SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

2003

26 November 2003

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

2003

26 November 2003

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

FOURTEENTH REPORT OF 2003

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

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

Financial Services Reform Amendment Bill 2003

Higher Education Support (Transitional Provisions and Consequential Amendments) Bill 2003

Maritime Transport Security Bill 2003

Ozone Protection and Synthetic Greenhouse Gas Legislation Amendment Bill 2003

Financial Services Reform Amendment Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2003*, in which it made various comments. The Parliamentary Secretary to the Treasurer has responded to those comments in a letter dated 11 September 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Parliamentary Secretary's response are discussed below.

Extract from Alert Digest No. 8 of 2003

[Introduced into the House of Representatives on 26 June 2003. Portfolio: Treasury]

The bill amends the *Corporations Act 2001* to clarify and amend various aspects of the regulatory framework governing the licensing, conduct and disclosure of providers of financial services, and the licensing of financial markets and clearing and settlement facilities, as contained in Chapter 7 and related provisions of the Act and following the commencement of the *Financial Services Reform Act 2001* on 11 March 2002.

The bill also proposes consequential amendments to the *Income Tax Assessment Act 1997* and the *Retirement Savings Accounts Act 1997*, and contains transitional provisions.

Delegation of legislative power
Parliamentary scrutiny
Schedule 1, item 42

Proposed new section 926A of the *Corporations Act 2001*, to be inserted by item 42 of Schedule 1 to this bill, would permit the Australian Securities and Investments Commission to exempt persons or classes of persons, or products or classes of products, from compliance with various provisions of that Act, and to modify the terms of the Act in various ways. This legislative power is granted without any provision for oversight by the Parliament.

The Committee notes that proposed new sections 926B (see item 42), 951C (see item 51), 992C (see item 69) and 1045A (see item 97) all provide for exemptions and modifications to be made to the Act by regulation, ensuring that such measures are subject to the scrutiny of the Regulations and Ordinances Committee.

In respect of proposed new section 926A, the Committee **seeks the Minister's advice** as to why such a power has been conferred on the Australian Securities and Investments Commission, and whether the powers of exemption and modification granted by proposed new section 926A should not be exercised by regulation rather than by the Commission.

Pending the Minister's advice, 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, and 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 Parliamentary Secretary

I refer to the letter of 14 August 2003 from the Secretary of your Committee to the Treasurer's Senior Adviser regarding the Financial Services Reform Amendment Bill 2003 (the Bill). As I have responsibility for that legislation, the letter has been forwarded to me for reply.

In its Scrutiny of Bills Alert Digest No. 8 of 2003 (13 August 2003) the Committee seeks advice in relation to Item 42 of Schedule 2 to the Bill, which proposes the insertion of a new section 926A into Part 7.6 of Chapter 7 of the *Corporations Act 2001.*

Proposed new section 926A gives to the Australian Securities and Investments Commission (ASIC) the power to exempt persons or classes of persons, or financial products or classes of financial products, from the provisions of Part 7.6 of the Act and to modify the application of the provisions of that Part.

The Committee has asked for advice as to why such a power has been conferred on ASIC and whether the exemption and modification (E&M) powers to be granted by proposed section 926A should not be exercised by regulation rather than by ASIC.

Proposed section 926A mirrors existing E&M powers already provided to ASIC under various Parts of the Act, both within Chapter 7 and elsewhere. As you may know, the *Financial Services Reform Act 2001* (FSR Act) inserted a new Chapter 7 into the *Corporations Act 2001*. When the FSR Act was being drafted, it was not felt necessary to provide E&M powers to ASIC in relation to Part 7.6 (which deals with licensing of providers of financial services and related matters). However, E&M powers for ASIC were inserted into Parts 7.7, 7.8, 7.9 and 7.11, dealing with matters relating to conduct and disclosure by financial service providers.

The powers in these Parts of Chapter 7 have proven extremely useful in allowing ASIC to respond effectively and promptly to situations where a strict application of the legislation would not be appropriate and/or may lead to unintended or undesirable consequences. It has also become apparent that the lack of such a power in Part 7.6 has limited the ability to respond to such circumstances involving the provisions of that Part, especially in the transition period to the new licensing arrangements introduced by the FSR Act.

I acknowledge that the individual use of E&M powers by a regulatory agency such as ASIC is not subject to parliamentary oversight in the same way as exemptions or modifications implemented by regulation would be. In this respect, I note that the Bill will also insert a regulation-making power into Part 7.6 to make exemptions and modifications (proposed section 926B). It is envisaged that the two E&M powers will complement each other.

While it is the Government's intention to use the regulation-making E&M power wherever possible, it is very difficult to predict the situations which might arise in future where prompt action may be required to make a modification to, or exemption from, the requirements of Part 7.6. It is therefore considered that it is necessary and prudent to provide a 'parallel' power to ASIC to make exemptions and modifications.

Although ASIC's use of its E&M powers is not subject to parliamentary oversight, it is subject to a number of safeguards to ensure the powers are not misused. This includes administrative review by the Administrative Appeals Tribunal, judicial review by the Federal Court and consideration in appropriate circumstances by the Commonwealth Ombudsman.

I would also note that ASIC is required to publish notice of any exemption or declaration of modification in the Gazette.

Further, ASIC is generally accountable to the Parliament in relation to its activities. ASIC's annual report is tabled in Parliament each year and ASIC representatives often appear before Parliamentary Committees to give evidence and answer questions in relation to the use of its powers and the exercise of its functions.

I believe that these accountability and review mechanisms provide an appropriate degree of oversight such that the delegation of power to ASIC in this case is not inappropriate and would not be in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Committee thanks the Parliamentary Secretary for this response. The Committee notes that the bill provides the power for exemptions and modifications to be made by both ASIC and regulations. The Committee is concerned that that power could accumulate substantial numbers of exemptions and modifications. The Committee further notes that it is proposed ASIC will exercise this power only when prompt action is required but that the use of such power will be subject to review by the Administrative Review Tribunal, the Federal Court and the Commonwealth Ombudsman.

The Committee acknowledges that decisions made by ASIC will be subject to review. Notwithstanding this, the Committee is concerned that although such exemptions and modifications will be made only when prompt action is required, they will not be subject to the same level of Parliamentary scrutiny as those made by regulations. Ultimately, the issue of whether exemptions and modifications approved by ASIC should be subject to Parliamentary scrutiny is best left for resolution by the Senate.

For this reason, the Committee continues to draw Senators' attention to this 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.

Higher Education Support (Transitional Provisions and Consequential Amendments) Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2003*, in which it made various comments. The Minister for Education, Science and Training has responded to those comments in a letter dated 21 November 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 Alert Digest No. 12 of 2003

[Introduced into the House of Representatives on 17 September 2003. Portfolio: Education, Science and Training]

Introduced with the Higher Education Support Bill 2003 and a related bill to establish a new framework for the Commonwealth funding of higher education, the bill provides for transitional arrangements and makes consequential amendments to the *Higher Education Funding Act 1988* and 10 other Acts. The bill also amends the *Australian National University Act 1991* and *Maritime College Act 1978* to change the governance structures of those institutions.

Retrospective commencement
Schedule 2, items 104 to 108

By virtue of item 9 and of item 10 (first occurring) in the table to subclause 2(1) of this bill, the amendments proposed in items 104 to 108 of Schedule 2 would commence retrospectively on 18 September 2001 or 4 April 2002.

As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. It appears from the notes on these items in the Explanatory Memorandum that the amendments may be beneficial to persons who have accrued either a postgraduate education loans scheme semester debt or a bridging for overseas trained professionals study period debt, however, it is not clear. Therefore, the Committee **seeks the Minister's advice** as to whether these amendments are indeed beneficial.

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

In the Digest the Committee noted that the amendments to sections 106L and 106M of the *Higher Education Funding Act 1988* (HEFA) proposed by items 104-111 of Schedule 2 to the Bill would, by virtue of items 9-11 of the Table in subclause 2(1) of the Bill, commence retrospectively on 18 September 2001 (items 9 and 11 [both occurrences]) and 4 April 2002 (item 10 [both occurrences]).

These amendments remedy an oversight when provisions for the Post-graduate education loan scheme (PELS) and the Bridging for overseas-trained professionals (BOTP) loan scheme were inserted in HEFA by the *Innovation and Education Legislation Amendment Act 2001* (for the PELS) and the *Higher Education Legislation Amendment (No. 1) Act 2002* (for the BOTP loan scheme).

The amendments will have the effect of providing the Secretary with the power to remit the whole or part of a person's PELS semester debt (item 104) or a BOTP study period debt (item 105) in the same way that the Secretary currently has the power under subsections 106L(1) and (2) of HEFA to remit a person's HECS semester debt or OL Study period debt (under the Higher Education Contribution Scheme or Open Learning Deferred Payment Scheme).

Items 106-111 of Schedule 2 to the Bill make consequential amendments to terminology used in paragraphs 106L(2)(a), 106L(2)(c), subsection 106L(3B) and paragraph 106M(1)(a) of HEFA and insert new paragraphs 106L(3B)(ba) and (bb) to define a BOTP student's withdrawal day for the purposes of the exercise of the Secretary's proposed power to remit a BOTP study period debt under section 106L of HEFA.

Pursuant to subsection 112(2) of HEFA, the Secretary's power to remit a debt under section 106L has been delegated to institutions. I am advised that a small number of institutions have remitted PELS/BOTP debts since the introduction of these loan schemes and this is the reason for the retrospective application of these provisions. 18 September 2001 is the date of commencement of the *Innovation and Education Legislation Amendment Act 2001* and 4 April 2002 is the date of commencement of the *Higher Education Legislation Amendment (No. 1) Act 2002.*

Item 112 of Schedule 2 to the Bill seeks to expressly validate any remission of debts by institutions under section 106L of HEFA and the remission scheme as amended will be more consistent with the scheme for remission of debts proposed under the Higher Education Support Bill 2003.

These amendments are clearly beneficial for the students affected and their retrospective application does not, in my view, trespass on personal rights and liberties as that term is used in principle 1(a)(i) of the Committee's terms of reference.

The Committee thanks the Minister for this response. The Committee notes that the amendments have been applied retrospectively to remedy an oversight that did not allow for the remission of debts under the Post-graduate education loan scheme and the Bridging for overseas-trained professionals loan scheme. The Committee notes, however, that it would have been preferable if the Explanatory Memorandum explained the reason for this retrospectivity and provided an assurance that the amendments were beneficial.

Retrospective commencement
Schedule 2, items 109 and 111

By virtue of item 11 (first occurring) and item 11 (second occurring) in the table to subclause 2(1) of this bill, the amendments proposed in items 109 and 111 of Schedule 2 would commence retrospectively on 18 September 2001.

As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the Explanatory Memorandum gives no indication of the reason for this retrospective commencement, or the reason for choosing that particular date, but merely states that the amendments will 'reflect the provisions of the *Higher Education Support Act 2003*', the bill for that Act having only been introduced on 17 September 2003. The Committee, therefore, **seeks Minister's advice** as to the reason for the retrospectivity and the reason for choosing the date of 18 September 2001.

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

Response same as above for Schedule 2, items 104 to 108.

The Committee thanks the Minister for this response. The Committee notes that the amendments have been applied retrospectively to remedy an oversight that did not allow for the remission of debts under the Post-graduate education loan scheme and the Bridging for overseas-trained professionals loan scheme. The Committee notes, however, that it would have been preferable if the Explanatory Memorandum explained the reason for this retrospectivity and provided an assurance that the amendments were beneficial.

Retrospective commencement
Schedule 2, item 110

By virtue of item 10 (second occurring) in the table to subclause 2(1) of this bill, the amendment proposed in item 110 of Schedule 2 would commence retrospectively on 4 April 2002.

As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the Explanatory Memorandum gives no indication of the reason for this retrospective commencement, or the reason for choosing that particular date. The Committee, therefore, **seeks the Minister's advice** as to the reason for the retrospectivity and the reason for choosing that date.

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

Response same as above for Schedule 2, items 104 to 108 and Schedule 2, items 109 and 111.

The Committee thanks the Minister for this response. The Committee notes that the amendments have been applied retrospectively to remedy an oversight that did not allow for the remission of debts under the Post-graduate education loan scheme and the Bridging for overseas-trained professionals loan scheme. The Committee notes, however, that it would have been preferable if the Explanatory Memorandum explained the reason for this retrospectivity and provided an assurance that the amendments were beneficial.

Maritime Transport Security Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2003*, in which it made various comments. The Minister for Transport and Regional Services has responded to those comments in a letter dated 8 November 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 Alert Digest No. 12 of 2003

[Introduced into the House of Representatives on 18 September 2003. Portfolio: Transport and Regional Services]

The bill establishes a maritime transport security regulatory framework, including certification, enforcement and control mechanisms. The regime is intended to provide adequate flexibility to respond to the changing threat environment and to align Australian maritime transport security with certain mandatory requirements under the Safety of Life at Sea Convention 1974. The bill also contains a regulation-making power, savings and application provisions.

Inappropriate delegation of legislative power
Insufficient parliamentary scrutiny
Clause 39

Clause 39 of the bill would create an offence of failing to comply with a security direction. By virtue of clause 33, the Secretary of the Department of Transport and Regional Services may issue a written direction where he considers it is appropriate to do so because an unlawful interference with maritime transport is probable or imminent. The discretionary nature of this provision overturns a fundamental principle by which penalties for criminal conduct are imposed. A person should not be exposed to a penalty or criminal sanction at the discretion of an official. The decision as to what is criminal conduct is more preferably left to the Parliament.

It is suggested that this provision comes within the Committee's Terms of Reference because such a security direction is issued without any form of Parliamentary oversight and without the Parliament even being informed of its making. In other words, a member of the Australian Public Service would be given the power to create criminal offences, without reference to either House of the Parliament.

The Committee **seeks the Minister's advice** as to the reason for this apparent abrogation of one of the functions of the Parliament. The Committee also **seeks the Minister's advice** as to whether a person affected has any review rights and, if this delegation of legislative power is considered appropriate, why these security directions are not subject to parliamentary scrutiny.

Pending the Minister's advice, 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 and 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

The Committee has noted that Clause 39 empowers the Secretary to give security directions requiring additional security measures to be taken. Failing to comply with a security direction is a punishable offence. The Committee is concerned that this creates a situation where a person may be subject to a penalty or criminal sanction at the discretion of an official. The Committee also seeks the Minister's advice as to whether a person affected has any review rights.

Maintenance of a secure maritime environment is a matter of public safety. The existence of a mechanism to develop a swift and often confidential response to a probable or imminent unlawful interference with maritime transport is essential. Under the MTSB, the security direction provisions in Division 4 of Part 2 serve as this mechanism. Under clause 39 the Secretary may give security directions which need to be followed by the persons to whom the Secretary can give these directions (clause 35). Those not complying with the security directions will commit an offence under clause 39. A reasonable excuse provision applies. In consideration of the swiftness with which security directions will need to be made and disseminated, it is not appropriate for these directions be subject to the Parliamentary process.

A decision by the Secretary to issue a security direction is not reviewable by the Administrative Appeals Tribunal (AAT) because security directions are a mechanism for immediate action in response to a specific security threat. Their

immediate nature does not lend themselves to review by the AAT, in comparison to, for example, generic or general directions. However, a person affected has review rights under the *Administrative Decisions (Judicial Review) Act 1977*.

The MTSB does limit the Secretary's discretionary power. Clause 33 provides that the Secretary may issue a security direction only if he or she has reason to believe that an unlawful interference with maritime transport is probable or imminent and that specific measures are appropriate to safeguard against an unlawful interference with maritime transport. Clause 38 provides that a security direction must be revoked if the unlawful interference with maritime transport, which was the subject of the direction, is no longer probable or imminent. Paragraph 37(3)(b) limits the duration of a security direction to no longer than a 3-month continuous period.

I consider the mechanism for security directions, the offence provision, and the limits imposed on the Secretary's discretionary power to be a reasonable and balanced approach, considering the consequences an unlawful interference with maritime transport could have at a local, State or Territory or national level.

The Committee thanks the Minister for this response which notes that the Secretary's discretion to determine additional security directions will allow a quick response to imminent threats to maritime safety. Notwithstanding this, the Committee continues to have concerns where criminal offences can be created by officials without reference to the Parliament. Ultimately, this is an issue best left for resolution by the Senate.

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

Parliamentary scrutiny
Part 4, paragraph 88(1)(b) and subclause 88(2)

Paragraph 88(1)(b) would empower the Secretary of the Department of Transport and Regional Services to delegate all or any of his or her powers or functions under Part 4 of the bill (which relates to ship security plans and International Ship Security Certificates) to an employee of, or contractor to, a 'recognised security organisation'. Although such a delegate must also satisfy such criteria as will in due course be prescribed by regulations, subclause 88(2) would grant to the Secretary the completely unfettered power to determine 'that an organisation is a recognised security organisation'. This latter power of determination is not subject to any sort of Parliamentary oversight, nor need the Parliament be informed of any instance of its exercise. The Committee, therefore, **seeks the Minister's advice** whether the Secretary's power to determine recognised security organisations ought not be subject to Parliamentary oversight.

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

The Committee has noted that subclause 88(2) allows the Secretary to determine who is a 'recognised security organisation'. The Committee is concerned that this power of determination is not subject to Parliamentary oversight, nor need the Parliament be informed of any instance of its exercise.

The concept of an recognised security organisation (RSO) stems from Chapter XI-2 of the Safety of Life at Sea (SOLAS) Convention, 1974, and the International Ship and Port Facility (ISPS) Code which is being implemented in Australia through the MTSB. Under Chapter XI-2 of SOLAS, a Contracting Government may authorise an organisation with appropriate expertise in security matters and with appropriate knowledge of ship and port operations to carry out certain security related functions. Such organisations are known as RSOs. The use of the concept of an RSO in the MTSB is consistent with Chapter XI-2 and the ISPS Code. Part B of the ISPS Code sets out RSO competencies.

I acknowledge that the determination of an RSO falls under the Secretary's discretionary power. This approach has been selected so that the Commonwealth can enter into service agreements when necessary with organisations whose employees

or contractors satisfy the criteria prescribed in the regulations. The criteria in the regulations will match the competencies listed in Part B of the ISPS Code, and Parliament will have the opportunity to scrutinise the regulations once tabled. I believe that this process ensures that Parliament has the necessary oversight and control over the Secretary's delegation of his powers to people engage by an RSO.

Thank you for giving me the opportunity to address the Committee's concerns.

The Committee thanks the Minister for this response. The Committee notes that the Secretary's discretion to determine a recognised security organisation (RSO) will be subject to criteria prescribed in regulations. The Committee further notes that the criteria will match the competencies listed in Part B of the ISPS Code and considers that it would have been helpful if this information had been included in the Explanatory Memorandum.

Ozone Protection and Synthetic Greenhouse Gas Legislation Amendment Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2003*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 1 August 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 Alert Digest No. 6 of 2003

This bill was introduced into the House of Representatives on 5 June 2003 by the Minister representing the Minister for the Environment and Heritage. [Portfolio responsibility: Environment and Heritage]

Part of a package of three bills, this bill proposes to amend the *Ozone Protection Act 1989* to:

- extend the existing licensing system for the import, export and manufacture of ozone depleting substances to also include synthetic greenhouse gas replacements;
- simplify current regulatory arrangements for end-use control of ozone depleting substances and synthetic greenhouse gas alternatives by replacing existing State and Territory legislation with a national framework;
- reform the current financial arrangements for the ozone protection program to establish the Ozone Protection and Synthetic Greenhouse Gas Account which requires a ban on trade in and manufacture of bromochloromethane, and a ban on hydrochlorofluorocarbons in certain countries;
- implement the Beijing Amendment to the *Montreal Protocol on Substances that Deplete the Ozone Layer*;
- change the short and long titles of the Act; and

- make minor technical amendments.

The bill also makes consequential amendments to the *Evidence Act 1995* and the *Trans-Tasman Mutual Recognition Act 1997*; and contains application and transitional provisions.

Application of provisions
Subclause 4(1)

Subclause 4(1) of this bill would delay the application of any amendment to be made thereby which would have the effect of creating, or expanding the scope of, an offence. However, the delay is merely until "a date fixed by Proclamation for the purposes of" that subclause, with no specification of a time within which the offence provisions must apply in any event. Although the subclause deals with the application of provisions, and not their commencement, it is clearly contrary to the legislative policy referred to in clause 17 of Drafting Direction 2002, No. 2, that, as a general rule, "a restriction should be placed on the period within which … a provision of an Act may be proclaimed." The Committee **seeks the Minister's advice** as to the reason for this breach of legislative policy.

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

> Subclause 4(1) provides that, to the extent that the amendments made by the bill have the effect of creating or expanding the scope of an offence, those amendments do not apply to conduct occurring before a date fixed by Proclamation.
>
> The Committee has sought my advice on the reasons for subclause 4(1) of the bill not specifying a time frame beyond which new or expanded offence provisions must apply to conduct in any event. The Committee has concerns that the clause may be considered to unduly trespass on personal rights and liberties.
>
> Subclause 4(l) relates to the application of each newly created or extended offence in the bill. The subclause is necessary to ensure that the personal rights and liberties of persons subject to the proposed new or extended offences are not unduly trespassed upon.

The subclause concerns new offences proposed under the Bill, namely:

- prohibitions on the import, export and manufacture of synthetic greenhouse gases (SGG);
- prohibitions on the import of certain products containing certain SGG and ozone depleting substances (ODS) without a licence;
- reporting requirements for the persons licensed to undertaken the above activities; and,
- prohibitions on the discharge of scheduled substances.

These new offences are not currently well known or understood. Subclause 4(1) is therefore necessary to ensure that these offences do not apply to conduct until relevant persons have been adequately notified of their new obligations.

More significantly, subclause 4(1) is necessary to ensure that sufficient time is allowed to develop and implement the administrative and regulatory regime required to give effect to these offences, after the passage of these bills through the Parliament. In consultation with a sizeable stakeholder group, my Department must develop and implement the administrative arrangements necessary to enable persons to apply for the licences required under the proposed amendments to import, export and manufacture SGGs and the import of certain products containing certain ODS and SGG. These new administrative arrangements will involve the development of new licence application and reporting forms and compliance and auditing procedures.

In addition, some of these new offences rely on mattels prescribed by the regulations to limit the extent of the offence. Extensive industry consultation must be undertaken to ensure that appropriate regulations are made to limit the effect of the offences on industries that the offences were not intended to cover. For example, the amendments are not intended to prohibit the import, export and manufacture of SGGs where they are not used as a replacement for ODS.

No accurate estimation of the time that will be needed to complete all these activities can be made. Considerable problems would be encountered if these offences had effect before all the necessary supporting mechanisms were in place. Potential problems could include ineffective enforcement of the offences owing to the lack of supporting administrative infrastructure, and exposure to potential prosecution of persons that are not the intended object of the offences or have not been adequately notified of the offences.

Once these tasks have been completed and an appropriate proclamation date identified, my Department will ensure adequate notification and education of the date from which the new offences will apply. This will be achieved through a communication strategy involving direct mail outs to individuals and industry associations, advertisements in national and regional/rural media, and website alerts.

The Committee thanks the Minister for this response. The Committee considers it would have been useful if this information had been included in the Explanatory Memorandum.

Strict liability
Proposed new subsection 45B(1)

Proposed new subsection 45B(1) of the Principal Act, to be inserted by item 59 of Schedule 1 to this bill, would create a strict liability offence. Not only does the Explanatory Memorandum fail to explain the nature of a strict liability offence, it also fails to explain the need, in these circumstances, for the imposition of criminal liability in the absence of fault on the part of the accused. Furthermore, the Explanatory Memorandum makes no reference to the Committee's *Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. The Committee **seeks the Minister's advice** as to why strict liability was regarded as necessary in these circumstances, and whether the terms of the Committee's Report were considered in coming to a conclusion on that question.

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

The Committee has asked why strict liability was regarded as necessary for the offence provision inserted by subsection 45B(1) of the Principal Act. The Committee has concerns that the provision may be considered to unduly trespass on personal rights and liberties.

In accordance with the Attorney-General's Department guidelines relating to strict liability, in this particular circumstance strict liability has been applied in a regulatory context relating to the protection of the environment.

The Committee has acknowledged on page 284 of the *Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation,* that (subject to other relevant principles) "strict liability may be appropriate where it

is necessary to ensure the integrity of a regulatory regime such as, for instance those relating to ... the environment".

The emission prevention provision is critical to the regulatory regime to minimise the impact on the atmosphere of the use of ozone depleting substances and their synthetic greenhouse gas replacements. It is the emission of these substances that causes damage to the ozone layer and contributes to global warming. Consequently, it is important that persons avoid actions that would result in emissions of these substances. The strict liability offence in the proposed subsection 45B(1) is therefore considered essential to providing adequate incentive to avoid such actions, and ensuring communication of a consistent message as to the seriousness of the threat that these substances pose to the environment; as currently evidenced by the application of strict liability to all offences under the existing legislation.

In relation to paragraph 45B(1)(a), if strict liability did not apply, the prosecution would have to prove the person intended to engage in conduct. Due to the extremely potent nature of ozone depleting substances (one kilogram of CFC-12 has the potential to deplete up to eighty tonnes of stratospheric ozone, while the synthetic greenhouse gas HFC-134a is 1300 times more potent in global warming terms as carbon dioxide), their use will be strictly controlled under the proposed amendments. Item 59 of the Bill provides that regulations may impose restrictions on the sale, purchase and handling of these substances and requirements for training in appropriate handling techniques. This will allow for regulations to ensure that, consistent with the principle stated on page 285 of the Committee's report that "strict liability should depend as far as possible on the actions ...of those who are actually liable for an offence", the people who are likely to come into contact with or handle these substances will be appropriately trained to ensure they do not engage in conduct that would contravene subsection 45B, and therefore should be held to a higher level of care.

Given therefore the importance of providing a sufficient deterrent to actions that would result in direct adverse impacts upon the atmosphere; that those persons handling scheduled substances should be held to a higher level of care; and that the defence of honest and reasonable mistake of fact will still be available to a potential defendant, a strong case exists for the application of strict liability.

In relation to paragraph 45B(1)(b), strict liability is appropriate in accordance with the principle stated on page 285 of the Committee's report that "strict liability may be appropriate to overcome the "knowledge of law" problem, where a physical element of the offence expressly incorporates a reference to a legislative provision". Paragraph 45B(1)(b) provides that, to be an offence, the conduct must occur "on or after the startup date". The Bill provides that the "startup date" is fixed by Proclamation. In accordance with the principle, a person will still have recourse to the defence of mistake of fact. If strict liability is not applied, the prosecution would be required to prove that the accused knew that his activities occurred on or after the startup date. This would make the offence unenforceable. As the Committee's report notes at page 265, "It is damaging to the credibility of the legal system if offences are incapable of enforcement".

The grounds for the need to apply strict liability to paragraphs 45(1)(c) and (d) are the same as those described in regard to paragraph 45(1)(a). If strict liability did not apply to paragraphs 45(1)(c) and (d) then the prosecution would have to show that the accused was aware that there was a substantial risk that their conduct would result in the discharge of a scheduled substance was reckless to the fact that the discharge occurred in circumstances where it is likely that the substance will enter the atmosphere. As stated above, due to the environmentally harmful nature of emissions of the scheduled substances, the proposed amendments under the Bill will enable the enactment of regulations that limit access to these substances to persons appropriately trained to ensure their conduct does not result in discharges of scheduled substances, in circumstances where it is likely the substance will enter the atmosphere.

Given therefore the importance of providing a sufficient deterrent to actions that would result in direct adverse impacts upon the atmosphere; that those persons handling scheduled substances should be held to a higher level of care; and that the defence of honest and reasonable mistake of fact will still be available to a potential defendant, the application of strict liability is appropriate.

Similar to paragraph 45B(1)(b), paragraph 45(b)(1)(e) warrants the application of strict liability on the grounds of its consistency with the Committee' principle that "strict liability may be appropriate to overcome the "knowledge of law" problem, where a physical element of the offence expressly incorporates a reference to a legislative provision". If strict liability is not applied to this element of the offence, then the prosecution would have to prove that the accused was aware that the discharge was not in accordance with the regulations. As with paragraph 45B(1)(b), unless strict liability is applied, the provision would be rendered virtually unenforceable, a situation that the Committee has noted would be damaging to the credibility of the legal system.

Given these circumstances, I consider the application of strict liability to this offence is necessary, and does not unduly trespass upon personal rights and liberties.

The Committee thanks the Minister for this response. The Committee considers it would have been useful if this information had been included in the Explanatory Memorandum.

Trish Crossin
Chair

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

PARLIAMENT HOUSE
CANBERRA ACT 2600

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

parlsec.treasurer.gov.au

Senator T Crossin
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

11 SEP 2003

Dear Senator ~~Crossin~~ Trish,

I refer to the letter of 14 August 2003 from the Secretary of your Committee to the Treasurer's Senior Adviser regarding the Financial Services Reform Amendment Bill 2003 (the Bill). As I have responsibility for that legislation, the letter has been forwarded to me for reply.

In its Scrutiny of Bills Alert Digest No. 8 of 2003 (13 August 2003) the Committee seeks advice in relation to Item 42 of Schedule 2 to the Bill, which proposes the insertion of a new section 926A into Part 7.6 of Chapter 7 of the *Corporations Act 2001*.

Proposed new section 926A gives to the Australian Securities and Investments Commission (ASIC) the power to exempt persons or classes of persons, or financial products or classes of financial products, from the provisions of Part 7.6 of the Act and to modify the application of the provisions of that Part.

The Committee has asked for advice as to why such a power has been conferred on ASIC and whether the exemption and modification (E&M) powers to be granted by proposed section 926A should not be exercised by regulation rather than by ASIC.

Proposed section 926A mirrors existing E&M powers already provided to ASIC under various Parts of the Act, both within Chapter 7 and elsewhere. As you may know, the *Financial Services Reform Act 2001* (FSR Act) inserted a new Chapter 7 into the *Corporations Act 2001*. When the FSR Act was being drafted, it was not felt necessary to provide E&M powers to ASIC in relation to Part 7.6 (which deals with licensing of providers of financial services and related matters). However, E&M powers for ASIC were inserted into Parts 7.7, 7.8, 7.9 and 7.11, dealing with matters relating to conduct and disclosure by financial service providers.

The powers in these Parts of Chapter 7 have proven extremely useful in allowing ASIC to respond effectively and promptly to situations where a strict application of the legislation would not be appropriate and/or may lead to unintended or undesirable consequences. It has also become apparent that the lack of such a power in Part 7.6 has limited the ability to respond to such

circumstances involving the provisions of that Part, especially in the transition period to the new licensing arrangements introduced by the FSR Act.

I acknowledge that the individual use of E&M powers by a regulatory agency such as ASIC is not subject to parliamentary oversight in the same way as exemptions or modifications implemented by regulation would be. In this respect, I note that the Bill will also insert a regulation-making power into Part 7.6 to make exemptions and modifications (proposed section 926B). It is envisaged that the two E&M powers will complement each other.

While it is the Government's intention to use the regulation-making E&M power wherever possible, it is very difficult to predict the situations which might arise in future where prompt action may be required to make a modification to, or exemption from, the requirements of Part 7.6. It is therefore considered that it is necessary and prudent to provide a 'parallel' power to ASIC to make exemptions and modifications.

Although ASIC's use of its E&M powers is not subject to parliamentary oversight, it is subject to a number of safeguards to ensure the powers are not misused. This includes administrative review by the Administrative Appeals Tribunal, judicial review by the Federal Court and consideration in appropriate circumstances by the Commonwealth Ombudsman.

I would also note that ASIC is required to publish notice of any exemption or declaration of modification in the Gazette.

Further, ASIC is generally accountable to the Parliament in relation to its activities. ASIC's annual report is tabled in Parliament each year and ASIC representatives often appear before Parliamentary Committees to give evidence and answer questions in relation to the use of its powers and the exercise of its functions.

I believe that these accountability and review mechanisms provide an appropriate degree of oversight such that the delegation of power to ASIC in this case is not inappropriate and would not be in breach of principle 1(a)(iv) of the Committee's terms of reference.

Yours sincerely

IAN CAMPBELL

MINISTER FOR EDUCATION, SCIENCE AND TRAINING
THE HON DR BRENDAN NELSON MP

21 NOV 2003

Senator T. Crossin
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Trish

Dear Senator Crossin

I refer to a letter dated 9 October 2003 from the Acting Secretary to the Committee, drawing my attention to the Committee's comments on the Higher Education Support (Transitional Provisions and Consequential Amendments) Bill 2003 (the Bill) in Scrutiny of Bills *Alert Digest* No. 12 of 8 October 2003 (the Digest).

In the Digest the Committee noted that the amendments to sections 106L and 106M of the *Higher Education Funding Act 1988* (HEFA) proposed by items 104-111 of Schedule 2 to the Bill would, by virtue of items 9-11 of the Table in subclause 2(1) of the Bill, commence retrospectively on 18 September 2001 (items 9 and 11 [both occurrences]) and 4 April 2002 (item 10 [both occurrences]).

These amendments remedy an oversight when provisions for the Post-graduate education loan scheme (PELS) and the Bridging for overseas-trained professionals (BOTP) loan scheme were inserted in HEFA by the *Innovation and Education Legislation Amendment Act 2001* (for the PELS) and the *Higher Education Legislation Amendment (No. 1) Act 2002* (for the BOTP loan scheme).

The amendments will have the effect of providing the Secretary with the power to remit the whole or part of a person's PELS semester debt (item 104) or a BOTP study period debt (item 105) in the same way that the Secretary currently has the power under subsections 106L(1) and (2) of HEFA to remit a person's HECS semester debt or OL Study period debt (under the Higher Education Contribution Scheme or Open Learning Deferred Payment Scheme).

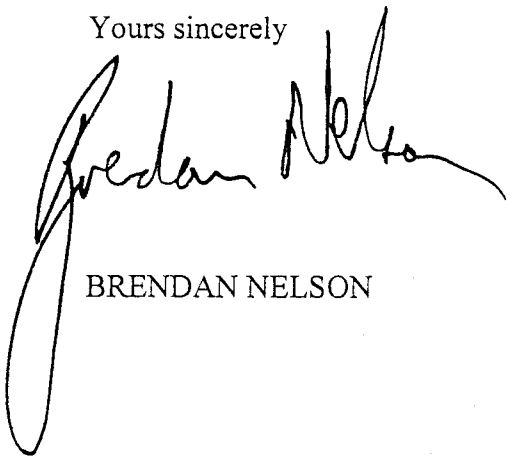
Items 106-111 of Schedule 2 to the Bill make consequential amendments to terminology used in paragraphs 106L(2)(a), 106L(2)(c), subsection 106L(3B) and paragraph 106M(1)(a) of HEFA and insert new paragraphs 106L(3B)(ba) and (bb) to define a BOTP student's withdrawal day for the purposes of the exercise of the Secretary's proposed power to remit a BOTP study period debt under section 106L of HEFA.

Pursuant to subsection 112(2) of HEFA, the Secretary's power to remit a debt under section 106L has been delegated to institutions. I am advised that a small number of institutions have remitted PELS/BOTP debts since the introduction of these loan schemes and this is the reason for the retrospective application of these provisions. 18 September 2001 is the date of commencement of the *Innovation and Education Legislation Amendment Act 2001* and 4 April 2002 is the date of commencement of the *Higher Education Legislation Amendment (No. 1) Act 2002*.

Item 112 of Schedule 2 to the Bill seeks to expressly validate any remission of debts by institutions under section 106L of HEFA and the remission scheme as amended will be more consistent with the scheme for remission of debts proposed under the Higher Education Support Bill 2003.

These amendments are clearly beneficial for the students affected and their retrospective application does not, in my view, trespass on personal rights and liberties as that term is used in principle 1(a)(i) of the Committee's terms of reference.

Yours sincerely



BRENDAN NELSON

The Hon John Anderson MP
Deputy Prime Minister
Minister for Transport and Regional Services
Leader of The Nationals

Reference: 2003100451

- 8 NOV 2003

Senator T Crossin
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

Dear Senator Crossin

I refer to the Alert Digest No. 12 of 2003 (8 October 2003) of the Senate Standing Committee for the Scrutiny of Bills, and the subsequent letter from the Acting Committee Secretary to my office concerning comments in the Digest on the Maritime Transport Security Bill 2003 (MTSB). I appreciate the opportunity to respond to the Committee's comments.

Inappropriate delegation of legislative power
Insufficient parliamentary scrutiny
Clause 39

The Committee has noted that Clause 39 empowers the Secretary to give security directions requiring additional security measures to be taken. Failing to comply with a security direction is a punishable offence. The Committee is concerned that this creates a situation where a person may be subject to a penalty or criminal sanction at the discretion of an official. The Committee also seeks the Minister's advice as to whether a person affected has any review rights.

Maintenance of a secure maritime environment is a matter of public safety. The existence of a mechanism to develop a swift and often confidential response to a probable or imminent unlawful interference with maritime transport is essential. Under the MTSB, the security direction provisions in Division 4 of Part 2 serve as this mechanism. Under clause 39 the Secretary may give security directions which need to be followed by the persons to whom the Secretary can give these directions (clause 35). Those not complying with the security directions will commit an offence under clause 39. A reasonable excuse provision applies. In consideration of the swiftness with which security directions will need to be made and disseminated, it is not appropriate for these directions be subject to the Parliamentary process.

A decision by the Secretary to issue a security direction is not reviewable by the Administrative Appeals Tribunal (AAT) because security directions are a mechanism for immediate action in response to a specific security threat. Their immediate nature does not

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

lend themselves to review by the AAT, in comparison to, for example, generic or general directions. However, a person affected has review rights under the *Administrative Decisions (Judicial Review) Act 1977.*

The MTSB does limit the Secretary's discretionary power. Clause 33 provides that the Secretary may issue a security direction only if he or she has reason to believe that an unlawful interference with maritime transport is probable or imminent and that specific measures are appropriate to safeguard against an unlawful interference with maritime transport. Clause 38 provides that a security direction must be revoked if the unlawful interference with maritime transport, which was the subject of the direction, is no longer probable or imminent. Paragraph 37(3)(b) limits the duration of a security direction to no longer than a 3-month continuous period.

I consider the mechanism for security directions, the offence provision, and the limits imposed on the Secretary's discretionary power to be a reasonable and balanced approach, considering the consequences an unlawful interference with maritime transport could have at a local, State or Territory or national level.

Parliamentary scrutiny
Part 4, paragraph 88(1)(b) and subclause 88(2)

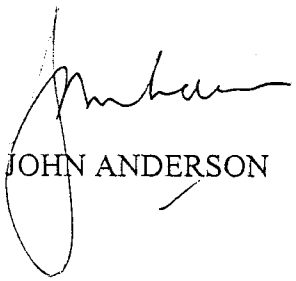
The Committee has noted that subclause 88(2) allows the Secretary to determine who is a 'recognised security organisation'. The Committee is concerned that this power of determination is not subject to Parliamentary oversight, nor need the Parliament be informed of any instance of its exercise.

The concept of an recognised security organisation (RSO) stems from Chapter XI-2 of the Safety of Life at Sea (SOLAS) Convention, 1974, and the International Ship and Port Facility (ISPS) Code which is being implemented in Australia through the MTSB. Under Chapter XI-2 of SOLAS, a Contracting Government may authorise an organisation with appropriate expertise in security matters and with appropriate knowledge of ship and port operations to carry out certain security related functions. Such organisations are known as RSOs. The use of the concept of an RSO in the MTSB is consistent with Chapter XI-2 and the ISPS Code. Part B of the ISPS Code sets out RSO competencies.

I acknowledge that the determination of an RSO falls under the Secretary's discretionary power. This approach has been selected so that the Commonwealth can enter into service agreements when necessary with organisations whose employees or contractors satisfy the criteria prescribed in the regulations. The criteria in the regulations will match the competencies listed in Part B of the ISPS Code, and Parliament will have the opportunity to scrutinise the regulations once tabled. I believe that this process ensures that Parliament has the necessary oversight and control over the Secretary's delegation of his powers to people engage by an RSO.

Thank you for giving me the opportunity to address the Committee's concerns.

Yours sincerely



JOHN ANDERSON

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

Senator Trish Crossin
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

-1 AUG 2003

Dear Senator

I refer to the letter of 19 June 2003 from Mr Richard Pye, Secretary of the Senate Standing Committee for the Scrutiny of Bills, regarding the comments in the *Scrutiny of Bills Alert Digest No. 6 of 2003 (18 June 2003)* concerning the *Ozone Protection and Synthetic Greenhouse Legislation Amendment Bill 2003*.

I thank the Committee for its comments and am pleased to provide the attached response for its consideration.

Yours sincerely

David Kemp

DAVID KEMP

Enclosure

Parliament House, Canberra ACT 2600 Australia
• Tel: (02) 6277 7640 • Fax: (02) 6273 6101 • www.ea.gov.au

Ozone Protection and Synthetic Greenhouse Gas Legislation Amendment Bill 2003

Strict liability
Proposed new subsection 45B(1)

The Committee has asked why strict liability was regarded as necessary for the offence provision inserted by subsection 45B(1) of the Principal Act. The Committee has concerns that the provision may be considered to unduly trespass on personal rights and liberties.

In accordance with the Attorney-General's Department guidelines relating to strict liability, in this particular circumstance strict liability has been applied in a regulatory context relating to the protection of the environment.

The Committee has acknowledged on page 284 of the *Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation,* that (subject to other relevant principles) "strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance those relating to ... the environment".

The emission prevention provision is critical to the regulatory regime to minimise the impact on the atmosphere of the use of ozone depleting substances and their synthetic greenhouse gas replacements. It is the emission of these substances that causes damage to the ozone layer and contributes to global warming. Consequently, it is important that persons avoid actions that would result in emissions of these substances. The strict liability offence in the proposed subsection 45B(1) is therefore considered essential to providing adequate incentive to avoid such actions, and ensuring communication of a consistent message as to the seriousness of the threat that these substances pose to the environment; as currently evidenced by the application of strict liability to all offences under the existing legislation.

In relation to paragraph 45B(1)(a), if strict liability did not apply, the prosecution would have to prove the person intended to engage in conduct. Due to the extremely potent nature of ozone depleting substances (one kilogram of CFC-12 has the potential to deplete up to eighty tonnes of stratospheric ozone, while the synthetic greenhouse gas HFC-134a is 1300 times more potent in global warming terms as carbon dioxide), their use will be strictly controlled under the proposed amendments. Item 59 of the Bill provides that regulations may impose restrictions on the sale, purchase and handling of these substances and requirements for training in appropriate handling techniques. This will allow for regulations to ensure that, consistent with the principle stated on page 285 of the Committee's report that "strict liability should depend as far as possible on the actions ...of those who are actually liable for an offence", the people who are likely to come into contact with or handle these substances will be appropriately trained to ensure they do not engage in conduct that would contravene subsection 45B, and therefore should be held to a higher level of care.

Given therefore the importance of providing a sufficient deterrent to actions that would result in direct adverse impacts upon the atmosphere; that those persons handling scheduled substances should be held to a higher level of care; and that the

defence of honest and reasonable mistake of fact will still be available to a potential defendant, a strong case exists for the application of strict liability.

In relation to paragraph 45B(1)(b), strict liability is appropriate in accordance with the principle stated on page 285 of the Committee's report that "strict liability may be appropriate to overcome the "knowledge of law" problem, where a physical element of the offence expressly incorporates a reference to a legislative provision". Paragraph 45B(1)(b) provides that, to be an offence, the conduct must occur "on or after the startup date". The Bill provides that the "startup date" is fixed by Proclamation. In accordance with the principle, a person will still have recourse to the defence of mistake of fact. If strict liability is not applied, the prosecution would be required to prove that the accused knew that his activities occurred on or after the startup date. This would make the offence unenforceable. As the Committee's report notes at page 265, "It is damaging to the credibility of the legal system if offences are incapable of enforcement".

The grounds for the need to apply strict liability to paragraphs 45(1)(c) and (d) are the same as those described in regard to paragraph 45(1)(a). If strict liability did not apply to paragraphs 45(1)(c) and (d) then the prosecution would have to show that the accused was aware that there was a substantial risk that their conduct would result in the discharge of a scheduled substance was reckless to the fact that the discharge occurred in circumstances where it is likely that the substance will enter the atmosphere. As stated above, due to the environmentally harmful nature of emissions of the scheduled substances, the proposed amendments under the Bill will enable the enactment of regulations that limit access to these substances to persons appropriately trained to ensure their conduct does not result in discharges of scheduled substances, in circumstances where it is likely the substance will enter the atmosphere.

Given therefore the importance of providing a sufficient deterrent to actions that would result in direct adverse impacts upon the atmosphere; that those persons handling scheduled substances should be held to a higher level of care; and that the defence of honest and reasonable mistake of fact will still be available to a potential defendant, the application of strict liability is appropriate.

Similar to paragraph 45B(1)(b), paragraph 45(b)(1)(e) warrants the application of strict liability on the grounds of its consistency with the Committee' principle that "strict liability may be appropriate to overcome the "knowledge of law" problem, where a physical element of the offence expressly incorporates a reference to a legislative provision". If strict liability is not applied to this element of the offence, then the prosecution would have to prove that the accused was aware that the discharge was not in accordance with the regulations. As with paragraph 45B(1)(b), unless strict liability is applied, the provision would be rendered virtually unenforceable, a situation that the Committee has noted would be damaging to the credibility of the legal system.

Given these circumstances, I consider the application of strict liability to this offence is necessary, and does not unduly trespass upon personal rights and liberties.

Application of provisions
Subclause 4(1)

Subclause 4(1) provides that, to the extent that the amendments made by the bill have the effect of creating or expanding the scope of an offence, those amendments do not apply to conduct occurring before a date fixed by Proclamation.

The Committee has sought my advice on the reasons for subclause 4(1) of the bill not specifying a time frame beyond which new or expanded offence provisions must apply to conduct in any event. The Committee has concerns that the clause may be considered to unduly trespass on personal rights and liberties.

Subclause 4(1) relates to the application of each newly created or extended offence in the bill. The subclause is necessary to ensure that the personal rights and liberties of persons subject to the proposed new or extended offences are not unduly trespassed upon.

The subclause concerns new offences proposed under the Bill, namely:

- prohibitions on the import, export and manufacture of synthetic greenhouse gases (SGG);
- prohibitions on the import of certain products containing certain SGG and ozone depleting substances (ODS) without a licence;
- reporting requirements for the persons licensed to undertaken the above activities; and,
- prohibitions on the discharge of scheduled substances.

These new offences are not currently well known or understood. Subclause 4(1) is therefore necessary to ensure that these offences do not apply to conduct until relevant persons have been adequately notified of their new obligations.

More significantly, subclause 4(1) is necessary to ensure that sufficient time is allowed to develop and implement the administrative and regulatory regime required to give effect to these offences, after the passage of these bills through the Parliament. In consultation with a sizeable stakeholder group, my Department must develop and implement the administrative arrangements necessary to enable persons to apply for the licences required under the proposed amendments to import, export and manufacture SGGs and the import of certain products containing certain ODS and SGG. These new administrative arrangements will involve the development of new licence application and reporting forms and compliance and auditing procedures.

In addition, some of these new offences rely on matters prescribed by the regulations to limit the extent of the offence. Extensive industry consultation must be undertaken to ensure that appropriate regulations are made to limit the effect of the offences on industries that the offences were not intended to cover. For example, the amendments are not intended to prohibit the import, export and manufacture of SGGs where they are not used as a replacement for ODS.

No accurate estimation of the time that will be needed to complete all these activities can be made. Considerable problems would be encountered if these offences had effect before all the necessary supporting mechanisms were in place. Potential

problems could include ineffective enforcement of the offences owing to the lack of supporting administrative infrastructure, and exposure to potential prosecution of persons that are not the intended object of the offences or have not been adequately notified of the offences.

Once these tasks have been completed and an appropriate proclamation date identified, my Department will ensure adequate notification and education of the date from which the new offences will apply. This will be achieved through a communication strategy involving direct mail outs to individuals and industry associations, advertisements in national and regional/rural media, and website alerts.