SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2003

5 February 2003

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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

FIRST REPORT OF 2003

The Committee presents its First Report of 2003 to the Senate.

The Committee draws the attention of the Senate to clauses of the following which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Criminal Code Amendment (Offences Against Australians) Act 2002

Environment Protection and Biodiversity Conservation Amendment (Invasive Species) Bill 2002

Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002

International Criminal Court Act 2002

International Criminal Court (Consequential Amendments) Act 2002

Quarantine Amendment Act 2001

Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002

Taxation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Act 2002

Criminal Code Amendment (Offences Against Australians) Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 15 of 2002*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 16 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.

Although this bill has been passed by both Houses (and received Royal Assent on 14 November 2002) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from *Alert Digest No. 15 of 2002* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 15 of 2002

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

The bill proposes to amend the *Criminal Code Act 1995* to insert new provisions that will make it an offence to murder, commit manslaughter or intentionally or recklessly cause serious harm to an Australian where that conduct occurs outside Australia.

The proposed offences will provide coverage for overseas attacks on Australian citizens and residents. In certain circumstances, the perpetrators of those attacks will be able to be prosecuted in Australia. The proposed new offences are intended to complement existing terrorism legislation, and provide a prosecution option where perpetrators are unable to be prosecuted under terrorism legislation.

Absolute liability
Proposed new subsections 104.1(2), 104.2(2), 104.3(2) and 104.4(2)

Proposed new subsections 104.1(2), 104.2(2), 104.3(2) and 104.4(2) of the *Criminal Code*, to be inserted by Schedule 1 to this bill, would impose absolute criminal liability for certain aspects of the offences created by those proposed sections. As the Explanatory Memorandum observes, this means that "it will not be necessary for the prosecution to prove a fault element in relation to that particular element, and that the defence of mistake of fact will not be available". In each case, the element of the crime to which this absolute liability applies is that the victim was an Australian citizen or resident of this country. The Committee considers that, given the background to the proposed legislation, absolute liability may be justified in this situation. However, there are two aspects of the bill on which the Committee would appreciate further advice.

The first aspect is the effect which a prosecution overseas would have on a possible prosecution under the bill in Australia in relation to the same actions. How would such an overseas prosecution be taken into account? What if, for instance, a person was acquitted in such an overseas prosecution?

The second aspect is the effect of the bill on Australia's treaty obligations. Will the bill come within the provisions of any treaty to which Australia is a party? Is it expected that the bill will require or trigger any treaty action by Australia?

The Committee accordingly **seeks the Minister's advice** on these two matters.

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

The effect which a prosecution overseas would have on a possible prosecution under the Act in Australia in relation to the same actions.

How would such an overseas prosecution be taken into account? What if, for instance, a person was acquitted in such an overseas prosecution?

An overseas prosecution would be taken into account in a number of ways.

In the case where the suspected offender was located overseas, and would therefore need to be extradited to stand trial in Australia, the fact that a prosecution had already occurred would affect that extradition process.

At the outset, the Attorney-General would be likely to consider the fact that an overseas prosecution has already occurred in determining whether to issue a request for the extradition of a person suspected of having committed an offence under the Act. The Attorney-General is empowered under section 40 of the *Extradition Act 1988* to issue such a request. The matters he must consider in making this determination are not specified, but a prior overseas prosecution is likely to be relevant.

Should an extradition request be made, the fact that a prosecution had already occurred in the foreign state from which Australia was seeking to extradite the suspect would be taken into account by the authorities in that requested state in determining whether to grant extradition.

The extradition treaties between Australia and its extradition partners generally provide for the refusal of an extradition request where the individual requested has already been tried and/or punished for the conduct in question. The requested state might therefore refuse Australia's request for extradition on the ground that the person had already been prosecuted for the conduct in question.

In addition, authorities in a requested state might consider a prior prosecution in a third state to be a bar to extradition to Australia. This would depend upon the terms of the extradition arrangements between Australia and the requested state.

Importantly, in any case where a suspect was to stand trial in Australia for an offence under the Act, that person would be entitled to raise allegations that he or she had previously been prosecuted overseas for the conduct in question as a bar to the exercise of jurisdiction by the Court in which he or she was being tried. The Act does not displace the common law doctrines of *autrefois convict, autrefois acquit* or abuse of process. In determining whether to apply any of these doctrines, Australian courts would have to weigh a number of public policy and practical considerations, including;

- the public interest in enforcing Australia's criminal law
- the need for a genuine opportunity to advance the interest of bringing offenders to justice, which might be hampered by relying on overseas proceedings, and
- the need for Australian courts to protect the integrity of their own processes.

Any such determination is likely to depend upon the particular circumstances of the case.

Effect of the Act on Australia's treaty obligations

Will the bill come within the provisions of any treaty to which Australia is a party? Is it expected that the bill will require or trigger any treaty action by Australia?

The Act does not come within the provisions of any treaty to which Australia is a party, and it is not expected that the Act will require or trigger any treaty action by Australia.

I trust this information is of assistance.

The Committee thanks the Minister for this response.

Environment Protection and Biodiversity Conservation Amendment (Invasive Species) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2002*, in which it made various comments. Senator Bartlett has responded to those comments in a letter dated 4 February 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of Senator Bartlett's response are discussed below.

Extract from Alert Digest No. 15 of 2002

This bill was introduced into the Senate on 19 November 2002 by Senator Bartlett as a Private Senator's bill.

The primary aim of the bill is to prevent the introduction of further invasive species into Australia and to eradicate or control those already here. The bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to provide for the Minister to list invasive species; for a permit system to regulate such species; and for invasive species threat abatement plans. The bill also establishes an Invasive Species Advisory Committee.

Possible absence of parliamentary scrutiny
Proposed new section 266AA

Under proposed new section 266AA of the Principal Act, to be inserted by item 1 of Schedule 1 to this bill, the Minister is to establish a list of invasive species for the purposes of that Act. And by virtue of proposed new sections 266BA and 266BB, the contents of that list will be relevant in determining a person's criminal liability. However, section 266AA provides only that the list be published in the *Gazette*, and not that it be subject to Parliamentary scrutiny. Nevertheless, this apparent lack of Parliamentary scrutiny may be addressed later in the bill. Proposed new subsection 266AD(3) ensures that any amendments to the list will be disallowable instruments, and it is therefore possible that that new subsection necessarily renders the list referred to in proposed new section 266AA a disallowable instrument. The Committee, accordingly, **seeks the advice of the Senator sponsoring the bill** as to whether it is intended that the list referred to in section 266AA should be a disallowable instrument.

Pending the Senator'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 Senator Bartlett

> The Democrats are happy to amend the Bill to provide for disallowance of the list under section 266AA. This is with the understanding sections 266AC(1) and (2) – defining permitted and prohibited imports - still have affect in the absence of a valid list under 266AA.

The Committee thanks the Senator for this response and for undertaking that it would be possible to amend the bill.

Strict liability
Proposed new subsections 266BA(3), 266BB(2) and 266DA(4)

Proposed new subsections 266BA(3), 266BB(2) and 266DA(4) declare some aspects of the offences created by those sections to be offences of strict liability. In the absence of an Explanatory Memorandum, the Committee is not advised of the reason for these impositions of strict criminal liability. The Committee, therefore, **seeks the advice of the Senator sponsoring the bill** about the necessity for such provisions.

Pending the Senator'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 Senator Bartlett

> Section 266BA(3) is deemed necessary because of an overriding public interest in preventing new invasive species in Australia. The intent is not to criminalise innocent importation but to strongly discourage the carriage of species unless the carrier is certain that the species is a permitted import. A strict liability provision removes the uncertainty that is inherent in both plant and animal identification and creates a simpler – as well as more stringent – standard.
>
> I hope this clarifies the relevant provisions to the satisfaction of the Committee.

The Committee thanks the Senator for this response.

Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002

Introduction

The Committee dealt with amendments made to this bill in *Alert Digest No. 15 of 2002*, in which it made various comments. The Minister for Health and Ageing has responded to those comments in a letter received on 31 January 2003. 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 Amendments Section of Alert Digest No. 15 of 2002

Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002: On 18 November 2002, the Senate agreed to request the House of Representatives to amend this bill. The requested amendment provides a discretion for the Minister to determine that, because of exceptional circumstances, a person needs repair of previous reconstructive surgery. It is, however, not certain whether this discretion is subject to independent merits review. Accordingly, the Committee **seeks the Minister's advice** on this aspect of the amendment.

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

> Thank you for your letter of 5 December 2002 concerning amendments made in the Senate to the Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002 regarding the Cleft Lip and Cleft Palate Scheme.
>
> The Opposition amendment to the Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002 does not contain any specific merits review provisions. In moving to implement a process that reflects the intent of the amendment, it is intended that all applications for the repair of previous reconstructive surgery for cleft lip and cleft palate conditions be considered by the delegate.
>
> In circumstances where the delegate's decision is challenged, other avenues for appeal are available including the *Administrative Decisions (Judicial Review) Act 1977.*

The Committee thanks the Minister for this response, but continues to draw the attention of the Senate to the provision, which may make personal rights unduly dependent upon a non-reviewable discretion.

International Criminal Court Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 7 of 2002*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 10 January 2003.

Although this bill has been passed by both Houses (and received Royal Assent on 27 June 2002) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from *Alert Digest No. 7 of 2002* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 7 of 2002

This bill was introduced into the House of Representatives on 25 June 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

Introduced with the International Criminal Court (Consequential Amendments) Bill 2002, the bill proposes provisions that allow Australia to comply with the international obligations it will incur upon ratification of the International Criminal Court Statute, by putting in place procedures to comply with requests for assistance or the enforcement of sentences. The Statute will enter into force on 1 July 2002.

The bill also contains provisions to ensure that Australian sovereignty is protected. In particular, it affirms the primacy of Australian law and declares that no person can be arrested on a warrant issued by the Court or surrendered to the Court without the consent of the Attorney-General.

Absence of review of exercise of discretion
Clauses 22 and 29

Clauses 22 and 29 of this bill provide expressly that the Attorney-General is to have an absolute discretion in deciding whether to issue a notice under clauses 20, 21 or 28, as the case may be. The absolute nature of the Attorney-General's discretion is further emphasised by clause 181 which prohibits any form of appeal, review or calling into question of the exercise of that discretion, subject only the jurisdiction of the High Court under section 75 of the Constitution. However, the Explanatory Memorandum merely explains the effect of these clauses, and does not attempt to provide a reason for these provisions. The Committee, therefore, **seeks the Attorney-General's advice** as to why the bill expressly precludes review of these discretions.

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

Relevant extract from the response from the Attorney-General

> [You] have asked for my advice on why clauses of the *International Criminal Court Bill 2002* and the *International Criminal Court (Consequential Amendments) Bill 2002* preclude review of a small number of specific decisions by the Attorney-General under those Bills. As you would be aware, both Bills were passed by the Senate on 27 June 2002 and received Royal Assent on the same day.
>
> As is noted in the Digest, the relevant clauses of the *International Criminal Court Act 2002* (the *ICC Act)* and the *International Criminal Court (Consequential Amendments) Act 2002* (the *ICC(CA) Act*) explicitly provide for review of the relevant decisions of the Attorney-General by the High Court, under section 75 of the Constitution. Due to the nature of those decisions, and the considerations taken into account by the Attorney-General in making them, it is not appropriate that they be subject to further judicial review.
>
> The *ICC Act* limits judicial review to the High Court in the case where the Attorney-General may decide to sign a certificate that it is appropriate to arrest or surrender a person to the ICC (sections 22 and 29). These decisions concern Australia's compliance with its international obligations and are based on Australia's national interests. If the Attorney-General signed a certificate to allow the surrender of a person to the ICC, it would be unacceptable for a court to declare that certificate invalid and therefore place Australia in breach of its international obligations.

The Committee thanks the Attorney-General for this response.

International Criminal Court (Consequential Amendments) Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 7 of 2002*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 10 January 2003.

Although this bill has been passed by both Houses (and received Royal Assent on 27 June 2002) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from *Alert Digest No. 7 of 2002* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 7 of 2002

This bill was introduced into the House of Representatives on 25 June 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

Introduced with the International Criminal Court Bill 2002, the bill proposes to amend the *Criminal Code Act 1995* to enact the crimes punishable by the International Criminal Court as crimes in Australian law. These crimes are genocide, crimes against humanity and war crimes. The bill also makes consequential amendments to six other Acts.

Absence of review of exercise of discretion
Schedule 1

Proposed new section 268.121 of the *Criminal Code*, to be inserted by Schedule 1 to this bill, would grant the Attorney-General an absolute discretion in deciding whether to commence proceedings under Division 268 of the *Code.* The absolute nature of the Attorney-General's discretion is emphasised by proposed new section 268.122 of the *Code*, which prohibits any form of appeal, review or calling into question of the exercise of that discretion, subject only the jurisdiction of the High Court under section 75 of the Constitution. However, the Explanatory Memorandum merely explains the effect of this section, and does not attempt to provide a reason for it. This is a possible deficiency similar to that noted earlier in this Digest in relation to the International Criminal Court Bill 2002. The Committee, therefore, **seeks the Attorney-General's advice** as to why the bill expressly precludes review of that discretion.

Pending the Attorney-General'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 Attorney-General

[You] have asked for my advice on why clauses of the *International Criminal Court Bill 2002* and the *International Criminal Court (Consequential Amendments) Bill 2002* preclude review of a small number of specific decisions by the Attorney-General under those Bills. As you would be aware, both Bills were passed by the Senate on 27 June 2002 and received Royal Assent on the same day.

As is noted in the Digest, the relevant clauses of the *International Criminal Court Act 2002* (the *ICC Act)* and the *International Criminal Court (Consequential Amendments) Act 2002* (the *ICC(CA) Act*) explicitly provide for review of the relevant decisions of the Attorney-General by the High Court, under section 75 of the Constitution. Due to the nature of those decisions, and the considerations taken into account by the Attorney-General in making them, it is not appropriate that they be subject to further judicial review…

The *ICC(CA) Act* limits judicial review of the decision by any Attorney-General to consent to bringing a prosecution under Division 268 of the *Criminal Code* (Genocide, Crimes Against Humanity, War Crimes and Crimes Against the Administration of Justice of the ICC). In Australian law, many crimes that have extraterritorial application require the consent of the Attorney-General for the commencement of a prosecution, for example crimes under Division 270 of the *Criminal Code* (Slavery, Sexual Servitude and Deceptive Recruiting).

The crimes in Division 268 claim universal jurisdiction, which requires certain issues to be taken into account in decisions on whether to prosecute such crimes in Australia, in particular issues of double jeopardy and concurrent requests for the extradition or the surrender of the person. The decision whether to consent to prosecution also requires consideration of Australia's relations with the United Nations (for example where the United National Security Council has requested that the ICC defer any investigation or prosecution for 12 months under Article 16 of the ICC Statute) and therefore should not be the subject of unlimited judicial review.

The Committee thanks the Attorney-General for this response.

Quarantine Amendment Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 3 of 2002*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 23 July 2002. Unfortunately this letter must have gone astray and after subsequent follow-up, was received on 24 January 2003.

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 *Alert Digest No. 3 of 2002* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 3 of 2002

This bill was introduced into the House of Representatives on 14 March 2002 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to provide for the Governor-General to declare, by proclamation, that an epidemic or danger of an epidemic has the potential to so affect a primary industry of national significance that it calls for the exercise of coordinated response powers.

The bill also extends the range of matters for which the Commonwealth may enter into arrangements with the States or Territories, broadens the range of persons who may perform the powers and exercise the functions of quarantine officers and introduces a new offence for the importation of prohibited goods for commercial purposes.

Strict liability offence
Proposed new subsections 2B(4) and 3(10)

Proposed new subsections 2B(4) and 3(10) of the Principal Act, to be inserted by items 2 and 3 of Schedule 1 to this bill, will impose strict liability in relation to certain aspects of criminal offences. The Explanatory Memorandum describes the effect of this imposition of strict liability, but does not provide a reason for the provisions. The Committee, therefore, **seeks the Minister's advice** as to why strict liability has been imposed in relation to these offences.

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

Relevant extract from the response from the Minister

The Committee seeks advice as to why strict liability has been imposed in relation to the three offences inserted by items 2 and 3 of Schedule 1 of the Bill and 18 of Part 2 Schedule 1 of the bill. The Bill applies strict liability to the same element of each of the three offences, that is, to the physical element of circumstance that the importation was in contravention of the Act.

I enclose a detailed explanation of which I trust will address the Committee's concerns.

Part 1 – Extension of the Act to enable authorized Commonwealth, State and Territory officers to act in exceptional circumstances

In relation to the offence under section 2B, strict liability applies to only one element of the offence. In particular, it applies to the physical element of circumstance that the direction was given to the person was a direction given under subsection (2). Strict liability means that the prosecution does not have to prove fault, such as knowledge or recklessness, in respect of this element of the offence. However, the defense of mistake of fact is still available.

The application of strict liability is necessary to ensure that a defendant who fails to comply with a direction given under subsection 2 cannot escape liability by demonstrating that he/she was not aware that the direction was given under that subsection.

In relation to the offence under section 3, strict liability applies to only one element of the offence. In particular, it applies to the physical element of circumstance that the direction that was given to the person was a direction given under section 3. Strict liability means that the prosecution does not have to prove fault, such as knowledge or recklessness, in respect of this element of the offence. However, the defense of mistake of fact is still available.

The application of strict liability is necessary to ensure that a defendant who fails to comply with a direction given under section 3 cannot escape liability by demonstrating that he/she was not aware that the direction was given under that section.

The Committee thanks the Minister for this response, which appears to indicate that the provisions are in accordance with the principles relating to strict liability contained in the Committee's *Sixth Report of 2002: The Application of Absolute and Strict Liability Offences in Commonwealth Legislation.*

The Committee emphasises that an Explanatory Memorandum should include a full explanation of the background to the bill and its intended effect. This is particularly the case where it includes provisions which may affect personal rights or parliamentary propriety. An Explanatory Memorandum should be more than a brief introduction followed by notes on clauses which largely reproduce the clauses themselves. The purpose of an Explanatory Memorandum is to assist parliamentarians during passage of the bill and to be a guide for those affected by its proposed provisions. It is therefore necessary for it to include all matters relevant to this purpose. This would usually include a substantial discussion of these issues in addition to the notes on clauses.

The Committee has decided to write to the Department of the Prime Minister and Cabinet and the Office of Parliamentary Counsel about its concerns in this area. The Committee will report to the Senate after it has considered advice from these agencies.

Strict liability offence
Proposed new subsections 18(2), 18(4A) and 18(4C)

Proposed new subsections 18(2), (4A) and (4C) of the Principal Act, to be inserted by Part 2 of Schedule 1 to this bill, will also impose strict liability in relation to certain criminal offences. The Explanatory Memorandum fails to provide a reason for these provisions, indeed it fails even to acknowledge the presence of Part 2 of Schedule 1 in this bill.

The Committee, therefore, **seeks the Minister advice** as to why strict liability has been imposed in relation to these offences, and why the Explanatory Memorandum fails to deal with Part 2 of Schedule 1 to the bill.

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

Relevant extract from the response from the Minister

Part 2 – Commercial smuggling and associated offences

1. This item repeals subsections 67(1), (2), (3) and (4) to accommodate the restructure of section 67 as a consequence of the insertion of a new offence described in the subheading to subsection 67(3) as an *aggravated illegal importation offence*. The restructure also incorporates the redrafting of the two existing offences in the section to reflect adjustments arising from the application of the *Criminal Code 1995*. The two existing offences are described in the restructured section 67 as the b*asic illegal importation offence* and *illegal removal offence*.

2. *Basic illegal importation offence*. The basic illegal imporation offence is covered by new subsection 67(1) and (2). Subsection 67(1) clarifies the elements of this offence by, in particular, emphasizing that a person must know that the thing he/she has imported is a disease or pest or a substance or article containing a pest or an animal, plant or other good. Subsection 67(2) applies strict liability to the physical element of circumstance that the importation is in contravention of the Act. The amendment to subsection 67(2) will overcome the effect of an earlier harmonization amendment that mistakenly took the view that the prosecution had to prove fault on the part of the defendant in relation to this physical element. The result of specifying that strict liability applies to a physical element is that the prosecution does not have to prove fault on the part of the defendant in relation to that physical element – in the case that the defendant knew that the importation was in contravention of the Act. Under the *Criminal Code*, and legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see Section 6.1 of the Code).

3. There is no change to the maximum penalty applicable to this offence. The maximum penalty continues to be imprisonment for 10 years.

4. *Aggravated illegal importation offence*. This new offence is covered by new subsections 67(3), (4) and (4A). This new offence consists of the elements of the basic illegal importation offence and an additional element dealing with commercial advantage. The element of commercial advantage requires that a person obtains, or is likely to obtain, a commercial advantage over the person's competitors or potential competitors. As no fault element is specified in relation to this additional element, by the operation of the *Criminal Code*, recklessness is the applicable fault element. Under the *Criminal Code*, recklessness can be established by proving intention, knowledge or recklessness.

5. Subsection 67(4) provides examples of *commercial advantage*. These examples are not exhaustive.

6. This offence attracts a higher maximum pecuniary penalty than that which applies to the *basic illegal importation offence* or the *illegal removal offence*. However, the same maximum penalty of 10 years imprisonment applies.

7. *Illegal removal offence*. The illegal removal offence is covered by subsections 67(4B) and (4C). This offence concerns the illegal movement of things between locations within Australia or within the Cocos Islands or between Australia and the Cocos Islands. By comparison, the *basic illegal importation offence* and the *aggravated illegal importation offence* concern the illegal movement of a thing from a location outside Australia to Australia or from a location outside the Cocos Islands to the Cocos Islands.

8. Subsection 67(4B) clarifies the elements of this offence by; in particular, emphasizing that a person must know that the thing he/she has removed is an animal, plant or other good. Subsection 67(4C) applies strict liability to the physical element of circumstance that the removal is in contravention of the Act. This amendment will overcome the effect of an earlier harmonization amendment that mistakenly took the view that the prosecution had to prove fault on the part of the defendant in relation to this physical element. The result of specifying that strict liability applies to a physical element is that the prosecution does not have to prove fault on the part of the defendant in relation to this physical element. The result of specifying that strict liability applies to a physical element is that the prosecution does not have to prove fault on the part of the defendant in relation to that physical element – in this case that the defendant knew that the removal was in contravention of the Act. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that is it an offence of strict liability (see Section 6.1 of the Code).

9. There is no change to the maximum penalty applicable to this offence. The maximum penalty continues to be imprisonment for 10 years.

The Committee thanks the Minister for this response, which appears to indicate that the provisions are in accordance with the principles relating to strict liability contained in the Committee's *Sixth Report of 2002: The Application of Absolute and Strict Liability Offences in Commonwealth Legislation.*

The Committee emphasises that an Explanatory Memorandum should include a full explanation of the background to the bill and its intended effect. This is particularly the case where it includes provisions which may affect personal rights or parliamentary propriety. An Explanatory Memorandum should be more than a brief introduction followed by notes on clauses which largely reproduce the clauses themselves. The purpose of an Explanatory Memorandum is to assist parliamentarians during passage of the bill and to be a guide for those affected by its proposed provisions. It is therefore necessary for it to include all matters relevant to this purpose. This would usually include a substantial discussion of these issues in addition to the notes on clauses.

The Committee has decided to write to the Department of the Prime Minister and Cabinet and the Office of Parliamentary Counsel about its concerns in this area. The Committee will report to the Senate after it has considered advice from these agencies.

Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2002*, in which it made various comments. The Minister for Finance and Administration responded to those comments in a letter dated 15 May 2002.

In its *Fifth Report of 2002,* the Committee requested that an additional Explanatory Memorandum be tabled explaining clearly the details of the background of retrospectivity. The Minister has responded to that request in a letter dated 19 December 2002.

An extract from the *Fifth Report of 2002* and relevant parts of the Minister's response are discussed below.

Extract from Fifth Report of 2002

This bill was introduced into the House of Representatives on 21 February 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to amend the following Acts:

- *Superannuation Act 1976* in relation to reversionary benefits; consolidation of funds from other superannuation arrangements into the Commonwealth Superannuation Scheme (CSS); and powers of Reconsideration Advisory Committees;
- *Superannuation Act 1976* and the *Superannuation Act 1990* in relation to the scope and administration of the Acts, the CSS and the Public Sector Superannuation Scheme (PSS); delegations by the relevant Board; and benefit options for members who cease membership on the sale of an asset or the transfer or outsourcing of a function;
- *Parliamentary Contributory Superannuation Act 1948* in relation to reversionary benefits, orphan benefits, transfer values and rollover funds; and the

- *Administrative Appeals Tribunal Act 1975*, *Law Officers Act 1964*, and the *Workplace Relations Act 1996* in relation to benefits for CSS and PSS members who join the Judges' Pension Scheme and the *Superannuation Legislation Amendment Act (No. 1) 1995*, to remove redundant references.

Retrospective commencement
Schedule 1, items 175, 183, 186, 187; Schedule 2, items 8 and 14

By virtue of the table in subclause 2(1) of this bill, the amendments proposed by items 175, 183, 186 and 187 of Schedule 1, and items 8 and 14 of Schedule 2, will commence retrospectively on 1 July 1995.

It appears that these amendments are technical in nature, being designed solely to clarify the operation of provisions which have been in force since 1 July 1995. For example, the Explanatory Memorandum states that item 175 of Schedule 1 is intended to ensure that Board members of the Commonwealth Superannuation Scheme "may only be indemnified in circumstances permitted by SIS". Item 187 of that Schedule is intended to amend the Act in the same terms as regulations which modified the Act in 1995 to apply less stringent preservation rules. The Committee **seeks the Minister's confirmation** that the retrospective commencement of these provisions will not detrimentally affect the rights of any person.

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

Relevant extract from the response from the Minister dated 15 May 2002

All of these items other than item 8 of Schedule 2 clarify or correct provisions of the *Superannuation Act 1976* (the 1976 Act) and the *Superannuation Act 1990* (the 1990 Act) that were inserted into those Acts or amended with effect from 1 July 1995 by the *Superannuation Legislation Amendment Act 1995*. The 1976 Act provides the rules for the Commonwealth Superannuation Scheme (CSS). The 1990 Act and the Trust Deed under that Act provide the rules for the Public Sector Superannuation Scheme (PSS).

Item 175 of Schedule 1 and item 14 of Schedule 2 ensure that members of the CSS and PSS Boards can only be indemnified in circumstances permitted by the Superannuation Industry (Supervision) Act 1993 and its regulations (SIS). Items 183 and 187 of Schedule 1 correct provisions relating to the release of benefits as permitted by SIS. These provisions have already been amended by regulations made under section 155C of the Act. When section 155C was inserted into the Act the then

Minister for Finance assured the Committee that the Act itself would be amended in line with any regulations made under that provision on the first possible occasion. The date of effect of these items is the same as the date of effect of the regulations under section 155C. These provisions ensure that the schemes comply with the national regulatory scheme for superannuation as provided for by SIS.

Item 186 of Schedule 1 corrects an error of drafting relating to the date on which deferred benefits become payable. The error occurred when section 138 was redrafted in 1995 and instead of providing, as had been done by the provision since 1976, that benefits become payable after a particular event, eg, death, it inadvertently provided that benefits should be payable from the day before the event. This creates a situation where a benefit appears to become payable from a day before the person was eligible for the benefit. As it was not intended that the provision be changed in this way, it has been administered since 1995 as if the error had not been made.

Item 8 of Schedule 2 amends the definition of Trust Deed included in the 1990 Act to ensure changes made to the Trust Deed through an Act of Parliament are included in the definition. The definition as currently drafted only includes amendments made under an Amending Deed. The definition is being retrospectively changed from 1 July 1995 in order to ensure that amendments made by item 17 of Schedule 2 (which take effect from that date) can be encompassed in the definition of Trust Deed. (Amendments made by item 17 of Schedule 2 are being made as a result of a request made by the Senate Standing Committee on Regulations and Ordinances in 1995.) This is a technical amendment that will not detrimentally affect the rights of any person.

The retrospective amendments clarify provisions amended or inserted with effect from 1 July 1995, or are consequential on such amendments, and the schemes have been administered as if these amendments were in place from that date. I therefore consider that the retrospective commencement will not detrimentally affect the rights of any person.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Relevant extract from the further response from the Minister dated 19 December 2002

Thank you for the letter of 20 June 2002 concerning the Committee's request that an additional Explanatory Memorandum be tabled for the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002. I apologise for the time taken to respond.

I would be happy to arrange for the tabling of an additional Explanatory Memorandum setting out the material I provided in my earlier response to the Committee when the Senate next considers the Bill.

The Committee thanks the Minister for this further response and for his undertaking to arrange for the tabling of an additional Explanatory Memorandum

Retrospective commencement
Schedule 1, items 176, 182 and 194 and Schedule 3

The table in subclause 2(1) will also permit the amendments proposed by items 176, 182 and 194 of Schedule 1, and the whole of Schedule 3, to commence retrospectively on 27 June 1997 – the date of a ministerial announcement.

It appears that these amendments may be beneficial to members of public service superannuation schemes who cease to be scheme members on the sale or transfer of government businesses or assets or as a result of outsourcing, but this is not clear from either the Explanatory Memorandum or the Minister's Second Reading Speech. The Committee, therefore, **seeks the Minister's confirmation** that these amendments are beneficial to those retrospectively affected.

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

Relevant extract from the response from the Minister dated 15 May 2002

These amendments relate to changes to the 1976 Act and the PSS Trust Deed under the 1990 Act to reflect changes to the scheme announced on 27 June 1997.

Items 176 and 194 of Schedule 1 amend the 1976 Act to remove existing restrictions on the payment of certain benefits from the CSS to persons who involuntarily retired as a result of a sale of an asset or the transfer of a function. Item 182 of Schedule 1 further amends the 1976 Act to provide a new benefit option for CSS members who cease CSS membership in those circumstances but who are not involuntarily retired. This can occur where a CSS member resigns from Commonwealth employment in some cases to work for the new owner of the asset or provider of the function.

Schedule 3 amends the PSS Trust Deed to remove similar restrictions on the payment of benefits from the PSS and provide a similar new benefit option in relation to PSS members who cease PSS membership in those circumstances.

The relevant benefit options have been available on an administrative basis since 27 June 1997 and are beneficial to the members concerned.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Relevant extract from the further response from the Minister dated 19 December 2002

Thank you for the letter of 20 June 2002 concerning the Committee's request that an additional Explanatory Memorandum be tabled for the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002. I apologise for the time taken to respond.

I would be happy to arrange for the tabling of an additional Explanatory Memorandum setting out the material I provided in my earlier response to the Committee when the Senate next considers the Bill.

The Committee thanks the Minister for this further response and for his undertaking to arrange for the tabling of an additional Explanatory Memorandum

Retrospective commencement
Schedule 1, item 193

The table in subclause 2(1) will also permit the amendment proposed by item 193 of Schedule 1 to commence retrospectively on 18 December 1992. This item amends section 155B of the *Superannuation Act 1976*. Section 155B provides for the making of regulations to modify the Principal Act in relation to members of the Commonwealth Superannuation Scheme (CSS) who cease to be members on the sale of an asset or the transfer of a function.

The Explanatory Memorandum states that section 155B was intended to apply to all persons who cease membership in those circumstances "but this is unclear". Item 193 amends section 155B to make this intent clear.

Again, it appears that this amendment is beneficial to former members of the CSS, but this is not clear from either the Explanatory Memorandum or the Minister's Second Reading Speech. The Committee, therefore, **seeks the Minister's confirmation** that these retrospective amendments will not adversely affect any person.

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

Relevant extract from the response from the Minister dated 15 May 2002

> This amendment clarifies the original intention of section 155B of the 1976 Act in relation to its application to all CSS members who cease membership through the sale of an asset or the transfer of a function. Legal advice has been received that the section as currently drafted would only apply to a person whose position ceases to exist in those circumstances. However, some persons may continue in their position but cease their CSS membership because an organisation is sold as a going concern to the private sector.
>
> Regulations made under section 155B allow me to make declarations which provide for the early payment of benefits where a person is made redundant within three years of the sale or transfer. The amendment made by item 193 of Schedule 1 is necessary to allow this benefit to apply where a person ceases CSS membership because a body by which they are employed is sold as a going concern.

Because the provision has been administered as originally intended and is a beneficial provision I do not consider the retrospective commencement will adversely affect any person.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Relevant extract from the further response from the Minister dated 19 December 2002

Thank you for the letter of 20 June 2002 concerning the Committee's request that an additional Explanatory Memorandum be tabled for the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002. I apologise for the time taken to respond.

I would be happy to arrange for the tabling of an additional Explanatory Memorandum setting out the material I provided in my earlier response to the Committee when the Senate next considers the Bill.

The Committee thanks the Minister for this further response and for his undertaking to arrange for the tabling of an additional Explanatory Memorandum

Declarations having retrospective effect
Schedule 1, items 12 to 15 and Schedule 2, items 4 to 7

The amendments proposed by items 12 to 15 of Schedule 1, and items 4 to 7 of Schedule 2, will permit the Minister to make declarations (for example, a declaration to include an authority or body as an approved authority) which have effect before the date on which those amendments have commenced.

It appears that any such declarations may be beneficial to members of public service superannuation schemes, but this is not clear from either the Explanatory Memorandum or the Minister's Second Reading Speech. The Committee, therefore, **seeks the Minister's confirmation** that these amendments are beneficial to those retrospectively affected.

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

Relevant extract from the response from the Minister dated 15 May 2002

> Items 12 to 15 of Schedule 1 and items 4 to 7 of Schedule 2 to the Bill will amend the 1976 and 1990 Acts in relation to my power to make declarations that an authority or body should be, or should not be, an approved authority for the purposes of the Act.
>
> A retrospective declaration that an authority or body is an approved authority is beneficial in effect to the employees of the authority or body because it validates their membership of the relevant scheme during the period of retrospectively.
>
> In the case of a declaration that an authority or body is not an approved authority I can not make a declaration with retrospective effect if any persons employed by that authority or body have been treated as CSS or PSS members during the period of retrospectivity. The amendments do not allow the making of a declaration that would disadvantage a person who has been contributing to either the CSS or the PSS.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Relevant extract from the further response from the Minister dated 19 December 2002

Thank you for the letter of 20 June 2002 concerning the Committee's request that an additional Explanatory Memorandum be tabled for the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002. I apologise for the time taken to respond.

I would be happy to arrange for the tabling of an additional Explanatory Memorandum setting out the material I provided in my earlier response to the Committee when the Senate next considers the Bill.

The Committee thanks the Minister for this further response and for his undertaking to arrange for the tabling of an additional Explanatory Memorandum

Taxation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 5 of 2002*, in which it made various comments. The Minister for Revenue and Assistant Treasurer 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 26 June 2002) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from *Alert Digest No. 5 of 2002* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 5 of 2002

This bill was introduced into the House of Representatives on 14 May 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Medicare Levy Act 1986* and the *A New Tax (Medicare Levy Surcharge—Fringe Benefits) Act 1999* to:

- increase the Medicare levy low income thresholds for individuals, married couples and sole parents in line with movements in the Consumer Price Index; and
- increase the individual low income threshold for Medicare levy surcharge purposes;

for the 2001-2002 financial year and later financial years.

The bill also amends the *Medicare Levy Act 1986* in relation to eligibility to use a family income threshold and the *Income Tax Assessment Act 1936* to make technical amendments.

Retrospective commencement
Items 1 and 2 of Schedule 2

By virtue of item 3 of Schedule 2 to this bill, the amendments proposed by items 1 and 2 thereof would apply retrospectively from the 1997-98 year of income, and by virtue of item 8 in the same schedule, the amendments proposed by items 4 to 7 would apply retrospectively from the 2000-01 year of income. The Explanatory Memorandum describes these amendments as "technical", but does not indicate whether the proposed retrospective application will operate to the disadvantage of any taxpayers. Given this, the Committee **seeks the Treasurer's advice** that no person will be adversely affected by the changes.

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

Thank you for your letter to the Treasurer of 20 June 2002 concerning the comments of the Senate Standing Committee for the Scrutiny of Bills on the Taxation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2002. I apologise for the delay in replying.

In the Scrutiny of Bills Alert Digest No. 5 of 2002, the Committee comments that the Explanatory Memorandum to the bill does not indicate whether the proposed retrospective commencement of amendments proposed by items 1 and 2 and 4 to 7 in Schedule 2 of this Bill will operate to the disadvantage of any taxpayers. The Committee is seeking advice that no person will be adversely affected by these changes.

The amendments to the *Income Tax Assessment Act 1936* in items 1 and 2 will ensure that the classes of taxpayers that were previously "prescribed" (that is, exempt) persons in respect of Medicare levy will continue to be "prescribed". The Commissioner of Taxation has advised me that no taxpayer will be adversely affected by retrospective commencement of the proposed amendments. Technically the amendments ensure that taxpayers do not lose exemption from the levy.

The amendments to the *Medicare Levy Act 1986* in items 4 to 7 will restore access to the Medicare levy family thresholds for taxpayers who are eligible for a housekeeper rebate or for a child-housekeeper rebate (families with incomes below the threshold are exempt from the levy; families whose incomes fall within a certain range pay a reduced levy). As an unintended consequence of earlier amendments, access to the exemption or reduced levy was removed. Although the Commissioner has been treating such taxpayers as eligible for the Medicare levy family thresholds, it was thought desirable to correct the law. No taxpayer will be adversely affected by retrospective commencement of these amendments.

I trust this information will be of assistance to you.

The Committee thanks the Minister for this response.

Brett Mason
Deputy Chairman

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

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3 FEB 2003
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02/10813

16 DEC 2002

Senator J McLucas
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite SG.49
Parliament House
CANBERRA ACT 2600

Dear Senator McLucas

Please find enclosed advice on two aspects of the *Criminal Code Amendment (Offences Against Australians) Act 2002* as requested by the Committee in the Scrutiny of Bills Alert Digest No. 15 of 2002.

The effect which a prosecution overseas would have on a possible prosecution under the Act in Australia in relation to the same actions.

How would such an overseas prosecution be taken into account? What if, for instance, a person was acquitted in such an overseas prosecution?

An overseas prosecution would be taken into account in a number of ways.

In the case where the suspected offender was located overseas, and would therefore need to be extradited to stand trial in Australia, the fact that a prosecution had already occurred would affect that extradition process.

At the outset, the Attorney-General would be likely to consider the fact that an overseas prosecution has already occurred in determining whether to issue a request for the extradition of a person suspected of having committed an offence under the Act. The Attorney-General is empowered under section 40 of the *Extradition Act 1988* to issue such a request. The matters he must consider in making this determination are not specified, but a prior overseas prosecution is likely to be relevant.

Should an extradition request be made, the fact that a prosecution had already occurred in the foreign state from which Australia was seeking to extradite the suspect would be taken into account by the authorities in that requested state in determining whether to grant extradition.

The extradition treaties between Australia and its extradition partners generally provide for the refusal of an extradition request where the individual requested has already been tried and/or punished for the conduct in question. The requested state might therefore refuse Australia's request for extradition on the ground that the person had already been prosecuted for the conduct in question.

In addition, authorities in a requested state might consider a prior prosecution in a third state to be a bar to extradition to Australia. This would depend upon the terms of the extradition arrangements between Australia and the requested state.

Importantly, in any case where a suspect was to stand trial in Australia for an offence under the Act, that person would be entitled to raise allegations that he or she had previously been prosecuted overseas for the conduct in question as a bar to the exercise of jurisdiction by the Court in which he or she was being tried. The Act does not displace the common law doctrines of *autrefois convict*, *autrefois acquit* or abuse of process. In determining whether to apply any of these doctrines, Australian courts would have to weigh a number of public policy and practical considerations, including:

- the public interest in enforcing Australia's criminal law
- the need for a genuine opportunity to advance the interest of bringing offenders to justice, which might be hampered by relying on overseas proceedings, and
- the need for Australian courts to protect the integrity of their own processes.

Any such determination is likely to depend upon the particular circumstances of the case.

Effect of the Act on Australia's treaty obligations

Will the bill come within the provisions of any treaty to which Australia is a party? Is it expected that the bill will require or trigger any treaty action by Australia?

The Act does not come within the provisions of any treaty to which Australia is a party, and it is not expected that the Act will require or trigger any treaty action by Australia.

I trust this information is of assistance.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

PARLIAMENT OF AUSTRALIA • THE SENATE

Andrew Bartlett

Leader of the Australian Democrats
Senator for Queensland

Senator Jan McLucas
Chair
Senate Scrutiny of Bills Committee

February 3, 2003

Dear Senator McLucas Jan

I am please to offer the following responses to the Scrutiny of Bills Committee queries (4 December 2002) regarding the *Environment Protection and Biodiversity Conservation Amendment (Invasive Species) Bill 2002.*

Possible absence of parliamentary scrutiny under proposed new section 266AA

The Democrats are happy to amend the Bill to provide for disallowance of the list under section 266AA. This is with the understanding sections 266AC(1) and (2) – defining permitted and prohibited imports - still have affect in the absence of a valid list under 266AA.

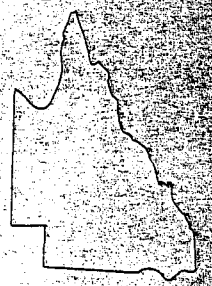
Strict liability – proposed new sections 266BA(3), 266BB(2) and 266DA(4)

Section 266BA(3) is deemed necessary because of an overriding public interest in preventing new invasive species in Australia. The intent is not to criminalise innocent importation but to strongly discourage the carriage of species unless the carrier is certain that the species is a permitted import. A strict liability provision removes the uncertainty that is inherent in both plant and animal identification and creates a simpler – as well as more stringent – standard.

I hope this clarifies the relevant provisions to the satisfaction of the Committee.

Sincerely yours

Senator Andrew Bartlett



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SENATOR THE HON KAY PATTERSON
Minister for Health and Ageing

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

Dear Senator McLucas,

Thank you for your letter of 5 December 2002 concerning amendments made in the Senate to the Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002 regarding the Cleft Lip and Cleft Palate Scheme.

The Opposition amendment to the Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002 does not contain any specific merits review provisions. In moving to implement a process that reflects the intent of the amendment, it is intended that all applications for the repair of previous reconstructive surgery for cleft lip and cleft palate conditions be considered by the delegate.

In circumstances where the delegate's decision is challenged, other avenues for appeal are available including the *Administrative Decisions (Judicial Review) Act 1977*.

Yours sincerely,

Senator Kay Patterson

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ATTORNEY-GENERAL
THE HON DARYL WILLIAMS AM QC MP

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

16 JAN 2003

Dear Senator McLucas

Thank you for the Senate Standing Committee's letter to my Senior Adviser dated 22 August 2002, enclosing a copy of Scrutiny of Bills Alert Digest No. 7 of 2002.

In that digest, you have asked for my advice on why clauses of the *International Criminal Court Bill 2002* and the *International Criminal Court (Consequential Amendments) Bill 2002* preclude review of a small number of specific decisions by the Attorney-General under those Bills. As you would be aware, both Bills were passed by the Senate on 27 June 2002 and received Royal Assent on the same day.

As is noted in the Digest, the relevant clauses of the *International Criminal Court Act 2002* (the *ICC Act*) and the *International Criminal Court (Consequential Amendments) Act 2002* (the *ICC(CA) Act*) explicitly provide for review of the relevant decisions of the Attorney-General by the High Court, under section 75 of the Constitution. Due to the nature of those decisions, and the considerations taken into account by the Attorney-General in making them, it is not appropriate that they be subject to further judicial review.

The *ICC Act* limits judicial review to the High Court in the case where the Attorney-General may decide to sign a certificate that it is appropriate to arrest or surrender a person to the ICC (sections 22 and 29). These decisions concern Australia's compliance with its international obligations and are based on Australia's national interests. If the Attorney-General signed a certificate to allow the surrender of a person to the ICC, it would be unacceptable for a court to declare that certificate invalid and therefore place Australia in breach of its international obligations.

The *ICC(CA) Act* limits judicial review of the decision by any Attorney-General to consent to bringing a prosecution under Division 268 of the *Criminal Code* (Genocide, Crimes Against Humanity, War Crimes and Crimes Against the Administration of Justice of the ICC). In Australian law, many crimes that have extraterritorial application require the consent of the Attorney-General for the commencement of a prosecution, for example crimes under Division 270 of the *Criminal Code* (Slavery, Sexual Servitude and Deceptive Recruiting).

The crimes in Division 268 claim universal jurisdiction, which requires certain issues to be taken into account in decisions on whether to prosecute such crimes in Australia, in particular issues of double jeopardy and concurrent requests for the extradition or the surrender of the person. The decision whether to consent to prosecution also requires consideration of Australia's relations with the United Nations (for example where the United National Security Council has requested that the ICC defer any investigation or prosecution for 12 months under Article 16 of the ICC Statute) and therefore should not be the subject of unlimited judicial review.

Yours sincerely

Daryl Williams

DARYL WILLIAMS

Copy: Mr David Creed
Committee Secretary
Senate Standing Committee for the Scrutiny of Bills
SG.49
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HON WARREN TRUSS MP

Minister for Agriculture, Fisheries and Forestry

Senator B Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2602

Dear Senator

I refer to the Scrutiny of Bills Alert Digest No. 3 of 2002 (20 March 2002) concerning the Quarantine Amendment Bill 2002.

The Committee seeks advice as to why strict liability has been imposed in relation to the three offences inserted by items 2 and 3 of Schedule 1 of the Bill and 18 of Part 2 Schedule 1of the Bill. The Bill applies strict liability to the same element of each of the three offences, that is, to the physical element of circumstance that the importation was in contravention of the Act.

I enclose a detailed explanation of which I trust will address the Committee's concerns.

Yours sincerely

WARREN TRUSS

23 JUL 2002

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7520 Facsimile: (02) 6273 4120

QUARANTINE AMENDMENT BILL 2002

SCHEDULE 1 – AMENDMENT OF THE QUARANTINE ACT 1908

Subsection 2B and 3(10)

Part 1 – Extension of the Act to enable authorised Commonwealth, State and Territory officers to act in exceptional circumstances

In relation to the offence under section 2B, strict liability applies to only one element of the offence. In particular, it applies to the physical element of circumstance that the direction was given to the person was a direction given under subsection (2). Strict liability means that the prosecution does not have to prove fault, such as knowledge or recklessness, in respect of this element of the offence. However, the defense of mistake of fact is still available.

The application of strict liability is necessary to ensure that a defendant who fails to comply with a direction given under subsection 2 cannot escape liability by demonstrating that he/she was not aware that the direction was given under that subsection.

In relation to the offence under section 3, strict liability applies to only one element of the offence. In particular, it applies to the physical element of circumstance that the direction that was given to the person was a direction given under section 3. Strict liability means that the prosecution does not have to prove fault, such as knowledge or recklessness, in respect of this element of the offence. However, the defense of mistake of fact is still available.

The application of strict liability is necessary to ensure that a defendant who fails to comply with a direction given under section 3 cannot escape liability by demonstrating that he/she was not aware that the direction was given under that section.

Subsections 18(2), 18(4A) and 18(4C)

Part 2 – Commercial smuggling and associated offences

Item 18 – Subsections 67(1), (2), (3) and (4)

1. This item repeals subsections 67(1), (2), (3) and (4) to accommodate the restructure of section 67 as a consequence of the insertion of a new offence described in the subheading to subsection 67(3) as an *aggravated illegal importation offence*. The restructure also incorporates the redrafting of the two existing offences in the section to reflect adjustments arising from the application of the *Criminal Code 1995*. The two existing offences are described in the restructured section 67 as the b*asic illegal importation offence* and the *illegal removal offence*.

2. *Basic illegal importation offence*. The basic illegal importation offence is covered by new subsections 67(1) and (2). Subsection 67(1) clarifies the elements of this offence by, in particular, emphasising that a person must know that the thing he/she has imported is a disease or pest or a substance or article containing a pest or an animal, plant or other good. Subsection 67(2) applies strict liability to the physical element of circumstance that the importation is in contravention of the Act. The amendment to

subsection 67(2) will overcome the effect of an earlier harmonisation amendment that mistakenly took the view that the prosecution had to prove fault on the part of the defendant in relation to this physical element. The result of specifying that strict liability applies to a physical element is that the prosecution does not have to prove fault on the part of the defendant in relation to that physical element - in this case that the defendant knew that the importation was in contravention of the Act. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see Section 6.1 of the Code).

3. There is no change to the maximum penalty applicable to this offence. The maximum penalty continues to be imprisonment for 10 years.

4. *Aggravated illegal importation offence*. This new offence is covered by new subsections 67(3), (4) and (4A). This new offence consists of the elements of the basic illegal importation offence and an additional element dealing with commercial advantage. The element of commercial advantage requires that a person obtains, or is likely to obtain, a commercial advantage over the person's competitors or potential competitors. As no fault element is specified in relation to this additional element, by the operation of the *Criminal Code*, recklessness is the applicable fault element. Under the *Criminal Code*, recklessness can be established by proving intention, knowledge or recklessness.

5. Subsection 67(4) provides examples of *commercial advantage*. These examples are not exhaustive.

6. This offence attracts a higher maximum pecuniary penalty than that which applies to the *basic illegal importation offence* or the *illegal removal offence*. However, the same maximum penalty of 10 years imprisonment applies.

7. *Illegal removal offence*. The illegal removal offence is covered by subsections 67(4B) and (4C). This offence concerns the illegal movement of things between locations within Australia or within the Cocos Islands or between Australia and the Cocos Islands. By comparison, the *basic illegal importation offence* and the *aggravated illegal importation offence* concern the illegal movement of a thing from a location outside Australia to Australia or from a location outside the Cocos Islands to the Cocos Islands.

8. Subsection 67(4B) clarifies the elements of this offence by; in particular, emphasising that a person must know that the thing he/she has removed is an animal, plant or other good. Subsection 67(4C)) applies strict liability to the physical element of circumstance that the removal is in contravention of the Act. This amendment will overcome the effect of an earlier harmonisation amendment that mistakenly took the view that the prosecution had to prove fault on the part of the defendant in relation to this physical element. The result of specifying that strict liability applies to a physical element is that the prosecution does not have to prove fault on the part of the defendant in relation to that physical element - in this case that the defendant knew that the removal was in contravention of the Act. Under the *Criminal Code*, any legislative provision that attracts strict liability must expressly state that is it an offence of strict liability (see Section 6.1 of the Code).

9. There is no change to the maximum penalty applicable to this offence. The maximum penalty continues to be imprisonment for 10 years.

SENATOR THE HON NICK MINCHIN

Minister for Finance and Administration

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

19 DEC 2002

Dear Jan

Thank you for the letter of 20 June 2002 from the Secretary of the Standing Committee for the Scrutiny of Bills, concerning the Committee's request that an additional Explanatory Memorandum be tabled for the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002. I apologise for the time taken to respond.

I would be happy to arrange for the tabling of an additional Explanatory Memorandum setting out the material I provided in my earlier response to the Committee when the Senate next considers the Bill.

Yours sincerely

Nick Minchin

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MINISTER FOR REVENUE AND
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12 NOV 2002

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

Dear Senator McLucas

Taxation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2002

Thank you for your letter to the Treasurer of 20 June 2002 concerning the comments of the Senate Standing Committee for the Scrutiny of Bills on the Taxation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2002. I apologise for the delay in replying.

In the Scrutiny of Bills Alert Digest No. 5 of 2002, the Committee comments that the Explanatory Memorandum to the bill does not indicate whether the proposed retrospective commencement of amendments proposed by items 1 and 2 and 4 to 7 in Schedule 2 of this Bill will operate to the disadvantage of any taxpayers. The Committee is seeking advice that no person will be adversely affected by these changes.

The amendments to the *Income Tax Assessment Act 1936* in items 1 and 2 will ensure that the classes of taxpayers that were previously "prescribed" (that is, exempt) persons in respect of Medicare levy will continue to be "prescribed". The Commissioner of Taxation has advised me that no taxpayer will be adversely affected by retrospective commencement of the proposed amendments. Technically the amendments ensure that taxpayers do not lose exemption from the levy.

The amendments to the *Medicare Levy Act 1986* in items 4 to 7 will restore access to the Medicare levy family thresholds for taxpayers who are eligible for a housekeeper rebate or for a child-housekeeper rebate (families with incomes below the threshold are exempt from the levy; families whose incomes fall within a certain range pay a reduced levy). As an unintended consequence of earlier amendments, access to the exemption or reduced levy was removed. Although the Commissioner has been treating such taxpayers as eligible for the Medicare levy family thresholds, it was thought desirable to correct the law. No taxpayer will be adversely affected by retrospective commencement of these amendments.

I trust this information will be of assistance to you.

Yours sincerely

HELEN COONAN