SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTH REPORT

OF

2008

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MEMBERS OF THE COMMITTEE

Senator the Hon C Ellison (Chair)
Senator M Bishop (Deputy Chair)
Senator J Collins
Senator A McEwen
Senator A Murray
Senator the Hon J Troeth

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 2008

The Committee presents its Fourth Report of 2008 to the Senate.

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

Australian Energy Market Amendment (Minor Amendments) Bill 2008

Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008

Independent Reviewer of Terrorism Laws Bill 2008

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008

Australian Energy Market Amendment (Minor Amendments) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2008*. The Minister for Resources and Energy responded to the Committee's comments in a letter dated 27 May 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 3 of 2008

Introduced into the House of Representatives on 20 March 2008
Portfolio: Resources, Energy and Tourism

Background

This bill amends the *Australian Energy Market Act 2004*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Australian Energy Market Amendment (Gas Legislation) Act 2007* and the *Trade Practices Act 1974* to correct the year of enactment, from 2007 to 2008, of South Australian and Western Australian legislation relating to the introduction of a new regime for the regulation of access to natural gas pipelines.

Uncertainty of commencement
Schedules 1, 3 and 4

Items 2 and 4 in the table to subclause 2(1) of this bill provide that the amendments proposed in Schedules 1, 2, and 4 will commence immediately after the commencement of Schedule 1 to the *Australian Energy Market Amendment (Gas Legislation) Act 2007*, while item 3 in the table to subclause 2(1) provides that the amendments proposed by Schedule 3 will commence at the same time as that commencement. Reference to the *Australian Energy Market Amendment (Gas Legislation) Act 2007* indicates that Schedule 1 will commence on Proclamation, with no time fixed within which it must commence in any event.

The Committee notes that, unfortunately, the explanatory memorandum does not give any indication of when the *Australian Energy Market Amendment (Gas Legislation) Act 2007* may commence, or whether it has already commenced. It is therefore impossible to determine if this bill will have some provisions operating retrospectively, or possibly left for commencement at an indeterminate future time. The Committee **seeks the Minister's advice** whether the amendments to the *Australian Energy Market Amendment (Gas Legislation) Act 2007*, referred to in the table to subclause 2(1) of this bill, have commenced or, if they have not commenced, when they are likely to do so.

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

Relevant extract from the response from the Minister

The Committee wished to know whether parts of the Bill were intended to apply retrospectively. Briefly the answer is that no part of the Bill is intended to apply retrospectively.

The reason for the uncertainty is that the commencement of the four schedules to the Bill is tied to the commencement of the *Australian Energy Market (Gas Legislation) Act 2007* (the Act). The Committee was uncertain as to whether the Act had commenced and wanted to know, if it had not already commenced, when it was expected to commence. The Act has not commenced but is expected to do so on 1 July this year. In the event that the Act commences before the passage of this Bill, Schedules 1 to 4 would apply retrospectively. I consider there to be a small risk of this outcome; and in the unlikely event of a delay to the commencement of the Act, I do not consider that retrospective application would adversely affect the interests of any person or body affected by the Bill.

The Act is part of a cooperative legislative scheme to introduce national regulation of gas pipeline services. The Act's commencement has been postponed because of delays in completing the national legislation, which will be passed through the South Australian Parliament as the *National Gas (South Australia) Act 2008.*

The Committee thanks the Minister for this response.

Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2008*. The Minister for Agriculture, Fisheries and Forestry responded to the Committee's comments in a letter dated 28 May 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 3 of 2008

Introduced into the House of Representatives on 20 March 2008
Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *Fisheries Administration Act 1991*, the *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984* and the *Migration Act 1958* with a view to improving governance of the Australian Fisheries Management Authority (AFMA) and strengthening measures to combat illegal, unregulated and unreported fishing. The changes to the governance arrangements are in response to recommendations of the Uhrig Review. The bill:

- removes the AFMA Board and Managing Director, replacing them with a new commission, comprising a chairperson and no more than eight other commissioners, including the Chief Executive Officer, who will replace the position of Managing Director;

- provides that AFMA will become a prescribed agency under the *Financial Management and Accountability Act 1997* and a statutory agency under the *Public Service Act 1999*;

- makes the commission responsible for acting on AFMA's behalf in matters relating to domestic fisheries management;

- makes the CEO solely responsible for AFMA's foreign compliance activities, subject to direction from the Minister;

- provides for new eligibility criteria, conflict of interest disclosure and reporting requirements for Commissioners; and

- provides that the CEO will have sole responsibility for AFMA's financial and human resource management.

In respect of amendments aimed at strengthening measures to combat illegal, unregulated and unreported fishing, the bill:

- makes it an offence for Australian persons and corporations to breach an agreed fishing measure of an international fisheries management organisation or arrangement to which Australia is a party;

- makes it possible for Australian nationals to be prosecuted in Australian courts for activities on board a foreign vessel in waters outside the Australian Fishing Zone;

- clarifies the ability of fisheries officers to exercise powers of the *Fisheries Management Act 1991* outside the Australian Fishing Zone, in specific circumstances; and

- further defines and expands on the stowage requirements for foreign fishing vessels transiting through the Australian Fishing Zone.

The bill also contains transitional provisions.

Commencement on Proclamation
Schedule 3

Item 4 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedule 3 will commence on Proclamation but must commence in any event 12 months after assent. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with Paragraph 19 of Drafting Direction No. 1.3.

The Committee notes that, in this instance, the explanatory memorandum seeks to justify a delayed commencement of up to 12 months on the basis that it will 'allow time for the necessary regulations underpinning those items to be prepared and put in place'. The Committee is of the view that six months is an adequate period of time to allow for the drafting of any necessary delegated legislation, thus the Committee's practice of not commenting on delayed commencement of six months or less. The Committee **seeks the Minister's advice** as to why up to 12 months is required for the preparation of regulations in this instance.

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.

Relevant extract from the response from the Minister

> The committee has queried why the commencement of Schedule 3 of the Bill will be delayed for up to 12 months to allow time for the preparation of regulations.
>
> The delayed commencement is warranted to allow time for the development of administrative systems to support the enforcement framework contained in Schedule 3.
>
> Schedule 3 gives effect to Australia's rights and obligations under international law in relation to boarding and inspection measures and offence provisions for Australian nationals and foreigners who breach prescribed international fisheries management measures. Twelve months is required in this instance, as developing the regulations will be a complex and time-consuming exercise for the Australian Fisheries Management Authority (AFMA) and the Department of Agriculture, Fisheries and Forestry (DAFF). AFMA and DAFF will need to work through a large number of international fisheries management measures to determine which measures to include in the regulations and how best to do so. This process will also require consultation with other relevant government departments and agencies, such as the Attorney-General's Department and the Department of Foreign Affairs and Trade, and the fishing industry.
>
> In addition, the delayed commencement will allow for the dissemination of information to industry about related offences before they come into effect.

The Committee thanks the Minister for this response and notes that it would have been helpful if this information had been included in the explanatory memorandum.

Wide delegation of powers
Schedule 1, item 79

Proposed new sections 92 and 93 of the *Fisheries Administration Act 1991*, to be inserted by item 79 of Schedule 1, would permit the Commission, which is to be established under new section 10B of the same Act, to delegate to the CEO of that Commission any of the domestic fisheries management functions and powers of the Australian Fisheries Management Authority. Proposed new subsection 92(3) then empowers the CEO to sub-delegate any of those delegated powers and functions to any one of a wide range of people. Although new subsection 92(3) lists the descriptions of the various types of persons to whom the sub-delegation may be made, it includes, for instance, ‘a person engaged as a consultant to the Authority’ or ‘a person engaged under a contract to assist the Authority’.

Similarly, proposed new sub-section 93(1) of the *Fisheries Administration Act 1991*, also to be inserted by item 79 of Schedule 1, would permit the CEO to delegate to a wide range of people, including consultants and contractors, ‘any of the functions or powers of the Authority for which the CEO is responsible. The Committee notes that subsection 69(1) of the Act, as proposed to be amended by item 67 of Schedule 1, would permit the CEO to engage a person as a consultant to the Authority. Similarly, ‘a person engaged under a contract to assist the Authority’ may also be engaged by the CEO. Thus the CEO may delegate any of his or her functions and powers and/or sub-delegate any delegated powers and functions, to any one of a wide range of people, many of whom may have been appointed by the CEO.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons. Where such delegations are made, the Committee considers that an explanation of why such broad delegations are considered necessary should be included in the explanatory memorandum. In this instance, the Committee notes that the explanatory memorandum merely paraphrases the relevant provision but provides no explanation for why it is necessary for the CEO to be able to delegate or sub-delegate these powers and functions to such a wide range of people, including contractors and consultants. The Committee **seeks the Minister’s advice** on this matter.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The committee raised concerns about the Chief Executive Officer (CEO) being able to delegate to a wide range of people any of AFMA's functions and powers for which the CEO is responsible.

The proposed delegation powers are consistent with and support the new governance framework for AFMA, under which both the commission and the CEO are responsible for performing and exercising their specific functions and powers of AFMA under the *Fisheries Administration Act 1991*. The delegation powers are designed to avoid any potential mixed lines of authority.

For the efficient and effective management of AFMA, it is essential that the commission can delegate its powers and functions only to the CEO and that the CEO can sub-delegate these powers and functions to other parties. If the commission were empowered to delegate functions and powers to other persons (such as staff of AFMA), by-passing the CEO, it would make it very difficult for the CEO to perform the functions conferred on him or her by the *Financial Management and Accountability Act 1997* and the *Public Service Act* 1999. Having the commission delegate powers to the CEO allows the CEO, in deciding how staff exercise those powers, to properly manage AFMA's staff and other resources.

Clearly, it would not be appropriate or practical for the commissioners to exercise all of their powers and functions personally or for the CEO personally to exercise all the powers delegated by the commission. The power of sub-delegation is designed to ensure that the CEO can determine which staff and other persons will exercise powers of the commission (consistent with the CEO's role in managing AFMA).

I believe it is appropriate for the CEO to delegate powers to persons he or she has appointed. Under the *Financial Management and Accountability Act 1997* and the *Public Service Act 1999*, the CEO will ultimately be responsible for all recruits to AFMA. An example of where AFMA has previously delegated its powers to contracts is in making internal review decisions under section 165 of the *Fisheries Management Act 1991*, when AFMA contracted two ex-AFMA staff to conduct the reviews.

The proposed section 93 enables the CEO to delegate all of the functions and powers of AFMA for which the CEO is responsible — that is, any domestic fisheries powers and functions delegated to him by the commission and the CEO's own foreign compliance powers and functions. The delegation can be to: an AFMA staff member; a committee established under section 54 of the *Fisheries Administration Act 1991*; a consultant; a contractor; or an officer within the meaning of the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984*. This group of persons essentially replicates the group to whom AFMA can currently delegate almost all of its powers and functions under section 92 of the *Fisheries Administration Act 1991*. Hence, overall, the proposed amendments will not change the scope of the delegation powers in the *Fisheries Administration Act 1991*…

Finally, the Explanatory Memorandum for the Bill will be revised to incorporate additional information on the delegations, the 'deductible component' and the strict liability offences.

The Committee thanks the Minister for this comprehensive response and for the commitment to amend the explanatory memorandum to include additional advice on delegations.

Standing (special) appropriation
Schedule 1, item 79, new section 94B

Proposed new section 94B of the *Fisheries Administration Act 1991*, to be inserted by item 79 of Schedule 1, establishes the Australian Fisheries Management Authority Special Account. If an Act establishes a Special Account and identifies the purposes of the account then, by virtue of section 21 of the *Financial Management and Accountability Act 1997*, the consolidated revenue fund is appropriated for those purposes. This proposed new section is, therefore, establishing a standing appropriation.

In its *Fourteenth Report of 2005*, the Committee stated that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The Committee notes that, in this instance, proposed new section 94C of the *Fisheries Administration Act 1991*, also to be inserted by item 79 of Schedule 1, places some limits on the amounts to be credited to the Special Account. Nevertheless, the Committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary.

In this instance, the Committee notes that the explanatory memorandum merely records the operation of the clause and does not provide any further reason for the special appropriation. The Committee, therefore, **seeks the Minister's advice** whether an explanation could be included in the explanatory memorandum regarding why this special (standing) appropriation is considered necessary.

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 sought advice on why the Special Account is necessary.

AFMA recovers most of the cost of domestic fisheries management from fishers via levies. Under the existing section 80 of the *Fisheries Administration Act 1991,* the levies that AFMA collects and pays to the Consolidated Revenue Fund are automatically appropriated to AFMA, in accordance with the formula set out in subsection 80(lA). This special appropriation is for, inter alia, expenditure relating to the provision of fisheries management services and incidental matters thereto.

The amendments in the Bill will repeal the existing section 80 and replace it with a special account, supported by a special appropriation under the *Financial Management and Accountability Act 1997,* which will be used to hypothecate funds for expenditures relating to fisheries management.

The special account is proposed in this situation for two main reasons.

- o First, it allows AFMA's financial situation under the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to be replicated, to the extent this is feasible, even though the Bill moves AFMA from being regulated by the CAC Act to being regulated by the *Financial Management and Accountability Act 1997.*

- o Second, a special account is an appropriate way to credit amounts that derive from levy payments where AFMA will use those amounts for specified statutory purposes. While AFMA is a CAC Act body, these levy payments can be paid to it outright. However, as AFMA is moving to being regulated by the *Financial Management and Accountability Act 1997,* the levy payments will need to be credited to an appropriation. The common model for such a situation is a special account, created in the enabling legislation, which is supported by the special appropriation under section 21 of *Financial Management and Accountability Act 1997.* Section 21 provides a standing appropriation for expenditures of the account for the purposes designated in the legislation.

AFMA's special account will provide for the crediting of any levies (excluding those for the Fisheries Research and Development Corporation) and any annual administered and departmental appropriations. Once monies have been credited to the Special Account, they can be classified as departmental expenditure. In the interests of transparency and ease of reporting, AFMA will use the Special Account to receipt and expend its levies and annual departmental appropriations but treat annual administered appropriations as stand-alone appropriations. The usual rules will apply to administered appropriations.

It is standard practice for statutory authorities with significant cost-recovered regulatory and business-type operations to use a special account. The proposed use of AFMA's special account is consistent with the principles for special accounts, which are contained in the *Guidelines for the Management of Special Accounts,* Financial Management Guidance No. 7, October 2003, Department of Finance and Administration.

The Committee thanks the Minister for this comprehensive response and notes that it would have been helpful if some of this information had been included in the explanatory memorandum.

Legislative Instruments Act—declarations
Schedule 1, item 79, new sub-section 94E(2)

Proposed new sub-section 94E(2) of the *Fisheries Administration Act 1991,* to be inserted by item 79 of Schedule 1, provides that a determination made under paragraph (b) of the definition of ***deductible component*** in proposed new subsection 94E(1) is not a legislative instrument.

As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.*

The Committee notes that, in this instance, the explanatory memorandum makes no mention of the proposed new subsection, let alone indicating whether it is purely declaratory or not. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

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 sought advice on whether subsection 94E(2) is declaratory in nature or provides for a substantive exemption.

The definition of 'deductible component' in the new subsection 94E(2) is identical to the definition of 'deductible amount' in the existing subsection 80(lA). The existing provision was drafted long before the *Legislative Instruments Act 2003 was enacted.* The new subsection 94E(2) is merely declaratory and has been included for the avoidance of doubt.

The determination is not a legislative instrument, because it does not fit within the definition of a legislative instrument in subsection 5(2) of the *Legislative Instruments Act 2003.* The determination does not affect a privilege or interest, impose an obligation, create a right or vary or remove an obligation or right.

Subsection 94E(1) states that a component of a levy amount, already collected by AFMA and paid to the Consolidated Revenue Fund, is to be deducted from the amount that will be credited to AFMA's Special Account. The deductible component is determined by and paid under other acts and legislative instruments. For example, the *Fishing Levy Act 1991* states that the amount of levy is such amount as is prescribed and is payable by the person who, at the time at which the levy is due and payable, is the holder of the fishing concession. The Fishing Levy Regulations 2008 set, for each fishery, the amount of levy payable and the date by which that amount is paid. Section 30A of the *Primary Industries and Energy Research and Development Act 1989* states that the Fisheries Research and Development Corporation is to be paid the research component of a fishing industry levy. The Fisheries Research and Development Corporation Regulations 1991 determine what percentage of the levy amount is the research amount. This research component is part of the deductible component…

Finally, the Explanatory Memorandum for the Bill will be revised to incorporate additional information on the delegations, the 'deductible component' and the strict liability offences.

The Committee thanks the Minister for this response and for the commitment to incorporate additional information on this matter into the explanatory memorandum.

Strict liability
Schedule 3, item 52

Proposed new subsections 105E(2), 105F(2) and 105H(2) of the *Fisheries Management Act 1991*, to be inserted by item 52 of Schedule 3, would impose strict liability for the offences created by subsections 105E(1), 105F(1) and 105H(1) of the same Act. The offences are the contravention of an international fisheries management measure by anyone on a foreign boat on the high seas or by an Australian national on a foreign boat in foreign waters, and unauthorised fishing on a foreign boat on the high seas. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this instance, the Committee notes that the explanatory memorandum seeks to justify this imposition of strict liability on the basis that 'the requirement to prove all fault elements as part of an offence can create a substantial impediment to the prosecution of such offences.' The Committee is of the view that a similar comment could be made about prosecutions for many offences and does not, in itself, justify the imposition of strict liability.

The explanatory memorandum goes on to note that there are two tiers of offences, at least in relation to new subsections 105E(2) and 105F(2), and that the strict liability offences carry a maximum penalty of 60 penalty units, whereas the offences in relation to which the prosecution must prove some elements of intention carry a maximum penalty of 500 penalty units. The explanatory memorandum correctly observes that to impose strict liability for the lower tier of offence, where the maximum penalty is 60 penalty units, 'is consistent with Commonwealth policies and principles on strict liability offences.' The Committee **seeks the Minister's advice** whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was consulted in the framing of these provisions and whether the imposition of strict liability in these circumstances is consistent with that *Guide*.

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 committee has sought advice on the strict liability provisions in Schedule 3, specifically sections 105E, 105F and 105H and their consistency with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.*

The guide was consulted in framing the amendments to Subdivisions B and C of Division 5A of Part 6 of the *Fisheries Management Act 1991*. The strict liability provisions were drafted in accordance with the requisite applicable considerations outlined on page 24 of the guide with the approval of the Attorney-General's Department and under the guidance of drafters from the Office of Parliamentary Counsel. They were determined to be consistent with the guide.

The offences are not punishable by imprisonment but are punishable by a maximum penalty of 60 penalty units. AFMA and the Commonwealth Director of Public Prosecutions (CDPP) have previously found it difficult to prosecute foreign fisheries offences of a similar nature to those under proposed sections 105E, 105F and 105H because of the need to prove fault, in particular to obtain evidence of intention and recklessness with regard to location and other elements of the offence. The imposition of strict liability will provide a more effective regime that allows for the prosecution of foreign fisheries offences without the need for evidence of intention and recklessness. Enhancing the effectiveness of the fisheries enforcement regime through the inclusion of offences not involving fault will also act as a strong deterrent for Australian and foreign fishers.

There are legitimate grounds for penalising persons lacking fault. Illegal fishing incursions by a person on a foreign boat on the high seas or by an Australian on a foreign boat in foreign waters and unauthorised fishing pose serious threats to the international fisheries management regime Australia participates in and is legally obliged to uphold. Any illegal or unauthorised fishing has the potential to undermine the work of international fisheries management organisations and arrangements that aim to ensure the long-term conservation and sustainable use of fish stocks.

Enforcement action will only be taken under sections 105E and 105H in relation to a foreign person where such action is authorised by the country to which the vessel is flagged, in accordance with all international fisheries management organisations or arrangements to which Australia is or may become a party, in accordance with the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (UNFSA) or on the basis of ad hoc or standing consent from the flag country. All member countries of those international fisheries agreements and arrangements are obliged to give effect to the rights and obligations through domestic law. This obligation includes ensuring that their fishing industry does not act contrary to the international fisheries agreement or arrangement, in effect placing their fishers on notice to guard against the possibility of any contravention.

In relation to the offences against Australian nationals, the Australian fishing industry has been consulted on the amendments contained in the Bill and those to be contained in the regulations that will underpin the Bill. To guard against the possibility of any contravention, Australian nationals have been put on notice and will continue to be put on notice as the regulations to underpin the fisheries enforcement regime are developed.

Australia will be enforcing international standards that apply not only to our fisheries but also to the high seas, where, as parties to the United Nations Convention on the Law of the Seas, and as a member of international fisheries management organisations, we have a legal obligation to act against illegal fishers regardless of their nationality. The amendments to control nationals are an Australian response to increased international calls for each nation to exercise control over its own nationals as a part of a broader strategy to combat global illegal, unreported and unregulated (IUU) fishing.

In addition, the application of strict liability continues to give rise to a defence of honest and reasonable mistake of fact.

Overall, the amendments were framed according to the requirements of the guide, and there are evidence and grounds to support the imposition of strict liability…

Finally, the Explanatory Memorandum for the Bill will be revised to incorporate additional information on the delegations, the 'deductible component' and the strict liability offences.

The Committee thanks the Minister for this comprehensive response and for the commitment to include additional information about these strict liability provisions in the explanatory memorandum.

The Committee reiterates its view that offences of strict liability cannot be justified simply by asserting in the explanatory memorandum that the requirement to prove fault of a particular element is undermining or will undermine the deterrent effect of an offence. Rather, the 'demonstrated evidence' referred to in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers,* supporting this assertion should be articulated in the explanatory memorandum.

Strict liability
Schedule 3, item 52

Proposed new subsections 105EA(2) and 105FA(2) of the *Fisheries Management Act 1991*, to be inserted by item 52 of Schedule 3, would impose strict liability for two elements of the offences created by subsections 105EA(1) and 105FA(1) of the same Act. The elements to which strict liability applies are the location of the boat (either on the high seas or in foreign waters) and the fact that the boat is a foreign boat.

The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this instance, the Committee notes that the explanatory memorandum seeks to justify this imposition of strict liability on the ground that the 'Commonwealth Director of Public Prosecutions has not been able to prosecute people for similar offences in the Fisheries Management Act because there have been difficulties collecting sufficient evidence to prove that the defendants intended, for instance, to be in the location' in which they were found.

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 24) states that applying strict liability to a particular physical element of an offence (as is proposed in this instance) may be considered appropriate where there is "demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element." It is unclear to the Committee the extent to which the imposition of strict liability in these instances is consistent with the *Guide.*

The Committee notes that it raised similar concerns in its *Seventh Report of 2007*, in respect of provisions in the Fisheries Legislation Amendment Bill 2007, which applied strict liability to the element of the location of a foreign fishing vessel in the territorial sea of Australia. The imposition of strict liability in these circumstances was also raised when the Senate considered that bill (*Senate Hansard*, 21 June 2007, pp. 139-149.)

The Committee **seeks the Minister's advice** whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was consulted in the course of framing these amendments and, if so, what was the nature of the 'demonstrated evidence' and 'legitimate grounds' referred to in the *Guide.*

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 committee has sought advice on the strict liability provisions in Schedule 3, specifically sections 105EA and 105FA, and their consistency with the guide.
>
> The strict liability provisions were drafted in accordance with the guide (page 24), with the approval of the Attorney-General's Department and under the guidance of drafters from the Office of Parliamentary Counsel. It was agreed that both of the elements of 'demonstrated evidence' and 'legitimate grounds' outlined in the guide existed.
>
> As outlined in the Explanatory Memorandum, the CDPP has provided evidence that strict liability is preferable for these two elements of sections 105EA and 105FA to be effective as a deterrent against offences committed on the high seas. Strict liability for these two elements of the offences was deemed necessary given the different nature of offences applicable to the high seas and foreign waters. For

instance, not having to prove that a vessel intended to be in the area of the high seas (as opposed to being in the exclusive economic zone of another state) where the breach took place makes the prosecution of these offences more likely to succeed. The remaining key elements of the offences are fault-based elements, and the overall offence remains one in which fault must be proven. Further, the defence of honest and reasonable mistake of fact is available.

The proposed subsections 105EA(2) and 105FA(2) also impose strict liability for a further element of the offences: the fact that the boat is a foreign boat (subsections 105EA(1)(d) and 105FA(1)(e)). Australians fishing on Australian-flagged boats on the high seas and in foreign waters are regulated by the *Fisheries Management Act 1991* through Subdivision A of Division 5A of Part 6 and fishing concessions, dealt with throughout the *Fisheries Management Act 1991*. Sections 105EA and 105FA deal with conduct not regulated by other areas of the *Fisheries Management Act 1991* or fishing concessions. The sections deal exclusively with two specific situations: foreign boats on the high seas and Australian nationals on foreign boats in foreign waters. Hence, the required elements of the offences differ.

Under its international obligations, Australia must control its nationals regardless of whether they are on an Australian-flagged boat or on a foreign boat. The proposed sections 105EA and 105FA aim to ensure that Australian nationals are prevented from fishing on a foreign boat in a way in which they would not be able to fish on an Australian-flagged boat, unless the act that contravenes the offence provision is fishing that is authorised by the flag state. Foreigners may be prosecuted for contravening section 105EA with the authorisation of the flag state. Enforcement action will only be taken under section 105EA in relation to a foreign person where such action is authorised by the country to which the vessel is flagged, in accordance with international fisheries management organisations or arrangements to which Australia is or may become a party, in accordance with UNFSA or on the basis of ad hoc or standing consent from the flag country. Subsections 105EA(2) and 105FA(2) impose strict liability so that whether or not the person is on a foreign boat does not prove an impediment to the prosecution of such offences undermining the deterrent effect of the offence regime in Division 5A of Part 6 of the *Fisheries Management Act 1991*.

Breaches of international fisheries management measures for the high seas pose a serious threat to the international fisheries management regime in which Australia participates in and is legally obliged to uphold. Unsuccessful prosecutions of international fisheries management measures send a strong message to illegal fishers around the globe that they are likely to escape prosecution in Australia when they violate high seas measures. Without the inclusion of strict liability in these offences, this unfortunate trend is likely to continue.

Enforcement action will only be taken under section 105EA in relation to a foreign person where such action is authorised by the country to which the vessel is flagged, in accordance with all international fisheries management organisations or arrangements to which Australia is or may become a party, in accordance with UNFSA or on the basis of ad hoc or standing consent from the flag country. All member countries of those international fisheries agreements and arrangements are obliged to give effect to the rights and obligations through domestic law. This obligation includes ensuring that their fishing industry does not act contrary to the international fisheries agreement or arrangement, in effect placing their fishers on notice to guard against the possibility of any contravention.

In relation to the offences against Australian nationals, the Australian fishing industry was consulted on the amendments contained in the Bill and those to be contained in the regulations that will underpin the Bill. To guard against the possibility of any contravention, Australian nationals have been put on notice and will continue to be informed as the regulations to underpin the fisheries enforcement regime are developed.

Australia will be enforcing international standards that apply not only to our fisheries but also to the high seas, where, as parties to the United Nations Convention on the Law of the Seas, and as a member of international fisheries management organisations, we have a legal obligation to act against illegal fishers regardless of their nationality. These amendments to control nationals are an Australian response to increased international calls for each nation to exercise control over its own nationals as a part of a broader strategy to combat global IUU fishing.

Foreigners' incursions into Australian waters are seen to pose serious threats to Australia's sovereign interests. Hence, Australians' incursions into foreign waters also pose serious threats to the sovereign interests of the foreign country. These amendments aim to deter and combat such illegal fishing.

Overall, the amendments were framed in accordance with the requirements of the guide, and there are evidence and grounds to support the imposition of strict liability for the two elements of the offences.

Finally, the Explanatory Memorandum for the Bill will be revised to incorporate additional information on the delegations, the 'deductible component' and the strict liability offences.

I hope this information satisfies the committee's requirements.

The Committee thanks the Minister for this comprehensive response and for the commitment to include additional information about these strict liability provisions in the explanatory memorandum.

The Committee reiterates its view that offences of strict liability cannot be justified simply by asserting in the explanatory memorandum that the requirement to prove fault of a particular element is undermining or will undermine the deterrent effect of an offence. Rather, the 'demonstrated evidence' referred to in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers,* supporting this assertion should be articulated in the explanatory memorandum.

Independent Reviewer of Terrorism Laws Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2008*. Mr Georgiou MP responded to the Committee's comments in a letter dated 26 May 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 3 of 2008

Introduced into the House of Representatives on 17 March 2008
By Mr Georgiou

Background

This bill establishes the position of 'Independent Reviewer of Terrorism Laws', to review the operation, effectiveness and implications of laws relating to terrorist acts. The bill specifies:

- the functions of the independent reviewer, the process for conducting a review and reporting requirements; and
- the terms and conditions of appointment of the independent reviewer, basis for termination of appointment, and disclosure of interests requirements.

Commencement on Proclamation
Clause 2

Clause 2 provides that this bill shall commence on Proclamation, with no time fixed by which it must commence in any event. The Committee takes the view that Parliament is responsible for determining when laws are to come into force and that commencement provisions should contain appropriate restrictions on the period during which legislation might commence. Paragraphs 16-22 of Drafting Direction No. 1.3 provide that a clause which provides for commencement by Proclamation should also specify a period or date after which the Act either commences or is taken to be repealed.

It also provides that any proposal to defer commencement for more than six months after assent should be explained in the explanatory memorandum.

The Committee notes that, in the absence of an explanatory memorandum, there is no explanation for this departure from Drafting Direction 1.3. The Committee **seeks the advice of the Member** as to the reason for this open commencement clause and whether clause 2 might specify a period or date after which the Act either commences or is taken to be repealed.

Pending the Member'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.

Relevant extract from the response from Mr Georgiou MP

> I welcome the Committee's advice that it would be appropriate for the Bill to specify a commencement date rather than having an open commencement date.
>
> As you may be aware, on 19 March the Government blocked a motion to permit debate of the Bill.
>
> I do not know when if ever the House will consider it further.
>
> Should the opportunity arise, I will seek to amend the Bill to provide as follows:
>
> > This Act commences on the day on which it receives the Royal Assent.

The Committee thanks Mr Georgiou, MP for this response and for his undertaking to amend the bill should it be further considered by the House.

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2008*. The Minister for Infrastructure, Transport, Regional Development and Local Government responded to the Committee's comments in a letter dated 28 May 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 3 of 2008

Introduced into the House of Representatives on 20 March 2008
Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

Introduced with the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) (Consequential Amendments) Bill 2008, this bill gives effect to Australia's commitment to ratify the International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunker Oil Convention). The Bunker Oil Convention, which will enter into force internationally on 21 November 2008, establishes a liability and compensation regime to apply in cases of pollution damage following the escape or discharge of bunker oil from a ship that is not an oil tanker.

The bill provides that:

- shipowners are strictly liable for pollution damage resulting from the escape or discharge of bunker oil from their ships, although shipowners can limit their liability, the liability limit depending on the size of the ship;

- ships with a gross tonnage greater than 1,000 will be required to be insured to cover the owners' liability for pollution damage related to bunker oil and will be required to carry evidence of that insurance; and

- persons suffering pollution damage will be able to seek compensation directly from the shipowner's insurer.

Uncertainty of commencement
Clauses 3 to 30

Item 2 in the table to subclause 2(1) of this bill provides that clauses 3 to 30 will commence on the later of assent and the day on which the International Convention on Civil Liability for Bunker Oil Pollution Damage enters into force for Australia. The item goes on to provide that these provisions do not commence at all if that Convention does not enter into force for Australia. The Committee has for some time been concerned that measures may be passed by the Parliament and the first few sections then commence, but there is no certainty as to when (or whether) the operative provisions of the bill might commence.

The Committee **seeks the Minister's advice** whether item 2 in the table to subclause 2(1) might provide that if the Convention does not enter into force for Australia within some fixed period after assent, the Minister shall announce that fact by *Gazette* notice, thus providing some certainty (just as item 2 already provides that the Minister must announce, by *Gazette* notice, when the Convention enters into force for Australia).

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.

Relevant extract from the response from the Minister

> The first matter raised in the Alert Digest is the apparent uncertainty in the commencement provision for the Bill. As stated in the Alert Digest, subclause 2(1) of the Bill provides that clauses 3 to 30 will commence on the later of assent and the day on which the International Convention on Civil Liability for Bunker Oil Pollution Damage (the Convention) enters into force for Australia. These provisions will not commence at all if that Convention does not enter into force for Australia.
>
> There is a requirement that the Minister is to announce by notice in the *Gazette* the date on which the Convention enters into force for Australia. The Alert Digest suggests that item 2 in the table to subclause 2(1) of the Bill might provide that, if the Convention does not enter into force for Australia within some fixed period after

assent, the Minister shall announce that fact by *Gazette* notice. Contrary to the suggestion in the Alert Digest, this would not provide any certainty as all such a notice would do is to advise that, on the date of the notice, the Convention had not entered into force for Australia. In addition, I do not consider such a notice necessary as the Convention will enter into force for Australia in the near future.

I would draw your attention to the statement in the Outline of the Bill in the explanatory memorandum that the Convention will enter into force internationally on 21 November 2008. The enactment of domestic implementing legislation is a necessary precursor to Australian ratification of the Convention. It is the Government's intention that Australia's instrument of ratification will be lodged with the Secretary-General of the International Maritime Organization as soon as all domestic requirements have been met. As the Convention will enter into force for Australia three months after the date of lodgement of the instrument of ratification, the major uncertainty relating to the commencement of the Bill concerns the timing of the passage of the Bill through Parliament. The Standing Committee for the Scrutiny of Bills can therefore be assured that the Bill, once enacted, will enter into force within a reasonable time of it having received Royal Assent.

The Committee thanks the Minister for this response and notes that it would have been helpful if this information had been included in the explanatory memorandum.

Legislative Instruments Act—declarations
Subclause 19(7)

Subclause 19(7) provides that a certificate issued under that clause for a ship owned or operated by the Commonwealth, a State or a Territory, is not a legislative instrument. As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

The Committee notes that the explanatory memorandum makes no mention of subclause 19(7), let alone indicating whether it is purely declaratory or not. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

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 second matter raised in the Alert Digest relates to the failure of the explanatory memorandum to include a statement advising that subclause 19(7) is merely declaratory of the law. The failure to include such a statement was an oversight in the drafting of the explanatory memorandum and a paragraph similar to the last paragraph relating to clause 18 should have been included in the explanatory memorandum.

The Committee thanks the Minister for this response and trusts that this oversight might be corrected should an opportunity arise in the future.

Chris Ellison
Chair

THE HON MARTIN FERGUSON AM MP

MINISTER FOR RESOURCES AND ENERGY
MINISTER FOR TOURISM

RECEIVED
28 MAY 2008
Senate Standing C'ttee for the Scrutiny of Bills

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PARLIAMENT HOUSE
CANBERRA ACT 2600

27 MAY 2008

Senator Christopher Ellison
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I am responding to the letter of 15 May 2008 from Cheryl Wilson, Secretary to the Standing Committee for the Scrutiny of Bills, concerning The *Australian Energy Market Amendment (Minor Amendments) Bill* 2008 (the Bill). The letter drew my attention to comments by the Committee on the Bill in its Alert Digest of 14 May 2008. The Committee wished to know whether parts of the Bill were intended to apply retrospectively. Briefly the answer is that no part of the Bill is intended to apply retrospectively.

The reason for the uncertainty is that the commencement of the four schedules to the Bill is tied to the commencement of the *Australian Energy Market (Gas Legislation) Act* 2007 (the Act). The Committee was uncertain as to whether the Act had commenced and wanted to know, if it had not already commenced, when it was expected to commence. The Act has not commenced but is expected to do so on 1 July this year. In the event that the Act commences before the passage of this Bill, Schedules 1 to 4 would apply retrospectively. I consider there to be a small risk of this outcome; and in the unlikely event of a delay to the commencement of the Act, I do not consider that retrospective application would adversely affect the interests of any person or body affected by the Bill.

The Act is part of a cooperative legislative scheme to introduce national regulation of gas pipeline services. The Act's commencement has been postponed because of delays in completing the national legislation, which will be passed through the South Australian Parliament as the *National Gas (South Australia) Act 2008.*

Should the Standing Committee require further information in relation to this matter, Mr Lindsay Gamble (02 6213 7852) in my Department will be able to assist.

Yours sincerely

Martin Ferguson

Telephone: (02) 6277 7930 Facsimile: (02) 6273 0434

The Hon. Tony Burke MP

Minister for Agriculture, Fisheries and Forestry

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Senate Standing C'ttee for the Scrutiny of Bills

28 MAY 2008

Senator the Hon. Chris Ellison
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ellison

I am writing in response to a letter sent on 15 May 2008 by Ms Cheryl Wilson, Secretary of the Senate Standing Committee for the Scrutiny of Bills, to my senior adviser. The letter drew my adviser's attention to comments contained in the Scrutiny of Bills *Alert Digest No. 3 of 2008* about the Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008 (the Bill).

In the *Alert Digest*, the committee asked me to clarify six matters. These are addressed below.

1. Commencement on Proclamation—Schedule 3

The committee has queried why the commencement of Schedule 3 of the Bill will be delayed for up to 12 months to allow time for the preparation of regulations.

The delayed commencement is warranted to allow time for the development of administrative systems to support the enforcement framework contained in Schedule 3.

Schedule 3 gives effect to Australia's rights and obligations under international law in relation to boarding and inspection measures and offence provisions for Australian nationals and foreigners who breach prescribed international fisheries management measures. Twelve months is required in this instance, as developing the regulations will be a complex and time-consuming exercise for the Australian Fisheries Management Authority (AFMA) and the Department of Agriculture, Fisheries and Forestry (DAFF). AFMA and DAFF will need to work through a large number of international fisheries management measures to determine which measures to include in the regulations and how best to do so. This process will also require consultation with other relevant government departments and agencies, such as the Attorney-General's Department and the Department of Foreign Affairs and Trade, and the fishing industry.

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In addition, the delayed commencement will allow for the dissemination of information to industry about related offences before they come into effect.

2. Wide delegation of powers—Schedule 1, item 79

The committee raised concerns about the Chief Executive Officer (CEO) being able to delegate to a wide range of people any of AFMA's functions and powers for which the CEO is responsible.

The proposed delegation powers are consistent with and support the new governance framework for AFMA, under which both the commission and the CEO are responsible for performing and exercising their specific functions and powers of AFMA under the *Fisheries Administration Act 1991*. The delegation powers are designed to avoid any potential mixed lines of authority.

For the efficient and effective management of AFMA, it is essential that the commission can delegate its powers and functions only to the CEO and that the CEO can sub-delegate these powers and functions to other parties. If the commission were empowered to delegate functions and powers to other persons (such as staff of AFMA), by-passing the CEO, it would make it very difficult for the CEO to perform the functions conferred on him or her by the *Financial Management and Accountability Act 1997* and the *Public Service Act 1999*. Having the commission delegate powers to the CEO allows the CEO, in deciding how staff exercise those powers, to properly manage AFMA's staff and other resources.

Clearly, it would not be appropriate or practical for the commissioners to exercise all of their powers and functions personally or for the CEO personally to exercise all the powers delegated by the commission. The power of sub-delegation is designed to ensure that the CEO can determine which staff and other persons will exercise powers of the commission (consistent with the CEO's role in managing AFMA).

I believe it is appropriate for the CEO to delegate powers to persons he or she has appointed. Under the *Financial Management and Accountability Act 1997* and the *Public Service Act 1999*, the CEO will ultimately be responsible for all recruits to AFMA. An example of where AFMA has previously delegated its powers to contracts is in making internal review decisions under section 165 of the *Fisheries Management Act 1991*, when AFMA contracted two ex-AFMA staff to conduct the reviews.

The proposed section 93 enables the CEO to delegate all of the functions and powers of AFMA for which the CEO is responsible—that is, any domestic fisheries powers and functions delegated to him by the commission and the CEO's own foreign compliance powers and functions. The delegation can be to: an AFMA staff member; a committee established under section 54 of the *Fisheries Administration Act 1991*; a consultant; a contractor; or an officer within the meaning of the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984*. This group of persons essentially replicates the group to whom AFMA can currently delegate almost all of its powers and functions under section 92 of the *Fisheries Administration Act 1991*. Hence, overall, the proposed amendments will not change the scope of the delegation powers in the *Fisheries Administration Act 1991*.

3. Standing (special) appropriation—Schedule 1, item 79, new section 94B

The committee sought advice on why the Special Account is necessary.

AFMA recovers most of the cost of domestic fisheries management from fishers via levies. Under the existing section 80 of the *Fisheries Administration Act 1991*, the levies that AFMA collects and pays to the Consolidated Revenue Fund are automatically appropriated to AFMA, in accordance with the formula set out in subsection 80(1A). This special appropriation is for, inter alia, expenditure relating to the provision of fisheries management services and incidental matters thereto.

The amendments in the Bill will repeal the existing section 80 and replace it with a special account, supported by a special appropriation under the *Financial Management and Accountability Act 1997*, which will be used to hypothecate funds for expenditures relating to fisheries management.

The special account is proposed in this situation for two main reasons.

- First, it allows AFMA's financial situation under the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to be replicated, to the extent this is feasible, even though the Bill moves AFMA from being regulated by the CAC Act to being regulated by the *Financial Management and Accountability Act 1997*.

- Second, a special account is an appropriate way to credit amounts that derive from levy payments where AFMA will use those amounts for specified statutory purposes. While AFMA is a CAC Act body, these levy payments can be paid to it outright. However, as AFMA is moving to being regulated by the *Financial Management and Accountability Act 1997*, the levy payments will need to be credited to an appropriation. The common model for such a situation is a special account, created in the enabling legislation, which is supported by the special appropriation under section 21 of *Financial Management and Accountability Act 1997*. Section 21 provides a standing appropriation for expenditures of the account for the purposes designated in the legislation.

AFMA's special account will provide for the crediting of any levies (excluding those for the Fisheries Research and Development Corporation) and any annual administered and departmental appropriations. Once monies have been credited to the Special Account, they can be classified as departmental expenditure. In the interests of transparency and ease of reporting, AFMA will use the Special Account to receipt and expend its levies and annual departmental appropriations but treat annual administered appropriations as stand-alone appropriations. The usual rules will apply to administered appropriations.

It is standard practice for statutory authorities with significant cost-recovered regulatory and business-type operations to use a special account. The proposed use of AFMA's special account is consistent with the principles for special accounts, which are contained in the *Guidelines for the Management of Special Accounts*, Financial Management Guidance No. 7, October 2003, Department of Finance and Administration.

4. Legislative Instruments Act—declarations—Schedule 1, item 79, new subsection 94E(2)

The committee sought advice on whether subsection 94E(2) is declaratory in nature or provides for a substantive exemption.

The definition of 'deductible component' in the new subsection 94E(2) is identical to the definition of 'deductible amount' in the existing subsection 80(1A). The existing provision was drafted long before the *Legislative Instruments Act 2003 was enacted.* The new subsection 94E(2) is merely declaratory and has been included for the avoidance of doubt.

The determination is not a legislative instrument, because it does not fit within the definition of a legislative instrument in subsection 5(2) of the *Legislative Instruments Act 2003*. The determination does not affect a privilege or interest, impose an obligation, create a right or vary or remove an obligation or right.

Subsection 94E(1) states that a component of a levy amount, already collected by AFMA and paid to the Consolidated Revenue Fund, is to be deducted from the amount that will be credited to AFMA's Special Account. The deductible component is determined by and paid under other acts and legislative instruments. For example, the *Fishing Levy Act 1991* states that the amount of levy is such amount as is prescribed and is payable by the person who, at the time at which the levy is due and payable, is the holder of the fishing concession. The Fishing Levy Regulations 2008 set, for each fishery, the amount of levy payable and the date by which that amount is paid. Section 30A of the *Primary Industries and Energy Research and Development Act 1989* states that the Fisheries Research and Development Corporation is to be paid the research component of a fishing industry levy. The Fisheries Research and Development Corporation Regulations 1991 determine what percentage of the levy amount is the research amount. This research component is part of the deductible component.

5. Strict Liability—Schedule 3, item 52

The committee has sought advice on the strict liability provisions in Schedule 3, specifically sections 105E, 105F and 105H and their consistency with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

The guide was consulted in framing the amendments to Subdivisions B and C of Division 5A of Part 6 of the *Fisheries Management Act 1991*. The strict liability provisions were drafted in accordance with the requisite applicable considerations outlined on page 24 of the guide with the approval of the Attorney-General's Department and under the guidance of drafters from the Office of Parliamentary Counsel. They were determined to be consistent with the guide.

The offences are not punishable by imprisonment but are punishable by a maximum penalty of 60 penalty units. AFMA and the Commonwealth Director of Public Prosecutions (CDPP) have previously found it difficult to prosecute foreign fisheries offences of a similar nature to those under proposed sections 105E, 105F and 105H because of the need to prove fault, in particular to obtain evidence of intention and recklessness with regard to location and other elements of the offence. The imposition of strict liability will provide a more effective regime that allows for the prosecution of foreign fisheries offences without the need for evidence of intention and recklessness. Enhancing the effectiveness of the fisheries enforcement regime through the inclusion of offences not involving fault will also act as a strong deterrent for Australian and foreign fishers.

There are legitimate grounds for penalising persons lacking fault. Illegal fishing incursions by a person on a foreign boat on the high seas or by an Australian on a foreign boat in foreign waters and unauthorised fishing pose serious threats to the international fisheries management regime Australia participates in and is legally obliged to uphold. Any illegal or unauthorised fishing has the potential to undermine the work of international fisheries management organisations and arrangements that aim to ensure the long-term conservation and sustainable use of fish stocks.

Enforcement action will only be taken under sections 105E and 105H in relation to a foreign person where such action is authorised by the country to which the vessel is flagged, in accordance with all international fisheries management organisations or arrangements to which Australia is or may become a party, in accordance with the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (UNFSA) or on the basis of ad hoc or standing consent from the flag country. All member countries of those international fisheries agreements and arrangements are obliged to give effect to the rights and obligations through domestic law. This obligation includes ensuring that their fishing industry does not act contrary to the international fisheries agreement or arrangement, in effect placing their fishers on notice to guard against the possibility of any contravention.

In relation to the offences against Australian nationals, the Australian fishing industry has been consulted on the amendments contained in the Bill and those to be contained in the regulations that will underpin the Bill. To guard against the possibility of any contravention, Australian nationals have been put on notice and will continue to be put on notice as the regulations to underpin the fisheries enforcement regime are developed.

Australia will be enforcing international standards that apply not only to our fisheries but also to the high seas, where, as parties to the United Nations Convention on the Law of the Seas, and as a member of international fisheries management organisations, we have a legal obligation to act against illegal fishers regardless of their nationality. The amendments to control nationals are an Australian response to increased international calls for each nation to exercise control over its own nationals as a part of a broader strategy to combat global illegal, unreported and unregulated (IUU) fishing.

In addition, the application of strict liability continues to give rise to a defence of honest and reasonable mistake of fact.

Overall, the amendments were framed according to the requirements of the guide, and there are evidence and grounds to support the imposition of strict liability.

6. Strict Liability—Schedule 3, item 52

The committee has sought advice on the strict liability provisions in Schedule 3, specifically sections 105EA and 105FA, and their consistency with the guide.

The strict liability provisions were drafted in accordance with the guide (page 24), with the approval of the Attorney-General's Department and under the guidance of drafters from the Office of Parliamentary Counsel. It was agreed that both of the elements of 'demonstrated evidence' and 'legitimate grounds' outlined in the guide existed.

As outlined in the Explanatory Memorandum, the CDPP has provided evidence that strict liability is preferable for these two elements of sections 105EA and 105FA to be effective as a deterrent against offences committed on the high seas. Strict liability for these two elements of the offences was deemed necessary given the different nature of offences applicable to the high seas and foreign waters. For instance, not having to prove that a vessel intended to be in the area of the high seas (as opposed to being in the exclusive economic zone of another state) where the breach took place makes the prosecution of these offences more likely to succeed. The remaining key elements of the offences are fault-based elements, and the overall offence remains one in which fault must be proven. Further, the defence of honest and reasonable mistake of fact is available.

The proposed subsections 105EA(2) and 105FA(2) also impose strict liability for a further element of the offences: the fact that the boat is a foreign boat (subsections 105EA(1)(d) and 105FA(1)(e)). Australians fishing on Australian-flagged boats on the high seas and in foreign waters are regulated by the *Fisheries Management Act 1991* through Subdivision A of Division 5A of Part 6 and fishing concessions, dealt with throughout the *Fisheries Management Act 1991*. Sections 105EA and 105FA deal with conduct not regulated by other areas of the *Fisheries Management Act 1991* or fishing concessions. The sections deal exclusively with two specific situations: foreign boats on the high seas and Australian nationals on foreign boats in foreign waters. Hence, the required elements of the offences differ.

Under its international obligations, Australia must control its nationals regardless of whether they are on an Australian-flagged boat or on a foreign boat. The proposed sections 105EA and 105FA aim to ensure that Australian nationals are prevented from fishing on a foreign boat in a way in which they would not be able to fish on an Australian-flagged boat, unless the act that contravenes the offence provision is fishing that is authorised by the flag state. Foreigners may be prosecuted for contravening section 105EA with the authorisation of the flag state. Enforcement action will only be taken under section 105EA in relation to a foreign person where such action is authorised by the country to which the vessel is flagged, in accordance with international fisheries management organisations or arrangements to which Australia is or may become a party, in accordance with UNFSA or on the basis of ad hoc or standing consent from the flag country. Subsections 105EA(2) and 105FA(2) impose strict liability so that whether or not the person is on a foreign boat does not prove an impediment to the prosecution of such offences undermining the deterrent effect of the offence regime in Division 5A of Part 6 of the *Fisheries Management Act 1991*.

Breaches of international fisheries management measures for the high seas pose a serious threat to the international fisheries management regime in which Australia participates in and is legally obliged to uphold. Unsuccessful prosecutions of international fisheries management measures send a strong message to illegal fishers around the globe that they are likely to escape prosecution in Australia when they violate high seas measures. Without the inclusion of strict liability in these offences, this unfortunate trend is likely to continue.

Enforcement action will only be taken under section 105EA in relation to a foreign person where such action is authorised by the country to which the vessel is flagged, in accordance with all international fisheries management organisations or arrangements to which Australia is or may become a party, in accordance with UNFSA or on the basis of ad hoc or standing consent from the flag country. All member countries of those international fisheries agreements and arrangements are obliged to give effect to the rights and obligations through domestic law. This obligation includes ensuring that their fishing industry does not act contrary to the international fisheries agreement or arrangement, in effect placing their fishers on notice to guard against the possibility of any contravention.

In relation to the offences against Australian nationals, the Australian fishing industry was consulted on the amendments contained in the Bill and those to be contained in the regulations that will underpin the Bill. To guard against the possibility of any contravention, Australian nationals have been put on notice and will continue to be informed as the regulations to underpin the fisheries enforcement regime are developed.

Australia will be enforcing international standards that apply not only to our fisheries but also to the high seas, where, as parties to the United Nations Convention on the Law of the Seas, and as a member of international fisheries management organisations, we have a legal obligation to act against illegal fishers regardless of their nationality. These amendments to control nationals are an Australian response to increased international calls for each nation to exercise control over its own nationals as a part of a broader strategy to combat global IUU fishing.

Foreigners' incursions into Australian waters are seen to pose serious threats to Australia's sovereign interests. Hence, Australians' incursions into foreign waters also pose serious threats to the sovereign interests of the foreign country. These amendments aim to deter and combat such illegal fishing.

Overall, the amendments were framed in accordance with the requirements of the guide, and there are evidence and grounds to support the imposition of strict liability for the two elements of the offences.

Finally, the Explanatory Memorandum for the Bill will be revised to incorporate additional information on the delegations, the 'deductible component' and the strict liability offences.

I hope this information satisfies the committee's requirements.

Yours sincerely

Tony Burke

Tony Burke

PARLIAMENT OF AUSTRALIA
HOUSE OF REPRESENTATIVES

PETRO GEORGIOU, MP
MEMBER FOR KOOYONG

26th May 2008

Senator Chris Ellison
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~ Chris

Independent Reviewer of Terrorism Laws Bill 2008

Thank you for the comments of the Committee on the ***Independent Reviewer of Terrorism Laws Bill 2008***.

I welcome the Committee's advice that it would be appropriate for the Bill to specify a commencement date rather than having an open commencement date.

As you may be aware, on 19 March the Government blocked a motion to permit debate of the Bill.

I do not know when if ever the House will consider it further.

Should the opportunity arise, I will seek to amend the Bill to provide as follows:

> This Act commences on the day on which it receives the Royal Assent.

Yours sincerely

Petro Georgiou

Petro Georgiou MP
Member for Kooyong

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The Hon Anthony Albanese MP

Minister for Infrastructure,
Transport, Regional Development
and Local Government
Leader of the House

Reference: 05145-2008

28 MAY 2008

Senator the Hon Chris Ellison
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Ellison~~ Chris,

I refer to the comments in the Scrutiny of Bills *Alert Digest No.* 3 (14 May 2008) (the Alert Digest) about the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008 (the Bill).

The first matter raised in the Alert Digest is the apparent uncertainty in the commencement provision for the Bill. As stated in the Alert Digest, subclause 2(1) of the Bill provides that clauses 3 to 30 will commence on the later of assent and the day on which the International Convention on Civil Liability for Bunker Oil Pollution Damage (the Convention) enters into force for Australia. These provisions will not commence at all if that Convention does not enter into force for Australia.

There is a requirement that the Minister is to announce by notice in the *Gazette* the date on which the Convention enters into force for Australia. The Alert Digest suggests that item 2 in the table to subclause 2(1) of the Bill might provide that, if the Convention does not enter into force for Australia within some fixed period after assent, the Minister shall announce that fact by *Gazette* notice. Contrary to the suggestion in the Alert Digest, this would not provide any certainty as all such a notice would do is to advise that, on the date of the notice, the Convention had not entered into force for Australia. In addition, I do not consider such a notice necessary as the Convention will enter into force for Australia in the near future.

I would draw your attention to the statement in the Outline of the Bill in the explanatory memorandum that the Convention will enter into force internationally on 21 November 2008. The enactment of domestic implementing legislation is a necessary precursor to Australian ratification of the Convention. It is the Government's intention that Australia's instrument of ratification will be lodged with the Secretary-General of the

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International Maritime Organization as soon as all domestic requirements have been met. As the Convention will enter into force for Australia three months after the date of lodgement of the instrument of ratification, the major uncertainty relating to the commencement of the Bill concerns the timing of the passage of the Bill through Parliament. The Standing Committee for the Scrutiny of Bills can therefore be assured that the Bill, once enacted, will enter into force within a reasonable time of it having received Royal Assent.

The second matter raised in the Alert Digest relates to the failure of the explanatory memorandum to include a statement advising that subclause 19(7) is merely declaratory of the law. The failure to include such a statement was an oversight in the drafting of the explanatory memorandum and a paragraph similar to the last paragraph relating to clause 18 should have been included in the explanatory memorandum.

Yours sincerely

ANTHONY ALBANESE