFTEENTH REPORT OF 2002

The Committee presents its Fifteenth 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:

Australian Heritage Council Bill 2002

Australian Heritage Council Bill (Consequential and Transitional Provisions) Bill 2002

Egg Industry Service Provision Act 2002

Financial Sector Legislation Amendment Bill (No. 2) 2002

Research Involving Embryos Bill 2002

Trade Practices Amendment (Liability for Recreational Services) Bill 2002

Transport and Regional Services Legislation Amendment (Application of Criminal Code) Act 2002

Australian Heritage Council Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2002*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 21 October 2002. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 7 of 2002

This bill was introduced into the House of Representatives on 27 June 2002 by the Minister for the Environment and Heritage. [Portfolio responsibility: Environment and Heritage]

Introduced with the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2002 and in conjunction with the Environment and Heritage Legislation Amendment Bill (No. 1) 2002, the bill proposes to:

> replace the Australian Heritage Commission by establishing the Australian Heritage Council which will provide advice on the identification, conservation and protection of places on the National Heritage List and the Commonwealth Heritage List;
>
> prescribe the functions of the Council in relation to the protection and conservation of heritage, including the keeping of the Register of the National Estate; and
>
> prescribe the composition of the Council and its requirements for meetings.

The bill also includes a regulation-making power.

Inadequate indication of commencement
Clauses 3 to 25

By virtue of item 2 in the table to subclause 2(1), clauses 3 to 25 of this bill would commence at the same time as Schedule 1 to the *Environment and Heritage Legislation Amendment Act (No. 1) 2002*. The Explanatory Memorandum merely states this fact, but gives no indication as to whether that Act is likely to commence before or after this bill has been debated and passed by both Houses of the Parliament. The bill for the Act referred to in that table was introduced at the same time as this bill, and it is therefore likely that the two measures will be debated together, in which case it is likely that item 2 in the table to subclause 2(1) will not lead to this bill having any effect prior to Assent. The Committee, therefore, **seeks the Minister's advice** as to why this information was not included in the Explanatory Memorandum.

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

Relevant extract from the response from the Minister

> In my view, both the Bills and the Explanatory Memoranda contain clear commencement information. The manner in which the information is presented complies with Government requirements and practice. The commencement provisions are, importantly, designed to ensure that the operative provisions of these Bills can only commence at the same time as the operative provisions of the primary Environment and Heritage Legislation Amendment Bill (No1) 2002. This is made clear in Item 2 in the table to Subclause 2(1) of the Bills and also in the Explanatory Memoranda. It is also clear from both the Bills and the Explanatory Memoranda that there is a linkage between these Bills and the Environment and Heritage Legislation Amendment Bill (No1) 2002. The Bills were introduced at the same time and the second reading speech for the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2002 makes clear the relationship between the Bills. Accordingly, I do not believe that there is a need to include additional information in the Explanatory Memoranda.

The Committee thanks the Minister for this response.

No apparent merits review of Minister's decisions
Clause 24

Clause 24 provides for various decisions of the Australian Heritage Council to be reviewed by the Minister. Those decisions appear to be of an administrative nature, but there is no provision for the Minister's decisions to be reviewed by the Administrative Appeals Tribunal. The Committee, therefore, **seeks the Minister's advice** as to the reason for this omission.

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

The provision for a Ministerial review provides recourse for individuals who feel aggrieved by a decision of the Australian Heritage Council to enter or remove a place from the Register of the National Estate. In my view, it is more appropriate for the Minister for the Environment and Heritage to undertake such reviews rather than the AAT. It is imperative that both the decision by the Council and any subsequent review be undertaken on heritage grounds, employing the use of heritage expertise. For the same reason, I do not consider it appropriate for the Minister's decision, in turn, to be subject to review by the Tribunal.

It is important to point out that the new Australian Heritage Council will be using the same criteria as the current Australian Heritage Commission, operating under the *Australian Heritage Council Act 1975* (AHC Act), and will be a very similar expert body. The Commission's entries and removals from the Register are not subject to AAT review. This has never posed any difficulties in the functioning of the Commission during its 25 years of operation and no such review has ever been sought for the Commission's decisions since its inception. Neither, in all this time, has there been any demonstrable disadvantage to an individual as a consequence of entry or removal of places from the Register.

The question of whether a merits review of the Commission's decisions on entries in the Register was appropriate, was addressed by the High Court on 18 March 1997. The High Court was considering an appeal against a Federal Court decision that, essentially, Commission decisions on whether a place was part of the national estate could be reviewed on the merits by the Federal Court. The High Court unanimously supported Black CJ, in his (dissenting) decision that:

> In determining, according to law, whether or not a place is part of the national estate, the Commission will of course need to make a proper assessment to determine whether a place is, in fact, within the definition of the national estate in section 4. In doing so it will need to determine whether,

> in fact, a place is within the definition. The final determination of that question is however one that is committed by the Act to the Commission. It is not, in my view, a jurisdictional fact.

The High Court determined that an entry may be made by the Australian Heritage Commission pursuant to Section 23 of the AHC Act in the Register of the National Estate of any place that the Australian Heritage Commission determines, according to law, is part of the national estate as that term is defined in the Act.

The High Court's decision clearly supported Parliament's intention, when it established the Commission in 1976, that the matter of identification should be left to the Commission as an expert body. The new Council will clearly follow on in exactly the same way of determining whether a place is eligible for entry in the Register.

The other point to make is that there will be no statutory implications for owners, occupiers or interested parties as a result of entering or removing places from the new Register of the National Estate - which is very much the situation under the current AHC Act. The only obligation will be on the Minister for the Environment and Heritage who must have regard to the information in the Register when making any decision under the *Environment Protection and Biodiversity Conservation Act 1999* to which this information is relevant.

Thank you for the opportunity to clarify these matters.

The Committee thanks the Minister for this response.

Australian Heritage Council (Consequential and Transitional Provisions) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2002*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 21 October 2002. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 7 of 2002

This bill was introduced into the House of Representatives on 27 June 2002 by the Minister for the Environment and Heritage. [Portfolio responsibility: Environment and Heritage]

The bill was introduced with the Australian Heritage Council Bill 2002 and in conjunction with the Environment and Heritage Legislation Amendment Bill (No. 1) 2002.

Schedule 1 to the bill proposes to repeal the *Australian Heritage Commission Act 1975*, and amends the *Environment Protection and Biodiversity Conservation Act 1999* to remove references to the *Australian Heritage Commission Act 1975*. It also amends five other Commonwealth Acts that refer or rely on elements of the *Australian Heritage Commission Act 1975*.

Schedule 2 to the bill contains the transitional mechanisms concerned with business matters, such as the vesting of former Australian Heritage Commission assets and liabilities in the Commonwealth, tax exemptions, and final reporting requirements. The schedule also provides for the making of regulations of a transitional nature.

Inadequate indication of commencement
Schedules 1 and 2

By virtue of item 2 in the table to subclause 2(1), Schedules 1 and 2 to this bill would commence at the same time as Schedule 1 to the *Environment and Heritage Legislation Amendment Act (No. 1) 2002*. The Explanatory Memorandum merely states this fact, but gives no indication as to whether that Act is likely to commence before or after this bill has been debated and passed by both Houses of the Parliament. The bill for the Act referred to in that table was introduced at the same time as this bill, and it is therefore likely that the two measures will be debated together, in which case it is likely that item 2 in the table to subclause 2(1) will not lead to this bill having any effect prior to Assent. The Committee **seeks the Minister's advice** as to why this information was not included in the Explanatory Memorandum.

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

Relevant extract from the response from the Minister

> In my view, both the Bills and the Explanatory Memoranda contain clear commencement information. The manner in which the information is presented complies with Government requirements and practice. The commencement provisions are, importantly, designed to ensure that the operative provisions of these Bills can only commence at the same time as the operative provisions of the primary Environment and Heritage Legislation Amendment Bill (No1) 2002. This is made clear in Item 2 in the table to Subclause 2(1) of the Bills and also in the Explanatory Memoranda. It is also clear from both the Bills and the Explanatory Memoranda that there is a linkage between these Bills and the Environment and Heritage Legislation Amendment Bill (No1) 2002. The Bills were introduced at the same time and the second reading speech for the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2002 makes clear the relationship between the Bills. Accordingly, I do not believe that there is a need to include additional information in the Explanatory Memoranda.

The Committee thanks the Minister for this response.

Egg Industry Service Provision Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2002*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 12 November 2002.

Although this bill has been passed by both Houses (and received Royal Assent on 2 December 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. 9 of 2002

This bill was introduced into the House of Representatives on 28 August 2002 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

Introduced with the Egg Industry Service Provision (Transitional and Consequential Provisions) Bill 2002, the bill proposes to create an egg industry company to be known as the Australian Egg Corporation Limited (AECL), to provide generic promotion, research and development (R&D), and other industry services to the egg industry. The new company will:

- be limited by guarantee under the Corporations Act;
- assume the R&D functions that are currently provided to the egg industry under a sub-program of the Rural Industries Research and Development Corporation (RIRDC); and
- be not for profit.

All levy payers who pay a new statutory promotional levy will be eligible to register for membership of the new company and have full voting rights.

The Minister will have the power to enter into a funding contract with an eligible body to enable it to receive and administer levies collected by the Commonwealth for industry promotion and R&D, and the Commonwealth's matching funding for eligible R&D expenditure. The Minister may then declare the body with which the contract is made to be the industry services body.

The contract between the body and the Commonwealth will set certain obligations and accountability requirements for the industry services body, including provisions relating to the use of levies, matching R&D funding and transfer of assets and liabilities from the RIRDC.

Parliamentary scrutiny of ministerial discretion
Clause 7

Clause 7 would permit the Minister to enter into a funding contract with the egg industry company which is being created by this bill. Although clause 7 sets out, in broad terms, some of the matters which the Minister may include in that contract, there is no prescription as to any matter which either must or must not be included and no indication as to whether it is intended that any matters will be kept confidential. Indeed, the Explanatory Memorandum notes, on page 2 (with emphasis added), that "The detail of the new industry services body's accountability arrangements to its members *and to the Commonwealth* will be outlined in [that] contract". However, there does not appear to be any provision by which the Parliament may (or must) be informed of these contractual details. The power to settle on the terms of this funding agreement may be regarded either as an administrative one or as a legislative power. It may therefore be argued that clause 7 either makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or the clause insufficiently subjects the exercise of legislative power to parliamentary scrutiny. In either event, the Committee **seeks the Minister's advice** as to what means will be available to the Parliament to be informed of – and, it would be hoped, have the power to review – the terms of the funding agreement.

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

Relevant extract from the response from the Minister

Thank you for the letter of 19 September 2002 from your Committee Secretary, Mr Creed, regarding comments contained in the Scrutiny of Bills Alert Digest No. 9 of 2002 (18 September), in relation to the *Egg Industry Service Provision Bill 2002* (the Bill).

In responding to those comments let me state that entry by the Commonwealth into a funding contract with the proposed new company, Australian Egg Corporation

Limited (AECL), as provided for under Section 7 of the Bill, is an administrative function, not legislative. Therefore there is no process through which the contract would ordinarily be reviewed by the Parliament before it is signed.

As an administrative function, the comments in the Alert Digest claim that Section 7 of the Bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. I believe however, that in conjunction with the funding contract, the administrative powers are sufficiently addressed through Sections 7.2 and 7.3 of the Bill.

Section 7.2 provides that the Minister must be satisfied that the terms of the contract make adequate provision to ensure that promotion, R&D and matching payments are spent by the company on promotion and R&D activities for the benefit of the Australian egg industry and the Australian community generally.

Section 7.3 provides that the contract may require the Commonwealth to pay amounts up to, but not exceeding, limits applicable under Section 8.

I would add that the provision to enter into such a funding contract, through Section 7 of the Bill, is not unique and is based on Section 9 of the Pig Industry Act 2001 and Section 31 of the *Wool Services Privatisation Act 2000*.

While the egg industry funding contract is in the preliminary drafting stage it will detail the arrangements under which the company will manage and administer industry levies collected by the Commonwealth and Commonwealth matching R&D payments. The contract will be developed in consultation with industry following passage of the legislation.

The contract will be closely modelled on other contracts drawn up for similar Corporations Act companies, currently operating in the pork, red-meat, wool and horticulture industries. The essential elements of these contracts require the Corporations Act companies to:

- produce an annual report in compliance with the requirements of the Act;
- develop strategic and operational plans that will take into account industry priorities and the Government's R&D funding policy, direction and priorities;
- provide regular reports to the Commonwealth on progress being made towards achieving agreed outcomes;
- engage an independent organisation to undertake a periodic performance review of their operations to be made available to the Commonwealth, levy payers and the public; and
- have a Director of the Board with corporate governance experience.

The experience has been that these companies have complied with their funding obligations to date and have been responsive to the accountability requirements of the Commonwealth, and industry levy payers.

Thank you again for bringing your concerns to my attention.

The Committee thanks the Minister for this response.

Financial Sector Legislation Amendment Bill (No. 2) 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2002*, in which it made various comments. The Parliamentary Secretary to the Treasurer has responded to those comments in a letter dated 12 November 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. 7 of 2002

This bill was introduced into the House of Representatives on 26 June 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Schedules 1, 3 and 4 to the bill propose to amend the *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001* and the *Corporations (Repeals, Consequentials and Transitionals) Act 2001* to correct minor errors, grammatical mistakes and erroneous cross references and remove obsolete provisions.

Schedule 2 to the bill proposes to amend the *Banking Act 1959* to:

- include provisions for a 'fit and proper' test for directors and senior managers in authorised deposit-taking institutions (ADI) and authorised non-operating holding companies (NOHC);
- make provisions relating to auditors consistent with the auditor provisions in the *Insurance Act 1973*;
- require an ADI, authorised NOHC of an ADI and their subsidiaries, to notify APRA immediately of breaches of prudential requirements and any material adverse developments;
- apply prudential standards on a consolidated group basis;

- provide additional grounds for APRA to revoke authority granted to an ADI or NOHC where the application for the authority contained false or misleading information; and

- correct a discrepancy between the indemnity provisions of the Banking Act and the *Australian Prudential Regulation Authority Act 1998* with respect to APRA staff.

Schedule 5 to the bill proposes to amend the *Insurance Act 1973* to permit APRA to discuss submissions, from a director or senior manager who is being removed, with third parties; require that an insurance company notifies APRA of any breach of prudential standards; and to correct the specification of penalties so that they are consistent with the penalty provisions contained in the *Crimes Act 1914*.

Schedule 6 to the bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* to allow for the recognition of awards, which are still in force, given under arbitration agreements, even after the arbitration power has been removed.

Schedule 7 to the bill proposes to amend the *Superannuation (Resolution of Complaints) Act 1993* to introduce flexibility in the time limits relating to complaints about certain disability benefits; to strengthen, modernise and improve the conciliation powers of the Superannuation Complaints Tribunal; and to remove redundant provisions dealing with arbitration.

Absence of assurance that retrospectivity is not prejudicial
Various provisions

By virtue of items 3, 5, 6 and 7 in the table to subclause 2(1), item 4 of Schedule 1 and items 1, 2 and 3 of Schedule 4 to this bill would commence immediately after the commencement of two Acts of 2001, on 1 July 2001. Each of the amendments proposed in this bill which is to commence retrospectively is technical in nature, and does no more than correct earlier drafting errors. Nevertheless, the Explanatory Memorandum makes no reference to clause 2, and, in referring to the various amendments, does not expressly confirm that the retrospective commencement will not disadvantage any person. The Committee, therefore, **seeks the Treasurer's advice** that this is the case.

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

Relevant extract from the response from the Parliamentary Secretary

> I apologise for the delay in responding to you.
>
> The need for the amendments in items 3, 5, 6 and 7 in the table to subclause 2(1), item 4 of Schedule 1 and items 1, 2 and 3 of Schedule 4 to FSLAB 2, were noted by the Australian Securities and Investments Commission (ASIC) and the Office of Parliamentary Counsel in routine reviews of recent enactments for minor anomalies and discrepancies and drafting oversights. Neither body has indicated any disadvantage flowing to any person from them.
>
> In relation to item 4 of Schedule 1, ASIC has advised that it is "not aware of any specific matter that is potentially adversely affected by the failure to include laws of the Commonwealth referred to in sections 74 and 75 of the old application Acts in the definition of 'old ASIC law'." The amendment may have the effect of protecting persons and the integrity of examinations and proceedings in circumstances where it has effect. The explanatory memorandum provides a detailed explanation of this amendment which corrects a technical drafting error. Without applying the correction as from commencement of the Act the relevant provisions would be uncertain in their operation.

The Committee thanks the Parliamentary Secretary for this response.

Strict liability offences
Item 17 of Schedule 2

Proposed new subsections 19(3) and (6) of the *Banking Act 1959*, to be inserted by item 17 of Schedule 2 to this bill, would create offences of strict liability. Although the Treasurer would not have had the opportunity, when formulating these provisions, to consider the Committee's report on offences of strict and absolute liability, the Explanatory Memorandum does not refer to the fact that the subsections create such liability, or seek to justify its imposition in these circumstances. The Committee, therefore, **seeks the Treasurer's advice** as to whether these provisions come within the guidelines for the imposition of strict liability referred to in the above Report.

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

Relevant extract from the response from the Parliamentary Secretary

The Committee has asked whether these offences "come within the guidelines" in the Committee's recent report on strict liability provisions. The Committee has acknowledged on page 284 of its report that (subject to other relevant principles) "strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance those relating to ... financial or corporate regulation".

APRA's view is that the disqualified person provisions are critical to the prudential regulation of the financial sector. Recent events and revelations (including in the HIH Royal Commission) have shown that it is essential for directors and senior managers of financial institutions to be of good fame and character. If they are not, it is very difficult for APRA to know of or control their conduct, and information provided by them may prove unreliable. The strict liability offences in proposed subsections 19(3) and (6) of the *Banking Act 1959* are important to ensure that the disqualified person provisions operate effectively. Having regard to the nature of the industry being regulated, and the nature of the offences in question, there is a strong case for strict liability.

On page 285 of the Committee's report it is noted that "strict liability may be appropriate where it has proved difficult to prosecute fault provisions". This is particularly relevant in relation to subsection 19(6). That subsection provides that a relevant authorised deposit-taking institution (ADI) or authorised non-operating holding company (NOHC) commits an offence if it allows a disqualified person to be a director or senior manager of the ADI or authorised NOHC. If the offence were one of fault liability, it would be necessary for a prosecutor to show that the ADI or authorised NOHC concerned knew of the person's disqualified status. This would be very difficult to show if the ADI or authorised NOHC had no procedures for undertaking probity checks on its staff. The ADI or authorised NOHC could defend itself on the basis that it did not know of the officer's disqualified status.

The offences in the proposed subsections 19(3) and (6) are otherwise generally in accordance with the considerations set out on page 284 to the top of page 287 of the Committee's report. In particular:

(1) a person may seek a determination by APRA under section 22 that they are not a disqualified person where the person is "highly unlikely to be a prudential risk to any ADI or authorised NOHC". This process is subject to review by the Administrative Appeals Tribunal (AAT).

(2) likewise, a determination by APRA under section 21 that a person is a disqualified person is ultimately subject to AAT review.

(3) the parallel fault liability offences have higher penalties.

(4) there is no provision for penalty notices.

(5) the criteria for a person's disqualified status (in proposed sections 20 and 21) are clear; that is, the person must have been convicted of a relevant offence, or entered into an arrangement relating to insolvency, or have been determined to be disqualified under section 21, or have been disqualified in an overseas jurisdiction.

I trust this information will be of assistance to you.

The Committee thanks the Parliamentary Secretary for this response.

Research Involving Embryos Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 14*, in which it made various comments. The Minister for Health and Ageing has responded to those comments in a letter dated 2 December 2002. 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. 14 of 2002

The Committee reported on the Research Involving Embryos and Prohibition of Human Cloning Bill 2002 in its *Alert Digest No. 7 of 2002*, advising that the Committee had no comments. Later, in *Alert Digest No. 9 of 2002*, the Committee noted that the House of Representatives had split that bill into the Research Involving Embryos Bill 2002 and the Prohibition of Human Cloning Bill 2002, but that the split did not raise any issues within the Committee's terms of reference.

Subsequently, Senator Collins wrote to the Committee requesting that it scrutinise all amendments which had been made, moved or circulated in relation to the two bills. Others have also suggested that the Committee look again at certain guidelines provided for in the Research Involving Embryos Bill 2002.

The Committee held a special meeting to discuss this matter, the results of which are set out below.

Scrutiny of amendments made, moved or circulated

The Committee decided to continue its practice of commenting only on amendments passed by either House and not to comment on amendments moved but not passed, or merely circulated.

The reasons for the Committee's decision are based on principle, precedent and practicality, with the practical considerations alone illustrating how difficult it would be to implement the proposal. In brief, it would not be feasible for the Committee to meet and respond to proposed amendments in a timely way, particularly given the often short time between circulation of amendments and action in the chamber. The practicalities of the proposal are that the Committee would be in almost constant session.

The Committee, however, endorsed its present practice of commenting upon amendments actually made by either House, noting that such amendments will then be considered by the other House, which may be assisted by the Committee's comments.

Delegation of legislative powers
Incorporation of material as in force from time to time
Clause 8, definition of proper consent; Subclause 11(2)

In clause 8, the concept of **proper consent** is defined in terms of *Ethical Guidelines* issued by the NHMRC and other guidelines specified by the Chairperson of the NHMRC Licensing Committee in relation to proper consent to the use of an excess ART embryo. These guidelines appear to be legislative in nature and to significantly affect the operation of the bill. Furthermore, paragraph (b) of the definition allows for the issue of further guidelines from time to time. The guidelines do not appear to be subject to any parliamentary scrutiny, whether by tabling or disallowance.

Subclause 11(2) provides, in relation to an offence provision punishable by imprisonment for up to 5 years, for the Reproductive Technology Accreditation Committee of the Fertility Society of Australia to issue guidelines from time to time. This also appears to be not only a legislative power, but also one which is capable of continuing exercise without parliamentary scrutiny.

Subclause 11(2) also provides for the regulations to prescribe a code or document as in force from time to time. Any regulations made under this provision will be subject to disallowance, but the provision appears effectively to permit subdelegation of continuing legislative power to any person at all, without parliamentary scrutiny of that subdelegated power.

The Committee therefore **seeks the Minister's advice** on these aspects of the provisions.

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

Relevant extract from the response from the Minister

I refer to David Creed's letter dated 19 November to the Senior Adviser, Minister for Health and Ageing. Mr Creed's letter drew attention to recent comments by the Scrutiny of Bills Committee in its Alert Digest 14/02, and suggested that I may like to respond to those comments.

The Committee considered that the definition of *proper consent* in clause 8 (which referred to the NHMRC's *Ethical Guidelines on Assisted Reproductive Technology)* and the reference in clause 11(2) to Codes of Practice issued by the Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia, may insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's term of reference. I will respond to each of these matters separately.

The definition of 'proper consent'

The Alert Digest 14/02 suggested that, in defining 'proper consent' by reference to the NHMRC *Ethical Guidelines on Assisted Reproductive Technology* or any other guidelines specified by the Chair of the NHMRC Licensing Committee, further guidelines could be issued by the Chair from time to time without parliamentary scrutiny.

Paragraph (b) of the definition of 'proper consent' was included in anticipation of the NHMRC issuing revised Guidelines to replace the *Ethical guidelines on assisted reproductive technology,* as referred to in paragraph (a). These 1996 Guidelines are currently under review. Given the changing nature of ART practice, it is foreseeable that the NHMRC will revise these Guidelines every few years. The purpose of paragraph (b) is to allow the Chair to specify the relevant NHMRC Guidelines for the purposes of the definition of 'proper consent'. I note that the Chair can only specify NHMRC Guidelines for the purposes of the definition of 'proper consent', not guidelines issued by any other body.

The Alert Digest also refers to the NHMRC Guidelines not being subject to parliamentary scrutiny either by tabling or disallowance. I would like to draw the Committee's attention to a number of points in relation to this.

Firstly, the *National Health and Medical Research Council Act 1992* (NHMRC Act) requires that Guidelines issued by the Australian Health Ethics Committee (which is the Committee responsible for the *Ethical Guidelines on Assisted Reproductive Technology)* be laid before each House of Parliament within 15 sitting days of the Guidelines being issued. Therefore, these Guidelines are subject to scrutiny by Parliament.

Secondly, if the Guidelines were to be made disallowable this would pose the following concerns:

- Only a relatively small part of the Guidelines will deal with matters relating to this Bill. Making the entire Guidelines disallowable for all purposes (rather than just for the purposes of this bill) is problematic as the Guidelines are broader than just research - they cover the whole of assisted reproductive technology (ART) practice. Use of the NHMRC Guidelines is required under legislation in 3 States and is a condition of accreditation of ART clinics. If these Guidelines were disallowed, it would impact on the whole of ART practice, which is clearly outside the scope of this legislation.
- Under the NHMRC Act, all guidelines must go through an extensive consultation process before being issued. I am concerned that by requiring the *Ethical Guidelines on Assisted Reproductive Technology* to be disallowable instruments, the independence of the NHMRC could be compromised. I note that any amendment or reissuing of the Guidelines would be subject to the same consultation procedures under the NHMRC Act as for the initial issuing of the Guidelines.
- It would be highly unusual for guidelines made under one Act to be disallowable for the purposes of another.

Clause 11 - use of an embryo that is not an excess ART embryo

I understand that the Scrutiny of Bills Committee's key concern in relation to clause 11 is the perceived lack of scrutiny arising from the reference to ART programs being carried out in accordance with RTAC's Code of Practice 'as in force from time to time'. The Committee's concerns are that the Code of Practice would be amended by RTAC (a non-government body) without appropriate Parliamentary scrutiny.

By way of background, it may be useful to describe the policy intent behind clause 11. Clause 11 was drafted so that a person could not use an embryo for research that was not an excess ART embryo. During development of the legislation, concern was expressed by States and Territories that, in the absence of this clause, a person could technically use for research purposes an embryo that the couple had not deemed to be excess or donated to research. This would not be illegal in the 5 jurisdictions that do not have existing legislation regulating ART, and it was considered important that the legislation include a provision to address this potential loophole.

In drafting clause 11 it was important to distinguish between organisations using non-excess ART embryos for genuine purposes in the course of routine ART clinical practice and those using non-excess ART embryos for other purposes. It was considered that the most appropriate way of framing clause 11 would be to pick up the requirements for RTAC accreditation, as set out in the RTAC Code of Practice. Since RTAC is the industry body responsible for accrediting and monitoring ART practice in Australia, and in April 2002 COAG decided that RTAC should provide the basis for a nationally-consistent approach to ART clinical practice, it was considered appropriate for RTAC to be referred to in the Bill.

All ART centres in Australia are accredited by RTAC and as a condition of accreditation all ART programs must be in accordance with the RTAC Code of Practice.

The reason that clause 11(2) was drafted was so that the Code could be amended from time to time and that another Code could be issued in place of the RTAC Code.

Recognising that RTAC provides oversight of all ART clinical practice, it is foreseeable that RTAC may wish to make changes to its Code as the need arises. COAG acknowledged the role of RTAC in deciding that they should set the national standard through their accreditation process.

Paragraph (b) of the definition of *ART Program* was included so that, in the event that RTAC ceases to be the accrediting body and another organisation takes it place, any codes issued by the new organisation could be prescribed instead.

I also draw your attention to the public availability of the RTAC Code of Practice (http://www.fsa.au.com/pdfs/RTAC-guidelines-2002.pdf). Also, amendments to the RTAC Code are made following negotiation with all 34 ART clinics in Australia. All these clinics are provided with the revised Code.

There are also good reasons why the RTAC Code of Practice itself cannot be made a disallowable instrument. RTAC is a non-government body, which regulates the ART industry. RTAC Codes of Practice are not issued under authority of legislation. It is my understanding that RTAC Codes of Practice cannot be made disallowable because section 46A of the *Acts Interpretation Act 1946* only applies where a provision of a Commonwealth Act or regulations confers a power to make an instrument.

The Committee thanks the Minister for this prompt response and makes the following comments in relation to it.

Clause 8 – the definition of 'proper consent'

The Committee notes the Minister's advice that another Act requires all NHMRC guidelines to be tabled within 15 sitting days of being issued. The Committee considers that this is a substantial safeguard, but that it does not provide the same level of parliamentary control as possible disallowance.

In relation to the three concerns expressed by the Minister about disallowance, the Committee makes the following points.

On the first concern, that only a relatively small part of the guidelines will address matters concerned with this bill, the Committee notes that under the usual disallowance provisions it would be possible to disallow only that small part.

On the second concern, about the independence of the NHMRC, the Committee considers that parliamentary scrutiny of a continuing legislative power would not affect the independence of the NHMRC. In any event, as noted above, all NHMRC guidelines must be tabled, which the Minister advises is a form of scrutiny.

The Minister's third concern is that it would be highly unusual for guidelines made under one Act to be disallowable for the purposes of another. The Committee notes, however, that something may be unusual but nevertheless be appropriate and beneficial.

Clause 11 – use of an embryo that is not an excess ART embryo

The Minister's response to the Committee's comments on subclause 11(2) gives detailed background information on the provision. The Committee is grateful for this additional information, which assisted its deliberations.

In relation to the Minister's advice about the provision itself, the Committee confirms its earlier comments that the subclause provides for the continuing exercise of legislative power without parliamentary scrutiny. The incorporation of material into Commonwealth legislation, whether such material is government or non-government, is not exceptional. However, it is cause for comment when it is incorporated as in force from time to time with no parliamentary oversight.

In this case proper parliamentary scrutiny of the incorporated material could be effected by the current formula in paragraph (b) of the subclause, which is that a code or document must be prescribed by the regulations. Regulations are subject to parliamentary scrutiny and possible disallowance and this would in the usual course ensure suitable oversight. However, provision for the incorporation of material as in force from time to time dilutes this safeguard.

The Committee notes that paragraph (a) of the subclause does not even include this protection, but instead provides for the RTAC to issue codes of practice directly from time to time.

The result is that under paragraphs (a) and (b) of subclause 11(2) the constituents of an offence provision punishable by up to five years' imprisonment may be determined by non-government bodies without parliamentary oversight or even knowledge.

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

Trade Practices Amendment (Liability for Recreational Services) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2002*, in which it made various comments. The Minister for Revenue and Assistant Treasurer responded to those comments in a letter dated 21 October 2001.

In its *Thirteenth Report of 2002* the Committee sought further advice from the Minister on several aspects of the bill. The Minister has responded to those comments in a letter dated 21 November 2002. A copy of the letter is attached to this report. An extract from the *Thirteenth Report of 2002* and relevant parts of the Minister's response are discussed below.

Extract from Thirteenth Report of 2002

This bill was introduced into the House of Representatives on 27 June 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Trade Practices Act 1974* to allow individuals to waive their contractual right to sue in relation to injury suffered while undertaking hazardous recreational activities.

Provision of incorrect print of bill and late provision of correct print of bill

The Committee commented on this bill in *Alert Digest No. 7 of 2002*, basing its comments on the print of the bill which had been supplied to it in the usual way. Although the bill was debated and passed in the House of Representatives on 28 August 2002, it was not until 9 September 2002 that the Committee secretariat received a substituted "First Reading Print" which was, apparently, the version which was debated in the House of Representatives. Among other differences between the two versions of the bill, one difference is that the substituted version does not contain the proposed new paragraph 68B(1)(d) of the Principal Act upon which the Committee commented in *Alert Digest No. 7 of 2002*.

The differences between the two versions are significant. The Committee, therefore, **seeks the Treasurer's advice** as to why the Committee was not provided with the correct version of the bill until 10 weeks after the bill had been first introduced on 27 June 2002.

Hereunder is the extract from *Alert Digest No. 7 of 2002* in relation to the initial version of the bill, followed by the comments the Committee has made in relation to the substituted version of the bill.

COMMENTS IN RELATION TO FIRST VERSION OF THE BILL

Dilution of liability for death or personal injury
Proposed new section 68B

Proposed new section 68B of the *Trade Practices Act 1974* would enable a corporation to exclude, restrict or modify the obligation, currently imposed by section 74 of the Act, that services will be rendered with due care and skill, and that any materials supplied in connection with those services will be reasonably fit for their purpose. Although the ability of the corporation to exclude, restrict or modify that obligation is limited to the supply of recreational services (as defined in proposed new subsection 68B(2)), the provision may be seen as coming within the Committee's Terms of Reference, especially because the exclusion, restriction or modification of liability is confined to liability for death or personal injury, two interests which are generally given all possible protection. The Parliamentary Secretary who introduced the bill asserted in his second reading speech that the bill "seeks to achieve that balance [between protecting consumers and allowing them to take responsibility for themselves] in a way that will benefit consumers and the many small businesses that are involved in recreational activities." The Committee brings this provision to the attention of Senators, but leaves for consideration by the Senate as a whole whether the bill trespasses unduly on the personal rights currently provided by section 74 of the Act.

Other than this, the Committee makes no further comment on this provision.

Uncertain operation
Proposed new paragraph 68B(1)(d)

Proposed new paragraph 68B(1)(d) would prevent a corporation from excluding, restricting or modifying its liability in cases where the corporation has been grossly negligent. The concept of "gross negligence" is one that the common law has never been asked to define, at least in relation to conduct causing death or personal injury. The Committee, therefore, brings to the attention of Senators the fact that this bill may be productive of considerable uncertainty for a number of years after it has been in force.

Other than this, the Committee makes no further comment on this provision.

COMMENTS IN RELATION TO THE SUBSTITUTED VERSION OF THE BILL

Dilution of liability for death or personal injury
Proposed new section 68B

The comments which the Committee made about the version of proposed paragraph 68B(1)(d) which was before it when *Alert Digest No. 7 of 2002* was considered, are now clearly not applicable. However the Committee makes the following comments about the correct version of proposed new section 68B as a whole, being a provision which lessens the liability of corporations for death and personal injury.

While the original version of the bill would have prevented a corporation from excluding its liability for its own gross negligence, the current version of the bill would permit such an exclusion of liability. Under the Bill as passed by the House of Representatives, a corporation which provides recreational services will be permitted to completely exclude any liability for death or personal injury which it might otherwise have been under to those to whom it provides such recreational services, even though the death or personal injury is caused by the gross and wilful lack of care of those acting for the corporation. Furthermore, while the original version of the bill made the ability to exclude, restrict or modify liability subject to the implementation by the corporation of a "reasonable risk management strategy", this limitation has been omitted from the current version of the bill. Those corporations which provide recreational services may knowingly act in a way which is contrary to any reasonable means of managing the risks of the activity, but exclude their liability for any resultant death or personal injury suffered by their customers.

The one possible saving grace of the current version of the bill is that a corporation will still not be able to exclude its liability for death or personal injury suffered by a minor (ie, a person under eighteen years of age) to whom it provides recreational services. However, that saving grace is the product solely of common law principles of contract law, and not of the bill passed by the House of Representatives.

The Committee, therefore, **seeks the Treasurer's advice** on these aspects of the bill.

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

Relevant extract from the response from the Minister and Assistant Treasurer dated 21 October 2002

I refer to matters raised by the Scrutiny of Bills Committee in its Alert Digest No 9 of 2002 concerning the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002. I* am responding on behalf of the Treasurer and as Minister responsible the legislation considered by the Committee.

Alert Digest No 7 of 2002 made remarks on a version of the Bill which appeared to be different to that which was introduced into the Parliament. I am advised that this mistake was the result of an inadvertent administrative oversight which occurred in the House of Representatives Table office at a time when that office was subject to significant and unusual work loads at the end of a . Parliamentary Sitting period. I am assured that the likelihood of such an incident being repeated is low.

The error was not discovered until Alert Digest No 7 of 21 August 2002 was examined by a Treasury official. The matter was immediately investigated and the error rectified.

In Alert Digest No 9 of 2002, the Committee commented on the correct version of the proposed new section 68B, referring to it as 'a provision which lessens the liability of corporations for death and personal injury'.

As noted in the Bill's Explanatory Memorandum, the contractual rights which consumers have by virtue of the Trade Practices Act (TPA) were not enacted with any specific intention that they might be used to provide remedies where consumers died or were injured as a result of a breach of a condition or warranty implied by the Act.

The purpose of the Bill is to ensure that the object of the TPA is not subverted for an improper purpose. There is scant evidence of the Act having

been used in the past as a vehicle for seeking damages in cases of death or personal injury. However, there is nonetheless a legitimate concern that the rights conferred by the Act might be misused to undermine the significant law reforms currently being undertaken by State and Territory jurisdictions to rectify the defects which are apparent in existing common law regimes.

In particular, there is a widespread community perception that litigants have abused their common law rights to sue for negligence and related causes of action, and that this is a significant factor in the current public liability insurance crisis. The Commonwealth recognises the primary role of the State and Territories in improving the law in this area, and the proposed section 68B is designed merely to underpin State and Territory reforms and ensure just outcomes for the community at large.

Senators should also note that the Bill has been considered by the Review of the Law of Negligence, chaired by Justice Ipp.

The Final Report of the Review of the Law of Negligence found that the Bill was effective in removing the obstacle presented by section 68 to the exclusion of the warranties implied by section 74. However, the Review concluded that that the Bill does not, by itself, exclude, restrict or modify the liability of providers of recreational services. The ordinary law of contract presents various significant obstacles to the achievement of that end.

The Committee thanks the Minister for this response, but raises the following matters in relation to it.

The Committee recognises that there are problems in this area which should be addressed and that the bill proposes to do this. The Committee agrees that it is necessary to balance consumer protection against allowing consumers to take responsibility for their own actions. Nevertheless, the Committee would appreciate further details of its intended operation.

Firstly, it is possible that the bill may result in uncertainty, particularly in relation to exclusion clauses which will be included in consumer contracts in reliance on the new provision. It is likely that this will result in lengthy legal challenges to test the extent of the power. These challenges will be complicated by State and Territory provisions which, as the Minister observes, have a significant role in this area. It is especially likely that difficulties will arise in relation to families, where one family member buys tickets for recreational services for the whole family, including minors. In any event, it appears that the bill will likely cause an increase in litigation, at least in the short term.

Next, the Committee would appreciate amplification of the Minister's advice that the Trade Practices Act (TPA) was not intended to provide remedies where consumers have died or were injured as a result of a breach of a condition or warranty implied by the TPA. Other provisions of the TPA provide for compensation for death or injury.

The Committee also would be grateful for additional advice as to why the Minister describes taking action under the TPA as improper subversion and abuse of common law rights. It may be that the TPA was not intended to be used to facilitate such actions, but that is not the effect of the way it is drafted.

As noted above, the Committee accepts that it may be appropriate for consumers to take more personal responsibility for their actions. However, this should be accompanied by appropriate safeguards. For instance, earlier proposals provided that exclusion clauses could not limit liability for gross negligence. In addition, limiting liability was to be subject to the corporation having a reasonable risk management strategy. The present bill does not include either of these protections.

The Committee **seeks the Minister's further advice** on these aspects of the bill.

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

Relevant extract from the response from the Minister and Assistant Treasurer dated 21 November 2002

I refer to matters raised by the Scrutiny of Bills Committee in its Report No 13 of 2002 concerning the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002,* and in its previous Alert Digests. I am responding on behalf of the Treasurer and as Minister responsible the legislation considered by the Committee. My comments are set out below.

The Committee has requested details of the intended operation of this Bill. The importance of this Bill is to under-pin important law reform initiatives currently being undertaken by the States and Territories. The problems that give rise to the need for law reforms are national in nature. The Commonwealth has an important role to ensure that reforms to the common law at a State level are not undermined by the operation of Commonwealth legislation. In the absence of the amendments made by this Bill, there is a reasonable concern that plaintiffs seeking damages for negligence might seek to rely, insofar as is possible, on other causes action which might provide more beneficial outcomes. Amending the Trade Practices Act will

enable certain service providers to guard against this possibility, to the benefit of the community at large.

I note the Committee's concern about the uncertainty that may result from the use of exclusion clauses and the potential for an increase in litigation, at least in the short term. While this is possible, of course, it is the Government's view that the ultimate benefit of law reform currently being undertaken by the States and Territories, and supported by this Bill, will considerably outweigh any short term consequences which might flow from the changes.

The Committee has requested amplification of my earlier advice 'that the Trade Practices Act (TPA) was not intended to provide remedies where consumers have died or were injured as a result of a breach of a condition or warranty implied by the TPA'. The Committee has noted that other provisions of the TPA provide for compensation for death or injury.

As recognised by the Committee and by the Report of the Review of the Law of Negligence, chaired by Justice Ipp, there are provisions of the Act which are directed towards the prevention of death and injury and where rights are conferred upon consumers where those unfortunate eventualities occur. These provisions are designed to provide compensation in circumstances of death or injury related to the provision by a corporation of products which are essentially unsafe. Of particular significance are the product safety provisions in Division 1A of Part V of the Act, where specific evidentiary provisions operate to assist consumers who suffer loss or damage - which includes, by virtue of section 4K (which was inserted in 1977) injury. Furthermore, Part VA of the Act was inserted in 1992 and establishes a strict product liability regime based on the 1985 European Community Product Liability Directive; it provides rights to those who are injured as a result of defective products.

The amendments proposed by this Bill are designed to apply to provisions enacted in 1974. When the Trade Practices Act was enacted in 1974 it incorporated specific implied terms and conditions into all contracts. The Second Reading Speech for the original Bill indicated that "The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices ….. Legislation of this kind is concerned with economic considerations." (House of Representatives Hansard, 16 July 1974).

From an examination of the background surrounding the introduction of the relevant provisions implying terms into contracts, it is clear that it was not the intent of the those provisions of the Act to provide compensation where consumers died or were injured. The subsequent enactment of provisions elsewhere in the Act dealing with injury does not in any way change the rationale for the existence of these provisions.

The Committee also queries why taking proceedings under the TPA may amount to an 'improper subversion and abuse of common law rights' when it was not the intent that these provisions of the TPA be used to facilitate such actions.

It is difficult to determine in what circumstance a use of the law for anything other than its intended purpose is other than an abuse of that law. Law reform initiatives progressed through the Parliament are often designed to remedy such abuses and to ensure that laws operate in a manner consistent with the intent of the Parliament. In interpreting legislation, courts have regard to the intent of provisions, and are assisted in doing so by interpretative rules, aided by provisions in the Acts Interpretation Acts passed by the Parliaments of the Commonwealth and States alike.

The final issue raised by the Committee relates to safeguards. Given that the aim of the amendments proposed by the Government is to prevent the rights conferred by section 74 being used for an unintended purpose, the need for further qualifications is difficult to argue.

As pointed out in pervious correspondence, referring to the Final Report of the Review of the Law of Negligence, the Bill removes the obstacle presented by s 68 to the exclusion of the warranties implied by s 74. It does not, by itself, exclude, restrict or modify the liability of providers of recreational services. Hence it is ultimately the role of the Courts to protect the rights of those who need to be protected, and the community is well served by the legal profession in ensuring that the interests of individuals are properly represented.

The Committee thanks the Minister for this further response, which advises on issues raised by the Committee in relation to the intended operation of the bill. The Committee accepts the Minister's advice that the bill addresses problems which are national in nature and which support related State and Territory reforms. It is in this context that the Committee makes the following comments on the Minister's responses to the specific matters which it raised.

The Committee notes the Minister's advice that it is possible there is potential for an increase in litigation as a result of the bill, at least in the short term, but that the ultimate benefits of the reforms will considerably outweigh any such consequences.

In relation to the Minister's discussion of the intention of the original Act in 1974 the Committee observes that economic loss may occur as a result of death or injury. Furthermore, the key sections 68 and 74, which were both included in the original Act (although subsequently amended), have the clear purpose of protecting consumers from defective, including negligent, services. The Committee therefore suggests that it has always been the intention of the Trade Practices Act to provide this protection. Section 4K, which expressly provides that a reference to loss or damage anywhere in the Act includes loss or damage as a result of injury, was added to the Act as early as 1977.

The points in the previous paragraph are also relevant to the Minister's advice that there has been abuse of the Act.

Finally, the Minister advises that it is difficult to argue that the bill should include safeguards for those who use the Trade Practices Act for unintended purposes. However, as the Committee noted in its *Thirteenth Report of 2002*, the relevant parts of which are reproduced above, an earlier version of the bill provided that a corporation could not exclude liability for its own gross negligence. Exclusion of liability was also subject to the corporation implementing a reasonable risk management strategy. These provisions, which do not appear in the present bill, were presumably included because at some point they were considered appropriate.

Transport and Regional Services Legislation Amendment (Application of Criminal Code) 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 Transport and Regional Services has responded to those comments in a letter dated 18 November 2002.

Although this bill has been passed by both Houses (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 Regional Services, Territories and Local Government. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend the *Aircraft Noise Levy Collection Act 1995*, the *Air Navigation Act 1920*, the *Airports Act 1996* and the *Civil Aviation Act 1988* to reflect the application of the *Criminal Code* to all Commonwealth offences. These amendments specify whether an offence is one of strict liability; and restate any relevant defences to an offence separately from the physical elements of the offence.

Strict liability offence
Schedule 1, item 77

Item 77 of Schedule 1 to this bill proposes to amend section 23 of the *Civil Aviation Act 1988* to create an offence of strict liability. Specifically, subsection 23(2A) deals with the carriage or consignment of dangerous goods on aircraft. Dangerous goods are defined as explosive substances, things which "by reason of their nature are liable to endanger the safety of an aircraft or persons on board an aircraft" and things which the regulations declare to be dangerous goods.

The Explanatory Memorandum states that this provision was an existing strict liability offence prior to the application of the *Criminal Code*. The fact that this offence is one of strict liability, together with the significant penalty imposed (a maximum penalty of imprisonment for 2 years), is said to deter people who carry or consign goods on board an aircraft "from failing to ascertain whether the goods are dangerous".

While this amendment does not create a new strict liability offence, the fact that an act or omission already constitutes such an offence does not, of itself, justify the continuation of that situation. Its retention must be looked at on its merits.

Accordingly, the Committee **seeks the Minister's advice** as to why it is appropriate that a person should be strictly liable for an offence potentially as wide and undefined as carrying or consigning things "which by reason of their nature are liable to endanger … safety".

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

Relevant extract from the response from the Minister

I refer to Mr Warmenhoven's letter of 14 March 2002 drawing my attention to comments contained in the Scrutiny of Bills Alert Digest No. 2 of 2002 (13 March 2002) concerning the Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002. I regret the delay in replying.

The Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002 (the Bill) was enacted on 4 April 2002, and commenced on 5 April 2002. The purpose of the Bill was to harmonise existing offence provisions, in legislation administered by my Portfolio, with the Criminal Code. The Criminal Code harmonisation exercise was not intended to be a fresh approach to the policy merits of strict liability, but rather was a process to determine the original character of each offence and to ensure that the original character was maintained following the application, from 15 December 2001, of the Criminal Code.

To this end, the amendment to subsection 23(2A) of the *Civil Aviation Act 1988* maintains the original character of the offence by making explicit the application of strict liability. The amendment is consistent with guidelines developed by the Attorney-General's Department to assist with the harmonisation exercise.

Thank you for raising this matter with me.

The Committee thanks the Minister for this response.

Jan McLucas
Chair

The Hon. Dr David Kemp MP
Minister for the Environment and Heritage

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Senate Standing Committee for the Scrutiny of Bills

21 OCT 2002

Senator Jan McLucas
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator McLucas

I am writing in response to the letter of 22 August 2002 from the Secretary of the Standing Committee for the Scrutiny of Bills in relation to the comments contained in the Scrutiny of Bills Alert Digest No.7 of 2002. The comments concern the Australian Heritage Council Bill 2002 (AHC Bill) and the Australian Heritage Council Bill (Consequential and Transitional Provisions) 2002 (AHC C&T Bill). My comments on the views of the Standing Committee are outlined below.

Inadequate indication of commencement
AHC Bill - Clauses 3 to 25; AHC C&T Bill - Schedules 1 and 2
In my view, both the Bills and the Explanatory Memoranda contain clear commencement information. The manner in which the information is presented complies with Government requirements and practice. The commencement provisions are, importantly, designed to ensure that the operative provisions of these Bills can only commence at the same time as the operative provisions of the primary Environment and Heritage Legislation Amendment Bill (No1) 2002. This is made clear in Item 2 in the table to Subclause 2(1) of the Bills and also in the Explanatory Memoranda. It is also clear from both the Bills and the Explanatory Memoranda that there is a linkage between these Bills and the Environment and Heritage Legislation Amendment Bill (No1) 2002. The Bills were introduced at the same time and the second reading speech for the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2002 makes clear the relationship between the Bills. Accordingly, I do not believe that there is a need to include additional information in the Explanatory Memoranda.

No apparent merits review of Minister's decisions
AHC Bill - Clause 24
The provision for a Ministerial review provides recourse for individuals who feel aggrieved by a decision of the Australian Heritage Council to enter or remove a place from the Register of the National Estate. In my view, it is more appropriate for the Minister for the Environment and Heritage to undertake such reviews rather than the AAT. It is imperative that both the decision by the Council and any subsequent review be undertaken on heritage grounds, employing the use of heritage expertise. For the same reason, I do not consider it appropriate for the Minister's decision, in turn, to be subject to review by the Tribunal.

It is important to point out that the new Australian Heritage Council will be using the same criteria as the current Australian Heritage Commission, operating under the *Australian Heritage Commission Act 1975* (AHC Act), and will be a very similar expert body. The Commission's entries and removals from the Register are not subject to AAT review. This has never posed any difficulties in the functioning of the Commission during its 25 years of operation and no such review has ever been sought for the Commission's decisions since its inception. Neither, in all this time, has there been any demonstrable disadvantage to an individual as a consequence of entry or removal of places from the Register.

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The question of whether a merits review of the Commission's decisions on entries in the Register was appropriate, was addressed by the High Court on 18 March 1997. The High Court was considering an appeal against a Federal Court decision that, essentially, Commission decisions on whether a place was part of the national estate could be reviewed on the merits by the Federal Court. The High Court unanimously supported Black CJ, in his (dissenting) decision that:

> In determining, according to law, whether or not a place is part of the national estate, the Commission will of course need to make a proper assessment to determine whether a place is, in fact, within the definition of the national estate in section 4. In doing so it will need to determine whether, in fact, a place is within the definition. The final determination of that question is however one that is committed by the Act to the Commission. It is not, in my view, a jurisdictional fact.

The High Court determined that an entry may be made by the Australian Heritage Commission pursuant to Section 23 of the AHC Act in the Register of the National Estate of any place that the Australian Heritage Commission determines, according to law, is part of the national estate as that term is defined in the Act.

The High Court's decision clearly supported Parliament's intention, when it established the Commission in 1976, that the matter of identification should be left to the Commission as an expert body. The new Council will clearly follow on in exactly the same way of determining whether a place is eligible for entry in the Register.

The other point to make is that there will be no statutory implications for owners, occupiers or interested parties as a result of entering or removing places from the new Register of the National Estate – which is very much the situation under the current AHC Act. The only obligation will be on the Minister for the Environment and Heritage who must have regard to the information in the Register when making any decision under the *Environment Protection and Biodiversity Conservation Act 1999* to which this information is relevant.

Thank you for the opportunity to clarify these matters.

Yours sincerely

DAVID KEMP

HON WARREN TRUSS MP
Minister for Agriculture, Fisheries and Forestry

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Senate Standing C'ttee for the Scrutiny of Bills

15 NOV 2002

Senator J McLucas
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator McLucas

Thank you for the letter of 19 September 2002 from your Committee Secretary, Mr Creed, regarding comments contained in the Scrutiny of Bills Alert Digest No. 9 of 2002 (18 September), in relation to the *Egg Industry Service Provision Bill 2002* (the Bill).

In responding to those comments let me state that entry by the Commonwealth into a funding contract with the proposed new company, Australian Egg Corporation Limited (AECL), as provided for under Section 7 of the Bill, is an administrative function, not legislative. Therefore there is no process through which the contract would ordinarily be reviewed by the Parliament before it is signed.

As an administrative function, the comments in the Alert Digest claim that Section 7 of the Bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. I believe however, that in conjunction with the funding contract, the administrative powers are sufficiently addressed through Sections 7.2 and 7.3 of the Bill.

Section 7.2 provides that the Minister must be satisfied that the terms of the contract make adequate provision to ensure that promotion, R&D and matching payments are spent by the company on promotion and R&D activities for the benefit of the Australian egg industry and the Australian community generally.

Section 7.3 provides that the contract may require the Commonwealth to pay amounts up to, but not exceeding, limits applicable under Section 8.

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I would add that the provision to enter into such a funding contract, through Section 7 of the Bill, is not unique and is based on Section 9 of the *Pig Industry Act 2001* and Section 31 of the *Wool Services Privatisation Act 2000*.

While the egg industry funding contract is in the preliminary drafting stage it will detail the arrangements under which the company will manage and administer industry levies collected by the Commonwealth and Commonwealth matching R&D payments. The contract will be developed in consultation with industry following passage of the legislation.

The contract will be closely modelled on other contracts drawn up for similar Corporations Act companies, currently operating in the pork, red-meat, wool and horticulture industries. The essential elements of these contracts require the Corporations Act companies to:

- produce an annual report in compliance with the requirements of the Act;
- develop strategic and operational plans that will take into account industry priorities and the Government's R&D funding policy, direction and priorities;
- provide regular reports to the Commonwealth on progress being made towards achieving agreed outcomes;
- engage an independent organisation to undertake a periodic performance review of their operations to be made available to the Commonwealth, levy payers and the public; and
- have a Director of the Board with corporate governance experience.

The experience has been that these companies have complied with their funding obligations to date and have been responsive to the accountability requirements of the Commonwealth, and industry levy payers.

Thank you again for bringing your concerns to my attention.

Yours sincerely

WARREN TRUSS

OFFICE OF THE
PARLIAMENTARY SECRETARY
TO THE TREASURER
MANAGER OF GOVERNMENT
BUSINESS IN THE SENATE
Senator the Hon Ian Campbell

PARLIAMENT HOUSE
CANBERRA ACT 2600

Telephone: (02) 6277 3955
Facsimile: (02) 6273 3958

parlsec.treasurer.gov.au

Senator J McLucas
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator ~~McL~~ucas Ian ,

Thank you for your letter of 22 August 2002 concerning Financial Sector Legislation Amendment Bill (No 2) 2002 (FSLAB 2). I apologise for the delay in responding to you.

There are two matters raised in the Alert Digest 7/02 (pages 16-18), to which your letter refers.

1. Absence of assurance that retrospectivity is not prejudicial - various provisions

The need for the amendments in items 3, 5, 6 and 7 in the table to subclause 2(1), item 4 of Schedule 1 and items 1, 2 and 3 of Schedule 4 to FSLAB 2, were noted by the Australian Securities and Investments Commission (ASIC) and the Office of Parliamentary Counsel in routine reviews of recent enactments for minor anomalies and discrepancies and drafting oversights. Neither body has indicated any disadvantage flowing to any person from them.

In relation to item 4 of Schedule 1, ASIC has advised that it is "not aware of any specific matter that is potentially adversely affected by the failure to include laws of the Commonwealth referred to in sections 74 and 75 of the old application Acts in the definition of 'old ASIC law'." The amendment may have the effect of protecting persons and the integrity of examinations and proceedings in circumstances where it has effect. The explanatory memorandum provides a detailed explanation of this amendment which corrects a technical drafting error. Without applying the correction as from commencement of the Act the relevant provisions would be uncertain in their operation.

2. Strict liability offences – item 17 of Schedule 2

The Committee has asked whether these offences "come within the guidelines" in the Committee's recent report on strict liability provisions. The Committee has acknowledged on page 284 of its report that (subject to other relevant principles) "strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance those relating to "... financial or corporate regulation".

APRA's view is that the disqualified person provisions are critical to the prudential regulation of the financial sector. Recent events and revelations (including in the HIH Royal Commission) have shown that it is essential for directors and senior managers of financial institutions to be of good fame and character. If they are not, it is very difficult for APRA to know of or control their conduct, and information provided by them may prove unreliable. The strict liability offences in proposed subsections 19(3) and (6) of the *Banking Act 1959* are important to ensure that the disqualified person provisions operate effectively. Having regard to the nature of the industry being regulated, and the nature of the offences in question, there is a strong case for strict liability.

On page 285 of the Committee's report it is noted that "strict liability may be appropriate where it has proved difficult to prosecute fault provisions". This is particularly relevant in relation to subsection 19(6). That subsection provides that a relevant authorised deposit-taking institution (ADI) or authorised non-operating holding company (NOHC) commits an offence if it allows a disqualified person to be a director or senior manager of the ADI or authorised NOHC. If the offence were one of fault liability, it would be necessary for a prosecutor to show that the ADI or authorised NOHC concerned knew of the person's disqualified status. This would be very difficult to show if the ADI or authorised NOHC had no procedures for undertaking probity checks on its staff. The ADI or authorised NOHC could defend itself on the basis that it did not know of the officer's disqualified status.

The offences in the proposed subsections 19(3) and (6) are otherwise generally in accordance with the considerations set out on page 284 to the top of page 287 of the Committee's report. In particular:

(1) a person may seek a determination by APRA under section 22 that they are not a disqualified person where the person is "highly unlikely to be a prudential risk to any ADI or authorised NOHC". This process is subject to review by the Administrative Appeals Tribunal (AAT).

(2) likewise, a determination by APRA under section 21 that a person is a disqualified person is ultimately subject to AAT review.

(3) the parallel fault liability offences have higher penalties.

(4) there is no provision for penalty notices.

(5) the criteria for a person's disqualified status (in proposed sections 20 and 21) are clear; that is, the person must have been convicted of a relevant offence, or entered into an arrangement relating to insolvency, or have been determined to be disqualified under section 21, or have been disqualified in an overseas jurisdiction.

I trust this information will be of assistance to you.

Yours sincerely

IAN CAMPBELL

SENATOR THE HON KAY PATTERSON
Minister for Health and Ageing

Senator J McLucas
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

Dear Senator McLucas

Research Involving Embryos Bill 2002

I refer to David Creed's letter dated 19 November to the Senior Adviser, Minister for Health and Ageing. Mr Creed's letter drew attention to recent comments by the Scrutiny of Bills Committee in its Alert Digest 14/02, and suggested that I may like to respond to those comments.

The Committee considered that the definition of *proper consent* in clause 8 (which referred to the NHMRC's *Ethical Guidelines on Assisted Reproductive Technology*) and the reference in clause 11(2) to Codes of Practice issued by the Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia, may insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's term of reference. I will respond to each of these matters separately.

The definition of 'proper consent'

The Alert Digest 14/02 suggested that, in defining 'proper consent' by reference to the NHMRC *Ethical Guidelines on Assisted Reproductive Technology* or any other guidelines specified by the Chair of the NHMRC Licensing Committee, further guidelines could be issued by the Chair from time to time without parliamentary scrutiny.

Paragraph (b) of the definition of 'proper consent' was included in anticipation of the NHMRC issuing revised Guidelines to replace the *Ethical guidelines on assisted reproductive technology*, as referred to in paragraph (a). These 1996 Guidelines are currently under review. Given the changing nature of ART practice, it is foreseeable that the NHMRC will revise these Guidelines every few years. The purpose of paragraph (b) is to allow the Chair to specify the relevant NHMRC Guidelines for the purposes of the definition of 'proper consent'. I note that the Chair can only specify NHMRC Guidelines for the purposes of the definition of 'proper consent', not guidelines issued by any other body.

The Alert Digest also refers to the NHMRC Guidelines not being subject to parliamentary scrutiny either by tabling or disallowance. I would like to draw the Committee's attention to a number of points in relation to this.

4 Treasury Place
Melbourne Vic 3002
Tel: (03) 9657 9577
Fax: (03) 9650 8884
Website: www.health.gov.au

Suite MG 48
Parliament House
Canberra ACT 2600
Tel: (02) 6277 7220
Fax: (02) 6273 4146

Firstly, the *National Health and Medical Research Council Act 1992* (NHMRC Act) requires that Guidelines issued by the Australian Health Ethics Committee (which is the Committee responsible for the *Ethical Guidelines on Assisted Reproductive Technology)* be laid before each House of Parliament within 15 sitting days of the Guidelines being issued. Therefore, these Guidelines are subject to scrutiny by Parliament.

Secondly, if the Guidelines were to be made disallowable this would pose the following concerns:

- Only a relatively small part of the Guidelines will deal with matters relating to this Bill. Making the entire Guidelines disallowable for all purposes (rather than just for the purposes of this bill) is problematic as the Guidelines are broader than just research – they cover the whole of assisted reproductive technology (ART) practice. Use of the NHMRC Guidelines is required under legislation in 3 States and is a condition of accreditation of ART clinics. If these Guidelines were disallowed, it would impact on the whole of ART practice, which is clearly outside the scope of this legislation.
- Under the NHMRC Act, all guidelines must go through an extensive consultation process before being issued. I am concerned that by requiring the *Ethical Guidelines on Assisted Reproductive Technology* to be disallowable instruments, the independence of the NHMRC could be compromised. I note that any amendment or reissuing of the Guidelines would be subject to the same consultation procedures under the NHMRC Act as for the initial issuing of the Guidelines.
- It would be highly unusual for guidelines made under one Act to be disallowable for the purposes of another.

Clause 11 – use of an embryo that is not an excess ART embryo

I understand that the Scrutiny of Bills Committee's key concern in relation to clause 11 is the perceived lack of scrutiny arising from the reference to ART programs being carried out in accordance with RTAC's Code of Practice 'as in force from time to time'. The Committee's concerns are that the Code of Practice would be amended by RTAC (a non-government body) without appropriate Parliamentary scrutiny.

By way of background, it may be useful to describe the policy intent behind clause 11. Clause 11 was drafted so that a person could not use an embryo for research that was not an excess ART embryo. During development of the legislation, concern was expressed by States and Territories that, in the absence of this clause, a person could technically use for research purposes an embryo that the couple had not deemed to be excess or donated to research. This would not be illegal in the 5 jurisdictions that do not have existing legislation regulating ART, and it was considered important that the legislation include a provision to address this potential loophole.

In drafting clause 11 it was important to distinguish between organisations using non-excess ART embryos for genuine purposes in the course of routine ART clinical practice and those using non-excess ART embryos for other purposes. It was considered that the most appropriate way of framing clause 11 would be to pick up the requirements for RTAC accreditation, as set out in the RTAC Code of Practice. Since RTAC is the industry body responsible for accrediting and monitoring ART practice in Australia, and in April 2002 COAG decided that RTAC should provide the basis for a nationally-consistent approach to ART clinical practice, it was considered appropriate for RTAC to be referred to in the Bill.

All ART centres in Australia are accredited by RTAC and as a condition of accreditation all ART programs must be in accordance with the RTAC Code of Practice.

The reason that clause 11(2) was drafted was so that the Code could be amended from time to time and that another Code could be issued in place of the RTAC Code. Recognising that RTAC provides oversight of all ART clinical practice, it is foreseeable that RTAC may wish to make changes to its Code as the need arises. COAG acknowledged the role of RTAC in deciding that they should set the national standard through their accreditation process.

Paragraph (b) of the definition of *ART Program* was included so that, in the event that RTAC ceases to be the accrediting body and another organisation takes it place, any codes issued by the new organisation could be prescribed instead.

I also draw your attention to the public availability of the RTAC Code of Practice (http://www.fsa.au.com/pdfs/RTAC-guidelines-2002.pdf). Also, amendments to the RTAC Code are made following negotiation with all 34 ART clinics in Australia. All these clinics are provided with the revised Code.

There are also good reasons why the RTAC Code of Practice itself cannot be made a disallowable instrument. RTAC is a non-government body, which regulates the ART industry. RTAC Codes of Practice are not issued under authority of legislation. It is my understanding that RTAC Codes of Practice cannot be made disallowable because section 46A of the *Acts Interpretation Act 1946* only applies where a provision of a Commonwealth Act or regulations confers a power to make an instrument.

Yours sincerely

Senator Kay Patterson

- 2 DEC 2002

MINISTER FOR REVENUE AND
ASSISTANT TREASURER
Senator the Hon Helen Coonan

PARLIAMENT HOUSE
CANBERRA ACT 2600

Telephone: (02) 6277 7360
Facsimile: (02) 6273 4125

assistant.treasurer.gov.au

Senator J McLucas
Chair
Senate Standing Committee for the Scrutiny of Bills
The Senate
Parliament House
Canberra ACT 2600

21 NOV 2002

Dear Senator McLucas

Scrutiny of Bills Report

I refer to matters raised by the Scrutiny of Bills Committee in its Report No 13 of 2002 concerning the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002*, and in its previous Alert Digests. I am responding on behalf of the Treasurer and as Minister responsible the legislation considered by the Committee. My comments are set out below.

The Committee has requested details of the intended operation of this Bill. The importance of this Bill is to under-pin important law reform initiatives currently being undertaken by the States and Territories. The problems that give rise to the need for law reforms are national in nature. The Commonwealth has an important role to ensure that reforms to the common law at a State level are not undermined by the operation of Commonwealth legislation. In the absence of the amendments made by this Bill, there is a reasonable concern that plaintiffs seeking damages for negligence might seek to rely, insofar as is possible, on other causes action which might provide more beneficial outcomes. Amending the Trade Practices Act will enable certain service providers to guard against this possibility, to the benefit of the community at large.

I note the Committee's concern about the uncertainty that may result from the use of exclusion clauses and the potential for an increase in litigation, at least in the short term. While this is possible, of course, it is the Government's view that the ultimate benefit of law reform currently being undertaken by the States and Territories, and supported by this Bill, will considerably outweigh any short term consequences which might flow from the changes.

The Committee has requested amplification of my earlier advice 'that the Trade Practices Act (TPA) was not intended to provide remedies where consumers have died or were injured as a result of a breach of a condition or warranty implied by the TPA'. The Committee has noted that other provisions of the TPA provide for compensation for death or injury.

As recognised by the Committee and by the Report of the Review of the Law of Negligence, chaired by Justice Ipp, there are provisions of the Act which are directed towards the prevention of death and injury and where rights are conferred upon consumers where those unfortunate

eventualities occur. These provisions are designed to provide compensation in circumstances of death or injury related to the provision by a corporation of products which are essentially unsafe. Of particular significance are the product safety provisions in Division 1A of Part V of the Act, where specific evidentiary provisions operate to assist consumers who suffer loss or damage - which includes, by virtue of section 4K (which was inserted in 1977) injury. Furthermore, Part VA of the Act was inserted in 1992 and establishes a strict product liability regime based on the 1985 European Community Product Liability Directive; it provides rights to those who are injured as a result of defective products.

The amendments proposed by this Bill are designed to apply to provisions enacted in 1974. When the Trade Practices Act was enacted in 1974 it incorporated specific implied terms and conditions into all contracts. The Second Reading Speech for the original Bill indicated that "The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices..... Legislation of this kind is concerned with economic considerations." (House of Representatives Hansard, 16 July 1974).

From an examination of the background surrounding the introduction of the relevant provisions implying terms into contracts, it is clear that it was not the intent of the those provisions of the Act to provide compensation where consumers died or were injured. The subsequent enactment of provisions elsewhere in the Act dealing with injury does not in any way change the rationale for the existence of these provisions.

The Committee also queries why taking proceedings under the TPA may amount to an 'improper subversion and abuse of common law rights' when it was not the intent that these provisions of the TPA be used to facilitate such actions.

It is difficult to determine in what circumstance a use of the law for anything other than its intended purpose is other than an abuse of that law. Law reform initiatives progressed through the Parliament are often designed to remedy such abuses and to ensure that laws operate in a manner consistent with the intent of the Parliament. In interpreting legislation, courts have regard to the intent of provisions, and are assisted in doing so by interpretative rules, aided by provisions in the Acts Interpretation Acts passed by the Parliaments of the Commonwealth and States alike.

The final issue raised by the Committee relates to safeguards. Given that the aim of the amendments proposed by the Government is to prevent the rights conferred by section 74 being used for an unintended purpose, the need for further qualifications is difficult to argue.

As pointed out in pervious correspondence, referring to the Final Report of the Review of the Law of Negligence, the Bill removes the obstacle presented by s 68 to the exclusion of the warranties implied by s 74. It does not, by itself, exclude, restrict or modify the liability of providers of recreational services. Hence it is ultimately the role of the Courts to protect the rights of those who need to be protected, and the community is well served by the legal profession in ensuring that the interests of individuals are properly represented.

Yours sincerely

HELEN COONAN

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

Senator Jan McLucas
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

18 NOV 2002

Dear Senator McLucas

I refer to Mr Warmenhoven's letter of 14 March 2002 drawing my attention to comments contained in the Scrutiny of Bills Alert Digest No. 2 of 2002 (13 March 2002) concerning the Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002. I regret the delay in replying.

The Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002 (the Bill) was enacted on 4 April 2002, and commenced on 5 April 2002. The purpose of the Bill was to harmonise existing offence provisions, in legislation administered by my Portfolio, with the Criminal Code. The Criminal Code harmonisation exercise was not intended to be a fresh approach to the policy merits of strict liability, but rather was a process to determine the original character of each offence and to ensure that the original character was maintained following the application, from 15 December 2001, of the Criminal Code.

To this end, the amendment to subsection 23(2A) of the *Civil Aviation Act 1988* maintains the original character of the offence by making explicit the application of strict liability. The amendment is consistent with guidelines developed by the Attorney-General's Department to assist with the harmonisation exercise.

Thank you for raising this matter with me.

Yours sincerely

JOHN ANDERSON

Parliament House, Canberra ACT 2600
Tel: (02) 6277 7680 Fax: (02) 6273 4126
john.anderson.mp@aph.gov.au

2002 Year of the Outback