



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Reference: Application of absolute and strict liability offences in Commonwealth legislation

WEDNESDAY, 1 MAY 2002

CANBERRA

BY AUTHORITY OF THE SENATE

SENATE
STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Wednesday, 1 May 2002

Members: Senator Cooney (*Chair*), Senator Crane (*Deputy Chair*), Senators Crossin, Ferris, Mason and Murray

Senators in attendance: Senators Cooney, Crane, Ferris and Murray

Terms of reference for the inquiry:

For inquiry into and report on:

The application of absolute and strict liability offences in Commonwealth legislation, with particular reference to:

- (a) the merit of making certain offences ones of absolute or strict liability;
- (b) the criteria used to characterise an offence, or an element of an offence, as appropriate for absolute or strict liability;
- (c) whether these criteria are applied consistently to all existing and proposed Commonwealth offences;
and
- (d) how these criteria relate to the practice in other Australian jurisdictions, and internationally.

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Subcommittee met at 9.07 a.m.

ALDERSON, Mr Karl John Richard, Principal Legal Officer, Attorney-General's Department

NOLAN, Mr Ricky James, Legal Officer, Criminal Law Reform, Criminal Law Branch, Attorney-General's Department

CHAIR—Welcome. Before we start, I just advise that Senator Ferris and I have authorised the release of four submissions. Senator Crane is taking part in today's hearing via teleconference. We are now going to form a subcommittee to give us some flexibility.

Senator CRANE—I move that we form a subcommittee. Any two of the four of us can form a subcommittee.

Senator FERRIS—Can we include Senator Crane on that subcommittee even though he is not physically here?

Senator CRANE—Yes.

Senator FERRIS—I have a federal executive meeting tomorrow so I cannot be here at all other than to start something off in the morning. I have a commitment all day.

CHAIR—This morning our two witnesses from the Attorney-General's Department are Mr Karl Alderson—who you have met on a few occasions, Senator Crane—and Mr Ricky Nolan. They have come to shed some light for us on the issues of strict liability and absolute liability.

Mr Alderson—I thought I would make a brief opening statement to highlight the areas in which we may be able to assist the committee and provide some information that would be of interest to the committee. There are three areas in which we may be able to assist. The first is that our department administers the relevant provisions of the Criminal Code that provide for the way that offences and defences, fault elements and strict and absolute liability work in Commonwealth law. The key provisions are obviously sections 6.1 and 6.2 which lay down rules for the application of strict and absolute liability in the Criminal Code and one of the key elements is that they make the situation explicit.

In an effort to assist the committee we have been doing some research to try and find the rules that operate in other jurisdictions. The real problem is that they tend to be very hard to find. The Commonwealth is one of the very few jurisdictions in Australia or elsewhere that has laid down a clear statutory rule; whereas in most jurisdictions it is really left to common law interpretive principles. It is a lot harder to see exactly where strict and absolute liability are applying.

One important issue to note about strict and absolute liability that does often cause confusion is that they negate the requirement to prove fault in respect of an offence but not the physical element of the offence: the facts of what occurred or did not occur. Often they can be read as negating the requirement to prove the facts in question. Whereas, in fact, there is still a full requirement in a criminal case to prove the underlying facts beyond reasonable doubt, the strict

and absolute liability removes the requirement to show guilty mind, *mens rea*, awareness of what was occurring.

The second issue to note about sections 6.1 and 6.2 is the fact that if strict or absolute liability is to be imposed they require that to be done explicitly and, in terms of the role of this committee and parliamentary scrutiny, one of the objectives is to make it easier and quite apparent where a decision has been made to impose strict or absolute liability. The third issue to note is that the way it is now usually done is to identify strict or absolute liability as applying to a particular element of the offence. For example, if you have an offence of causing harm to UN personnel you can require fault for the causing harm element and impose strict liability on the fact that the person was UN personnel. The provision is set up to allow those distinctions to be made.

The fourth thing I would say about the provisions concerns the difference between strict and absolute liability under the Criminal Code. The difference is that the defence of honest and reasonable mistake of fact is available if strict liability is applied but not available if absolute liability is applied. An issue that has turned up from our research is that the terms in the common law system are used more interchangeably; there is not a clear distinction but in the code that is the distinction that has been made between the two concepts. So that is the Criminal Code.

I also want to refer to the harmonisation process that has occurred over the last five years with a particularly intense focus during 2001. Because the code requires explicitness in saying an element of an offence or an offence is strict or absolute liability and otherwise requires proof of fault, the harmonisation process was designed to take offences that would have been read as strict or absolute liability, or elements that would have been read as strict or absolute liability under the common law system, and make that clear under the new Criminal Code system where that has to be explicit in the legislation. So there was a harmonisation bill for each portfolio.

Our department normally has a role in looking at the policy appropriateness of strict or absolute liability in a particular situation. That was not the case with harmonisation; it was not the case of revisiting the substantive policy merits but merely attempting a legal analysis of how a court would have read this to make that explicit.

The third area of our role is the one that I have already alluded to—the scrutiny role where, within the government, different areas of our department play a scrutiny role in applying certain principles to draft legislation that is being prepared. There is an area that looks at admin law issues. Within the Criminal Law Branch, we look at the range of issues to do with appropriate enforcement powers and the framing of offences, and we work towards a coherent, consistent and principled approach in Commonwealth law, including by applying criteria to when it is appropriate to have a strict or absolute liability in an offence. Obviously, that criminal law policy is not an absolute. Governments always have a range of policy settings that they have regard to—particular enforcement objectives, community concerns and the need to deal with particular problems—but criminal law policy is always a part of that mix, so the government is always aware of what the criminal law policy considerations are in a particular issue when legislation is being framed. We also assist because many departments working on legislation will not be familiar with these provisions, so we play a role in assisting them to understand how these provisions will work. So, again, Commonwealth laws are framed in a way that takes more

account of the way these operate and takes into account those principles. That is all I propose to say by way of introduction, and we welcome any questions the committee wants to ask.

Senator FERRIS—I know Senator Crane has a particular interest in this, so I will defer to him on this occasion.

CHAIR—Senator Crane, we are looking to you. You are coming over loud and clear.

Senator CRANE—Regarding this paper, ‘Inquiry into absolute and strict liability offences in Commonwealth Legislation’, I will just ask—

CHAIR—Senator Crane, you are coming over not quite distinct—

Senator CRANE—Can you hear me now?

CHAIR—Yes, that is better.

Senator CRANE—The first question is: you gave us some examples where you would apply—

CHAIR—Now you are breaking up again. Can you understand that, Mr Alderson?

Mr Alderson—Yes. Senator Crane was asking for examples of appropriate cases in which to apply strict or absolute liability. There are really two main categories where it is appropriate, according to the normal policies that we apply. The first is what we call a jurisdictional element, where there is something that would really be a technicality or a loophole for someone to escape conviction based on that fact. The UN personnel example I mentioned earlier is a classic example of that. Already in Australia we have offences dealing with murder, kidnapping and assault, but because of our international treaty obligations we are required to enact special offences that related to murder, kidnapping and assault et cetera of UN personnel.

The elements of the offence, the substance of what is done—the murder, the kidnapping, the harm—require proof of fault. It has to be an intentional murder et cetera, but also an element of the offence is that it has to be UN personnel. The argument is: if you murder somebody, you are equally culpable whether you knew who they were or not; the punishment is for the act of murder. So the rationale for strict liability applying to whether that person is from the United Nations is that, if in fact you intentionally committed a murder—you may not know whether they were UN personnel; you may not have cared or been conscious of that—it comes within that provision. That kind of example recurs quite a lot for the Commonwealth, because of our federal system, when you have offences which are about theft of Commonwealth property. For constitutional reasons, we need our own provisions and we have our own provisions dealing, say, with theft of or damage to Commonwealth property. If you prove fault in respect of the theft or the damage, the usual approach is to apply strict liability to the fact that it is Commonwealth property.

The second example is for minor or regulatory offences and there are a couple of rationales here. That kind of thing would be something under the civil aviation regulations about checking in a flight plan before you fly, environmental legislation about lodging reports, or the

requirement to hand in an identity card when you are a Commonwealth officer and have finished using that card. These are low penalty offences, maybe carrying a maximum of a 10 penalty unit fine up to a 50 penalty unit fine. There are a couple of rationales in that case. Firstly, because they are very minor offences, they are not the kind of thing that you would envisage having a full-blown Supreme Court trial over with QCs, so in simplifying the operation of those provisions the requirement to prove fault is taken out.

The second and related rationale is that for those minor regulatory offences, if there is something where really you ought to be on guard and make sure there is no error, it is appropriate to apply strict liability—in particular, where you are talking about something that is not an inherent right but something that the government permits you to do under a regulated system. I know that the Law Council has referred to some of Customs's international trade modernisation provisions and they are really a classic example of that. There are offences relating to the number of errors in cargo reports. Customs had a real problem in that, because of other commercial priorities, importers and freight forwarders were not taking their obligations seriously and were not putting much effort into cargo reports. That is the kind of case where, if you say that strict liability applies to making an error in a cargo report, the onus is on you as the cargo reporter to get it right; mistakes are not acceptable; you have to make the effort to make sure that you are reporting accurately; and, if you get it wrong, it is not a case where you are going to jail or anything, but it is something where a fine would be imposed upon you to deter you from that lax conduct.

Senator Crane, the third category I would mention is that there are cases where it is considered that the seriousness of the harm resulting is so great that it is necessary to put people on guard by saying, 'Because these consequences are so severe, we need to have an offence that puts you on notice to be as careful as possible.' Into that category would come some serious environmental offences in the Environment Protection and Biodiversity Conservation Act, for example, which relate to trading in endangered wildlife et cetera, where you say, 'We've really got to stop this happening.' So if people are dealing with anything to do with wildlife, they need to make sure that they know there are the proper certificates et cetera; we are not going to require fault in relation to this offence. We will obviously be coming back to this issue in more detail—the government's terrorism offences would also be in that category. The rationale for strict and absolute liability for a number of those offences is that the seriousness of the consequences is so great that people need to be put on guard.

Senator CRANE—I am sure you know that the committee—I in particular—became concerned about the number of split liability clauses that were being included in various pieces of legislation. In fact, in my view—and I do not have the figures—they have increased significantly in the last six years, having regard to the material that is presented to the committee. In effect, strict liability denies significant rights in terms of being able to defend oneself. Let us go to the other side of the coin: when do you go over the line so that it can be covered by strict liability and it becomes a normal type of offence where the person charged has full rights before the court to defend oneself?

Mr Alderson—Are you asking: when is it not appropriate to have stricter absolute liability?

Senator CRANE—When do you go over that line? It seems to me to be a very grey area. There seems to be inconsistency in various pieces of legislation which are examined by the

committee. When are you not in that area? Where is the line drawn by government or by your department in terms of when it should not be strict liability? You have the extreme cases on the one hand; you are talking about murder of UN officials. On the other hand you are talking about relatively, in your words, minor offences. I would say that, under environmental law, clearing a piece of land that you should not clear, for example—something that I as a farmer understand; the facts are clear, you have cleared it, as can be seen—is a relatively minor thing, as it will grow back and in 10 years time nobody will be able to see that it has been done. When do you go past the land clearing offence or the environmental one that you gave and reach the situation of the murder of UN envoys, for example?

Mr Alderson—Before I turn to that, in terms of the increasing prevalence of strict and absolute liability, I think that is in large part a function of the fact that it now has to be made explicit. Six years ago, and before these provisions came in in 1995, many strict and absolute liability offences were enacted by the parliament because certain code words were put in that were known to be read by courts as strict or absolute liability; it is just that there was no consciousness and no debate, because other than those framing the legislation and the courts, there was very limited awareness. That is really borne out by the harmonisation process, which threw up so many hundreds of existing strict liability offences.

Senator CRANE—I was not aware of that. I do not know whether any other committee members were. How well informed were people about the changes?

Mr Alderson—The changes in the harmonisation process were very clearly articulated in the rationale put forward, including in letters to this committee, particularly when the first few harmonisation bills were coming through. The committee raised a whole series of questions about those, and there were letters from the relevant ministers that our department was consulted on and assisted in the framing. That was made very explicit.

Senator CRANE—My question is broader than that. It was not just the committee that expressed concerns about strict liability. How widespread was it out in the general community?

Mr Alderson—Because there has been such an intense focus on the harmonisation process, there have been a number of efforts to explain the way the process works. In a way, the heart of it was about making the way this works clear to the parliament and to the community, so there was a lot of focus on this issue. In addition, in terms of how this will work from now on, it is intended to put out proposed Criminal Code guidelines which will again, in a very clear way, help people understand how all this works.

Senator CRANE—That is of interest.

Mr Alderson—In regard to your question about where the threshold lies, as a rule of thumb, in the category I mentioned of minor regulatory offences the general cut-off is 60 penalty units for an individual—that is, a \$6,600 fine and zero imprisonment. So, to make an offence in its entirety strict liability, the general benchmark is a \$6,600 fine and no imprisonment. To make it absolute liability in its entirety, the general benchmark is 10 penalty units—that is, a \$1,100 fine and no imprisonment. The next test applied is: is there something that the person can legitimately be expected to guard against? I guess the monetary one is clearer to see as a clearer cut-off. The test about whether it is legitimate for the person to be on their guard is really a case

of looking at each offence case by case. But that is essentially the test that is applied. With the third one, in terms of the seriousness of the consequences, again you really need to look case by case, and that really goes to broader questions of government policy about where the emphasis lies, say, in terrorism or environmental contexts.

With regard to the fourth category, where the rationale is based on it being a jurisdictional element, the real test is: is it going to the heart of the culpability of the wrongdoing, or is it something that is really an additional element that just brings in Commonwealth jurisdiction or some other form of jurisdiction? In the case of the theft of Commonwealth property or the murder of UN personnel, the normal approach is that the heart of the culpability is the theft or the murder, and that carries fault. With the element about it being Commonwealth property or an offence where we have some limits about bringing in the Constitution or some other basis of jurisdiction, you say, 'What makes this bad is not that it is Commonwealth property; it is that it is theft,' and so there is no injustice to the person in attaching strict or absolute liability to that jurisdictional element. Senator Crane, they are basically the main four tests that are applied.

Senator CRANE—Thank you.

Senator FERRIS—I do not really have any difficulties with this, because I understand the harmonisation principle. My biggest concern is to ensure that, where a liability is imposed, the individual who is unaware of it is able to have the lack of awareness or understanding taken into account—for example, a remote pastoralist who may discover that they have inadvertently offended in some way. I think you have explained that fairly clearly. Senator Crane and I have discussed this. It is an area that we do have some concerns about, given difficulties with communication and so on. I am relatively comfortable with your explanation. I suppose I am just disappointed, in a way, that we were not able to know, when this harmonisation began, that this codification was necessary for legal reasons. Senator Crane and I, and perhaps also Senator Mason, were concerned that there appeared to be an increase in the use of strict liability when in fact what you were doing was codifying it, as you have now explained it to us. To that extent, I am quite comfortable with your explanation and I do not have any questions arising from it.

Mr Alderson—I mentioned that under the common law certain things would be read as strict or absolute liability even though lay persons often did not understand it. There was a paper, which was used for those purposes, prepared by the department explaining how those cases operated. Perhaps we could provide that to the committee.

Senator FERRIS—That would be very useful. How long ago was that done?

Mr Alderson—The paper was prepared at the end of 2000.

Senator FERRIS—That is a pity—I certainly was not aware of it on this committee. Were you, Chair?

CHAIR—No, not that I can remember.

Senator FERRIS—It would be very useful if we could include that as a submission perhaps.

Mr Alderson—Yes.

CHAIR—I think you have categorised them well. With regard to those offences where there are limited penalties—I think you said 110 penalty units are the maximum—is there any problem with making them civil penalties? I will tell you what I am getting at, and I would like your comments. We go from regulatory provisions to make sure you file your document on a particular day and, if you do not, you get fined for that as a reminder. It is a bit like a parking offence: if you do not pay your parking fine or if you leave your car there for too long, you get a reminder; that is part of the criminal law. But if you go right up to the issue of murder and terrorism, where you also have absolute liability and strict liability being referred to, it is right at the other end of the scale. A lot of the problems come about because people think, ‘This is all criminal activity,’ whereas, if you do not file your document, although it is something you should not do and you are breaking the law, it is not criminal in the sense that you are doing anything morally wrong. Have you read anything about this, done any research into it or had any thoughts about it?

Mr Alderson—We have, Senator. In fact, the choice between civil and criminal is one that we discuss at length with many Commonwealth agencies and it is often a difficult choice. The argument you make is often put forward and sometimes law enforcement agencies would be quite keen to say, ‘We don’t really want to put criminal sanctions on people; they should be dealt with in a civil way.’ The thing that trades off against that and can make it difficult depends in part on what civil remedy is available. On the one hand, what we would refer to as an administrative kind of penalty is where you have a licensing registration scheme such as the superannuation providers, and if there is some wrongdoing—late filing—you can vary registration conditions, you can revoke licences. The problem with that, as agencies often find, is that really those solutions end up seeming too draconian—a superannuation fund varying their conditions as some kind of penalty, or threatening to suspend a licence or whatever, can seem too draconian and affect too adversely their members. So that is one reason to hesitate.

The second is in terms of a due process criminal justice issue. The other type of civil penalty which appears, say, in the Corporations Law is where you say, ‘We approved this on the balance of probabilities.’ They pay a financial penalty if they are found guilty but it is not an offence—they are not convicted of an offence. But the reason that they are used only in limited situations is that, in effect, you are subjecting someone to a penalty that is like a fine but only on the balance of probabilities.

There are certainly cases where that is the desirable route to take and for corporate wrongdoing it often is appropriate. In other contexts, where a defendant is more likely to be an individual than a corporation, to say, ‘We are going to have to go to the balance of probabilities and then you are levied with a penalty,’ can work an injustice. That is the trade-off. The choice can often be a difficult one. There is an Australian Law Reform Commission inquiry into civil and administrative penalties at the moment—they may have a discussion paper coming out soon. They are certainly looking at those issues, too, which are very interesting.

CHAIR—A lot of the state parking fines, which are the ones I am most familiar with—

Senator FERRIS—I wonder why, Senator Cooney.

CHAIR—I wonder why. I think I have paid a few penalties. They have default notices.

Mr Alderson—That is another thing entirely.

CHAIR—It is in this area.

Mr Alderson—Yes.

CHAIR—We are trying to find that happy situation where we say that these are the sorts of things we have to keep giving you a reminder about so that you are not going to let your mind lapse and forget to do it. The best way of doing that is to add a penalty. People will say, ‘That’s it; I understand I have to do that.’ I do not like having a criminal conviction, even though it is going to make very little difference to your civil life. We all break the law, we have all driven more than 60 kilometres an hour, and we all know that. Nevertheless, there is that appellation to it. We have to try to get a system where people can be reminded and have their minds concentrated without leaving a smudge—it would be only a very slight smudge—on their reputation. If you have default notices together with civil penalties, you get over that problem. If you look at the default notice system, isn’t that a system that suggests we ought to go down the civil penalty trail?

Mr Alderson—That is another category altogether. The way it normally works in Commonwealth and state law is, where you have an infringement notice, it hangs off a criminal offence which could be prosecuted. In relation to that offence, the enforcing agency can issue a default notice and, if the person does not pay within 28 days, they can be prosecuted; if they do pay within 28 days, they have an immunity and cannot be prosecuted for that offence. That certainly is frequently used. The normal approach in almost all cases is to couple that with a criminal offence, so there is still a criminal offence there. One reason for that is that, if you couple a civil penalty with an infringement notice, it can be seen to be getting too far away from due process, that there are all these decisions being made by administrators and it is getting too far away from the traditional model of beyond reasonable doubt in a court. Certainly there would be times when that would be considered and I think there is one Commonwealth act that does couple civil penalties with infringement notices.

Your raising of infringement notices gives me an opportunity to raise an important point—this is another aspect of restricting liability and what we bring to the formulation of law. The one area where we will actually encourage the use of strict liability is where it is coupled with an infringement notice scheme. The rationale for that is that, if an administrator is issuing a notice, they can do that a lot more effectively if they are looking at the facts of the situation. It is a lot harder for an administrator to assess concepts such as intentional recklessness. So the usual approach, which is encouraged as a matter of criminal law policy, is that, if you want that kind of on-the-spot fine system, you back it up with a low penalty criminal offence and you make that offence strict liability—and that means that it is only appropriate where strict liability is appropriate, so it has to be something that is low penalty that someone should guard against, and so forth. Then, when the administrator is issuing the infringement notice, they have a more solid basis for their decision. It is: was the person speeding or weren’t they, and not whether the person in their car was looking at the dial and knowing whether they were over the speed limit. That is the approach that is normally taken.

CHAIR—I want to come back to the discretionary issue of infringement notices because I think that is a problem, but I would like to stick with this other issue for a while. I somehow feel

we have not got that magic concept that will let us impose strict liability in a way that makes us happy, particularly now, as you say, when we come to the terrorism offences. What you are saying is that, 'We have to do that to obtain jurisdiction and let the Commonwealth operate in this area'. Is that what you are saying?

Mr Alderson—Well—

CHAIR—I suppose that is not quite right. As long as the facts are that the United Nations official was assaulted in a grievous way that founds the Commonwealth jurisdiction, doesn't it?

Mr Alderson—The use of strict and absolute liability in terrorism, which obviously we will be coming back to in greater detail this afternoon, is really in two categories. The financing of terrorism bill is using it in a more narrow sense when talking about a technical element. The committee drew attention to one that is in the charter of the United Nations act; that is saying that you have to prove fault in relation to genuine culpability, which is that you knowingly pass money to somebody and you are aware that it is breaching a restraining order but that the strict liability attaches to whether you have been given permission under a notice under section 22. That is saying that a person is not going to know whether there is a section 22 and so forth. That use is in the narrower category.

The use that is in the main terrorism bill, where there are the four offences that apply absolute liability to the fact of the terrorist connection, is in the category where there is a government decision in terms of the consequences being so serious that people have to be put on guard and there is a heavy onus on those people to proceed with caution. The argument for that is not on the basis of it being a jurisdictional element; you are quite right, it is that other argument.

CHAIR—That brings the worry into play when you go from the parking offence to a murder. In both cases you are relying, to some extent at least, on strict liability and in some cases in the terrorist legislation absolute liability.

Mr Alderson—Yes, that is correct.

Senator MURRAY—My apologies for being late. Every time I think we are a First World country and I sit in an airport in fog, I realise we might not be. When I read through all these submissions I almost get to this kind of summary: that a strict liability offence says that if you do a certain action you are automatically going to be punished for it. It is the equivalent of getting a fine: you do something you should not do—it does not matter what your motive is, what your intent was, you should not have done it—and you get the fine. That is almost the sense that comes through, isn't it?

Mr Alderson—That is certainly part of the rationale. The major qualification I would put on that is the Criminal Code provisions work to encourage identification of strict or absolute liability for a particular element of the offence, and that is how it is often done.

So there will be many offences that use strict or absolute liability where a key element of the offence is that you do have to prove the person's fault—that they knew what they were doing or that they were reckless as to the situation—but then the strict or absolute liability only goes to a particular aspect. An example I gave earlier was the theft of Commonwealth property; the cul-

pability is in the act of theft, you prove fault. The fact that it is Commonwealth property is seen as a jurisdictional element; it does not make the conduct any more serious or affect the penalty that would apply. So strict or absolute liability applies to that. You are quite right that an important part of the rationale, especially where it is applied to an offence as a whole, is that this is something that people ought to guard against and that it is appropriate to have a penalty for inadvertent mistakes. But there are also cases where the reasoning is not that sweeping and is more targeted at considering each element of the offence separately.

Senator MURRAY—One of the things which makes fines work well is the widespread community acceptance of them: people know that if you overstay your parking time or if you speed—those are two common examples—then you will get a fine. They accept that. Although people do, of course, default on fine payments, by and large the community accepts that fines are a fair thing. One of the attachments, therefore, to the strict liability rationale, in the context that we have just been discussing it, is that the penalty will be relatively low. I sense though that there is an emerging possibility in some legislation for strict liability not only to be applied in the sense that we have just been discussing but also for the penalty to be high. Should one of the cut-off points really be that if you are going to move into a serious penalty situation, strict liability is simply inappropriate because it is only appropriate when you have a low penalty regime?

Mr Alderson—Certainly one of the tests that we apply in working with other Commonwealth agencies in developing proposals for the government is that low penalty test. By and large the case is a lot easier to make if it is a low penalty. The point you make about community acceptance is an important one because certainly one of the considerations is: is this something that someone can guard against? Knowing that there is a strict liability offence out there, can the person guard against being in this situation? Obviously the more that it is something that someone can guard against, the more that it can be said that it can have that deterrent effect as a strict liability offence.

In terms of more serious offences, the argument is twofold. Firstly, there are specific elements where you say, ‘Yes, okay, it is a serious offence. You should have to prove fault in relation to the substantive culpability.’ For example, in the case of the financing of terrorism the substantive culpability is that you knew this was a frozen asset and you still intentionally allowed the person to withdraw it from their account. Even though that is a serious offence, the specific element of whether there was a notice under section 22 authorising you to move the asset is something that does not go to the heart of your culpability. Having established those major elements, you should be on notice and take the care yourself as to whether you have an authorisation under section 22.

One of the most notable serious Commonwealth offences where there is a key use of strict liability is in the child sex tourism offence where it says that if you are an Australian overseas and you knowingly engage in sex with a person strict liability attaches to the fact that they are under 16. That is something that you ought to be sure of—that they are not under 16—before you proceed. So that is a case where the argument is put that even though this is a serious offence there is a discrete area of it.

In fact, child sex tourism probably falls into the second category where it is not so much a discrete area but one where you decide that, even though this is a serious offence, the conse-

quences are so dire that it is legitimate, even though it is a serious offence, to put the onus on the person to avoid that happening. The example I gave of child sex tourism is more in that second category—it is not so much a technical element but one where you are saying, ‘We view that it is appropriate to put the onus on the person.’

Senator MURRAY—ASIC have written a rather good submission and they clearly indicate that their preference, if they want to give an administrative penalty, is to have a strict liability provision automatically applied—if you did not do what you are supposed to do then bang, you are fined. However, if they want to go after you and give you a bit of pain then they go to the harder test of a no fault liability but with a higher penalty. I think that is a good principle but there is a real danger, if the matter is not well understood and the criteria not well established by persons such as yourselves—parliamentary draftspeople—that that boundary will be crossed.

I find the way the Law Council and Customs submissions have been presented very confusing—they are not really clear, but they seem to feel that that is happening to them. It seems to me that, where you have major powers, which persons in Customs, police officers and so on do, the issues of your identification matter enormously. That strict liability is probably quite an important provision—an automatic fine for failing to have the very thing that shows other people that you are who you say you are. I do not quarrel much with that, but there are other areas where it is the ease of process, the ease of administrative enforcement, which seems to be the criteria rather than the ethical application of law, if I could put it that way.

Mr Alderson—I think the Customs context is a good example of how that kind of issue plays out. Customs are coming along to talk to you later in the day and they can obviously better explain the way they work their specific provisions. There are a couple of things about the Customs provisions. The normal processes we apply were fully engaged in the development of the Customs legislation. There are benchmarks that are generally applied to Commonwealth law but then the mix of government policies may lead to a difficult outcome in a particular case. But this is a case where the pure criminal law policy is reflected in the Customs provisions. The offences that have a strict liability in the International Trade Organisation are, by the test we apply, low penalty offences in being 60 penalty units or lower, particularly where they are infringement notices. For reasons I was commenting on earlier, that is something that we consider desirable, so you are not having administrators trying to assess intention, recklessness and so forth.

The administrative convenience is really an issue. I guess governments face an incredibly difficult task. In, say, the import of cargo area, the volumes of trade in a modern economy are so enormous that the pressures to allow very quick movement of goods are very great so there are real challenges. We apply a more theoretical or principles based rationale in considering these—Customs are more at the coalface. We would say that the principle with these is that people do not have an absolute right to import or export—they are engaging in an activity that is regulated by government and has been for hundreds of years—and it is legitimate that, if people are to take advantage of a system that allows quick movement of goods, they be making an effort to make sure that their reports to Customs are accurate. There is a problem with large wealthy commercial firms—or even smaller ones—where they have competing pressures. Unless the incentives are right they may simply not put the effort into trying to get their cargo reports accurate.

So, really, making the system work to give them quick access but allowing those who are not making proper efforts to be brought within a sanctioning system can be an appropriate use of strict liability. Under those provisions, Customs have developed detailed guidelines as well so that, even with the powers that are there, there is a stepping back to have criteria about what would be an appropriate situation to put a fine on a company and so forth.

Senator MURRAY—I think the recognition that there is a review under way into administrative penalties, and our own inquiry now, indicates that there is unease that the criteria and principles were not established prior to the advent of quite major change. As you know, large numbers of bills have now gone through the Senate reinforcing the strict liability provisions. We have found the same thing, frankly, with the warrants issues—the search and entry provisions. In fact, I still think that the Senate report produced on that is the best exposition of the principles that should attach to search and entry that exists. There have been no equivalent developments, as far as I am aware, from your department, which is a shame. If it has happened, I will be pleased.

I talk like that because I want to go back to the public acceptance issue. One of the reasons that the application of fines which are generally applied throughout the community is well-established and well-accepted is that the principles of the application of those fines is common, whether it is state or Commonwealth—and typically of traffic offences; that is really the best example of that. Here we have a short but quite definite submission—I think that is the way to describe it—from the Hon. Rod Welford, the Attorney-General and Minister for Justice for the Queensland government, who is quite adamant that absolute or strict liability offences should be avoided. Have you sighted this?

Mr Alderson—I am afraid I haven't.

Senator MURRAY—I will read the last paragraph:

In relation to your specific questions, the use of absolute or strict liability should only be used where the interests of the public must be paramount.

I suppose traffic, health and stuff like that.

Such occasions should, and would, be relatively rare. I would warn the Committee of the danger of seeking to erode fundamental concepts of criminal responsibility—

As you know, those are the intent provisions.

concepts that have served this State well for over 100 years, to achieve ease of prosecution of particular offences. Jurisdictions where offences of absolute or strict liability are relatively rare generally have little problem in bringing proper proof to court.

The view is that they are not taken to court because it is very difficult to achieve, and so on. My real question to you is: isn't it very important that the principles which surround the fundamental establishment of law, which have been developed through the Criminal Code and which have been discussed, apparently, with the attorneys-general of all the states, should be accepted? It seems to me that that Criminal Code determination, which I understood was agreed in COAG, is not actually agreed on by one of the participants.

Mr Alderson—I would suspect that there may be more strict and absolute liability in Queensland law than the Queensland Attorney-General is aware of, in that Queensland still operates on the common law system—there was some discussion of this earlier. There is a series of principles, and I have undertaken to provide our paper on this to the committee, where the common law will read in strict or absolute liability and it is just that, when that legislation is enacted, those not familiar with the legal principles would not be as aware of that. The argument for the Commonwealth's approach is that it has made it very explicit: you now have to state openly, in black and white, when you are applying strict and absolute liability.

Senator MURRAY—Isn't the COAG agreement that the states should do the same?

Mr Alderson—I am not sure—

Senator MURRAY—Surely, if the Criminal Code has been agreed by them all, and if it has been agreed within that—it is my understanding—that it is not apparent as to whether something is strict or absolute liability or no fault liability, it should be expressly determined in that way.

Mr Alderson—I am not aware of that. There certainly are a whole range of Commonwealth-state agreements through the Standing Committee of Attorneys-General and through the recent leaders summit relating to criminal law issues and national approaches. I am not aware of that one but perhaps the best thing is for me—

Senator MURRAY—The Criminal Code was agreed between all the Attorney-Generals, wasn't it—the changes? Or have I got that wrong?

Mr Alderson—No, there has been a commitment to the Criminal Code process and to the development of proposals but the states and territories have not signed off on the model criminal code or the Commonwealth Criminal Code in its entirety.

Senator MURRAY—So there is no common Attorney-Generals' approval of this aspect of the law?

Mr Alderson—No.

Senator MURRAY—That does put a new light on things for me.

CHAIR—Senator Crane, do you have anything further?

Senator CRANE—I have a number of further questions which I will put on notice, but I do have a couple that I would like to put on the record. Do we have time to deal with those now?

CHAIR—Go ahead.

Senator CRANE—My first question is a follow-up to my earlier questions and also to the question that Senator Murray asked, in terms of the application of strict liability. I refer to the enforcement of fishing regulations; there is now cross-jurisdiction between the states and the

Commonwealth. Also, in recent times Customs has got involved in the enforcement of fishing regulations. It seems to me that there is enormous potential for conflict in this three-way exercise—between two departments and between the Commonwealth and the states. What is occurring? What direction is being taken with respect to dealing with cross-jurisdiction matters? Following on from Senator Murray's question, it seems to me that it would be better if we were all operating under the one code in terms of strict liability, which we are not doing at present. Can you comment on that or would you like to take it on notice?

Mr Alderson—I can comment on that, Senator. The Commonwealth has made consistent efforts over a number of years to assist and encourage the states to move towards a more uniform approach both for substantive criminal offences and for criminal procedure. So the process with the model criminal code is that the Commonwealth, states and territories are not bound by each model criminal code report, but then there is discussion of that and in a number of instances on specific sets of recommendations—say, the computer offences—there has been agreement about implementing those.

The Commonwealth, through its active participation in the model criminal code process, has really worked hard to try to pursue that. That has been given real impetus out of the leaders summit last month, where there was discussion about progressing uniform national approaches for both criminal offences and criminal investigation between the Commonwealth, states and territories in a number of key areas. So the desirability of national approaches, of consistent approaches, and of avoiding unnecessary contradictions and complications is something that the Commonwealth and this government have put a lot of effort into. Obviously, in a federal system, it is a very time consuming process. There is always a lot of work with the states and territories and there are always particular areas where some states and territories will need a lot of persuading to adopt a national approach.

Senator CRANE—The problem with this is that in different situations you will have similar offences, or the same offence even, being treated quite differently under law. That to me is a situation which should not be allowed to continue.

Mr Alderson—The government's approach across a whole range of areas is in line with the sentiment you are expressing, subject to the workings of our federal system. Unlike the framers of the Canadian constitution, the framers of our Constitution did not feel it appropriate to give the Commonwealth express power over criminal law.

Senator CRANE—We all understand that and that is history—but in my view it avoids the point I am trying to raise. My next question goes back to strict liability and the very first question I asked—I do not think you were here then, Andrew. You said that there seems to have been an enormous increase in the last six years, that we have evolved a system and, put simply, 'It is now transparent or much more transparent.' I question that, and I would like to know whether you have any research to demonstrate that this is fact and that there has not been an increase in the use of strict liability?

It seems to me—and I have not recorded things—that in the last couple of years in particular we have had a flood of strict liability offences coming through a whole range of legislation, much of it in my view most inappropriate. Has any research been done, or is there any informa-

tion we could obtain to put on the public record, to demonstrate what has occurred in terms of the application of strict liability now that it is much more transparent?

Mr Alderson—There are no statistics on measuring an exact or absolute increase in the use of strict and absolute liability. Obviously, the number of Commonwealth offences that are enacted would make that extremely difficult. What I am saying is not that—

Senator CRANE—That means that your statement earlier that there has not been an increase, and that the process has been made much more transparent, is off the top of your head. In fact, you cannot demonstrate that to me, no more than I can prove that your statement is wrong.

Mr Alderson—It is correct, Senator, that I cannot say there has been no increase. The point I was making is that in my assessment, in large part, the reason that these kinds of issues have come to the fore and attracted the attention of the committee is that an apparent increase is much larger than any actual increase. The evidence I point to is the number of offences in, I think, the 19 harmonisation bills. I would suspect that in those harmonisation bills there was probably over 1,000 offences to which strict or absolute liability was attached to some element or another. In each of those cases that was something that already existed on the Commonwealth statute book but had not, by and large, attracted attention before that.

I agree with you that there is no precise scientific measure as to whether there has been an increase in use or not, but that there has certainly been an enormous number of existing uses of strict and absolute liability that existed beforehand that just were not evident before this process of making it transparent under the code.

Senator CRANE—Like Senator Ferris, I am reasonably across the issue of harmonisation. But to separate that away for a moment, I suspect that there has been a significant increase. Unfortunately, I have come to the conclusion that that has occurred in many instances—not in all instances, obviously, but in many instances. If we go through some of the legislation in the industry in which I am personally involved in a commercial way—farming, agriculture, pastoral activity, land care—there has been an enormous increase, as a matter of convenience, in terms of dealing with these matters. It has removed the rights of people who are often working in very difficult circumstances and they are certainly not people who are, if you like, practising petty criminals. But they are people who make genuine mistakes because of a whole raft of laws and things that they now have to deal with—the technical side—when in fact they are very practical, hardworking operators. I will leave it at that. I do have some other questions but I think we have run out of time. I will put those on notice through the secretary.

CHAIR—We will have to get Mr Alderson and Mr Nolan back at some stage.

Mr Alderson—Certainly.

CHAIR—The only other matter I would like you to look at is the issue you raised about sexual offences against people under 18—or 16 or whatever it is now. That might be an area that involves the strict liability issue. The only other case I can remember of terrorist-like offences, or treason, is the Lord Haw-Haw case. Remember that? Was it Joyce—in about 1945?

Mr Alderson—Yes.

CHAIR—I think that depended on whether or not he had a passport. That is one of those things where it said, ‘It was a British passport; therefore that’s that.’ Do you mind having a look at that sort of thing to see whether there is some background in the law which in effect is a strict liability approach?

Mr Alderson—Certainly, Senator. In terms of whether you can make a precise measure of the use of strict and absolute liability, from this year on—now that harmonisation is out of the way—I think it will be feasible to do such a calculation. I think that the way the legal databases are set up is such that, from this year on, you can do a search of the number of times the terms ‘strict liability’ and ‘absolute liability’ are used each year.

Senator MURRAY—I would add one last thing which you might think about. It seems to me that the development of this side of law may be an automatic consequence of the withdrawal of regulatory agencies from regular policing; they do selective and targeted policing. Therefore, you do not have self-regulation; you actually require people to police themselves under the law—Customs or corporations or whatever—and if they do not, there is an automatic consequence. That seems to be affecting the application of some of these principles.

Mr Alderson—Certainly. I guess some of the regulatory agencies that you will be talking to will be better placed to comment on how this is fitting in with their regulatory strategies.

CHAIR—The changing community standards might be worth looking at, too, especially on the issue of rape. Do you remember the evidence that you can lead, depending on what jurisdiction you are in, against the prosecutrix? That has changed a bit, hasn’t it? There has been a different attitude to sexual offences, I think.

Mr Alderson—Yes, I think that is fair to say.

CHAIR—Would it be too much trouble to look that up and see what community standards have done in that area?

Mr Alderson—Community standards as reflected in the law?

CHAIR—Yes, that is what I mean—the sort of thing that Senator Murray was asking about. Thank you, Mr Alderson and Mr Nolan, for coming along.

[10.19 a.m.]

BROWN, Mr Roger Heath Charles, Senior Manager, Rehabilitation and Enforcement (SW), Australian Prudential Regulation Authority

CHAIR—Welcome. This is starting to become an interesting topic: the Australian Law Reform Commission is doing something on it and we are doing something on it. I am sure you will elucidate the facts for us this morning.

Mr Brown—I will endeavour to. APRA's role, as you would be familiar with, is the prudential regulation of authorised deposit-taking institutions, insurance companies and superannuation funds. In regulating these financial institutions I could thumbnail APRA's fundamental objective as making sure that in all foreseeable circumstances the institutions meet the financial promises that they are making to their customers or policy holders. To do that requires that we rely heavily on the board and management of those institutions. We rely on external scrutiny from auditors and, where appropriate, actuaries as well as relying on periodic review by APRA. For APRA to have a credible role in ensuring that institutions are soundly run wherever possible we need to have a credible enforcement capacity. It had been the case, in APRA's predecessor institutions, that that credible enforcement capacity was lacking.

This was particularly evident in superannuation, where at that time we were regulating in the order of 180,000 funds. This has since grown to about 205,000 funds, most of which are very small. There were so many players in the industry that there was not the capacity for effective enforcement. Where we became aware of instances of, in my view, profound breaches of the law—to the point that we recommended to the DPP that prosecution take place—the advice we received was that the behaviour could not reasonably be proven on a fault liability basis. In particular, in the instances we were concerned about, we were dealing with acts of omission by people holding themselves out as professionals in that industry and looking after other people's money.

There were amendments to the Superannuation Industry (Supervision) Act which came into effect, from my recollection, on 24 January 2001. There have also been some amendments to the Insurance Act. Both of these sets of amendments have introduced strict liability offence provisions by converting some things which were previously fault liability. They also introduced a range of two-tier offence provisions as well as some other enforcement tools such as the capacity for APRA to accept enforceable undertakings and to disqualify people on our own initiative if they had either systematically breached provisions of the superannuation legislation or they were otherwise not a fit and proper person.

Our experience to this point has been that our direct use of those strict liability offence provisions has been very limited. But the assistance they have provided to us in creating a climate where people are much more willing to rectify significant deficiencies in the institutions that they are managing has been very great. I will leave that as an opening statement and offer the opportunity for the committee to ask any questions.

Senator CRANE—I would like to take you to the last page of your submission where you list issues and then come to your conclusion. I will deal with the conclusion first. That conclusion is very much through the eyes of what is required for APRA and for APRA legislation to be enforceable. I understand why you would be putting that view forward and where you are coming from, but I would like to ask you about the broader question because the principles behind strict liability and the various forms under which offences are dealt with, or the prosecution process by which they are dealt with, is a question which I think we have all got to apply ourselves to. My question is: would you apply across the board the arguments that you have put as far as APRA and its operations are concerned, which are fundamentally dealing with company situations, or would you modify those as they apply to individuals and the community at large?

Mr Brown—In my view the appropriate test was commented on here earlier this morning, and it is a public interest test and a balance of public interest. I certainly could not speak for legislative provisions which apply to other agencies, so when you are talking about the application of offence provisions to companies I am presuming that you are talking in the sense of companies operating within the financial sector as regulated by APRA.

Senator CRANE—Yes, that is what I am referring to there, but I enlarged that to the broader community question. Dealing with companies, their responsibilities and how the law is applied to them as companies is one thing. How the law is applied to the broader community—you and I as citizens in the community—is another thing. I would have thought that in the broader context it would have been important to differentiate between the two.

Mr Brown—In our experience, to differentiate between a corporate entity and an individual has the potential to expose other people's money to significant risk. Particularly in superannuation there is an easy capacity for people to operate in the industry in an individual capacity rather than a corporate one. The equal representation model of trustee boards, where you have individuals elected to those boards representing, in equal proportion, employer sponsors and members of the funds, is one example. Auditors operate in an individual capacity in signing off accounts. So in those regards there is a significant onus on people, in accepting those roles, to be exercising good faith, due care and diligence. If there is a regulator seeking to protect the interests of super fund members or insurance policy holders we need to prove in respect of individuals—

Senator CRANE—I am sorry, I had to stop a phone ringing here. Can I follow up with a second question. When you go up the issues you say:

In moving to a regime of strict liability under APRA-administrative legislation, there is a misunderstanding that offences identified as attracting strict liability will lead to a reversal in the onus of proof.

I then find your next paragraph somewhat contradictory because you say:

As the burden of proof on a defendant is an evidential burden, the defendant will only have to point to evidence that suggests a reasonable possibility that the defence applies. This is a considerably lower standard of proof than for the prosecution.

But, nonetheless, is that not the reversal of the onus of proof?

Mr Brown—In our view no, Senator. As we say in the submission, the onus is still on the Director of Public Prosecutions on behalf of APRA to bring the evidence of an actual contravention of the act. We have got to prove the facts of the offence. If then, once that has been proven, the defendant is wishing to bring forward one of the statutory defences, yes, they do have to bring forward evidence to support that claim, but, as we say in the submission, that is at a significantly lower standard of demonstration. So the onus of proof to demonstrate the offence has not been reversed, in our view—it remains firmly on the regulator.

Senator CRANE—I would beg to differ with you on that. One of the things that our committee often expresses a very strong view against is a reversal of the onus of proof. I will leave it at that, Mr Chair.

Senator MURRAY—Mr Brown, I move through steps when I am thinking of a regulator such as yourself. The community of interest that you regulate is so large that you cannot possibly effectively police every entity. The consequence is that you do not leave it to self-regulation; you apply law and if they are found not to have complied, there is an automatic penalty, which is true of a strict liability regime. It is like traffic offences: the police cannot possibly follow every car around all day, but if they catch you speeding you are done. Moving on from that step, you have clearly identified in your submission the two-tier approach. I want to ask you more about the two-stream approach, which relates somewhat to a question that Senator Crane asked, and it is an issue I have been pursuing with my colleagues. It is my belief that it is proper, and it is apparent in law, for different liabilities and different onuses to be on corporations as opposed to individuals. In Corporations Law there are, as you know, very major fines—up to \$10 million—for corporations which do not apply to individuals.

My question is this: should there be a number of steps up in terms of the automatic provision of strict liability when it relates to an individual's conduct within a corporation and where the consequence for that is met by the corporation—a monetary penalty, for instance. For an individual who earns, say, \$30,000 or \$40,000 and is fined \$500, that is a big hit. But if they work for a large corporation and the corporation pays it, it just does not matter. It is an administrative penalty; it is a little blip on the bottom line. You have not developed in your legislation, as I understand it, the two-stream approach to strict liability penalties.

Mr Brown—Senator, I am not sure that I understand your question.

Senator MURRAY—If you are going to apply a strict liability offence automatically, which has a monetary consequence—the equivalent to a fine—do you think it is appropriate for the same fine to be applied to a person acting in an individual capacity—for instance, a very small business such as an accountant, an auditor or a customs broker—as opposed to a large corporation?

Mr Brown—If we have a corporation which has committed an offence through the agency of its responsible officers, we would expect in the first instance to recommend prosecution of the corporation. If it appeared that the individual had a special culpability, then we would seek to target the individual as well. In the circumstance where the prosecution is against the corporation, of course there is the uplift factor that is applied to pecuniary penalties.

Senator MURRAY—But is it significant enough to distinguish between a small business—which is 20 employees and under by the ABS definition—and one with perhaps thousands of employees?

Mr Brown—It is an issue which we have not turned our minds to.

Senator MURRAY—Isn't it an issue that should be addressed? As I understand some of the argument about strict liability—and we discussed it earlier with the Attorney-General's Department—it is an accepted automatic infringement in return for a lower penalty. I have no objection to that same principle applying to a corporation, because that would be consistent, but the monitoring impact upon a corporation of any size can be meaningless. The Corporations Law has specifically recognised that and their uplift factor is very substantial. When you can go all the way up to \$10 million even a very large corporation takes note. I just wonder why that has not been thought through.

Mr Brown—I would think for two reasons. One is that our practice has not been one of using the prosecutorial powers available to us, in significant part because, in our view, useable prosecutorial powers have been available only for a very short period of time. But I think the other factor is perhaps more significant. When we are dealing with large entities in the finance sector, a large part of their value resides in their brand name. If they are seen as being in conflict with their prudential regulator, which goes to questions about their management and the safety of their customers' funds, then damage to their brand name arising from prosecution and conviction is likely to outweigh many monetary penalties.

Senator MURRAY—I do not have an example of your legislation in my possession which indicates the level of penalties that apply. I know a penalty unit is \$110. But I would think, typically, you have some fairly low penalty regimes.

Mr Brown—Yes, they are. Typically in the superannuation legislation, we are talking about 50 penalty units for a strict liability provision.

Senator MURRAY—Close to \$6,000?

Mr Brown—Yes.

Senator MURRAY—Taking your argument forward, frankly, in my view, the brand name is never going to be affected for anyone who receives just a \$6,000 fine.

Mr Brown—The fine is not going to be potentially damaging to the brand name. If the behaviour was such that we had serious concerns about a significant corporate entity in the insurance or superannuation regimes, I would think it highly unlikely that we would be proceeding on the basis of simply strict liability offences. In other words, we would be expecting that we would be able to demonstrate culpability and we would be looking at other offence provisions within the legislation.

Senator MURRAY—There is a view in the submissions—a view held by some legislators—that strict liability provisions are useful as a convenient, effective, workable administrative deterrent, that things that people do which would be difficult to prove on intent grounds and

take through the expense of a court case are much easier worked through through an automatic system. If you were to go through that as a regime, then you need to look at whether the deterrent is effective. I am quite certain that your penalty regime is impactful on an individual—\$6,000 is a lot of money for any person—but I cannot see that it would hit a corporation even when there is an uplift factor. It is another set of principles, if you like, or assessment, which seems to me to have not been fully thought through yet.

Mr Brown—I would accept it as something which we would quite happily take on notice in our work on policy development in areas of enforcement harmonisation. I would point out just a couple of instances where there is a gloss, I think, which should be put on your comments. As one illustration with regard to superannuation, in a number of instances we have approved trustees who operate for a very large number of small superannuation funds. If we take as an example the lodgment of annual returns—which was previously seen as somewhat voluntary in the superannuation industry—an approved trustee may act for perhaps 5,000 small funds. If they were entirely reckless in terms of lodging annual returns, the potential penalty would be significantly greater. With respect to some of the other offence provisions—for example, operating a business of insurance without being an authorised insurer—the offence can occur on a daily basis, and that of itself can provide a significant uplift factor and penalties. However, I think that the general premise that you raise is certainly one that we will feed into our policy development work.

Senator MURRAY—One of the other reasons I raised it with you is that, as a regulatory authority, you are relatively new and your experience, or your book of events, is still developing under your legislation. So you cannot yet, I would have thought, be sure of the effectiveness of your deterrent regime in all its varieties.

Mr Brown—Certainly we cannot. We have seen some things which we see as most promising straws in the wind, but we certainly could not make definitive statements about it at the moment.

CHAIR—From what you have told Senator Crane and Senator Murray, I gather that you need several tools to use in particular circumstances. So if it is just a reminder—somebody has innocently forgotten to return a form or to do something—a \$500 penalty would be enough to shake them into doing the job they are supposed to do, whereas others might be reluctant to do it. So do you have stronger penalties and take stronger action depending on whether it is just an oversight, whether it is done deliberately, whether it is done with some malice or whether it is a very bad action indeed? Are they the sorts of things that you take into account in deciding what to do?

Mr Brown—Yes. As a starting point, before we contemplate formal enforcement action, we will always write to people and remind them. I mentioned earlier that the lodgment of superannuation annual returns had been very poor. The provision of information to the regulator is essential so that we can have data on which to risk rate the various funds. In October 2000 there was a lodgment date of 31 October. Only 17 per cent of all funds had their returns lodged on time. In 2001, the corresponding figure was 71 per cent. What was different was the introduction of the strict liability offence provisions and APRA indicating within the industry that we were willing and able to use those provisions.

We have since identified a sample of 83 superannuation funds which had failed to lodge returns over some years but which had been lodging tax returns and claiming tax deductions. We wrote to each one of those and said, 'Could you please tell us why we should not refer your fund and you as trustee to the Director of Public Prosecutions?' We got quite a good response. In fact, out of that 83, 70 responded to us, having had no contact with the regulator for some years. They demonstrated to us that they had been wound up or they completed their obligations in lodging returns. Thirteen of the funds have been referred to the DPP and we anticipate prosecution.

So we took the tool, which in this instance was the creation of a strict liability offence provision. The way in which we used it was publicly within the industry and, in what we consider was a very measured way, we then went out to those which still remain recalcitrant. We will now follow through for those which persist in recalcitrance and actually seek those prosecutions. That is the way in which we have used the tool.

The tool has been used in other ways. Because of the effect that the potential for prosecution has on focusing a person's mind, we have secured a number of enforceable undertakings from trustees of superannuation funds and people associated with them to do significant rectification in a fund, which includes putting money into the fund. We see this as being a better outcome, given the prime focus on the member there ahead of going to court and securing a small fine which will go into consolidated revenue.

CHAIR—The ones you have sent to the DPP are potentially serious offences in any event and they will be proved by the DPP in the usual way?

Mr Brown—We certainly trust that they will be proved by the DPP in the usual way. In terms of seriousness, we have a pattern of behaviour, although the offence with which the people will be charged will relate only to one year's annual return not being lodged, because in prior years the fault liability provision obtained and our advice from DPP had been that it was virtually impossible to prove a reckless or deliberate failure to lodge a return in the absence of a confession.

Senator MURRAY—There is a possible view I would leave with you, but I cannot think it applies in your case. It is that if we follow the two streams approach, individuals who do not act in a corporate or fiduciary capacity should not be subject to the strict liability that those who do operate in a fiduciary or corporate capacity should. Should those who have greater resources or greater obligations under the law have the stricter application applied to them? I have not sorted that out in my own mind yet, but I cannot see it would apply in your circumstances.

Mr Brown—Casting my mind briefly over our industry, Senator, I would think that in each instance covered by the law the people we deal with would be acting in either a corporate or a fiduciary context.

Senator MURRAY—Yes, that is what I thought. Thank you, Mr Brown.

CHAIR—Thank you.

[10.49 a.m.]

DUNN, Lieutenant Colonel John Andrew Talbot, Director, Military Justice, Department of Defence

WESTWOOD, Colonel Ian Denis, Chief Judge Advocate, Department of Defence

CHAIR—Welcome. Do you have any comments before we start questioning?

Col. Westwood—Mr Chairman, perhaps I could indicate our respective areas of responsibility and expertise. Colonel Dunn is the director in charge of the policy matters that go to the particular amendments that were made to harmonise with the Criminal Code. My line of work is to sit as a judge advocate at courts martial and as a Defence Force Magistrate. I am here in case I can be of some assistance with the practical application of the legislation as it was and how I would envisage the legislation being applied post the harmonisation amendments.

CHAIR—Thanks very much. You are going to go first, by the sound of things, Colonel Dunn?

Lt Col. Dunn—No, Chairman. You have read our submission and we do not propose to go through that again. We are really here to answer your questions on that.

Senator MURRAY—Colonel Dunn, thank you for your submission, it was very helpful. I am interested in this six-month rule. Right through the country now, states have followed the Commonwealth in doing away with three-month imprisonment: pretty well, you do not go to jail unless it is a six-month minimum. I have always thought, as anybody who has ever spent an hour in a jail would know, that the leap from three to six months was amazingly heavy. You indicate a view, which is expressed elsewhere by other authorities, that below six months is a less onerous and more minor penalty regime than above six months, even if it is the financial equivalent. But you say on page 3 in your submission:

Defence is, however, of the view that the six-month rule should not be applied inflexibly.

You go on:

Consequently, strict and absolute liability continues to apply to some offences or elements of offences within Defence portfolio legislation whose penalties exceed the benchmark six months imprisonment. These offences and their strict and absolute liability elements relate to the maintenance of service discipline and therefore to the ADF's operational effectiveness. These offences include assault on an inferior or on a superior officer ... low flying ... failure to comply with general orders ... and failure to comply with a direction of a person in command.

I would have thought that in criminal law precedence in the civilian community you would very definitely want intent to be part of the prosecution case that has to be made with regard to those instances. Certainly assault could range from just an altercation—the kind of thing that goes on between people—all the way through to insubordination, which is an entirely different affair. A sergeant punching a corporal in a pub is different to a battlefield punch, I would have thought. I

am interested in your acceptance that strict liability should apply to offences that can have a very serious imprisonment situation.

Lt Col. Dunn—Senator, to go back to the issue of the six-month benchmark, I understand that was a benchmark set by Attorney-General's on advice, so we followed that advice. Even the DFDA, under the old system of offences, had punishments of more than six months for offences that were interpreted as strict liability offences. The distinction generally is that strict liability offences apply to the disciplinary or the regulatory types of offences, such as absence without leave, disobeying a lawful command. The criminal type offences—in other words, offences that have a criminal civilian equivalent, such as assaults—are not strict liability. It may be a bit misleading here. But in the elements of 'assault on an inferior' or 'assault on a superior', the assault, the conduct, is not strict liability—that has to be proved; it is the fact that the person was a superior or an inferior officer that is only that element of that offence that the strict liability applies to. In a number of our offences, strict liability applies to only certain elements of the offence. Generally speaking, where it is a criminal offence or has a civilian equivalent, the same practice as applies in the civilian community applies here. So, for example, with assault we have to prove that the conduct was intentional.

Senator MURRAY—But you regard it as a simple fact as to whether someone is a sergeant or a lieutenant.

Lt Col. Dunn—Yes. And to safeguard the accused person we have a statutory defence that the person did not know or could not reasonably have known that the person was a superior. I will use your case where a sergeant and a corporal are having a drink in a pub. They do not know each other because they are not from the same unit, and the corporal assaults the sergeant. He may not know that the person is a superior officer; therefore, common assault might apply, not assault on a superior. Obviously, assault on a superior has a higher penalty, because it is more serious to assault your superior or your subordinate.

Senator MURRAY—Please explain to me 'failure to comply with general orders' in the same way as you have just outlined.

Lt Col. Dunn—General orders cover a range of aspects—instructions or directions as opposed to a command. If I order you to do something and you do not do it, that is disobeying a lawful command, but there may be general orders about doing things—getting up at 6 o'clock in the morning, standing orders—ranging from very simple matters to sometimes serious matters. Generally it is regulatory-type matters, and if you fail to comply with that, that is a disciplinary type offence; if you are late for parade, for example.

Senator MURRAY—So it is the equivalent of a fine—in the same way as a fine is applied automatically if you do something wrong.

Lt Col. Dunn—It could range from wartime, when it would be more serious, hence there is the provision for imprisonment.

Senator MURRAY—But you distinguish between the seriousness.

Lt Col. Dunn—It is a scale, yes. When it dealt with at the commanding officer level, he cannot award imprisonment. It would generally be dealt with by a fine or some lower penalty, such as restriction of privileges, stoppage of leave—those internal disciplinary type penalties that we have for disciplinary offences

Senator MURRAY—I think yours is one of the departments where changes have been made to the law. I think they have gone through the Senate already. What effect has that had? Has it cleaned up the act in terms of making it far clearer where there were areas of greyness? Have you introduced any new strict liability offences?

Lt Col. Dunn—Yes, it has made it clearer, because a number of our offences, particularly disciplinary ones, were strict liability and they have been interpreted that way, even under the old military law system we used to apply in the last 100 years. By specifying an offence, or elements of the offence, as strict liability, it makes it much clearer—bearing in mind that most of our disciplinary offences are managed by non-lawyers. The commanding officer is in charge, and the prosecutor and defending officer at the lower level are not lawyers. By deconstructing offences into elements, it has made it a lot easier, so that the prosecution and the defence know what has to be proved in relation to a specific charge. It has caused some problems for lawyers, changing over from the old system, but for non-lawyers it makes it very clear. We have chapters, we put out guidelines, where we deconstruct offences—

Senator MURRAY—So there is much more certainty.

Lt Col. Dunn—Yes, much more certainty—

Senator MURRAY—And much more clarity in the defence community.

Lt Col. Dunn—Yes. We attempted to harmonise, as far as possible. Offences which had been interpreted as strict liability over the years remain strict liability. One offence which we did make strict liability where it was not always strict liability is the offence of prejudicial behaviour. It is a sort of catch-all article that has a punishment of three months imprisonment. It is an offence where people do things which bring discredit upon the Defence Force or which affect discipline of the Defence Force. Generally they are minor matters. They could be more serious matters, particularly in operational settings, but generally they are minor matters that are dealt with by COs. That offence sometimes has intent and sometimes it does not. To make it clear, that was introduced as a strict liability offence but with a defence of reasonable excuse specifically placed into the offence to make it clear that if the person had a reasonable excuse—

Senator MURRAY—If I take one of these offences, I will assume that assault was relatively common. Given the large number of people that you have and how many of them are young, I would assume that assault is relatively common as an offence, and by relatively I mean relative to other offences. Have you noticed or recorded in any way whether, prior to the new regime coming in which makes it far clearer which elements are strict liability, the number of convictions, if I can use that term, has increased? Has the application of the law become sterner or more apparent? Are there more people being nailed under that provision?

Col. Westwood—I think it is fair to say that the statistical results which flow through have not yet encapsulated post Criminal Code amendments. We were looking at an amendment with

effect from 15 December last year; it was the block leave period, of course, so there has been little scope for offenders to participate under the new regime. On the example of assault that you mentioned, I would just confirm that the post Criminal Code amendments did not make the wrongdoing in the assault a matter of strict liability; it retained its common law fault elements of requiring that the accused acted intentionally or recklessly. It was only in relation to two of the offences that the status of the alleged victim was a matter of strict liability subject to the accused being able to establish, on the balance of probabilities, that he did not know and could not reasonably have been expected to know.

Senator MURRAY—My apologies; you had made that clear earlier and I probably should not have used that example. Will you be watching the statistics to see if there is a lift?

Col. Westwood—Certainly we will be watching to see if there are any problems with it but, for the reasons that Lieutenant Colonel Dunn has advanced to you, I think it has made the position so much clearer that, in relation to the summary matters, I would expect there to be far fewer problems than there were previously.

Senator MURRAY—Let me explain to you why I am asking the question this way. When we were addressing Mr Brown—you might have heard his evidence—we heard that imposing strict liability provisions has resulted in a greater enforcement of the requirements under the law. He gave that good example of I think 13 per cent compliance lifting to 71 per cent compliance. In your case, if the number of offences under a particular area had moved from 13 to 71 per cent then I would become concerned because to me it would mean that people were starting to use the law or the changed circumstances improperly. So really the question to you is whether you are alert to that danger and whether you will be monitoring the change to see if there is that side effect.

Col. Westwood—We will be monitoring it, and there is an annual report to the parliament that gives statistical figures by offence, so it would be readily apparent to the parliament if there were some enormous increase in convictions for particular offences. With the narrow exception of the general article, which has been changed, and another one of ordering into arrest, which hardly ever arises in practical circumstances, the rest really were a matter of pure harmonisation and I would be very surprised if any change occurred. The strict liability aspects of those do not go to the wrongdoing, in most cases; they go to an element of circumstance which the Criminal Code would have applied a default element of recklessness to but where, under established military law, it was simply an unexplained failure on the part of the accused that constituted guilt.

Senator MURRAY—You would be aware that, from our side of the table, we are sensitive to the thought that giving greater powers can result in a greater abuse of powers. From your perspective, I would expect that you would have that same sensitivity and that, if you have received greater powers, you would be alert to the potential for greater abuse, human nature being what it is. I think I can leave it there. I think we understand each other.

Col. Westwood—I could say to you, in general terms, that it would be counterproductive to military justice for the system to be abused. It is a disciplinary system and not a criminal one. If members of the Defence Force were being convicted for things where there was not a notion of

proper blameworthiness, this would undermine the disciplinary system as opposed to enforcing it. There needs to be a confidence across all levels that the system is fair in military terms.

Senator MURRAY—It is what I call ‘community acceptance’. We accept speeding fines; they need to accept that the automatic infringement is warranted.

Lt Col. Dunn—Even our summary levels, which do not have lawyers, are all subject to automatic review by a lawyer, a legal officer, and another superior authority. So any matters that have been dealt with go before a legal officer to review, to make sure they are correct in law. There are legal officers in various offices like Townsville or Darwin. He or she would pick up the changes that may be occurring for offences, if there are any changes. As Colonel Westwood said, it was pure harmonisation. Most of the offences were interpreted to be strict liability, in the past anyway—the disciplinary ones as opposed to the criminal.

CHAIR—Senator Crane, do you have questions?

Senator CRANE—Yes, thank you. First of all, let me say that I find your submission excellent. On page 2 in the paragraph at the top of the page you say:

On the other hand, Defence applied the policy produced by the Attorney-General’s Department ... when identifying offences and elements of offences as being ones of strict or absolute liability for the purpose of later specification in the Bill.’

In your general application of the Attorney-General’s Department guidelines, do you follow those strictly or just indicatively?

Lt Col. Dunn—The six-month benchmark was obviously imposed upon us. In fact, if we had an offence with a punishment greater than six months, we had to go to the Prime Minister to get approval for it. We did not follow that strictly because we obviously have some offences that have more than six months imprisonment. These offences were already in existence with set penalties and were being interpreted to strict liability anyway, and we were harmonising those offences in accordance with the policy. The six-month benchmark was the main guideline that was followed, but obviously we looked at the penalty of the offence, the subject covered and all those other aspects in deciding whether an offence should be strict liability and whether in fact in the past it had been interpreted as strict liability.

Senator CRANE—My question is broader than that. We were told earlier today by representatives from the Attorney-General’s Department that these guidelines were produced in recent times—I think they started preparation six years ago—with the suggestion that they now be utilised as a general principle. My question is broader than the answer you have just given. If it was new legislation or legislation done in recent times, how strictly do you apply those guidelines in the formation of legislation.

Lt Col. Dunn—It was not new legislation for us; it has been in existence since 1985.

Senator CRANE—To define it even more: if you have legislation, which no doubt you will have—Defence legislation comes before us fairly regularly, and it is being developed through the minister—how strictly do you apply those guidelines in the formation of new legislation?

Col. Westwood—I think I could say to you, Senator, that the department would follow the guidelines strictly but I could also say by way of a rider that it is very unusual for us to seek to introduce new offences, certainly in relation to the disciplinary codes that govern servicemen. The Defence Force Discipline Act, I am sure you are aware, was a result of a very long gestation period but the offences simply embrace those that applied under the Army Act and the other pieces of imperial legislation that preceded it. I cannot envisage the situation where we would be looking to add new offences to the disciplinary code. It might be that, in relation to certain narrow ones, we would be applying to amend them.

I can give you an example of one which we think might be problematical under the new Criminal Code arrangements, and this is the unauthorised discharge of a weapon. It might be that trying to prove a fault element insofar as the accused is concerned would have adverse disciplinary consequences because, again, traditionally, the negligence that was required for this particular offence was not the criminal standard of negligence; it was the lesser standard that applied to things like negligent driving. Under the code, we will be obliged to prove the criminal standard of negligence. That may prove unworkable. We may seek to have the legislation amended, but we would have to revisit the penalties and so on in accordance with the Attorney-General's guidelines.

Senator CRANE—In your submission you refer to strict liability as appropriate for offences that are regulatory in nature. I think Senator Murray had some comments on that. Could you elaborate on the distinction between regulatory provisions and penal provisions?

Col Westwood—I think the best way of viewing them is that penal ones are essentially those that are criminal under the general law. If you take stealing or assault, they are offences in the general community. There are particular service variations of them. If you take the assault one, there are essentially three main types. There is common assault, which is in the act as assault on service land. Then there is the assault with aggravating factors of an inferior or a superior victim. We would view regulatory matters as those things going to the purely internal disciplinary component. So, to come back to those examples of assault that I mentioned, the element that is strict liability is the status of the victim—that the accused is at risk if he strikes someone; that he not do it against his superior or inferior, subject of course to a statutory defence.

The other ones where there are elements of strict liability are best described as disciplinary matters, *per se*. An example might be disobedience of a lawful general order. The gravamen of the offence traditionally at service law was the unexplained failure to obey the order. The accused did not have to intend to disobey it; he could disobey it recklessly or negligently. That offence has been made one of strict liability because, traditionally, for that disciplinary offence, the mental element of the accused just did not enter into the equation; it was the unexplained failure to comply. So those disciplinary matters have continued to maintain the pre-existing status quo of being strict liability.

Senator CRANE—On page three of your submission you deal with express defence. In answering a couple of Senator Murray's questions, you mentioned the term 'reasonable excuse'. 'Reasonable' is one of these words where you can ask, 'How long is a piece of string?' Could you expand and try to put some definition around what you mean by 'reasonable excuse'?

Col Westwood—I think it is fair to say that the ‘reasonable excuse’ one arises in connection with the general article, ‘prejudicial behaviour’. This, of course, is the type of offence that is unique to disciplined bodies. Prior to the Criminal Code amendments, the elements of the offence were that the accused had done or had failed to do some particular specified act and that this was likely to prejudice discipline or bring discredit upon the Defence Force. It was never necessary that the accused had intended to prejudice discipline or bring discredit; the test was an objective one by the tribunal—either the court martial or the commanding officer—and they applied to it their general service knowledge. In making that offence one of strict liability, for the reasons that Colonel Dunn advanced earlier, that the mental element that attached to this general article was a bit of a moveable feast depending upon what the wrongdoing was, we have introduced the concept of reasonable excuse.

It seems to me to be entirely consistent to have a concept of reasonableness in something where the tribunal always traditionally applied an objective test as to whether something had been made out, whether discipline was likely to be prejudiced. It was always the sort of offence where, to a degree, it was beauty in the eye of the beholder.

Senator CRANE—In terms of applying or making judgment on a defence of reasonable excuse, it would also very much be in the eyes of either the tribunal or the commanding officer who was dealing with the matter, wouldn’t it?

Col. Westwood—It would. But, as I have endeavoured to say, prior to making it a strict liability offence, it was again a matter for the tribunal to an objective standard. It was never necessary to prove that the accused intended to prejudice discipline. The offence attracts a comparatively low maximum punishment, but it is three months of civil imprisonment—although, in my experience, there has never been a term of imprisonment awarded under the Defence Force Discipline Act. But again, under service history—under the old Army Act—it was possible to sentence the accused to life imprisonment for a breach of a general article. The old legislation did not differentiate wrongdoing with a particular maximum punishment that was available to it, but it was always an objective test. As I say, it seems to me that introducing this concept of a reasonable excuse for the accused is entirely consistent with this objective assessment of the nature of the wrongdoing.

Senator CRANE—Thank you. I move to legislation that you have in operation now. Could you identify to the committee legislation that contains any offences of absolute liability? When is absolute liability appropriate?

Col. Westwood—My colleague is checking the tables, but I can tell you from my own knowledge that loss of service property is one of absolute liability. It was made so because that was the decision of the Federal Court in the matter of *CGS v. Stuart* as to the mental element that attached to the offence previously.

Senator CRANE—You may need to take this question on notice.

Col. Westwood—I have the others now; Colonel Dunn has turned them up. They are the driving offences under section 40: driving while under the influence of alcohol or a drug, and some of the dangerous driving offences. These were done simply to bring our practice into compliance with established community practice.

Senator CRANE—Mr Chairman, could I get those tabled, please.

CHAIR—Yes. Do you have references to the cases—the one where there was absolute liability for loss of military property?

Col. Westwood—Yes. It is the matter of the Chief of the General Staff v. Lieutenant Colonel Russell Alexander Stuart. I have a print-out of the case with me, which I would be happy to leave with the committee.

CHAIR—Thank you very much.

Senator CRANE—Thank you very much for that. Do you administer any legislation that contains a two-tier defence system?

CHAIR—That is where there is strict liability if it is a fairly minor offence, but if it is a more serious matter you go to the conventional way of proving criminal offences, that is, you have to prove intent.

Col. Westwood—I think it is fair to say no. Although, in relation to a number of the offences under the discipline act, there are graded levels of severity, such as conduct which is intentional, conduct which is reckless and conduct which is negligent attracting lesser maximum punishments.

Senator CRANE—Yes, that is so in normal law. In terms of the way absolute and strict liability offences are applied in Defence, are there similar examples that operate overseas? Are we consistent with other countries, or do we have major variations to how the law is applied to Defence in other countries?

Lt. Col. Dunn—I can talk from personal experience with the British system and obviously our system is based on this. They do not have the Criminal Code where they have to specify whether an offence is strict or absolute liability. But the sorts of offences we have just talked about, such as the disciplinary or regulatory offences, have been interpreted as strict liability. In that sense, as we said before, we were harmonising what was occurring before and that was a practice that was used in Britain and New Zealand as well. I am not familiar with other non-common law countries for example.

Col. Westwood—The DFDA itself when it was introduced back in the mid-1980s did introduce some changes to some offences. An example would be assault on a superior officer. Under previous service law the prosecution had to prove that the accused knew the rank of the victim. The DFDA changed that, made it an offence of strict liability subject to a statutory defence that the accused establish on the balance of probabilities that he did not know and could not reasonably have been expected to know the rank of the victim. I do not know what the current position is in the United Kingdom but I would not be surprised if they had retained the sort of pre-DFDA mental element to it. As Colonel Dunn says, I think it is not unfair to say that the DFDA is largely consistent in application with that of our principal allies.

Senator CRANE—So the principles are similar?

Col. Westwood—Yes, I think that is so although there may be some narrow variations in relation to particular traditional offences.

Senator CRANE—Has the introduction or the expansion of strict liability made your task in dealing with offences easier or more complicated? Has it eased the penalties that might be applied? Could you just give us a general overview of the impact?

Col. Westwood—Senator, I fear that there have been so few cases come through under the new system that I just cannot answer it. There have been no post-Criminal Code matters for instance come up to the court-martial level in part because the block leave period over Christmas means that there was little scope for disciplinary enterprise. Also there is some lead time in bringing the matters on to those higher tribunals. There are undoubtedly matters being dealt with at summary level but I have not received even anecdotal evidence that there has been any significant change in the rate of conviction or the bringing of charges. For the reasons that I mentioned earlier, because with the narrow exception of the general article, this really was a matter of pure harmonisation I would be very surprised if there were any significant change. We will be alert to monitor the statistical figures as they come through to pick up if there has been some dramatic change one way or the other following the amendments.

Senator CRANE—I am not going to ask you a hypothetical. I thank you both particularly for the clarity of your answers, and I will leave it at that, Mr Chairman.

CHAIR—Thanks, Senator. Did you have any further questions Senator Murray?

Senator MURRAY—Senator Crane, I was trying to interject whilst you were talking but I forgot that the system makes it difficult to do so. I wanted to explore a little bit on that reasonable excuse area. It seems to me that in some respects you could say that strict liability provisions constitute a mandatory punishment. What a reasonable excuse provision does when it is set together with a strict liability provision is to provide an element of judicial discretion. Would that be right?

Col. Westwood—With respect, I would not describe it so much as a discretion, which seems to me to indicate that one would be at liberty to go either way depending upon one's predilection in the matter. I would regard it being a genuine discretion for instance for a commanding officer to determine whether or not to charge a soldier who was late for work. One would not charge a soldier who was late for work on the first occasion but if it were for the third time within a fortnight plainly discipline would require something to be done. Within the offence, the statutory defence itself would have to be determined according to proper legal principle. It would have to legitimately be available to the tribunal to the requisite standard of proof to reach that degree of satisfaction.

Senator MURRAY—That is why I qualified it by saying 'judicial discretion', because that implies it is against a set body of principle. Are you confirming that that is true?

Col. Westwood—Yes. But, having said that, it is possible on certain areas that get towards the middle of a particular continuum that a particular tribunal might resolve the matter one way and another tribunal might resolve it another. But it is a fairly narrow area in the middle where I think one could legitimately decide one way or the other in bringing this sort of objective test to

bear. One gets it under the ordinary criminal law, to a standard of beyond reasonable doubt: a particular jury might be satisfied beyond reasonable doubt but that is not to say that another one, differently constituted, would necessarily reach the same conclusion. The appeal courts will not interfere with this unless the verdict of a particular jury is so far outside the permissible boundaries as to be an unreasonable finding.

Senator MURRAY—From a legislator's point of view, one of the reasons I am exploring this is that you are faced with an assumption that you are ending up with three categories—no fault, strict liability and absolute liability—but, in fact, on strict liability in particular, there are modifications to it and defences that are permissible under different acts, so there are a few variants on strict liability. It is not just one kind of legal animal; there are several kinds of legal animals, and this 'reasonable excuse' is one of those.

Lt Col. Dunn—Reasonable excuse does exist for an offence such as absence from duty. If someone is late for work, under a disciplinary regime, he should be there on time and, as long as it is proven that he was not there and he had a duty to be there, that is enough for the prosecution. He then has a defence of reasonable excuse, and he can raise that defence—'I was involved in a car accident on the way to work.'

Senator MURRAY—That is sensible.

Lt Col. Dunn—That is the way it works in the disciplinary environment.

Senator MURRAY—So that automatic element is not there. The same thing applies in things which we regard as automatic, such as speeding fines. If you write to them and say that you were on the way to hospital because your wife was about to give birth, for instance, they are likely to say, 'Well, just don't do it again.'

CHAIR—May I ask you, Colonel Westwood, in the issue of assaulting an officer—

Senator CRANE—I cannot hear you; I am sorry.

CHAIR—Sorry. I am asking Colonel Westwood if, when he was deciding the case where somebody was charged with assaulting a superior officer, all the prosecution had to do was prove the assault and then the accused person had to prove that it was reasonable for him not to know that the person was either an inferior or a superior officer. As a decision maker, the duty on the accused is much more onerous than it would be in England where, as I understand it, the prosecution has to prove that the accused person knew that the officer he struck was a superior. Have you been to England and seen this in operation?

Col. Westwood—No, I have not served with the British forces. My experience is limited to New Zealand.

CHAIR—What do they do there? What is the test in New Zealand?

Col. Westwood—I fear it is almost 15 years ago, but my understanding is that they probably followed our old service law under the Army Act.

CHAIR—As a decision maker, in any event, there is a big difference between those two positions, isn't there?

Col. Westwood—It very rarely arises in practise, given that the offence normally occurs either between people who know one another and their respective position in the unit or they are in uniform, where their respective position is plainly available. It is possible, of course, that there would be a fortuitous meeting between servicemen. It might give rise to jurisdictional issues, if they do not know that they are both servicemen, as to whether this is a matter for the civil authority or one for the military, but in practical terms, it very rarely arises for consideration. Certainly, I do not think that any unfairness flows from it. In making it strict liability, we did in this case have a decision of the Defence Force Discipline Appeals Tribunal in the matter of McInnes that indicated that it had become a strict liability offence so far as that element went. So in harmonising, we were not really at liberty to go back and change matters.

CHAIR—If, as you say, the question rarely arises—you might want to express an opinion about this or you might not—does it put too much strain on the traditional principles of the law to throw the onus of proving that there was a lack of knowledge onto the accused, lack of knowledge that this person was either a superior or an inferior officer?

Col. Westwood—I think not.

CHAIR—That is a matter of policy, but I would like your views.

Col. Westwood—My personal view is that it is not unfair because, as a matter of discipline, members of the Defence Force should not strike another member of the Defence Force in any event. So to put them at some risk if they happen to strike either a subordinate or a superior, both of which are aggravating military factors because of the obvious effect on discipline, seems to be not unfair to the accused. It is not as if we are going to have a luckless victim because he does have a statutory defence on the balance of probabilities that he did not know and could not reasonably have been expected to know. It seems to me to be a somewhat fairer position, having regard to the quasi criminal nature of the conduct in the first place, that he be at risk, that he has committed the aggravated military form of it subject to the statutory defence.

CHAIR—It is contrary to the usual flow of the law, which is that it is on the Crown to prove everything, although I suppose there are some exceptions—provocation and things like that.

Col. Westwood—Possibly the reason—this is speculation on my part—for the change was that the accused is really in the best position to establish the fact of not knowing and the fact that he should not have known, as opposed to requiring the Crown to endeavour to prove it.

CHAIR—The problem with that is that where there is a mental element in any offence the best person in the position to know that is the accused. To develop it a bit more: you say, if I heard you correctly, that the whole of the military law is really aimed at keeping discipline rather than punishing crime.

Col. Westwood—That is the purpose, I think it is fair to say, of the disciplinary code, though as you will be aware, outside this country particularly we do have the concept of territory offences where essentially it is an offence for a serviceman to commit anywhere something that

would have been an offence against the law as it applied in the Jervis Bay territory. For instance, on operations in Timor, it is quite conceivable that one would deal by military authority with murder or rape matters.

CHAIR—Can I ask you this, although I think there is a fairly obvious answer to it. As the tribunal, I should imagine it would be a lot easier to impose a fine than a prison sentence. Are you in charge of the military tribunals?

Col. Westwood—I hold the position of Chief Judge Advocate, which does not necessarily mean that I am pre-eminent. We have civilian judges who are on the panel and Her Majesty's counsel. In answer to your question, the punishments available under the Defence Force Discipline Act do not really mirror terribly closely those in the civilian courts. We have all manner of peculiarly military punishments like forfeiture of seniority, reduction in rank and military detention in the corrective establishment. Civil imprisonment is a punishment of last resort. It is the most severe punishment that can be awarded. It can only be done at the court martial, magistrate level and it must be accompanied by dismissal from the Defence Force, which itself involves an enormous financial detriment. The statistics furnished each year would give the actual figures, but I think it is fair to say that no more than one or two people per annum would be sentenced to a term of civil imprisonment.

Concerning the sorts of offences that attract it, from memory, there was a senior noncommissioned officer in a position of trust who, on a course of conduct, stole \$40,000 from the Commonwealth and was sentenced to three months civil imprisonment, one month to serve and then release on a recognisance order. The reality is that he would not in fact have gone to prison because while the matter was pending review he was held in military custody and that would have discharged the month. The other that comes to mind was an allegation of homosexual assault occurring outside this country where the offender did receive, I think, some five years of civil imprisonment. But, it is highly unusual for us to need, as a result of discipline—this is a disciplinary tool—to deal with matters where essentially a criminal sanction is being applied as opposed to the more traditional disciplinary one that arises under section 68 of the act.

CHAIR—The more severe the penalty, I suppose, the greater the pressure on any tribunal. Was not *Briggenshaw v. Briggenshaw* a case? I do not know whether it still is.

Col. Westwood—The *Briggenshaw* test should still be applied, particularly by boards of inquiry to their degree of satisfaction.

CHAIR—What we are dealing with is a whole range of offences. If you have a parking fine—I have paid many a parking fine in my time—you say, 'Well, that is how the system works. It is not the end of the world,' and you get about your business. Nobody is going to take away your senatorship because of that, so there is no problem. But as you go up the scale a bit it becomes more and more of a problem. We are wrestling here trying to find whether there is any magic mark—perhaps there is none—where we say that this is all right for strict liability or even absolute liability but now the matter is of such a nature that we think that even though there is a heavy onus on the prosecution, the prosecution ought to bear that. Have you thought about this during your career in the law, whether there is a right division between situations? Have you thought about situations where you say, 'That's life; that is how the community runs.'

If we did not do it that way, things would be in chaos,' 'The penalty is not all that heavy—it is substantial because we had to bring home to you that these are the sorts of things that you ought not to be doing,' and, 'The consequences for this person are so great that we are not going to impose that penalty unless we can prove that he or she was sinful'? Do you know what I mean?

Col. Westwood—The military example does not necessarily translate terribly well because you have the overriding public interest that the Defence Force must function in time of war to defend the nation. For instance, with disobedience of orders one might be prepared to move a certain way in making the offence easier to prove, because of the dreadful repercussions if orders are not obeyed.

CHAIR—So the issue of consequences is a very big issue.

Col. Westwood—I think that the consequences are also reflected in our thinking with maximum punishments. Absence without leave carries a maximum punishment of two years civil imprisonment. You can imagine the situation where someone who absents himself from the front-lines and causes the tide of battle to turn, as may occur; that is a particularly serious offence and may be visited with a term of civil imprisonment. Of course, the soldier who is absent for a couple of hours without leave from the workplace here because he has gone to the hotel, or otherwise taken himself off, will be dealt with in a far more lenient way. One would not contemplate civil imprisonment. He would probably be severely reprimanded or perhaps fined. The great difficulty I think in trying to apply the military perspective to your more general oversight of these is that you do have this other very significant public interest in the defence of the country.

CHAIR—I have found this, as Senator Crane and Senator Murray have said, very helpful. Thank you.

Senator CRANE—Express defence, does that mean precisely what it says?

Lt Col. Dunn—I think you are referring to an express defence as defence that is actually set out in the act in the Defence Force system as a statutory defence as opposed to the other Criminal Code defences which are set out in the Criminal Code itself.

Senator CRANE—I am referring to the paragraph in your submission which deals with a number of issues. There was reasonable defence. It started off with the title 'express defence' and moved into it. To me express means fast or quickly. Is there more to it than that?

Lt Col. Dunn—In the context of page 3 where it says, 'the final significant factor is the presence of an express defence' that refers to an offence set out in the actual act itself.

CHAIR—Thank you.

[11.47 a.m.]

FLETCHER, Mr Wayne William, Director, Legislation Policy Section, Department of the Environment and Heritage

HODGMAN, Mr Laurence Michael, Director, Compliance and Enforcement Section, Environment Australia

MARTIN, Ms Stephanie Rose, Assistant Secretary, Policy and Compliance Branch, Approvals and Legislation Division, Department of Environment and Heritage

CHAIR—Welcome. Would you like to make an opening statement?

Ms Martin—We have a statement to put this in some context, which you might find useful. You may be aware that the federal environment law has undergone major reform over the last few years and the centrepiece of legislation for that reform is the Environment Protection and Biodiversity Conservation Act 1999. This is generally referred to as the EPBC Act. It came into effect in July 2000 and in January this year some fairly significant amendments relating to wildlife protection also came into effect. It is a reasonably sized act that has up to now incorporated six previous pieces of legislation into the one centrepiece.

The reform process provided an opportunity to implement a whole new penalty regime for federal environment laws for matters covered within the EPBC Act and more specifically to the inquiry an opportunity to review and update the application of strict liability to offence provisions in the act. In reviewing that penalty regime, the new regime brings into play a fairly sophisticated mix of criminal, both with fault element and strict liability, and also civil penalty provisions. We do not have any absolute liability provisions in the act or in other regulatory legislation that the department administers. The EPBC Act has about 100 penalty provisions and 10 of these are strict liability provisions. There are some limited components in another 15 provisions. All of the provisions in the EPBC Act that have strict liability components are consistent with the Attorney-General's guidelines.

In approaching the law design issue, when considering whether a particular offence should be strict liability, we seek to set a balance between public interest and the rights and obligations of individuals. Most of the strict liability offence provisions in the act include a range of additional statutory exemptions aimed at ensuring they do not operate unduly harshly in day-to-day practical circumstances. Obviously these exemptions are in addition to the mistake of fact defence that is available for strict liability.

In relation to the other regulatory portfolio legislation, there are quite a number of separate pieces of legislation. A review was undertaken and legislation was passed last year updating the penalty provisions in those acts for pre-existing offence provisions to continue operation and to align them with chapter 2 of the Criminal Code which came into effect.

Senator CRANE—Mr Chairman, the telephone line keeps on dropping out.

CHAIR—I am sorry, Ms Martin, could you perhaps speak up a bit? Senator Crane is listening on the line from Perth. How do you find that now?

Senator CRANE—I have not heard her. I can hear you clearly, Barney.

Ms Martin—Would you like me to repeat what I have said?

Senator CRANE—No, do not repeat anything.

Ms Martin—That is all I had to say to set the scene.

Senator MURRAY—Thank you for your submission. One of the words that intrigued me, which you used twice—on page 1 and page 2—was when you referred to an offence as being ‘intuitively’ against community requirements. My antenna went up and I thought, ‘What do you mean by that?’

Ms Martin—Our attempt there, when we said ‘intuitively’, was to reflect more or less accepted community standards for public interest, that we were not going out and applying strict liability in new areas that were not already fairly well established as having a public interest component.

Senator MURRAY—So you are saying—to repeat my understanding of it—that if the community at large would understand the offence, such as speeding or littering, then intuitively that is the area that you refer to.

Ms Martin—Yes, and also that there is a history of that type of provision being one with a no-fault element or a strict liability element.

Senator MURRAY—It seems to me that you have listed another distinction for us in this inquiry. Throughout the submissions is the view that strict liability is appropriate almost in the mandatory fining, automatic consequence of an action approach, and you say ‘especially for relatively minor offences’. There are minor minor things and there are minor major things. Let me explain to you what I mean. To me, a minor offence that has a minor consequence, in the individual act, might be littering; a minor offence that has a major consequence would be speeding, because you could kill somebody. Are you with me?

Ms Martin—Yes.

Senator MURRAY—Within your act I would assume that you apply strict liability in both those senses—for instance, littering which may well be minor and minor in the way I have expressed it, and something which causes or could cause significant and permanent environmental damage. Do you have any of those kinds of strict liability provisions?

Ms Martin—I think we have some that reflect—you mentioned the permanent nature—that environmental damage in many instances is irreversible. That obviously comes into it and it has fairly serious consequences. So we do have some, and I think it is recognised in the Attorney-

General's guidelines, where the consequences, being the penalties, are maybe a bit higher than for other areas or for what you would call the minor minor offences.

Senator MURRAY—Let me take that a little further. In the speeding example, unless you are at very high speeds, one of the reasons they use the strict liability approach is because most often a speeding offence will not result in somebody being killed. I can see why strict liability can apply in that circumstance. But surely if something is a minor offence with a major consequence it should not be strict liability because the nature of the consequence should determine that it is dealt with in a far more serious way.

Ms Martin—We have a number of what we have here called parallel provisions and what others call mirror provisions, where we have two provisions that cover seemingly a similar act. One maintains the fault element and it has more significant penalties. The other one covers the same sort of act but is strict liability and has lesser penalties. That enables greater flexibility to tailor the appropriate response to the nature of the action taken. To take your speeding example, if you were speeding and you killed somebody, you may well use the one with the fault element with the more significant penalty. If you were speeding and it was not terribly dangerous, you may well use the strict liability. We have built that into this new penalty regime in the act for the purpose of trying to better tailor responses to the nature of the contravention.

Senator MURRAY—That is the approach that ASIC also spell out: that they will choose according to the severity of the occurrence. So you have that distinction?

Ms Martin—Yes.

Senator MURRAY—You have mentioned a two-tier approach, which we clearly understand. The other one, which I have not seen well expressed in any submission but which I know to be there in other forms of law, is the two-stream approach. That is where an act done by somebody on behalf of a corporation, under the Corporations Law or trade practices law can attract far higher penalties than an act done by an individual. Do you distinguish between your penalty regime on that basis in any respect?

Ms Martin—Yes, we do. I think all or most of our penalty provisions will have a penalty for an individual and then a penalty for a body corporate, which is consistent with the Criminal Code. They are generally five times the individual penalty. Just to clarify a point before: when I mentioned the example of speeding, obviously we do not have speeding in our legislation.

Senator MURRAY—No, I understand. We all use that as an easy example in this particular circumstance. Following from that, one of the things I am toying with—and I have not come to a firm view on it, which is why I want your response—is that part of the two-stream approach is the view that protections which should be available to individuals under common law should not be available to corporations. To give you an example, both Commonwealth and state law applies a far greater onus on corporations in many respects, and this may be one. Do you think it is appropriate for strict liability to not apply to individuals in some circumstances, but to apply to corporations because the ability of a corporation not only to defend the matter but also to take greater care may be more apparent?

Ms Martin—It is recognised and implicit in our act that corporations generally will have greater capacity and capability to inform themselves of the law and to do something to prevent contravention. Obviously, that is reflected in penalties. I am not sure if we have taken that to the distinction of strict liability or not. Would you be able to comment any further, Mr Fletcher?

Mr Fletcher—Most of the strict liability provisions are restricted in terms of the areas in which they can apply. They mainly relate to persons doing certain actions in Commonwealth areas or in Commonwealth waters—the killing, injuring or taking of a threatened species, for instance. So the corporations angle does not really come into play as much.

Senator MURRAY—There are other fields—and that is why I am looking for the principle—where that may be an appropriate distinction to make, the view being that laws which apply to entities should be less accommodating, if you like, than laws which apply to individuals. What entities and particularly corporations do is that they attempt to use law developed for individuals to protect officers of a corporation. Often the result is that they can escape the consequence of the intent of the legislation where you have to prove intent.

Ms Martin—We also have some provisions where in certain circumstances it will hold particular officers of the company liable in an individual capacity. That is not unique, but we do have some of those provisions as well and that would reduce the opportunity to circumvent provisions through entities in that way.

Senator CRANE—My first question relates to the issues under the heading, ‘Appropriate criteria to characterise the use of strict liability.’ I quote from the submission:

Environment Australia supports the appropriate use of strict liability for instance in environmental legislation where it would not be unfair to or biased against a potential offender.

I find that rather an interesting comment. Can you explain to the committee how you determine the criteria, ‘unfair to or biased against a potential offender’?

Ms Martin—The words we are referring to come back to the issue that Senator Murray raised earlier about the use of our word ‘intuitively’. We are really fundamentally coming back to what are accepted public interest areas, and in the environmental fields that would also be consistent with the Attorney-General’s guidelines. We are reflecting back, maybe in somewhat interesting language, accepted concepts.

Senator CRANE—With these things one’s views are often determined, or influenced at least, by one’s own personal experience. One of the big problems that I have with strict liability is that with all departments, regulators or authorities one of the score cards of measurement is how many people they can tick in a box saying, ‘During the process of doing our duties, we prosecuted X number’—whether it is for a speeding fine or whatever it might be—‘and for that part of it we are doing our job.’ But there is a problem with that, and I will give you a life experience which happened to me about 10 years ago.

I received a letter from an authority in Western Australia alleging, with a photograph, that I had thrown a cigarette out of the window of a vehicle and I think there was a \$40 fine. I know damn well that vehicle and I that day were in Esperance—I live 500 miles from Perth. But the

number plate that was quoted on the vehicle—the vehicle was not clear in the photograph—was my number plate. I wrote back and said, ‘Hey, I was in Esperance’, and this, that and the other. They said, ‘Well, see us in court, defend the action.’ So I had a \$40 fine, with the alternative of appearing in court, which involved going 500 miles to Perth to brief a lawyer, and running the whole thing, which probably at the end of the day would have cost me somewhere between \$1,000 and \$2,000. For plain expediency I paid the 40 bucks—it was not worth mucking around with.

From time to time, you see someone taking on a speeding fine and you see they often win the case. But the cost of defending oneself against the fine is absolutely enormous. To use an example of the use of strict liability, if in fact the so-called offender or the person being prosecuted at the end of the day says, ‘I can’t be bothered with this; it is a relatively little amount of \$100’—to employ a lawyer and get him to walk through the door would cost you a darned sight more than that to defend yourself—how do you determine that the prosecutions you are making under strict liability are in fact absolutely and totally above board?

Ms Martin—We have a compliance strategy where we use a cooperative—

Senator CRANE—Do you understand the point that I am making?

Ms Martin—Yes, I understand the point. We use a cooperative compliance model. First of all, many of our strict liability provisions do not have automatic fines as such; they still need to go to a court and a court imposes the penalty. So it is not automatic, though there are some minor ones—in national parks, I think.

Senator CRANE—If you do not defend yourself then that is an admission of guilt, isn’t it?

Ms Martin—In a compliance approach what you are really after—and I think this is particularly true for environmental laws—is a behavioural change so that people do not do the things that actually contravene the act; therefore, a prosecution is not necessarily a measure. Numbers of prosecutions are not necessarily a measure of your success in obtaining compliance with the act. We very much look more broadly at a more developed approach in compliance so that if we can find out if somebody is going to do something to contravene the act, and we intervene so their behaviour is different and we do not have to prosecute, that is a successful compliance outcome without a prosecution. From a Department of Environment and Heritage perspective, I would say that we do not measure our success on numbers of prosecutions.

Senator CRANE—Nonetheless, it is taken into account?

Ms Martin—But it would have to be where other measures are not appropriate or have failed, and also to show that something has happened where a prosecution is appropriate. We go through quite a considered process as to whether prosecution is the appropriate remedy for the behaviour.

Senator CRANE—I will put this on notice: could you give us some examples where in fact you could have prosecuted but—and I am not asking you to put names to it or even the place where it occurred; you can black them out—you chose to go down the alternative route? Could you give the committee an idea of how you do this and the sorts of offences?

Ms Martin—Yes, we probably can in relation to potential significant impacts on matters of national environmental significance—a generalist case study of what we do.

Senator CRANE—This question is similar to some I asked earlier. In terms of establishing new legislation, what process do you go through—as far as that is concerned—to determine what will come under the heading of strict liability and what will come under other headings? Do you follow the A-G’s policy guidelines accurately—to the letter of the law, or whatever terms you want to put around it—or do you just use them as indicative guidelines?

Ms Martin—Yes, we do follow the Attorney-General’s guidelines. I think Wayne Fletcher would be better placed to explain in detail how we approach the matter.

Mr Fletcher—When we reviewed our legislation and put in place the EPBC Act we had a large amount of interaction with the Attorney-General’s Department, to make sure that the offence provisions that we were putting in the act were in line with the policy that was around at the time.

Senator CRANE—One of the things that has brought this inquiry on is the fact that a number of us on the committee became concerned that there appeared to be a flood coming through various pieces of legislation—I am not referring here directly to yours—in terms of the increase in the number of strict liability offences. One thing that is very notable is that there is very seldom any explanation in the explanatory memorandum—the EM—as to the thought processes or why these changes are being made or introduced. How do you approach, in terms of new legislation, the dealing with the EM and the explanation of offences that are included in new legislation?

Mr Fletcher—With this very large act the EM is quite extensive. Certainly the EM identifies as you go through, those offences that are strict liability. It does explain how the fine applies to an individual and a corporation for instance. It makes a link with the Crimes Act. It looks at the tiering of the offences. That is how we dealt with it.

Senator CRANE—You are talking about a specific piece of legislation?

Mr Fletcher—Yes.

Senator CRANE—Mine was a more general question. Once again, I am not talking about you as a department personally but certainly we have many examples where changes to the penalty provisions in EMs are virtually non-existent, in some cases not identified. You are saying that, in terms of your department’s role in this, you will give a full and proper explanation as to what those changes are and the new penalties which are introduced. Environmental law is certainly one where there have been new penalties introduced in recent years. You will give a full and proper explanation in the EM?

Mr Fletcher—We certainly identify the changes that we have made in terms of the penalty provisions in the act. We have certainly identified where strict liability is used and, as I have said, we have referred to the application of the Crimes Act to those penalty provisions.

Senator CRANE—You are avoiding my question. My question relates to the full and proper explanation of what they mean and why you are requiring in a particular case strict liability. At the end of the day, those of us who sit on the Standing Committee for the Scrutiny of Bills have developed some expertise in terms of the EMs we receive—we have experts advising us. In general—once again, I am not referring to your department in particular—that explanation is not there. Legislation is difficult for a layman to read; an EM is written in much clearer terms, but there seems to me to be an avoidance in a lot of areas of explaining what the changes mean.

Mr Fletcher—We have not included in our EM the criteria behind the use of strict liability. That is the case.

Senator CRANE—I hope in the future it is something you do seriously consider because people have a right to know. In your particular legislation you administer, are there any two-tiered offence systems?

CHAIR—What we mean by two-tiered is this: say for a less serious offence we go along with a strict liability regime but if there is an outrageous breach we go back to the conventional criminal rule of having to prove intent.

Ms Martin—We do; that approach is reflected through our legislation for criminal offences, where there may be a reckless offence and also a more minor strict liability offence. We also have other provisions where we have a criminal offence—the normal fault element—and also a second tier being a civil penalty, which is something fairly new in this area.

Senator CRANE—Following that answer, and you can take this on notice, could you outline the principles by which you apply this? My concern, once again, is this: in utilising strict liability—and it goes back to my earlier question—it is easy to prosecute and get that offence dealt with quickly, often because whoever is being prosecuted—and I gave you my example—just say, ‘It is far cheaper for us to go ahead and just pay it rather than put up with the process.’ How do you determine when it is just strict liability or when you will go that step further?

Ms Martin—To clarify, you are after some general principles that we would apply. We have not as yet taken prosecution under this act—it is fairly new—but there are general principles that we would apply. Is that what you are after?

Senator CRANE—Yes, please. If you have not used it yet it is a good idea to get the principles in place to start with.

Ms Martin—We do have principles in—

Senator CRANE—You may have them. Do not take that question the wrong way. You may have them. If you have, could you afford them to the committee?

Ms Martin—Yes.

Senator CRANE—If you have not, then let us know how you are going about developing principles by which you will apply it.

Ms Martin—The other point there is that even with strict liability the penalty is not automatic. It still needs to go to a court, so the difference may not be as great as in some other circumstances.

Senator CRANE—Thank you. In the area you operate in there is an enormous amount of public division or dispute about what is in the public interest. There are very wide-ranging views on how we should deal as a community with environmental considerations. Of course, being a farmer I have very strong views as to how we on the land need to deal with it and manage it, bearing in mind that, at the end of the day, if we do not look after our resource we will not be in business very long. Others almost seem to adopt a totally negative view about any form of development. I am not aiming those comments at anyone, it is just an observation. Have you got guidelines or principles established as to how you determine, in dealing with these likely prosecutions, what is in the public interest?

Ms Martin—Not as such; not on a case by case basis.

Senator CRANE—General principles do not apply on a case by case basis.

Ms Martin—The main part of the legislation deals with significant impact on matters of national environmental significance, that is in identified matters. We do have guidelines about how those tests would apply, but the legislation does not go into when we would prosecute under them or not. It goes into guidelines about what would be regarded as significant.

Senator CRANE—Significant what? I did not hear that.

Ms Martin—The guidelines cover what would be regarded as a significant impact in that context. They do not necessarily go into the situation where, if there was a contravention, which provision we would go to for prosecution.

Senator CRANE—Can you table those guidelines, please, or get a copy to the committee?

Ms Martin—Yes.

Senator CRANE—I will leave it at that for the moment. Thank you.

CHAIR—Senator Crane put to you a situation where he found it just sensible to pay. Have you got any internal review system to look at that sort of situation? For example, somebody is presented with a penalty notice and all sense says not to defend it in court but nevertheless he or she would like to get the department to look at it. Is there an internal review system in the department that would enable a person to do that?

Ms Martin—As I said, those types of offences to my knowledge are found only in relation to our parks system.

Mr Hodgman—I do not think there is anything formally in place. Those sorts of infringement notices, at least under the EPBC Act, really apply only to behaviour in national parks generally speaking because you have a regime there where speeding and littering and those sorts of

minor things are not dealt with by the normal law enforcement agencies. Under the regulations there are those sorts of offences where we have infringement notices. I would have to check with Parks Australia as to whether there is actually a review.

CHAIR—Do you have custodial sentences under your act at all?

Ms Martin—Yes.

CHAIR—Are any of those in respect of strict liability offences?

Ms Martin—No.

CHAIR—Would you have some diagram that shows what offences are strict, what are those needed to be proved with mens rea?

Ms Martin—Yes, we could provide that for you. Just for the EPBC Act?

CHAIR—Just for the sort of legislation that you administer.

Mr Fletcher—We could provide you with a table.

CHAIR—Ms Martin, you mentioned a matter that I do not think has been mentioned by others but which I think is significant. You were talking about the educative role of regulation, mainly minor regulation. Would you like to say something about that?

Ms Martin—A fair bit of work and research has been done, and I think the Australian Law Reform Commission is looking at administrative approaches more broadly to penalty provisions and regulatory regimes. I know there is a fair bit of work done, for example, at the Australian National University, on understanding what makes people comply and what does not and how best to design legislation to get compliance in a most effective way. There are a lot of other regulatory agencies that have been contributing to this work for some time; the Australian Taxation Office is probably the biggest and has been doing it for over 10 years. That is showing up a lot of historical assumptions—for example, doing nothing and then prosecute as being the way to achieve compliance—as flawed and that you need a more sophisticated approach. You need to match your penalties with the behaviour and the attitude of the person. They are linked very much with the nature of what you are doing as well as with what causes behavioural change. Fundamentally it is about achieving the outcome—the behavioural change—so that you do not have to prosecute but, if you need to, it is a very important component that you do prosecute those that may otherwise seek advantage by not complying.

CHAIR—That educates the whole community?

Ms Martin—Yes. It is called a pyramid approach and the broadest element of that is letting people know. Obviously you cannot expect people to comply if they do not know what it is they have to comply with. It is letting them know—in terms that they can understand and that are related to their needs—what their obligations are and what the law seeks to do.

CHAIR—You say that there is some research done by the ANU. At the law school?

Ms Martin—Yes, there is research in the law school and the social sciences area. Professor John Braithwaite heads up that process.

Mr Fletcher—I would like to clarify an answer I gave to Senator Murray. He asked about penalties that apply to persons versus corporations. I answered the question in terms of some of our provisions that apply to the taking of, killing and injuring of threatened species. I should just clarify that if a penalty for a person is 500 penalty points, for a corporation it is 2,500. That is provided for through section 4B(3) of the Crimes Act.

CHAIR—Thank you, Mr Fletcher, Ms Martin and Mr Hodgman, and to Hansard, as always.

Proceedings suspended from 12.25 p.m. to 1.30 p.m.

HUDSON, Mr Andrew Thomas Paul, Chair, Customs and International Transactions Committee, Law Council of Australia

CHAIR—Welcome. Is there anything you wish to say about the capacity in which you appear?

Mr Hudson—I am here in my capacity as chair of the Customs and International Transactions Committee of the Law Council of Australia. I am also a partner in the firm of Herbert Geer and Rundle of Melbourne.

CHAIR—Do you want to make preliminary remarks?

Mr Hudson—Yes, just some brief comments. Thank you for the opportunity to appear today. As I said, I am here in my capacity as chair of the Customs and International Transactions Committee, and in that committee we have been looking at strict liability offences in the customs legislation context which at the moment cover the strict liability offences which were added to the Customs Act through the trade modernisation legislation which went through parliament in June 2001. We have also been looking at the infringement notice scheme which has been introduced by that legislation as it applies to strict liability offences. There are some administrative guidelines as to that infringement notice scheme, which is novel to the customs field. The third area is the strict liability provisions which were intended to be added as part of the border security legislation, which is part of the five antiterrorism bills which went before parliament in March. There are a number of strict liability offences which affect the Customs Service and the customs industry.

There are just a few general observations in terms of the nature of the inquiry. Could I just make the observation that everyone appreciates that Customs has a uniquely difficult job within the Australian context. They facilitate trade. They facilitate movement of people in and out of Australia. They maintain compliance with Australian laws. They collect revenue. They administer industry schemes and so forth, and they look after border control and security. So they have a very broad category of responsibilities. We have found of recent time that there seems to be an emphasis on introducing strict liability offences as a means to assist them in administering that framework and to concentrate on what they call their risk management concepts. As lawyers from the Law Council we were just a little bit interested and perhaps to an extent concerned about the increasing use of strict liability offences. I think those concerns were ventilated extensively during the debates to do with the trade modernisation legislation and have been the subject of additional comments in respect to the guidelines to do with the infringement notice scheme and also in relation to the border security legislation. That is the context in which we are looking at these matters. I welcome the opportunity to answer questions.

Could I just also add that the concerns which the Law Council has expressed are not unique to the Law Council. Other industry bodies such as the Customs Brokers and Forwarders Council of Australia and the Australian Federation of International Forwarders have expressed some concerns about the extent of strict liability offences in the customs area, and there have been a number of concerns expressed by the Law Reform Commission in the draft discussion paper it is releasing at the moment in its reference to civil and administrative penalties.

CHAIR—I will go to Senator Murray and then Senator Crane, who is the deputy chair, may ask a few questions after that.

Senator MURRAY—Just a point of clarification: do you have knowledge of when the discussion paper of the Law Reform Commission is coming out?

Mr Hudson—It is very new. I am involved on the advisory committee to that and we were working on a draft very recently. I think it is being printed at the moment. I have seen an electronic version. I think it is due to come out probably late this month or the middle of this month.

Senator MURRAY—Obviously within that they will examine the strict liability issue, won't they?

Mr Hudson—Yes.

Senator MURRAY—What is your opinion, just for the guidance of the committee, as to what we should do? We have been concerned at this issue in that we are trying to get to grips with what it means in terms of a legislative 'fashion', if you like. Would it be helpful for the Australian Law Reform Commission, in your view, if this committee were to produce a report fairly speedily so they could 'feed off it'?

Mr Hudson—Indeed. I think it would actually work very well both ways. I think that the report of the Law Reform Commission may be of assistance to this committee as well.

Senator MURRAY—That is right.

Mr Hudson—I think you have got a reporting date in September.

Senator MURRAY—Yes.

Mr Hudson—I think certainly your views would be useful. In fact they know of this committee's hearings and their discussion paper refers to the fact that there are comments to come later in the year. They are looking forward to actually having some input from this committee, I know. The Law Reform Commission reference was given by the Attorney-General some time ago now. It is into civil and administrative penalties. In doing so it touches on strict liability. It touches on Customs prosecutions. It is broadly based on all Commonwealth legislation as well.

Senator MURRAY—One of the themes we have been presented with in some of the submissions we have got is that strict liability should be used deal with lower order offences where you need a high degree of compliance but you do not want to have to go through the difficulties of court procedures. That means, in the minds of many of the agencies, simply a formalisation of what they are already doing. I think your point throughout all your experience of the customs legislation and its progress through the committee and parliamentary system was that with respect to customs they had introduced a lot of new strict liability provisions. So the first question for us is: for what kind of offence do you think within customs legislation you should have strict liability offences apply?

Mr Hudson—That is an extremely good question. It is from the perspective of where there is a real risk to the revenue. I think you have to look at it in the context of an ‘evolution’ of Customs responsibilities—they are now looking after revenue as well as looking after cargo management. So I think strict liability in terms of significant threat to the revenue in terms of customs duty and so forth and perhaps in terms of movement of cargo which is subject to Customs control. As an example, section 33 which is already there is now being recast as a strict liability offence. I can understand that goods subject to Customs control is an appropriate area for strict liability. There is also a fraud or a fault based offence.

Where I guess we have differences is in the timely reporting. Those offences will not start for some time, but when you have an industry such as Customs where huge amounts of transactions take place, huge amounts of reporting, and information has to come from third parties, often overseas, or from clients, there are going to be difficulties in ensuring 100 per cent compliance. As a result, to then impose strict liability does not necessarily assist the industry, because I think the industry is sufficiently aware of its responsibilities. Having strict liability just means that one person is going to end up with the difficulty of facing a prosecution for something which other people have created for them, and there are a whole lot of issues associated with that.

If I had to say strict liability was, if you like, a good idea, certainly it is where there is a significant risk to revenue, because I understand that needs to be collected. I can also understand there are a lot of issues to do with control of the movement of goods already subject to Customs control, in which case there should be primary responsibility for just not moving it.

Senator MURRAY—As a principle you would say that, where the physical element—which is key to the strict liability regime—the fact of an act, has a real chance of being created by third party actions, it is not appropriate for that to be strict liability. Is that the correct interpretation of what you are saying?

Mr Hudson—In relation to movement, for example, movement of goods is subject to Customs control. Where they are moved, regardless of who moves them, somebody has the responsibility for making sure they do not get moved, if you like. Somebody, whether it is a depot operator or a warehouse operator, has an obligation to make sure the goods are only dealt with with Customs approval. So they have that responsibility. If somebody then moves those goods, they should be strictly liable, subject to the appropriate defences.

The other situation I wanted to talk about is where there is a high degree of reliance on information and acts of third parties, such as making entries and providing information to Customs. In that situation, it is beyond the capacity of the person who is dealing with Customs.

Senator MURRAY—That is what I was referring to. You made that remark earlier. It would seem to me that our purpose is to elicit principles by which we should judge this matter. If I can give some credit to my colleagues and the secretariat, I think our right of entry report was absolutely excellent in that process. So one of the principles, you are saying, is that, if it is likely, possible or frequent that third party involvement could in fact create the fault, it is inappropriate to have strict liability?

Mr Hudson—That would be our view, and that is the position we have taken from the very commencement of the litigious process introducing the broader categories of strict liability. An-

other example of an area where it is perhaps inappropriate is in the border security legislation and the compulsion to provide information about individuals. There are strict liability offences associated with that if people fail to provide the required identity information. That definition of 'required identity information' can be changed by regulation, so from time to time people may not know what they have to provide to Customs or to the regulatory authority. If they are then punished for failing to provide the information when they are not sure what they have to provide, that would appear to be inappropriate for strict liability. I think another category of offence where strict liability is inappropriate is where it is not clear. While I appreciate that ignorance is no excuse and that it is the philosophy behind a lot of law, if it is not clear to people in industry exactly what their obligations are and if those obligations are moving, to then publish them with strict liability if they offend is inappropriate in our view.

Senator MURRAY—That is a principle which has been differently expressed but has the same content today—namely, that for something like that to apply, it must have general community acceptance and understanding. The easiest example is a speeding fine.

Mr Hudson—Yes.

Senator MURRAY—You mentioned that you did not think that strict liability should apply to situations where there is a high volume of transactions—in other words, the requirement to provide information. The APRA witness earlier today indicated, in respect of the provision of returns, that they had found the introduction of strict liability provisions had in one particular set of circumstances improved the compliance from 13 per cent for essential superannuation returns to 71 per cent. But I think what he was referring to was an annual return. You are referring to frequent—daily or even hourly—transactions of a high level. However, Customs, as you know, cannot police every transaction and self-regulation has been dismissed, so the only way to get it done is that the people doing the job have to be regulating it. How do you apply the law? The argument would be that a strict liability provision keeps people on their toes. That has the flavour of administrative convenience, but you do not want to be taking people off to court all the time for transactional transgressions. But you do want a high level of accuracy.

Mr Hudson—My friends from Customs behind me will doubtless address that issue. I think somebody from the relevant industries may be better placed to answer it than me, but the way I look at it is that there have been obligations in terms of timely reporting and proper reporting for the importing community for 100 years—as long as there has been the Customs Act, customs law and so forth. All of a sudden, at one point, a decision was made that we need better compliance. I do not think, from my own experience, that there is evidence that the industry does not try very hard already to comply, in terms of imports, so I do not think that strict liability will necessarily deliver a significantly increased level of compliance. We obviously will not know that until the legislation has been in place for some time. I think one of the issues here is that there will be an auditing process at some stage.

The situation in terms of export is slightly different. The general understanding is that export information is not terribly well provided. There are significant new issues to do with exports, to do with revenue with GST and so forth. That industry does need a lot of encouragement to behave itself, for want of a better term. I still do not know whether the automatic introduction of strict liability will necessarily deliver that. Again, I think there is enough anecdotal evidence and my own experience has been that people do try pretty hard to comply and that strict liability

will not necessarily deliver a higher degree of compliance. Penalties are still there; it is just a question of strict liability.

With strict liability, you then have the situation where people who are making entries—for example, customs brokers or owners—may suddenly face a strict liability penalty and they feel, even if the law does not actually reverse the onus, that they are automatically guilty and they then have to try to invoke the appropriate strict liability defences. This is complicated for industry with the infringement notice scheme which is being introduced, which is associated with strict liability offences under the Customs Act. The infringement notice scheme enables an appropriately qualified customs officer, if they have reason to believe an offence has been committed, to issue an infringement notice. People have drawn the analogy to a parking offence, but I think it is somewhat different. If you say, ‘We reasonably believe there has been an offence; if you pay this penalty’—for example, 20 per cent of the penalty otherwise payable—‘we won’t prosecute you.’ There are issues associated with that. So you will have people in industry perhaps receiving infringement notices or trying to defend strict liability prosecutions, but I don’t think either of those things will make them try to comply any more than they are trying to do at the moment.

Senator MURRAY—Is there sufficient thought in your view regarding the automatic compliance you would want at the low but very important level of information provision, in comparison to the speeding fine?

What I mean by that is that when people are done for speeding they do not feel guilty in the sense of, ‘I am a criminal.’ They say, ‘I was speeding and I will cop it sweet,’ and they do. If ever they are caught and they were not speeding then, of course, they get aggravated. I can imagine a circumstance whereby, providing the fines for failing to do something that you should have done and did not do were reasonable and relative, people would say, ‘I will cop it sweet,’ and you would not have that sense of guilt and outrage in the way that you just expressed it. Do you not feel that, as the legislation settles down and people get experience with it—and the difficulty you have and we have is, of course, that we do not know how it is going to pan out—there will come to be that acceptance that if they do not do it properly, they will get fined and they will cop it sweet?

Mr Hudson—Again, it is a little bit difficult for me, not being a practitioner in terms of being a broker or whatever, but certainly the attitude of Customs to date has been that proceedings, whether they be strict liability prosecutions or infringement notices, are a last resort and they will work toward compliance. People who get prosecuted will know that they have been given every opportunity to do the right thing. In that environment, over time they may feel that they deserve it and they have to actually do the right thing and comply. I guess that may well beg the question that, if that is the environment in which they are going to operate, why is strict liability required?

Senator MURRAY—Again, it is back to the culture of application. I am a bit scared to keep using this analogy because I know that it has real weaknesses, but, again, with that speeding analogy, if people were getting fined a hundred dollars for being five kilometres over the limit, you would find that they would get very aggravated. Generally speaking there is some latitude allowed and once you are over then people get pinned. I would assume that one of the principles you would need to see established in the guidelines, the culture and the framework of these

things, is the way in which it is applied. That is the point that you have just made. On a strict reading of the law, both with respect to speeding and to Customs, it can be pretty harsh, but the application has evolved into some discretion on the speeding side.

Mr Hudson—Certainly I think that is fairly clear. There are two ‘governing’ documents, to use that term, which give an indication as to Customs’ approach to all of this. My friends from Customs will doubtlessly talk about those. One document is called the high-level principles, which were issued at the time of the legislation issue, which was the regulatory philosophy, if you like, behind the new regime. Then there are these guidelines, which are to do with the infringement notice scheme. In addition to that, Customs have also been out talking about their regulatory philosophy, and certainly everything there talks about the fact that they intend to encourage compliance, penalties will be the last straw and infringement notices will only be issued where there is evidence that there has been a bad compliance history. The difficulty with that is that obviously there is an inherent discretion as to whether to choose to act or not. You then perhaps have a problem with inconsistencies across the jurisdiction. You might get people in Adelaide doing things differently to what is being done in Perth.

Senator MURRAY—Let me move from being reasonable to putting the other side, if I can. There is the alternative view that strict liability really says, ‘We would never be able to pin you anyway and we want to come at you with a heavy hand and make people who are making ordinary human mistakes felons. Therefore we have invented this strict liability regime out of administrative and bureaucratic need for effective, workable administration.’

Mr Hudson—That is sometimes called the big stick and small carrot.

Senator MURRAY—All right, that is very useful. The fact is that in some of the correspondence that I have seen about the new strict liability regime people say that it is unfair and unjust and it should not happen because these are not matters that should be subject to that kind of sanction unless they are at their most extreme of importance, in which case you should have the no fault liability and be taken to court, which they accept. How much of that mood is there in your analysis of this material?

Mr Hudson—Again, there is a degree of difficulty, in that we do not know how they are going to administer all this. But, putting that to one side, there was a significant feeling within the industry, and among members of my committee of the Law Council, that this across-the-board adoption of strict liability was harsh. I think we made that observation during the evidence we gave before the Senate Legal and Constitutional Legislation Committee. Indeed, following that, and during the subsequent Senate debates before the legislation was introduced, a number of strict liability offences were removed. The offences are still there, but they are not strict liability. So a decision was made, presumably through the usual parliamentary process, to remove some of them. I think there is still a fear that there is a very broad category of strict liability offences, and there is real concern as to what is going to happen, for example, come 1 July. There is also concern that they were perhaps introduced in too broad a category of offence, given the nature of industry and the fact that there is a very high turnover of transactions and reliance on third parties, some very technical legislation in terms of valuation to deal with, and so on. Perhaps it was not entirely appropriate to implement it across the board, but, unfortunately or fortunately, we have the situation that the legislation is now there. The proof will be in its exercise.

I feel somewhat differently about the border security legislation, which has not got through yet—or is yet to come back to parliament. There are some strict liability offences there, which, for privacy and other reasons, I quite strongly feel are inappropriate. It is inappropriate to use strict liability in those cases. There were certainly significant concerns about strict liability when the first trade modernisation legislation came in. Some of those concerns were addressed, but there is still a very broad category of strict liability offences. People in industry and, in some respects, my industry think it is perhaps a bit harsh in terms of the extent of it, but we are resigned to those facts. They are there and we have to deal with them. Customs's public philosophy about its enforcement has given people some more comfort as to the way in which it may be implemented, and we will wait and see. However, as I have said before, if prosecution will only happen in the worst cases where there has been no redeeming behaviour, perhaps those characteristics could have been dealt with by an ordinary offence anyway, rather than a strict liability offence.

Senator CRANE—I would like to begin with one of the questions Senator Murray raised earlier, when he was talking about our search and entry report. We also prepared a report somewhat before that on the appropriateness of jail sentences in Commonwealth law. We set out to put in place a series of principles under which the matters in those reports should be dealt with, including the search and entry one. I would hope that we can produce a similar quality of production out of this report. Would you be prepared to set out any principles that, in your view, we should be defining in terms of this report into strict liability? Would that be possible for you, or the Law Council, to do?

Mr Hudson—It certainly would be; clearly, I would prefer to take that on notice.

Senator CRANE—I am not asking you to do it now. I do not expect you to do it now. It would be very useful for us, because I agree with much—or most—of what you have said. I am not sure that I disagree with anything, which makes questions a little bit less likely to happen. If you could take that on notice and get back to us, we would certainly appreciate it very much.

Mr Hudson—I would be delighted to do that. In the meantime, it might be worth a question to the commissioners at the Law Reform Commission, because I think their discussion paper may have some of those sorts of principles also enunciated. But I will certainly take that on notice and, as soon as I am able to, I can put down some views as to the appropriate areas and recommendations for that sort of area.

Senator CRANE—The only thing I would ask, if you have the time, is that, since two of us will be leaving the parliament on 30 June—that is, the chairman and the vice-chairman, so Andrew will have it all to himself—

CHAIR—Your voice is breaking up a bit; we can no longer hear you.

Mr Hudson—I think there was a second thing.

Senator CRANE—We have dealt with the principles. I was saying that Senator Cooney and I will both leave the parliament on 30 June, so we would like, if possible, to get this report completed before then. In terms of your observations—and you have dealt fundamentally with

the Customs Act on matters pertaining to Customs—would you apply the same principles to AQIS in the role that they have in terms of inspection of goods coming in and out of Australia?

Mr Hudson—I think AQIS—and I confess at the beginning that my practice does not extend terribly far toward AQIS—have a unique, real and very important regulatory role in preserving the integrity of Australia against such things as disease and so forth. So, given the level of importance there, perhaps they might have a greater need for strict liability offences. So if you bring in a six-foot millipede, it is your fault; you are in strife. I could understand there being a larger need for strict liability in that instance as far as it affects quarantine.

Senator CRANE—And equally in terms of our exports as well, that we do not breach our quality requirements.

Mr Hudson—That is true, and you are right about exports. In exports you also have this revenue issue now with GST, which has not been there previously and as importantly, so that is another reason, coming back to the notion of protecting the revenue, where it becomes all the more important. There are significant revenue issues associated with that.

Senator CRANE—To move to the fundamental reason that this inquiry has been started, it was our observation as a committee looking at legislation every Wednesday morning—and often 10 to 20 pieces of legislation—that there seemed to be a significant increase in the use of strict liability provisions in a host of legislation where it had not appeared before. Have you come to the same conclusion as we have—from an anecdotal point of view, because nobody seems to have any hard evidence with regard to this and it would require a lot of research—that, in fact, strict liability is becoming more common than it used to be?

Mr Hudson—Absolutely. Speaking from my own experience in this field, certainly there is significantly more strict liability than there was when I started in the law. There is certainly significantly more in the customs area, I know—my father has been in the Customs field since 1952. But, in other areas, it is clear that there is more reliance on strict liability than there has been. Just anecdotally, looking through other legislation, there is a higher degree of use of strict liability than there has been. It is certainly my view, anyway; that is my feel for it.

Senator CRANE—I certainly agree with you. A conclusion that I have come to is that it appears, although it has been denied, to be a very easy method by which to bring a case against somebody and, often, the penalty is such that it does not pay to appeal against it because the fines are \$100 or a couple of hundred dollars. In comparison to the cost of challenging it in a law court, I think a lot of people—I have certainly done it—have said, ‘Blow this for a joke, I’ll just pay it. It’s quicker and easier, and it’s going to cost me a lot less money.’ Is that a conclusion that you have also come to?

Mr Hudson—It is, probably, if you are talking about strict liability in terms of parking offences or speeding tickets. It will be an interesting exercise in this field because there are what they are going to call the three-tier system, where the first tier is the existing fraud offences. Then there will be the strict liability offences, for which the penalty is usually about 20 per cent of the penalty otherwise payable, to use a rule of thumb. Sorry, I am talking about the infringement notice scheme. I will go back a bit: with the infringement notice scheme, it will be interesting because there does not need to be any proof of the fact of an offence having been com-

mitted. If you do not then pay the infringement notice—it is almost a commercial rather than a legal decision as to whether you pay an infringement notice—Customs can then decide whether to prosecute on the offence or whether it just stays there.

The difficulty is if you pay it for whatever reason—if you believe it is commercially more appropriate to pay it rather than having a brawl over a strict liability offence—it still remains on your compliance record, which governs the issue of future infringement notices, whether you pay the offence or not. So even if it is not proved it still remains on your record and—if you like to use the expression—it can be ‘taken into account’ when they are making a decision on whether to issue future infringement notices. There is a paragraph in the Law Reform Commission report in chapter 12 which deals with the infringement notice scheme that says:

The ALRC notes with some concern that, under the Customs Act Draft Infringement Notice Guidelines, the previous issue of infringement notices is a relevant factor to be considered by the decision maker when deciding whether or not to issue an infringement notice. The issue of notices is no more than an allegation, which is never tested unless the alleged offender chooses to defend the matter in court.

So there you have a difficulty: people will get an infringement notice, there is effectively 20 per cent of the penalty otherwise payable, and even if they choose to pay it as an administrative function to avoid any potential prosecution it still remains on their record. So, in this case, not only do we have the issue of whether you take the chance with a strict liability prosecution, you also have the issue of an infringement notice on your record.

In terms of the strict liability prosecution in this field, the penalties are probably significantly higher than what you would find for current strict liability offences such as parking fines and speeding tickets, so there will be a different series of considerations. It will not be as easy as just paying the amount, because the amounts could add up fairly significantly. There will also be the issue as to who pays it. If an owner is prosecuted for strict liability, he might then turn to his broker and say, ‘Well, it is your fault,’ and then those issues will need to be resolved. So I do not think people will just pay these penalties on a strict liability basis in this field, because by the time it gets to there we are probably talking about some reasonably serious money and it will be a much more difficult decision to make than merely paying a parking fine or a speeding ticket.

Senator CRANE—In summary, what you are saying is that there is a point where people will defend themselves?

Mr Hudson—Yes, I think there is, especially when there are issues of the involvement of third parties, as to who will ultimately bear the responsibility for the fine and so forth, and when people’s professional reputations and licences come into question. Prosecution for a strict liability offence against a broker, for example, may be held against them when it comes to renewing their customs brokers licence, or the same thing may apply for warehouse operators. So there will come a point, and I think people will be less inclined to just pay strict liability penalties under this legislation than they might be under similar legislation elsewhere.

Senator CRANE—I had an experience where I got an infringement notice with a fine. I knew that, on that day, I and the vehicle were more than 500 miles away. I wrote to them and lodged a complaint and was just told, ‘We’ll see you in court.’ I made a commercial decision: why would I brief a lawyer and go through all that for \$40? That worries me greatly.

Mr Hudson—I think it is a concern that industry has, especially when industry knows that, to apply the Customs regulatory philosophy, it is only at the very end of the path that there will be a prosecution, so it will be a very serious question at that point. I think there will not be a decision just to pay. It will be a difficult decision; it will not be as easy as a parking fine or a speeding ticket.

Senator CRANE—In terms of the customs legislation, are you saying that it is inappropriate for any strict liability offences or that strict liability has gone too far?

Mr Hudson—Subject to the items I described earlier as, if you like, warranting strict liability, our view was that strict liability had gone too far from a practical or legal perspective but, fortunately, we are past that point. It is there and we are just having to deal with it. Our position from the beginning has been that broadly based strict liability may not necessarily be appropriate, but parliament decided otherwise. So we now have this fairly broadly based strict liability scheme in the customs legislation, with the possibility of more should the border security legislation go through in more or less its current format.

Senator CRANE—With the principles that I raised earlier on—which you are going to respond to—I imagine you will deal with the issue of when it is appropriate for absolute liability offences to come in. Will you deal with that issue when you come back to us?

Mr Hudson—I will, subject to an admission that I have little to do with absolute liability, thankfully, and there are no absolute liability offences that I deal with. Certainly we will research the issue, but I will not be speaking from as much practical experience as I will in respect of strict liability.

Senator CRANE—In your submission you refer to customs legislation in New Zealand. Can you outline your concerns there and explain what happened?

Mr Hudson—In terms of international strict liability or international customs regimes, New Zealand introduced into its legislation, some time ago, provisions similar to those we have recently introduced. I think there is anecdotal evidence from New Zealand customs authorities—and I may be corrected on this—that it has not had the desired result. So it has not really delivered the increased levels of compliance that had been intended at the time that the legislation was introduced in New Zealand. I am only reporting in that place. Those were the comments made to me anecdotally by other officers in New Zealand, that it has not had quite the result which they had hoped. So they are a number of years ahead of us in that respect.

Senator CRANE—Regarding the Attorney's guidelines—and we asked the department this morning when they will be putting the guidelines out—do you have any comments to make? Are they too broad, too narrow?

Mr Hudson—Sorry, which guidelines are they?

Senator CRANE—The Attorney's guidelines and when it is appropriate to use strict liability and other forms of penalty in dealing with issues. I have not actually seen them, but we did ask this morning whether we will get copies. If you have not seen them, maybe we can send you a copy of them.

Mr Hudson—That would be good. I would certainly undertake to take that on notice as well. I may have seen them at some stage, but I certainly have no significant recollection of them.

Senator CRANE—That is an interesting answer because one of the questions I asked this morning of the department was: how widespread are they? I would have thought you would have been an appropriate body to have a copy of them. Mr Chair, that satisfies me for the moment.

CHAIR—With your clients within the industry itself, do you detect any feeling of oppression, that this is just getting a bit too much for people to withstand? I want to then ask you about the road laws.

Mr Hudson—Anecdotally I can report that I have presented on this topic—

Senator CRANE—Mr Chair, this is most unsatisfactory on the mobile. I am going to pull out now because I can only stay another quarter of an hour anyhow. Thank you very much for that.

CHAIR—Thank you very much.

Mr Hudson—Just to address that point, I have spoken on the new regime on a number of instances elsewhere in Australia, in Perth, Adelaide and Queensland. A number of people have come up to me afterwards and said, ‘This is all going to make life too hard.’ That has been an honestly held belief by a lot of people. I have not seen anybody baling out of the industry yet. I think that is one of the concerns we raised originally—that it makes the regime so tough or so difficult, perhaps, to comply with that you will end up getting smaller players leaving the industry and that it will concentrate players with the bigger service providers. That is also a concern when part of the strict liability regime is timely reporting within prescribed times. That will effectively mean that smaller operators will have to find a way of providing the service 24 hours a day, seven days a week. That is a real concern for industry. But people have said to me, ‘This is all too hard. Why would I bother? I think I’ll go and do something else.’

CHAIR—What about being liable for the actions of third parties? Is that a linked problem?

Mr Hudson—They are certainly worried about that. Our advice has been—and indeed Customs and ourselves have spent some time with some training suggestions—that it is all about retraining clients: retraining people and saying to people, ‘Well, you have to give me the right information or I’m going to hold you liable.’ In other words, if something goes wrong then it is your fault, not mine. So there are real issues to do with that, and it does worry them as well. If you sat a group of customs brokers down in a room, each of them could give you 10 or 20 examples of problems they will face because they are dealing with third parties, and it makes it very difficult for them to comply with strict liability.

CHAIR—We have been talking about speeding. Let us say that the road traffic regulation is mainly carried out in terms of strict liability. But there are some distinguishing features in the road traffic laws compared with this one. One of them is that there is a certain consensus right across the community that it is a reasonable system. When you start losing that consensus, you get into some problems. I do not know whether you know Dr Denis Napthine with the issue of the 10 per cent—that sort of thing. Once people get the impression that the laws themselves are

unfair or are being administered fairly, you get some trouble. But if people feel that these are fair and they are being administered well, you probably do not get that trouble.

I suppose, with road traffic laws it is universal in the sense that if I am the person who is working the camera or the radar gun I am just as much subject to the laws as you are—it covers everyone. I think everybody sees that and understands it. They understand that the consequences to be avoided are beneficial to everybody, so that we can all go around the roads together. A road traffic offence is not an offence that brings you into great disrepute within any industry.

Thirdly, you are in control of a situation, which you are not with the third party one that you were talking about there. In other words, you are in charge of the wheel. You have gone up to 70 instead of 60, but you were in control. You could have done something about it. To a large extent, those sorts of elements are missing, aren't they, from a lot of the customs legislation? It is not universal; it only hits a particular class of people. It is customs agents and who else?

Mr Hudson—It will deal with everybody who has dealings with Customs—everybody who reports to Customs or makes entries. So it is a fairly broad category of people, including importers. People do not necessarily use brokers to make entries, for example.

CHAIR—But it is not a law that covers everybody in the community, no matter what.

Mr Hudson—No.

CHAIR—If you are Customs officer, you are not going to be hit by these laws. You are going administer them, but you are not going to be hit by them.

Mr Hudson—Correct.

CHAIR—Whereas with the police, in theory at least and I think in most cases in practice, if they get up over the 60, they have gone. They are road users, so there is a universal use of the road in a way that is different, I suppose, from people using Customs.

Mr Hudson—Yes. It is interesting. On that strict liability issue, obviously there is still a defence under the Criminal Code for acts of third parties and so forth. There are statutory defences. The difficulty will be for people to invoke those in prosecution. That is always the difficulty—the ability to successfully invoke all those defences. A number of the defences to strict liability just won't work. Intoxication won't work.

CHAIR—What would it cost a person to defend a Customs prosecution?

Mr Hudson—It will depend upon the lawyer they brief, somewhat. It is really difficult.

CHAIR—If you went along and got a very competent solicitor and a very competent counsel?

Mr Hudson—If you had made the decision to defend it and, depending on the quantum, if it was brought, for example, at Federal Court level it would cost probably tens of thousands. It could conceivably be thousands of dollars and possibly tens of thousands of dollars, depending upon the lawyer and depending upon the counsel if indeed you retain separate counsel. Queens Counsel these days cost seven or eight thousand dollars a day. That is just for appearing, let alone preparation time. So it can become expensive, which is a disincentive to actually defend the prosecution when you look at the cost to defend. It is difficult to give a universal response, I am afraid.

CHAIR—But what you are putting is that the reality of it is, as distinct from the reading of the black-letter law, that you would have to be very wealthy or very determined to take on a prosecution that was brought against you.

Mr Hudson—Absolutely. There is no question as to that. That will be the practical effect—that the cost of defending it, wherever it is brought, will be significant. Therefore that acts as an effective disincentive. Once upon a time if it was just an offence and the prosecution was brought, when it was not a strict liability offence you might think you had a better chance of defending the prosecution. But if it is strict liability you might think, ‘Okay, I have got less of an opportunity to defend it and the actual cost is significant. Even if I succeed I won’t get all those costs back, the way that the scales work.’ That becomes a very practical consideration when deciding whether to defend it or not.

CHAIR—I guess if you were giving advice you would say, ‘Look, intent is just not an issue. That is decided against you already.’

Mr Hudson—Yes. And even though it is stated strict liability does not reverse the onus which Customs have to prove, it does take the mental element out of it. You are then looking at: ‘What else has caused this that I can successfully bring into play?’ If you are a service provider that it is being sued and your client says, ‘Well, it might have been my fault but I am not going to admit to it and you have got to come to court. You are going to have to compel me into court’, you have got almost two proceedings on foot. That makes it even more difficult.

CHAIR—Are there any particular offences that you find might present, say, your clients with a problem like that? I suppose there would be a lot of formal regulatory offences where you say, ‘Just pay it and get on with it.’ Are there any big ones where you would say, ‘Well, this is a real issue’?

Mr Hudson—I am predicting what might eventuate. There is a provision under section 33, the movement of goods without Customs authorisation, which holds an employer responsible for the acts of the employee, but there is a defence to that if appropriate levels of management or due diligence have been displayed. In that case, you might want to have a fight about that because you would want some certainty as to exactly what levels of management and due diligence you have to exercise.

Another one is misstatements to Customs where there is no loss of duty involved but there is now a penalty, whereas before penalties revolved around the amount of duty which is forgone or drawbacks incorrectly paid or refunds incorrectly paid. There is now a new offence which says that if you make certain misstatements, regardless of the fact that it may not lead to a loss of

duty or improper drawback or improper refund, you can be held strictly liable for that misstatement. You might want to take an issue at that point, because it goes to the way in which you deal with customers, perhaps. All these sorts of issues will then arise again at a lower level now with the infringement notice scheme, where you have got Customs making a decision: 'We reasonably believe that there has been an offence. We issue an infringement notice.' There you have got a new playing field, a new level of dispute at that infringement notice level.

There is no external review. You cannot seek an external review. You cannot go to the AAT. You can go to the Federal Court perhaps and it might be a decision under enactment. But the way to seek to appeal that is that you write back to the CEO of Customs and say, 'This should be withdrawn for the following reasons.' So there is no external review. You then have those decisions you are talking about having been made again at an entirely different level, a real microlevel.

CHAIR—And there is a discretion as to whether or not to issue the infringement.

Mr Hudson—Absolutely.

CHAIR—So what used to be a judicial function has gone back to an administrative function.

Mr Hudson—I do not think it is deemed to be a judicial decision. You are right: it is an administrative decision to issue the infringement notice. It has to be that, otherwise it is not a court making the decision.

CHAIR—I am sorry; I should have said that it is something that used to be supervised through the courts because it was always, I suppose, at the prosecutor's discretion whether or not to bring it.

Mr Hudson—Correct.

CHAIR—What I am getting at is that at least there was some quality control exercised by the courts.

Mr Hudson—Which is why Customs have issued these guidelines, but it is still inherently to their discretion. There are guidelines that are subject to consultation at the moment as to the circumstances in which they will be issued or will not be issued or withdrawn or not withdrawn. But at the end of the day, they reserve the right to act at their discretion as they see appropriate.

Senator MURRAY—But that is standard with all regulators. APRA, ASIC or ACCC all exercise discretion in the exercise of their enforcement.

Mr Hudson—Absolutely, but for this industry this is bringing it to a new level—and I think that is what we are talking about here. There have not really been these infringement notice provisions before; there are in the other industries.

Senator MURRAY—Sorry to interrupt, Mr Chairman, but as you were talking that was one of the things which occurred to me. Do you think one of the problems is that the industry has

not been used to the sort of action we are discussing now and that people who deal with ASIC or ACCC are used to it—and APRA now?

Mr Hudson—I do not think so, because I think industry has been dealing at the coalface with Customs for a hundred years and—

Senator MURRAY—No, I am talking about a regulatory style where the application of fairly sweeping powers is discretionary, flexible.

Mr Hudson—I think it has always been like this. I think the change has been that it is now strict liability. I think that has changed the mix or the framework somewhat. There has always been this sort of interaction with Customs at this level for a number of years. I think it is just that the nature of the consequences is different to what it may once have been.

Senator MURRAY—My apologies, Mr Chairman.

CHAIR—No, and I will finish on that. I think what is being put is this: is the discretion that is left with Customs now and the ability to issue these default notices, or whatever you call them—

Mr Hudson—Infringement notices.

CHAIR—a big issue? What do you think?

Mr Hudson—I think it could potentially be a big issue. Clearly there are guidelines, but ultimately it is a discretionary thing. An infringement notice (a) is new and (b) goes to your record or your history, which can then militate against you in the future. Because there is no external review, although there may be internal review, at the moment there is nothing that has been made public about the way in which old notices will be dealt with. In other areas an infringement notice, whether or not it gets prosecuted, gets removed from the record. That will not happen in this case. Nothing in the guidelines at the moment—we have raised this issue and I am sure it will be addressed at some stage—addresses the question: at what point does your record get cleared? The Law Reform Commission talks about the normal expectation being that—I think everyone understands this—at a certain point, your record gets cleared. But the minister, at the time the legislation came in, said that what was called a ‘stale’ infringement notice would still be part of your record, and so it could stay there indefinitely. Then it comes back to how Customs use that.

One of the issues in making a decision about whether or not to issue an infringement notice under the guidelines is your compliance history. Compliance history could go back to infringement notices that had been issued both correctly and incorrectly. They do not prove anything; they just form part of your statement. Those notices could also have a regulatory impact on Customs brokers, for example, in terms of whether they get their licences renewed or so forth. We have yet to resolve that issue. We have certainly put that to Customs and Customs have undertaken to get back on that, and so I do not know quite where that position is going. But one of the criteria they will look at is compliance with the act and whether you have been a good person and so forth, and these things at a certain point could presumably be held against you.

CHAIR—Are there any further questions? Thank you very much, Mr Hudson. You will now hear all the answers; are you going to wait and listen to them?

Mr Hudson—I would do, but I am due at the War Memorial at 3 p.m.

[2.59 p.m.]

GOGGS, Mr Stephen John, National Manager, Commercial Compliance Branch, Australian Customs Service

NYAKUENGAMA, Ms Sharon, Acting Director, Compliance Policy Unit, Commercial Compliance Branch, Australian Customs Service

CHAIR—Welcome.

Mr Goggs—It was intended that Phil Burns, the National Director of the Commercial Division, be available to attend the hearing, but he has not been available today, so I give apologies for that. I am accompanied by a member of my staff, Ms Nyakuengama. I hope that she will be able to assist you with any detailed questions that you might have about the intricacies, especially of the strict liability and infringement notice scheme. I just flag in advance that I understand that she has some further insight that might be useful for the committee in relation to the New Zealand experience around these things.

Ms Nyakuengama—In relation to the New Zealand situation in particular, I think that this piece of information that New Zealand has a strict liability scheme which they say does not work was originally in the CBFCA submission to the Senate Legal and Constitutional References Committee inquiry into this. There was so much in that submission that that was something which we did not go back and check at the time. Then it ended up being reported in the committee's report as fact.

I got in contact with the New Zealand Customs Service after that. I happen to have a copy of the New Zealand Customs Act on my desk. There is no strict liability regime in the New Zealand Customs Act with an infringement notice scheme in lieu of offences that are prosecuted. What they have is an administrative penalty scheme under the same terms as the current Customs Act administrative penalty scheme for false and misleading statements. The only difference to the current Australian Customs Act scheme is that the Australian scheme only applies if the false or misleading statement results in a loss of duty.

The New Zealand system applies to duty and non-duty false and misleading statements. The act applies the penalty. An unpaid penalty is a debt due to the Crown and it can be recovered as a debt. The distinction with what we are doing in our new scheme is that we are replacing that imposition of the penalty by the act, the decision maker giving you a notice that that has happened and then our ability to recover that penalty as a debt, with the infringement notice scheme, which is an alternative to prosecution for an offence. Then a non-payment of the reduced penalty in the notice gives rise to a right to prosecute for the full penalty in court.

My understanding of the New Zealand Customs Act is that they do not have a strict liability/infringement notice scheme. Any comment that the New Zealand chief executive of Customs made at the conference that was cited in that submission—which I do not have with me at the moment—was anecdotal. I obtained a copy of his speech and there was nothing in that

at the time either. So I do not think we can cite New Zealand's experience as something that is a reason why we should not be moving down this path in the customs context.

CHAIR—So we cannot use that as evidence or as an example of what has happened elsewhere?

Ms Nyakuengama—No, I do not think so. The comments that were made were in relation to specific non-duty false or misleading statements. Making that the subject of a penalty, did not necessarily improve performance in improving the quality of that information. They certainly do not have a broad ranging infringement notice scheme that applies to a vast range of strict liability offences.

CHAIR—It might be worthwhile correcting that in our report, if we can remember to do so. There is a false impression abroad. Do you want to say something else?

Mr Goggs—Senator, it was not my intention to rehearse the whole philosophical process or the legal framework in which the liability offences now appear on the statute book. Obviously, that is something that was canvassed at great length in the parliamentary debate. It is something which is set in place as much as anything by the criminal code harmonisation which is bigger than the role that Customs plays.

I did want to take the opportunity just to emphasise the fact that the developments that Customs has put in place, in relation to the strict liability regime generally, are very much in the context of a whole of government approach to the extent that the Attorney-General's Department has indicated that, for example, if an offence is to be regarded as a strict liability offence it should be expressly stated to be a strict liability offence and that if an infringement notice scheme is to apply then it should be very clear which offences are appropriate for the scheme to apply to. So it was very much in line with that whole of government approach—or at least in tandem with the approach that was being promulgated by the Attorney-General in relation to the harmonisation of the Criminal Code generally—that changes have been made to the Customs Act. It now appears, of course, that under the trade modernisation legislation lots of strict liability offences have been introduced to the Customs Act. But, in a sense, had it not been for the trade modernisation legislation they would have been introduced into the Customs Act anyway as a result of the harmonisation process, which has gone on across the board and is in fact continuing to be played out in terms of tying up the loose ends.

Another thing that I think it is important to remember is that the strict liability regime and the infringement notice scheme, while they are of course the 'pointy end' of a compliance regime, are not the only part of that regime. They are also not the only part of the amendments that are made to the Customs Act. It is very much a look at the whole of the cargo management continuum so that, for example, there are very significant reforms in relation to the requirement to keep documentation. We operate in a self-assessed regime where much of the information that the trading community are able to give to Customs they sort out for themselves, they prioritise for themselves and they provide to Customs. What we say is: 'Yes, it is great to proceed in terms of the facilitation of trade without unnecessary intervention on the basis of self-assessment. You just need to keep the records that led to the provision of information to Customs.' Not surprisingly, the next step in that is: 'We will want to look at those records on a periodic basis to make sure that that self-assessment is working and, furthermore, having looked

at it, if we find that it is not working, we will want to work with you to make sure that your compliance levels improve. And if, as a result of having worked with you through a range of different compliance improvement mechanisms, we find that things are not working then as a last resort we will not be afraid to come to the pointy end of the compliance continuum to enforce that compliance to make sure that the point is made.’ I think that, while obviously people are going to be concerned about the operation of a penalty scheme and the implications for them, Customs very much sees it as just part of a continuous process.

Inevitably, the fact that an offence exists on the statute book means that if one took these things absolutely strictly—and I do not mean to use that term in the sense of strict liability but very technically—every time a statement that happens to be false is made to Customs in relation to the false or misleading statement provisions Customs could use the infringement notice scheme to impose a penalty. The simple, plain truth of the fact is that that will not happen. I know that Senator Murray made the point earlier this afternoon that it depends on the application of this process. Technically, it would be possible for that to happen and that would be a very onerous regime. In order to describe a threshold or some sort of tolerance of noncompliance, the legislation would have to be enormous because the range of circumstances in which they could happen would be very extensive, just as it might be, for example, in relation to other discretionary activities carried out by government authorities.

Customs very much sees itself as embarking on a process of compliance monitoring and improvement mechanisms, which will be about educating industry, working at all levels of industry sectors to identify problems, and identifying where things have appeared to go wrong and where there might be some room for improvement. Against that background, I am relatively new to Customs and while I do not offer that in any way as exculpation or excuse, it may be useful for you to know that in the sense that there may be some of your questions that I will be forced to take on notice. It is also relevant to the extent that it will be my responsibility to work on the finalisation of the guidelines, for example, that relate to the infringement notice scheme. Looking at the document as it currently exists and now that I have had an opportunity to go back through the history of the development of this process, I can see that a number of issues are not dealt with at all in the guidelines which ought to be dealt with. We are very grateful for the comments that we have received from various authors in relation to the draft guidelines so far, in particular, those of the Law Council. I am thinking of areas like the topic of compliance history.

People always confuse compliance with noncompliance. There is very much an impression that when we say that we are going to look at your compliance history, all we are going to look at it is your noncompliance history and that we are going to say, ‘Oh, you have had two penalties before; we’re going to impose another one.’ The more significant statement, as far as Customs is concerned, is that we are going to look at a person’s transaction history—and in a sense part of the trade modernisation amendment is around an integrated cargo system so it would be much easier for us to look—and say, ‘You have dealt with us on 5,000 occasions this year and you have only made this mistake to the level of penalty once before; your compliance history is in fact very good.’ We are more likely to say, ‘Well, the fact that this has occurred again means that we need to bring this back to your attention so it does not become a systemic problem.’ If we look at the transaction and history and say, ‘Look, you only do this 10 times a year, and on five occasions already the situation has led to a penalty, you are clearly not getting

the message. Here is another penalty, and we will be working with you yet again on a range of other improvement mechanisms’—that is a very different state of affairs.

Another issue on compliance history, which I know the last speaker referred to, is the issue of stale notices. This is something that is exercising the mind of industry: what will happen in terms of an infringement notice, which has been given to a person who has decided not to pay, if Customs does not then prosecute and it is just left in abeyance in some way on the record? It is very much the intention of Customs that we will not be giving a person an infringement notice unless we are prepared to prosecute them for the offence that it relates to, so I do not see that stale infringement notices are going to become a problem. There is a step between the issuing of the infringement notice and the prosecution and that is, if a person thinks that there is a valid reason why the notice should not have been issued—why, in effect, they can flag a defence that they would raise in court—they can apply for the notice to be withdrawn. So I would very much see notices as being paid; or if not paid, withdrawn for some good reason; or if not withdrawn, prosecuted. I do not see a place for a whole raft of stale notices floating around out there with some dubious status.

In relation to that withdrawal process, I know that one of the submissions that the Law Council has made says that the guidelines are silent on just exactly how the withdrawal process will work. The legislation is scant on detail in relation to the process. It is certainly my intention to incorporate into the guidelines some more directive indication on the time within which Customs will make a decision on a withdrawal representation, and what happens to the time that is otherwise running to pay the penalty while the withdrawal representation is being considered. The legislation does not say anything, but it is only fair that people should know that, when they have 28 days to pay but during 14 days of that they put up a good reason why they should not pay and if they have not heard anything back from Customs and the rest of the 28 days has already expired, it would not be right that they would have to pay while we are sorting that out. So I would expect the guidelines to have much more meaningful information about that.

Likewise, some of the representations have been that there is nothing in the guidelines that indicates what an infringement notice would look like. I think it is a good idea that if somebody can look at the guidelines, they can say, ‘So that is what a penalty notice is going to look like. I will have to keep an eye out for those because if I get one I will know I am in trouble.’ I think it is a very good idea and it is something that we will actively work on. That is all I want to say by way of general comment. Obviously there are a number of issues that you will have and I am happy to try to answer your questions.

Senator MURRAY—You may be aware that the Standing Committee for the Scrutiny of Bills is one of only two committees in the Senate which sees every bill that goes through the Senate. The other one is the Standing Committee for the Selection of Bills, which is just a post office really. This is the only committee that looks at all bills, albeit against limited terms of reference. One of the things we have learnt is to be afraid of precedent because what happens is that somewhere, someone, somehow, sneakily gets in a provision and tells everybody it is an exception, just needed for this particular area, and in no time at all we find it mushrooming through the system because of the precedent. In listening to your discourse on strict liability, obviously the notion of a physical fault has been around a long time.

Our instinct in the committee, talking amongst each other, is that there are unlikely to be many principles laid out for the establishment of liability provisions in any real sense—they were developed in common law. When the Commonwealth made its decision to be explicit as to whether it is a fault liability, a strict, or an absolute liability, most of the advice we have got—in contrast to the impression you might not meant to have given—and we have been diligent in writing to departments, is that they have merely reaffirmed liability provisions, which were already strict. Now in the instances of Customs, your revision includes quite a large number that were never strict before and that is why there has been some focus on Customs.

The first question to you is this: when you were looking at the application of strict liability in the new legislation, were there sets of principles you were using? To give you an example, you would have heard some of the criticisms expressed by the Law Council representative who said that where the liability could result from the action of a third party it is plainly unfair for liability to accrue to a person who might not have any control over that third party. This would seem to me to be a reasonable principle. Did you have a set of guidelines?

Mr Goggs—Yes, we had a set of guidelines to the extent that we were working on the framework established by the Attorney-General's Department for the harmonisation of the Criminal Code. Obviously the practical implementation of that harmonisation has been quite recent although it has been going on over at least 2000 and 2001. What that had shown us was that there were already a number of offences on the statute book which, while they were not specifically described as strict liability offences, used phrases like 'without reasonable excuse'. This was an implied way of saying that if there was some sort of reasonable excuse then an offence has not been committed but in the absence of a reasonable excuse there is no fault element attached to an offence. In that sense, we saw that there was quite a large range of offences that were in transition from not being described as strict liability to offences that were to be described as strict liability. Beyond that, as you say, there are a number of offences that are new and there are some offences where it was at least ambiguous as to whether there was a strict liability previously.

And Customs took the view—once again in line with the sort of reasoning that had been outlined in the principles for such things by the Attorney-General's Department—that if the offences related to matters of the protection of the revenue or, in particular, in relation to community protections, then those were areas where it was very important to be able to identify quickly and react quickly to apparent noncompliance.

Senator MURRAY—Why would you think it appropriate that something like protection of the revenue would automatically attract a strict liability provision? You can see where a public interest thing like health—a bug comes and starts to kill lots of people, and so you are fairly careful on health. You can see where there are obvious consequences from an activity. We have used speeding a lot as an analogy today, but if you speed, you kill. Revenue can vary from you should have paid \$10 to millions of dollars. Why do you think it would automatically fall into the principles?

Mr Goggs—That is something of a philosophical debate and it is inevitable, when you consider the context of Customs, that we look at the ways in which revenue is generated generally in this country. You see Customs is effectively the second largest agency responsible for revenue collection—

Senator MURRAY—Let me explain where I am going to with this. In some of the evidence that we have been given today, and in the submissions, it seems that quite a lot of the strict liability provisions that are in legislation very much relate to a factual circumstance which is easily established. For instance, in Defence, it is a much worse offence under their disciplinary code to assault a superior or an inferior officer than to assault somebody of the same rank. I must say that loses me a little; I cannot see why it would be but I can see it from a battlefield perspective. Let me not be flippant. The fact is you can identify in most cases that somebody is in civilian clothes and you would not know where they came from. It is the same with speeding almost; you are either over or under the speed limit.

When you get into issues like revenue, there may not be a fact attached to it. It could be a notional loss. It could not be an obvious loss. It could not be an ‘evidence loss’. It might be a loss that had to be proven. You see where I am going to with it? I know in your legislation there are levels of that for which you can put up a defence—yes, I do know that. I suspect that when we finish this exercise we will come back with a set of principles—and perhaps the Australian Law Reform Commission will have some more—some of which, if reapplied back to all the various legislation that exists, we might find do not fit. That is the point I am making. People have in the past automatically made a presumption, because the precedent already existed in common law. It had been established and therefore it should simply apply again. Why? It is almost, in legal terms, going to a zero sum approach—you start from a basic response.

Mr Goggs—Yes, in that sense I suppose it is no direct answer, but it is important to couch any response to this sort of development in the context of the business and, as far as Customs is concerned, the trading context. In that, traditionally one might have looked to import goods and produced one’s information to Customs to enable Customs to make a decision about exactly whether a duty component might apply. In that sense, the issue of making the assessment was left within the government’s hands or at least in the hands of the administration. In the 21st century, where we are dealing with a far greater volume of these things and with the far greater necessity of a self-assessment regime, Customs would argue that it is almost inevitable that the counterbalancing weight to be given to a regime where industry self assesses is some kind of capacity for immediate and direct response by way of penalty.

Senator MURRAY—I agree with you on that sort of thing; the provision of information is vital to the regulatory function. If you were unable to police vast numbers of transactions and you gave up self-regulation, which I think quite properly you could, the regulatory device has to be by way of administrative fiat, which implies a strict liability consequence, I guess. It is a very serious issue so I accept that, that makes sense to me.

I will give you another example which makes sense to me. It seems to be a principle which I want to know whether you think I am right about or not. If something matters a great deal but is a really almost petty and irritating thing to take to court, it is far better dealt with by a strict liability regime, which has an automatic fine or infringement notice or something attached to it. I will give you an example. To me it matters a great deal that people who have great powers given to them are capable of being properly identified as having those powers—their identity cards, their uniforms and their police badges with their number on. All that sort of thing, to me, should be a strict liability offence if they fail to do so. I would not like to prosecute a police officer and take him to court for failing to appear with his badge, but it is very important, otherwise how does a person in the street know that they are dealing with someone who

purports to be a police officer? It is that kind of relationship which I think you can distinguish. But when somebody says to me, 'Well, revenue automatically should carry a strict liability inference,' I am not as easily persuaded. I think the revenue issue is the kind of issue you can take to court because it is fraud or loss or negligence.

Mr Goggs—I think I can only say that Customs would beg to differ in the sense that it is essential business to Customs to be concerned about the important issue of the proper payment of customs duty and other related revenues.

Senator MURRAY—But we do not differ that it is a fault; we merely differ as to the way in which the fault should be treated—

Mr Goggs—Yes.

Senator MURRAY—or we might differ as to the way in which the fault might be treated.

Mr Goggs—From a philosophical perspective, we might have to agree to differ. If one does not accept that the need to protect the revenue is something that can be dealt with without the need to prove fault, then it would be logical to say also that a strict liability regime is not appropriate to that environment. As soon as one recognises that the import and the export processes, the trading processes, that go with that are fairly automatic but should not be allowed to go unnoticed because of their automation—they are a relatively automatic process but they have very important consequences in terms of both the revenue and community protection—then Customs would say the importance of that consequence is something that has to be addressed without the necessity to have to go through the requirement to prove fault.

Senator MURRAY—But you do hear what you are saying, don't you? You are saying that the principles of defence developed under our common law for an individual faced with an allegation of criminal activity should be lessened or subordinated to the interests of the state vis-a-vis money. That is a slippery path, isn't it?

Mr Goggs—I suppose that is right. Partly the distinction you make is between strict liability and absolute liability offences, to the extent that the defences are all still there in relation to strict liability. While it is not a requirement to prove fault in the first place, if one is acting, for example, on an honest and reasonable mistake, which might be in relation to information that comes to you from a third party and is beyond your control, then those defences are still available to you. I know it is said that one of the problems with an infringement notice scheme is that you never get to raise that defence until you get to court, but you do get to raise the defence effectively because, in terms of the infringement notice scheme at least, you can make representations that it was not appropriate for you to have been the one who was penalised because the activity was outside your control.

Senator MURRAY—I would like to ask about review. I agree with the steps you have so far, which is an infringement notice and an internal review process. You can write to the chief executive officer or their delegate and you can have the matter re-examined. Nevertheless, traditionally there is a next step. The inference I got from the previous witness is that there is no next step. I do not think that is true, is it? Somebody aggrieved by your internal process can still go to the AAT and to the Ombudsman, can't they?

Mr Goggs—Not in relation to the decision to issue an infringement notice.

Senator MURRAY—But to the process they can—how it is dealt with and the principles of natural justice.

Mr Goggs—The process of general administration to the Ombudsman, yes, but to the AAT, one only has the right of appeal to the tribunal if a statute gives you a specific right of appeal, and there is not a right in relation to the infringement notice scheme.

Senator MURRAY—Is it specifically excluded in the legislation? I cannot recall.

Ms Nyakuengama—It is just not cited in the referral to the AAT provision. We have a section at the back of the Customs Act that lists all the decisions which are subject to AAT review.

Senator MURRAY—So it is specifically excluded?

Mr Goggs—That is right. The AAT legislation says we only have jurisdiction if another enactment lists something that can be brought on appeal to the tribunal.

CHAIR—Following on from what Senator Murray was asking, you are saying that the real issue here is the revenue. Is there anything else?

Mr Goggs—Community protection.

CHAIR—I know we are talking in terms of philosophy and that, in a certain sense, is not what you are about, but we have to try to tease it out for ourselves. Does that mean to say that revenue is more important protecting life and limb? Would you go that far? Would you say, 'We have got strict liability where revenue is concerned because that is more important than anything else?'

Mr Goggs—The short answer is no. Protection of revenue is not more important than protecting life and limb, but the issue of protecting life and limb falls into the other category of offences which we believe are appropriately classified as strict liability and that is protection of the community. That can happen in a range of ways. It is about whether prohibited substances are brought into the country which could be detrimental to wellbeing of individuals or the community. It could be about prohibited matters such as diseased material or firearms et cetera.

CHAIR—And that would be strict liability as well.

Mr Goggs—That is right, and that is why there is a range of strict liability offences relating to the movement of goods which may have a community protection component. It is very difficult, of course, because the Customs Act does not purport to regulate exactly what the goods are that are being imported—it purports to regulate the process by which a whole range of goods might be imported into the country, and it becomes very difficult. If one were to say, 'We want to be absolutely certain that anything which is capable of bearing a certain type of disease should be excluded from the country,' then, if you had to list all the things that could

carry that, the list would be endless. The only way around that is to say that we will want to know about the way all goods are moved, so that we can work out if we think that a particular consignment is something that is of concern. We can track it down quickly, and we can identify accurately what information has been provided about it.

CHAIR—The trouble is that we do not have strict liability for murder, rape, armed robbery and what have you, which a lot of people would say are more terrible offences than many of the offences you are dealing with here. Have you got any thoughts about that? Would you distinguish those in terms of the penalties involved? How would you distinguish them?

Mr Goggs—We see the strict liability regime as applying to a lesser range of criminal offences, and that is partly reflected by the nature of the penalty that can be imposed in the sense that, the greater the penalty, the less likely an offence is to be strict liability. In fact, the strict liability offences do not apply to any offence which has a penalty of imprisonment. As soon as you start talking about those other types of crimes, they are crimes for which our society has determined that it is appropriate that the penalty be imprisonment.

CHAIR—It is like a surrogate. If your liberty is at stake, your general reputation is at stake or something like that, then you have to be more concerned about convicting a person.

Ms Nyakuengama—When we say that the community protection area is an area that we have considered that strict liability is appropriate for—and we cite things like importing drugs in particular—those offences of importing the prohibited goods or importing drugs are not strict liability. We have to prove fault in those ones. It is in the whole context of the self-assessment regime and risk management: if we have a philosophy of intervention by exception—at face value, we accept what you tell us is correct—and we let the goods go on the basis of initial information, the damage is done, whether you intended that the information you gave us was wrong or not. Or, if the cargo report is late, there is no time for us to assess that information to decide whether we will have a look in that container.

As for the strict liability penalties and then the infringement notice penalties, the highest you will get in an infringement notice, other than for false or misleading statements on duty, is \$1,320—12 penalty units. It is the maximum. We are not penalising people huge amounts via an infringement notice, whereas the ones that have the higher monetary penalties or the imprisonment—the acts of importing the prohibited goods—are fault based and have the higher penalties. What we are saying is that, for us to be able to facilitate the vast majority of compliers—people who are not importing prohibited imports, people who are not trying to defraud the revenue—having their goods within three or four hours of them arriving in Australia, we need this information accurately and on time so that we can apply these principles. It is the breakdown in that that we feel attracts the strict liability offence. In order to get people to take care, because they will get caught—

CHAIR—You say that the strict liability offence is aimed at their consciousness and at their memory to ensure that they keep in mind what they have to do. This is not a draconian penalty but a penalty that keeps matters alive in somebody's mind.

Ms Nyakuengama—Yes. I think so.

CHAIR—So that you say, ‘If I don’t do this, it will cost me some money.’ It might be the end of the world but it is a lot nicer than—

Senator MURRAY—It will keep costing them money, I suppose as—

CHAIR—Do you think it is an educative function? How would you describe it? Making sure that people are educated into sending in their forms—is that part of it, or does it go beyond that? Is it just a matter of reminding people?

Mr Goggs—I think it certainly is a way for a lesson to be learned. Customs sees education in improving compliance generally as a very important part of its function. One of the ways that that educative message can be delivered, if all other means are failing, is to use the big stick approach of ‘We are going to hit your hip pocket as well as other means.’

CHAIR—You would say this is a slap on the wrist. It is not a prison sentence; it is not a penalty that is going to ruin you in the eyes of the public but nevertheless it is going to be enough to stir your mind in future.

Mr Goggs—That is one of the components of that issue. It is very important to bear in mind the difference between the offence of importing the prohibited goods as distinct from the process. But if you are going to be either intentional in your attempts to defraud the revenue or reckless as to the defrauding of the revenue, the important thing as far as we are concerned is that the revenue could be affected—and to a very large extent.

CHAIR—If you defraud the revenue, you are then into some fairly serious criminal offences.

Mr Goggs—Absolutely.

CHAIR—Which the DPP would take over, and prove intent too, in the circumstances.

Mr Goggs—Yes.

CHAIR—But aren’t these of a different nature and for a different purpose as well?

Mr Goggs—In the majority of cases, they will be of a completely different nature. It may be that the sorts of things that are being detected and dealt with through the infringement notice scheme might be fraudulent. It may not be possible to prove that, in which case the information is still wrong.

CHAIR—If it was fraudulent, you would be much more angry about it all.

Mr Goggs—Absolutely. If there was a realistic chance that it could be proven, then those are matters that would be brought to the attention of the courts.

CHAIR—Thank you very much for that.

Senator MURRAY—One last question from me, just to be sure, because I see all sorts of press reports as to when bits of this legislation will be in place. When will the liabilities regimes be law? Is it from 1 July?

Mr Goggs—Yes. It is proposed that on 1 July this year a certain number of the offence provisions and the infringement notice scheme—to the extent that it can apply to those offences—will commence.

Senator MURRAY—Has that gone through the Executive Council process?

Mr Goggs—No, it has not. That is why I say it is proposed that it be 1 July. That will be things like 243T: the false or misleading statements affecting duty, and 243U: not affecting duty.

Senator MURRAY—But is there any uncertainty about that?

Mr Goggs—As far as the chief executive officer of Customs is concerned, he sees no reason why it should not be 1 July. As you say, the Executive Council has to approve it, so we cannot assume that it absolutely will happen but we see no reason why it should not.

Senator MURRAY—Certainty is one of the things people need most and this legislation has generated a fair bit of fear, as you know.

Mr Goggs—We have tried to be very clear about the fact that there are a large number of other strict liability offences to which the infringement notice scheme will in due course apply, but it will not be from 1 July. It may not be for the next couple of years.

CHAIR—You would deny that strict liability offences were an easy way for every department—other than yours, of course—to prove an offence without too much trouble.

Mr Goggs—It is not a mechanism that we adopt just for the sake of bureaucratic convenience.

CHAIR—Not you, but other departments.

Mr Goggs—I cannot speak for many other departments. I have had some experience in other departments. In terms of the harmonisation process—

CHAIR—Where were you before Customs?

Mr Goggs—Aged Care.

CHAIR—I am very interested in that.

Mr Goggs—In those other places we looked very closely at whether or not the sorts of offences that were being described ought to be described as strict liability offences. That was an area where it was much more appropriate for them not to be strict liability offences. There were not that many offences anyway in that sphere.

CHAIR—Thank you very much, Mr Goggs and Ms Nyakuengama, for coming along.

Committee adjourned at 3.46 p.m.