SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTH REPORT

OF

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

FOURTH REPORT OF 2003

The Committee presents its Fourth 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:

Communications Legislation Amendment Bill (No. 1) 2002

Criminal Code Amendment (Terrorism) Bill 2003

Dairy Industry Service Reform Act 2003

Electoral Amendment (Political Honesty) Bill 2003

Petroleum (Timor Sea Treaty) Amendment Act 2003

Petroleum (Timor Sea Treaty) (Consequential Amendments) Act 2003

Communications Legislation Amendment Bill (No. 1) 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2002*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 10 September 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 representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

Schedule 1 to the bill proposes to amend the *Australian Communications Authority Act 1997* to allow a definitions determination made under the Act to apply, adopt or incorporate certain materials, and in certain circumstances, as are permitted under the provisions of both section 314A of the *Radiocommunications Act 1992* and section 589 of the *Telecommunications Act 1997.*

Schedule 2 to the bill proposes to amend the *Freedom of Information Act 1982* (FOI Act) to exempt certain prohibited material, including on-line and offensive material, from disclosure under the FOI Act. The amendments also exempt the Classification Board, the Classification Review Board and the Office of Film and Literature Classification from the operation of the FOI Act in relation to the same types of materials which could be the subject of an FOI request.

Schedule 3 to the bill proposes to amend the *Radiocommunications Act 1992* to:

- expand the objects clause of the Act to include an object to make adequate provision of the radiofrequency spectrum for use by agencies involved in the defence or national security of Australia, law enforcement or the provision of emergency services and for use by other public or community services;

- allow the Australian Communications Authority (ACA), by disallowable instrument, to exempt certain law enforcement and anti-corruption personnel from some sections of the Act dealing with unlicensed transmissions, equipment standards and interference emissions; and
- streamline licensing provisions to allow the ACA to allow specified bodies to lawfully operate covert surveillance devices for the specific purpose of investigating serious crime or corruption.

Schedule 4 to the bill proposes to amend the *Telecommunications Act 1997* to abolish the specially-constituted Australian Communications Authority (SC-ACA) which, in its four years of operation, has received no applications for facility installation permits.

Schedule 5 to the bill proposes to amend the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to make a number of minor amendments in relation to the National Relay Service (NRS); calculation and payment of the NRS levy; the disallowance of a revocation or variation of a customer service guarantee standard; and the Telecommunications Industry Ombudsman Scheme.

Incorporation of extrinsic material as in force from time to time
Item 1 of Schedule 1

Proposed new section 54A of the *Australian Communications Authority Act 1997*, to be inserted by item 1 of Schedule 1 to this bill, would permit the Australian Communications Authority to make determinations by applying, adopting or incorporating matter contained in other instruments as in force from time to time. The new section would therefore derogate from the provisions of section 49A of the *Acts Interpretation Act 1901*. The Explanatory Memorandum seeks to justify this proposal as preventing "unnecessary administrative work" for the Authority. The Committee, however, **seeks the Minister's advice** on the need for the proposed new section which would also prevent the Parliament from being able to consider and scrutinise the content of determinations made thereunder.

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

On page 12 of the Digest, the Committee has sought my advice on the need for the proposed new section 54A of the *Australian Communications Authority Act 1997* (ACA Act).

The amendment would allow the Australian Communications Authority (ACA), when making a determination under section 54 of the ACA Act, to incorporate material by reference not only from instruments and writings in force at the time the determination is made, but also from instruments and writings in force or existing from time to time.

This amendment is intended to reduce the administrative load of the ACA, so that it would not be required to amend a determination under section 54 every time instruments or writings referred to in that determination change. It is important to the ACA's delegated legislation making that it be able to incorporate other instruments by reference (including international technical standards and relevant Australian industry standards) as in force or existing from time to time.

Section 54 of the ACA Act lacks the flexibility found in other provisions in the telecommunications and radiocommunications legislation. For example:

(a) Section 349 of the *Telecommunications Act 1997* allows the ACA to make a written determination requiring certain carriers and carriage service providers to provide pre-selection in favour of carnage service providers. Subsection 349(7) provides that in making a determination under section 349, the ACA may incorporate by reference (with or without modification) any matter contained in a code or standard as in force or existing from time to time that has been proposed or approved by a body or association. This enables the ACA to readily adopt pre-selection arrangements that the industry has been able to reach agreement upon itself.

(b) Section 377 of the *Telecommunications Act 1997* allows the ACA, in making a technical standard under section 376, to incorporate (with or without modification) any matter contained in a standard as in force or existing from time to time proposed or approved by Standards Australia International Limited or any other body or association.

(c) Section 589 of the *Telecommunications Act 1997* and section 314A of the *Radiocommunications Act 1992* allow any instrument under those Acts to incorporate by reference (with or without modification) matter contained in any other instrument or writing whatsoever as in force or existing from time to time.

(d) Section 147 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* enables the ACA to impose requirements on carriers, carriage service providers and emergency call persons in relation to emergency call services. Subsection 147(8) provides that in making a determination under section 147, the ACA may incorporate by reference (with or without modification) any matter contained in a code or standard as in force or existing from time to time that has been proposed or approved by a body or association. This allows the ACA to take into account any work in the area of emergency call services which may be undertaken by a body formed for that purpose by representatives from the telecommunications industry and from emergency service organisations. The *Telecommunications*

(Emergency Call Service) Determination 2002 incorporates by reference requirements in the *Emergency Caller No Response Guidelines 2002* as in force from time to time and in the *Mobile Location Indicator for Emergency Services - Stage 1 Service Description Interim Mobile Location Indicator* developed by the Australian Communications Industry Forum (ACIF), as in force from time to time.

In a technical sense, it is true that the amendment will reduce Parliamentary scrutiny over the minutiae of ACA determinations under section 54 of the ACA Act. However, this is not intended to affect the policy behind such determinations, but rather to allow for change and innovation in the technical details.

The Committee thanks the Minister for this response and notes that the incorporated material is not intended to affect policy, but rather to make technical changes. However, in relation to the Minister's advice that the amendment is intended to reduce the administrative load of the agency, the Committee has previously reported that mere convenience cannot justify an absence of parliamentary scrutiny.

Criminal Code Amendment (Terrorism) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2003*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 24 April 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 1 of 2003

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

The bill proposes to amend the:

- *Criminal Code Act 1995* to re-enact counter-terrorism offences as Commonwealth provisions capable of operating throughout Australia, without any constitutional limitations, by virtue of the reference of powers by the States in accordance with section 51(xxxvii) of the Constitution; and
- *Security Legislation Amendment (Terrorism) Act 2002* to add this proposed Act to the list of counter-terrorism legislation that is subject to a public and independent review mechanism.

The bill also contains transitional provisions.

Indeterminate commencement
Subclause 2(1)

By virtue of item 2 in the table to subclause 2(1) of this bill, the amendments proposed by this bill would commence on Proclamation, without any time being fixed within which they must commence in any event. However, the Explanatory Memorandum points out that the purpose of this bill is to allow the States to pass legislation referring their powers relating to the subject matter of this bill to the Commonwealth under section 51(xxxvii) of the Constitution. The Committee notes that the enactment of complementary State legislation is one of the circumstances referred to in Drafting Direction 2002, No. 2, where such commencement provisions are acceptable.

The Committee would, however, **appreciate the Minister's advice** as to the desirability of providing some form of time limit within which the legislation would either commence automatically or, alternatively, be subject to a sunset provision. The Committee would also be grateful for advice about when it is presently expected that it will be possible to proclaim the legislation. The Committee accepts that the Government reports to Parliament every six months on unproclaimed legislation, but such legislation is usually subject in any event to a fixed period or date for commencement.

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

Relevant extract from the response from the Attorney-General

The Committee noted the indeterminate commencement provision in the Bill and sought my advice as to the desirability of providing some form of time limit within which the legislation would either commence automatically or, alternatively, be subject to a sunset provision. In my view, neither of these options would be appropriate.

The Bill is the central component of the Commonwealth and State legislative package to implement the Leaders' Summit agreement on the constitutional references of power. Work on this matter has proceeded on the understanding that all States had agreed to refer, and that the intention was to re-enact a single law of national application. Accordingly, negotiations with the States have proceeded on the basis that commencement of the Commonwealth legislation will be delayed to provide a reasonable opportunity for all States to enact and commence their references. In order to preserve flexibility to accommodate the timetables of States acting in good faith, the Bill does not include the usual default commencement provision. This is consistent with the approach adopted in relation to the corporations reference.

The Committee also sought advice on when it is presently expected that it will be possible to proclaim the legislation. At this stage, the Commonwealth and State legislative package is well advanced. New South Wales, Tasmania, Queensland, South Australia and Western Australia have all passed legislation in a form acceptable to the Commonwealth. Victoria has indicated it will introduce a bill as a matter of priority. On this basis, it appears that the legislation could well be proclaimed very quickly after passage. However, for the reasons outlined above, it is important to maintain the flexibility in the commencement provision.

The Committee thanks the Attorney-General for this response and notes the advice that five states have passed the necessary legislation, with the sixth treating the matter as a priority, which might allow proclamation very soon after passage. The Committee considers that in the circumstances of the present case, as explained by the Attorney-General, the commencement provision may be acceptable.

However, in relation to the advice that flexibility is necessary, the Committee notes that the interests of the Parliament and the public in certainty of commencement are more important than the interests of administrators in flexibility.

Legislation by regulation
Proposed new section 100.7

Proposed new section 100.7 of the *Criminal Code*, to be inserted by this bill, would permit the operation of Part 5.3 of the *Code* to be modified by regulation. Although any such regulation would be subject to Parliamentary scrutiny, and disallowance if necessary, the modification in such a regulation would not be subject to amendment but simply to acceptance or rejection. It may therefore be thought that proposed new section 100.7 is an inappropriate delegation of Parliamentary powers. However, the section limits the power of modification by regulation to those circumstances where the modification will ensure that both State and Commonwealth provisions relating to terrorism will apply to the fullest extent possible.

In the circumstances, the Committee makes no further comment on this provision.

Relevant extract from the response from the Attorney-General

> I note the Committee's comment on proposed new section 100.7, which provides a regulation-making mechanism to 'roll-back' aspects of the new Part 5.3 of the Criminal Code to accommodate certain State and Territory legislation. The Committee has not requested specific advice on this matter, but I just make the point that this proposed section is not without precedent as it is modelled on 'roll-back' provisions in the Corporations Act 2001 (see sections 5E to 5G).

The Committee thanks the Attorney-General for this response.

Dairy Industry Service Reform Act 2003

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 2 of 2003*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 7 April 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.

Although this bill has been passed by both Houses (and received Royal Assent on 15 April 2003) 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 2003

This bill was introduced into the House of Representatives on 12 February 2003 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

Introduced with the Primary Industries (Excise) Levies Amendment (Dairy) Bill 2003, the bill proposes to:

- convert the Australian Dairy Corporation (ADC) into a not for profit organisation, limited by guarantee, under the *Corporations Act 2001*. The new corporation, to be known as Dairy Australia Limited, will be controlled by levy-paying dairy farmers. The staff, assets and liabilities of the Dairy Research and Development Corporation (DRDC) will be transferred to Dairy Australia so that the new corporation can provide most of the marketing, and research and development services for the dairy industry that are currently provided by the ADC and the DRDC;
- establish the concept of an "industry services body", entitled under a funding contract with the Commonwealth, to levy payments and match of Commonwealth payments;
- require the industry services body to take over the ADC's role in relation to the Dairy Structural Adjustment Fund;

- simplify the export control arrangements for dairy produce whilst retaining the function with the Commonwealth;
- repeal the Dairy Research and Development Corporation Regulations 1990; and
- make consequential amendments to 6 Acts.

The bill also contains transitional provisions.

Commencement by Proclamation
Schedule 1

By virtue of item 2 in the table to subclause 2(1) of this bill, the amendments proposed by Schedule 1 would commence on "a single day to be fixed by Proclamation", but with no provision in the bill for that Schedule to commence at a particular time in any event. The Explanatory Memorandum seeks to justify this provision by asserting that "the commencement of the amendments can only, effectively, take place after [an] industry services body has been selected and a funding contract negotiated with it. It would be undesirable to commence the amendments, which include amendments imposing a new levy and providing for levy amounts to be paid to the industry services body, before the industry services body had been selected and appropriate protections for the Commonwealth's interests put in place." The Committee accepts that some leeway needs to be provided in the commencement of Schedule 1, but **seeks the Minister's advice** as to whether subclause 2(1) could not contain a sunset clause under which Schedule 1 would be repealed if it had not come into force, say, 12 months after the bill had been assented to. Such a provision would meet the Committee's concerns of the commencement being subject to an unfettered Ministerial discretion, and may meet the Minister's concerns, as the sunset clause could always be amended, if the industry services body had not been selected within that period of 12 months.

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

Thank you for your letter of 6 March 2003 regarding Dairy Industry Services Reform Bill 2003 (the Bill) and, more specifically, your query as to whether subclause 2(1) of the Bill could not contain a sunset clause under which Schedule 1 would be repealed if it had not come into force within a stipulated period of time.

The issue of a sunset clause was certainly considered, but deemed undesirable during the drafting of the Bill because it may potentially hamper the progress of the reform process by placing an unnecessary time pressure on negotiations between the Government and the dairy industry. At the present time, Government and industry are in the process of negotiating the provisions of the constitution of the company and the contract between the Commonwealth and company, which will set out the company's objects and accountability obligations. This contract will be known as the Statutory Funding Agreement. Excellent progress is being made with these draft documents and it is likely that any outstanding matters will be largely addressed by the time of Royal Assent. However, the timeframes for the negotiation of any outstanding issues should not be curbed by a sunset clause.

In addition, it would be detrimental to introduce a clause that places a deadline on negotiations as this could lead to the Government, industry, or both being tied into arrangements which are not workable in the future. A sunset clause could potentially result in the automatic establishment of arrangements that had not yet been agreed with industry. It is important that all parties reach agreement on these documents that are integral to the successful establishment and functioning of the new company and its accountability, in particular to the Commonwealth.

The Government is fully supportive of industry's desire to undertake these reforms**,** which broadly adhere to similar successful reforms in other agricultural industries, including meat, wool, horticulture, pork and eggs. This Bill is the culmination of a cooperative effort between the dairy industry and the Government, and follows on from significant changes in recent years in the market situation and corporate structure of the Australian dairy industry. For this reason, I do not anticipate any delays in Schedule 1 coming into effect on 1 July 2003.

Thank you for bringing your concerns to my attention.

The Committee thanks the Minister for this response and notes the advice that the provisions should be proclaimed to commence 1 July 2003. However, the Committee restates its view that certainty of commencement of legislation is a parliamentary and public right, which should not be displaced simply because it is inconvenient for bureaucratic processes.

Electoral Amendment (Political Honesty) Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2003,* in which it made various comments. Senator Murray, the sponsor of the bill, wrote to the Committee in a letter dated 24 April 2003 drawing its attention to issues in the bill in relation to the reversal of the onus of proof.

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

Extract from Alert Digest No. 5 of 2003

This bill was introduced into the Senate on 27 March 2003 by Senator Murray as a Private Senator's bill.

The bill proposes to amend the *Commonwealth Electoral Act 1918* to require political advertising to meet similar standards of probity and honesty as commercial advertising must meet under the *Trade Practices Act 1974*. The bill prohibits political advertising that is inaccurate and misleading to a material extent.

Reversal of the onus of proof
Proposed new subsection 329(9)

Proposed new subsection 329(9) of the *Commonwealth Electoral Act 1918*, to be inserted by item 2 of Schedule 1 to this bill, would reverse the onus of proof in a criminal prosecution. The proposer of this bill indicates, in his Second Reading speech, that it is "a revised version of a bill of the same name [which he] introduced in 2000." The proposer also comments, in a later part of the Second Reading speech, that the bill "takes into account the comments and contributions of a number of people over the past three years." In that last version (which the Committee reported on in its *Seventeenth Report of 2000*), there was a reversal of the onus of proof proposed to be inserted in a revised version of subsection 329(5) of the *Commonwealth Electoral Act 1918*. The proposer of the bill, in his response to the Committee's comments in 2000, said that he intended "to have the bill amended to ensure that the Crown bears the onus of proof." Nevertheless, in this current version of the bill, not only is there no change proposed to subsection 329(5) of the Act, but also, as mentioned above, the bill would insert a second provision, in the same section, for the reversal of the onus of proof.

The proposer of the bill, however, has written to the Committee giving detailed reasons for the inclusion of the provisions. The Committee accepts that in this case those reasons may be justified and has reported on them in its *Fourth Report of 2003*.

In the circumstances, the Committee makes no further comment on these provisions.

Relevant extract from the Senator sponsoring the bill

I am writing in relation to the *Electoral Amendment (Political Honest) Bill 2003*, which I recently introduced as a Private Senator's Bill. It is a revised version of a bill of the same name on which the Scrutiny of Bills Committee reported in its Seventeenth Report of 2000.

I understand the Committee may be considering the revised Bill at its next meeting. As the sponsor of the Bill, I do not think it appropriate that I participate in the Committee's deliberations on it, as a member of your Committee.

However, I do wish the Committee to be aware of some issues relevant to the Bill.

I wish to draw the attention of the Committee to the onus of proof issue raised in the Committee's Report in 2000. The Committee made the following comments:

Section 329 of the *Commonwealth Electoral Act 1918* deals with publications or other matter likely to mislead or deceive an elector in relation to the casting of a vote. Under existing subsection 329(5), it is a defence to a prosecution if the defendant proves that he or she did not know, and could not reasonably be expected to have known, that the matter or thing in question was likely to mislead.

This bill proposes to amend section 329 to include an additional prohibition on printing, publishing or distributing electoral advertisements containing a statement of fact that is inaccurate or misleading to a material extent.

Item 5 of Schedule 1 to the bill proposes to substitute a new subsection 329(5). This new subsection will provide a defence if the defendant proves that he or she took no part in determining the content of the matter, thing or advertisement, and could not reasonably be expected to have known that the matter, thing or advertisement was inaccurate or misleading. Clearly, this proposed new subsection will impose on a person charged with an offence the onus of proving these matters by way of a defence.

In his second reading speech, the proposer of the bill does not provide any reasons for imposing this onus on a defendant, however it seems that the new provision has adopted the approach contained in the existing provision, and extended it to the additional offence of misleading electoral advertising.

The Committee **seeks the advice of the Senator sponsoring the bill** as to the appropriateness of requiring a person charged with publishing misleading matter, or

misleading electoral advertising, to bear the onus of proving the matters set out in proposed new subsection 329(5).

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

I replied as follows:

I thank the Committee for drawing my attention to the reversal of the onus of proof in proposed new subsection 329 (5) of the *Commonwealth Electoral Act 1918*. The section in the existing legislation prohibits misleading and deceptive conduct in limited circumstances. The existing s 329 (5) sets out relevant defences and contains a reversal of the onus of proof. The proposed Bill has widened the ambit of the offences under the Act without addressing the onus of proof reversal. I intend to have the Bill amended to ensure that the Crown bears the onus of proof.

I thank the Committee for its comments of these bills.

Following the Committee's Report, the Bill was considered in detail by the Senate Finance and Public Administration Committee. In it's Report, that Committee considered this issue and found as follows:

The Committee notes that one of the fundamental tenets of criminal law is that the prosecution is required to prove all the elements of the offence beyond reasonable doubt, and that this generally includes negativing evidence that would support a defence.

However, provisions that require a defendant to prove a defence are not unknown where their use is considered justified. The Bill as drafted does not rule out any of the common law defences that would normally apply, but merely provides an additional defence which the defendant must prove.[1] The South Australian electoral advertising offence provision similarly places the onus of proof on the defendant. As Senator Murray noted, section 329(1) of the Electoral Act already contains a similar defence in relation to misleading a voter in relation to casting his or her vote. In addition, the Committee notes that the Trade Practices Act, on which much of the reasoning for these provisions is based, provides a defence to proceedings for misleading and deceptive advertising in which the onus is similarly cast on the defendant (even though it must be remembered that those proceedings are civil rather than criminal).[2] The Committee notes also that the submission from the Attorney-General's Department did not comment on the provision as drafted.

The Committee does not consider that the provision is unduly onerous. Reversing the onus of proof in the current provision would effectively require the prosecution to prove that a person who caused, permitted, authorised or carried out the printing, publication or distribution of the electoral advertisement did not take part in determining its contents and could reasonably be expected to have known that the

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1 In *Cameron v Becker* (1994) 64 SASR 238, the court noted that the similar South Australian provision did not preclude the common law defence of honest and reasonable mistake of fact.

2 *Trade Practices Act 1974,*section 85(3). The defendant must prove that he or she is in the business of publishing advertisements and had no reason to suspect that the publication would contravene the Act.

material was inaccurate or misleading. This change would significantly narrow the ambit of the proposed offence.

For these reasons, the Committee does not consider that the onus of proof of the defence in the provision as drafted would need to be changed if the Bill were to proceed.

After careful consideration of this matter, I decided to adopt the view of the Senate Finance and Public Administration Committee in the revised version of the Bill. Given my earlier comments to the Committee, I felt it necessary to provide a written explanation as to my reasons for adopting this position.

In particular, I draw the attention of the Committee to the fact that the Bill does not seek to exclude normal common law defences, it simply provides an additional defence which the defendant must prove. I also draw the attention of the Committee to the precedents for this approach in the South Australian electoral advertising offence provision, the existing provisions of the Commonwealth Electoral Act and the existing provisions of the Trade Practices Act.

Furthermore, I note the need for the offence provision to be effective in preventing misleading electoral advertising and the Senate Finance and Public Administration Committee's concern that redrafting the onus of proof provision would significantly narrow the ambit of the proposed offence.

I trust that this advice is of assistance to the Committee.

The Committee thanks Senator Murray for this detailed explanation.

Petroleum (Timor Sea Treaty) Act 2003

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 3 of 2003*, in which it made various comments. The Minister for Industry, Tourism and Resources has responded to those comments in a letter dated 15 April 2003.

Although this bill has been passed by both Houses (and received Royal Assent on 2 April 2003) 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. 3 of 2003

This bill was introduced into the House of Representatives on 5 March 2003 by the Minister for Industry, Tourism and Resources. [Portfolio responsibility: Industry, Tourism and Resources]

Part of a package of three bills relating to the Timor Sea Treaty, the bill proposes to give effect to the Timor Sea Treaty between Australia and East Timor. The Treaty provides a framework for the exploration, development and exploitation of the petroleum resources in the Joint Petroleum Development Area (JPDA) created by the Treaty. The Treaty is a provisional arrangement pending permanent delimitation of maritime boundaries between Australia and East Timor. The main aspects of the Treaty include:

- sharing of petroleum production and revenue by Australia and East Timor, split 90/10 in East Timor's favour;
- a joint three tiered administrative structure involving both Australia and East Timor to govern the day to day running and broader policy issues in the JPDA; and
- a tax code for the imposition of taxes on income derived from the JPDA.

The bill also contains application and transitional provisions and a regulation-making power.

Retrospectivity
Clause 2, items 2, 4, 6 and 7

By virtue of items 2, 4, 6 and 7 in the table in clause 2 of this bill, most of its provisions would commence on 20 May 2002. The Explanatory Memorandum notes that those provisions which are not to commence retrospectively are ones which create offences, and that their commencement is designed to "remove the possibility of retrospective criminal liability." While the Committee acknowledges that this will prevent some adverse effects of retrospectivity, it also notes that Part 3 of the bill would enact tax provisions, and there is no assurance in the Explanatory Memorandum that the commencement of that Part on 20 May 2002 will not adversely affect taxpayers. The Committee accordingly **seeks the Minister's advice** on this aspect of the bill.

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

Relevant extract from the response from the Minister

The tax related provisions of the Petroleum (Timor Sea Treaty) Bill 2003 are contained in Part 3 and Schedule 1 (Articles 5, 6 and 13 of the Timor Sea Treaty and the Taxation Code) of the Bill. In general, these tax provisions apply from the date of signature of the Timor Sea Treaty, 20 May 2002. The application of these provisions from that date will not adversely affect taxpayers.

Taxpayers involved in the Joint Petroleum Development Area (JPDA) were informed in June 2001 that the Government of Australia and the Government of East Timor intended to move from the previous 50:50 to the 90:10 revenue split in East Timor's favour and that the new split would apply from the date of signature of the Timor Sea Treaty. The major oil and gas companies operating in the JPDA were also heavily consulted throughout the Timor Sea Treaty negotiation process.

The tax provisions under the Timor Sea Treaty predominantly reflect the taxing arrangements from the previous Timor Gap Treaty, with the main departure being the 90:10 revenue split in East Timor's favour. Therefore, the only impact of the retrospective application of the Timor Sea Treaty on taxpayers is a relatively minor compliance burden of ensuring that their JPDA taxable income is remitted to Australia and East Timor from 20 May 2002 in accordance with the new 90:10 revenue split.

This application date is extremely important to East Timor as this is the date of East Timor's independence. East Timor feels very strongly about commencing arrangements with a clean slate from the date of its independence, and also wishes to

access the greater share of revenue it is entitled to under the Timor Sea Treaty from that date.

Only two tax provisions will have a prospective application date. Australia will apply the superannuation guarantee charge (SGC) and will tax East Timor resident individuals from 1 July 2003.

The prospective application of the SGC and the taxation of East Timor resident individuals is necessary because these are two new taxing rights that Australia did not have in the JPDA prior to the Timor Sea Treaty. Unlike the rest of the tax provisions in the *Petroleum (Timor Sea Treaty) Bill 2003,* taxpayers had no prior warning of these two new taxing arrangements. This approach ensures that affected taxpayers are not disadvantaged by being required to comply with a tax with which they had no prior awareness or obligation. Australia is able to unilaterally vary the application date of the SGC and the taxation *of* East Timor resident individuals to operate prospectively because the wording of these provisions in the Taxation Code is discretionary and therefore allows Australia to choose if and when it will apply these taxing rights.

The Committee thanks the Minister for this response.

Petroleum (Timor Sea Treaty) (Consequential Amendments) Act 2003

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 3 of 2003*, in which it made various comments. The Minister for Industry, Tourism and resources has responded to those comments in a letter dated 15 April 2003.

Although this bill has been passed by both Houses (and received Royal Assent on 2 April 2003) 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. 3 of 2003

This bill was introduced into the House of Representatives on 5 March 2003 by the Minister for Industry, Tourism and Resources. [Portfolio responsibility: Industry, Tourism and Resources]

Part of a package of three bills relating to the Timor Sea Treaty, the bill proposes to amend the following Acts to give effect to provisions contained in certain Articles of the Treaty relating to criminal jurisdiction, customs, employment regulation, migration, quarantine, income tax and fringe benefits tax.

Crimes at Sea Act 2000
Customs Act 1901
Fringe Benefits Tax Assessment Act 1986
Income Tax Assessment Act 1936
International Organisations (Privileges and Immunities) Act 1963
Migration Act 1958
Passenger Movement Charge Collection Act 1978
Petroleum (Submerged Lands) Act 1967
Quarantine Act 1908
Superannuation Guarantee (Administration) Act 1992
Taxation Administration Act 1953
Workplace Relations Act 1996

The bill also repeals the *Petroleum (Timor Gap Zone of Cooperation) Act 1990* and contains application, saving and transitional provisions.

Retrospective commencement
Clause 2, items 2, 4 and 6

By virtue of items 2, 4 and 6 in the table in clause 2 of this bill, almost all of its provisions would commence on 20 May 2002. Although the Minister's Second Reading speech notes that the bill will "prevent any retrospective criminal liability arising under the amendments" contained in the bill, many of the amendments that would commence on 20 May 2002 relate to taxation matters. As with the Petroleum (Timor Sea Treaty) Bill 2003, the Committee therefore **seeks the Minister's advice** on whether their retrospective commencement would adversely affect taxpayers.

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 tax related provisions of the *Petroleum (Timor Sea Treaty) (Consequential Amendments) Bill 2003* are the amendments to the *Fringe Benefits Tax Assessment Act 1986, Income Tax Assessment Act 1936, Superannuation Guarantee Charge (Administration) Act 1992,* and *Taxation Administration Act 1953.* In general, these tax provisions apply from the date of signature of the Timor Sea Treaty, 20 May 2002. The application of these provisions from that date will not adversely affect taxpayers.
>
> Taxpayers involved in the Joint Petroleum Development Area (JPDA) were informed in June 2001 that the Government of Australia and the Government of East Timor intended to move from the previous 50:50 to the 90:10 revenue split in East Timor's favour and that the new split would apply from the date of signature of the Timor Sea Treaty. The major oil and gas companies operating in the JPDA were also heavily consulted throughout the Timor Sea Treaty negotiation process.
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> The tax provisions under the Timor Sea Treaty predominantly reflect the taxing arrangements from the previous Timor Gap Treaty, with the main departure being the 90:10 revenue split in East Timor's favour. Therefore, the only impact of the retrospective application of the Timor Sea Treaty on taxpayers is a relatively minor compliance burden of ensuring that their JPDA taxable income is remitted to Australia and East Timor from 20 May 2002 in accordance with the new 90:10 revenue split.

This application date is extremely important to East Timor as this is the date of East Timor's independence. East Timor feels very strongly about commencing arrangements with a clean slate from the date of its independence, and also wishes to access the greater share of revenue it is entitled to under the Timor Sea Treaty from that date.

Only two tax provisions will have a prospective application date. Australia will apply the superannuation guarantee charge (SGC) and will tax East Timor resident individuals from 1 July 2003.

The prospective application of the SGC and the taxation of East Timor resident individuals is necessary because these are two new taxing rights that Australia did not have in the JPDA prior to the Timor Sea 'Treaty. Unlike the rest of the tax provisions in the *Petroleum (Timor Sea Treaty) (Consequential Amendments) Bill 2003,* taxpayers had no prior warning of these two new taxing arrangements. This approach ensures that affected taxpayers are not disadvantaged by being required to comply with a tax with which they had no prior awareness or obligation. Australia is able to unilaterally vary the application date of the SGC and the taxation of East Timor resident individuals to operate prospectively because the wording of these provisions in the Taxation Code is discretionary and therefore allows Australia to choose if and when it will apply these taxing rights.

The Committee thanks the Minister for this response.

Jan McLucas
Chair

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

Senator J. McLucas
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2601

10 SEP 2002

Dear Senator McLucas

Thank you for the opportunity to respond to comments made by the Committee on the *Communications Legislation Amendment Bill (No. 1) 2002* (the Bill), in the Committee's Alert Digest, No. 7 of 2002. On page 12 of the Digest, the Committee has sought my advice on the need for the proposed new section 54A of the *Australian Communications Authority Act 1997* (ACA Act).

The amendment would allow the Australian Communications Authority (ACA), when making a determination under section 54 of the ACA Act, to incorporate material by reference not only from instruments and writings in force at the time the determination is made, but also from instruments and writings in force or existing from time to time.

This amendment is intended to reduce the administrative load of the ACA, so that it would not be required to amend a determination under section 54 every time instruments or writings referred to in that determination change. It is important to the ACA's delegated legislation making that it be able to incorporate other instruments by reference (including international technical standards and relevant Australian industry standards) as in force or existing from time to time.

Section 54 of the ACA Act lacks the flexibility found in other provisions in the telecommunications and radiocommunications legislation. For example:

(a) Section 349 of the *Telecommunications Act 1997* allows the ACA to make a written determination requiring certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers. Subsection 349(7) provides that in making a determination under section 349, the ACA may incorporate by reference (with or without modification) any matter contained in a code or standard as in force or existing from time to time that has been proposed or approved by a body or association. This enables the ACA to readily adopt pre-selection arrangements that the industry has been able to reach agreement upon itself.

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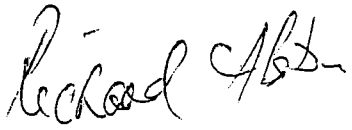
(b) Section 377 of the *Telecommunications Act 1997* allows the ACA, in making a technical standard under section 376, to incorporate (with or without modification) any matter contained in a standard as in force or existing from time to time proposed or approved by Standards Australia International Limited or any other body or association.

(c) Section 589 of the *Telecommunications Act 1997* and section 314A of the *Radiocommunications Act 1992* allow any instrument under those Acts to incorporate by reference (with or without modification) matter contained in any other instrument or writing whatsoever as in force or existing from time to time.

(d) Section 147 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* enables the ACA to impose requirements on carriers, carriage service providers and emergency call persons in relation to emergency call services. Subsection 147(8) provides that in making a determination under section 147, the ACA may incorporate by reference (with or without modification) any matter contained in a code or standard as in force or existing from time to time that has been proposed or approved by a body or association. This allows the ACA to take into account any work in the area of emergency call services which may be undertaken by a body formed for that purpose by representatives from the telecommunications industry and from emergency service organisations. The *Telecommunications (Emergency Call Service) Determination 2002* incorporates by reference requirements in the *Emergency Caller No Response Guidelines 2002* as in force from time to time and in the *Mobile Location Indicator for Emergency Services - Stage 1 Service Description Interim Mobile Location Indicator* developed by the Australian Communications Industry Forum (ACIF), as in force from time to time.

In a technical sense, it is true that the amendment will reduce Parliamentary scrutiny over the minutiae of ACA determinations under section 54 of the ACA Act. However, this is not intended to affect the policy behind such determinations, but rather to allow for change and innovation in the technical details.

Yours sincerely



RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts

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

24 APR 2003

Dear Senator

I refer to David Creed's letter of 6 February 2003 drawing my attention to the Committee's comments in the Scrutiny of Bills Alert Digest No. 1 of 2003 (5 February 2003) concerning the Criminal Code Amendment (Terrorism) Bill 2002 (the Bill).

The Committee noted the indeterminate commencement provision in the Bill and sought my advice as to the desirability of providing some form of time limit within which the legislation would either commence automatically or, alternatively, be subject to a sunset provision. In my view, neither of these options would be appropriate.

The Bill is the central component of the Commonwealth and State legislative package to implement the Leaders' Summit agreement on the constitutional references of power. Work on this matter has proceeded on the understanding that all States had agreed to refer, and that the intention was to re-enact a single law of national application. Accordingly, negotiations with the States have proceeded on the basis that commencement of the Commonwealth legislation will be delayed to provide a reasonable opportunity for all States to enact and commence their references. In order to preserve flexibility to accommodate the timetables of States acting in good faith, the Bill does not include the usual default commencement provision. This is consistent with the approach adopted in relation to the corporations reference.

The Committee also sought advice on when it is presently expected that it will be possible to proclaim the legislation. At this stage, the Commonwealth and State legislative package is well advanced. New South Wales, Tasmania, Queensland, South Australia and Western Australia have all passed legislation in a form acceptable to the Commonwealth. Victoria has indicated it will introduce a bill as a matter of priority. On this basis, it appears that the legislation could well be proclaimed very quickly after passage. However, for the reasons outlined above, it is important to maintain the flexibility in the commencement provision.

I note the Committee's comment on proposed new section 100.7, which provides a regulation-making mechanism to 'roll-back' aspects of the new Part 5.3 of the Criminal Code to accommodate certain State and Territory legislation. The Committee has not requested specific

advice on this matter, but I just make the point that this proposed section is not without precedent as it is modelled on 'roll-back' provisions in the *Corporations Act 2001* (see sections 5E to 5G).

Yours sincerely

Daryl Williams

DARYL WILLIAMS

AUSTRALIA

HON WARREN TRUSS MP

Minister for Agriculture, Fisheries and Forestry

7 APR 2003

Mr David Creed
Secretary
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Mr Creed

Thank you for your letter of 6 March 2003 regarding Dairy Industry Services Reform Bill 2003 (the Bill) and, more specifically, your query as to whether subclause 2(1) of the Bill could not contain a sunset clause under which Schedule 1 would be repealed if it had not come into force within a stipulated period of time.

The issue of a sunset clause was certainly considered, but deemed undesirable during the drafting of the Bill because it may potentially hamper the progress of the reform process by placing an unnecessary time pressure on negotiations between the Government and the dairy industry. At the present time, Government and industry are in the process of negotiating the provisions of the constitution of the company and the contract between the Commonwealth and company, which will set out the company's objects and accountability obligations. This contract will be known as the Statutory Funding Agreement. Excellent progress is being made with these draft documents and it is likely that any outstanding matters will be largely addressed by the time of Royal Assent. However, the timeframes for the negotiation of any outstanding issues should not be curbed by a sunset clause.

In addition, it would be detrimental to introduce a clause that places a deadline on negotiations as this could lead to the Government, industry, or both being tied into arrangements which are not workable in the future. A sunset clause could potentially result in the automatic establishment of arrangements that had not yet been agreed with industry. It is important that all parties reach agreement on these documents that are integral to the successful establishment and functioning of the new company and its accountability, in particular to the Commonwealth.

The Government is fully supportive of industry's desire to undertake these reforms, which broadly adhere to similar successful reforms in other agricultural industries, including meat, wool, horticulture, pork and eggs. This Bill is the culmination of a cooperative effort between the dairy industry and the Government, and follows on from

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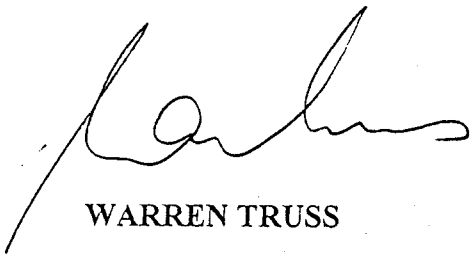
significant changes in recent years in the market situation and corporate structure of the Australian dairy industry. For this reason, I do not anticipate any delays in Schedule 1 coming into effect on 1 July 2003.

Thank you for bringing your concerns to my attention.

Yours sincerely



WARREN TRUSS

PARLIAMENT OF AUSTRALIA · THE SENATE

SENATOR ANDREW MURRAY

SENATOR FOR WESTERN AUSTRALIA

Parliament House
CANBERRA ACT 2600
Tel: (02) 6277 3709
Fax: (02) 6277 3767

Electorate Office
51 Ord Street
WEST PERTH WA 6005
Tel: (08) 9481 1455
Fax: (08) 9481 1679

24 April 2003

Senator Jan McLucas
Chair: Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

Dear Senator McLucas Jan

I am writing in relation to the *Electoral Amendment (Political Honest) Bill 2003*, which I recently introduced as a Private Senator's Bill. It is a revised version of a bill of the same name on which the Scrutiny of Bills Committee reported in its Seventeenth Report of 2000.

I understand the Committee may be considering the revised Bill at its next meeting. As the sponsor of the Bill, I do not think it appropriate that I participate in the Committee's deliberations on it, as a member of your Committee.

However, I do wish the Committee to be aware of some issues relevant to the Bill.

I wish to draw the attention of the Committee to the onus of proof issue raised in the Committee's Report in 2000. The Committee made the following comments:

> Section 329 of the *Commonwealth Electoral Act 1918* deals with publications or other matter likely to mislead or deceive an elector in relation to the casting of a vote. Under existing subsection 329(5), it is a defence to a prosecution if the defendant proves that he or she did not know, and could not reasonably be expected to have known, that the matter or thing in question was likely to mislead.
>
> This bill proposes to amend section 329 to include an additional prohibition on printing, publishing or distributing electoral advertisements containing a statement of fact that is inaccurate or misleading to a material extent.
>
> Item 5 of Schedule 1 to the bill proposes to substitute a new subsection 329(5). This new subsection will provide a defence if the defendant proves that he or she took no part in determining the content of the matter, thing or advertisement, and could not reasonably be expected to have known that the matter, thing or advertisement was inaccurate or misleading. Clearly, this

proposed new subsection will impose on a person charged with an offence the onus of proving these matters by way of a defence.

In his second reading speech, the proposer of the bill does not provide any reasons for imposing this onus on a defendant, however it seems that the new provision has adopted the approach contained in the existing provision, and extended it to the additional offence of misleading electoral advertising.

The Committee **seeks the advice of the Senator sponsoring the bill** as to the appropriateness of requiring a person charged with publishing misleading matter, or misleading electoral advertising, to bear the onus of proving the matters set out in proposed new subsection 329(5).

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

I replied as follows:

I thank the Committee for drawing my attention to the reversal of the onus of proof in proposed new subsection 329 (5) of the *Commonwealth Electoral Act 1918*. The section in the existing legislation prohibits misleading and deceptive conduct in limited circumstances. The existing s 329 (5) sets out relevant defences and contains a reversal of the onus of proof. The proposed Bill has widened the ambit of the offences under the Act without addressing the onus of proof reversal. I intend to have the Bill amended to ensure that the Crown bears the onus of proof.

I thank the Committee for its comments of these bills.

Following the Committee's Report, the Bill was considered in detail by the Senate Finance and Public Administration Committee. In it's Report, that Committee considered this issue and found as follows:

The Committee notes that one of the fundamental tenets of criminal law is that the prosecution is required to prove all the elements of the offence beyond reasonable doubt, and that this generally includes negativing evidence that would support a defence.

However, provisions that require a defendant to prove a defence are not unknown where their use is considered justified. The Bill as drafted does not rule out any of the common law defences that would normally apply, but merely provides an additional defence which the defendant must prove.[1] The South Australian electoral advertising offence provision similarly places the onus of proof on the defendant. As Senator Murray noted, section 329(1) of the Electoral Act already contains a similar defence in relation to misleading a voter in relation to casting his or her vote. In addition, the Committee notes that the Trade Practices Act, on which much of the reasoning for these provisions is based, provides a defence to proceedings for misleading and deceptive advertising in which the onus is similarly cast on the defendant (even

[1] In *Cameron v Becker* (1994) 64 SASR 238, the court noted that the similar South Australian provision did not preclude the common law defence of honest and reasonable mistake of fact.

though it must be remembered that those proceedings are civil rather than criminal).[2] The Committee notes also that the submission from the Attorney-General's Department did not comment on the provision as drafted.

The Committee does not consider that the provision is unduly onerous. Reversing the onus of proof in the current provision would effectively require the prosecution to prove that a person who caused, permitted, authorised or carried out the printing, publication or distribution of the electoral advertisement did not take part in determining its contents and could reasonably be expected to have known that the material was inaccurate or misleading. This change would significantly narrow the ambit of the proposed offence.

For these reasons, the Committee does not consider that the onus of proof of the defence in the provision as drafted would need to be changed if the Bill were to proceed.

After careful consideration of this matter, I decided to adopt the view of the Senate Finance and Public Administration Committee in the revised version of the Bill. Given my earlier comments to the Committee, I felt it necessary to provide a written explanation as to my reasons for adopting this position.

In particular, I draw the attention of the Committee to the fact that the Bill does not seek to exclude normal common law defences, it simply provides an additional defence which the defendant must prove. I also draw the attention of the Committee to the precedents for this approach in the South Australian electoral advertising offence provision, the existing provisions of the Commonwealth Electoral Act and the existing provisions of the Trade Practices Act.

Furthermore, I note the need for the offence provision to be effective in preventing misleading electoral advertising and the Senate Finance and Public Administration Committee's concern that redrafting the onus of proof provision would significantly narrow the ambit of the proposed offence.

I trust that this advice is of assistance to the Committee.

Yours Sincerely

Senator Andrew Murray
Senator for Western Australia

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2 *Trade Practices Act 1974*, section 85(3). The defendant must prove that he or she is in the business of publishing advertisements and had no reason to suspect that the publication would contravene the Act.

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

PARLIAMENT HOUSE
CANBERRA ACT 2600

15 APR 2003

Mr David Creed
Secretary
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Mr Creed

Thank you for your letter of 20 March 2003 concerning retrospective application of taxation provisions in the *Petroleum (Timor Sea) Treaty Bill 2003*.

The tax related provisions of the *Petroleum (Timor Sea Treaty) Bill 2003* are contained in Part 3 and Schedule 1 (Articles 5, 6 and 13 of the Timor Sea Treaty and the Taxation Code) of the Bill. In general, these tax provisions apply from the date of signature of the Timor Sea Treaty, 20 May 2002. The application of these provisions from that date will not adversely affect taxpayers.

Taxpayers involved in the Joint Petroleum Development Area (JPDA) were informed in June 2001 that the Government of Australia and the Government of East Timor intended to move from the previous 50:50 to the 90:10 revenue split in East Timor's favour and that the new split would apply from the date of signature of the Timor Sea Treaty. The major oil and gas companies operating in the JPDA were also heavily consulted throughout the Timor Sea Treaty negotiation process.

The tax provisions under the Timor Sea Treaty predominantly reflect the taxing arrangements from the previous Timor Gap Treaty, with the main departure being the 90:10 revenue split in East Timor's favour. Therefore, the only impact of the retrospective application of the Timor Sea Treaty on taxpayers is a relatively minor compliance burden of ensuring that their JPDA taxable income is remitted to Australia and East Timor from 20 May 2002 in accordance with the new 90:10 revenue split.

This application date is extremely important to East Timor as this is the date of East Timor's independence. East Timor feels very strongly about commencing arrangements with a clean slate from the date of its independence, and also wishes to access the greater share of revenue it is entitled to under the Timor Sea Treaty from that date.

Only two tax provisions will have a prospective application date. Australia will apply the superannuation guarantee charge (SGC) and will tax East Timor resident individuals from 1 July 2003.

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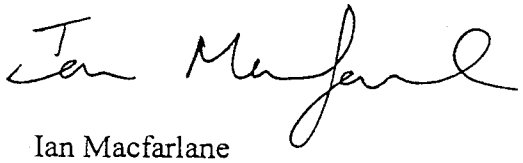
The prospective application of the SGC and the taxation of East Timor resident individuals is necessary because these are two new taxing rights that Australia did not have in the JPDA prior to the Timor Sea Treaty. Unlike the rest of the tax provisions in the *Petroleum (Timor Sea Treaty) Bill 2003*, taxpayers had no prior warning of these two new taxing arrangements. This approach ensures that affected taxpayers are not disadvantaged by being required to comply with a tax with which they had no prior awareness or obligation. Australia is able to unilaterally vary the application date of the SGC and the taxation of East Timor resident individuals to operate prospectively because the wording of these provisions in the Taxation Code is discretionary and therefore allows Australia to choose if and when it will apply these taxing rights.

Yours sincerely



Ian Macfarlane

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

PARLIAMENT HOUSE
CANBERRA ACT 2600

15 APR 2003

Mr David Creed
Secretary
Standing Committee for the Scrutiny of Bills
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CANBERRA ACT 2600

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Yours sincerely

Ian Macfarlane