AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1989

1 MARCH 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1989

1 MARCH 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1989

The Committee has the honour to present its First Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Administrative Services Legislation Amendment Bill 1988

Broadcasting (National Metropolitan Radio Plan) Act 1988

Crimes (Torture) Act 1988

Electoral and Referendum Amendment Bill 1988

ADMINISTRATIVE SERVICES LEGISLATION AMENDMENT BILL 1988

The Committee commented on this Bill in its Thirteenth Report of 1988 (19 October 1988). A response has since been received from the Minister for Administrative Services that clause 3 of the Bill which added a new subsection 5(2) to the Public Works Committee Act 1967 is no longer necessary. The Minister advises that subsection 5(2) was transitional and will be the subject of an amendment to the Bill to omit the subsection.

The response from the Minister dated 22 December 1988 is at Attachment A.

BROADCASTING (NATIONAL METROPOLITAN RADIO PLAN) ACT 1988

The Committee noted in Alert Digest No. 15 of 1988 (9 November 1988) an aspect of the Broadcasting (National Metropolitan Radio Plan) Bill 1988.

The Bill was assented to on 26 December 1988 and the Committee received a response to its comments from Mr R. Willis the Minister for Transport and Communications dated 9 January 1989.

The Act amends the Broadcasting Act 1942 to implement stage one of the National Radio Plan. The plan provides further commercial FM radio licences in mainland capital cities, and also establishes AM networks for Parliamentary and Print Handicapped Broadcasting. The Act at the initial stage invited AM licencees to convert to FM frequencies.

The Committee noted that clause 4 of the Bill (subsection 89 DAN(1) of the Principal Act) gave the Minister a discretion to determine whether licence bids are affected by collusion. The discretion was not reviewable as to merits by the Administrative Appeals Tribunal but only as to legality under the Administrative Decisions (Judicial Review) Act 1977.

The Committee noted that the clause may breach principle 1(a)(iii) as a non-reviewable decision.

The Minister states that his power is limited to deciding that bids have been affected by collusion between licencees. Once the Minister makes this decision he is then able to determine that fresh applications for tendering be published in the area covered by the licence. The view of the Minister is that merely restarting the tendering process need not be subject to AAT review.

The Minister's response is at Attachment B.

CRIMES (TORTURE) ACT 1988

The Committee commented on sections 8 and 9 of the Crimes (Torture) Act 1988, (which was assented to on 26 December 1988) in its Sixteenth Report (30 November 1988).

The Committee drew Senators' attention to clause 8 of the Bill which provided that proceedings against the Act could only take place with the consent of the Attorney-General, but noted that subclause 8(2)(a) provided:

(a) a person may be arrested for the offence and a warrant for the arrest of a person for the offence may be issued and executed;

(b) a person may be charged with the offence.

The Committee was concerned that a prisoner could be arrested, charged and remanded in custody in relation to a charge that is not ultimately proceeded with. The Committee noted that whilst this could be regarded as operating to the benefit of the person charged, the clause may be in breach of principle 1(a)(i) and trespass unduly on individual rights and liberties.

The Committee noted that clause 9(2) of the Bill provides that the onus of establishing a defence to an offence lies on the accused - where that offence under clause 3 is:

(a) an act of torture that is done outside of Australia and is punishable within Australia as an offence against the law of the jurisdiction in which the charge is brought; and

(b) pursuant to subclause 6 regard is to be had in such proceedings to any defence which could be raised in relation to such an offence in that jurisdiction.

The Committee noted that although the reversal of the onus of proof relates to the relevant State or Territory from which the Bill originates, the effect of the clause may act to reverse the onus of proof which would have applied if the offence was charged under a Commonwealth enactment. Accordingly the Bill may be considered to be in breach of principle 1(a)(i) and trespass unduly on civil liberties.

The Attorney-General responded on 9 February 1989 and stated that clause 8 is "a more or less standard clause necessitated by the proposition that proceedings can be commenced by the issue of a warrant for the arrest of a suspect", and that to not include clause 8(2) would require the Attorney-General's consent in writing prior to the issue of a warrant for the arrest of a suspect.

In respect of clause 9(2) the Attorney-General states that it has the affect of maintaining for the accused defences available to a defendant under State and Territory laws. The effect of clause 9(2) maintains the probative onus on the prosecution provided that the onus normally lies on the prosecution in the State or Territory in question. The combined effect on the sections is to

> benefit the defendant by placing him or her in exactly the same position as a person charged with the equivalent State or Territory offence.

The letter from the Attorney-General is at Attachment C.

ELECTORAL AND REFERENDUM AMENDMENT BILL 1988

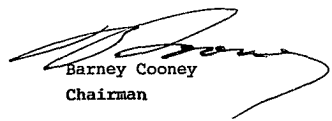
The Committee commented on this Bill in its Eighth Report of 1988 (25 May 1988) and has received a response to the Committee by the then Minister for Home Affairs, Senator Ray.

A further response from the Minister for Administrative Services Mr S. West dated 10 February 1989, has been received.

The Minister for Home Affairs had undertaken to move two amendments to account for the concerns of the Committee.

Mr West points out that one of the amendments has been made, but that the other amendment is now contained in the provisions of the Privacy Act and, accordingly that amendment should no longer proceed.

A copy of the Minister's letter is at Attachment D.



Barney Cooney
Chairman

1 March 1989

ATTACHMENT A

Minister for Administrative Services

The Hon. Stewart West MP

Parliament House
Canberra ACT 2600

22 DEC 1988

Senator B C Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Colleague

I refer to the comments expressed in the Committee's Scrutiny of Bills Alert Digest No. 13 on the Administrative Services Legislation Amendment bill 1988. The Committee commented that proposed subsection 5(2) of the Public Works Committee Act was a 'Henry VIII' clause, because although the regulation is subject to parliamentary scrutiny, the only powers either House would have would be to accept or disallow the regulation.

The proposed amendments to the Public Works Committee Act 1969 seek to bring works in the Australian Capital Territory within the purview of the Public Works Committee, with the exception of works within the Parliamentary zone or works of a territorial or municipal nature. Subsection 5(2) was a transitional provision to provide that regulations may be made to determine whether particular works are of a territorial/municipal or national nature. Following passage of the Australian Capital Territory Self-Government legislation, subsection 5(2) is no longer necessary. I will, therefore, be moving an amendment when the Bill is debated in the House of Representatives to omit subsection 5(2).

Yours sincerely

STEWART WEST

ATTACHMENT B

Minister for Transport and Communications

Hon. Ralph Willis M.P.

Parliament House
Canberra ACT 2600

Senator B C Cooney
Chairman
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 9 November 1988 from the Secretary of your Committee enclosing comments contained in the Scrutiny of Bills Alert Digest No.14 of 1988 concerning the Broadcasting (National Metropolitan Radio Plan) Bill 1988.

In 1985, the Government rejected recommendations in the Administrative Review Council's 1982 Report on AAT jurisdiction under the Broadcasting Act 1942, that Ministerial decisions under the Act generally be subject to AAT review. This was because such decisions often involve complex questions relevant to general government broadcasting policy which it would be inappropriate to have subject to such review.

The Government also agreed that the ARC reconsider its recommendations for extending AAT review of ABT decisions once the Tribunal's new Inquiries Procedures were implemented. This reconsideration will occur in the context of the review of the Broadcasting Act currently being undertaken by my Department. It would seem that any new review provisions would be best considered as part of this more comprehensive exercise to ensure a consistent approach throughout the Act.

Further, a decision by me as Minister that bids have been affected by collusion among licensees would only allow me to determine that fresh applications for tendering in the city or town concerned be published. I am not empowered to penalise any particular applicant who I believe may have been involved in collusion, for example, by exclusion from the second round of applications. The power is only one to restart the process and AAT review would seem unnecessary.

Yours sincerely

RALPH WILLIS

- 9 JAN 1989

ATTACHMENT C

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

-9 FEB 1989

Dear Barney

I have been provided with a copy of the Scrutiny of Bills Report 16/1988 which raises concerns in respect of sections 8 and 9 of the Crimes (Torture) Act 1988 ("the Bill"). That legislation has now been passed by Parliament and is expected to be proclaimed shortly.

Section 8 allows for the power of arrest and detention of an alleged offender before the Attorney-General's consent to the prosecution of that person is given. This is now a more or less standard clause (see e.g. sub-section 45(5) of the Extradition Act 1988) necessitated by the existence of authority for the proposition that proceedings can be commenced by the issue of a warrant for the arrest of a suspect. Not to include a provision along the lines of sub-section 8(2) would leave the impractical result that the Attorney-General's consent in writing would be required prior to the issuing of a warrant for the arrest of the accused.

In respect of the Committee's concerns about sub-section 9(2), I would point out that sub-section 9(2) is a necessary corollary of sub-section 6(2) and, in effect, maintains the status quo in applying State or Territory laws and giving the benefit of defences available under those laws to the defendant. The effect of sub-section 9(2) is to maintain the probative onus that falls on the prosecution once a defence has been raised provided, of course, that onus normally lies on the prosecution under the State or Territory law in question. Therefore the combined effect of sub-sections 6(2) and 9(2) is to the benefit of the defendant by placing him or her in exactly the same situation as a person charged with the equivalent State or Territory offence.

Yours faithfully

(Lionel Bowen)

Senator B. Cooney
Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

ATTACHMENT D

Minister for Administrative Services

The Hon. Stewart West MP

Parliament House
Canberra ACT 2600

10 FEB 1989

Senator B C Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

In September 1988, following the Report by your Committee on clause 32 of the Electoral and Referendum Amendment Bill 1988, the then Minister for Home Affairs, Senator Ray, agreed to make Government amendments to:

(a) require the Electoral Commissioner to be satisfied as to the existence of adequate safeguards to ensure that information supplied to Government Departments under clause 32 will be properly protected; and

(b) to exclude from the operation of clause 32 such Commonwealth authorities with commercial operations as are prescribed by regulations under the Act – bodies such as Qantas and the Commonwealth Bank.

2. Parliamentary Counsel was instructed by the Electoral Commission to draft the necessary amendments and have done so in relation to point (b). However, in relation to point (a), Parliamentary Counsel advised that provisions are now contained in the Privacy Act which lay down a code as to the way in which agencies are to handle and protect information which they have. Inclusion of provisions in the Electoral and Referendum Amendment Bill to cover point (a) would be a duplication of the Privacy Act.

3. In view of this advice, I have decided that amendment of the Electoral and Referendum Amendment Bill in relation to point (a) should not proceed.

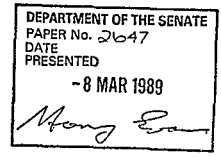
Yours sincerely

STEWART WEST

RECEIVED
23 FEB 1989
Senate Stdg. Committee for the Scrutiny of Bills

AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS



SECOND REPORT

OF 1989

8 MARCH 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF 1989

8 MARCH 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF 1989

The Committee has the honour to present its Second Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Aged or Disabled Persons Homes Amendment Bill 1988

Australian Industry Development Corporation Amendment Bill 1988

Lands Acquisition Bill 1988

National Occupational Health and Safety Commission Bill 1988

Social Security Legislation Amendment Act 1988

AGED OR DISABLED PERSONS HOMES AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 30 November 1988 by the Minister for Housing and Aged Care.

The Bill will introduce new arrangements for planning and financial management in the hostel sector. It also proposes measures that will ensure better targetting of subsidised hostel services for aged people and introduces provisions for respite care services in hostels. It proposes amendments to the Aged or Disabled Persons Homes Act 1964 and will repeal the Aged or Disabled Persons Hostels Act 1974.

The Committee commented on this Bill in Alert Digest No. 15 of 1988 and received a response from the Minister for Housing and Aged Care Mr P. Staples received 6 March 1989.

The Committee was concerned that clause 15 of the Bill allows the Minister to approve accommodation and personal care services, and the proposed subsection 10(5) of the Act allows the Minister to decide whether a hostel complies with conditions set out in an approval in principle.

The Minister's decision was reviewable only as to legality and not on merits, and the provision was considered by the Committee to possibly be in breach of principle 1(a)(iii) of its Terms of Reference in making rights, liberties and or obligations unduly dependent on non-reviewable decisions.

The Minister states in his response that the aim of the section is to 'ensure that the Commonwealth is able to control the growth in the number of subsidised hostel places, that hostel places are located where the need exists and that organisations receiving recurrent funding meet the Commonwealth's objectives in terms of service provision for frail aged people'. The aim of subsection 10B(5) and (6) is to

'reflect the Commonwealth's intention that an applicant for recurrent funding should hold an approval in principle allocated on the basis of a need for hospital places in a particular location'.

The Minister points out that there would, in his opinion, not be a significant number of appeals and that a right of review is available under the Administrative Decisions (Judicial Review) Act 1977.

The Minister also states:

> I should also mention that while there is some way to go in developing the detail of the principles under the proposed subsection 10B(6), it is intended that they will be formulated and tabled prior to proclamation of clause 15 in the second half of 1989. Given that the Committee acknowledges the relevance of these to determining the true nature of the Minister's discretion, I consider that it would be appropriate to give further consideration to the appropriateness of making subsection 10B(5) subject to AAT review at the time the principles are tabled.

The Committee was aware of the right of review under the Administrative Decisions (Judicial Review) Act 1977 but was concerned at the lack of right to merit review by the Administrative Appeals Tribunal.

The Committee thanks the Minister for his assurance that further consideration will be given to making subsection 10B(5) subject to AAT review.

The Committee also examined subclause 10B(10) which would give the Minister discretion to determine the terms of an agreement to be entered by a currently operating organisation in order to receive the recurrent subsidy.

The Committee viewed this as a situation where:

(a) the Government in entering into agreements with private organisations could place that person at a disadvantage in negotiations; and

(b) the Minister could be legislatively able to possibly conclude an agreement imposing a wide range of onerous conditions.

The Committee drew Senators' attention to a possible breach of principle 1(a)(iii) of the Committee's Terms of Reference making rights, liberties and/or obligations unduly dependent on non-reviewable decisions.

The Minister's response states:

> In fact, subsection 10B(10) is simply a provision which provides for an approval to be deemed to have been revoked if an organisation fails to enter into an agreement within a specified period. It is consistent with the provisions of the proposed section 10FA, introduced by clause 20, which provides that recurrent funding shall not be payable unless the organisation and the Minister enter into an agreement. The Minister's capacity to set the terms of the agreement is determined under the proposed section 10FA. The Committee should note that the items to be specified in the agreement are precisely set out in paragraphs 10FA(1)(a), (b) and (c) and that paragraph 10FA(1)(d) requires that any other conditions imposed must not be inconsistent with the General Conditions which in themselves constitute a disallowable instrument. Hence, I do not consider that the provision would breach the Committee's terms of reference.

The Committee thanks the Minister for this response and trusts that it will be of assistance to Senators in debating the Bill.

AUSTRALIAN INDUSTRY DEVELOPMENT CORPORATION AMENDMENT BILL 1988 (AIDC Bill)

This Bill was introduced into the House of Representatives on 7 November 1988 by the Minister for Science, Customs and Small Business.

This Bill proposes to amend the Australian Industry Development Corporation Act 1970 to enable the re-organisation of the Corporation's business. This will involve the transfer of the Corporation's assets and liabilities to a nominated wholly-owned subsidiary of the Corporation. The subsidiary will issue shares to the public, be listed and use the capital raised to increase investment and financing of industry development, revitalisation and restructuring.

The Committee commented on this Bill in Alert Digest No. 16 of 1988 that the Bill may substantially reduce the amount of information available to the Parliament on the activities of the AIDC group.

The Minister stated in his response of 13 December 1988:

> While the Parliament will not automatically receive the subsidiary's annual report there is nothing preventing the responsible Minister from tabling the report in Parliament once it is publicly released. Members of the Parliament cannot expect to receive information on the activities of the subsidiary over and above that available to other shareholders in the company.

The Committee pointed out in Alert Digest No. 11 of 1988 in relation to the ANL (Conversion into Public Company)Bill 1988 and in the Eighteenth Report of 1988 in relation to the OTC (Conversion into Public Company) Bill 1988 that it regards as a matter of importance, the tabling in Parliament of annual

reports of all organisations and instrumentalities in which the Commonwealth owns all or a substantial part of the issued shares.

The Committee notes the response from the Minister but seeks an undertaking that the annual reports will be tabled in Parliament immediately they become available and requests that this be made a requirement of the legislation at the earliest opportunity.

The Committee also made the following comments in respect of the proposed new section 29A of the Principal Act.

> **Clause 8 - Delegation**
>
> The definition of 'authorised person' in proposed new section 29A of the Principal Act would give to the Minister an unfettered and, it is suggested, unacceptably broad discretion to delegate his or her powers to 'a person', without any specification of the office or employment (or lack of it) that such a person might hold. When it is recalled that such a person may exercise important functions under proposed new subsections 29P(1) and 29Y(1), the Committee believes that the delegation by the Minister should be to a person holding or performing the functions of a specified office.

The Minister has responded:

> The Committee was also concerned over the broad delegation of powers available to the Minister under the Bill. In many cases AIDC has financial interests overseas where there may not necessarily be any permanent AIDC representation. In such situations, in order to be able to produce the necessary documentary evidence involving the reorganisation and tax exemptions, broad powers of delegation are required under subsections 29P(1) and 29Y(1) of the Bill.

> I would stress however that the delegation is not broad in terms of what the delegate may do. The authorised person will not have the power to transfer assets, liabilities or instruments; nor will the person have the power to create a tax exemption.

The Committee thanks the Minister for his response and trusts that it will be of assistance to Senators when debating the Bill.

LANDS ACQUISITION BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Minister for Administrative Services.

The Bill intends to give legislative effect to the Government's decisions on issues arising from the Australian Law Reform Commission report on Land Acquisition. It proposes an entirely new and comprehensive process that must be followed when the Commonwealth wishes to acquire property.

The Committee commented on this Bill in Alert Digest No. 9 of 1988 and has received a response from the Minister dated 29 November 1988.

The Committee thanks the Minister for his response and is pleased to note that the Committee's concerns in respect of clauses 21, 33 and 139 have been accepted and appropriate undertakings have been made to make the relative amendments. The constructive response of the Minister is appreciated by the Committee.

Clause 21 and 117(b)

The Committee notes that the provisions of clause 21 exempting acquiring authorities from the requirements of the Act for acquisitions in certain circumstances, are to be subject to parliamentary consideration.

Clause 37

This clause requires a Minister to provide Parliament with the reasons for his rejection of an Administrative Appeals Tribunal recommendation. The Minister informed the Committee that the Bill now provides that the 'Minister has 90 days within which to reject an AAT recommendation and he must provide a statement to each House of Parliament within 3 days explaining his reasons for rejection'.

Clause 139 - Delegation

The Committee had concerns that the Bill did not sufficiently define the category of person to whom such powers could be delegated.

The Minister has accepted the Committee's concerns and the Bill is amended to limit the delegation of the relevant powers to members of the Australian Public Service.

Clauses 22 and 24 - Non-reviewable discretions

Subclause 22(4) and clause 24 appear to give the Minister an unreviewable discretion to by-pass the pre-acquisition procedures on the grounds that the acquisition is in the interests of national security, or a matter of urgency or essentiality.

The Minister responded:

> The LRC recommended in its report that there should be two instances where a pre acquisition declaration need not be given and where there would be no right of appeal to the AAT about the decision to acquire. These were in cases of urgency or where national security requirements prevented the disclosure of details of the proposed land use.
>
> The Administrative Review Council (ARC) recommended that a third situation should have a constraint on appeal to the AAT, namely, where the Minister is satisfied, and certifies, that it is essential that particular land be acquired.
>
> The urgency provision was proposed by the LRC to cover the situation where an owner, whose land was to be acquired and who did not wish to appeal that decision, wanted the acquisition to proceed quickly and before the statutory time periods specified in the Bill had expired. This situation has arisen recently in several cases in the programme of land acquisitions at Badgerys Creek, the site of the second Sydney airport. In such circumstances, access to review by the AAT would be irrelevant. of course, there may also be occasions, where for overriding reasons of national interest it may be necessary for the government to conclude an acquisition quickly. However, I would expect such cases to be very rare indeed.
>
> The LRC also recognised that there were instances where the requirement to issue a pre acquisition declaration may result in the disclosure of information which could be prejudical to national security. In that case review by the AAT would be impractical.
>
> The essentiality provision was cited twice in the initial Bill at Clause 22(4) (where a pre acquisition declaration would be issued and appeal to the Minister to reconsider would be available but appeal to the AAT would not be available) and secondly at Clause 24(1)(b) (where there would be no pre acquisition declaration and no appeal to the Minister or the AAT).

> The Bill has now been amended to delete the more severe of these provisions at clause 24(1)(b). However I am of the view that sub clause 22(4) (sub clause 22(6) in the revised Bill) should remain unaltered because in its present form the need for public accountability is met.
>
> If a Minister chose to use this provision he would not be able to do so without the details of what he was doing being public. A pre-acquisition declaration would be issued to anyone affected by the acquisition and copies of the declaration would have to be published in the gazette and in a newspaper circulated in the area where the land was located.
>
> Furthermore if an owner of land being acquired using any of the above three provisions i.e. urgency, national security or essentiality believed that the provision was being misused he or she would be able to appeal to the Federal Court under the provisions of the Administrative Decisions (Judicial Review) Act 1977.

The Committee thanks the Minister for his response and hopes this will help Senators when debating the Bill.

Clause 47 - Non-reviewable discretion

The Minister has a discretion at subclause 47(2) which allows the Minister to require that a former owner must leave the site of land that has been acquired and when the Minister determines that the land is required urgently the former owner is not entitled to AAT review.

The Committee considered that subclause 47(2) may constitute a discretion which make rights, liberties and/or reviews unduly dependent on a non-reviewable decision.

The Minister responded that 'to provide AAT review of the Ministers decision that land was required immediately would likely occasion a delay which would defeat the purpose for which the particular power was exercised'.

The Committee thanks the Minister for his reply and hopes this will help Senators when debating the Bill.

A copy of the Minister's response is at Attachment A.

NATIONAL OCCUPATIONAL HEALTH AND SAFETY COMMISSION BILL 1988

This Bill was introduced into the House of Representatives on 31 August 1988 by the Minister for Industrial Relations.

The Bill proposes amendments to the National Occupational Health and Safety Commission Act 1985 to separate the management functions of the Chief Executive Officer and broaden a more public role of the Chairperson of the National Occupational Health and Safety Commission. This separation was one of the recommendations of the 1987 review of the Commission which was conducted to improve its operations and streamline its administration.

The Committee commented on this Bill in its Eighteenth Report of 1988 noting that proposed section 16A allowed the Minister to appoint a 'person' to act as a Chief Executive Officer of the Commission, and that there was no limit on the period in which a person could act in a vacancy.

The Minister has responded on 1 March 1989 and has undertaken 'that at the next available opportunity, an amendment to the legislation will be proposed to limit the period of acting as Chief Executive Officer under an appointment by the Minister for a period of 12 months'.

The Committee thanks the Minister for his response and accepts his undertaking to amend the legislation the Committee would prefer to see the amendment made whilst the Bill is before Parliament.

The Minister's response is at Attachment B.

SOCIAL SECURITY LEGISLATION AMENDMENT ACT 1988

This Bill was introduced into the House of Representatives on 19 October 1988 by the Minister for Social Security and gained Royal Assent on 22 December 1988.

This Bill amends the Social Security Act 1947 to further implement changes flowing from the Social Security Review established in 1985 (lead by Professor Cass). Other amendments implement decisions announced in the 1988 May Statement and the 1988/89 Budget.

The Committee commented on this Bill in the Eighteenth report for 1988. The Minister has since replied with two responses both dated 27 February 1989.

Clause 8

The Committee was concerned that clause 8 of the Bill - new subsection 19(4A), (4B) and (4C) - which enable the Minister for Social Security to certify that when it was necessary to release information in the public interest such release would be subject to ministerial guidelines, not subject to parliamentary disallowance.

The Committee is grateful for the Minister's advice that the Act was amended to make the determinations disallowable.

Clauses 13 and 23

The Committee was concerned that these clauses contain an element of retrospectivity in introducing limits to certain payments outside Australia.

The Minister has stated in response:

> Clause 13 limits the payment of sole parent's pension to the first 12 months of a person's absence from Australia from 1 July 1988. Clause 23 applies a 3 year limit to the payment of family allowance in respect of an absence from 18 May 1986.
>
> Both of these amendments were announced in the May Economic Statement on 25 May 1988. Therefore, notwithstanding the date of introduction of the Bill, there was complete advance notice of the sole parent's pension amendment. The family allowance amendment will take effect on the payday in 1989 which is nearest to the 12 month anniversary of the Government's announcement. I believe that 12 months is a reasonable period of notice for people in these circumstances.

The Committee thanks the Minister for his response.

Clause 52 - Trespass on individual rights and liberties

The Committee was concerned at possibly unnecessary intrusions on the privacy of individuals especially those in receipt of a benefit under the Act.

The clause in the Committee's view enables the Secretary to obtain personal details of a whole class of persons even though members of that class do not have a connection with the Department.

The Minister has replied that:

> Clause 52 amends section 164 of the Principal Act which deals with the power to obtain information, etc. As the Committee points out, clause 52 has the effect of limiting the purposes for which the Secretary may obtain information and the nature of the information which may be obtained, yet the Committee feels that new subsection 164(2AE), which enables the Secretary to obtain personal information about a whole class of person even though some of those persons may have no connection with the Department, is unduly intrusive.
>
> However, by virtue of new subsection 164(2AC) of the Principal Act, the Secretary can only collect such information for the purposes of detecting incorrect payment or verifying entitlement to benefits under the Act. Furthermore, new subsection 164(2AG) to 164(2AJ) provides that he must within 3 months identify any information that is not relevant to those purposes and destroy it.
>
> The clause was formulated after consultations with the NSW Privacy Committee. It strikes a balance between the public interest in protecting privacy and the public interest in detecting cases where social security payments are being made to person not entitled to receive them.

The Committee thanks the Minister for his reply but is still concerned that the amendments made by the clause may be intrusive, and would request that this effect be monitored by the Minister with a view to amending the Act.

Clause 57

The Committee in the Seventeenth Report of 1988 commented that this clause may inappropriately delegate legislative power in requiring the AAT and Social Security Appeals Tribunal, to act in accordance with the directions of the Minister in exercising their power to waive the right of the Commonwealth to recover a debt repayable under the Social Security Act 1947.

The Committee felt it appropriate to make the ministerial determinations disallowable instruments for the purposes of the Act.

The Minister stated in response:

> It is necessary that the directions issued by the Minister pursuant to clause 57 are of a binding nature to obviate the difficulties encountered by my Department when faced with trying to reconcile decisions made by the Administrative Appeals Tribunal and the department policy on effective debt management and control. The directions will only go to the criteria to be followed when waiving a debt rather than, for example, outlining cases where waiver is barred. Such criteria are currently outlined in the Department's internal manuals which guide departmental officers in the appropriate use of delegated powers arising under the Social Security Act. These guidelines are based on those issued by the Minister for Finance to delegates making decisions on waiver under the Audit Act 1901.

The Committee thanks the Minister for his response.

The Committee acknowledges that these comments are made on a Bill now passed by the Senate. However in accord with its terms of reference, the Committee makes these comments to enhance the awareness of Senators of the issues involved.

The Minister's responses are at Attachments C and D.

Barney Cooney
Chairman

8 March 1989

ATTACHMENT A

Minister for Administrative Services

The Hon. Stewart West MP

Parliament House
Canberra ACT 2600

Senator Barney Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to your letter of 2 June 1988 providing a copy of the comments contained in an extract of the Scrutiny of Bills Alert Digest No. 9 of 1988 on the Lands Acquisition Bill 1988 as introduced into the House of Representatives.

In the late 1970's the Law Reform Commission (LRC) was briefed by the Government to review the Commonwealth's land acquisiton legislation. After a major investigation taking about three years the LRC recommended that the Lands Acquisition Act 1955 be replaced by a new Act to achieve three main objectives:-

- more open procedures in the acquisition process;
- greater public accountability for decisions to acquire property, and
- more generous statutory provisions for compensation when land is *compulsorily acquired.*

The Lands Acquisition Bill 1988 adopts the vast majority of the numerous detailed recommendations of the LRC.

When I introduced this Bill at the end of the Autumn sittings I indicated that debate of the Bill would not occur for some months to allow sufficient time for interested parties to examine it in detail and provide comment on it. I am pleased that several groups participated and literally dozens of comments on different parts of the Bill were made to me. Subsequently I proposed a series of amendments to the Bill which I believed contributed to the objectives of this major legislative change.

Some of those amendments resolve concerns raised in the Alert Digest. The following is my response to all the issues raised in the Digest.

Clause 21

Subclause 21(b) allows acquiring authorities to be exempt by regulation from the *requirements of the Act for acquisitions in particular circumstances.* I understand your concern that this clause could be used to bypass the requirements of the Act by making and acting on a regulation before Parliament had the opportunity to consider the regulation.

I accept this concern and the Bill has been amended so that an exemption regulation under subclause 21(b) must be first scrutinized by Parliament before any acquisitions can proceed. Furthermore the same concern applies to subclause 117(b) regarding disposals and this clause has been similarly amended. Hence, even though an exemption regulation may be gazetted, an acquiring authority so exempted cannot act upon that exemption until Parliament has considered the matter.

Clauses 22 and 24

Clauses 22 and 24 provide amongst other things that the Minister can decide to proceed with an acquisition without following the pre acquisition procedures that would give an owner the right to appeal to the Administrative Appeals Tribunal (AAT) the decision to acquire.

The LRC recommended in its report that there should be two instances where a pre acquisition declaration need not be given and where there would be no right of appeal to the AAT about the decision to acquire. These were in cases of urgency or where national security requirements prevented the disclosure of details of the proposed land use.

The Administrative Review Council (ARC) recommended that a third situation should have a constraint on appeal to the AAT, namely, where the Minister is satisfied, and certifies, that it is essential that particular land be acquired.

The urgency provision was proposed by the LRC to cover the situation where an owner, whose land was to be acquired and who did not wish to appeal that decision, wanted the acquisition to proceed quickly and before the statutory time periods specified in the Bill had expired. This situation has arisen recently in several cases in the programme of land acquisitions at Badgerys Creek, the site of the second Sydney airport. In such circumstances, access to review by the AAT would be irrelevant. Of course, there may also be occasions, where for overriding reasons of national interest it may be necessary for the government to conclude an acquisition quickly. However, I would expect such cases to be very rare indeed.

The LRC also recognised that there were instances where the requirement to issue a pre acquisition declaration may result in the disclosure of information which could be prejudical to national security. In that case review by the AAT would be impractical.

As I have already mentioned the restraint on appeal relevant to the essentiality provision has been included on the recommendation of the Administrative Review Council. Circumstances where this provision might be used would arise infrequently but, for example, the Commonwealth may need to acquire land that must be in a unique location such as an aircraft navigation aid.

Council expressed the view that in such instances appeal to the AAT should be precluded provided the Minister makes a public declaration that the acquisition is essential. Such a declaration would indicate the Government's commitment to the acquisition. Hence review by the AAT would be redundant given that the Government is not bound to accept a recommendation of the AAT. The Council believed that it was highly desirable that the Minister remain politically accountable for such decisions.

The essentiality provision was cited twice in the initial Bill at Clause 22(4) (where a pre acquisition declaration would be issued and appeal to the Minister to reconsider would be available but appeal to the AAT would not be available) and secondly at Clause 24(1)(b) (where there would be no pre acquisition declaration and no appeal to the Minister or the AAT).

The Bill has now been amended to delete the more severe of these provisions at clause 24(1)(b). However I am of the view that sub clause 22(4) (sub clause 22 (6) in the revised Bill) should remain unaltered because in its present form the need for public accountability is met.

If a Minister chose to use this provision he would not be able to do so without the details of what he was doing being public. A pre-acquisition declaration would be issued to anyone affected by the acquisition and copies of the declaration would have to be published in the gazette and in a newspaper circulated in the area where the land was located.

Furthermore if an owner of land being acquired using any of the above three provisions i.e. urgency, national security or essentiality believed that the provision was being misused he or she would be able to appeal to the Federal Court under the provisions of the Administrative Decisions (Judicial Review) Act 1977.

Clause 33

Clause 33 provides that the Minister may accept or reject a recommendation of the AAT in relation to a pre-acquisition declaration. It also requires that the Minister will provide to Parliament the reasons for such a rejection.

The LRC considered this point and recommended that although in normal circumstances the AAT makes decisions which would bind both the Minister and the applicant, in this instance the final decision to acquire or not acquire should rest with the responsible Minister. A decision on a matter which may contain important political and financial implications should be made by a person who is responsible to Parliament and the electors.

I agree with this view provided that some time limit is placed on the Minister's consideration of an AAT recommendation and that the Minister's decision is open to public scrutiny. The Bill provides that the Minister has 90 days within which to reject an AAT recommendation and he must provide a statement to each House of Parliament within 3 sitting days explaining his reasons for the rejection.

Clause 47

Clause 47 deals with taking vacant possession of land that has been compulsorily acquired. The clause contains two discretions that are available to the Minister.

At subclause 47(4) the Minister can determine the terms and conditions that will apply to a former owner's continued occupation of the site. The Bill provides that the former owner may seek review by the AAT of that decision.

The other discretion is at subclause 47(2) which provides that the Minister may state that the land is required urgently and consequently the former owner must vacate the land by a fixed date. In this case there is no provision for the former owner to seek review by the AAT.

The provisions in this clause are identical to those proposed by the LRC. Whilst the Commission recognised the apparent inconsistency of not providing review of the urgency certification it concluded that to provide AAT review of the Minister's decision that land was required immediately would likely occasion a delay which would defeat the purpose for which the particular power was exercised.

I accept this view and believe this section of the Bill should remain as drafted.

Clause 139 (formerly clause 137)

Clause 139 provides for the delegation of powers under the Bill. The Committee is concerned that although the clause identifies a range of powers which cannot be delegated, the Bill does not sufficiently define the category of person or persons to whom powers can be delegated.

I accept the Committee's concern and the Bill has been amended to the effect that relevant powers can only be delegated to a member of the Australian Public Service.

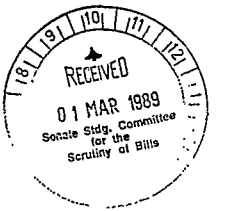
In conclusion I wish to thank the Committee for the interest it has shown in the Bill and the useful contribution it has made. I trust that the information I have provided satisfies the Committee's concerns.

Yours sincerely

STEWART WEST

ATTACHMENT B

MINISTER FOR INDUSTRIAL RELATIONS



Dear Senator Cooney

On 14 December 1988 the Acting Secretary of the Standing Committee wrote seeking my response on the Committee's comments on the National Occupational Health and Safety Commission Amendment Bill 1988 (the Bill).

Clause 10 of the Bill proposes the insertion of a new section 16A into the National Occupational Health and Safety Commission Act 1985 (the Act). The new section, once enacted, would allow the Minister to appoint "a person" to act in the office of Chief Executive Officer of the National Occupational Health and Safety Commission (the Commission). The Committee considers that powers should be delegated by reference to a particular office, to a specified class of people or to officers above a certain level of seniority.

The Committee has also noted that, unlike section 16 of the Act which provides for a 12 month limit for an acting Chairperson of the Commission, there is no limit on the period that a person can act as Chief Executive Officer under clause 10 of the Bill.

As to the first matter I point out that under the Act no qualifications are specified for appointment to the position of Chief Executive Officer of the Commission. It would be inappropriate to specify qualifications in respect of a person performing the duties of the Chief Executive Officer in an acting capacity. I do not consider that the Bill requires amendment in this respect.

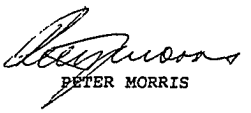
After consideration of the second point raised by the Committee, I accept that it would be appropriate for the legislation to be amended. While section 33A of the Acts Interpretation Act 1901 supplies a 12 month limit on an acting appointment in certain circumstances, it does not operate in the case of a person who is acting in a position that is substantively vacant. The omission of such a limit under the Bill was a drafting oversight.

I consider, however, that it is important to make substantive appointments as soon as possible to the new positions created under the legislation of part-time Chairperson and full-time Chief Executive Officer.

Parliament House, CANBERRA 2600, AUSTRALIA Telephone: (062) 77 7320 Telex: AA62286 Facsimile: (062) 73 4115

In the circumstances, the Government would prefer not to amend the Bill while it is currently before the Parliament. Instead, I undertake that, at the next available opportunity, an amendment to the legislation will be proposed to limit the period of acting as Chief Executive Officer under an appointment by the Minister to a period of 12 months.

Yours sincerely



PETER MORRIS

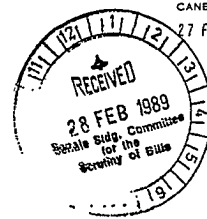
Senator B C Cooney
Chairman
Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

ATTACHMENT C

COMMONWEALTH OF AUSTRALIA

MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

27 FEB 1989



Senator B Cooney
Chairman
Standing Committee for
the Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

In a memorandum dated 7 December 1988, the Secretary to your Committee referred for attention the comments on clause 57 of the Social Security Legislation Amendment Bill 1988 (the Bill) contained in the Scrutiny of Bills Committee's Seventeenth Report of 1988.

I provide the following comments on the matters that you have raised, notwithstanding that the Bill received Royal Assent on 22 December 1988.

Despite earlier comments on other aspects of the Bill in the Scrutiny of Bills Alert Digest as well as the committee's Report, it is regrettable that your concerns regarding clause 57 of the Bill in the Alert Digest were not drawn to notice, as the issues raised could have been addressed at an earlier stage.

During the progress of the Senate debate, Senator Bolkus addressed the issues raised by the Committee concerning clause 57 of the Bill while responding to amendments moved by Australian Democrat Senator Powell. I draw your attention to the discussion in Senate Hansard of Tuesday 13 December 1988 at pages 4070-4071.

It is necessary that the directions issued by the Minister pursuant to clause 57 are of a binding nature to obviate the difficulties encountred by my Department when faced with trying to reconcile decisions made by the Administrative Appeals Tribunal and the departmental policy on effective debt management and control. The directions will only go to the criteria to be followed when waiving a debt rather than, for example, outlining cases where waiver is barred. Such criteria are currently outlined in the Department's internal manuals which guide departmental officers in the appropriate use of delegated powers arising under the Social Security Act. These guidelines are based on those issued by the Minister for Finance to delegates making decisions on waiver under the Audit Act 1901.

The amendments effected by clause 57 of the Bill produce a result consistent with the administration of debts due to the Commonwealth in other Commonwealth departments and instrumentalities such as the Department of Finance. Other Commonwealth agencies act in accordance with the debt recovery provisions of the Audit Act 1901. This amendment, as Senator Bolkus pointed out in the Senate, seeks to remedy the unintended results of 1985 amendments to the Social Security Act which replaced the power to waive social security debts in the Audit Act with a similar power under the Social Security Act. That amendment made the full range of social security debt recovery decisions reviewable by the Administrative Appeals Tribunal. Although it is appropriate for the Administrative Appeals Tribunal to have this function, I believe that it should not be free to operate in this area according to principles of its own devising which are considerably less rigorous than those generally applicable in Commonwealth administration.

Yours sincerely

BRIAN HOWE

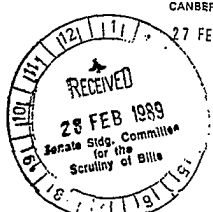
ATTACHMENT D

COMMONWEALTH OF AUSTRALIA

MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600.

27 FEB 1989

Senator B C Cooney
Chairman
Standing Committee for the
Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600



Dear Senator Cooney

On 14 December 1988, your Committee's Secretary drew to attention the comments on the Social Security Legislation Amendment Bill 1988 (the Bill) made by the Committee in its Eighteenth Report of 1988.

As you would be aware, the Bill ultimately received Royal Assent on 22 December 1988, but, regardless of this, I provide the following response to the Committee's comments.

The Committee raised three different concerns with the Bill. The first of these was that clause 8 may constitute an inappropriate delegation of legislative power. The Committee noted that the amendments proposed by clause 8 to section 19 of the Social Security Act 1947 (the Principal Act) provided for the Minister to make determinations in writing to set the parameters for the exercise of the Secretary's power to certify that it was necessary in the public interest to divulge information relating to a person. It also noted that the Minister was to be required to table such determinations in Parliament but that there was to be no provision for disallowance by Parliament.

I draw the Committee's attention to the fact that on 23 November 1988 the Government accepted an Opposition amendment moved by Mr Connolly to make Ministerial determinations in this area disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901. Thus, such determinations will not come into force until Parliament has had an opportunity to consider them - this answers the Committee's concerns.

The Committee also commented upon clauses 13 and 23 to the extent that each contains an element of retrospectivity. These clauses introduce limits on certain payments outside Australia. Clause 13 limits the payment of sole parent's pension to the first 12 months of a person's absence from Australia from 1 July 1988. Clause 23 applies a 3 year limit to the payment of family allowance in respect of an absence from 18 May 1986.

Both of these amendments were announced in the May Economic Statement on 25 May 1988. Therefore, notwithstanding the date of introduction of the Bill, there was complete advance notice of the sole parent's pension amendment. The family allowance amendment will take effect on the payday in 1989 which is nearest to the 12 month anniversary of the Government's announcement. I believe that 12 months is a reasonable period of notice for people in these circumstances.

Finally, the Committee suggested that clause 52 could in part constitute a trespass on personal rights and liberties. Clause 52 amends section 164 of the Principal Act which deals with the power to obtain information, etc. As the Committee points out, clause 52 has the effect of limiting the purposes for which the Secretary may obtain information and the nature of the information which may be obtained, yet the Committee feels that new subsection 164(2AE), which enables the Secretary to obtain personal information about a whole class of persons even though some of those persons may have no connection with the Department, is unduly intrusive.

However, by virtue of new subsection 164(2AC) of the Principal Act, the Secretary can only collect such information for the purposes of detecting incorrect payment or verifying entitlement to benefits under the Act. Furthermore, new subsections 164(2AG) to 164(2AJ) provide that he must within 3 months identify any information that is not relevant to those purposes and destroy it.

The clause was formulated after consultations with the NSW Privacy Committee. It strikes a balance between the public interest in protecting privacy and the public interest in detecting cases where social security payments are being made to persons not entitled to receive them.

Yours sincerely

BRIAN HOWE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1989

5 APRIL 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1989

5 APRIL 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1989

The Committee has the honour to present its Third Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA.

Australian Securities Commission Bill 1989

Close Corporations Bill 1988

Corporations Bill 1988

Stock Exchange and Futures Exchanges Levy Bills 1988

Crimes (Hostages) Bill 1988

Customs and Excise Legislation Amendment Bill (No. 2) 1987

Customs and Excise Legislation Amendment Bill 1988

CORPORATIONS LEGISLATION PACKAGE

The Committee commented on the Corporations legislation package in the Tenth Scrutiny of Bills Digest of 1988, and a response dated 29 January 1989 to the Committee's comments was received from the Acting Attorney-General.

In his introductory comments to his response the Minister makes the following points:

1. That most of the clauses of the Bills on which the Committee has commented are in substantially the same terms as existing provisions of the co-operative companies and securities legislation.

2. The Bills continue to provide wide discretions to the Australian Securities Commission. The Minister stated in his response that,

   "As with existing legislation, the Bills draw a balance between the specific and detailed rules governing the majority of cases and the need to alter those rules quickly when a strict application of the black letter law may cause hardship or may be inappropriate. The effectiveness of the regulatory regime would be seriously compromised if it were necessary to seek Parliamentary approval for every minor modification of the black letter law."

3. In response to the Committee's comments on reversals of the onus of proof the Minister states, "Again, in most cases the provisions in question are based on provisions in the existing co-operative companies and securities legislation."

The Committee thanks the Minister for his response but stresses that the fact that a provision in a Bill is similar to a provision in existing legislation is not itself a reason for supporting that provision. In any event a provision that breaches any of principles (i)(a) to (v) of the Committee's terms of reference is a matter of concern to the Committee. The existing legislation was in many cases passed before the Committee was formed, or was the result of a Ministerial Council agreement and for all practical purposes not able to be amended by Parliament.

The Committee is concerned to preserve the rights of the Parliament to oversight legislation. Whilst there may be a need for the Commission to be flexible in its regulatory regime it should not operate in a manner that reduces Parliament's role in the review of legislation.

AUSTRALIAN SECURITIES COMMISSION BILL 1989

Sub-clause 64(3) and 196(2) - Reversal of onus of proof.

The Committee accepts the Minister's view that the defences in these sub-clauses are analogous to the defence of "honest and reasonable mistake of fact."

Sub-clause 67(2)

The Minister states the defence provided by this sub-clause is "easy for the defendant to prove and difficult for the prosecution to disprove and that the matters raised by the defence are also likely to be particularly within the knowledge of the defendants". The Committee is of the view that this clause should be amended to include the intent of the accused as an element of the offence, similar to clause 153 of the Close Corporation Bill.

The sub-clause is brought to Senators attention as it may be in breach of principle 1(a)(i) of the terms of reference and may trespass unduly on personal rights and liberties by reversing the normal onus of proof.

Clause 68 - Self-incrimination

In examining clause 68 the Committee noted that this clause requires persons to give evidence against themselves under oath. Sub-clause 68(4) provides that information so obtained cannot be used against the provider of that information except in certain limited circumstances. Moreover, it is an investigative tool which is exceptional and not known to the common law. The Committee is concerned at the further growth of the use of this investigatory procedure which the Committee regards as a possible breach of principle (1)(a)(i) that may trespass unduly on individual rights and liberties.

Clause 126 - Reversal of onus of proof

This clause provides a defence to clause 125, which creates an offence of, failure to give notice to the Commission of a possible conflict of interest in a matter before the Commission. The Committee accepts the Minister's view that this clause provides a defence analogous to that of mistake and has no further comments.

Sub-clause 215(3) - In view of the House of Representatives amendment to this clause which mitigates strict liability and gives the defendant an opportunity to establish that in giving evidence there was a belief on reasonable grounds, that the evidence was true and was not misleading. The Committee has no further comments on the sub-clause.

Sub-clauses 23(2) and 48(2) - The Committee accepts the Ministers response and has no further comments on the sub-clauses.

Clause 102 - Delegation of Administrative power

The Committee notes the Minister's statement with the respect to the persons to be appointed to the Commission. The Committee has no further comments on the clause.

Clause 138 - Annual Report

The Committee accepts the Minister's explanation that the *Annual Report and Financial Statement are to be submitted to* Parliament. The Committee has no further comment on the clause.

CLOSE CORPORATIONS BILL 1988

Clause 15 - 'Henry VIII' Clause

Sub-clause 15(3) enables the Court to achieve the object of any particular provision of a Corporations Bill in relation to the Close Corporation to "make such order as is necessary which may arise in connection with the application of that provision of the Corporations Bill including an order modifying the terms of the relevant provision of the Corporations Bill."

The Committee accepts the Minister's statement that such orders will be binding only on the parties and that Courts will not be enabled to act as delegatees of legislative authority.

Clauses 154, 155, and 159

The Committee accepts the Minister's statement that "The Government is prepared to introduce amendments so that the elements of intent to be defined or to conceal the state of affairs of the company are included as elements of the offence."

With respect to the Minister's statement that the defence in sub-clause 159 (3) is "analogous to the defence of honest and reasonable mistakes of fact, the onus of establishing which lies with the defendant at common law". The Committee would prefer to see the sub-clause amended in the same terms as clause 153.

CORPORATIONS BILL 1988

Clause 43 - 'Henry VIII' Clause

The Committee was concerned that this clause which allows the modification of a number of provisions of the Bill by regulation may constitute a Henry VIII clause; in that specified relevant interests in shares are subject to a number of conditions which can be disregarded for the purposes of provisions in a number of sections and parts of the Bill.

The Committee notes the Minister's comment that "the relevant interest provisions are complicated and involve difficult decisions on matters such as who controls particular shares and whether a shareholder is associated with another person".

Further the Minister states, any regulations made are subject to Parliamentary disallowance and submits that "this level of parliamentary scrutiny is appropriate for the type of modification power that is being proposed."

The Committee is always concerned at the use of King Henry VIII Clauses, but in this instance notes that the relevant interest provisions are complex and the clause in its present form is reasonable in the circumstances.

Subclause 112(3) - 'Henry VIII' Clause

The Committee notes the Minister's response but sees no reason why the Minister cannot increase the size of maximum membership of unincorporated associations by the use of regulations rather than gazettal.

Senators' attention is drawn to the clause as it may breach principle 1(a)(iv) of the terms of reference and be considered to constitute an inappropriate delegation of legislative power.

Subclause 590(2) and 591(2) - Reversal of onus of proof.

The Committee notes the Minister's statement that clause 590(2) is to be amended and clause 591(2) is to be omitted. The Committee has no further comments on these clauses.

Paragraph 618(3) (b) - Henry VIII Clause

The paragraph is part of the provisions which set the thresholds beyond which the acquisition controls imposed by Part VI of the Bill apply. The paragraph allows the thresholds to be altered quickly if they were to be abused. The Committee accepts the Minister's explanation and has no further comments on the paragraph.

Sub-clauses 704(6) and 705(6) - Reversal of onus of proof.

The Committee accepts the Minister's view that the sub-clauses which were subject of the Committee's concern "enable the defendant to present evidence of his or her knowledge of belief not known to the prosecution", and as such do not require the further attention of the Committee.

Clause 707 - Gazette Notice

The Committee accepts the Minister's view that the Clause allows the Minister to act via Gazette notice to "declare an unlisted company as being a company which should comply with the substantial shareholdings requirements "and the Gazettal procedure enables the Minister to act quickly to prevent the substantial shareholdings requirements being circumvented to the detriment of shareholders".

Paragraph 708(5)(b)

The clause governs substantial shareholdings in corporations and paragraph 708(5)(b) allows the Minister to specify in regulations a percentage of shareholdings which is relevant to the provisions other than five per cent. The Committee accepts the Minister's views that the "specification of a particular percentage is appropriately done in regulations because it does not involve any change in the general policy or principles involving the relevant provisions."

Clause 728 and 730

This clause allows gazettal of a notice determining exemptions from compliance with Chapter Six of the Bill.

Whilst the Committee does not favour the use of gazettal in place of Regulations, it accepts that the Gazette procedure is appropriate to allow the Commission to act quickly in a takeover matter to prevent hardship.

Clause 748 - The Committee notes the Minister's comment that "The Government accepts the force of the Committee's objection to clause 748 and proposes to introduce an amendment to omit clause 748."

Clause 996 - Reversal of onus of proof.

The Committee is pleased to note that the Government is prepared to omit paragraph 2(a). The Committee still sees it as appropriate to omit paragraph 2(c) and redraft sub-clause (1). It is the view of the Committee that the notion of inadvertence should be an element of the offence and not a matter for a defendant to establish.

The Committee draws the Senate's attention to sub-clause (1) and paragraph 2(1) as possibly being in breach of principle (1)(a)(i) of the terms of reference and may unduly trespass on personal rights and liberties.

Sub-clause 998(8) - Reversal of onus of proof

Sub-clause 998(3) of the Bill establishes offences of trading in a false manner or engaging in transaction which may affect market rigging.

Sub-clause 998(8) proposes a defence of proving that the purposes for which securities in question were bought or sold was not for the purpose of creating a misleading appearance with respect to a market for, or the price of certain securities.

The Committee accepts that for policy reasons the offences should be strict liability offences and if the prosecution were required to prove guilty intent the offences would become unworkable.

Accordingly the Committee is of the view that although the clause is a reversal of the onus of proof it is acceptable within the Committee's guidelines.

Clause 1127 - Non-reviewable decision

The Committee repeats its view expressed in Scrutiny of Bills Digest No. 10 of 1988 that sub-clause 1127 (1) appears to give the Minister an unfettered discretion to exempt futures markets pursuant to the provisions of the Bill.

The Committee thanks the Minister for his response but seeks a detailed explanation from the Minister of the need for this provision.

The clause is drawn to the Senators' attention in that it may be in breach of principle 1(a)(iii) of the Committee's terms of reference that it would make rights, liberties and/or obligations unduly dependant upon a non-reviewable decision.

STOCK EXCHANGE AND FUTURES EXCHANGES LEVY BILLS

The Committee notes the Minister's response and accepts his statement that regulations setting a maximum rate of levy are designed to give effect to the Futures and Stock Exchanges prescribing the level of the maximum rate.

The committee has no further comments on this clause.

CRIMES (HOSTAGES) ACT 1988

The Committee commented on this Act in the Scrutiny of Bills Eighteenth Report of 1988. A response has been received from the Attorney-General.

Clause 10 - Consent of Attorney-General

The Committee expressed concern as to the provisions of Section 8 of the Act which allows for the arrest and detention of alleged offenders prior to the granting of the Attorney-General's consent to prosecution. The Committee commented on a similar provision in the Crimes (Torture) Act 1988 in its First Report of 1988. The Committee noted the Minister's response which emphasised the serious nature of hostage-taking and that sub-clause 10(2) is required to implement Australia's obligations under the International Convention Against the Taking of Hostages.

The Committee thanks the Minister for his response and trusts that it will be of assistance to Senators in debating the Bill.

Clause 11 - Reversal of Onus of Proof

The Committee notes the Minister's response and is prepared to accept the reasons advanced by the Attorney-General with respect to the reasons for the clause. The Committee is concerned that the provision should be used solely for the technical jurisdictional reasons outlined by the Minister.

The Committee thanks the Minister for his response and trusts that it will be of assistance to Senators when debating the Bill.

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL (1987)

The Committee has received a copy of a detailed submission from the Law Council of Australia on aspects of the Bill. Some of the comments made by the Law Council are not relevant to the Committee's terms of reference, and the Committee has not commented on these matters.

The Bill was commented on in Scrutiny of Bills Digest No. 16 of 1987.

Proposed new sections 214AA

The Committee remains of the view that the power of entry without warrant is acceptable in this instance in view of its limited application. The Committee has carefully considered the views of the Law Council and is of the view that the section is acceptable.

Proposed new Section 214AB

The Committee is of the view that if an authorised officer enters premises by obtaining the permission of the occupier in an improper manner, the occupier has an action in trespass against the officer. The Committee's concerns in sub-section (2) were dealt with by the Minister in his response to the Committee.

Section 240 - 'Henry VIII' Clause

The Committee maintains its view that exemptions from record-keeping obligations in paragraphs 4(b) and (c) should be expressed in the Bill and not in the Regulations.

The section is brought to Senators' attention as it may be in breach of principle 1(a)(iv) of its principles and constitute an inappropriate delegation of legislative power.

CUSTOMS AND EXCISE LEGISLATIVE AMENDMENT BILL 1988

The Committee is pleased to note that Amendment 4 of the amendments moved by the Government honours the Ministers' undertaking to the Committee noted in Scrutiny of Bills Report No. 16 of 1988.

Proposed New Sub-section 243T and 243U

The concern of the Committee has been met by the Minister's response that the re-drafted version of section 243 T allows for review by the Administrative Appeals Tribunal of the imposition of a penalty for false or misleading statements.

Proposed New Paragraph 273GA(1)(ka)

The Committee is of the view that Amendment 12 to be moved by the Government meets the Committee's objection to the Comptroller's discretion to remit penalties without provision for review.

Proposed New Section 243T(1)(a)

The Committee is concerned that innocent as well as fraudulent misstatements render the maker liable to duty. The Minister's view expressed in his response of 9 December 1988 that this is part of the price to be paid for a "green line" Customs clearance. Fast track Customs Clearance does not in the Committee's view justify the terms of the section.

The clause is brought to the attention of Senators as being possibly in breach of principle 1(a)(i) of the Terms of Reference in that it may be considered to unduly trespass on personal rights and liberties.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF 1989

12 APRIL 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF 1989

12 APRIL 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF 1989

The Committee has the honour to present its Fourth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1 (a) to (v) of Standing Order 36AAA.

Audit Amendment Bill 1989

Foreign Takeovers Amendment Bill 1988

Primary Industries and Energy Legislation Amendment Bill (No.2) of 1989

Student Assistance Amendment Bill 1989

Taxation Laws Amendment (Employee Share Acquisition) Bill 1988

Trade Practices (International Liner Cargo Shipping) Amendment Bill 1989

AUDIT AMENDMENT BILL 1987

In Scrutiny of Bills Alert Digest No. 1 of 1989 the Committee commented on sub-clause 2(3) of the Bill which allowed for certain sub-clauses of the Bill to come into effect on a date to be fixed by Proclamation or the first day after the end of 12 months from the date of Royal Assent.

The Committee has since become aware of Drafting Instruction No. 2 of 1989 issued by the Office of Parliamentary Counsel and Legislation Circular No. 1 of 1989 from the Office of the Prime Minister and Cabinet dated 16 January 1989. The legislation circular encapsulates the Senate motion of Senator Macklin agreed to by the Senate on 29 November 1989 relating to procedures for unproclaimed legislation.

The drafting instruction by the Office of Parliamentary Counsel states that if a date of proclamation longer than 6 months after the date of Royal Assent is chosen the reason should be explained in the Explanatory Memorandum.

The Committee again draws Senators' attention to the comments made in Digest No. 1 of 1989 that the clause is considered to be in breach of principle 1(a)(iv) of the terms of reference as it may constitute as invalid delegation of legislative power.

FOREIGN TAKEOVERS AMENDMENT BILL 1988

This Bill was commented upon by the Committee in Scrutiny of Bills Alert Digest No. 16 of 1988. The Bill has not been subject to comment in a previous Scrutiny of Bills Report as there has been no response from the Treasurer in respect of the Committee's comments.

The Committee in its annual report of 1986 (page 33) noted that

> "The Committee has been hampered by the lack of response from the Treasurer particularly in respect of the practice of legislation by press release.

The Committee has commented favourably on Bills where Treasury has amended a Bill in light of concerns expressed by the Committee notably the General Insurance Supervisory Levy Bill 1989, Insurance Legislation Amendment Bill 1989 and Life Insurance Supervisory Levy Bill 1989 commented upon in Digest No. 1 of 1989.

In the Foreign Takeover Amendment Bill 1988 the Committee commented that clause 20 may be non-reviewable and clause 32 which the Committee saw as an example of retrospective legislation. In respect of clause 32 of the Bill the Committee stated on page 16 of Scrutiny of Bills Alert Digest No. 16 of 1988.

Clause 32 - Retrospectivity

> Subclause 32(2) of the Bill, and the Explanatory Memorandum, for that clause, make it clear that the proposed amendments are an example of legislation, if not by press release, then by 'detailed corrigenda' to the foreign investment guidelines'. The Second Reading speech further indicates that the Foreign Investment Review Board has been acting, for more than a year, as though this proposed legislation had already been passed by both Houses of the Parliament.

Though this situation is comparable to what has been done in relation to previous proposed amendments to the tax legislation, Senators' attention is drawn to the clause as it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

The Committee draws Senators' attention to the comments on the the Foreign Takeovers Amendment Bill 1988. The provision of a response by the Treasurer, especially in respect of the Foreign Takeovers Amendment Bill would markedly assist both the Committee and the Senate in its examination of the Bill.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL (NO.2) OF 1989

TRADE PRACTICES (INTERNATIONAL LINER CARGO SHIPPING) AMENDMENT BILL 1989

In Scrutiny of Bills Alert Digest No. 2 of 1989 the Committee draws attention to schedule 1 of Primary Industries and Energy Legislation Amendment Bill (No.2) of 1989 and clause 10.90 of the Trade Practices (International Liner Cargo Shipping) Amendment Bill 1989.

The comments relate to the Committee's concern as to the practice of allowing various fees to be set by regulation with no upper limit on the level of fees to be charged.

Departments should be able to set a level of fees which allows sufficient flexibility to ensure that parliamentary scrutiny is maintained without the necessity of fees being amended at too frequent intervals.

The matter is brought to Senators' attention as it appears to be an increasingly common practice by Departments which is considered by the Committee to be in breach of principle 1(a)(v) and insufficiently subject the exercise of legislative power to parliamentary scrutiny.

STUDENTS ASSISTANCE AMENDMENT BILL

Sub-clause 2(1)(c) - Commencement

The Committee in Alert Digest No. 1 of 1989 drew attention to the commencement date of a certain clause of the Bill.

The commencement date was at the Minister's discretion or under the terms of a sub-clause not necessarily until 1 January 1990.

In view of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 and the Department of the Prime Minister and Cabinet Legislation Circulation No. 1 of 1989 the Committee repeats its concern expressed in Alert Digest No. 1 of 1989 that the clause may be in breach of principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

TAXATION LAWS AMENDMENT (EMPLOYEE SHARE ACQUISITION) BILL 1988

This Bill was commented upon by the Committee in Scrutiny of Bills Alert Digest No. 6 of 1988 where the Committee commented on clause 4 of the Bill which the Committee viewed as being a Henry VIII clause.

The Bill is a Private Member's Bill and the Commitee has not as yet received a response to its comments in the Alert Digest. Timely responses to comments made by the Committee assist both the Committee and the Senate in examining Bills before it.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF 1989

3 MAY 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF 1989

3 MAY 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF 1989

The Committee has the honour to present its Fifth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1 (a) to (v) of Standing Order 36AAA.

Transport and Communications Legislation Amendment Bill 1989.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 8 March 1989 by the Minister for Land Transport and Shipping Support.

This Bill proposes to make amendments essentially of a technical nature to the following five Acts:

- Air Navigation (Charges) Act 1952;
- Airports (Surface Traffic) Act 1960;
- Broadcasting Act 1942;
- Telecommunications Act 1975;

In Alert Digest No. 2 of 1989 (5 April 1989) the Committee drew attention to Part VII of the Telecommunications Act 1975.

Telecommunications Act 1975 - Part VII - Retrospectivity

The Committee noted changes to Part VII of the Act to validate a number of zonal and telex charges made by Telecom since 21 May 1980 without appropriate by-laws.

The Committee expressed concern at the retrospectivity of the provision but noted that the amendment resulted from an undertaking given by the then Minister, Mr Punch, to the Regulations and Ordinances Committee in November 1988.

The Minister has responded to the Committee:

Background

Early in 1988, the Committee picked up some errors in a number of Telecom by-law amendments relating to routine zonal and telex changes.

As a result, Telecom was asked to investigate the extent of the problem and to seek advice from the Attorney-General's Department on an appropriate remedy, specifically on whether validating legislation is necessary. A series of errors were found, dating back to 4 May 1980. The errors generally reflected inadequate administrative controls and inappropriate reporting procedures within Telecom's organisation.

Subsequent advice from the Attorney-General's Department indicated that the only way of rectifying the errors was through validating legislation and that this legislations would need to be retrospective.

When this advice was conveyed, the Committee asked that validating legislation be introduced as soon as possible and sought a commitment that corrective action would be taken.

Part VII of the Bill meets that commitment.

It is relevant to note that any by-law made pursuant to Part VII will be subject to Parliamentary scrutiny.

Mr Punch received a detailed report from Telecom, a copy of which was provided to the Committee. Telecom has identified 118 zoning changes which now require by-law authorisation. Of these, only 8 were for the purpose of varying existing call charges.

Telecom is unable to identify the precise effect on individual customers of these 8 zoning changes. The zoning changes would have resulted in higher charges in particular directions offset by lower charges in the other directions. The net result would depend on the individual customer's calling pattern. Telecom believes, however, that the zoning changes would have resulted in affected customers incurring lower call costs than would otherwise have been the case.

Telecom has undertaken action to ensure understanding of the proper processes to be followed when routine zonal changes are made. Telecom also proposes to reconfigure its network call charging data base, CHARMS (Charging Record Maintenance System) to ensure that no variation to charges can occur without by-law authorisation.

It is also relevant to note that under the Telecommunications Corporation Bill 1989, introduced in the House of Representatives on 13 April 1989, it is proposed that Telecom's charging arrangements will be subject to simplified administrative arrangements which should ensure that such problems do not recur. The power to make by-laws will be repealed.

The Committee thanks the Minister for his response and trusts it will be of assistance to Senators when further debating the Bill.

Barney Cooney
Chairman

3 May 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 1989

10 MAY 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1989

10 MAY 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1989

The Committee has the honour to present its Sixth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1 (a) to (v) of Standing Order 36AAA.

Australia Council Amendment Bill 1988
Bounty (Ships) Bill 1989
Primary Industries and Energy Legislation Amendment Bill (No 2.) 1989

AUSTRALIA COUNCIL AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Minister for the Arts and Territories.

The Bill intends to give legislative effect to the Government's response to the report by the House of Representatives Standing Committee on Expenditure on its Inquiry into Commonwealth Assistance to the Arts. The amendments propose a streamlined administrative structure for the Council, and clarify the relationship between the Council and Government at Commonwealth, State and local levels.

This Bill was mentioned in Scrutiny of Bills Alert Digest No. 9 of 1988 (1 June 1988) at which stage the Committee had no comments on the Bill.

Since that time a matter relevant to the Committee's terms of reference has been brought to the Committee's attention.

Proposed Section 6B

This proposed section permits the Minister to give directions to the Council "with respect to the performance of its functions or the exercise of it powers."

Proposed subsection 6B(3) requires the Minister to table the direction within 21 sitting days after the direction is given. The Committee is of the opinion that the requirement to table the directions within 21 days allows an appropriate level of parliamentary scrutiny.

It is the view of the Committee that all directions similar to those occasioned by proposed section 6B should be required to be tabled before parliament and the Committee will continue to bring such provisions to the attention of the Senate.

BOUNTY (SHIPS) BILL 1989

This Bill was introduced into the House of Representatives on 5 April 1989 by the Minister for Science, Customs and Small Business.

The Bill proposes to provide bounty for the construction or modification of bountiable vessels in Australia which are completed between 1 July 1989 to 30 June 1995. The present assistance rates (a cash limited bounty assistance scheme) will be phased down until June 1995.

The Committee drew the attention of the Senate to the following clauses of the Bill in Alert Digest No. 3 of 1989. (12 April 1989)

Subclause 23(5) - Self-incrimination

The Committee commented on this clause as in the view of the Committee all such clauses should be brought to the attention of the Senate.

It was noted by the Committee that such clauses were usual in Bounty Bills.

The Minister has responded:

> The Committee, in drawing the attention of Senators to this subclause, has repeated its concern expressed on a number of occasions that such a provision removes the privilege against self-incrimination in investigations relevant to the operation of the Act.
>
> As the Committee correctly observes, the provision is common to most modern bounty schemes (it is identical, for instance, to sub-section 28(5) of the Subsidy (Grain Harvesters and Equipment) Act 1985, to which the Committee referred in Alert Digest No. 16 of 4 December 1985, and sub-sections 28(5) and 33(5) of the Bounty (Agricultural Tractors and Equipment) Act 1985 and the

Bounty (Metal Working Machines and Robots) Act 1985 respectively, to which the Committee referred in its Alert Digest No. 10 of 9 October 1985). I can only reiterate the comments made on both those occasions as to the justification for the Clause (which the Committee reproduced in the latter case in its 14th Report of 6 November 1985), as follows:

> ... 'the provision is in standard form, and includes the usual provision that the evidence received in such investigations is not admissible in evidence in criminal proceedings against the particular person concerned. It is felt that this adequately safeguards the rights of individuals, while at the same time ensuring that the administrators of a bounty scheme possess adequate power to conduct investigations relevant to the operation of it.' ...

The Committee thanks the Minister for his response and trusts it will be of assistance to Senators when further considering the Bill.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL (No. 2) 1989

This Bill was introduced into the House of Representatives on 8 March 1989.

The Bill is an omnibus Bill administrated within the Primary Industries and Energy portfolio. It proposes to amend 10 Acts and replace 13.

The Committee commented on the Bill in The Scrutiny of Bills Alert Digest No. 2 of 5 April 1989 and the Fourth Report of 12 April 1989.

The Committee was concerned that the amendments will permit administrative fees to be set by regulation without an upper limit to the fees being provided in the Act, or a legislative mechanism being provided to limit the level of fees set and the purpose for which fees are to be increased.

The Minister has responded:

> The Committee's concern raises the issue of whether it is desirable that a rigid policy of including maximum rates of fees or levies in Acts be adhered to in every case. I consider that such a rigid policy is not desirable and that instead proper regard should be had to the circumstances of each case including the administrative difficulties involved in having a maximum fee and the safeguards other than a maximum level, which may be built into a particular piece of legislation.
>
> The reason, as I understand it, why the Committee object to legislation which does not contain a maximum fee or levy is that the level of fees set will not be subject to Parliamentary Scrutiny. Whilst this would certainly be true of some legislation, it is not true in relation to either the Petroleum (Submerged Lands) legislation or Primary Industry levy legislation because Parliament has approved a system of fee and levy setting which includes safeguards against abuse. Of course one safeguard which applies to all regulations is the Parliamentary scrutiny that they undergo once they are tabled. The additional safeguards I refer to and the administrative

difficulties which failure to rely on those safeguards can result in are:

Primary Industries Levy legislation

Under these Acts the operative rate of levy can only be set after consultation with the industry concerned and all levy receipts are paid out in full to bodies nominated by industry. These measures appear to me to be perfectly adequate safeguards against abuse and any further Parliamentary review is likely to focus on industries wishes in any case.

Given that the levy receipts are paid out in full to the bodies nominated by industry, the delay caused by implementing industry's wishes through setting maximum rates is difficult to justify. For example, should the wine industry decide on a change of rates in February of a year it is unlikely to receive the benefits of the new rate before September of the following year at the earliest.

Petroleum (Submerged Lands) Legislation

The level of the administrative fees under this legislation will be determined in consultation with the States and the Northern Territory. As part of the Offshore Constitutional Settlement any fees received in relation to the areas adjacent to the States/Northern Territory are retained by those States/Northern Territory to cover costs of administration. Apart from fees received from Commonwealth Territories such as the Ashmore/Cartier Islands Adjacent Area, the Commonwealth gains no benefit from an increase in these fees. Again I consider that these measures constitute an adequate safeguard against abuse.

The intention of the amendments is to enable timely adjustment of these fees so that they more closely reflect actual administrative costs. The majority of the current fees were set to cover costs of administration of the legislation in 1979. Since that time there have been substantial changes in administrative procedures and in a number of cases, the legislation has been revised. While it is intended that the majority or thirty eight separate fees and securities be adjusted in line with inflation, some fees will be adjusted to take account of changes in the resource required to undertake the tasks.

In the circumstances I wish to streamline the process of amending fees to maintain alignment with administrative costs. The inclusion of an upper limit on fees will impose unnecessary constraints on the Government's cost

recovery efforts. Full cost recovery would be delayed by the lengthy process of amending fees legislation whenever administrative effort increases as a result of changes to administrative procedures or changes within the industry which might lead to changed administrative costs.

The inclusion of complex formulae in the legislation to cover inflationary effects is not likely to properly reflect changes in administrative costs over time and consequently would require periodic adjustments to any base figures set in the legislation.

For the above reasons I do not propose to include a maximum fee level in the Petroleum (Submerged Lands) Legislation.

The Committee thanks the Minister for his response, but is of the opinion that if fees are to be set by Regulation then either a maximum amount, or a mechanism for controlling the level of fees ought to be included in the Act.

The Committee is of the opinion that the inclusion of maximum fees in a Bill need not involve the lengthy period envisioned by the Minister, and that it is possible to include appropriate formulae in legislation to reflect changes in administrative costs over time.

Barney Cooney
Chairman

10 May 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 1989

10 MAY 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1989

10 MAY 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1989

The Committee has the honour to present its Sixth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1 (a) to (v) of Standing Order 36AAA.

Australia Council Amendment Bill 1988
Bounty (Ships) Bill 1989
Primary Industries and Energy Legislation Amendment Bill (No 2.) 1989

AUSTRALIA COUNCIL AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Minister for the Arts and Territories.

The Bill intends to give legislative effect to the Government's response to the report by the House of Representatives Standing Committee on Expenditure on its Inquiry into Commonwealth Assistance to the Arts. The amendments propose a streamlined administrative structure for the Council, and clarify the relationship between the Council and Government at Commonwealth, State and local levels.

This Bill was mentioned in Scrutiny of Bills Alert Digest No. 9 of 1988 (1 June 1988) at which stage the Committee had no comments on the Bill.

Since that time a matter relevant to the Committee's terms of reference has been brought to the Committee's attention.

Proposed Section 6B

This proposed section permits the Minister to give directions to the Council "with respect to the performance of its functions or the exercise of it powers."

Proposed subsection 6B(3) requires the Minister to table the direction within 21 sitting days after the direction is given. The Committee is of the opinion that the requirement to table the directions within 21 days allows an appropriate level of parliamentary scrutiny.

It is the view of the Committee that all directions similar to those occasioned by proposed section 6B should be required to be tabled before parliament and the Committee will continue to bring such provisions to the attention of the Senate.

BOUNTY (SHIPS) BILL 1989

This Bill was introduced into the House of Representatives on 5 April 1989 by the Minister for Science, Customs and Small Business.

The Bill proposes to provide bounty for the construction or modification of bountiable vessels in Australia which are completed between 1 July 1989 to 30 June 1995. The present assistance rates (a cash limited bounty assistance scheme) will be phased down until June 1995.

The Committee drew the attention of the Senate to the following clauses of the Bill in Alert Digest No. 3 of 1989. (12 April 1989)

Subclause 23(5) - Self-incrimination

The Committee commented on this clause as in the view of the Committee all such clauses should be brought to the attention of the Senate.

It was noted by the Committee that such clauses were usual in Bounty Bills.

The Minister has responded:

> The Committee, in drawing the attention of Senators to this subclause, has repeated its concern expressed on a number of occasions that such a provision removes the privilege against self-incrimination in investigations relevant to the operation of the Act.
>
> As the Committee correctly observes, the provision is common to most modern bounty schemes (it is identical, for instance, to sub-section 28(5) of the Subsidy (Grain Harvesters and Equipment) Act 1985, to which the Committee referred in Alert Digest No. 16 of 4 December 1985, and sub-sections 28(5) and 33(5) of the Bounty (Agricultural Tractors and Equipment) Act 1985 and the

Bounty (Metal Working Machines and Robots) Act 1985 respectively, to which the Committee referred in its Alert Digest No. 10 of 9 October 1985). I can only reiterate the comments made on both those occasions as to the justification for the Clause (which the Committee reproduced in the latter case in its 14th Report of 6 November 1985), as follows:

> ... 'the provision is in standard form, and includes the usual provision that the evidence received in such investigations is not admissible in evidence in criminal proceedings against the particular person concerned. It is felt that this adequately safeguards the rights of individuals, while at the same time ensuring that the administrators of a bounty scheme possess adequate power to conduct investigations relevant to the operation of it.' ...

The Committee thanks the Minister for his response and trusts it will be of assistance to Senators when further considering the Bill.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL (No. 2) 1989

This Bill was introduced into the House of Representatives on 8 March 1989.

The Bill is an omnibus Bill administrated within the Primary Industries and Energy portfolio. It proposes to amend 10 Acts and replace 13.

The Committee commented on the Bill in The Scrutiny of Bills Alert Digest No. 2 of 5 April 1989 and the Fourth Report of 12 April 1989.

The Committee was concerned that the amendments will permit administrative fees to be set by regulation without an upper limit to the fees being provided in the Act, or a legislative mechanism being provided to limit the level of fees set and the purpose for which fees are to be increased.

The Minister has responded:

> The Committee's concern raises the issue of whether it is desirable that a rigid policy of including maximum rates of fees or levies in Acts be adhered to in every case. I consider that such a rigid policy is not desirable and that instead proper regard should be had to the circumstances of each case including the administrative difficulties involved in having a maximum fee and the safeguards other than a maximum level, which may be built into a particular piece of legislation.
>
> The reason, as I understand it, why the Committee object to legislation which does not contain a maximum fee or levy is that the level of fees set will not be subject to Parliamentary Scrutiny. Whilst this would certainly be true of some legislation, it is not true in relation to either the Petroleum (Submerged Lands) legislation or Primary Industry levy legislation because Parliament has approved a system of fee and levy setting which includes safeguards against abuse. Of course one safeguard which applies to all regulations is the Parliamentary scrutiny that they undergo once they are tabled. The additional safeguards I refer to and the administrative

difficulties which failure to rely on those safeguards can result in are:

Primary Industries Levy legislation

Under these Acts the operative rate of levy can only be set after consultation with the industry concerned and all levy receipts are paid out in full to bodies nominated by industry. These measures appear to me to be perfectly adequate safeguards against abuse and any further Parliamentary review is likely to focus on industries wishes in any case.

Given that the levy receipts are paid out in full to the bodies nominated by industry, the delay caused by implementing industry's wishes through setting maximum rates is difficult to justify. For example, should the wine industry decide on a change of rates in February of a year it is unlikely to receive the benefits of the new rate before September of the following year at the earliest.

Petroleum (Submerged Lands) Legislation

The level of the administrative fees under this legislation will be determined in consultation with the States and the Northern Territory. As part of the Offshore Constitutional Settlement any fees received in relation to the areas adjacent to the States/Northern Territory are retained by those States/Northern Territory to cover costs of administration. Apart from fees received from Commonwealth Territories such as the Ashmore/Cartier Islands Adjacent Area, the Commonwealth gains no benefit from an increase in these fees. Again I consider that these measures constitute an adequate safeguard against abuse.

The intention of the amendments is to enable timely adjustment of these fees so that they more closely reflect actual administrative costs. The majority of the current fees were set to cover costs of administration of the legislation in 1979. Since that time there have been substantial changes in administrative procedures and in a number of cases, the legislation has been revised. While it is intended that the majority or thirty eight separate fees and securities be adjusted in line with inflation, some fees will be adjusted to take account of changes in the resource required to undertake the tasks.

In the circumstances I wish to streamline the process of amending fees to maintain alignment with administrative costs. The inclusion of an upper limit on fees will impose unnecessary constraints on the Government's cost

recovery efforts. Full cost recovery would be delayed by the lengthy process of amending fees legislation whenever administrative effort increases as a result of changes to administrative procedures or changes within the industry which might lead to changed administrative costs.

The inclusion of complex formulae in the legislation to cover inflationary effects is not likely to properly reflect changes in administrative costs over time and consequently would require periodic adjustments to any base figures set in the legislation.

For the above reasons I do not propose to include a maximum fee level in the Petroleum (Submerged Lands) Legislation.

The Committee thanks the Minister for his response, but is of the opinion that if fees are to be set by Regulation then either a maximum amount, or a mechanism for controlling the level of fees ought to be included in the Act.

The Committee is of the opinion that the inclusion of maximum fees in a Bill need not involve the lengthy period envisioned by the Minister, and that it is possible to include appropriate formulae in legislation to reflect changes in administrative costs over time.

Barney Cooney
Chairman

10 May 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 1989

24 MAY 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF 1989

24 MAY 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF 1989

The Committee has the honour to present its Seventh Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1 (a) to (v) of Standing Order 36AAA.

Audit Amendment Bill 1989
Australian Centennial Roads Development Act 1988
Australian Postal Corporation Bill 1989
Australian Telecommunications Corporation Bill 1989
Limitation of Liability for Maritime Claims Bill 1989
Migration Legislation Amendment Bill 1989
Social Security Legislation Amendment Act 1988
Student Assistance Amendment Bill 1989
Telecommunications Bill 1989
Telecommunications and Postal Services (Transitional Provisions and Consequential Amendments) Bill 1989
Trade Practices (International Liner Cargo Shipping) Amendment Bill 1989

AUDIT AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 2 March 1989 by the Minister for Employment and Education Services.

The Bill will amend the Audit Act 1901. The principal amendments are intended to improve the administrative procedures followed by departments, make arrangements for signing audit reports, enhance the Auditor-General's powers to undertake audits and to indemnify the Auditor-General and his or her staff.

The Bill will also enable the Minister for Finance to direct that moneys appropriated to one Parliamentary Department should on the transfer of functions, be transferred to the department gaining those functions. The Minister may give directions which apply retrospectively or reduce amounts previously transferred.

The Committee drew the attention of Senators to a number of clauses of the Bill in Alert Digest No. 1 of 1989 (8 March 1989)

Subclause 2(3) - Commencement

The Committee noted that the subclause provided that proposed new paragraph 17(a) and subsection 18(2) were to come into operation 12 months after the date of Royal Assent unless Proclaimed previously.

The Minister stated in response to the Committee:

> Since it is now clear that the Australian Capital Territory will be self-governing in the near future, I agree that the limit for the commencement of paragraph 17(a) and subsection 18(2) should be reduced from 12 months to 6 months.

Accordingly, an appropriate amendment has been made to the Bill in the House of Representatives.

The Committee thanks the Minister for his response.

Clause 6 - Duties of paying, authorising and certifying officers - Inappropriate delegation of legislative power

The Committee was concerned that clause 6 allowed an unfettered discretion to authorise "a person" to carry out various functions.

The Minister has responded:

> Clause 6 amends section 34 of the Audit Act which already gives the Minister for Finance the power to appoint persons to authorise payments. That is, the amendment merely repeats the present wording, so far as such appointments are concerned.
>
> The need for the Minister to be able to appoint persons, rather than only designated officers or a specified class of people, is to accommodate the fact that, across the vast spectrum of its activities, the Commonwealth may, in some circumstances, require the flexibility to allow a payment process to be undertaken by persons other than Commonwealth employees. For example, it may need to enter into agreements with agents, banks, foreign governments, statutory authorities etc. to pay particular types of accounts or claims on its behalf. The provisions that exist in section 34 maintain that flexibility and ensure that such persons are brought within the statutory restraints afforded by the Audit Act.
>
> Note also that, pursuant to section 70A of the Audit Act, the Minister for Finance may delegate to officers the power to make appointments under section 34, and may also give directions to those delegates as to how the delegation is to be exercised. It is, therefore, possible (and is, indeed, the practice) for the Minister, in the light of any particular circumstances, to place limits on who may be appointed.

The Committee thanks the Minister for his response and trusts it will be of assistance to Senators when considering the Bill.

Clause 14 - Project Performance Audits -
Clause 21 - Audit of subsidiaries -
Inappropriate delegation of legislative power

The proposed new sections 54 and 70BB introduced by clauses 14 and 21 give the Auditor-General, or a person authorised by the Auditor-General, authority to undertake certain functions.

The Committee was concerned that the provision enabling the authorisation of "a person" may constitute an inappropriate delegation of legislative power.

The Minister has informed the Committee:

> Given the independence of the Auditor-General - who is ultimately responsible for all audits undertaken under the Audit Act - it is appropriate that he or she should have complete discretion to authorise whomsoever he or she thinks is best able to perform the various functions under that Act.

The Committee thanks the Minister for his response and draws it to the attention of the Senate when further considering the Bill.

Clause 7 - proposed new subsection 35A(1A) - Discretion to transfer moneys

The Committee drew attention to proposed new section 35(1A) which allows the Minister for Finance to give a retrospective direction transferring funds between Departments when Departmental functions have changed. The Committee expressed the view that it may be preferable to limit the power of the Minister when amending Finance Directions in these circumstances to amend amounts only.

The Minister has responded to the Committee:

> Section 35A comes into play when there is a transfer of functions between Departments pursuant to changes in the Administrative Arrangements Orders. The section's purpose in enabling appropriated funds to accompany their designated functions not only permits those functions to continue, but also allows an accurate accounting to be given to Parliament after the event.
>
> The need for retrospectivity could arise at the end of a financial year if functions were transferred from one Department to another and there is insufficient time to make a direction before the close of the financial year. Under the current provisions of section 35A, a direction covering annual appropriations could not be given after the close of the financial year since those appropriations would have lapsed. There would, therefore, be no authority for the Department receiving the function to spend the funds necessary to perform that function, despite the fact that Parliament has appropriated the funds to be so spent. The proposed amendment will rectify this anomaly.
>
> There is no need to specify in the provision that directions given under section 35A should be limited to amounts. In fact, such a direction relates only to amounts. In terms of subsection 35A(1), all a direction may do is direct that "all or any of the moneys appropriated by an Appropriation Act" (ie for the function concerned) may be transferred from one Department to another.

The Committee thanks the Minister for clarifying the situation and has no further comment on the clause.

Clause 21 - Proposed section 70BB - Audit of subsidiaries

The Committee was concerned that the provision allowing the Auditor-General power not to report minor irregularities, and to dispense with certain detailed audits, may constitute an invalid delegation of legislative power.

The Minister has informed the Committee

> The Digest states that proposed new section 70BB will give the Auditor-General power not to report minor irregularities and dispense with certain detailed audits and that the section may therefore constitute an inappropriate delegation of legislative power.
>
> New section 70BB(2)(b) provides that the Auditor-General may decline the audit of a subsidiary if it would not be cost effective. Such subsidiaries include those established by authorities for short transitional periods and/or those that operate in a remote locality.
>
> For example, where subsidiary companies are established overseas the Auditor-General is unable to be appointed or undertake the statutory audits because of his inability to meet certain residential requirements. Accordingly, section 70BB provides for such circumstances by the inclusion of the provisions enabling the Auditor-General to decline such an appointment.
>
> Proposed new subsections 70BB(3) and (4) require the Auditor-General to report any irregularity disclosed that is, in the Auditor-General's opinion, of sufficient importance to be reported and enables the Auditor-General to dispense with all or any part of the detailed inspection and audit.
>
> The proposed provisions simply enable the Auditor-General to decide what is of sufficient importance to draw to the attention of the Minister. (Indeed, if the Auditor-General had no such discretion, what sorts of matters would he or she report?) They provide no greater discretion to the Auditor-General than would be provided in accordance with professional auditing practice in audits conducted by private sector auditing firms.

The Committee thanks the Minister for his clear and detailed response and trusts that it will be of assistance to Senators when considering the Bill.

Clause 24 - Guidelines to Ministers

The Minister has responded to the Committee's concerns in the matter and states:

> The Digest states that guidelines given by a Minister should be required to be tabled before the Parliament.
>
> I have no objection to the tabling of any guidelines and, once the regulations are in place, shall arrange with any Minister who issues such guidelines for this action to be taken.
>
> I do not, however, see a need to specifically deal with the tabling of the guidelines in the Act, since they would be, after all, only guidelines. The statutory requirement in the regulations will be that officers have regard to any such guidelines before acting. The guidelines themselves would not be mandatory. Thus, an officer would not be liable for any breach of the Finance Regulations if there were perceived reasons for not following the guidelines in a particular instance. However, the officer would be in breach of the Finance Regulations if he or she failed to even consider such guidelines before acting.

The Committee thanks the Minister for his response and his undertaking with respect to tabling the guidelines.

AUSTRALIAN CENTENNIAL ROADS DEVELOPMENT ACT 1988

The Committee reported on this Act in the Sixteenth and Seventeenth Reports of 1988.

In Report 17 of 1988 the Committee stated that it considered clause 10 of the Bill which allowed the Minister to set a charge rate in consultation only with the Treasurer not subject to parliamentary or other review, may constitute an inappropriate delegation of legislative power.

The Committee notes that the Transport and Communications Legislation Amendment Act 1989 provides that the determination of a revised charge rate it to be treated as a disallowable instrument.

Although the legislation was considered by the Senate on 8 May 1989 the Committee brings the matter to the attention of the Senate as relevant to the principles of the Committee.

AUSTRALIAN POSTAL CORPORATION BILL 1989

This Bill was introduced into the House of Representatives on 13 April 1989 by the Minister for Transport and Communications.

This Bill proposes to:

- remake the Postal Services Act 1975 as the Australian Postal Corporation Act 1989;

- redefine the objectives, functions and powers of the Corporation;

- provide for the implementation of accountability measures, including the preparation of financial targets and corporate plans; and

- provide for the financial restructuring of the Corporation by providing capital, providing for dividend payments and the application of income tax and State and local Government taxes and charges.

The Committee drew the following clauses of the Bill to the attention of the Senate in Alert Digest No.4 of 3 May 1989.

Paragraph 30(1)(q) - Changes to Reserved Services

The Committee was concerned that the content of reserved services which are provisions of the Bill could be amended by regulation.

The Minister has responded:

> The provisions in the Postal Services Act 1975 for Australia Post's monopoly take the form of an offence prohibiting the carriage of letters for reward, subject to a number of exemptions. The term "letter" is not defined. The maximum penalty is a fine of $1000.

A significantly different approach is adopted in the Bill. Clause 29 provides for the carriage of letters (as defined) within Australia, to between Australia and places outside (reserved services). This is subject to a series of exemptions in clause 30. Clause 31 provides for actions for infringement of reserved services to be brought in the Federal Court.

The Committee comments that, under paragraph 30(1)(q), the content of reserved services can be altered by regulation, which may be considered an inappropriate delegation of legislative power.

The Government is concerned that the new approach to definition and protection of Australia Post's reserved services must be given an opportunity to work in practice, and to allow for change if unforeseen situations arise. It is against the background that the power to make regulations is included in paragraph 30(1)(q).

However, regulations could not be made under paragraph 30(1)(q) to extend the scope of Australia Post's *reserved services* and thus limit further the business which can be subject to competition. Regulations can only be made which would extend the scope of the exemption and open up more opportunities for competitors.

To ensure that the scope of Australia Post's reserved services is not altered without Parliament having an opportunity to be involved, subclause 30(2) delays commencement of any regulations until members of Parliament have had an opportunity to consider the change and move for disallowance.

The Committee thanks the Minister for the response but points out that the Committee is generally only prepared to accept the alteration of Acts by regulations in a limited range of circumstances. In this instance it is the view of the Committee that the Bill should not necessarily be subject to amendment by regulation.

The paragraph is brought to the attention of the Senate in that it may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

Subclause 34(1) - Alteration of existing legal rights

The Committee was concerned that this subclause affected the rights of persons to institute certain actions against Australia Post.

The Minister has responded:

> The Committee comments that subclause 34(1) removes the rights of persons to institute certain forms of legal action against Australia Post.
>
> The provision relates only to Australia Post's reserved services and is therefore far more limited than section 104 of the Postal Services Act which currently provides for immunity for Australia Post in respect of any loss or damage suffered by a person by reason of any default, delay, error, omission or loss in the receipt, transmission or delivery of postal articles or of money. In addition, subclause 34(2) further limits the scope of the immunity so that it does not cover any situation where a receipt is provided by Australia Post, even if the service is one classified as a reserved service.
>
> We have sought in clause 34 to strike a balance between the rights of consumers and the consequences for Australia Post if there is no limit to actions that might be brought for loss suffered in circumstances over which Australia Post has little or no control; for example, if uninsured valuables are lost after being dropped into a post box.
>
> The Committee might also bear in mind that Australia Post will remain subject to the jurisdiction of the Ombudsman.

The Committee thanks the Minister for the response. However, the Committee is of the opinion that reference to the Ombudsman is no substitute for the right to have a court adjudicate on a claim.

Subclause 59(9) - Self-incrimination

The Minister has responded to the Committee's concern:

> Clause 59 provides that the Auditor-General is to audit Australia Post's books and for the giving of information to the Auditor-General. The Committee has commented that subclause 59(9) does not offer adequate protection against the derivative use of information.
>
> The Government decided that Australia Post should remain subject to the jurisdiction of the Auditor-General. The audit provisions in the Bill deliberately follow the language of the provision in the Audit Act 1901 which deal with audit of public authorities required to keep accounts in accordance with commercial practice (section 63G). However, the Government undertakes to look again at the provision and make any necessary amendments at a later time if it is subsequently decided to amend the Audit Act.

The Committee thanks the Minister for the response but would prefer to see an amendment of the subclause to include protection of information derived as a result of the subclause, (a user-derivative use indemnity) which is now the legislative formula used in such clauses.

AUSTRALIAN TELECOMMUNICATIONS CORPORATION BILL 1989

This Bill was introduced into the House of Representatives on 13 April 1989 by the Minister for Transport and Communications.

This Bill proposes to:

- remake the Telecommunications Act 1975 as The Australian Telecommunications Corporation Act 1989;

- redefine the objectives, functions and powers of the Corporation;

- provide for the implementation of accountability measures, including the preparation of financial targets and corporate plans; and

- provide for the financial restructuring of the Corporation by providing capital, providing for dividend payments and the application of income tax and State and local government taxes and charges.

The Committee was concerned that this clause would remove legal liability from Telecom in a manner that could infringe the rights of citizens.

The Minister has responded:

> Clause 30 - Indemnity
>
> The Committee comments that clause 30 removes legal liability of Telecom at common law in a way which would seriously infringe the rights of citizens.
>
> The provision relates only to Telecom's reserved services and is therefore far more limited than section 101 of the Telecommunications Act 1975 which currently provides for immunity for Telecom in respect of any loss or damage suffered by a person by reason of any default,

delay, error, omission or loss, whether negligent or not, in the transmission or delivery of a telecommunications message, or in the provision, maintenance or operation of a telecommunications service.

We have sought in clause 30 to strike a balance between the rights of consumers and the consequences for Telecom if there is no limit to actions that might be brought for loss suffered in circumstances over which Telecom has little or no control; for example, if a minor technical error led to breakdown of a service and claims for consequent losses by customers because losses by customers because the service was not available.

The Committee might also bear in mind that Telecom will remain subject to the jurisdiction of the Ombudsman.

The Committee thanks the Minister for the response. The fact that Telecom remains subject to the jurisdiction of the Ombudsman does not in the Committee's view act as an efficient substitute for due legal process.

The provisions of clause 30 are brought to the attention of the Senate in that they may constitute a breach of principle 1(a)(i) and trespass unduly on personal rights and liberties.

Clause 59 - Self-incrimination

The Minister has responded to the concerns of the Committee expressed in Alert Digest No.4 of 1989:

Clause 55 provides that the Auditor-General is to audit Telecom's books and for the giving of information to the Auditor-General. The Committee has commented that subclause 55(9) does not offer adequate protection to information obtained indirectly as a result of information required to be provided under the clause.

The Government decided that Telecom should remain subject to the jurisdiction of the Auditor-General. The audit provisions in the Bill deliberately follow the language of the provision in the Audit Act which deal with audit of public authorities required to keep accounts in accordance with commercial practice (section 63G).

However, the Government undertakes to look again at the provision and make any necessary amendments at a later time if it subsequently decided to amend the Audit Act.

The Committee thanks the Minister for the response but seeks that subclause 59(9) be amended to provide for protection against the use of information derived from the use of the clause, (the user-derivative use indemnity). The Committee points out that this is now considered the appropriate form for such clauses.

LIMITATION OF LIABILITY FOR MARITIME CLAIMS BILL 1989

This Bill was introduced into the House of Representatives on 12 April 1989 by the Minister for Land Transport and Shipping Support.

This Bill proposes to enable Australia to become one of 17 parties to the Convention on Limitation for Maritime Claims. This will greatly increase the amount of compensation available to victims of a maritime accident.

The Committee drew attention to the following clause of the Bill, in Scrutiny of Bills Alert Digest No. 4 of 1989.

The Committee stated:

Subclause 2(2) - Proclamation date -

The subclause would allow for an 18 month period between Royal Assent and commencement of this measure.

This period exceeds the 6 month period now accepted as reasonable, but the reason for the extended period is adequately explained in the Minister's Second Reading speech.

A response has been received from the Minister who informed the Committee:

> I note that the Standing Committee for the Scrutiny of Bills has, in its Alert Digest No. 4 of 1989, drawn attention to the commencement provision contained in the *Limitation of Liability for Maritime Claims Bill 1989*. The Committee has noted that the time limit for proclamation of commencement exceeds the 6 month period now accepted as reasonable.

I am grateful to the Committee for informing Senators that the extended period is adequately explained in my Second Reading speech.

The Committee thanks the Minister for his response.

MIGRATION LEGISLATION AMENDMENT BILL 1989

This Bill was introduced into the Senate on 5 April 1989 by the Minister for Immigration, Local Government and Ethnic Affairs.

This Bill proposes to give legislative effect to the Report of the Committee to advise on Australia's Immigration Policies.

In broad terms the Bill proposes to:

- revise the approach to immigration decision making;
- introduce a two-tier review system, with an appeal process available through the Immigration Review Tribunal;
- establish mechanisms to ensure planned immigration program intakes are not exceeded;
- transfer the cost of detention and deportation to the offender;
- make commercial immigration advisors accountable to their clients;

The Committee drew the attention of the Senate to a number of clauses of this Bill in Alert Digest No. 4 of 1989 (12 April 1989), and has received a response from the Minister which is attached to this report.

Proposed new subsections 11A(9)(10) and proposed subsection 6(2).

Proposed subsections 11A(9) and (10) when read with proposed new subsection 6(2) may result in a person becoming an illegal entrant to Australia even though that person had no knowledge of the falsity of documents etc.

In turn, when read with proposed paragraph 27(1)(c) an offence of strict liability is created that is not dependent upon the alleged offender's degree of knowledge.

The Minister has responded that the decision in the case of Murphy v. Farmer (1988) 79 ALR 1, cast doubt on the previously accepted view that Section 16 of the Migration Act 1958 imposed strict liability and that subsections 11A(9) and (10) were designed to clarify the issue.

The Minister informed the Committee:

> The operation of new section 11A would be ineffective without strict liability. To have provided otherwise would have required that persons who fall within the scope of the clause be required to show cause why they should not be deemed to be an illegal entrant. The intention of such persons could not be proved or disproved without a separate inquiry in which the person would be entitled to make representations and in which the decision maker would be required to make a separate judgement based on all the circumstances including the demeanour and credibility of the person making the representations. The procedure would be costly, resource intensive, cumbersome and therefore undesirable. However, I accept the view of the Committee that the corresponding criminal offence provision in new paragraph 27(1)(c) should not impose strict liability. Accordingly that paragraph will be amended to require knowledge by the accused of the falsity or the misleading nature of the material that lead to the operation of paragraph 11A(1)(b) or (c) or subsection 11A(2).

The Committee thanks the Minister for his undertaking in respect of proposed paragraph 27(1)(c), and notes his explanation in respect of proposed subsections 11A(9) and (10).

The Minister states that the Committee's reference to proposed subsection 11A(11) appears to be in error, as it does not in the Minister's opinion relate to the offence provisions in proposed paragraph 27(1)(c);

The Minister informed the Committee:

> new subsection 11A(11) has the same effect as existing subsection 16(1A) of the Migration Act which is, to ensure that persons who were convicted of crimes and placed in institutions other than prisons (e.g. borstals) would fall within the scope of the deeming provision:

The Committee notes the Ministers views and thanks him for the response.

Proposed subsections 11D(1), 11P(1), and 11ZJ(1)

The Committee was concerned that these provisions which relate to the granting of visas, entry permits and entry permits for statutory visitors, allow the substantive operation of the subsections to be determined by regulation and not by the Act.

In his response the Minister states:

> The scheme of the Bill contemplates policy criteria being prescribed in regulations. This constitutes a considerable improvement - in terms of Parliamentary scrutiny - over the present system where policy (in most areas) is determined by the Minister alone.
>
> It would not be possible to include all the criteria in the Act. It will take some 18 months to settle all the regulations and it would delay the Bill - for at least that period of time - to include policy criteria for decision making in the Act. Moreover there is the need for fine tuning policy criteria once set out. Inclusion of criteria in the regulations allows for this to be done more easily than if the criteria were set out in the Act.

The Committee notes the response of the Minister. Whilst the Committee is prepared to accept clauses where the alteration of Acts by regulation is essentially consequential or technical in nature, the Committee is of the view that the policy criteria

for decision making should be tabled before Parliament as soon as they are finalised, and eventually made a part of the Bill, if necessary as a schedule when the Bill is amended.

Section 11G and Subsection 11R(1) - Unfettered Discretion

The Committee was concerned at the width of the discretion given to the Secretary to cancel a visa or temporary entry permit, not subject to the review procedures in the Bill.

The Minister has responded:

> These provisions merely re-enact provisions already in the Act (sections 7 and 11B) and give the Secretary the power to cancel visas and temporary entry permits. While the language of the sections is cast in terms which provide for absolute discretion the cancellation may not take place without the person affected being accorded natural justice. The Department considers itself bound by the dictum set out in Kioa v. West (1985) 62 ALR 321, see the judgement of Mason J. (as he then was) at page 345, line 16-20 - and applies that reasoning to the cancellation of visas and permits. The proposition that natural justice applies regardless of words importing absolute discretion is supported by the decision of Woodward J in Rojas v. Minister for Immigration and Ethnic Affairs & Anor (1986) 11 ALN 232.

The Committee thanks the Minister for his comments on the provisions and trusts that they will be of assistance to Senators when debating the Bill.

Proposed Subsections 11N(1) and 11Y(1) - Gazette notification of cut off points

These provisions relate to the notification of cut off points for the pool entrance mark and priority entrance marks in relation to a class of visas, and the priority mark in relation to a class of entry permit.

The Minister has responded:

> It was felt that the requirement to publish the cut-off points in the Gazette was sufficient notification. All Honourable Senators, and indeed members of the Parliament generally, as well as the public have ready access to the Commonwealth Gazette. However, this amendment is acceptable.

The Committee thanks the Minister for his response and notes his undertaking to amend the provision.

Subsection 21D(14) - Search warrants

The Committee was concerned that the issue of a search warrant did not involve an application to a judge or magistrate.

The Minister has responded:

> This provision merely repeats similar provisions found in subsection 37(3) of the Act. This provision parallels a provision in the Customs Act. It is not appropriate for these warrants to be issued by magistrates because officers need to move quickly against illegal entrants who may themselves move quickly to disappear. However, to meet the Committee's concern I propose that these provisions be amended to empower the Secretary to issue warrants. I expect that this power would be delegated, but only to very senior officers.

The Committee notes the Minister's response, and appreciates the limitation of the power to issue warrants to the Secretary. However, the Committee notes that methods of obtaining warrants quickly are available, such as the power to obtain warrants by telephone in an urgent situation (section 23 of the National Crime Authority Act 1984.)

The fact that the subsection 37(3) of the Migration Act is a similar provision does not in the Committee's view justify supporting the provision, and the Committee would prefer subsection 37(3) to be amended to allow for search warrants to be issued only by judges or magistrates.

Proposed new subsection 21D(14) is drawn to the attention of the Senate, in that providing for the issue of a search warrant by other than judges or magistrates it may be considered to trespass unduly on personal rights and liberties.

New Subsection 27(2A) - Reversal of onus of proof

The Committee was concerned at this section which appears to reverse the onus of proof in respect of whether a permit has been issued to a person.

Minister has responded:

> It is appropriate that the persuasive onus as to whether a permit has been issued to a person be placed on the person. If such an onus were placed on the Department, the onus would be to prove a negative ie that no entry permit had been granted. This would involve the onerous task of searching numerous records and determining at what point there had been sufficient search to discharge the onus. On the other hand the persuasive and evidential onus on the defendant may be satisfied by mere production of a passport in which an entry permit has been stamped.

The Committee thanks the Minister for his response, but the Committee is concerned at the apparent reversal of the onus of proof. The Committee requests the Minister explore the possibility of incorporating within the Bill a provision allowing for the production of a certificate, signed by an appropriate person, stating the Department had not issued an entry permit. The production of that certificate may be treated as prima facie evidence that the Department had not issued the relevant permit.

New Section 46 - Strict Liability Offence

The Committee was concerned that the new section created a strict liability offence with respect to making false or

misleading statements in relation to the provision of migration services.

The Minister has responded:

> New section 46 prohibits a person making certain false or misleading statements in relation to the provision of migration services. The provision is comparable with sections of the Trade Practices Act 1974 which provide liability for persons or corporations making false or misleading statements in connection with the promotion or supply of goods or services. Section 53 of the Trade Practices Act would in itself apply to persons providing Migration services: new section 46 merely provides a more specific offence.

The Committee thanks the Minister for his response and trusts that it will be of assistance to Senators in further debate on the Bill.

Section 53A - Exemption

The Committee thanks the Minister for his undertaking that the instrument of exemption from the requirement that persons entering Australia hold entry permits will be made public in the Gazette.

New Sections 61 and 62

The Committee's attention has been drawn to the terms of proposed new subsection 61(1)

"Internal review of certain decisions
61(1). The regulations may provide for prescribed decisions of the Secretary to be reviewed by prescribed review officers on application, as prescribed, by prescribed persons."

The Committee suggests that the provision be redrafted in a form that makes sense to persons reading the Bill.

The Committee also sought comments from the Minister on the Committee's view that certain decision criteria in new sections 61 and 62 should be included in the Act.

The Minister has responded:

> Consistent with categories of visas/entry permits and decision criteria for each category being set out in regulations, so too, the categories of decision (that may be reviewed by the Immigration Review Tribunal) will be set out in regulations.
>
> As stated in the Second Reading speech the categories of decision - for which there will be review - will in the first instance, largely be the same as the which existed in the past for the Immigration Review Panel. It would be near impossible to set out all the categories of decisions where review was allowed in advance of those categories being finalised. As said in relation to new sections 11D and 11P the process of devising all the decision criteria and categories will take some 18 months.

The Committee thanks the Minister for his response but maintains that the criteria for decision should be tabled before Parliament, as soon as they have been finalised and then incorporated within the Act, if necessary as a schedule when the Bill is amended.

Immigration Review Tribunal

The Committee sought a response from the Minister as to the need to establish an Immigration Review Tribunal when the Administrative Appeals Tribunal was already established as a forum for Administrative Review.

The Minister has responded:

> Part III - IMMIGRATION REVIEW TRIBUNAL (IRT)
>
> The IRT was chosen by Cabinet as the alternative to the Administrative Appeals Tribunal (AAT). The IRT will in fact be somewhat different to the AAT as the IRT will conduct its procedures on a non-adversarial basis unlike the AAT. This Department will not be a party to proceedings. It is anticipated that the non-adversarial process will decrease the time and therefore the cost of reviewing migration decisions. It will be more cost effective, less intimidating than the AAT and more conducive to client satisfaction.

The Committee endorses the Minister's concept of a quicker, cheaper non-adversarial means of reviewing migration decisions. The Committee is concerned that the role of the IRT needs to be explained and distinguished from that of the AAT.

New Section 66DA - Delegation

The Committee notes that delegations in this section were to "a person" and pointed out that the reasons for the provision were not explained in the Explanatory Memorandum.

The Minister has responded:

> New Section 66DA provides for delegation to a "person" to retain the flexibility essential for proper administration of the Migration Act which was previously available by any person being able to be made an "officer" within the terms of section 5 of the Migration Act. The Bill removes this "catch all" provision and in order to take account of the necessity to allow many and various persons (e.g. officers of other agencies, officers of the administration of external territories, locally engaged staff in overseas posts and consular officers of foreign governments in countries where Australia is not represented) to perform functions under the Act the delegations provision allowed delegation to a person. It would be impossible to categorise all persons who might be required to exercise a power or function under the Migration Act.

The Committee thanks the Minister for his response, but is of the view that there should be some limit on the seniority of persons holding the delegation.

Numbering of Act

The Committee did not raise the matter in Alert Digest No 3 but expressed to the Minister some concerns about the complexity of the numbering of the Act.

The Minister has responded to the Committee:

> Regarding the concern about the numbering of the Migration Act when amended, attached is a memorandum from the Office of Parliamentary Counsel. I have decided that it would be appropriate at this stage to include a provision in the Bill which allows the Migration Act to be renumbered once it is reprinted.

The Committee thanks the Minister for his response.

Other Matters

The Committee has considered other aspects of the Bill that have been raised by various interest groups and Honourable Senators.

Proposed section 11M

The proposed subsection relates to the initial application of the "points" system. The Committee is concerned that an applicant who reaches the applicable pool entrance mark but not the applicable priority mark may spend a lengthy period of time in the "pool".

It does not appear that an applicant has a right of appeal against the decision placing them in the pool or the period in which they remain in the pool.

The Committee requests that the Minister consider implementing a system of review of the Secretary's decision to place applicants in the pool, and also of the period of time an applicant remains in the pool.

Proposed section 21D(18)

This section provides that an officer may stop any vehicle. The Committee requests that the provision be amended to require the officer to hold a reasonable belief that in the exercise of his or her powers it is necessary to stop the vehicle.

Proposed section 21D(19) - Limitations of Actions.

The proposed subsection provides that an officer acting in good faith who takes possession of valuables pursuant to the exercise of powers under subsection (5) is not liable "to an civil or criminal action in respect of the doing of that act or thing".

The Committee requests that the Minister make provision for allowing an action in the appropriate circumstances, but that an officer acting in good faith have a defence to any such action.

Proposed subsections 61(4), 62(3) and 62(4) - Time limits for review.

These subsections provide a twenty-eight day time limit for the institution of review of a decision. The Committee requests that the Minister provide for the possibility of review of the relevant decisions outside of the twenty-eight day time limit in appropriate circumstances.

Proposed subsection 64B(2) - Ministerial certificates.

This subsection provides that the Minister can give a certificate that a decision shall not be reviewed, or continue to be reviewed where it would be contrary to the public interest to change that decision: as it may prejudice the security, defence, or international relations of Australia.

The Committee requests that the Minister provide for the Ministerial certificate to be tabled before the Parliament, if necessary in the form of an abstract of the certificate.

Proposed subsection 64M(2) - Addressing the Tribunal.

This subsection provides that "the Tribunal is not required to allow any person to address it orally about the issues arising in relation to the decision under review."

The Committee requests that the provision be amended to allow any person to request to orally address the Tribunal about the relevant issues and for the Tribunal to have the right to refuse and application to hear that person.

Subsection 64P(6) - Representation before the Tribunal.

This subsection provides that a person appearing before the Tribunal to give evidence is not entitled to

(a) "be represented before the Tribunal by any other person or;

(b) examine or cross-examine any other person appearing before the Tribunal to give evidence".

The Committee requests that the Tribunal be given a discretion to allow representation of a person or allow examination or cross-examination of a witness or any other person.

Additional Responses to the Migration Legislation Amendment Bill.

The Committee has received responses to the matters raised in Alert Digest No 3 of 1989, from the following persons and organisations.

1. Mr M Clothier and Ms M Crock.

Ms Crock is chairperson of the Migration Law Subcommittee of the Law Institute of Victoria, and Mr Clothier is a member of that Committee.

The Committee has considered the material put to it by Mr Clothier and Ms Crock, and regards the points raised by them as having already been referred to in the Alert Digest or otherwise considered by the Committee.

2. Human Rights Centre - University of New South Wales

A submission was forwarded to the Committee from the Human Rights Centre at the University of New South Wales signed jointly by Professor J. Crawford and Associate Professor P. Hyndman.

The submission which is attached to the report raises several issues, in particular the proposition that in certain limited instances a mandatory deportation pursuant to Clause 17A may bring Australia into breach of the non-refoulement requirement of Article 33 of the 1951 Convention Relating to the States of Refugees.
The Senate thanks Professors Crawford and Hyndman for bringing the matter to the Committee's attention.

Clause 17A is brought to the attention of Senators, in that in certain circumstances a mandatory deportation may lead to

The enactment of new subsection 164(2AE) allow the Department to match its own data with data from external agencies to detect instances of incorrect payment of pension or benefit. The Privacy Commissioner has indicated that he plans to take a close interest in such data-matching activities, and my Department will be consulting extensively with the Commissioner in arriving at suitable data-matching principles and practices.

The Privacy Act also gives the Commissioner wide ranging functions in undertaking investigations, research and audits into any aspect of an agency's operations as they affect the privacy of individuals. The Commissioner has indicated that he expects agencies to establish internal arrangements for privacy audits and my Department will be doing so in the near future.

Against this background, I am confident that new subsection 164(2AE) will be implemented in a manner that avoids unnecessary intrusion into the privacy of individuals. Use of the new provision will be closely monitored, both by the Department itself and by the Privacy Commissioner, as outlined above. Corrective action will of course be taken should any problems arise.

The Committee thanks the Minister for his response and the steps taken to ensure that the concerns noted by the Committee have been addressed. The Committee brings the matter to the attention of Senators as although the Bill has passed the Parliament, the issue raised is important.

SOCIAL SECURITY LEGISLATION AMENDMENT ACT 1988

This Act was introduced into the House of Representatives on 19 October 1988 by the Minister for Social Security.

The Bill received the Royal Assent on 22 December 1988.

The Act amends the Social Security Act 1942 to further implement changes flowing from the Social Security Review lead by Professor Cass. Other amendments implement decisions announced in the 1988 May Statement and the 1988/89 Budget.

The Committee reported on the Act in the Eighteenth Report of 1988 and the Second Report of 1989.

The Minister for Social Security has responded to the comments made by the Committee in the Second Report of 1989.

The Committee was concerned that clause 52 of the Bill which amended section 164 of the Principal Act may be unduly intrusive on personal privacy, in enabling the Secretary to obtain personal information about a whole class of persons even though some of these persons may have no connection with the Department.

The Committee asked that the effect of the new provisions with a view to amending the Act.

The Minister has responded:

> As I pointed out to you in my last letter, this amendment was formulated after consultations with the NSW Privacy Committee. Further more, the Privacy Act 1988 contains a comprehensive set of Information Privacy Principles which provide an effective framework for my Department's activities in this area.

Australia being in breach of its obligations under the 1951 Convention on the Status of Refugees and may thereby trespass unduly on personal rights and liberties.

3. Legal Aid Commissions of Victoria and New South Wales

The Committee considers that the contents of this submission have been considered by the Committee.

4. Public Interest Advisory Centre - (Sydney)

A submission on the effects of the Bill by the Public Interest Advisory Centre - Sydney was considered by the Committee. The contents of the submission have previously been considered by the Committee or are incorporated within other submissions.

5. National Immigration Forum

A submission on suggested amendments to the Bill from the National Immigration Forum was also considered by the Committee. The content of this submission had previously been considered by the Committee.

STUDENT ASSISTANCE AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 2 March 1989 by the Minister for Employment, Education and Training.

The Bill will amend the Student Assistance Act 1973. The amendments are largely administrative, for example, one will replace the expressions 'advanced education institution' and 'university' with references to 'higher education institution'. The Bill will also repeal the requirement that Departmental assessors be appointed by the Minister and will modify the appeal procedure. It also will amend the principal Act's recovery and waiver/write off provisions and provide for regulations to be redrafted in a simpler manner.

The Committee drew Senators' attention to the following clauses of the Bill, in Alert Digest No. 1 of 1989.

Subclause 2(2)(1)(a) - Commencement

The Committee was concerned that the clause introduced a discretion that may delay the commencement date of the Bill until 1 January 1990.

The Minister has responded:

> Commencement provisions
>
> Clause 2 of the Bill provides that the substantive provisions are to come into operation on a day fixed by Proclamation, with the proviso that they will automatically come into effect on 1 January 1990 if they have not been proclaimed to commence before then.
>
> As the Committee has noted, the delay in the commencement of the Bill is to allow time for drafting amendments to the Student Assistance Regulations. The changes consequential on the change to section 10 and the repeal of section 11 of the Student Assistance Act

> may involve extensive redrafting of the present regulations, and the commencement clause therefore proposes a longer period than would normally be needed for drafting consequential amendments to subsidiary legislation.
>
> I mentioned in my second reading speech that the Department is currently seeking to have the Regulations dealing with the AUSTUDY scheme redrafted in a simpler manner and that the proposed amendments are intended to facilitate this. As AUSTUDY is administered on a calendar year basis, it is proposed that the new regulations will come into effect on 1 January 1990. If the amendments to the regulations consequential on the Bill turn out to involve significant drafting, it would be advantageous for them to be included in the redrafted regulations planned to come into effect on 1 January 1990.

The Committee thanks the Minister for his explanation of the delayed commencement date.

Clause 8 - Regulations

The Committee was concerned that many of the Student Assistance rules were laid down by Regulations made under the Act.

The Minister has responded:

> The AUSTUDY rules are complex and the Student Assistance Regulations are frequently amended. The present approach has worked well and it is not proposed to depart from it. If the provisions currently in the regulations were to be incorporated into the Student Assistance Act, there would be considerably more demands on Parliamentary time for debating amendments to the Act, together with increased pressures on drafting and Departmental resources.

The Committee noted that in response to clause 2 the Minister states that it is intended that the AUSTUDY regulations be redrafted in a simpler manner and requests that the opportunity

be taken to incorporate as many as possible of the student assistance rules now contained in the regulations within the Act.

Paragraph 17(1)(b) - waiver right to receive document

The Committee was concerned that paragraph 17(1)(b) allowing an applicant to waive the right to receive copies of documents 14 days prior to the hearing against the decision may unduly trespass on that students rights.

The Minister has responded:

> Students sometimes ask the Student Assistance Review Tribunal (SART) to defer hearing of their appeals until after the date on which their appeal has been listed to be heard. There are necessarily some delays in having a matter heard by the SART, particularly as it is a part-time body. Hence the SART Secretariat may seek to list another matter in place of the cancelled hearing, so that the other matter can be brought forward some time before it would otherwise be heard.
>
> However, section 25(1)(c)(ii) of the Student Assistance Act requires that appellants be given copies of all documents relevant to their appeals at least 14 days before the hearing by the SART. This can prevent the SART Secretariat from asking other students if they would like to have their appeals listed in place of a cancelled hearing. Paragraph 17(1)(b) of the Bill seeks to avoid this limitation enabling students to waive their right to have the documents 14 days in advance of their hearing.
>
> The amendment would also bring section 25(1)(c)(ii) into line with section 25(1)(aa). The latter section provides that *at least 14 days' notice is to be given of* SART hearings, but adds that a student may waive his or her right to the notice.

The Committee thanks the Minister for his response. The Committee seeks that students are made fully aware of their rights and options prior to making a decision to waive the 14 day period.

Telephone Network (PSTN). It will be necessary for Government to have the ability to take quick action to protect the exclusive common carrier role of Telecom while policy decisions are taken on the best method to introduce new technology.

Any regulations must, of course, be consistent with the Act and, given the clear statements of policy intent contained in clauses 33 and 35, could not be used to defeat the telecom monopoly. The office of Parliamentary Counsel drafted the legislation with the object that regulations could only be made to clarify the law should technological developments put pressure on the current wording. This feature of the legislation will ensure the Government is able to respond quickly to technological developments so as to safeguard the carriers' monopoly provision of Australia's public telecommunications infrastructure and networks.

The Committee thanks the Minister for the response but would prefer to see the Bill drafted in such a manner that the Bill cannot be amended by altering the regulations. It is the view of the Committee that this clause does not fit within the limited range of circumstances where such clauses are regarded as appropriate by the Committee; namely where the clauses are essentially technical or consequential in nature.

The Committee brings Clause 4 and subclause 40(1) to the attention of the Senate in that they may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

TELECOMMUNICATIONS BILL 1989

The Bill was introduced into the House of Representatives on 13 April 1989 by the Minister for Transport and Communications.

This Bill proposes, together with the *Telecommunications* Corporation Bill 1989, to reform the structure and regulation of the telecommunications industry. The Australian *Telecommunications* Authority (AUSTEL) will carry out the role of economic and technical regulation of the industry, separate from the operations of the carriers - Telecom, OTC and AUSSAT.

Clause 4 - Basic telephone services

The Committee was concerned that the definition of basic telephone services could be altered by regulation.

Subclause 40(1) - Redefinition of boundaries

The Minister has responded

> Clause 4 - Interpretation - definitions defines the meaning of 'basic telephone service' while subclause 40(1) - Boundaries of public switched telephone network defines the boundary of the network.
>
> The Committee expressed concern at the way in which regulations could be used to vary an aspect of the legislation, outlined in these two clauses, and thus effect Telecom's rights.
>
> The purpose of making these definitions subject to regulation was not to alter the intent of the legislation, nor to inhibit Telecom's monopoly position, but to enable the Government to be responsive to change.
>
> Technological advancement in the telecommunications arena has occurred so rapidly that it is important that new legislation is flexible enough to deal with continuing change. This is certainly relevant to the definition of the basic telephone service (which is used in clause 47 to provide for Telecom's first telephone monopoly) and the boundary of the Public Switched

TELECOMMUNICATIONS AND POSTAL SERVICES (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1989

This Bill was introduced into the House of Representatives on 13 April 1989 by the Minister for Transport and Communications.

This Bill proposes to repeal the Telecommunications Act 1975 (to be replaced by the Telecommunications Act 1989 and the Australian Telecommunications Corporation Act 1989) and the Postal Services Act 1975 (to be replaced by the Australian Postal Corporation Act 1989). It also proposes to amend other acts and makes transitional provisions relating to the imposition of income tax and State and Territory taxes and charges, and for other purposes.

The Committee was concerned that the proposed new subsection 76 of the Overseas Telecommunications Act 1946 gave OTC too wide an immunity from actions of loss or damage even if caused intentionally.

The Minister has informed the Committee:

> The provision relats only to OTC's reserved services and is therefore far more limited than section 78 of the OTC Act, which it replaces. Section 78 currently provides that no action lies against OTC Limited by reason of any default, delay, error, omission or loss, whether negligent or otherwise in the transmission, delivery or reception of a telecommunication.
>
> We have sought in proposed section 76 to strike a balance between the rights of consumers and the consequences for OTC if there is no limit to actions that might be brought for loss suffered in circumstances over which OTC has little or no control; for example, if a minor technical error led to breakdown of a service and claims for consequent losses by customers because the service was not available. OTC is only one carrier in a chain of carriers providing the network on which a service is provided.

The Committee might also bear in mind that OTC remains subject to the jurisdiction of the Ombudsman.

The Committee notes the Minister's response but remains of the opinion that the clause may infringe the rights of citizens, and draws the provision to the attention of Senators in that it may be considered to trespass unduly on personal rights and liberties.

TRADE PRACTICES (INTERNATIONAL LINER CARGO SHIPPING) AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 8 March 1989 by the Minister for Transport and Communications.

This Bill proposes to repeal and replace Part X of the Trade Practices Act 1974 to effect major changes to the regulatory system governing international liner cargo shipping, as announced by the government in November 1987.

Certain clauses of the Bill were commented upon by the Committee in Scrutiny of Bill Alert Digest No. 2 of 1989 and Report No. 4 of 1989.

The Committee was concerned as to the effect of the following matters;

Clause 10:05 - Onus of proof

The Committee was concerned that an ocean carrier allegedly discriminating between shippers requiring similar outwards liner cargo shipping services on a particular trade route were required to prove certain defences possibly invading a reversal of the onus of proof.

The Minister has responded to the Committee:

> I note that the Committee has, in its annual report for 1986/87 accepted that there are occasions on which it might be acceptable for the burden of proof to be reversed. I understand the Committee has accepted that it is permissible to reverse the persuasive onus of proof where the matters to be raised by way of defence by the accused were peculiarly within the knowledge of the accused and where it would be extremely difficult and costly for the prosecution to be required to negative the defence.

The question of whether the discrimination within the meaning of clause 10.05 was solely due to reasonable allowance to difference types of cost, capacity of the ocean carrier, schedules of departures or meeting competition are all things peculiarly within the knowledge of the defendant. In addition, those matters concern intimate details of the business affairs of the ocean carrier and would be very difficult and costly for the prosecution to obtain or assemble in a way which would be an accurate reflection of the market. On the other hand it is relatively easy for the defence to make out the defence from its own business records and would involve minimum expense for the defendant.

I therefore believe that clause 10.05 meets the Committee's test and that reversal of the onus of proof does not in this case trespass unduly on personal rights and liberties.

The Committee thanks the Minister for the response and trusts it will be of assistance to Senators when considering the Bill.

Clauses 10.44, 10.54 and 10.61 - Ministerial powers

The Committee notes the width of the discretion given the Minister in taking action against ocean carriers but notes that the Minister's powers are limited by the provisions of the Act, and there is a right of review available under the Administrative Division (Judicial Review) Act 1977.

The Minister has responded:

I have noted the Committee's comments that the Minister's discretion for action against ocean carriers is wide. However I believe these powers are necessary to ensure ocean carrier compliance with the provisions of the legislation. In addition, as noted in the Committee's comments, the use of these powers is limited by provisions in the Bill.

Generally the Minister cannot take action against an ocean carrier under the legislation without first receiving and taking into account a Report by the Trade Practices Commission or, in the case of unfair pricing practices, a Report by the Trade Practices Tribunal. In exceptional circumstances the Minister can take action prior to receiving the Report of the Trade Practices

Commission but on consideration of the Report must reconfirm the action against the ocean carrier or it would automatically lapse after 21 days.

The Minister must also attempt to resolve the problem through consultations with the parties concerned before taking any action. Aggrieved parties have the right to appeal against the Minister's decisions under the Administrative Decisions (Judicial Review) Act 1977.

The Committee thanks the Minister for his response and trusts it will be of assistance to Senators when debating the Bill.

Clause 10.90 - Level of fees to be amended by Regulation

The Committee was concerned that the level of fees could be set by Regulations with no upper limit to the level of fees set.

The Minister has responded:

In relation to the level of fees to be prescribed by Regulation, I accept the Committee's comments on the need for an upper limit on these fees to be specified in the Bill. On 13 April 1989 an amendment I moved to the Bill in the House of Representatives included provision for an upper limit on the level of fees which may be set by Regulation for the purposes of this legislation.

The Committee thanks the Minister for his response meeting the concerns of the Committee.

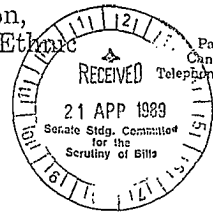
Barney Cooney
Chairman

24 May 1989

Minister for Immigration, Local Government and Ethnic Affairs

Senator the Hon. Robert Ray

Parliament House
Canberra ACT 2600
Telephone: (062) 777 860



Senator B Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

MIGRATION LEGISLATION AMENDMENT BILL 1989

I wish to respond to comments appearing in your Committee's Scrutiny of Bills Alert Digest No 3 of 1989, on certain provisions of the Migration Legislation Amendment Bill 1989 and to the letter of 14 April 1989.

NEW SECTION 11A(9)(10) AND (11) AND NEW PARAGRAPH 27(1)(c)

New Section 11A replaces section 16 of the Migration Act 1958. Prior to the High Court's decision in Murphy v Farmer (1988) 79 ALR, section 16 was always regarded as imposing strict liability. This view was accepted by the full Federal Court in Naumovska v Minister for Immigration and Ethnic Affairs 5 ALN 357. Murphy v Farmer cast doubt on that interpretation and subsections 11A(9) and (10) were intended to provide clarity to the issue of strict liability.

The operation of new section 11A would be ineffective without strict liability. To have provided otherwise would have required that persons who fell within the scope of the clause be required to show cause why they should not be deemed to be an illegal entrant. The intention of such persons could not be proved or disproved without a separate inquiry in which the person would be entitled to make representations and in which the decision maker would be required to make a separate judgment based on all the circumstances including the demeanour and credibility of the person making the representations. The procedure would be costly, resource intensive, cumbersome and therefore undesirable. However, I accept the view of the Committee that the corresponding criminal offence provision in new paragraph 27(1)(c) should not impose strict liability. Accordingly that paragraph will be amended to require knowledge by the accused of the falsity or the misleading nature of the material that lead to the operation of paragraph 11A(1)(b) or (c) or subsection 11A (2).

I am uncertain why new section 11A(11) has been referred to in the alert. The reference appears to be in error as it does not relate to the offence provisions contained in new paragraph 27(1)(c). New subsection 11A(11) has the same effect as existing subsection 16(1A) of the Migration Act; this was inserted to ensure that persons who were convicted of crimes and incarcerated in institutions other than prisons (eg borstals) would fall within the scope of the deeming provision.

NEW SUBSECTIONS 11D(1) AND 11P(1)

The scheme of the Bill contemplates policy criteria being prescribed in regulations. This constitutes a considerable improvement - in terms of Parliamentary scrutiny - over the present system where policy (in most areas) is determined by the Minister alone.

It would not be possible to include all the criteria in the Act. It will take some 18 months to settle all the regulations and it would delay the Bill - for at least that period of time - to include policy criteria for decision making in the Act. Moreover there is the need for fine tuning policy criteria once set out. Inclusion of criteria in the regulations allows for this to be done more easily than if the criteria were set out in the Act.

NEW SECTION 11G AND SUBSECTION 11R(1)

These provisions merely re-enact provisons already in the Act (sections 7 and 11B) and give the Secretary the power to cancel visas and temporary entry permits. While the language of the sections is cast in terms which provide for absolute discretion the cancellation may not take place without the person affected being accorded natural justice. The Department considers itself bound by the dictum set out in Kioa v West (1985) 62 ALR 321, see the judgment of Mason J (as he then was) at page 345, line 16-20 - and applies that reasoning to the cancellation of visas and permits. The proposition that natural justice applies regardless of words importing absolute discretion is supported by the decision of Woodward J in Rojas v Minister for Immigration and Ethnic Affairs & Anor (1986) 11 ALN 232.

NEW SUBSECTIONS 11N(1) AND 11Y(1)

It was felt that the requirement to publish the cut-off points in the Gazette was sufficient notification. All Honourable Senators, and indeed members of the Parliament generally, as well as the public have ready access to the Commonwealth Gazette. However, this amendment is acceptable.

NEW SUBSECTION 21D(14)

This provision merely repeats similar provisions found in subsection 37(3) of the Act. This provision parallels a provision in the Customs Act. It is not appropriate for these warrants to be issued by magistrates because officers need to move quickly against illegal entrants who may themselves move quickly to disappear. However, to meet the Committee's concern I propose that these provisions be amended to empower the Secretary to issue warrants. I expect that this power would be delegated, but only to very senior officers.

NEW SUBSECTION 27(2A)

It is appropriate that the persuasive onus as to whether a permit has been issued to a person be placed on the person. If such an onus were placed on the Department, the onus would be to prove a negative ie that no entry permit had been granted. This would involve the onerous task of searching numerous records and determining at what point there had been sufficient search to discharge the onus. On the other hand the persuasive and evidential onus on the defendant may be satisfied by mere production of a passport in which an entry permit has been stamped.

NEW SECTION 46

New section 46 prohibits a person making certain false or misleading statements in relation to the provision of migration services. The provision is comparable with sections of the Trade Practices Act 1974 which provide strict liability for persons or corporations making false or misleading statements in connexion with the promotion or supply of goods or services. Section 53 of the Trade Practices Act would in itself apply to persons providing Migration services: new section 46 merely provides a more specific offence.

NEW SECTION 53A - EXEMPTIONS

I accept the Committee's view that the instrument of exemption should be made public in the Gazette. Accordingly this amendment is acceptable.

NEW SECTIONS 61 AND 62

Consistent with categories of visas/entry permits and decision criteria for each category being set out in regulations, so too, the categories of decision (that may be reviewed by the Immigration Review Tribunal) will be set out in regulations.

As stated in the Second Reading Speech the categories of decision - for which there will be review - will in the first instance, largely be the same as that which existed in the past for the Immigration Review Panel. It would be near impossible to set out all the categories of decisions where review was allowed in advance of those categories being finalised. As said in relation to new sections 11D and 11P the process of devising all the decision criteria and categories will take some 18 months.

PART III - IMMIGRATION REVIEW TRIBUNAL (IRT)

The IRT was chosen by Cabinet as the alternative to the Administrative Appeals Tribunal (AAT). The IRT will in fact be somewhat different to the AAT as the IRT will conduct its procedures on a non-adversarial basis unlike the AAT. This Department will not be a party to proceedings. It is anticipated that the non-adversarial process will decrease the time and therefore the cost of reviewing migration decisions. It will be more cost effective, less intimidating than the AAT and more conducive to client satisfaction.

NEW SECTION 66DA - DELEGATIONS

New Section 66DA provides for delegation to a "person" to retain the flexibility essential for proper administration of the Migration Act which was previously available by any person being able to be made an "officer" within the terms of section 5 of the Migration Act. The Bill removes this "catch all" provision and in order to take account of the necessity to allow many and various persons (eg officers of other agencies, officers of the administration of external territories, locally engaged staff in overseas posts and consular officers of foreign governments in countries where Australia is not represented) to perform functions under the Act the delegation provision allowed delegation to a person. It would be impossible to categorise all persons who might be required to exercise a power or function under the Migration Act.

Regarding the concern about the numbering of the Migration Act when amended, attached is a memorandum from the Office of Parliamentary Counsel. I have decided that it would be appropriate at this stage to include a provision in the Bill which allows the Migration Act to be renumbered once it is reprinted.

Yours sincerely

ROBERT RAY

COMMONWEALTH OF AUSTRALIA

TELEPHONE 71 9111
TELEGRAMS COMATTGEN
TELEX 62002

OFFICE OF PARLIAMENTARY COUNSEL
ROBERT GARRAN OFFICES
KINGS AVENUE
CANBERRA, A.C.T. 2600

OUR REFERENCE:

YOUR REFERENCE:

17 April 1989

Secretary
Department of Immigration, Local
Government and Ethnic Affairs
CANBERRA ACT 2600

Attention: Mr M. Lawless

Migration Legislation Amendment Bill 1989

On Friday you drew to my attention the concern of the Senate Scrutiny of Bills Committee that "the numbering of the Bill was somewhat confusing and difficult to follow", and the Committee's suggestion that the Bill could possibly be numbered "to make its provisions more accessible to the public".

2. I do not see that there is any particular problem with the numbering of the clauses of the Bill itself.

3. I presume that the Committee is concerned with the numbering of the many new sections proposed to be inserted in the Migration Act in new Divisions 1, 1A, 1B and 1C of Part II, and proposed new Parts III and IIIA. The numbering of these provisions could only be simplified if the Migration Act as a whole could be renumbered.

4. This could be achieved by moving a series of amendments to the Bill in the Senate. The amendments would be extensive and technical and they would be very time-consuming to put together. Furthermore, because this approach involves amending the Bill during the Parliamentary process, the Bill would in the normal course of events not be reprinted to show the new, simpler numbering until the Senate had finished considering its provisions in detail.

5. Another method of proceeding would be to withdraw the Bill and introduce a new version, which could include the renumbering of the proposed new provisions of the Migration Act, provisions enabling the renumbering of the rest of the Migration Act and provisions dealing with the necessary amendments of cross-references. This would make the Senate's consideration of the proposed new provisions easier, but there would still be some difficulties arising from the fact that the Bill would need to rely on the anticipated new numbering of the remaining provisions of the Migration Act while copies of that Act as currently in force would of course still have the old numbering.

6. If the real concern is with the accessibility of the Migration Act, as amended, to the public, there is a third possibility. As you know, we are currently preparing a Migration Legislation Amendment (Consequential Amendments) Bill, to be introduced into the House of Representatives when the Migration Legislation Amendment Bill reaches that House. The necessary amendments of the Migration Act could be included in that Bill, subject to the timing constraints mentioned in paragraph 7.

7. Each of these approaches would require a considerable amount of work on our part. I do not see any prospect of this work being started before 11 May, by which time we should have finished our work on Bills regarded as essential for passage this Sittings. Even then, it may be that the Parliamentary Business Committee would prefer us to give priority to the completion of substantive Bills for introduction this Sittings.

8. It should also be remembered that, while the introduction of a new version of the Bill with renumbering alterations might marginally simplify both Parliamentary and public debate on the proposed amendments of the Migration Act, the real benefit of renumbering the whole Act would not be felt until the Migration Act is next reprinted.

Hilary Penfold

(Hilary Penfold)
Second Parliamentary Counsel

P.S. As discussed, if the very simple renumbering method used for the Social Security Act were adopted (see section 50 of Act No. 77 of 1947), no benefit at all would be realised until the Migration Act is reprinted.

HP.

HUMAN RIGHTS CENTRE
THE UNIVERSITY OF
NEW SOUTH WALES

28 April 1989

The Secretary
The Senate Scrutiny Committee on
Proposed Legislation
Fax No. (062) 773899

Dear Secretary,

We understand you are undertaking a consideration of the Migration Legislation Amendment Bill 1989. This Bill, in various ways makes provisions which infringe severely on personal liberties and human rights, and, in some instances, impacts very unfairly on specific individuals. For instance: the very stringent bail provisions of amended s 27(4) (increasing the amount of bail required from two sureties from the sum of $2,500 each to $10,000 each) will discriminate against the poor and those with no connections in Australia; there is a lack of adequate review (cl.64), and, in some cases, lack of opportunity for any review at all (cl.64B); cl.11 A disadvantages those innocently presenting false documentation to immigration authorities and not discovering the mistake until after the expiry of the 28 day period of grace, against those who deliberately practise deception yet have that 28 days in which to try to regularise their status, and cl.37A and amended s.38 contain extremely broad powers of search and arrest.

Here we focus on only one issue: the effect that the provisions of the Bill must, in their present form, have on Australia's obligations under the 1951 UN Convention on the Status of Refugees (and its 1967 Protocol) to which international instruments Australia is a state party.

Article 33(1) of the 1951 Convention states:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Australia has undertaken this obligation. In fact the obligation is so central to the protection of refugees afforded by the Convention that it admits of no reservation.

On arrival in a new country refugees not infrequently possess documentation (often acquired in order to leave their country of origin in circumstances of haste, and, in some instances, necessarily, by deception) which contains particulars which are false in some regard. The combination of clauses 6(1) and (2), 11A and 17A of the Migration Legislation Bill 1989 have the effect that, where such documentation is presented to Australian immigration authorities and entry is afforded on the basis that it is correct, the Secretary will have no discretion and must order deportation after the expiration of the 28 day period of grace, unless, within that time, steps have been taken towards regularization of status. This will be the position whether or not the refugee is aware that the documentation is false (cl.11A(8),(9)).

FACULTY OF LAW • PO BOX 1 • KENSINGTON • NEW SOUTH WALES • AUSTRALIA • 2033
TELEX AA26054 • TELEGRAPH: UNITECH, SYDNEY • TELEPHONE (02) 697 2227 • DX 1320 • FACSIMILE: (02) 663 0758

Clause 17A reads

> "(1) An illegal entrant is liable to deportation if the period of grace for the illegal entrant has ended.
>
> (2) Where the Secretary is satisfied that a person is, under subsection (1), liable to deportation, the Secretary shall, in writing, order the deportation of the person.
>
> (3) A deportation order made under this section may not be revoked."

In all likelihood the only country to which deportation will be possible will be the country from which the refugee has fled i.e. the country from which he or she fears persecution.

Such a deportation will necessarily bring Australia into breach of the non-refoulement requirement of Article 33 of the 1951 Convention Relating to the Status of Refugees, and, in any case would be unconscionable.

Under clause 17A the deportation order may not be revoked. Further, appeal to the immigration review tribunal is forbidden in relation to refugee status claims (clause 64(B)(1)) and the tribunal has no right to vary or set aside any decision and issue an entry permit on humanitarian grounds (clause 64(3)). There is no other right of appeal granted under the legislation.

We wish to draw your attention to the serious implications of these proposed amendments.

Yours sincerely

Patricia Hyndman
on behalf of

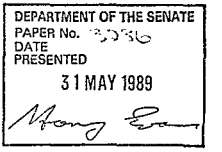
Professor James Crawford
Challis Professor of International Law
University of Sydney

Patricia Hyndman

Associate Professor Patricia Hyndman
Secretary,
LAWASIA Human Rights Committee
Director, UNSW Human Rights Centre

AUSTRALIAN SENATE
CANBERRA, A.C.T.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS



EIGHTH REPORT OF 1989

31 MAY 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF 1989

31 MAY 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF 1989

The Committee has the honour to present its Eighth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1 (a) to (v) of Standing Order 36AAA.

Arts, Territories and Environment Legislation Amendment Bill 1989
Australian Federal Police Legislation Amendment Bill 1989
Customs and Excise Legislation Amendment Bill (No.3) 1989
Customs Tariff Amendment Bill (No.2) 1989
Defence Legislation Amendment Bill 1989
Insurance Legislation Amendment Bill 1989
Snowy Mountains Engineering Corporation (Conversion into Public Company) Bill 1989
Taxation Laws Amendment (Superannuation) Bill 1989
Wheat Marketing Bill 1989
Wheat Industry Fund Levy Collection Act 1989

Model Amendment Legislation

This Report also incorporates a Model Amendment Legislation from the Law Reform Commission of Victoria.

The comments of the Committee on the Model Amendment Legislation can be found on page 122 of the Report.

MODEL AMENDMENT LEGISLATION

A letter has been received by the Committee from Professor David St.L. Kelly, Chairman of the Law Reform Commission of Victoria, with suggestions for showing an amending Bill together with an existing Act in one document.

Any step towards making legislation more accessible to the public is directly relevant to the role of the Committee in accordance with its terms of reference.

The Committee feels that there is considerable merit in the proposal particularly for an Act which over a long period of time has been subject to numerous amendments without a reprint, and the Committee thanks the Law Reform Commission of Victoria for its positive contribution to the difficult task of improving the presentation of legislation.

A copy of the letter from the Law Reform Commission is attached to this Report, and the Committee commends the approach contained in the Model Legislation to all authorities responsible for drafting legislation.

ARTS, TERRITORIES AND ENVIRONMENT LEGISLATION AMENDMENT BILL 1989

This Bill was introduced into the Senate on 12 April 1989 by the Minister for Arts, Sport, the Environment, Tourism and Territories.

This portfolio legislation proposes to amend 14 Acts and one Ordinance falling under the responsibility of the Arts, Sport, the Environment, Tourism and Territories.

The Committee drew to the attention of the Senate the following provisions of the Bill.

Clause 17 - Proposed new subsection 15AC(9) of the Cocos (Keeling) Islands Act 1955.

The Committee was concerned as to the means of payment of witness expenses when a trial was held on the mainland, and sought clarification of the matter from the Minister.

The Minister has informed the Committee:

> Part 6 of the Bill amends the Cocos (Keeling) Islands Act 1955 to restore criminal trial by jury under Cocos law. The amendments (including proposed subsection 15AC(9)) are virtually identical to those which restored jury trial on Christmas Island in 1987 (Part 2 of the Crimes Legislation Amendment Act 1987; the relevant provision is subsection 11AA(9) of the Christmas Island Act 1958). As on Christmas, because of the possibility that a jury will not be obtainable from the small Territory community, the Cocos amendments enable a Cocos court to move the venue of a trial from Cocos to a mainland jurisdiction or another external territory (termed a State in the Bill), where mainland jurors can be summoned.
>
> The Rules of the ACT Supreme Court, as in force on 22 November 1955, apply to witnesses' attendance at the Supreme Court of Cocos. (This is similar to the position on Christmas Island under the Christmas Island Act 1958,

although in that case the relevant date is 30 September 1958.) However, these rules do not regulate witnesses' fees in criminal cases.

Ordinarily, a witness' expenses are a matter between the witness and the party calling that witness. Proposed subsection 15AC(9) will make the Director of Public Prosecutions responsible for the expenses of both prosecution and defence witnesses. (The Commonwealth is assuming this responsibility because of the special reasons for which a trial under Territory law may have to be held at a venue remote from these Territories.

The Director of Public Prosecutions pay prosecution witnesses all reasonable expenses for travel from home (whether in the ACT, interstate or overseas) to court, accommodation (where applicable), and compensation for income lost through attendance. In the case of Christmas Island trials held in a 'State', these payments apply to both prosecution and defence witnesses. The same will apply to Cocos trials.

The Committee thanks the Minister for his response.

Proposed new section 37A - Environment Protection (Sea Dumping) Act 1981

The Committee was concerned that in removing the one year limit on prosecutions under this section the provision may act retrospectively.

The Minister has responded:

The amendments are intended to deal with the possibility that owners or masters of offending vessels may remain outside of Australian jurisdiction until expiry of the time limit for prosecutions before resuming activities in Australian waters, and then do so with immunity. The amendment is consistent will all major pollution of the sea legislation. For example, there is no time limit upon prosecutions under either section 17 of the Protection of the Sea (Discharge of Oil from Ships) Act 1983 or section 29 of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983.

I recognise the Committee's concern that the proposed subsection might be applied retrospectively. However, it

will not be so applied. My understanding is that, in law, proposed section 37A could not be applied, retrospectively. It is certainly my intention that there will be no retrospective prosecutions.

Section 21 of the Crimes Act 1914 applies general time limits to the institution of prosecutions for offences against Federal laws. Section 37A of the Environment Protection (Sea Dumping) Act 1981 will impliedly repeal section 21 in respect of offences against the Sea Dumping Act. However, section 8 of the Acts Interpretation Act 1901 combined with the general presumption against the retrospective operation of penal statutes will ensure that section 37A will not apply to offences the prosecution of which has been barred by section 21 of the Crimes Act when section 37A comes into force.

Section 37A will operate only to prevent offences whose prosecution is not barred on the date on which the proposed subsection comes into force from being time-barred. My Department does not know of any sea dumping incidents for which prosecutions may lie under the Sea Dumping Act but for which prosecution has not yet been instituted.

The Committee thanks the Minister for his particularly clear response which fully meets the concerns of the Committee.

AUSTRALIAN FEDERAL POLICE LEGISLATION AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 4 May 1989 by the Attorney-General.

This Bill proposes to amend the Australian Federal Police Act 1979 and the Superannuation Act 1976. Broadly speaking, these amendments propose to:

- guard against potential corruption in the Australian Federal Police (AFP);
- increase the functions of the AFP; and
- improve the AFP's administration.

The Committee drew the following provisions of the Bill to the attention of the Senate in Alert Digest No.5 of 1989.

Division 2 of Part VA - Double Jeopardy

The provisions of this Division when read with proposed section 55 of the Principal Act appear to impose a double penalty on an officer convicted of a corruption offence.

The Committee sought the views of the Minister with respect to situations where it appears more appropriate to have a discretion in respect of the amount of superannuation 'penalty' imposed.

The Minister has responded:

> Proposed Division 2 of Part VA of the Australian Federal Police Act 1979 provides for the making of a superannuation order by an appropriate court where a member or former member is convicted of a "corruption offence" and is sentenced in respect of that offence to imprisonment for life or for a term longer than 12 months. The effect of the superannuation order is that the member is entitled to be paid only his or her

accumulated contributions (plus interest) in a superannuation scheme to which the Commonwealth has made contribution as employer. What the member loses is all future employer financed benefits.

These provisions do not impose a double penalty on members of the Australian Federal Police (AFP) convicted of a corruption offence. The object of proposed Division 2 of Part VA is not to punish or to exact retribution but to protect the public, to maintain proper standards of conduct by members of the AFP and to protect the reputation of that organisation. Although a superannuation order is to be made by the court before which the member was convicted of the "corruption offence", the order is not a penalty for an offence against the criminal law.

A useful comparison may be made by reference to the AFP (Discipline) Regulations. Where a member of the AFP is charged and convicted in relation, for example, to unlawful assaults which are also the subject of disciplinary offences, the member does not face double jeopardy, nor punishment twice for the same offence: Hardcastle v Commissioner of Police (1984) 53 ALR 593, at p597 per Bowen CJ, Gallop and Lockhart JJ. In that case, the Federal Court described criminal and disciplinary proceedings arising out of the same transaction as 'essentially different in character and result', and expressly rejected a submission that they constituted double jeopardy. In the present context, the proposed superannuation order is a penalty for misconduct as a member, not a penalty for a criminal offence.

The Committee has also raised the question whether it is appropriate to have a discretion in respect of the amount of superannuation benefits lost by a member under proposed Division 2 of Part VA. I am strongly of the view that it is not necessary to have a discretion because Division 2 only applies to major corruption by members or former members of the AFP. The Government firmly believes the Commonwealth should not provide any superannuation benefits to a member or former member who undermines public confidence in the AFP by being involved in a corruption offence which results in conviction and sentence to a term of imprisonment longer than 12 months.

The purpose of section 55 of the AFP Act is to ensure that, in sentencing a member of the AFP for a criminal offence, a court does not determine the appropriate level of penalty by taking account of the fact that a sentence of longer than 12 months imprisonment may result in loss of Commonwealth funded superannuation

rights and benefits if a superannuation order is made. Again, the rationale behind this provision is that the superannuation order is a penalty for misconduct as a member, not a penalty for the criminal offence.

The Committee thanks the Minister for this response.

Proposed section 49. - Imposition of penalty for discipline offence.

It is the opinion of the Committee that the proposed section may impose a penalty, in respect of employer superannuation contributions that appears unrelated to the seriousness of the discipline offence committed.

The Minister has responded:

> *Proposed subsection 49(1) provides that section 49* applies where a member is found guilty of a relevant disciplinary offence and as a consequence is dismissed from the AFP as a penalty for that offence. Proposed section 41 defines "relevant disciplinary offence" as one under the AFP (Discipline) Regulations that is declared by those Regulations to be a relevant disciplinary offence.
>
> Drafting of the necessary amendments to the AFP (Discipline) Regulations to create relevant disciplinary offences has not yet commenced. I assure you, however, that all proposed disciplinary offences will be subject to normal Parliamentary scrutiny for regulations, and the offences will be disciplinary offences which are linked to corrupt behaviour on the part of members of the AFP. This, together with the fact that the disciplinary offence must be serious enough to warrant dismissal, will ensure that section 49 will only operate *in situations where a member has engaged in serious* misconduct. If the misconduct is not serious enough to warrant dismissal there is a range of lesser penalties available under the Regulations.
>
> It is necessary to prescribe relevant disciplinary offences to avoid penalising a member who is dismissed for misconduct which, for example, relates to his or her personal life, and does not involve corruption.

As I hope the Standing Committee will accept , proposed Division 3 of Part VA has been drafted, as has proposed Division 2 of Part VA, to ensure that there is an appropriate relationship between loss of employer superannuation benefits and the seriousness of the relevant disciplinary offence.

The Committee thanks the Minister for this response, which meets the concerns of the Committee.

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL (No. 3) 1989

This Bill was introduced into the House of Representatives on 3 May 1989 by the Minister for Land Transport and Shipping Support.

This Bill is an omnibus Bill, proposing amendments to the Customs Act 1901, the Excise Act 1901 and the Customs Administration Act 1985. Principally the amendments relate to the Diesel Fuel Rebate Scheme, implementing changes to improve the scheme's administration and correct some anomalies in the coverage of activities eligible for rebate.

The Committee drew the following provisions of the Bill to the attention of the Senate, in Alert Digest No.5 of 1989 (10 May).

Proposed subsections 164AA(1A) of the Customs Act 1901 and 78 AB(1A) of the Excise Act 1901

The Committee stated:

"The effect of the proposed subsections is to create strict liability offences in which knowledge or intention are irrelevant and the offender faces an "on the spot fine" of up to $5000. The Explanatory Memorandum claims the provisions mirror existing offence provisions, and the Committee seeks clarification from the Minister that the provisions are in the same form as existing subsection 164AA(1) of the Customs Act which is in terms of a person acting knowingly or recklessly."

The Minister has responded:

> I would not agree with the Committee that the provisions create "strict liability offence(s) in which knowledge or intention are irrelevant."

These provisions merely permit the Customs Service to give an option to persons who make false or misleading statements on diesel fuel rebate applications to pay a penalty as ascertained by those sections in substitution of having proceedings brought against them for an offence against the Act, eg. under paragraphs 234(1)(d) of the Customs Act or 120(1)(vi) of the Excise Act, which relate to the offence of knowingly or recklessly making a false or misleading statement to an officer of Customs. It follows that should a person choose not to pay the sum demanded by the ACS pursuant to either subsection 164AA(1A) of the Customs Act or subsection 78AB(1A) of the Excise Act, the ACS may then prosecute the person, and must prove all elements of the offence (including intent or reckless indifference) in court.

The current wording of the above offence provisions was recently inserted into ACS legislation by sections 23 and 41 respectively of the Customs and Excise Legislation Amendment Act (No.2) 1989 - Act 24, 1989. (Section 41 commenced on 5 May 1989, the date of Royal Assent of Act No.24 of 1989; Section 23 is to commence on 1 July 1989. With the 28 day prospective commencement provided for both Clauses 6 and 16 of this Bill, the new Customs Act offence provision in paragraph 234(1)(d) will be in operation when the proposed Clause 6 is to commence).

These new provisions therefore are similar in nature to subsection 164AA(1) of the Customs Act and 78AB(1) of the Excise Act, which provide the same escape from prosecution should the ACS elect to lay charges against the person under paragraph 234(1)(vb) of the Excise Act, which penalise persons who obtain rebate which is not payable. It should also be noted that the words "knowingly and recklessly" are absent from these penalty provisions, hence the difference in wording between the two subsections of section 164AA of the Customs Act and 78AB of the Excise Act.

The Committee thanks the Minister for his clarification of the matters raised by the Committee.

CUSTOMS TARIFF AMENDMENT BILL (No. 2) 1989

This Bill was introduced into the House of Representatives on 4 May 1989 by the Minister for Land Transport and Shipping Support.

This Bill proposes to enact a range of changes to the Customs Tariff Act 1987, reflecting decisions on the chemicals and plastics industries, post 1988 TCF arrangements and the 1988 May Economic Statement.

In Alert Digest No.5 of 1989 the Committee made the following general comment:

"Many of the provisions of this Bill are retrospective in effect which is usual for such Bills. The Committee however notes that the amendments to Schedule 1 are retrospective to 1 January 1988, and is of the view that the matters could possibly have been incorporated in the two amendments to the Principal Act introduced during 1988."

The Minister has informed the Committee:

> The Committee, in drawing the attention of Senators to this Schedule, expressed the view that the amendments contained in the Schedule, which is operative on and from 1 January 1988, could possibly have been incorporated in one of the two Tariff Amendment Bills introduced during 1988.
>
> This Schedule contains three amendments, the first two of which correct minor drafting inaccuracies which have come to notice since the introduction of previous amending legislation. The third reduces the rate of duty on embroidery kits from 25% to 15% and rectifies an unintended effect of the translation of the Customs Tariff to the Harmonised System format on 1 January 1988. This amendment was approved on 17 January 1989 following a recommendation by the Textiles, Clothing and Footwear Development Authority.

The Committee thanks the Minister for his response.

DEFENCE LEGISLATION AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 3 May 1989 by the Minister for Defence.

Establishments operated within the Office of Defence Production (within the Department of Defence) are being transferred to a government owned company, Australian Defence Industries (ADI) Pty. Ltd. This Bill proposes to amend the Defence Act 1903 to exempt ADI for a transitional period of six years from certain State and Territory laws relating to land usage, dangerous goods or licensing of activities, or which impose taxes, charges or rates. The Bill also proposes to exempt employees of prescribed organisations (such as ADI) from State and Territory firearms licensing laws.

The Committee stated in Alert Digest No.5 of 1989 drawing the following provisions of the Bill to the attention of the Senate.

Paragraph 122A(2)(b) *and subsection* 122A(3) - Immunities granted by Regulation

The effect of the proposed provisions of the Defence Act is to allow the immunities to be granted or withheld from Australian Defence Industries Pty. Ltd. to be determined by regulation. In view of the nature and width of the determinations subject to regulation, it is the view of the Committee that they should be incorporated in the Bill. The Committee sought the Minister's views on this point.

The Minister has responded to the Committee stating that in putting ADI on a commercial footing outside the Public Service there are two areas of "difficulty" in the "initial transitional phase" in "subjecting the Company to the full range of State and Territory laws".

The first is potential liability to stamp duty etc. on the transfer of assets to the company, even though ultimate Commonwealth ownership is not affected. The second area involves the impact of some State and Territory regulatory laws, due to the fact that the operating standards of the production establishments, though at the highest level have been upon the establishments' status as Commonwealth activities and have not necessarily corresponded to local laws.....

Accordingly proposed subsection 122A(1) to be inserted in the Defence Act provides that a law of a State or Territory, to which the subsection applied does not apply in relation to ADL to property or transactions, or activities carried on by it or on its behalf."

The Minister informs the Committee

paragraph (a) specifies categories of laws to which the section applies and from which ADI is therefore exempt. No further action by way of regulation is required for this exemption to operate and achieve the requirement which I have mentioned.

The Minister states that the measures achieve the effect sought by the Committee:

I suggest, therefore, that the principle indicated in Alert Digest No.5 is in fact achieved by the legislation. The basic exemption is provided by proposed paragraph 122A(2)(a). All that proposed paragraph 122A(2)(b) and subsection 122A(3) do is to allow particular laws to be added to or deleted from the area of exemption. I consider that his degree of flexibility is essential if the transitional phase for ADI is to be satisfactorily achieved.

You will appreciate, of course, that the prescription of any laws for these purposes will be open to Parliamentary scrutiny through tabling of the regulations.

I would also mention two further controls on the exemption given to ADI. The first is that it is limited to properties, transactions and activities relating to defence production (proposed subsection 122A(4)). The second is the sunset provision in proposed subsection 122A(5).

In summary, then, I believe that the proposed exemptions for ADI are stated in the proposed amendments to the Act, consistently with the principle advanced in the Alert Digest. The provision for variation by regulation will allow marginal changes only to the basic

exemptions, to meet cases which have not been and cannot be reasonably identified at this stage without creating an exemption that is unnecessarily broad.

The full text of the Minister's response is attached to the report.

The Committee thanks the Minister for his response.

Although the matter has already been debated by the Senate it is brought to the attention of Senators as a matter of importance.

INSURANCE LEGISLATION AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 2 March 1989 by the Minister Assisting the Treasurer.

The Bill contains provisions for amendment of the Insurance Act 1973, the Insurance (Agents and Brokers) Act 1984 and the Life Insurance Act 1945 to overcome certain deficiencies in the existing legislation so as to maintain effective supervision by the Insurance and Superannuation Commission over the general insurance and life insurance industries and insurance intermediaries.

The Committee drew Senators' attention to the following clause of the Bill, in Alert Digest No.1 of 1989.

Clause 4 - 'Henry VIII' clause

The Committee notes that clause 4 will insert a definition of debenture into subsection 3(1) of the Insurance Act. The clause allows the definition to be narrowed but not expanded by the operation of the regulations.

The Committee regrets that it has not had a response from the Minister to assist both the Committee and the Senate in considering the Bill.

The clause is drawn to Senators' attention as it may breach principle 1(a)(iv) of the Committee's terms of reference and inappropriately delegate legislative power.

SNOWY MOUNTAINS ENGINEERING CORPORATION (CONVERSION INTO PUBLIC COMPANY) BILL 1989

This Bill was introduced into the House of Representatives on 5 April 1989 by the Minister for Science, Customs and Small Business.

This Bill proposes to amend the Snowy Mountains Engineering Corporation Act 1970 to establish the Snowy Mountains Engineering Corporation as a company, incorporated under the Companies Act 1981. The public company will be called the Snowy Mountains Engineering Corporation Limited.

The Committee noted in Alert Digest No.3 of 1989 (12 April 1989) that the Bill did not contain a provision for tabling the Annual Report.

The Minister has responded:

> The Committee expressed its concern that the Bill may substantially reduce the information available to Parliament on the activities of the Snowy Mountains Engineering Corporation Limited (SMEC). While SMEC will not be required by legislation to present its annual report to the Parliament, I, as the responsible Minister, undertake to table the report in Parliament once it is publicly released.
>
> Initially the Commonwealth will be the sole shareholder, however, a limited employee equity participation scheme is being considered for introduction at a later date. The Companies Act requires that no class of shareholder can expect to receive information on the activities of a company over and above that available to other classes of shareholders in the company. Establishment of a such a privileged position by legislation would be a breach of the principle of oppression of minority shareholders and perhaps the provision prohibiting insider trading.

In respect of the comments made by the Minister, the Committee requested that Parliament have the Annual Report tabled to ensure that Parliament continues to receive information

previously available to it pursuant to Section 49 of the Snowy Mountains Engineering Corporation Act 1970.

By tabling the Annual Report after it has already been released, and is thereby a public document, the Parliament cannot be in "breach of the principle of oppression of minority shareholders and perhaps the provision prohibiting insider trading". The tabling of the Annual Report of SMEC does not place Parliament in a "privileged position", with respect to other classes of shareholders.

The Committee thanks the Minister for his response and undertaking to table the report.

TAXATION LAWS AMENDMENT (SUPERANNUATION) BILL 1989

This Bill was introduced into the House of Representatives on 4 May 1989 by the Minister Assisting the Treasurer.

This Bill proposes to reduce for recipients of superannuation benefits and related amounts the tax they pay on eligible termination payments, superannuation, pensions or annuities. This Bill complements the Income Tax Rates Amendment Bill (No.2) 1989.

General Comment

Much of the substance of this Bill would have retrospective effect to 1 July 1988, and in the General Outline to the Explanatory Memorandum (pp 1-4) it states that the changes were announced in the May 1988 Economic Statement or various later press releases, between 25 May 1988 and 11 August 1988.

The Committee has always been concerned at "legislation by press release": see in particular paragraphs 2:10 to 2:12 (p11.) of the Committee's Annual Report of 1986-87. Legislation by press release is the practice whereby the Minister announces by way of a press release or press conference, the intention of the Government to change the law with effect from that day and then, often many months later, introduces into the Parliament legislation giving effect to that change back dated to the day of announcement.

The Committee refers to the Senate the following provisions of the Bill.

1. Superannuation and other retirement benefits
2. Provisions applying to Life Assurance Companies
3. Registration of organisations
4. Gains and losses on disposals of assets.

5. Amendments to the Occupational Superannuation Standards Act 1987.

These provisions of the Bill all come within the terms of the Orders of the Senate relating to Taxation Bills which state:-

Taxation Bills - Limit on Retrospectivity - That, where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the Draft Bill. (Agreed to 8 November 1988, as paragraph (d) of an amendment to the motion for the second reading of the Taxation Laws Amendment Bill (No.3) 1988.) See page 5777 of Senate Notice Paper No. 149 of 4 May 1989.

The Committee has expressed its views on the practice of legislation by press release in paragraph 2:10 of the 1986-87 Annual Report (p. 11):-

"As the Committee has repeatedly stated, the practice of 'legislation by press release' carries with it the assumption that citizens should arrange their affairs in accordance with announcement made by the Executive rather than in accordance with the laws made by Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement. Moreover, quite apart

from the debilitating effect on the practice on the Parliament, it leaves the law in a state of uncertainty."

The Committee has been hampered in its consideration of Taxation matters by a general lack of response from the Treasurer, particularly in respect of comments made by the Committee on the practice of legislation by press release, and regrets that it has not had a response from the Minister in respect of the comments made on this Bill in Alert Digest No.5 of 1989 (10 May 1989).

The provisions are brought to the attention of the Senate in that they may breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

WHEAT MARKETING BILL 1989

This Bill was introduced into the House of Representatives on 13 April 1989 by the Minister for Primary Industries and Energy.

This Bill proposes to introduce new marketing arrangements for the wheat industry from 1 July 1989. These new arrangements will result in a deregulated domestic market.

The Committee draws attention to the following clauses of the Bill, in Alert Digest No.3 of 1989 (12 April 1989).

Clauses 6 and 59 and paragraph 10(2)(b) - Functions of Board - Wheat and Other Grains

The Committee was concerned that the clauses allow the wheat Board to trade in and export grain other than wheat but restricted it to giving the Minister advice on matters solely relating to the marketing of wheat.

The provisions of clause 59 allow the Board to determine quality standards for "wheat and other grain delivered to the Board for sale by the Board."

Paragraph 10(2)(b) limited the Board to consulting with the Grains Council "on any matter of a general policy nature relating to the marketing of wheat."

The Committee sought clarification as to:

1. what degree the various provisions of the Bill were intended to refer to grains other than wheat, and

2. if the Minister could provide for wheat to be specifically defined to in the Bill.

The Minister has responded:

> The Committee sought clarification as to the extent to which provisions in the Bill are intended to apply to grains other than wheat and sought the addition of a definition of "wheat".
>
> The Government's objective thought the legislation is to establish statutory marketing arrangements for wheat. The legislation therefore focusses on the powers and functions of the Wheat Board and requires the Board to operate for the benefit of wheat growers. For example, the AWB's objects, as amended, provide for it to participate commercially in the market for grain and grain products in order to provide Australian wheat growers with a choice of marketing options.
>
> The Government recognises, however, that to be effective in meeting its objectives, the Wheat Board should have the power to trade in other grains, where this is consistent with achieving the Board's primary objectives. The Board's activities in respect of grain are thus regarded as secondary to its wheat marketing functions. This reflected in the legislation thus
>
> - the performance by the Board of its functions in regard to grain and grain products is limited to those which will promote an object of the Board;
> - arrangements entered into by the Board in regard to the growing of grain other than wheat are subject to Ministerial approval.
> - the power to regulate to exempt the AWB and other grain trading corporations from the operation of restrictive provisions of State legislation, is restricted to State legislation dealing with the storage, handling and transport of grain and the marketing of wheat.
>
> As regards the inclusion of a definition of wheat, I suggest this is unnecessary and, indeed, any attempt to define it may only lead to confusion.
>
> Clause 10(2)(b) regarding consultation between the GCA and the AWB has been recast to reflect the Board's operations in regard to grains other than wheat.

The Committee thanks the Minister for this response.

Subclauses 7(5), 88(2) to 88(10) - Inappropriate delegation legislative power.

The Committee was concerned that the provisions contained to matters that might impact on the principles of the Committee into respects.

1. The Committee suggested that persons engaged in the Wheat Industry may be adversely affected if they did not receive prior notice of which State and Territory enactments were to be rendered ineffective by the operation of the regulations. Unfortunately the Minister did not address this point in his response.

Prior Notice

The Committee seeks that the Minister provide for adequate prior notice to given to any person or organisation, operating under conditions governed by a State or Territory enactment which may be rendered effective by Regulation. The timely provision of advance notice in the Gazette, appropriate regional media, magazines of relevant grain organisations are appropriate examples of the type of prior notice envisioned by the Committee.

2. The Committee was also concerned that State and Territory enactments could be rendered ineffective by regulations, and sought the Minister's response to this point.

The Minister has responded:

> The Committee expressed concern that provisions in the Bill regarding the making of regulations to enable exemption from the operation of State or Territory legislation is an inappropriate use of delegated powers. The Committee further considered that such provisions should be contained in the Bill rather than the Regulations to enable Parliamentary scrutiny.

> Given the potential breadth of relevant State and Territory legislation and the need for continuous updating to reflect any amendments, it would not be feasible for these provisions to be included in the Bill. In any event, any Regulation made would be required to be laid before both Houses with the potential for disallowance.

The Committee thanks the Minister for his response.

Clause 63 - Closure of Pools

The Committee was concerned that the Bill does not establish criteria for the closure of the operations of a pool, and that subclause (3) enables the Board to attribute to transferred wheat such sale price as the Board thinks appropriate.

The Minister has responded:

> The Committee's concern relates to the lack of criteria regarding closure of pools.
>
> Clause 63 establishes that the closure of a pool may take place where its continued operation would make no significant financial impact and that the AWB may determine an appropriate price for any unsold wheat. The procedure relating to pool closures is a commercial matter for the Board to determine and it is not appropriate that such matters be legislated for in detail.

The Committee thanks the Minister for his response.

Other Matters

Since the publication of the Alert Digest No.3 of 1989 matters relating to the Bill have been brought to the attention of the Committee relevant to the Committee's principles and which are now drawn to the attention of the Senate.

Clauses 49 and 54 - Operational Plans

These clauses relate to the Board supplying the Minister with a corporate plan effective for a period of up to 5 years "as the Board chooses" (clause 49).

The Committee requests that the Minister consider arranging for the plan to be tabled before Parliament.

The Committee requests that the Minister consider arranging for the annual operational plan to be tabled before Parliament prior to its commencement on 1 October each year (clause 54).

Clause 72 - Discounting letters of credit

Subclause 72(1) allows the Board to discount letters of credit in accordance with the written guidelines of the Minister (subclause 72(3)).

The Committee requests that the Minister consider arranging for such guidelines to be tabled before Parliament, if necessary in such a manner as to preserve any commercially confidential information.

Clause 74 - Futures Contract

Subclause 74(1) allows that the Board "in the application of its risk management policies, may enter into and deal with contracts to which section applies for hedging purpose, in relation to matters set out in paragraphs (a) to (c).

Subclause 74(2) states:

"The Minister may, be written determination, set guidelines for the exercise by the Board of its powers under subsection (1), and shall give to the Board a copy of such Determination."
The Committee requests that the Minister consider arranging for the determinations to be tabled before Parliament.

WHEAT INDUSTRY FUND LEVY COLLECTION ACT 1989

This Act was introduced into the House of Representatives on 13 April 1989 by the Minister for Primary Industries and Energy, and received the Royal Assent on 30 May 1989.

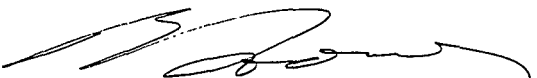
The Act proposes to provide the arrangements necessary for collecting the levy imposed by the Wheat Industry Fund Levy Bill 1989.

The Committee was concerned that clause 17 allowed the Secretary an unfettered discretion as to whom he appointed as an "authorised person".

The Minister has informed the Committee:

> The committee expressed concern that the Bill provides excessive discretion as to those persons who could be appointed as authorised persons.
>
> This concern has been met through an amendment passed in the House of Representatives to provide that appointments be made from amongst a designated class of persons ie public servants.

The Committee thanks the Minister for his response.

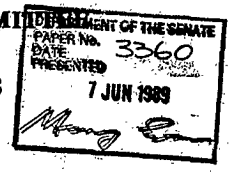


Barney Cooney
Chairman

30 May 1989

AUSTRALIAN SENATE
CANBERRA, A.C.T.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS



NINTH REPORT OF 1989

7 JUNE 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF 1989

7 JUNE 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator K. Patterson
Senator J. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF 1989

The Committee has the honour to present its Ninth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1 (a) to (v) of Standing Order 36AAA.

Community Services and Health Legislation Amendment Bill 1989

Industry, Technology and Commerce Legislation Amendment Bill 1989

Motor Vehicle Standards Bill 1989

Taxation Laws Amendment Bill (No.3) 1989

The letter from the Law Reform Commission of Victoria and the letter from the Minister for Defence were inadvertently omitted from Report No.8 and are attached to this Report. The Committee regrets any inconvenience caused by this omission.

COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 10 May 1989 by the Minister for Community Services and Health.

This Bill proposes to amend six Acts to enact a number of changes to improve a range of services provided through the Community Services and Health portfolio. The most significant changes include:

- the implementation of the first stage of the new general practitioner fees package,

- new private health insurance arrangements designed to maximise the security and protection of the insured aged, and

- strengthening the confidentiality provisions of the Australian Institute of Health Act 1987

The Committee drew the following clause of the Bill to the attention of the Senate, in Alert Digest No.6 of 1989 (24 May).

Clause 5 - Directions - Australian Institute of Health

The clause adds the State Ministers of Health to the chairperson of the Institute, as persons whom the Minister consults prior to the Minister "giving a direction to the Institute with respect to the performance of its functions or the exercise of its powers."

The Committee suggested that directions made by the Minister be required to be tabled before Parliament.

The Minister has responded:

> The amendments are being introduced in response to the concerns of the States and Territories and will impose more stringent controls on the release of information by the Institute of Health, preventing the disclosure of information contrary to the conditions under which it was supplied to the Institute. The amendments, which have the support of the States and Territories, are designed to ensure the co-operation of the States and Territories in supplying data from their statistical collection to the Institute thus ensuring, amongst other things, that important national initiatives, including the National Death Index and the National Cancer Clearing House, can proceed.
>
> I have noted the Committee's view that Ministerial directions under Clause 5 of the Bill should be required to be tabled. This aspect was considered when the amendments were being prepared. However, subsection 24(2) of the Australian Institute of Health Act 1987 requires particulars of each direction given by the Minister under subsection 7(1) of the Act that is applicable to the period to which the Report relates to be included in the Institute's Annual Report. The Institute's Annual Report is, of course, tabled in Parliament. On this basis, it was considered that the tabling of such directions separately from the Institute's Annual Report was unnecessary.

The Committee thanks the Minister for his response but considers it more appropriate that the Minister table the directions immediately they have been given.

INDUSTRY, TECHNOLOGY AND COMMERCE LEGISLATION AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 11 May 1989 by the Minister representing the Minister for Industry, Technology and Commerce.

This Bill proposes to amend the:

- Australian Industry Development Corporation Act 1970, to free the Corporation from bureaucratic procedures while maintaining strategic control;

- Australian Trade Commission Act 1985, to increase the number of Government members from one to two on the Board of the Commission:

- National Measurement Act 1960,to include a definition of 'measuring instrument'; and

- Designs Act 1906, Patents Act 1952 and Trade Marks Act 1955, to enable the Commissioner of Patents and Registrars of Designs and Trade Marks to delegate statutory powers and functions to appropriate levels within their respective offices.

The Committee drew the following provisions of the Bill to the attention of the Senate, in Alert Digest No.6 of 1989 (24 May 1989).

Part IIIA - Corporate Plans - Australian Industry Development Corporation Act 1970 (AIDC)

Proposed sections 23F, 23G, and 23H which relate to -

23F Corporate plans to be given to Minister.

23G Minister may direct certain variations of corporate plan.

23H Board to notify Minister of significant affecting events,

should in the Committee's view be required to be tabled before Parliament.

Proposed section 37 of the AIDC Act - subclause 17(1) of the Bill - Annual report

The clause amends section 37 of the AIDC Act by listing certain matters to be included in the Annual Report of the Corporation's operations for a financial year.

In Scrutiny of Bills Alert Digest No.16 of 1988 and Scrutiny of Bills Report No.2 of 1989 in respect of the Australian Industry Development Corporation Amendment Act 1988, the Committee requested that the Minister arrange to legislate for the tabling of the Annual Report.

The Committee repeats its request that the Minister arrange for the Annual Report of AIDC and subsidiaries be tabled before Parliament.

MOTOR VEHICLE STANDARDS BILL 1989

This Bill was introduced into the House of Representatives on 23 May 1989 by the Minister for Land Transport and Shipping Support.

This Bill proposes to give effect to a recommendation by the Inter-State Commission that there be a common Australia-wide system of vehicle standards. These standards will apply to all motor vehicles (including trailers) and initially will conform to the existing Australian Design Rules. Standards will be made by the Minister by Order, being a disallowable instrument for the purposes of the Acts Interpretation Act 1901.

The Committee drew the following provisions of the Bill to the attention of the Senate, in Alert Digest No.7 of 1989 (31 May 1989).

Paragraphs 14(2)(b), 15(2)(b) and 16(3)(b) - Ministerial approval

These provisions allow the Minister to approve the supply of non-standard vehicles, use of non-standard vehicles by manufacturers, and modification of standard vehicles in a way that makes them non-standard. Without Ministerial approval these actions would be criminal offences carrying substantial monetary penalties, and there is no parliamentary oversight of the grant of Ministerial approval.

The Committee requested that the Minister provide for an Annual Report of the circumstances in which such approvals have been granted, to be tabled before Parliament.

The Minister has responded:

> With regard to the exercise of Ministerial approval under Clauses 14(2)(b), 15(2)(b) and 16(3)(b) I believe that the Committee's proposal that a report on the circumstances in which approvals under those clauses have been granted is an appropriate course of action. As the Administrator is to undertake his Statutory function as part of his duties in the Department of Transport and Communications, it was envisaged that key information about operations would be included in the Departments annual report. This would include the information you mention. I would envisage a separate section within that Report detailing the Administrator's specific operations under the new Act, but inclusion in the Department's report would allow that information to be presented in a broader context of other developments in land transport and road safety. I note however that I would not expect to exercise the approval powers in these clauses on a regular basis.

The Committee thanks the Minister for this response.

Subclause 24(1) - Setting of Fees by Regulation

The Committee notes that this subclause allows the amount of fees to be changed to be determined by Regulation with no upper limit specified in the Bill. Subclause 24(4) provides that the level of fees will be no more than will cover the necessary costs, and whilst this provides an indirect upper limit to the level of fees the Committee requests that the Bill be amended to provide an upper limit to the level of fees.

The Minister has informed the Committee:

> You also suggested the inclusion of a ceiling for fees. Clause 24(4) provides that the fees to be set by the regulations shall not amount to taxation. Some guidance as to the force of the limitations which this imposes can be obtained from the High Court's decision in the Air Caledonie Case in late 1988. The inclusion of that limitation reflects my firm intention that the rate of charges reflects my firm intention that the rate of charges reflect the costs of providing the service in

certifying vehicles.

The Motor Vehicle Standards Bill 1989 will give a basis in Federal law for the levying of such charges. To date, the system has relied essentially on the cooperation of both industry and State and Territory Governments.

There are a range of charges involved in the system and I have attached a copy of the current schedule of charges for the information of the Committee. There will be a need for an annual review of the level of charges to assess the impact of both the costs incurred in administering the system and the expected level of motor vehicle sales in the following period. The objectives of the review are to ensure that costs are properly recovered and that industry can plan on a reasonable degree of stability in the level of fees and charges.

In these circumstances it would be difficult to prescribe a meaningful upper limit to the level of fees in the legislation itself.

It is proposed that the basis for establishing the fees and charges will be described in the regulations. This will emphasise the fact that the fees are to be based on the recovering of costs of the services provided and should properly address the concerns of the Committee on this aspect of the Bill. Furthermore, as noted earlier, the legislation itself requires that the charges shall not amount to taxation.

Given the fact that the regulations are instruments which will be tabled in the Senate for approval I believe that the arrangements proposed in the legislation are appropriate. The High Court ruling referred to above has clarified the limitations on the fees and charges that can be levied for services provided. I noted in my Second Reading Speech that it was unlikely that charges would need to be increased at the present time. I also note that it is proposed that the motor vehicle industry will have opportunity to make an input to the process of preparing the relevant regulations.

The Committee thanks the Minister for this response.

TAXATION LAWS AMENDMENT BILL (NO. 3) 1989

This Bill was introduced into the House of Representatives on 10 May 1989 by the Minister Assisting the Treasurer.

This Bill proposes to amend and repeal three Acts and make consequential amendments to other Acts. The significant amendments relate to the:

- taxation of traditional securities,
- capital gains principal residence exemption,
- maintenance payments,
- taxation of unmarried mothers,
- beneficiary rebate,
- gifts, and
- access to taxation information.

The Committee drew the following clause of the Bill to the attention of the Senate, in Alert Digest No.6 of 1989 (24 May 1989).

General Comment.

The Committee notes the use of the term "unmarried mothers" with respect to the purpose of the amendments. It is the opinion of the Committee that the term unmarried mothers has sexist connotations, and requests that the Minister use the term 'sole parent' used in Social Security Legislation.

Clause 4 - Review of Discretion of Tax Commissioner

Clause 28 introduces proposed Section 3E which gives the Commissioner a wide ranging power to supply information to Law Enforcement Agencies. Clause 4 means that the Commissioner's

discretion to disclose information on tax matters to these agencies is not reviewable as to legality under the Administrative Decisions (Judicial Review Act) 1977.

Clause 26 of the Bill inserts proposed paragraph 3B(1AA)(b) of the Taxation Administration Act 1953 which would inform Parliament on the number of occasions on which such information had been sought and supplied. The Committee is of the view that the Parliamentary oversight provided in clause 26 imposes only an indirect measure of control over how the Commissioner uses the discretion.

The Committee is particularly concerned that such a major change in legislative procedure relating to the disclosure of information by the Commissioner has been incorporated in a Bill which deals primarily with technical matters.

In the view of the Committee there should be provision for greater Parliamentary scrutiny of the Commissioner's discretion to release information to Law Enforcement Agencies, and clause 26 should be redrafted to ensure that Parliament receives more information on the use of the Commissioner's discretion.

The Committee requests that the Minister consider making provision for review, in appropriate circumstances of the legality of the decision of the Commissioner to release information pursuant to subsection 3E of the Taxation Administration Act 1953.

The provisions of clauses 4, 26 and 28 are drawn to the attention of the Senate in that they may constitute a breach of principle of 1 (a) (iii) and make such rights liberties and/or obligations unduly dependent on non-reviewable decisions.

Barney Cooney

Chairman
8 June 1989

LAW REFORM
COMMISSION
VICTORIA

23 May 1989

Senator B. Cooney
The Senate
Parliament House
Canberra ACT 2600

Dear Senator,

I am writing to you to ask for your help in a Commission project that is aimed at improving the standard of the information given to Members of Parliament in relation to Bills.

The Commission has developed a new legislative 'model' -for amending Bills, in particular. I enclose a copy of that model. As you will see, it is very different from the present form of an amending Bill - and not only because of the cover!

At present, amending Bills are quite unintelligible unless reference is made to a substantial amount of other material. This 'other material' includes

- the relevant sections of the Act being amended
- the explanatory memorandum

The 'model' we are proposing attempts to bring together all of the relevant material into a single document. That should facilitate understanding and debate, make it easier for Members of Parliament to assess the effect and value of proposed legislation, and markedly reduce the time taken in debate and in Committee.

The model Bill contains an explanation of the nature and effect of each of the enacting clauses. In each case, the explanation precedes the enacting clause. The two are separated from one another by the use of bold type for the enacting clause. Further emphasis of the distinction might be obtained by 'boxing' the explanatory material.

The explanatory material is not intended to be part of the Bill for the purposes of debate. However, just like the present explanatory memorandum (which it supercedes), it could be taken into account in determining the purpose of the enacting clauses.

7TH FLOOR 160 QUEEN STREET
MELBOURNE 3000 AUSTRALIA
TELEPHONE (03) 602 4566
FACSIMILE (03) 670 4280

The relevant sections of the Act being amended are set out on the right-hand page, opposite the Bill's enacting clauses. This enables Members of Parliament to see at a glance how the clause affects the original provision. Bold type is used to highlight particular words that are to be deleted.

X The model could probably be improved in a number of ways. One of the most obvious improvements would involve abandoning the practice of simply adding or deleting particular words in a section or subsection. Instead, the whole section or subsection would be repealed and a new one (incorporating the deletion or addition) would be inserted in its place.

X On that basis, the model Bill would be altered substantially. The left-hand page would contain the section or subsection as it would look if the Bill were passed. It could be directly compared with the existing section or subsection on the right hand page. The omitted or added words could be highlighted to help Members of Parliament to find the difference quickly.

I should be very grateful if you could let me know what you think of the enclosed model Bill and the possible improvements I have mentioned. To help you give your views on the subject, I am attaching a questionnaire which you might care to fill out and return to me.

Your help will be most important to us in developing a better system for providing information not only to Members of Parliament, but also to those who administer or must comply with the laws that are passed.

Our overall aim is to make a contribution to improving the efficiency of the legislative process and to reducing administrative and compliance costs. I know you share that aim with us.

Yours sincerely,

David St.L. Kelly
Chairman

LAW REFORM COMMISSION OF VICTORIA

MODEL AMENDING BILL

QUESTIONNAIRE

PLEASE TICK THE APPROPRIATE BOX

DO YOUR PREFER

The present form of an amending Bill	
The 'model' amending Bill	

WOULD YOUR PREFER THE EXPLANATORY MATERIAL TO BE SET OUT

As in the 'model'	
As in the 'model', but also boxed	

WOULD YOU PREFER THE ENACTING PROVISIONS

to continue to be in the form of inserting or deleting particular words	
to be in the new form suggested in my letter (See X)	

WOULD YOU LIKE ADDITIONAL INFORMATION TO BE INCLUDED SUCH AS:

The relevant provisions in other legislation that is referred to in amending Bill	
A separate list naming any other legislation affected by the amending Bill	

Other comments or suggestions:

COMMONWEALTH OF AUSTRALIA

MINISTER FOR DEFENCE
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

22 MAY 1989

Senator B. Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I am writing in relation to the Committee's comments in Scrutiny of Bills Alert Digest No. 5 of 1989 about the Defence Legislation Amendment Bill 1989.

The Bill proposes amendments to the Defence Act 1903, which would exempt the new government-owned company Australian Defence Industries Pty Ltd (ADI) from certain State and Territory laws for a transitional period of 6 years.

The Alert Digest comments on proposed paragraph 122A(2)(b) and subsection 122A(3) as follows:

> "The effect of the proposed provisions of the Defence Act is to allow the immunities to be granted or withheld from Australian Defence Industries Pty Ltd to be determined by regulation. In view of the nature and width of the determinations subject to regulation, it is the view of the Committee that they should be incorporated in the Bill."

It seems to me that these comments rather misstate the effect of the proposed provisions. I agree that the Act itself should set out the exemptions being conferred on ADI and I consider that this is what the proposed amendments achieve, subject only to provision for some modification by regulation for reasons explained below.

As I indicated in my Second Reading speech, the purpose of establishing ADI is to improve the performance of the Defence production establishments by putting them on a commercial footing outside the Public Service. The intention is that ADI, though government owned, will reach the situation where it operates on a competitive basis in the open market with only commercial restrictions and controls on it. This objective involves ADI becoming subject to the same governmental controls as ordinary companies.

However, in the initial transitional phase of ADI's activities there are two areas of difficulty in subjecting the company to the full range of State and Terrtitory laws. The first is potential liability to stamp duty etc on the transfer of assets to the company, even though ultimate Commonwealth ownership is not affected. The second area involves the impact of some State and Territory regulatory laws, due to the fact that the operating standards of the production establishments, though at the highest level, have been based upon the establishments' status as Commonwealth activities and have not necessarily corresponded to local laws.

With this background, the proposed legislation will provide a transition period during which ADI can adjust to the requirements of State and Territory regulatory laws, as well as providing exemption from stamp duty.

Accordingly, proposed subsection 122A(1) to be inserted in the Defence Act provides that a law of a State or Territory to which the section applies does not apply in relation to ADI, its property or transactions, or activities carried on by it or on its behalf.

Proposed subsection 122A(2) specifies the laws to which the section applies. Paragraph (a) provides that it applies to a law:

> "to the extent that the law relates to:
>
> (i) the use of land or premises;
>
> (ii) the environmental consequences of the use of land or premises;
>
> (iii) dangerous goods;
>
> (iv) licensing in relation to:
>
> (A) employment;
>
> (B) the carrying on of a particular kind of business or undertaking; or
>
> (C) the conduct of a particular kind of operation; or
>
> (v) the liability to pay, or the payment of, taxes, rates or charges (including stamp duty)."

In addition, paragraph (b) provides that the section also applies to a law "if regulations made for the purposes of this paragraph declare that this section applies to the law".

I emphasise that paragraph (a) specifies categories of laws to which the section applies and from which ADI is therefore exempt. No further action by way of regulation is required for this exemption to operate and achieve the requirement which I have mentioned. (I might also say that the exemptions have been deliberately framed as specific categories rather than in general terms, to emphasise the limited and transitional nature of these arrangements.)

However, although these specified categories are considered to meet the requirement, it is possible that a situation could arise where unacceptable constraints are imposed on ADI by a State or Territory law which does not fall within the specified categories. In this event, paragraph 122A(2)(b) would enable that law to be prescribed.

You will appreciate that, if such a situation arose, the constraint might be such as to preclude the continuing operation of an establishment. In this event, it would not be practicable to limit or suspend operations until the Act could be amended. It would be essential to have the ability to preserve ADI's position quickly, and the regulation procedure enables this.

Conversely, it is possible that the prescribed categories in paragraph 122A(2)(a) will exempt ADI from a law when this is not necessary or, indeed, is undesirable. Proposed subsection 122A(3) therefore enables laws to be prescribed by regulation so that they are excluded from the exemption and therefore apply to ADI.

I suggest, therefore, that the principle indicated in Alert Digest No. 5 is in fact achieved by the legislation. The basic exemption is provided by proposed paragraph 122A(2)(a). All that proposed paragraph 122A(2)(b) and subsection 122A(3) do is to allow particular laws to be added to or deleted from the area of exemption. I consider that this degree of flexibility is essential if the transitional phase for ADI is to be satisfactorily achieved.

You will appreciate, of course, that the prescription of any laws for these purposes will be open to Parliamentary scrutiny through tabling of the regulations.

I would also mention two further controls on the exemption given to ADI. The first is that it is limited to properties, transactions and activities relating to defence production (proposed subsection 122A(4)). The second is the sunset provision in proposed subsection 122A(5).

In summary, then, I believe that the proposed exemptions for ADI are stated in the proposed amendments to the Act, consistently with the principle advanced in the Alert Digest. The provision for variation by regulation will allow marginal changes only to the basic exemptions, to meet cases which have not been and cannot be reasonably identified at this stage without creating an exemption that is unnecessarily broad.

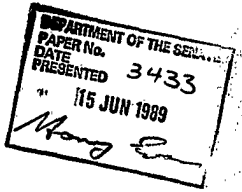
I trust that what I have said meets the Committee's concerns as set out in Alert Digest No. 5.

Yours sincerely

KIM C. BEAZLEY

AUSTRALIAN SENATE
CANBERRA, A.C.T.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS



TENTH REPORT OF 1989

14 JUNE 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF 1989

14 JUNE 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator K. Patterson
Senator J. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF 1989

The Committee has the honour to present its Tenth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1 (a) to (v) of Standing Order 36AAA.

Aboriginal and Torres Strait Islander Commission Bill 1989
Aboriginal Development Commission Amendment Bill 1989
Australian Airlines (Conversion to Public Company) Act 1988
Institute of Aboriginal and Torres Strait Islander Studies Bill 1989.
Crimes Legislation Amendment Bill 1989
Sex Discrimination Amendment Bill 1989

This Report includes a summary of Scrutiny of Bills Reports Nos. 1-9 of 1989 (pp 187-190).

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION BILL 1989

This Bill was introduced into the House of Representatives on 4 May 1989 by the Minister for Aboriginal Affairs.

This Bill proposes to establish the Aboriginal and Torres Strait Islander Commission. The Commission will be established as a body corporate with responsibilities across the whole spectrum of Aboriginal and Torres Strait Islander affairs. This Bill replaces the 1988 Bill with the same title and embodies recommendations made by the Senate Select Committee on the Administration of Aboriginal Affairs, the Auditor-General and the Department of Finance.

The Committee drew the following clauses of the Bill to the attention of the Senate, in Alert Digests Nos.5 & 6 of 1989.

Clause 8 and Paragraph 7(m) - Conferring of Power.

Clause 8 of the Bill allows the Prime Minister to confer a departmental function on the Commission by means of a notice placed in the Gazette pursuant to subclause 8(2). Paragraph 7(m) in referring to the functions of the Commission states:

> "such other functions as are conferred on the the Commission by the Prime Minister by notices in force under section 8."

The Committee requested that the notices be subject to tabling to enable them to be subject to the scrutiny of Parliament.

The Minister has responded to the Committee:

> Clause 8 of the Bill establishes a system by which administrative responsibilities may be transferred from Commonwealth Departments to the Aboriginal and Torres Strait Islander Commission. It is therefore equivalent, in effect, to administrative arrangements orders. Such

> arrangements are not, of course, subject to Parliamentary disallowance. As is the case with administrative arrangements orders, the rights or liabilities of persons cannot be affected by the exercise of this power.

The Committee thanks the Minister for his response, but regards it as appropriate that the "notices" be tabled. The Committee does not seek that the notices be subject to disallowance, but regards it as appropriate that they be tabled.

Subclauses 12(3) and (5) - Directions by Minister

Clause 12 relates to the Commission performing its functions and exercising its powers in accordance with general directions given by the Minister.

Subclause 12(3) states that the Minister is not empowered to give directions relating to the content of advice that may be given by the Commission to a Minister, Department of State or authority of a State or Territory

> "except for the purpose of protecting the confidentiality of information given to the Commission by the Commonwealth or an authority of the Commonwealth."

Subclause 12(5) states that a direction laid before Parliament by the Minister "shall not disclose any matters known to the Minister to be held sacred by Aboriginal persons or Torres Strait Islanders or by a particular community or group of Aboriginal persons or Torres Strait Islanders."

The Committee fully appreciates the concerns of the Minister in this area, but in order to keep Parliament as fully informed as is reasonable in all the circumstances, felt that the Minister should include a brief statement as to the general nature of any direction relating to sacred matters.

The Minister has informed the Committee:

> The Committee indicated that it was concerned that any direction concerning sacred matters should be outlined in general terms for the Parliament.
>
> This is an entirely legitimate concern, but is based on a misinterpretation of the clause in question. Sub clause 12(5) does not provide an exemption from disclosure where directions relate to sacred matters (a highly unlikely event), but rather provides that the mandatory publication of <u>all</u> directions (whether they relate to sacred matters or not) shall not disclose information of a sacred nature.
>
> Consequently, the Parliament will always be informed, at least in general terms, of any directions made by the Minister.

The Committee thanks the Minister for his response.

Subclauses 20(1) and (3) - Non-reviewable decisions

The subclauses allow the Commission to give written notice to a person or body who has received a grant under the Act, that the person or body has failed to fulfil a term or condition of the grant.

The decision of the Commission cannot be reviewed as to its merits but only as to legality. If a decision of this nature were to be made by the Minister the Committee considers that it should be subject to review by the Administrative Appeals Tribunal. The Committee is concerned that there is no appeal on the merits of a decision of the Commission.

The Committee sought a clarification from the Minister as to the possibility of providing merit review for decisions made by the Commission pursuant to clause 20.

The Minister has informed the Committee:

> The Bill has been amended by the House of Representatives to provide for the Administrative Appeals Tribunal to review Commission decisions on these matters; see paragraph 194(1)(c) of the Bill.

The Committee thanks the Minister for his response which meets the concerns of the Committee.

Clause 23 - Documents to show authority

This clause requires the Commission to ensure that documents it issues meet certain requirements. The terms of the clause do not indicate the consequences of the Commission failing to comply with those requirements.

The Committee requested that the Minister explain the consequences of the Commission not complying with the terms of the clause.

The Minister has responded:

> The Committee has requested an explanation of the consequences of the Commission not complying with the terms of the clause.
>
> One obvious consequence is that the Commission would be open to public criticism by both the Office of Evaluation and Audit and the Auditor-General.
>
> It may also be that a conscious decision by Commissioners to disregard the provision would constitute misbehaviour within the terms of clause 38.

The Committee thanks the Minister for his response and trusts that it will be of assistance to Senators when considering the provision.

Clause 24 - Guidelines

This clause allows the Commission to formulate written guidelines relating to the making of loans to natural persons, and the giving of guarantees in respect of loans given to natural persons.

Subclause (5) requires the Chief Executive officer to give notice of the making of the guidelines in the Gazette.

The opinion of the Committee is that such guidelines should be tabled before Parliament.

The Minister has informed the Committee:

> The Committee has sought an explanation as to why guidelines made pursuant to clause 24 are only required to be published in the Gazette, and not tabled in Parliament.
>
> The primary reason is that these are the Commission's own guidelines, and not the Minister's. The Commission would not be able to make guidelines which are inconsistent with the Act.

The Committee thanks the Minister for his response.

Subclause 38(1) - Termination of appointment of a Commissioner

The effect of this subclause is that a Commissioner possibly subject to suspension does not have the opportunity to put their position to the Minister.

The Committee notes that a Commissioner subject to the provision is able to:

> (a) challenge the legality of the Minister's decision to suspend if the Commissioner has not had the opportunity

to be heard; and

(b) the Commissioner can petition Parliament to seek that the suspension be terminated pursuant to subclause 38(3).

It is the opinion of the Committee that a Commissioner should have the right to put a case to the Commissioner prior to being suspended, possibly by the insertion of a provision that the Minister require a Commissioner to "show cause" why they should not be suspended.

The Minister has responded:

> The Committee takes the view that the requirement for the Minister to consult with the Commissioner is not adequate, and that a Commissioner to be suspended ought to have an opportunity to show cause why he or she ought not be suspended from office and perhaps terminated as a Commissioner.
>
> The Government sees no problems with such a provision, and will make an appropriate amendment at the earliest opportunity.

The Committee thanks the Minister for his response which meets the concerns of the Committee.

Paragraph 99(a) - Entitlement to vote

This paragraph lists one of the entitlements to vote in Regional Council Elections - "that the person is an Aboriginal person or Torres Strait Islander."

There is no provision for determining when the entitlement is satisfied, and the Minister on page 6 of the Second Reading Speech suggests that a process for determining entitlement to vote has been arrived at and will presumably be included in the Electoral Rules to be made pursuant to clause 109.

The Committee sought a clarification of the mechanism by which a person denied eligibility to vote is able to have that decision reviewed.

The Minister has responded:

> The Committee has sought clarification of the mechanism proposed by which a person denied eligibility to vote is able to have that decision reviewed.
>
> The electoral rules to be made pursuant to clause 110 will provide for voters to certify that they are Aboriginal or Torres Strait Islander persons. They will also provide for liaison officers who will be engaged to assist in the conduct of the election. Where a person is unable to satisfy the liaison officer that they are in fact Aboriginal or Torres Strait Islander persons, their vote will be set aside.
>
> Voters challenged by the liaison officer will have eight days from the date of the election to satisfy the senior liaison officer for the region of their eligibility.
>
> Finally, voters who have been unable to satisfy the senior liaison officer will be able to appeal to the Court of Disputed Elections. See clause 137 and Schedule 4.

The Committee notes the clarification given by the Minister

Clause 115 - Disclosure of interest

This clause is in similar terms to clause 101 in the previous Bill and requires a member of a Regional Council to disclose a direct or indirect pecuniary interest in a matter before the Council, and that interest is to be recorded in the Minutes of the Meeting.

This provision is compared with:

(1) Clause 36 - where a member of the Commission is required to disclose any pecuniary interest which is duly recorded in the

Minutes. Subclause 36(2) provides that the Commissioner cannot be present, or take part in any decision relating to that matter.

(2) Subclause 159(1) and (2) are similar provisions relating to disclosure by a Director of the Aboriginal and Torres Strait Islander Commercial Development Board.

The Committee sought comment from the Minister on the reason for the difference between the disclosure of interest provisions for members of Regional Councils, compared to those imposed on a Commissioner or a Director of the Board.

The Minister has informed the Committee:

> The Committee has requested comment on the reasons why Regional Councillors, in contrast to Commissioners, are not required to not be present and not vote in circumstances where they have a direct or indirect pecuniary interest.
>
> The reason for the difference relates primarily to the role and functions of regional councils. Regional councils will frequently deal with matters that will necessarily directly or indirectly affect the pecuniary interests of all the regional councillors. In such circumstances, a provision requiring councillors not to take part in decisions and decision-making would prevent the regional council from fulfilling its functions.

The Committee thanks the Minister for his response which it regards as acceptable in view of the circumstances outlined by the Minister.

Subclause 128(2) - Ineligibility to stand for re-election

The subclause provides that a person whose appointment as a Commissioner representing a zone was terminated for misbehaviour pursuant to clause 38, is ineligible to stand in the next election for zone representation.

This provision could result in a person having their appointment as a counsellor terminated for "misbehaviour" for contravening a Ministerial direction (see subclause 38(7)); when the counsellor may have been acting in response to requests from constituents. The Committee is of the view that in such circumstances it appears inequitable that a person should not be be able to be re-elected as a representative of the zone.

The Minister has responded:

> The Committee is concerned that Commissioners who have been dismissed for misbehaviour arising out of the contravention of a Ministerial directive may have been "acting in response to requests from constituents", and that it would be inequitable to prevent them from standing for re-election under cl. 128.
>
> The effect of clause 129(2) [previously 128(2)] is to ensure that a Commissioner who is dismissed for misbehaviour is not immediately re-elected at the election to fill the casual vacancy.

The Committee thanks the Minister for his response and draws the matter to the attention of the Senate.

ABORIGINAL DEVELOPMENT COMMISSION AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 4 May 1989 by the Minister for Aboriginal Affairs.

This Bill proposes to amend the Principal Act to:

- enable the Commission to provide information/advice to the Minister, upon request, including information regarding the Commission's expenditure,

- modify business enterprise provisions so that the Commission will become or continue to be commercially successful,

- change a number of financial provisions,

- change staffing arrangements, and

- provide for the appointment of a General Manager by the Minister, with responsibility for day to day administration of the Commission.

The Committee drew the following clauses of the Bill to the attention of the Senate, in Alert Digest No.5 of 1989.

Proposed section 26A - Merit Review

This proposed section is in similar terms to clause 20 of the ATSIC Bill, in not providing for merit review of a notice by the Commission to a person or body, that a term or condition of a grant has not been fulfilled. As with clause 20 of the ATSIC Bill the Committee seeks the Minister's opinion on the possibility of providing for merit review of the decisions.

The Minister informs the Committee:

> The proposed section 26A would merely replace (in an extended form) the provision presently set out in section 24(4).
>
> The ADC Act presently has no review provisions equivalent to clause 194 of the ATSIC Bill.
>
> These present amendments do not represent a comprehensive attempt to revise and update the ADC Act, but are merely the minimum amendments necessary to ensure proper accountability pending the commencement of the proposed Aboriginal and Torres Strait Islander Commission.

The Committee thanks the Minister for his response and draws the matter to the attention of the Senate.

Proposed section 31A - Documents to show legislative authority

This provision requires the Commission upon approving a grant, loan, acquisition or guarantee to ensure that the documents meet the requirements of:

> (a) the provision of this Part that authorises the making of the loan, grant or acquisition or giving of the guarantee; and
>
> (b) which of the Commission's objectives, as set out in the corporate plan, will be furthered by the making of the loan, grant or acquisition or the giving of the guarantee.

This provision is in the same terms as clause 23 of the ATSIC Bill, and the Committee requests an explanation from the Minister of the consequences of non-compliance by the Commission with the terms of the provision.

The Minister has responded:

> The Committee has requested an explanation of the consequences of the Commission not complying with the terms of the clause.
>
> One obvious consequence is that the Commission would be open to public criticism by the Auditor-General.
>
> It may also be that a conscious decision by the Commissioners to disregard the provision would constitute misbehaviour within the terms of section 17.

The Committee thanks the Minister for his response.

AUSTRALIAN AIRLINES (CONVERSION TO PUBLIC COMPANY) ACT 1988

A response has been received by the Committee from Mr Willis, the Minister for Transport and Communications undertaking to table the Annual Report of Australian Airlines Limited.

The Committee thanks the Minister for his response.

CRIMES LEGISLATION AMENDMENT BILL

This Bill was introduced into the House of Representatives on 11 May 1989 by the Attorney-General.

This Bill proposes to amend seven Acts concerned with crime, law enforcement and criminal justice administered within the Attorney-General's portfolio. Minor amendments are designed to correct or update existing legislation. Significant amendments relate to computer offences and substantially follow the recommendations of the Committee revising Commonwealth criminal law, chaired by Sir Harry Gibbs.

The Committee drew the following clauses of the Bill to the attention of the Senate, in Alert Digest No.6 of 1989 (24 May).

Subclauses 21(1) and 22(2) - Possible Retrospectivity

The amendments made by these subclauses would apply to things done and activities carried out before the commencement of the provisions, provided only that the hearing of a prosecution had not commenced before the provisions entered into force.

Clause 21 prescribes the means of calculating the amount of pecuniary penalty to be imposed upon a person, in reference to the value of the benefit they have derived from engaging in dealing with narcotics.

Clause 22 expresses the intention to enable the Court to treat as the "property of the defendant" any property subject to the "effective control" of the defendant. This clause includes within the scope of the penalty, property the defendant has attempted to disguise as the property of another person or company.

The point raised by the Committee is that there appears to be a degree of retrospectivity in the effect of the clause which may encourage prosecutors to delay the commencement of proceedings.

Subclause 23(2) - Retrospectivity

This subclause appears to give a retrospective effect to the amendments to various subsections referred to therein, and allows the provisions to apply to orders made before the amendments come into force.

The Minister has informed the Committee:

> Subclauses 21(1), 22(2) and 23(2). These subclauses, which are the application provisions for the amendments made by those clauses, are reported for giving apparent retrospective effect to the amendments.
>
> The correct interpretation of each of the subclauses reported for apparent retrospectivity is that the amendments do not have retrospective operation. More correctly, the future operation of the amendments made by clauses 21, 22 and 23 is based upon past events.

The Minister states in summary of his views:

> Accordingly, to summarize, it is my view that the amendments proposed by clauses 21, 22 and 23 are not retrospective in operation. In any event, it is my strong view that the measure is clearly warranted having regard to the abuse which the amendments are designed to combat. Any narrower application of the amendments than that proposed in the Bill would work a great disservice upon the Australian community.

A detailed legal basis for the views of the Minister is incorporated in his response and is attached to this Report.

The Committee thanks the Minister for his response.

INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES BILL 1989.

This Bill was introduced into the House of Representatives on 4 May 1989 by the Minister for Aboriginal Affairs.

This Bill proposes to establish the Institute of Aboriginal and Torres Strait Islander Studies to replace the existing Australian Institute (AIAS). The membership of the Institute will be differently structured to that of the AIAS and the Institute's Council will include representation from the Aboriginal and Torres Strait Islander Commission.

The Committee drew the following clauses of the Bill to the attention of the Senate.

Clause 59 - Continuity of Employment

Clause 59 provides that there is no continuity of employment for persons employed under contracts of employment by the former institute. Clause 60 refers to the position of members of the Public Service employed by the Institute who are consequently unattached officers under the Public Service Act 1922. The Committee sought clarification from the Minister of the position of persons covered by clauses 59 and 60.

The Minister has responded:

> Clause 59 and clause 60 are not directly related. Clause 59 is required to ensure that staff of the new Institute, who by virtue of clause 29 will become public servants, are not simultaneously subject to their previous contractual obligations and rights.

Clause 60 would enable unattached officers of the public service who immediately before the Bill commences are employed by the old Institute, to be transferred to the new Institute by means of s.81B of the Public Service Act. Without this provision such persons would have to resign from the public service before being transferred.

The Committee thanks the Minister for his clarification of the matter.

SEX DISCRIMINATION AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 11 May 1989 by the Attorney General.

This Bill proposes to remove section 41 of the Sex Discrimination Act 1984, which will remove most forms of direct discrimination on the grounds of sex and marital status in superannuation practices for new schemes.

Proposed sections 41A, 41B and 41C - Repeal of section by regulation

The provisions all apply to new, existing or the repeal of superannuation provisions. Proposed section 41C allows either or both proposed sections 41A and 41B to be repealed by regulation.

Proposed subsection 41C(3) allows for a 12 month period between the making of such regulations and their commencement, and the provision cannot really be said to be included to incorporate a speedy change to the legislation. The Explanatory Memorandum states the regulation will only be made after the Minister has consulted superannuation funds, and that,

> "The purpose of these provisions is to provide that, when such a regulation is to be made, superannuation funds, will have a year in which to change their fund rules in order to comply with the Act."

The Committee is of the view that Acts should not be changed by regulation unless the changes are essentially technical or consequential in nature and brings to the attention of the Senate any provisions in a Bill that permits this course to occur.

The Minister has responded to the concerns of the Committee expressed in Alert Digest No.6 (24 May).

> While appreciating the general concerns of the Committee that, as a general proposition, a regulation making power should not be used to amend legislation, in this particular case I believe that there exist special and specific reasons which justify the insertion of this clause. As your Committee would be aware, the existing provisions in section 41 providing a blanket exemption for superannuation practices are subject to repeal by regulation. Accordingly, section 41C maintains the status quo of these exemptions.
>
> The exemptions are clearly spelt out in the Bill and the making of such regulations would be subject to Parliamentary scrutiny and disallowance before the regulations would have any effect. As your Committee is aware there are significant delays in getting Bills through Parliament and it is necessary to maintain policy flexibility on this issue. There are safeguards built in to protect the interests of members of superannuation funds; through the requirement that consultations be held with industry and fund operators and the delayed implementation provision. The proposal is in fact more protective of industry's interests that the present s.41(1).
>
> Section 41C reflects the Government's commitment to progressively moving to a truly non-discriminatory superannuation industry. Repeal by Regulation is justified because what would be repealed are exemptions for discriminatory practices. The scope of the power is clearly defined because the exemptions are clearly spelt out in the amendments.

The Committee draws the attention of the Senate to the Ministers comments that "as a general proposition, a regulation making power should not be used to amend legislation" which is a view the Committee strongly supports.

The Committee thanks the Minister for this response and draws it to the attention of the Senate.

SUMMARY OF SCRUTINY OF BILLS IN REPORTS NOS. 1-9 OF 1989 (AUTUMN SITTINGS)

The Committee has examined 108 Bills in Alert Digests Nos. 1-8 of 1989.

Of these, the Committee has had no comments on 49 Bills, and a further 20 have been subject to comments by the Committee which have not required a direct response from the Minister. The Committee has commented on 39 Bills in Digests which involve a response from the Minister.

A total of 60 Bills and Acts have been incorporated in the Committee's Reports Nos. 1-10 of 1989. These comprise 6 Acts, 16 Bills subject to comments in Alert Digest prior to 1989 (principally the Corporations Package), and 37 Bills which have been the subject of comments in 1989 Alert Digests.

In respect of the matters raised in Reports 1-9 tabled by the Committee, there are several matters the Committee regards as worthy of bringing to the Senate's attention.

In Report No.7 the Committee raised the following matters which it feels should be further emphasised.

1. **Australian Postal Corporation Bill subclause 59(9)**
   Australian Telecommunications Corporations Bill subclause 55(9)

The above subclauses required a person to incriminate themselves but did not in the Committee's opinion provide adequate protection against self-incrimination. In view of the Committee's long established objections to clauses which do not protect against the derivative use of such information the Committee is concerned at the use in these Bills, of the "use indemnity" in preference to the "use derivative use indemnity".

The Committee pointed out the more acceptable form of the provision in respect of subclause 23(5) of the Bounty (Ships) Bill (page 65 Report No.6 of 1989) and subclause 15(2) of the Wheat Industry Fund Levy Collection Act 1989 (Digest No.4 of 3 May 1989).

2. Migration Legislation Amendment Bill 1989

In Report No.7 of 1989 the Committee expressed concerns about certain provisions of the Migration Legislation Amendment Bill 1989. In particular

Proposed subsection 21D(14) which allows the Secretary of the Department to issue search warrants. The Committee has always strongly held the view that search warrants giving such wide powers should be issued only by judges or magistrates. The issue of search warrants by the judiciary or the magistracy is fundamental to the preservation of "personal rights and liberties."

Proposed subsection 21D(18). This provision allows an officer to stop any vehicle. The provision should in the Committee's view require an officer to hold a reasonable belief, that it was necessary for the officer in the course of his duties to require the vehicle to stop.

The power in proposed subsection 21D(18) is, in the Committee's view, couched far too widely, and allows an officer the power to stop vehicles at random, seemingly without cause.

The Committee also notes the introduction of the Immigration Review Tribunal and whilst it supports the Minister's concept of a quicker and cheaper non-adversarial means of reviewing migration decisions, the Committee is concerned that the creation of Tribunal with limitations upon individual rights of representation and address should be kept to an absolute

minimum. The Committee is particularly concerned that the role of the AAT as the means of obtaining merit review of administrative decisions is not in any way diminished by the establishment of other alternative forums for merit review.

3. Legislation by Press Release

In view of the terms of the Senate Order relating to limiting the retrospectivity of Taxation Bills the Committee was concerned at the example of 'legislation by press release' contained in the Taxation Laws Amendment (Superannuation) Bill 1989 (page 139 of Report No.8 of 1989).

The Committee regrets that it has not had the benefit of a response from the Treasurer in respect of any of the Taxation Legislation it has commented on. The Committee regards responses from Ministers as vital to consideration by the Committee and the Senate of any legislation which may fall within the Committee's terms of reference.

4. Alteration of Bills by Regulation

The Committee has commented on several examples of provisions that would enable the alteration of Bills by Regulation. Such clauses which are known as "King Henry VIII Clauses", constitute a breach of principle 1(a)(iv) and "inappropriately delegate legislative power". The Committee does not regard such clauses as breaching the Committee's principles where they are necessary and required, such as in the Sex Discrimination Amendment Bill (page 185 of this Report) or technical or consequential in nature. However, the Committee is concerned that recently it has had to comment on several Bills where the alteration of the provisions of the Bill by regulation goes to the "heart of the measure."

The Committee noted in Reports No.7 & 8 of 1989 the following examples of amendment of Bills by Regulation.

1. Paragraph 30(1)(q) of the Australian Postal Corporation Bill 1989.

2. Subclause 40(1) of the Telecommunications Bill and,

3. Proposed subsections 11D(1), 11P(1) and 11ZJ(1) and proposed sections 61 and 62 of the Migration Legislation Amendment Bill 1989.

4. Clause (4) of the Insurance Legislation Amendment Act 1989.

Tabling of Directions

Where a Minister is empowered to give "directions" under a Bill, those Directions should be required to be tabled at the earliest opportunity - examples of directions where the Committee regards tabling as required are

1. Proposed section 6A of the Australia Council Amendment Bill 1988 (page 64 of Report No.6 of 1989) and,

2. Clause 5 of the Community Services and Health Legislation Amendment Bill (page 150 of Report No.9 of 1989).

Where a provision empowers the making of prescriptive or quasi-prescriptive instruments the Committee is firmly of the opinion that such provisions should always be subject to tabling and disallowance.

Plain Language

The Committee is concerned that legislation should be expressed in simple and concise language, which makes it as accessible as possible to all persons using the legislation, and that legislative provisions should be readily accessible to members of the general public.

The Committee points out its comments on paragraph 51(c), of the Child Support (Assessment) Bill 1989, where the proposed legislation states "(with each shared custody of child of the liable parent taken to be half a child)" - see page 5 of Scrutiny of Bills Alert Digest No.8 of 1989 (7 June 1989). The Committee regards the term "half a child" as inappropriate and suggests that the term "half the liability for the care of the child" be used.

A related matter of concern to the Committee is the complexity of the numbering of certain Acts. The Committee was particularly pleased to note the response of the Minister, to the renumbering of the Migration Legislation Amendment Bill (page 96 of the Report No.7 of 1989).

Barney Cooney
Chairman

14 June 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF 1989

16 AUGUST 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chair)
Senator M. Beahan
Senator R. Crowley
Senator J.J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF 1989

The Committee has the honour to present its Eleventh Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Banking Legislation Amendment Bill 1989
Co-operative Scheme Legislation Amendment Act 1989
Exotic Animal Disease Control Bill 1989
Live-Stock Slaughter Levy Amendment Bill 1989
Wheat Marketing Act 1989

BANKING LEGISLATION AMENDMENT BILL 1989

This bill was introduced into the House of Representatives on 4 May 1989 by the Minister Assisting the Treasurer.

The bill proposes to amend the Banking Act 1959 to:

- provide the Reserve Bank with formal authority for the prudential supervision of banks;
- remove the distinction between trading and savings banks;
- replace the Statutory Reserve Deposit requirement on trading banks with a non-callable deposit requirement on all banks, and
- make the arrangements for collection and publication of banking statistics more flexible.

The Committee drew the attention of Senators to the following clauses of the bill in Alert Digest No.5 of 1989 (10 May 1989).

Proposed subsection 9(4) - Ministerial Discretion.

The Committee commented that the proposed subsection would allow the Governor-General to impose new conditions on a banking authority, or to vary or revoke conditions previously imposed on a banking authority. The discretion would be reviewable only as to legality and not on merits.

The Minister has responded to the Committee's comments, and stated that any variation to the conditions attached to a banking authority would be recommended by the Treasurer and would consequently directly reflect the Government's policy on banking. In the opinion of the Minister the matter was one in which the Government is answerable to Parliament, and any decision giving effect to the Government's banking policy should not be reviewable on grounds of merit by the Administrative Appeals Tribunal.

The banks by virtue of their status as authorised banks have a close relationship with the Reserve Bank, and have ample opportunity to make their views known and considered both by the Reserve Bank and the Treasurer.

The Committee trusts that these comments will assist Senators' consideration of the proposed subsection during debate on the bill.

Proposed subsections 66(2) and 67(2) - Imposition of conditions.

Proposed section 66 allows a person having the consent in writing of the Treasurer to use a bank-related word in relation to financial business carried on by the person. Proposed subsection 66(2) allows the Treasurer to impose conditions or additional conditions on a consent, to vary or revoke such conditions or revoke a consent. The decision of the Treasurer is not subject to merits review.

The Minister has informed the Committee that the use of the word 'bank' in the business names of financial enterprises is confined by policy to authorised banks or international banks which establish representative offices in Australia.

When individuals or small businesses wish to use the word bank it is generally not related to business activities of a financial nature, and is consequently not within the ambit of the proposed section.

Further the Minister is of the view that small businesses or individuals are unlikely to be affected by the exercise of the Treasurer's discretion under the provision. Consent to use the word 'bank' in descriptive expressions is given to classes of institutions, in accordance with action under other areas of the Act rather than on a case-by-case basis. It is the Minister's view that the operation of proposed section 66 should not be subject to review other than pursuant to the Administrative Decisions (Judicial Review) Act 1977.

Proposed section 67 relates to the regulation of the manner in which international banks that are not authorised as banks under the Banking Act, may establish liaison offices in Australia.

The provision which is in similar terms to subsection 66(2) relates to the Treasurer giving consent to persons (not being a bank) to establish an office relating to carrying on banking business in respect of a foreign country. The Minister considers it unlikely that the type of institution involved in this provision would seek to use administrative review

processes in respect of a decision under the section. Any difficulty between an international bank and the government concerning a representative office would be settled by informal negotiations.

A decision pursuant to proposed section 67 would be subject to review pursuant to the Administrative Decisions (Judicial Review) Act.

The Committee thanks the Minister for his response.

Clause 7, paragraph 8(b) and proposed subsection 61(1) - Delegation.

These provisions were commented upon by the Committee as replacing a reference to a specified officer with a reference to a person. This would give the Reserve Bank an unfettered discretion as to the attributes of a person authorised by it.

The Minister has responded that currently the Act allows the investigation of banks to be undertaken by the Auditor-General (Section 61), or by an officer of the Reserve Bank (Section 13).

The Minister points out that the provisions would allow the Reserve Bank to appoint other persons to undertake bank investigations, such as professional auditors, or accountants or auditors already familiar with the particular systems used by the bank to be investigated.

Whilst the power to investigate the prudential affairs of banks would remain with the Reserve Bank, the provision would enable the Reserve Bank to supplement its own resources with professional skilled persons when necessary.

The Committee thanks the Minister for this response, but is of the opinion that the appointment of such persons should be subject to legislative criteria.

This committee is particularly pleased to receive such a constructive, informative response from the Treasury portfolio, and hopes that it will set the norm for future responses to the Committee's comments.

The full text of the response from the Minister is annexed to this Report.

CO-OPERATIVE SCHEME LEGISLATION AMENDMENT ACT 1989

The bill was introduced in the House of Representatives by the Attorney-General on 12 April 1989.

The legislation was passed by the Senate on 16 June 1989 and received the Royal Assent on 27 June 1989. The Committee commented on the bill in its Alert Digest No.4 of 1989 (3 May 1989).

A response has been received from the Attorney-General, and although the Act has been passed by the Parliament the Committee believes that the matters raised by the Committee and the response of the Minister are of interest to Honourable Senators.

General Comment - Delegation of Legislative Powers

The Minister has responded to comments made by the Committee on the introduction and timing of the Act. The Committee was concerned that although the Corporations Bill had passed the House of Representatives, and been considered by a Senate Select Committee the Explanatory Memorandum suggested (para 5 pp 29-30) that the Corporations Act 1989 may be amended further by the incorporation of the share buy-back provision of this Act.

The Co-operative Scheme Legislation does not in any way diminish the Government's commitment to the early implementation of the buy-back scheme, and that the Government will be giving consideration to including corresponding amendments in the Corporations Bill.

Delegation of Legislative Powers

The Committee noted that the Act may possibly be considered as an inappropriate delegation of legislative power. The bill had been approved by the Ministerial Council, and Parliament faced the prospect of either approving the bill as is, or delaying passage of the bill until the Ministerial Council approved the changes.

The Minister has acknowledged that the circumstances in which the Co-operative Scheme legislation was introduced into Parliament did severely diminish Parliament's ability to perform its legislative function. However, the Government was required to abide by its obligations under the Formal Agreement establishing the Co-operative Scheme, and any delay caused to this bill may have involved a breach of the agreement, and affected the commencement of the National Legislation.

The Committee thanks the Minister for his detailed response.

Proclamation of parts 4 and 9

The Committee noted that parts 4 and 9 of the Act were to commence on proclamation. The reasons advanced in the Explanatory Memorandum explained the situation with respect to Part 4 of the Act, and the Committee sought clarification of the timing of Part 9. The Minister has responded that the proclamation of Part 9 of the Act is unspecified because a number of financial and administrative agreements have yet to be completed before the amendments can operate.

Part 9 of the Act includes amendments that facilitate the introduction of revised funding arrangements for the National Companies and Securities Commission (NCSC) agreed to by the Ministerial Council. The precise form of the new fees structure and financial arrangements have yet to be finalised by State Governments and the Ministerial Council.

The Committee thanks the Minister for his advice and accepts the reason for the timing of the proclamation of Part 9 not being specified. It would have been of assistance to the Committee and the Senate if the reason had been included in the Explanatory Memorandum.

Section 133BG - Reversal of Onus

The Committee sought an explanation from the Minister as to the effects of this section upon the rights of directors, and other persons affected by the actions of directors. The section places on a director the onus of proving a lack of knowledge of a proposed or actual takeover of a company, by creating a presumption that a director is aware of any such bid.

The Minister has responded that the presumption of knowledge is conditional on the takeover bid being the subject of either a public announcement or a Part A statement. In the Minister's view the presumption of knowledge in these circumstances is dependent on the director doing no more than the minimum that could be expected in exercising due care and diligence.

The degree of diligence and care required is, in the Minister's opinion, a fair and reasonable one in light of the Government's and the Ministerial Council's desire to protect shareholders, by requiring all company director's to fulfil their fiduciary obligations and act with care and diligence.

The presumption is within the Committee's guidelines according to the Minister, as knowledge of the matters covered by the section would be extremely difficult for the prosecution to prove, whereas it would be easy for a defendant to establish a justifiable lack of knowledge.

The Committee accepts the response of the Minister, but points out the Committee is only prepared to approve legislative provisions reversing the onus of proof in the limited situation where proof would be difficult for the prosecution to establish, and relatively simple for the defence to negative.

Subsection 133QC(6) - Onus of proof on directors

This section places on directors the onus of proving that at the time of making a solvency declaration, they had reasonable grounds to do so, to avoid becoming personally liable to the creditors of a company which becomes insolvent.

The Minister has responded that the section deliberately places a burden of honesty, care and diligence on to company directors. Subsection 133QC(6) mitigates what would otherwise be the imposition of strict liability upon directors, by relieving them of personal liability, provided they can establish that at the time of making a solvency declaration they had reasonable grounds for their opinion.

The Minister submits that the onus placed on directors of justifying their opinions as at the time of making solvency declarations, is consistent with the need to ensure that

directors do not enter into buy-back transactions without ensuring that creditors and shareholders are adequately protected. The Committee thanks the Minister for his detailed and constructive response.

Subsection 133SB(5) - Presumption of Knowledge

That the provision casts on a person the onus of establishing that the person was not aware of matters known to the person's agent or employee, in respect of avoiding the application of Section 130 of the Act to the buy-back scheme.

The Minister has responded that the basis for the reversal of the onus is that the defence would involve matters largely within the exclusive knowledge of the accused, and where the prosecution would find it very difficult to negative the matter.

The Committee thanks the Minister for his response.

Subsections 133SD(4) and 133SE(2) - Reversal of onus of proof

Both subsections reverse the onus of proof in criminal proceedings relating to buy-back schemes. The defendant is required to prove a reasonable belief of compliance with section 129, which is based on the purpose or intent behind a transaction.

The subsections in the Minister's opinion provide a defence analogous to that of honest and reasonable mistake of fact.

The Minister states that the evidential burden on a defendant is to raise a reasonable doubt as to guilt. The burden of proving guilt beyond reasonable doubt remains on the prosecution.

The Committee draws the provisions and the response of the Minister to the attention of the Senate. The Committee does not necessarily comment adversely on all legislative provisions which reverse the evidentiary onus of proof, when to do so provides a defence analogous to that 'honest and reasonable mistake or fact'. However, the Committee is ever mindful of the right of any accused to have all elements of an offence proven 'beyond reasonable doubt' and the Committee closely examines any provision that appears to reverse that evidentiary onus.

Section 61C of the Securities Industries Act 1980 - Liability of Principal

The Committee requested an explanation from the Minister as to the basis of this provision which exposes a principal to greater liability for the acts of an agent, than the liability which applies at common law.

The Minister has responded that the provision imposes an additional liability on principals, as a result of the discontinuance of the licensing of representatives. Principals are now required to accept greater responsibility for the conduct of their representatives.

These are limits set by the legislation to the liability of principals for the conduct of their representative or agents, and a principal cannot be criminally liable for the conduct of an agent (subsection 61F(2)).

The basis of the provision is that once a client is able to establish that an agent has engaged in conduct as a representative of the principal, (as defined in subsection 64(3)), that client is not required to establish the scope of that authority.

The Committee thanks the Minister for his Response.

Sections 62A and 62B of the Securities Industries Act and sections 80A and 80B of the Futures Industry Act 1986

The Committee was concerned that the Commission (NCSC) could in certain circumstances revoke the licence of a natural person without that person having the right to a hearing.

The Minister has responded that there is a general right of review from a decision of the Commission in Section 134 of the Securities Industries Act.

Securities Industries Act Section 68D - Reversal of onus of proof

The Committee noted that subsection 68D(1) was analogous to the common law defence of mistake of fact, but subsection 68D(2) requires matters to be proven that are not peculiarly within the knowledge of the defendant.

The provision was in the view of the Minister necessary to protect corporate advisors operating a Chinese Wall. The provision provides a defence when there is a failure to

disclose an interest where a Chinese Wall is in place; so that the person making the recommendation, did not know or receive any advice of the interest or the recommendation. In that situation there is no breach of subsection 68(2).

A Chinese Wall is where a corporate entity establishes internal procedures for the purpose of preventing sensitive information being communicated between areas of that corporate entity.

The Committee thanks the Minister for his response.

Subsection 91(2) - Securities Industries Act (SIA) - Reversal of onus of proof.

The Committee sought an explanation of the operation of this provision, which appears to reverse the onus of proof in defences to prosecutions under sections 89, 90 or 90A of the SIA.

The Minister has responded that the section presumes an employer or principal to have knowledge of facts or occurrences relating to securities, that are known to a 'relevant' employee. The provisions deem a defendant employer or principal to be aware of certain matters only if a relevant agent or employee is found to be aware of those facts.

Where a relevant agent or employee is proven to be aware of certain facts, the defendant is required to prove that he/she was unaware of the matters. This is a matter particularly within the defendant's knowledge, as it relates directly to the defendant's knowledge or otherwise of the particular facts.

The Committee thanks the Minister for his response.

Numbering of the Bill

The Committee requested that the Minister examine the possibility of re-numbering the Bill in order to simplify it. The Minister has replied at length on difficulties the Minister sees as inherent in undertaking such a project.

The Committee thanks the Minister for his constructive and detailed responses to all matters raised by the Committee, and appreciates that the Minister has taken the opportunity to respond to all matters raised by the Committee. The full text of the Minister's reply is attached to this Report.

Exotic Animal Disease Control Bill 1989

This bill was introduced into the House of Representatives on 24 May 1989 by the Minister for Primary Industries and Energy.

The purpose of the legislation is to establish the Exotic Animal Diseases Preparedness Consultation Council (EADPCC) and

provide financial assistance for purposes related to the control and eradication of exotic animal diseases. The Council's functions and powers are set out in the bill which makes consequential amendments to three Acts.

The Committee drew the attention of the Senate to provisions of the Bill in Alert Digest No. 7 of 1989 (31 May 1989).

Paragraph 3(p) - Definition of Exotic animal disease -

The Committee was concerned that this provision allowed the Minister to determine a disease to be an animal disease, and that determination was not subject to any form of Parliamentary scrutiny.

A determination by the Minister makes it possible for actions to be taken by the Consultative Council if the Government deems it appropriate, and applies to a new exotic disease that is considered to possibly threaten Australia's livestock based industries.

In view of the rapidity with which a disease threat may develop the Minister regards it as inappropriate that the determination of new exotic diseases be made by regulation.

The Committee thanks the Minister for his response, and requests that the Minister arrange for the determinations to be tabled before Parliament.

Subclause 7(2) - Ministerial Direction

The provisions of the subclause enable the Minister to give directions to the Council which will not be required to be tabled before Parliament.

The Minister has responded that an amendment is to be made to the bill to require the directions to be tabled.

The Committee thanks the Minister for this response.

The Minister's response is attached to this Report.

LIVE-STOCK SLAUGHTER LEVY AMENDMENT BILL 1989

This bill was introduced into the House of Representatives on 24 May 1989 by the Minister for Primary Industries and Energy.

The bill proposes to compliment the Exotic Animal Disease Control Bill 1989 to provide for the meat and livestock contribution to the Exotic Animal Disease Preparedness Trust Account. This amendment bill provides for a new levy component for exotic disease purposes, expected to raise about 26 per cent of the total funds provided by industry in the first year's operation of the Exotic Animal Disease Preparedness Consultation Council.

The Bill was commented upon by the Committee in Alert Digest No. 7 (31 May 1989).

Clauses 3 to 9 of the bill provide for amounts of levy to be set by regulations, with no provision in the legislation to limit the amount of the levy. The clauses were contrasted with other levy amendment bills which have provisions limiting the upper limit of levy.

The Minister has responded that industry contributions to the trust account will be subject to a maximum limit of $750,000 thereby setting a final limit to the annual contributions made by the red meat industry.

The Minister points out the Government will be led by industry in setting industry contributions in what is a self-taxing mechanism for industry self-interest purposes. All operative levy rates will be incorporated in regulations subject to disallowance by the Senate.

The Committee thanks the Minister for his response, which is included with the Minister's response to the Committee's comments on the Exotic Animal Disease Control Bill and is attached to this report.

Wheat Marketing Act 1989

The Committee reported on this Act in the Eighth Report of 1989 14 June 1989 and reported on certain additional matters that had been brought to its attention.

The Minister has responded to the further matters raised by the Committee.

Clause 49 and 54 - Operational plans

The Committee requested that the Minister arrange for the corporate plan of the Australian Wheat Board to be tabled before Parliament.

The Minister has responded that the white paper entitled Reform of Commonwealth Primary Industry Statutory Marketing Authorities (SMA's) published in January 1986 provides guidelines for the operations of SMA's and their accountability to Parliament and Industry. The document outlines the view that it is not considered appropriate that corporate and annual operating plans of SMA's be treated as public documents or tabled in Parliament. However, the Annual Report outlining the broad objectives of the SMA and action taken to achieve those objectives will be tabled before Parliament.

The Committee thanks the Minister for his response.

Subclauses 7(5), 88(2) - (10) - Prior Notice

The Committee requested that prior notice be given to persons or organisations operating under State and Territory Laws which are to be rendered ineffective by the making of regulations.

The Minister has responded that the legislation provides for the relevant State Minister to be notified prior to the making of any regulations under these sections. The Minister has agreed to consult the ACTU and relevant unions once the regulations have been drafted.

The Committee thanks the Minister for his response.

Clauses 72 and 74 - Tabling of Discount Letters of Credit and Future Contracts guidelines.

The Committee sought the Minister's response to the suggestion that guidelines relating to the Wheat Board's powers to discount letters of credit, and Ministerial determinations of guidelines regarding Wheat Board Futures trading be tabled before Parliament.

The Minister has responded that the intention of the Government is to replace Ministerial control of the day to day activities of SMA's with Ministerial guidelines. The guidelines in the area of discounting letters of credit and futures trading are necessary because of the possible risk to the Government's contingent liability associated with indemnity arrangements.

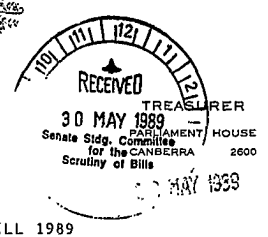
Further the guidelines are considered to be generally commercially confidential, especially in respect of futures trading.

The Committee thanks the Minister for his response but requests that the Minister continue to examine ways in which such information can be given to Parliament. The guidelines and directions contain information which would considerably assist the Parliament in maintaining its awareness of the full range of the activities of the Australian Wheat Board.

The Minister's response is attached to the Report.

Barney Cooney
(Chairman)

16 August 1989



Dear Senator

BANKING LEGISLATION AMENDMENT BILL 1989

I refer to the comments contained in the Scrutiny of Bills Alert Digest No 5 of 1989, concerning the abovementioned Bill which I introduced into the House of Representatives on 4 May 1989.

PROPOSED SUBSECTION 9(4)

The proposed subsection will provide for the Governor-General to impose new conditions on a banking authority or to vary or revoke conditions previously imposed on a banking authority.

Any variation to the conditions attached to banking authorities would be recommended by the Treasurer and would directly reflect the Government's policy on banking. This is a matter on which the Government is answerable to Parliament. In the circumstances, it is not considered appropriate that decisions which give effect to the Government's banking policy should be reviewable on the grounds of merit by the Administrative Appeals Tribunal. It is also relevant that the banks which would be affected by any actions under subsection 9(4) have a close relationship with the Reserve Bank, by virtue of their status as authorised banks, and accordingly have ample opportunity to make their views known and to have them considered both by the Reserve Bank and the Treasurer.

PROPOSED SUBSECTIONS 66(2) and 67(2)

The proposed new section 66 is concerned essentially with the activities of corporate bodies including international banks, rather than individuals. Use of the word "bank" in the business names of financial businesses is confined by policy to the authorised banks or international banks which establish representative offices in Australia.

Where small businesses or individuals may wish to use the word "bank" in business names they generally do so in relation to business activities which are not of a financial nature and therefore do not fall within the ambit of the proposed section. It is also unlikely that small businesses or individuals would be adversely affected by the exercise of the Treasurer's discretion under the section, since consent to use the word "bank" in descriptive expressions is given to

classes of institutions in accordance with action under other areas of the Act rather than on a case-by-case basis. Accordingly, it is not considered necessary for the operation of the proposed new section 66 to be subject to external review.

The proposed section 67 is concerned solely with the regulation of the manner in which international banks, which are not authorised as banks under the Banking Act, may establish liaison offices in Australia. It is unlikely that this kind of institution would seek to use administrative review processes in respect of a decision under this section. It is much more likely that any difficulties arising between an international bank and the Government in relation to a representative office would be sorted out in informal negotiations.

It is noted that decisions pursuant to sections 66 and 67 would be subject to review pursuant to the Administrative Decisions (Judicial Review) Act 1977.

CLAUSES 7, 8(b) AND 16

As the Banking act presently stands, investigations of banks may be undertaken by the Auditor-General pursuant to section 61 or by an officer of the Reserve Bank pursuant to section 13. For the reasons set out in the Explanatory Memorandum to the Bill, the power to investigate the prudential affairs of banks should rest with the Reserve Bank, but it would unnecessarily restrict the Reserve Bank to require that persons who undertake these investigations, or any investigation pursuant to section 13, at its direction should be its own officers. The provision of scope for the Reserve Bank to appoint other persons would allow it to appoint professional auditors and accountants, including auditors already familiar with a particular bank's systems, to undertake an investigation. This would enable the Reserve Bank to make the best use of its own resources and to supplement them with professional, skilled persons as may be necessary.

Yours sincerely

PETER MORRIS
Minister Assisting the Treasurer

Senator B.C. Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600
BAD89-6498
65310-7

15 JUN 1989

Dear Senator Cooney

I refer to the letter from Mr Ben Calcraft, Secretary of the Senate Standing Committee for the Scrutiny of Bills, of 4 May 1989 enclosing comments about the Co-operative Scheme Legislation Amendment Bill 1989 made in the Committee's Alert Digest No.4 of 3 May.

The issues raised by the Committee have been considered in the light of the Commonwealth Government's obligations under the Formal Agreement establishing the Co-operative Scheme.

The Committee will be aware that the National Corporations Bill, which had been the subject of a report by a Parliamentary Joint Select Committee, was finally passed by the House of Representatives on 23 May 1989. The Co-operative Scheme Legislation Amendment Bill was passed by the House on 24 May 1989 and introduced into the Senate on 26 May 1989.

It is this Government's intention that the Corporations legislaiton will supplant the Co-operative Scheme legislation. The Corporations legislation will be subject to the scrutiny of the Committee, as well as examination and report by the Joint Parliamentary Select Committee on Corporations and Securities established under the legislation as amended by the Senate. The Government is proceeding to set up the machinery for the proper implementation of the national legislation as soon as possible. In the meantime the Government is committed to maintain the existing scheme of regulation. This Co-operative Legislation Amendment Bill is part of that maintenance. When the national legislation supplants the Co-operative Scheme legislation, the current inhibition on disallowance by the Senate, which applies in relation to the Co-operative Scheme legislation will no longer apply.

I trust that the attached response meets your Committee's concerns.

Yours sincerely

(Lionel Bowen)

Senator B C Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House

RESPONSE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS [ALERT DIGEST NO.4 OF 1989]: CO-OPERATIVE SCHEME LEGISLATION AMENDMENT BILL 1989

General Comments

1. The Co-operative Scheme Legislation Amendment Bill 1989 has been introduced pursuant to the Commonwealth's obligations under the Co-operative Companies and Securities Scheme. The current amendments to scheme legislation were approved by the Ministerial Council for Companies and Securities at its March 1989 meeting.

2. The Commonwealth's own proposals to regulate companies and the securities and futures industries in Australia arose out of the Report of the Senate Standing Committee on Constitutional and Legal Affairs of April 1987 that unanimously recommended that the Commonwealth introduce comprehensive legislation to assume responsibility for all areas covered by the Co-operative Scheme.

Timing

3. The national Corporations legislation was introduced into the Senate on 14 October 1988 and was referred with the concurrence of the Government to the Joint Select Committee on Corporations Legislation. The Committee's report was presented to the Senate on 13 April 1989, the day following the introduction into the House of the Co-operative Scheme Amendment legislation. The Corporations legislation has now been passed by both Houses of this Parliament and incorporates a large number of amendments recommended by the Joint Select Committee.

4. As the Attorney-General indicated when introducing the Co-operative Scheme Bill into the House of Representatives, the introduction of that Bill in no way diminishes the Government's commitment to the early implementation of the national Corporations legislation. The Government is proceeding to set up the machinery necessary for the proper implementation of the national scheme as soon as possible. In the meantime the Government has indicated its commitment to maintain the existing scheme of regulation, pending the commencement of the new national legislation. In the case of the buy-back provisions, the Government will be giving consideration to the inclusion of corresponding amendments in the Corporations Bill.

Delegation of Legislative Powers

5. The Government acknowledges that the circumstances in which Co-operative Scheme legislation is brought forward severely diminish the Parliament's ability to perform its legislative function. On the other hand, pending the commencement of the national legislation, the Government is abiding by its obligations under the Formal Agreement to take such steps as are appropriate to secure the passage of the Bill. Any attempt to amend the Bill could result in serious delay to its enactment, and may involve a breach of that Agreement.

Consistency between the Corporations Bill and the Co-operative Scheme Amendment Bill

6. The Ministerial Council agreed in September 1988 that a number of the provisions in the Co-operative Scheme Amendment Bill should correspond with provisions in the Corporations Bill, namely: the FAST Scheme provisions and the reform of the licensing system governing securities and futures dealers and investment advisers.

7. When the Corporations Bill was passed by the Senate certain amendments were made affecting the right of clients to rescind contracts with unlicensed dealers. These amendments made the Co-operative Scheme Bill as introduced into the House of Representative inconsistent with the Corporations Bill. However, the Ministerial Council voted by telex to restore the consistency between the Corporations Bill and the Co-operative Scheme Bill before that Bill was considered in the House of Representatives. Following the Ministerial Council vote, the Government moved amendments during Committee stage in the House to bring the Co-operative Scheme Bill back into line with the Corporations Bill. These amendments were incorporated into the Bill as passed by the House of Representatives on 24 May 1989. The Bill was introduced into the Senate on 26 May 1989.

Proclamation of Parts 4 and 9

8. Subclause 2(4) of the Bill provides that, consistent with the approach adopted in other co-operative scheme legislation, the Governor-General's power to fix by proclamation the commencement of Part 4 or 9 of the Bill shall be exercised only in accordance with advice that is consistent with resolutions of the Ministerial Council. Reference to proclamation of Part 4 of the Bill is made at para.14 of the Explanatory Memorandum.

9. The reason for leaving the timing of the proclamation of Part 9 unspecified is because a number of financial and administrative arrangements have yet to be completed before the amendments can operate. Part 9 of the Bill includes amendments to the Fees Acts for the Companies, Companies (Acquisition of Shares), Futures Industry and Securities Industry Codes to facilitate the introduction of revised funding arrangements for the NCSC agreed to by the Ministerial

Council. The precise form of the fee structure and the financial arrangements underpinning the scheme have yet to be finalised by State Governments and the Ministerial Council. In addition, State Parliamentary Counsel have expressed the view that amendments to State Application of Laws legislation will be necessary before the amendments can take effect in the States.

10. It was agreed at the June meeting of the Ministerial Council that States would seek to introduce their amending legislation by September 1989. Part 9 of the Bill will be proclaimed when the Ministerial Council is advised that all necessary amendments to State laws and appropriate financial and administrative arrangements are in place.

Abbreviations

11. The following abbreviations are used below:

CA - Companies Act 1981 and Codes
SIA - Securities Industry Act 1980 and Codes
FIA - Futures Industry Act 1986 and Codes.

Proposed CA s.133BG (Page 17)

12. The presumption of knowledge under the proposed section is conditional on the takeover bid being the subject of either a public announcement or a Part A statement. The presumption of knowledge by a director in either of these circumstances is thus dependant on the director doing no more than the minimum that could be expected in exercising due care and diligence.

13. The common law duty imposes on company directors a minimum standard of care and diligence in exercising their duties, as does CA s.229(2), which provides that:

> 'An officer of a corporation shall at all times excercise a reasonable degree of care and diligence in the excercise of his powers and the discharge of his duties'.

14. While this section is couched in general terms, because of the differing standards that could be applied across the spectrum of corporations, it is not considered unreasonable to place on company directors generally, a responsibility to keep themselves aware of critically important developments such as takeover offers, where these are the subject of public announcements or Part A statements. In other words, a director excercising a reasonable degree of care and diligence should be expected to be aware of such developments.

5. It is submitted that the degree of care and diligence required under proposed s.133BG is not significantly different from that required under CA s.229(2) and that the presumption of such knowledge is a fair and reasonable one in light of the Government's and the Ministerial Council's desire to protect shareholders by requiring all company directors to fulfil their fiduciary obligations and act with care and diligence.

16. It is also submitted that in the absence of the presumption, it would be extremely difficult for the prosecution to prove the existence of knowledge of the matters covered by the proposed section. Conversely, it would be relatively easy in the circumstances for a defendant to establish a justifiable lack of knowledge, for example, if he or she had been ill, on leave or overseas at the time of publication or lodgement of the Part A Statement.

Proposed CA sub-s.133QC(6) (Page 17)

17. As with proposed s.133BG, the proposed section does, quite deliberately, place a burden of honesty, care and diligence on company directors. This is consistent with the rationale that creditors and shareholders alike, have a right to expect that the companies with which they deal and invest in, respectively, are administered with due care and diligence.

18. Proposed sub-s.133QC(6), it is submitted, has the effect of mitigating what would otherwise be the harsh imposition of strict liability on directors, by relieving them of personal liability whenever they can establish that at the time of making a solvency declaration, they had reasonable grounds for their opinions. In order to be able to establish such reasonable grounds, directors should be able to show that they have made sufficient enquiry into the affairs of the company to be able to form an opinion that the company will be able to pay its debts as and when they fall due over the next twelve months.

19. In relation to its effect upon the rights of directors, proposed sub-s.133QC(6) is similar to the CA s.395(5), (Declaration of Solvency), which presumes, in the event of a winding up that a director did not have reasonable grounds for his opinion as to solvency unless the contrary is known.

20. In addition, proposed s.133QD gives further relief to directors from personal liability under proposed s.133QC, where it appears to the court that the director has:

(a) acted honestly at all relevant times; and

(b) having regard to all the circumstances of the case, ought fairly to be excused in relation to the liability.

21. It is submitted that the onus placed on directors, of justifying their opinions at the time of making solvency declarations, is consistent with the need to ensure that directors do not enter into buy-back transactions without ensuring that creditors and shareholders are adequately protected. As knowledge of the basis of an opinion is likely to be held by the director alone, to place the onus on the prosecution to show that an opinion was not reasonably held would give it an almost impossible task.

Proposed CA sub-s.133SB(5) (Page 17)

22. It is submitted that in this case the presumption of knowledge is acceptable because a defence would involve raising matters largely within the exclusive knowledge of the accused. It would be very difficult for the prosecution to negative a defence where the defendant is in the best position to establish lack of knowledge.

Proposed CA sub-s.133SD(4), proposed CA sub-s.133SE(2) (Page 18)

23. The proposed subsections are similar to CA s.14(3), in that they provide a defence analogous to that of 'honest and reasonable mistake of fact', the onus of establishing which lies with the defence at common law.

24. With proposed sub-ss.133SD(4) and 133SE(2) therefore, the evidential burden on the defendant would only be to raise a reasonable doubt as to guilt. Having discharged this burden, the prosecution would then have to discharge the legal burden of proving guilt beyond reasonable doubt.

Division 2 of Part IV of SIA and Subdivision B of Division 1 of Part IV of FIA - Agreements with unlicensed persons (Page 18)

25. The Committee's comments on these provisions are noted. By way of clarification, it should be noted that these provisions only relate to unlicensed dealers, brokers or advisers, who are required by the legislation to hold a licence but neglect to do so. Such persons commit a criminal offence by failing to hold a licence: see ss.43 and 45 of the SIA, and ss.61 and 63 of the FIA. These provisions supplement these criminal prohibitions on acting as an unlicensed dealer, broker or adviser, by making it unprofitable to act as such..

26. Similar provisions appear in the Corporations Bill 1988. The corresponding provisions were amended in the Senate on 11 May 1989, and the Government moved amendments in the Committee stage of the House of Representatives debate on this Bill to maintain consistency with the Corporations Bill. The amendments remove the right of a client of an unlicensed person to rescind agreements with the non-licensee, where the non-licensee has informed the client, within a reasonable period before entering into the agreement, that he or she does not hold a licence. In this way, the amendments remove any potential for unfair prejudice to a non-licensee who has made full disclosure to the client.

Proposed SIA s.60C, proposed FIA s.78C (Page 19)

27. The Committee's comments on these provisions are noted.

It is also noted that this provision, and the following provisions relating to the securities and futures industries are the same as in the Corporations Bill which has been passed by the Parliament.

Proposed SIA s.61C - Liability of Principal (Page 19)

28. The additional liability imposed on principals is a result of the basic rationale behind the discontinuance of licensing of representatives - that principals should take more responsibility for the conduct of representatives.

29. Because representatives will no longer be required to be licensed, thus removing significant pre-entry screening by the NCSC, it is considered that the licensees ("principals") should take on more responsibility for the conduct of their representatives ("agents"). While it may be argued that the provisions imposing certain liability on principals for their representatives' conduct could expose principals to some risks, the legislation contains significant limits on that liability. Principals will not be liable for conduct engaged in by a person who holds himself out to be a representative of the principal or employer but who is not in fact such a representative (proposed sub-s.6H(4)). Principals will also not be liable in respect of conduct engaged in by a representative on the representative's own behalf except where the representative holds out to the client that the representative is acting on behalf of the principal and it is reasonable for the client to so believe (proposed s.61C).

30. The provisions will in no way make the principal criminally liable for the conduct of a representative (see proposed sub-s.61F(2)).

31. In addition, they will not make principals civilly liable in respect of the representative's activities which are unrelated to the securities business carried on by the principal.

32. As stated in para. 496 of the Explanatory Memorandum, the general effect is that, where a representative engages in conduct in connection with the principal's securities dealing or advice business, which conduct is actually engaged in on behalf of, on account of or for the benefit of the principal, the principal is liable for that conduct. This is so regardless of the scope of the authority conferred by the principal on the representative according to the general law of agency. Therefore, provided that the client can establish that the representative was engaging in conduct as a representative of the principal (as defined in proposed sub-s.6H(3)), the client need not establish the scope of the representative's authority.

33. Proposed s.61C also deals with the situation where a representative is acting on behalf of a number of securities dealers or advisers. In such a case, unless the particular principal who is responsible for the representative's conduct can be identified, all the principals of that representative are rendered jointly and severally liable for that conduct. This provision therefore addresses the problem faced in this situation by a client who, under normal agency principles, would have to identify the particular principal responsible in order to sheet home liability. This provision transfers that task to the principals, who are in a better position to exercise control over the representative's conduct and records.

34. The provisions achieve more certainty than the common law doctrine of ostensible authority. Complex and subtle questions about the extent of authority and the parties' awareness of the absence of authority do not arise.

35. Although both the principal and the client may be 'innocent parties' where the representative is in default, given that the principal has chosen the person to act as his or her representative and that under the licensing reforms the principal no longer needs to have his or her representatives licensed, it does not seem unduly onerous for the principal, rather than the client, to bear the responsibility of pursuing the representative in cases of default. This would seem to be a small price to pay for the benefits that a principal enjoys from the savings associated with the removal of the requirement to have representatives licensed. Also, the principal is responsible for putting the representative into the market in the first place and is in a better position than the client to control the representative's conduct.

Proposed SIA ss.62A, 62B, proposed FIA ss.80A, 80B - Revocation of a person's licence without a hearing (Page 20)

36. Although the Commission may revoke the licence of a natural person without a hearing on the grounds listed in proposed s.62A, the decision is reviewable. SIA s.134 gives a general right of appeal to the Court from a decision of the Commission (except where an appeal or review is expressly provided in the Act or the act or decision is declared by the Act to be final or conclusive).

Proposed SIA s.68D - Defences to alleged breach of proposed sub-s.68C(2) (Pages 20-21)

37. Doubts were expressed in public submissions on the comparable provisions of the Corporations Bill that corporate advisers operating Chinese Walls, despite the defence offered by cl.850 (the equivalent provision to proposed sub-s.68D(1)), may still be in breach of cl.849 (the equivalent provision to proposed s.68C). A Chinese Wall is a term used to describe a set of internal rules and procedures established by a company or firm for the purpose of preventing sensitive information known to one division or part of the company from being communicated to other divisions.

38. To remove any uncertainty, an additional defence was therefore inserted in the Corporations Bill and repeated in this Bill (proposed sub-s.68D(2)). It provides that where there is a failure to comply with proposed sub-s. 68C(2), i.e. a failure to disclose an interest, and there is in place a Chinese Wall (see proposed sub-s.68D(2)(c)), and the person making the recommendation did not in fact know of the interest and received no advice in relation to the recommendation from anyone who did know of the interest, then there is no contravention of sub-s.68C(2)(see para.374 of the Explanatory Memorandum).

39. Proposed sub-s.68D(2) therefore only clarifies the operation of sub-s.68D(1) with respect to Chinese walls. It removes any uncertainty that an effective Chinese Wall in an organisation can prevent contraventions of proposed s.68C. As such, it is analogous to the common law defence of mistake of fact, like sub-s.68D(1), and only requires the defendant organisation to prove matters peculiarly within its knowledge.

Proposed SIA sub-s.91(2) - Defence (Page 21)

40. Proposed sub-s.91(2)(which follows the existing sub-s.91(2)) presumes that the employer or principal is aware of the facts or occurrences relating to securities of which an employee or agent, "being an employee or agent having duties or acting in relation to the employer's or principal's interest in the relevant securities", is aware. Thus it is only the knowledge of certain employees' or agents' knowledge that is relevant.

41. The Committee states that proposed sub-s.91(2) casts on the defendant the onus of proving either:

"(a) that agents or employees of the person were unaware of facts - a matter not peculiarly within the knowledge of the defendant; or

(b) that those agents or employees were aware of those facts but did not divulge them to the defendant - again, not necessarily a matter peculiarly within the knowledge of the defendant".

42. However, it is submitted that the sub-section casts no onus on the defendant as described in (a) above. Proposed sub-s.91(2) deems that the defendant is presumed to have been aware of certain facts only if a relevant agent or employee is found to be aware of those facts, i.e. it will be necessary for the prosecution to prove that the agent or employee was aware of those facts, before the presumption of knowledge on the defendant's part arises. Therefore, the defendant does not bear the onus of disproving that the relevant agent or employee was aware of particular facts, - the prosecution bears the onus of proof on this issue.

43. Where it is proved that a relevant agent or employee was aware of the facts, the proposed sub-section casts the onus on the defendant of proving that the defendant was unaware of those facts. However, with respect it is submitted that, contrary to the Committee's view, this is a matter that is peculiarly within the defendant's knowledge, because it relates directly to the defendant's knowledge or otherwise of particular facts. Therefore, it is submitted that the reversal of the onus of proof in these circumstances is justified.

44. This sub-section acts to limit the wide defence given by sub-s. 91(1) which would otherwise allow licensees and financial journalists (and, under the proposed sections, holders of proper authorities (proposed sub-s.88(1)) to avoid compliance with the Part through arrangements to delegate

control of their financial interests, or who may have such arrangements in place for other reasons. Further, many licensees are bodies corporate, and without a provision such as proposed sub-s.91(2) prosecutions would not be practicable.

Numbering of the Bill (Page 21)

45. The Committee's concerns regarding the numbering of the Bill are noted. However, the options available when numbering an amending Bill of the kind are extremely limited.

46. Clause 16 of the Bill serves as an example. It inserts into the Companies Act 1981 a new Division consisting of 20 Subdivisions and 90 new sections. If the Division is not simply to be added at the end of the Act but rather inserted at a point where it makes most sense in terms of the Act's arrangement, the drafter must somehow "find " 90 section numbers between sections 133 and 134. In the present case this was done by giving each new section a number consisting of "133" followed by, first, the letter denoting the Subdivision in which the section occurs, and then a further distinguishing letter. It is suggested that this approach gives the reader as much help as is possible in the circumstances.

47. It should also be noted that Part 9 of the Bill goes to the trouble of remaking the last 3 sections of each of the very short Acts it amends. One reason for doing this was to avoid the use of letter-numbers (i.e. section numbers consisting of digits followed by one or more letters). However, this course is rarely available in the case of longer Acts.

48. The Committee may also have in mind how the new sections will look in the Principal Acts once the Bill is enacted and proclaimed. On some previous occasions when the Committee has commented on the numbering of a Bill, the Government has responded by agreeing to include a clause (a "renumbering clause") providing for the amended Principal Act to be renumbered.

49. However, this solution is not feasible in the case of the Co-operative Scheme legislation. For one thing, it would cause major disruption to the legislative device on which the Co-operative Scheme is based. The Commonwealth Co-operative Scheme Acts apply, by virtue of the State Application of Laws Acts, as laws of the States. The State Acts modify the Commonwealth Acts as so applying, and refer extensively to provisions of the Commonwealth Acts by their existing numbers. To change those numbers would make nonsense of the State Acts.

50. Quite apart from that, a renumbering would cause a huge amount of work for the Reprints Section in the Attorney-General's Department, for the Commonwealth Government Printer, for commercial publishers of the legislation, and for the States, each of which publishes its own edition of the Commonwealth Acts as they apply in that State.

51. A renumbering clause would not improve the readability of the amending Bill while it is a Bill. Since the renumbering would not happen until the Bill becomes law, the sections in the Bill must be based on the old numbering.

52. Furthermore, many legal practitioners, accountants and other users of the legislation are opposed to the Acts being renumbered. Renumbering causes considerable confusion and inconvenience. The new numbers would have to be learnt for the purposes of reference to, and discussion of, the legislation. References in other legislation and in private agreements would need to be updated. Explanatory memoranda, text books and letters of advice would need to be rewritten, or read with concordances that relate the old numbering to the new.

53. All these problems would be exacerbated by the fact that companies and securities legislation is extensively amended quite often. The Securities Industry Act 1980 gained around 80 new sections from an amending Bill passed in 1987. The 1989 Bill inserts over 70 more. If both Bills had contained renumbering clauses, users of the Act would have had to familiarise themselves with 2 radically different new numberings within 3 years.

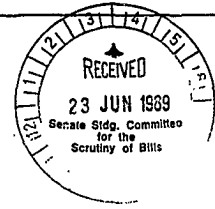
54. To outweigh these objections, a renumbering of the Acts amended by the Bill would need to produce very great benefits. It is submitted that a renumbering would not produce such benefits in practice.

55. In due course, it is anticipated that the Corporation Bill 1988 (which is currently awaiting Royal Assent) may be amended to bring it into line with the amendments of the Companies Act made by Parts 3 and 4 of the Bill. A similar numbering scheme to that employed in the Bill will be used when this is done. The digits in the section numbers will change, but the same letter combinations will be kept. This should minimise disruption for users of the legislation who have become familiar with the Companies Act provisions.

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
THE HON. JOHN KERIN, M.P.

Parliament House,
Canberra ACT 2600
Telephone (062) 77 7520
Facsimile (062) 73 4120

21 JUN 1989



Senator B Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I am writing in relation to the comments in the "Scrutiny of Bills Alert Digest" of 31 May 1989 that refer to the package of draft legislation on exotic animal disease control which I tabled on 24 May 1989.

I will arrange for an amendment to be made to the Exotic Animal Disease Control Bill 1989 pursuant to the Committee's request for tabling before Parliament of any Ministerial direction given to the Exotic Animal Disease Preparedness Consultative Council.

In regard to the view expressed by the Committee on the definition of exotic animal disease, I would point out that the specification of a new disease would not, of itself, commit the Consultative Council nor the Government to any particular action. Rather, a determination that a new exotic disease may pose a threat to Australia's livestock based industries would simply make it possible for decisions and actions to be taken by the Consultative Council and the Government if deemed appropriate. Any such decisions or actions would be subject to the same accountability and review provisions which apply to the diseases specifically listed in the Control Bill, and would of course have to be reported in the Annual Reports of the Council which will be tabled before Parliament. It also seems to me that it is possible that any new exotic disease threat that might emerge would do so without advance warning, and could require that an urgent determination be made so that immediate decisions on control action could be taken.

Against this background, I strongly believe that it would be inappropriate to amend the Control Bill to provide for determination of new exotic diseases by Regulation.

You also made reference to a perceived anomaly with the Live-stock Slaughter Levy Amendment Bill 1989 in regard to prescription of maximum rates of levy for exotic disease control purposes. As indicated in my Second Reading Speech on the Control Bill, industry contributions to the Exotic Animal Disease Preparedness Trust Account will be subject to a maximum limit of $750,000 per annum. Accordingly, there will be a finite limit on the annual contributions to be made by the red meat industry through the livestock slaughter levy, that being $750,000 less the combined total contribution of the other livestock based industries.

When the Control and Levy Amendment Bills were being finalised it was apparent that the smaller livestock based industries (dairy, eggs, chicken meat and pig meat) would not accept shares of the $750,000 funding limit greater than their relative contributions to the combined gross value of production of all the livestock based industries. Accordingly, it was appropriate to set maximum levy rates for exotic disease control purposes in the other Levy Amendment Bills to reflect these relativities.

However, discussion is continuing between the red meat and wool industries on the appropriate basis for allocating what will be the major shares of the $750,000 funding limit. In these circumstances, it seems to me that any maximum rates included in the Live-stock Levy Amendment Bill could have no more than notional significance and could very well be an unhelpful move by Government to amicable resolution of the continuing industry discussion.

At any rate, it is clear that the Government will be led in the setting of all industry contributions by industry's advice, as this initiative involves the establishment of an industry self-taxing mechanism for industry self-interest purposes. Moreover, all operative levy rates will be set by Regulations which will be reviewable and disallowable by the Senate.

I, therefore, believe that the current provisions of the Slaughter Levy Amendment Bill are appropriate.

Yours fraternally

John Kerin

John Kerin

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

GCD89/4821DB

13 JUL 1989

Dear Barney

Thank you for the comments of the Senate Standing Committee for the Scrutiny of Bills on the Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989 contained in Scrutiny of Bills Alert Digest No.8 of 1989 which were forwarded to me in a letter dated 8 June 1989 from the Secretary to the Committee.

I have noted the Committee's comments on the Bill and do not wish to add anything beyond the explanations contained in the Explanatory Memorandum for the Bill and my Second Reading Speech.

Yours sincerely

(Lionel Bowen)

Senator B C Cooney
Chairman
Senate Standing Comittee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT OF 1989

30 AUGUST 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1989

30 AUGUST 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1989

The Committee has the honour to present its Twelfth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Child Support (Assessment) Bill 1989

Income Equalization Deposits Laws Amendment Act 1989

Industry, Technology and Commerce Legislation Amendment Act 1989

Law and Justice Legislation Amendment Bill 1989

Textiles Clothing and Footwear Development Authority Act 1988

Veterans' Affairs Legislation Amendment Act 1989

CHILD SUPPORT (ASSESSMENT) BILL 1989

This bill was introduced into the House of Representatives on 1 June 1989 by the Acting Minister for Social Security.

The bill proposes to provide for the registration, collection and enforcement of court orders for maintenance by the Child Support Registrar. It proposes to provide administrative assessment of child support by the Registrar which would be registerable under the Child Support Act 1988 which is to be renamed the Child Support (Registration and Collection) Act 1988.

The bill was commented upon by the Committee in Alert Digest No.8 of 1989.

The Committee draws the following aspects of the bill to the attention of the Senate.

Proposed paragraph 51(c) - 'Half a child'

The Committee requested that the reference to 'half a child' be redrafted using more appropriate terminology.

The Minister has responded that the reference to half a child is to be amended to read 'the number attributed to each shared custody child (if any) taken to be 0.5.'

The Committee thanks the Minister for his response but considers that the use of the terms 'half a child' or '0.5 of a child' should be replaced by more appropriate terminology.

Subclause 100(2) - Imposition of liability

The Committee was concerned that in establishing a criminal offence on the basis of what a person ought reasonably to have known, the bill appears to be removing the requirement of *mens rea* in a criminal offence.

The Minister has informed the Committee that the provision was inserted into the bill on the advice of the Attorney-General. The Minister refers to the response of the Attorney-General to the Committee's concerns in respect of proposed subsections 85ZKA(3) and 85ZKB(3) of the Crimes Act 1914 which are in similar terms to subsection 100(2).

The Committee thanks the Minister for his response which is attached to this Report.

INCOME EQUALIZATION DEPOSITS LAWS AMENDMENT ACT 1989

The bill was introduced into the House of Representatives on 23 May 1989 by the Minister for Primary Industries and Energy and received the Royal Assent on 14 June 1989.

This Act amends the Loan (Income Equalization Deposits) Act 1976 and the Income Tax Assessment Act 1936 to give effect to major changes to the provisions for the making of income equalization deposits by primary producers. The essential change is that from 1 July 1989 deposits made by primary producers with the Government as cash reserves will be tax deductible in the year of deposit and assessable for income tax purposes in the year the deposit is withdrawn.

In Alert Digest No.7 of 1989 (31 May 1989) the Committee drew attention to the following provisions of the legislation.

Section 3 - Definition of investment component

The definition of investment component in Section 3 of the Loan (Income Equalization Deposits) Act 1976 is subject to alteration by regulation. The Committee sought the views of the Minister as to the reason for this provision.

In his response the Minister states the establishment of the investment component by regulation is to allow easy and rapid change where necessary, and that the investment component needs to be changed to reflect any significant changes in the income profile of depositors.

Any determination of a regulation would be laid before Parliament and be subject to disallowance.

Subsection 19(1) - Review of decision

The Committee pointed out that there was no provision for merits review of a decision by the 'authorised person' of whether or not an owner of a deposit was an eligible primary producer.

The lack of merits review was contrasted with subsections 20C(3) and 22(3) of the Act which allow for merits review of a decision by the 'authorised person' by the Administrative Appeals Tribunal.

The Minister has responded that a specific merits review mechanism was not considered necessary in this instance. The authorised person must, when satisfied that the owner of a deposit is not an eligible primary producer, declare in writing that the deposit has become repayable.

The Act provides that an authorised person cannot make such a declaration while a request for withdrawal of deposit is pending, and that a grace period of 120 days is provided after a primary producer leaves the industry before that person is declared not to be a primary producer.

The Minister is of the opinion that the procedure outlined provides ample opportunity for a depositor to demonstrate whether that person is an eligible primary producer.

The Committee thanks the Minister for his response but points out that the provision should allow merits review of the decision of an authorised person.

The response of the Minister is attached to this Report.

INDUSTRY, TECHNOLOGY AND COMMERCE LEGISLATION AMENDMENT ACT 1989

The Act was introduced into the House of Representatives on 11 May 1989, by the Minister representing the Ministry for Industry, Technology and Commerce.

The Act was subject to comment by the Committee in Alert Digest No.6 of 1989 and the Ninth Report of 1989 (7 June 1989) and received the Royal Assent on 27 June 1989.

The Minister has since responded to the Committee.

Annual Report - Australian Industry Development Corporation (AIDC)

The Committee requested that the Minister make arrangements to table the AIDC Annual Report before Parliament. The Minister has undertaken to table the annual report and the Committee thanks him for this undertaking.

Part III of the Act - sections 23F, 23G and 23H

The Committee requested that the Minister make arrangements to have matters subject to the terms of the sections tabled before Parliament.

The sections require corporate plans to be given to the Minister (section 23F), give the Minister power to direct certain variations of the corporate plan (section 23G) and require that the AIDC Board notify the Minister of certain significant events (section 23H).

In his response the Minister has informed the Committee that section 23G was amended during the Senate Second Reading Debate, to provide that any direction given to the AIDC Board by the Minister to vary the financial target of the AIDC is to be tabled before Parliament.

There is no legislative requirement to have documentation of all matters subject to sections 23F and 23H tabled before Parliament. The Minister has informed the Committee that the AIDC is required to include in its annual report several matters which are required to be incorporated in the corporate plan, and which cover a number of the provisions of sections 23F and 23H.

In the view of the Minister a legislative requirement to table before the Parliament the matters in sections 23G and 23H is

> 'inappropriate as sensitive commercial information could be released and disadvantage AIDC in the market'.

The Committee thanks the Minister for this response.

Although the legislation has passed the Parliament the Committee regards the issues raised as important and they are drawn to the attention of the Senate.

The response of the Minister is attached to this Report.

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1989

This bill was introduced into the House of Representatives on 25 May 1989 by the Attorney-General.

The bill proposes to amend 13 Acts falling within the responsibility of the Attorney-General's portfolio. Several amendments are of a policy nature and some minor technical amendments are also proposed.

The bill was commented upon by the Committee in Alert Digest No.7 (31 May 1989).

Proposed subsections 85ZKA(3) and 85ZKB(3) - Imposition of criminal liability

The proposed subsections 85ZKA(3) and 85ZKB(3) of the Crimes Act 1914 to be inserted by Clause 8 of the bill, may in the Committee's view impose criminal liability on persons who had a state of mind that was something less than knowledge of the facts; and that in establishing a criminal offence on the basis of what a person ought reasonably to have known the bill may remove the element of mens rea in criminal offences.

The Minister has responded to the Committee stating that mens rea has been described by the Chief Justice of the High Court 'as an evil intention or a knowledge of the wrongfulness of an act which is the essential ingredient of an offence'. The

term may also include recklessness (conscious unreasonable risk-taking) and in some cases negligence (inadvertent unreasonable risk-taking). (Gibbs C.J. in He Kaw Teh v the Queen (1984-85) 157 CLR at p.530).

The Minister states that mens rea may be determined by a state of mind, or a failure to comply with a standard of conduct or a combination of state of mind or failure to comply with a standard of conduct, and that mens rea is not necessarily synonymous with actual knowledge.

In response to the concern expressed by the Committee that the subsections impose criminal liability on persons who possess a state of mind less than knowledge of the facts. The Minister states that the criteria for criminal liability is not only actual knowledge but may be recklessness or, in the case of certain offences (such as manslaughter), negligence. However regardless of the criterion all offences are 'mens rea' offences.

The Attorney-General has informed the Committee -

> It should be borne in mind that the test is not that a reasonable person in similar circumstances should have known but rather the defendant, having regard to his or her other abilities, experiences, qualifications and other attributes and the circumstances, should have known. While the test may be objective in part (i.e. ought reasonably to have known) it is subjectively based (i.e. whether the person, having regard to his or her individual traits etc. should have known).

> Thus the formulation adopted is directed at creating an offence the mens rea of which covers both actual knowledge and recklessness (including wilful blindness) and takes into account the characteristics of the defendant and all the surrounding circumstances.

The Committee notes the response of the Minister but considers that where legislation creates a serious offence, an element of that offence ought to be a guilty intention or a reckless disregard of the consequences of that act. Mere negligence should not be enough to make a person guilty of a serious crime.

The test provided in the proposed subsections to visit criminality on a person is that he or she 'ought reasonably to have known of the existence of a set of facts.' This test is less stringent than one requiring actual knowledge or a reckless disregard of the facts which the Committee considers the appropriate standard to be applied before a person is found guilty of a serious offence.

The Committee's comments similarly apply to Subclause 100(2) of the Child Support (Assessment) Bill.

The Minister's response is attached to this Report.

TEXTILES CLOTHING AND FOOTWEAR DEVELOPMENT AUTHORITY ACT 1988

The response of the Minister in respect of the Committee's comments on this Act have not been previously reported by the Committee. Although the Act passed the Parliament in 1988 there are several matters in the Minister's response that the Committee feels should be brought to the attention of the Senate.

Clause 46 - Power to summon witnesses

The Committee was concerned that the Chairman of the Authority would have had the power to summon witnesses without a requirement that the time and place for the giving of evidence and production of books and documents be reasonable.

The Committee is pleased to note that the provision was deleted from the bill during the second reading debate.

Section 59 - Recovery of costs

The Minister has answered the concern of the Committee that the section permitted the Commonwealth to recover the cost of registering a judgement in a court of competent jurisdiction against a person who had been convicted of an offence under *subsection 58(1)*.

The section provides for the Commonwealth to recover any grant (other than a loan) made to a person or body corporate

convicted under section 58 of knowingly providing false or misleading information to the Authority.

The Minister states that the Government's view is that a person should compensate the Commonwealth for all costs involved in recovering a grant; including any relevant costs of registering a certificate in the appropriate court. The provision enables this to be done where a court does not have the appropriate level of civil jurisdiction for the amount required to be repaid.

Section 66 - Delegation

The Committee was concerned that paragraph 66(1)(c) allowed the Authority with the consent of the Minister, to have an unfettered discretion as to the attributes of a person to whom it might delegate its powers.

The Minister's response states that because of the widespread nature of the industries with which the Authority is concerned, the power to delegate certain of the powers of the Authority is vital to the efficient operation of the Authority.

The Committee notes that the delegation to a person not a member of the Authority or its staff is subject to the important caveat of approval by the Minister. However, the Committee prefers all delegations to be subject to legislative criteria.

VETERANS' AFFAIRS LEGISLATION AMENDMENT ACT 1989

This bill was introduced into the House of Representatives on 3 May 1989 by the Minister for Veterans' Affairs, and received the Royal Assent on 27 June, 1989.

The Act extends repatriation pensions and benefits to Australian Defence Force personnel who serve with the United Nations Transition Assistance Group Namibia. Other amendments relate to technical and administrative adjustments to the portfolio.

The Committee noted in Alert Digest No. 5 (10 May 1989) that certain sections of the bill had retrospective effect but as the retrospectivity would be beneficial to persons affected by the Act, and was adequately explained in the Explanatory Memorandum, the Committee had no other comment.

A member of the House of Representatives and The Returned Services League of Australia have both drawn to the Committee's attention a Departmental instruction that subsection 11(c) of the Act is in their view being administered in a manner that is contrary to the provisions of the subsection. A copy of the letter from The Returned Services League is attached to this Report for the information of Senators.

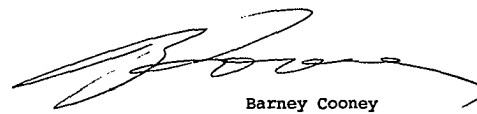
The matters raised by The Returned services League and the Honourable Member are not within the Committee's terms of reference.

The Senate has given the Committee a particular task, namely to put proposed legislation to the specific tests outlined in the Committee's terms of reference. The Committee reports to the Senate the results of its analysis of legislation.

The role of the Committee is solely to deal with proposed legislation, not to examine the manner in which that legislation is administered.

Maladministration of legislation may be remedied in the Courts, or through complaints to Members of the Parliament who take up the relevant issues with the appropriate Minister.

The Committee is not empowered to do more than point out to a Minister that a Department has apparently failed to comply with a particular legislative provision. Certainly the Committee is unable to give a final decision in any dispute between a department and a citizen when to do so might make the Committee appear to be acting in an inappropriate adjudicative role.

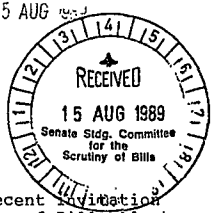


Barney Cooney
(Chairman)

30 August 1989

COMMONWEALTH OF AUSTRALIA

MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600.



Senator B C Cooney
Chairperson
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I am writing in response to your Committee's recent invitation to respond to comments contained in the Scrutiny of Bills Alert Digest No 8 of 1989 concerning the Child Support (Assessment) Bill 1989.

Your Committee raised two concerns:

(i) first, that the reference in proposed paragraph 51(c) to *each shared custody child of the liable parent* being taken to be half a child was a totally inappropriate term; and

(ii) secondly, that in establishing a criminal offence as the basis of what a person "ought reasonably to have known" subclause 100(2) is apparently removing the requirement of "mens rea" in a criminal offence.

Turning to your Committee's first concern, it is now proposed to make an amendment to the Bill to replace the reference to "half a child" with "the number attributed to each shared custody child (if any) taken to be 0.5".

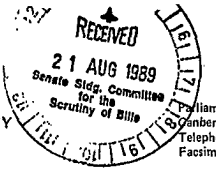
With respect to your Committee's second concern, I would point out that subclause 100(2) of the Bill was inserted on the advice of the Attorney-General's Department which is responsible for criminal law policy matters. In view of your Committee's comments I sought the advice of the Attorney-General. The Attorney-General suggested that I refer your Committee to his letter to you of 11 July 1989 in which the Attorney-General explained proposed subsections 85ZKA(3) and 85ZKB(3) of the Crimes Act 1914 which are in similar terms to subclause 100(2) of the Child Support (Assessment) Bill 1989.

Yours sincerely

Brian Howe

BRIAN HOWE

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
THE HON. JOHN KERIN, M.P.



Parliament House,
Canberra ACT 2600
Telephone (062) 77 7520
Facsimile (062) 73 4120

21 AUG 1989

Senator B C Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to comments made by the Standing Committee for the Scrutiny of Bills in the Scrutiny of Bills Alert Digest No 7 of 1989 concerning the Income Equalization Deposits Laws Amendment Bill 1989.

The Committee notes that the definition of the investment component of deposits under the new Act is subject to alteration by regulation. It also notes that this approach might have been taken to allow rapid change of the definition.

The Committee is quite right in that it was decided to establish the investment component by regulation to allow easy and ready change where necessary. The investment component would need to be changed to reflect any significant change in the income profile of depositors.

As the Committee would be aware, any determination of a regulation would be laid before Parliament and be open to objection in the normal manner.

The Committee also noted that no specific merits review mechanism was established in this Bill for the determination, under subsection 19(1), by the "authorised person" of whether or not an owner of a deposit was an eligible primary producer.

A specific merits review mechanism was not considered necessary in this instance. The Bill provides that where the authorised person is satisfied that the owner of a deposit is not an eligible primary producer the authorised person must declare in writing that the deposit has become repayable. The Bill also provides that the authorised person cannot make such a declaration while a request for withdrawal of a deposit is pending. As well, the Bill provides a grace period of 120 days after a primary producer leaves the industry before he is declared not to be a primary producer to take account of those moving from one primary production business to another.

Further, where the authorised person declares in writing that a deposit has become repayable (due to the owner not being an eligible primary producer), the authorised person must, in writing, advise the person to whom the deposit concerned is repayable that the person should, within 14 days after receiving the advice, provide a statement of the assessable amount and any relevant information. The authorised person cannot repay deposits until this information is received or 14 days have passed, whichever is the earlier. As well, the deposit holder would be able to take advantage of the 120 day grace period if he/she expects to re-enter primary production within that time.

This procedure is considered to provide ample opportunity for a depositor to demonstrate whether he/she is an eligible primary producer. The determination of an eligible primary producer is set out in Section 3 of the Act.

I trust these comments are of assistance.

Yours fraternally

John Kerin

MINISTER FOR INDUSTRY,
TECHNOLOGY AND COMMERCE
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

Senator Barney C Cooney
Chairman
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to your Committee Secretary's letter of 26 May 1989 to my Office concerning the Committee's comments on the then Industry, Technology and Commerce Legislation Amendment Bill 1989 contained in the Scrutiny of Bills Alert Digest No. 6 of 24 May 1989.

The Committee commented on part of clause 11 of the Bill, specifically proposed sections 23F, 23G and 23H of the Australian Industry Development Corporation Act 1970 which relate to the AIDC's corporate plan. The Committee was of the opinion that any action taken under these provisions should be required to be tabled in Parliament.

Proposed section 23G was amended on the floor of the Senate during the Second Reading Debate to provide that any direction which the Minister gives to the AIDC Board to vary the financial target of the AIDC shall be tabled before Parliament. The Government accepted that amendment.

Proposed section 23F requires the Board to give the Minister a copy of each AIDC corporate plan as soon as practicable and proposed section 23H requires the Board to notify the Minister of matters which will prevent or significantly affect the achievement of the objectives or financial target under a corporate plan.

There is no legislative requirement to have the documentation for these matters laid before Parliament. However, the AIDC is required to include in its annual report several of the matters which must be incorporated in the corporate plan. These matters are listed in proposed subsection 37(2C) of the AIDC Act (subclause 17(1) of the Bill) and include the objectives of the Corporation and its eligible subsidiaries under the corporate plan, an outline of the overall strategies and policies of the Corporation, an assessment of the extent it has achieved its objectives, the financial target, an assessment of the progress in achieving the financial target and the dividend payable to the Commonwealth.

I am of the view that a legislative requirement to table in Parliament the matters in proposed sections 23G and 23H is inappropriate as sensitive commercial information could be released and disadvantage AIDC in the market. However as suggested by the Committee I undertake to table the AIDC's annual report in the Parliament once it is publicly released. This accords with practice of the Minister of Transport and Communications as regards QANTAS' annual report as outlined in the Committee's letter.

Yours sincerely

John N Button

(John N Button)

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

11 JUL 1989

Dear Senator Cooney

I am writing in response to your Committee's recent invitation to respond to comments contained in Scrutiny of Bills Alert Digest No. 7 of 1989 concerning the Law and Justice Legislation Amendment Bill 1989.

Your Committee has expressed two main concerns:

(i) that the proposed subsections 85ZKA(3) and 85ZKB(3) of the Crimes Act 1913, to be inserted by Clause 8 of the Bill would impose criminal liability upon persons who had a state of mind that was something less than knowledge of the facts; and

(ii) that in establishing a criminal offence on the basis of what a person ought reasonably to know the Bill is apparently removing the requirement of mens rea in criminal offences.

Before turning to the specific issues it is necessary to consider what is meant by 'mens rea'. The question of rationalisation and simplification of this area of the law is currently being considered by the Review of Commonwealth Criminal Law, (Discussion Paper 21, 'General Principles Relating to Criminal Responsibility'). It is expected that the Review will report next month on this issue. The Discussion Paper provides a useful summary of the law concerning 'mens rea' and how the Courts have applied it to Commonwealth legislation.

The expression 'mens rea' is "ambiguous and imprecise", (according to Gibbs CJ in He Kaw Teh -v- the Queen (1984-1985) 157 CLR at p.530). Gibbs CJ noted that while 'mens rea' is accurately described "as an evil intention or a knowledge of the wrongfulness of the act" which is the essential ingredient of an offence, it also may include recklessness (conscious unreasonable risk-taking) and in some cases negligence (inadvertent unreasonable risk-taking). Gibbs CJ also said, "there is no single mental element that is common to all offences". For example, in manslaughter or culpable driving, it is sufficient to prove negligence. Accordingly mens rea may be determined by a state of mind, such as knowledge or intention, or by a failure to comply with a standard of conduct (for example, negligence) or a combination of a state of mind and a failure to comply with a standard (for example, recklessness). It is therefore not the case that 'mens rea' is synonymous with actual knowledge.

At common law 'mens rea' is a constituent part of any statutory offence, unless having regard to the statute or its subject matter, that presumption is rebutted. In He Kaw Teh it was held that where a statute is silent concerning the mental element, 'mens rea' will be imputed where the subject matter of the offence is criminal in a real sense (i.e. is a serious offence and involves imprisonment).

In addition to 'mens rea' offences there are two further classes of offences, strict liability and absolute liability. In circumstances where the offence is less serious, and the absence of the requirement to prove 'mens rea' is an important aid to effective enforcement, it is not necessary to prove the mental element. Those offences are called "strict liability" offences, (for example, minor traffic offences and health regulations) and are subject to the defence of honest and reasonable mistake of fact. The defence arises where the accused entertains an honest belief in the existence of facts which, if true, would make the act charged innocent. In such cases the accused must raise the defence, though the prosecution has the ultimate onus of proving the elements which constitute the offence. The final class of offences is absolute liability offences which are those where the statute clearly indicates there is no 'mens rea' requirement. As a defence of honest and reasonable mistake of fact is imputed where the statute is silent, the statute would need to specifically state that the offence is one of absolute liability. Absolute liability offences are rarely created.

I turn now to your Committee's first concern, which was that proposed subsections 85ZKA(3) and 85ZKB(3) impose criminal liability upon persons who have a state of mind that is something less than knowledge of the facts. There are many circumstances in the criminal law where criminal liability is imposed on something less than actual knowledge. As outlined above the criterion for criminal liability may be actual knowledge, recklessness or in certain circumstances (for example, manslaughter) negligence. Regardless of the criterion all offences are 'mens rea' offences.

Your Committee's second concern was that in establishing a criminal offence on the basis of what a person ought reasonably to know, the Bill is apparently removing the requirement of mens rea in criminal offences. This concern seems to be based on an assumption that 'mens rea' requires actual knowledge, and this is not the case. Clearly 'mens rea' may be satisfied by something less than actual knowledge. The drafting of the provisions does not remove the requirement of mens rea.

What may be of concern to your Committee is the test of "ought reasonably to know". The legislative intention behind the provision is to cover both actual knowledge and recklessness. In certain circumstances "wilful blindness" may be construed as actual knowledge (see the facts of He Kaw Teh), but it may be that not all circumstances of wilful blindness will be taken as actual knowledge. It is theoretically better to treat "wilful blindness" as a type of recklessness rather than elevate it to actual knowledge. Thus the provisions have been formulated to cover both actual knowledge and recklessness (i.e. in other words where the defendant knew, or ought reasonably to have known).

It should be borne in mind that the test is not that a reasonable person in similar circumstances should have known but rather the defendant, having regard to his or her abilities, experiences, qualifications and other attributes and the circumstances, should have known. While the test may be objective in part (i.e. ought reasonably to have known) it is subjectively based (i.e. whether the person, having regard to his or her individual traits etc, should have known).

Thus the formulation adopted is directed at creating an offence the *mens rea* of which covers both actual knowledge and recklessness (including wilful blindness) and takes into account the characteristics of the defendant and all the surrounding circumstances.

Your Committee also drew attention to a misdescription of subsections 85ZKA and 85ZKB of the Crimes Act in paragraph 9 and 11 of the Explanatory Memorandum to the Bill. A Correction to the Explanatory Memorandum will be tabled in the House of Representatives when debate resumes on the Bill.

Yours sincerely

(Lionel Bowen)

Senator B.C. Cooney
Chairperson
Senate Standing Committee for the
Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

NATIONAL HEADQUARTERS

THE RETURNED SERVICES LEAGUE OF AUSTRALIA

GPO Box 303
Canberra ACT 2601
Ph: (062) 487199
Fax: (062) 477637

In reply quote IJG:BH R1-1-51

22 August 1989

Senator B Cooney
Chairman
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

The RSL is concerned for matters arising out of enactment of the Veterans' Affairs Legislation Amendment Act 1989. This Act was introduced by the Government primarily to provide operational service cover under the VEA for members of the Australian Army posted to Namibia.

However, Section 11(c) of the Act brought about an amendment in respect of an unrelated matter i.e. service pension eligibility for Commonwealth veterans now resident in Australia.

At the request of the RSL the Opposition and the Democrats combined to postpone the date of commencement of this Section to 1 January 1990 so that an inquiry currently being conducted by the Deputy President of the Repatriation Commission on this matter, amongst others, could be completed.

However, the Department of Veterans' Affairs now appears to have disregarded Parliament's intentions in respect of the date of commencement - a question by the Shadow Minister for Veterans' Affairs in the House of Representatives on 17 August refers.

We would be grateful if your Committee would look into this matter.

Yours sincerely

IAN GOLLINGS
National Secretary

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT OF 1989

6 SEPTEMBER 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1989

6 SEPTEMBER 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1989

The Committee has the honour to present its Thirteenth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Child Support (Assessment) Bill 1989

Close Corporations Act 1989

Family Law Amendment Bill 1989

Privacy Amendment Bill 1989

Social Security and Veterans' Affairs Legislation Amendment Act (No 2) 1989

CHILD SUPPORT (ASSESSMENT) BILL 1989

This bill was introduced into the House of Representatives on 1 June 1989 by the Acting Minister for Social Security.

The bill was included in the Twelfth Report of the Committee (30 August 1989). A further matter relating to the provisions of the bill has since been brought to the attention of the Committee.

Clause 5 - Definition of parent

The definition of parent in clause 5 of the bill uses the word 'means' rather than 'includes'. The normal construction given to the use of 'means' in a definition makes the term exclusive of any other meaning the defined word or phrase might have. In relation to the definition of parent in this bill, the definition would exclude all natural parents from its ambit.

The Committee draws the matter to the attention of the Senate and trusts that it will assist Senators when the bill is debated.

CLOSE CORPORATIONS ACT 1989

This Act was included in the Third Report of 1989 (5 April 1989) and received the Royal Assent on 14 July 1989.

Section 153 - Reversal of onus of proof

This provision was commented upon by the Committee in Alert Digest No.10 of 1988 (31 August 1988) as reversing the onus of proof in a criminal prosecution.

The Acting Attorney-General responded to the Committee on 20 January 1989 and stated that the provision would be amended to meet the concerns of the Committee. Accordingly the Committee did not make a subsequent comment on the measure in its Third Report.

The Act has now received the Royal Assent and has been printed, but section 153 remains in the same form as when the Committee first commented upon it.

The Committee requests that the Minister make appropriate arrangements to amend the section to accord with the terms of his response to the Committee.

The relevant paragraph of the Minister's response of 20 January 1989 is attached to this Report.

FAMILY LAW AMENDMENT BILL 1989

This bill was introduced into the Senate on 16 June 1989 by the Minister for Justice.

The bill proposes to amend the Family Law Act 1975, principally to provide force to orders and a mechanism to ensure that concerned parties and the courts address the problems of access to ensure that all needs of parties in dispute are met in an appropriate way.

The Committee drew proposed new subsections 112AP(4) and (5) to the attention of the Senate in Alert Digest No.9 of 1989 (16 August 1989) and the Minister has responded to the concerns of the Committee.

In the view of the Committee the proposed subsections of the Principal Act will allow a court to punish a person or corporation for contempt with no maximum limit to the fine that may be imposed, or the term of imprisonment that may be set.

The Minister has informed the Committee that the provisions are in relation to contempt of court and as such are not provisions imposing criminal penalties. However, the Minister notes that the provisions will apply to contempts that have previously been categorised as criminal contempts; and the penalties imposed are a matter of judicial rather than administrative discretion.

In his response the Minister has drawn attention to judicial comment on the apparent severity of penalties available in contempt matters in the case of Australian Meat Industry Employees Union and others v Mudginberri Station Pty Ltd (1986) 66 ALR 577.

The Committee thanks the Minister for his prompt and detailed response.

The matter is drawn to the attention of the Senate.

The response of the Minister is attached to this Report.

PRIVACY AMENDMENT BILL 1989

This bill was introduced into the Senate on 16 June 1989 by the Minister for Consumer Affairs.

The bill proposes to amend the Privacy Act 1988 to provide privacy protection for individuals in relation to their consumer credit records. The bill principally adopts the OECD Guidelines on Personal Privacy which Australia has adhered to.

The Committee commented on the provisions of the bill in Alert Digest No.9 of 1989 (16 August 1989) and the Minister has replied to the Committee.

Proposed subsection 11B(2) - Discretion to exempt a class of credit providers

The Committee commented on two aspects of the proposed subsection. The provision would grant to the Governor-General acting on the advice of the Executive Council the discretion to exempt a class of credit providers from obligations to be imposed by proposed Part IIIA of the Principal Act. Further the provision will allow the application of subsection 11B(1) to be changed by regulation.

The Minister has informed the Committee that proposed subsection 11B(2) will allow a corporation that is 'prima facie' a credit provider, to be exempted by regulation from the provisions of the legislation applying to credit providers. The regulation will be tabled and subject to disallowance.

The purpose of the provision as outlined by the Minister is to allow flexibility in the regulatory scheme for the determination of who is a credit provider. There is provision in the bill in subparagraph 11B(1)(b)(v) to enable classes of corporations that are not within the categories of bodies defined as credit providers by the legislation to be determined to be credit providers by the Privacy Commissioner. The determination is reviewable by Parliament.

There is also provision in the proposed subsection to allow bodies which fall within the definition of credit provider, but do not provide consumer credit or have ceased to provide consumer credit, to be declared by regulation not to be credit providers.

The Minister states that the flexibility provided is required to enable the legislative scheme to be able to adapt to the changing circumstances of credit providers.

The Minister informs the Committee,

> I would consider it to be an unnecessary burden on the limited resources of the Parliament for it to be required to pass legislation dealing with the status of corporations under the Act each time their business operations changed.

The Committee thanks the Minister for his response. However, the Committee considers that policy changes of the magnitude of those proposed by the particular provisions of the bill should be incorporated within an amending bill as the primary source of legislation.

The response of the Minister is attached to this Report.

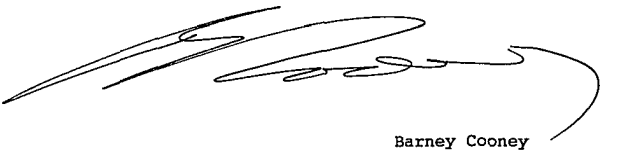
SOCIAL SECURITY AND VETERANS' AFFAIRS LEGISLATION AMENDMENT ACT (No 2) 1989

This Act was introduced into the House of Representatives on 10 May 1989 by the Minister for Veterans' Affairs and received the Royal Assent on 27 June 1989.

The Committee noted in Alert Digest No.6 of 1989 (24 May 1989) that certain provisions of the legislation have a retrospective effect, but as the retrospectivity was to correct drafting errors and for other technical reasons the Committee had no further comment.

The Minister has responded confirming the view of the Committee on the purpose of the retrospectivity and the Committee thanks the Minister for his courtesy in responding.

The response of the Minister is attached to this Report.



Barney Cooney
(Chairman)

6 September 1989

Clauses 153, 154, 155 and 159

21. It is recognised that subclauses 153(2), (3) and (4) are not in accordance with provisions usually contained in Commonwealth legislation because they remove the normal mens rea element for offences of this kind. The Government is prepared to introduce amendments so that the elements of intent to defraud or to conceal the state of affairs of the company are included as elements of the offence. These amendments would:

(a) omit subclauses 153(2), (3) and (4);

(b) add 'fraudulently' before 'concealed' in subparagraph 153(1)(c)(i) and before 'makes' in paragraph 153(1)(d);

(c) add 'fraudulently' before 'pawned' in subparagraph 153(1)(c)(v) and omit 'otherwise than in the ordinary course of business of the corporation' in that subparagraph; and

(d) add 'with intent to conceal the state of affairs of the corporation' after 'corporation' in paragraph 153(1)(f).

22. It is submitted that subclauses 154(2) and 155(2) are acceptable in that they deal with circumstances peculiarly within the defendant's knowledge which it would be difficult for the prosecution to disprove and relatively easy for the defendant to prove.

23. It is submitted that the defence is subclause 159(3) is analogous to the defence of 'honest and reasonable mistake of fact', the onus of establishing which lies with the defendant at common law. It is therefore submitted that this defence should be retained.

Minister for Justice
Senator The Hon. Michael Tate

JAL89-14281:67942:SPM

30 AUG 1989

Dear Senator Cooney

I refer to the comment made in Scrutiny of Bills Alert Digest No 9 of 1989 in relation to the Family Law Amendment Bill 1989. In the Alert Digest the attention of Senators has been drawn to proposed new subsections 112AP(4) and (5) of the Family Law Act, which deal with contempt of court in proceedings under that Act.

In the Alert Digest attention is drawn to the lack of similarity between the proposed provision and 'other criminal sanctions'. I suggest that this is not an appropriate analogy. The provision is in fact a provision in relation to contempt of court and is not therefore a provision imposing criminal penalties, although it will apply only in relation to those contempts which have been categorised in the past as criminal contempts.

The comment in the Digest also indicates a view that the provisions may trespass unduly on personal rights and liberties. This might be the case if the courts were to act irresponsibly. However, it is not probable that they would do so. In Australian Meat Industry Employees Union and others v Mudginberri Station Pty Ltd (1986) 66 ALR 577, the judges commented on the apparent severity of penalties available in contempt matters in the following terms,

> "These are considerable powers, resort to which imposes a heavy responsibility on a court confronted with a determined challenge to its authority. The propriety of their exercise cannot be measured solely by reference to the established procedures attending the prosecution of ordinary breaches of the law. Contempt of court is a distinctive offence attracting remedies which are sui generis. It is required of the chosen remedy that it be effective, no more but

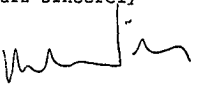
Parliament House, Canberra, A.C.T. 2600. Tel.(062) 77 7260, Fax. (062) 73 4136.

> no less. For, if it is not effective, serious and lasting damage to the fabric of the law will result." (at p 589, line 25)

I should also repeat what is stated in the Explanatory Memorandum. The provision under discussion is not new. It appears in the Bill as section 112AP only because of the restructuring of Part XIII, which has necessitated a relocation of the existing section 108. I mention that section 108 was included in the Family Law Bill 1974 in the terms of a recommendation made by the Senate Standing Committee on Constitutional and Legal Affairs in its report on the reference 'The law and administration of divorce, custody and family matters with particular regard to oppressive costs, delays, indignities and other injustices' (para 78).

I hope that this information is of assistance to you.

Yours sincerely



(Michael Tate)

Senator B C Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

SENATOR THE HON. NICK BOLKUS
Minister for Consumer Affairs
Minister Assisting the Treasurer for Prices

Parliament House
Canberra, A.C.T. 2600
Telephone: (062) 77 7380

JAL89/9016:JAM

- 4 SEP 1989

Senator B. Cooney
Chair
Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Barney

I refer to the letter dated 18 August 1989 from the Secretary to your Committee concerning the Privacy Amendment Bill 1989.

Your Committee drew proposed subsection 11B(2) to the attention of the Senate on two grounds. First, that the provision would grant to the Governor-General acting on advice of the Executive Council, the discretion to exempt a class of credit providers from the obligations to be imposed under proposed Part IIIA of the Principal Act. Secondly, that the provision may also constitute an inappropriate delegation of power as it permits the application of subsection 11B(1) to be changed by regulations.

It is the intention that proposed subsection 11B(2) would enable a corporation, which prima facie would be a credit provider within the terms of the legislation, to be determined by regulation not to be a credit provider. Such a regulation would be required to be notified in the Gazette and laid before each House of the Parliament within 15 sitting days of their making. It can be disallowed by either House.

The purpose of this provision is to give some flexibility to the regulatory scheme for determining who are credit providers. Consumer credit is provided by a wide range of bodies. The definition of credit provider sets out certain categories of bodies which would be commonly regarded as credit providers. However, there are other bodies which provide consumer credit and which should legitimately be classified as credit providers for the purposes of the Bill. Proposed section 11B makes provision for two mechanisms to provide a means of meeting any contingencies that may arise in relation to that definition. One, proposed section 11B(1)(b)(v), enables classes of corporations which do not fall within the earlier parts of the provision to be

determined to be credit providers by the Privacy Commissioner. Such a determination is reviewable by the Parliament. The second, proposed s.11B(2), enables corporations, which although falling within the earlier parts of the provision do not provide consumer credit or are no longer providing consumer credit, to be declared by regulation not to be credit providers.

It is essential that there is some flexibility contained in the proposed regulatory scheme for the credit reporting industry to enable the scheme to be adaptable to the changing circumstances of credit providers. Proposed subsection 11B(2) provides this flexibility. I would consider it to be an unnecessary burden on the limited resources of the Parliament for it to be required to pass legislation dealing with the status of corporations under the Act each time their business operations changed. In the circumstances, I do not regard the provision as an inappropriate delegation of power.

Yours sincerely

NICK BOLKUS

Minister for Veterans' Affairs
Ben Humphreys, MP
Member for Griffith

Dear Senator Cooney

17 JUL 1989

I refer to the letter of 26 May 1989 from the Secretary to the Standing Committee for the Scrutiny of Bills regarding certain provisions of the *Social Security and Veterans' Affairs Legislation Amendment Bill (No.2) 1989.*

The Committee noted that numerous provisions of the Bill have retrospective effect, but that the retrospectivity in each case is to correct drafting errors or for other technical reasons.

I have discussed the Committee's comments with my colleague, the Minister for Social Security, and can confirm that the Committee's assessment of the retrospective provisions is the same as ours. Given that there is no adverse effect on any person flowing from these provisions, there should be no objection to their inclusion in the Bill.

Yours sincerely,

(BEN HUMPHREYS)

Senator BC Cooney
Chairman
Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Parliament House, Canberra ACT 2600. Telephone : (062) 72 7302

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT OF 1989

27 SEPTEMBER 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1989

27 SEPTEMBER 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1989

The Committee has the honour to present its Fourteenth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Corporations Act 1989

CORPORATIONS ACT 1989

This Act was reported by the Committee in its Third Report of 1989 (5 April 1989) and received the Royal Assent on 14 July 1989.

In the Third Report the Committee noted certain clauses which the Acting Attorney-General undertook to amend in his response to the Committee dated 20 January 1989. The printed Act is now available and the Committee draws the following matters to the attention of the Senate.

Section 348 - Liability of local agent

The Committee was concerned that this provision would reverse the normal onus of proof. The provision makes a local agent of a registered foreign company

> 'answerable for the doing of all acts, matters and things that the foreign company is required by or under this Act to do;'.

The local agent is personally liable for a penalty imposed on a foreign company for contravening a provision of the legislation unless the local agent is able to satisfy the Court or Tribunal hearing the matter that the local agent should not be so liable.

In his response to the Committee dated 20 January 1989 the Minister stated that the provisions would be amended to omit the words in paragraph 348(b) 'unless the local agent satisfies the court or tribunal hearing the matter that the local agent should not be so liable'.

The Committee did not comment further on the section in the Third Report of 1989.

The Committee notes, however, that the amendment outlined in the Minister's letter has not been made in the printed Act.

Offences by Officers of Companies - Reversal of onus of proof Subsections 590(2) and 591(2)

The provisions of subsection 590(2) provide a defence to a charge that may arise under a number of provisions of subclause 590(1), if a defendant proves that there was no intent to defraud or conceal the state of affairs described by the section. This casts on the defendant the onus of disproving guilty intent.

The provision was commented upon by the Committee in Alert Digest No.10 of 1988 (31 August 1988), and in the Third Report of 1989 the Committee noted the undertaking by the Minister to omit subsection 590(2).

Subsection 591(1) makes it an offence not to comply with certain provisions of Section 289 of the Act, relating to the keeping of books of account and other accounting records by a corporation.

Subsection 591(2) provides a defence if a defendant can prove that he or she had reasonable grounds to believe, and did believe, that a competent and reliable person was responsible for meeting the requirements of the Act and was in a position to discharge that duty.

The Committee commented in Alert Digest No.10 of 1988 that the defendant was thereby required to bear the onus of proving the matters set out in subsection 591(2).

The Committee noted in Report No.3 of 1989 the undertaking of the Minister to omit subsection 591(2).

The amendments to subsections 590(2) and 591(2) outlined by the Minister have not been incorporated in the Printed Act.

Altering the Act by Regulation
Section 748

In Alert Digest No.10 of 1988 the Committee noted that the provision allowed the requirements of any statement set out in Part 6.12 of the Act to be amended, altered or the requirements added to by regulation. The Committee regarded the provision as an inappropriate delegation of legislative power.

In the Third Report of 1989 the Minister commented that the Government accepted the force of the Committee's objections to section 748 and proposed to introduce an amendment to omit the provision.

The Committee notes that the provision remains unchanged in the printed Act thereby allowing important policy issues not to be subject to full Parliamentary scrutiny.

Defence to a charge of issuing a prospectus that contains a false or misleading statement or from which there is an omission
Section 996

Subsection 996(1) establishes an offence where a person causes the issue of a prospectus relating to the securities of a corporation in which there is a false or misleading statement or an omission.

Subsection 996(2) provides a defence that includes a number of matters, including a defendant establishing that he or she believed on reasonable grounds that the statements in the prospectus were true and not misleading and the omission was not material or inadvertent.

The Committee brought the provision to the attention of the Senate in Alert Digest No.10 of 1988 as reversing the onus of proof in obliging the defendant to disprove both negligence and intention, when in the criminal law the prosecution is required to prove both matters.

In its Third Report of 1989 the Committee noted the undertaking by the Minister to omit **paragraph 996 (2)(a)** requiring the defence to prove that the statement or omission was not material. **Paragraph 996 (2)(a)** remains in the printed Act.

The Committee asks the Minister to inform it why the amendments noted have not been made.

The full response of the Minister in respect of matters raised by the Committee is attached to this Report.

Barney Cooney
(Chairman)

27 September 1989

CORPORATIONS BILL

Clause 43

24. The effect of clause 43 is that regulations may be made to enable specified relevant interests in specified shares to be disregarded in specified circumstances for the purposes of:

(a) clause 234 (dealing with company loans to directors);

(b) clause 235 (dealing with the register of directors' shareholdings which a company is required to keep);

(c) clause 236 (dealing with the general duty of a director to make disclosure to his or her company);

(d) Part 6.7 (dealing with the reporting of substantial (5%) shareholdings in a company);

(e) Part 6.8 (dealing with the power of the ASC to obtain information as to the beneficial ownership of shares); and

(f) Chapter 7 (dealing with the regulation of the securities industry).

25. Clause 43 is based on CA subsection 8(11) and SIA subsection 5(11). No regulations have been made under the existing relevant interest provisions.

26. The relevant interest provisions are complicated and involve difficult decisions on matters such as who controls particular shares and whether a shareholder is associated with another person.

27. Clause 43 is necessary to enable the above provisions to be modified quickly should it ever be necessary to do so to prevent an inappropriate application of them. Any regulations made to modify the application of clause 43 will of course be subject to Parliamentary disallowance. It is submitted that this level of parliamentary scrutiny in appropriate for the type of modification power that is being proposed.

Subclause 112(3)

28. This provision is based on CA subsection 33(4).

29. The Gazettal procedure provided for enables the Minister to increase the maximum membership of unincorporated partnerships and associations (such as firms of solicitors or accountants) at very short notice should the need arise. It is desirable that the Minister should have this power to prevent outsize partnerships and associations being in breach of the law. If, however, in exercising this power the Minister failed to take a relevant consideration into account or took an irrelevant consideration into account, an appeal would lie to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. The exercise of this power does not warrant parliamentary scrutiny. The power is appropriate in the circumstances.

Clause 348

30. This provision is based on CA subsection 514(2). The Government accepts the force of the Committee's arguments and is prepared to introduce an amendment which would omit the words following 'Act' in paragraph 348(b) (i.e. 'unless the local agent satisfies the court or tribunal hearing the matter that the local agent should not be so liable'). This will result in liability being imposed on the local agent in circumstances where the foreign company is liable.

Subclauses 590(2) and 591(2)

31. These subclauses are based on CA subsection 554(2) and 555(2).

32. The Government accepts the force of the Committee's arguments and is prepared to introduce further amendments to clause 590 which would:

(a) add the word 'fraudulently' in sub-paragraphs (1)(c)(i) and (v) and in paragraph (1)(d);

(b) omit subclauses (2) and (3);

(c) add the element of intention to conceal the state of affairs of the company in paragraph (1)(f) (e.g. by the addition of the words 'without reasonable excuse'); and

(d) omit subclause (4).

33. Consideration within the Department of the terms of clause 591 has led to the conclusion that it may create the potential for double jeopardy with clause 289. Clause 289 requires a company to keep proper accounting records. Subclause 289(11) requires a director to take reasonable steps to ensure that the company complies with clause 289. Subclause 289(12) provides a defence along the same lines as subclause 591(2), which the Committee has criticised as being an undesirable reversal of the normal onus of proof in criminal proceedings. Clause 591 creates an offence of failing to keep proper accounting records in contravention of clause 289 in the case of a company that is in financial difficulty or the affairs of which are or have been under investigation.

34. Consideration within the Department of the terms of subclause 289(11) has led to the conclusion that it may be too uncertain to be of any use as an offence. Subclauses 289(12) and 591(2) reverse the onus of proof and seem unnecessary as the matters itemized would negative taking the 'reasonable steps' referred to in subclauses 289(11) and 591(1). To overcome the problems inherent in clauses 289 and 591 the Government proposes to introduce further amendments that would omit subclauses 289(11), 289(12) and 591(2) and recast the terms of subclause 591(1) to make clear that if a person has been convicted of an offence against clause 289 the person is not liable to be convicted of an offence against clause 591.

Paragraph 618(3)(b)

35. This provision is the same as CASA para.15(2)(b). There is a similar provision in para.615(7)(b) of the bill, which is the same as CASA subsection 11(7). No regulations have been made under the existing provisions. These provisions set the thresholds beyond which the acquisition controls imposed by Chapter 6 of the Bill will apply. They remain appropriate and no regulations are contemplated to alter the thresholds. In most cases the thresholds fall short of a controlling interest. If, however, it ever emerged that the thresholds were inappropriate and were being abused it would be necessary to act quickly to stem the abuse. For this reason it is preferable to allow the thresholds to be altered by regulation.

Subclauses 704(6) and 705(6)

36. These provisions are based on CASA subsections 44(16) and (17). The prosecution must prove that there are materially false or misleading statements in, or omission of material from, the takeover documents or publicity. The subclauses to which the Committee has drawn attention enable the defendant to present evidence of his or her knowledge or belief not known to the prosecution. These defences are broadly equivalent to a defence of 'honest and reasonable mistake of fact', the onus of establishing which rests with the defendant at common law.

Clause 707

37. This clause is based on CA s.134. No bodies corporate have been declared by Gazette notice for the purposes of this provision and it is not contemplated that any will be declared. If, however, it became apparent to the Minister that it was necessary to declare an unlisted company as being a company which should comply with the substantial shareholdings requirements, the Minister would need to act quickly. (The substantial shareholdings requirements provide shareholders with an early warning of persons who might be planning to move towards control of a company.) The Gazettal procedure will enable the Minister to act quickly should the need ever arise. It is desirable that this procedure should be available to the Minister to prevent the substantial shareholdings requirements being circumvented. If, however, in making a declaration, the Minister failed to take a relevant consideration into account or took an irrelevant consideration into account, an appeal would lie to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. The making of such declarations does not warrant Parliamentary scrutiny. The power conferred on the Minister under clause 707 is appropriate in the circumstances.

Paragraph 708(5)(b)

38. Paragraph 708(5)(b) is based on CA subsection 136(9) except that the substantial shareholdings reporting threshold is set at 5% instead of 10%. The proposed 5% threshold is to ensure that appropriate levels of public disclosure are maintained following the proposed abolition of the capacity of

a company and shareholders to issue notices to trace beneficial ownership of shares. The ability of the Minister to make regulations quickly to alter the threshold is, however, desirable, should the need for finetuning arise. The specification of a particular percentage is appropriately done in regulations because it does not involve any change in the general policy or principles underlying the relevant provisions in the Act but provides for the appropriate parliamentary scrutiny through tabling and disallowance.

Clause 728

39. This clause is based on CASA s.57 but extends the exemption powers available under that provision. Clause 728, like CASA s.57, will be of crucial importance to the effective operation of the takeover provisions. The importance and usefulness of CASA s.57 is generally recognised in the business community. CASA s.57 has worked satisfactorily to date. It is essential that the ASC, like the NCSC, should be able to act very quickly in a takeover matter (where time is of the essence) to alter the black letter law where its strict application would cause hardship or would be inappropriate. The Gazette notice procedure is the appropriate one in the circumstances. If, however, in exercising this power, the ASC failed to take a relevant consideration into account, or took an irrelevant consideration into account, an appeal would lie to the Federal court under the Administrative Decisions (Judicial Review) Act 1977.

Clause 730

40. This clause is based on CASA s.58 but extends the modification powers available under that provision. The comments in paragraph 39 above are equally applicable to this provision.

Clause 748

41. This clause is based on CASA subsections 62(3) and (4). No regulations have been made in reliance on these provisions. All amendments made to the Schedule of CASA have been made by Act of Parliament. The Government accepts the force of the Committee's objection to clause 748 and proposes to introduce an amendment to omit clause 748. It is recognised that amendments to the requirements of statements set out in Part 6.12 and to the provisions detailing the types of documents to be served or lodged under Chapter 6 should be effected by way of legislation. These amendments may raise important policy issues warranting full Parliamentary scrutiny.

Subclause 996(2)

42. This subclause is based on CA subsection 108(1). The Government accepts the need to introduce amendments to include the element of materiality in subclause (1) and to omit paragraph 2(a). Like the defences in subclauses 704(6) and 705(6), the defences in paragraphs 996(2)(b) and (c) are

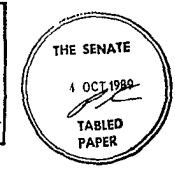
analogous to the defence of 'honest and reasonable mistake of fact', the onus of establishing which lies with the defendant at common law. It is submitted that these defences should be retained.

Subclause 998(8)

43. This subclause is based on SIA subsection 124(6). The prosecution must prove the elements of subclauses 998(3) or (4). Subclause 998(8) will enable the defendant to present evidence about his or her purpose for buying or selling securities. Subclauses 998(3) and (4) create strict liability offences which do not have a mens rea element and the prosecution is thus not required to establish 'guilty minds'. The defence provided by subclause 998(8) mitigates the strict liability. At common law there are only limited defences to strict liability offences and the onus of proving the defence is on the defendant. Thus, in circumstances where a strict liability offence provides a defence which places the onus on the defendant, it is not correct to say that the defendant has to 'disprove guilty intent'. There is no 'guilty intent' element in the offence. Instead, as at common law, the defendant has to establish a defence (in this case, the purpose for engaging in the conduct) on the balance of probabilities. It is therefore submitted that subclause 998(8) should be retained.

Clause 1127

44. This provision is based on FIA subsections 45(2) and (3). Any person aggrieved by the Minister's decision to declare a specified futures market to be an exempt futures market would, as the Committee has noted, have a right to appeal to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. The grounds of review are set out in s.5 of that Act. One ground is that the making of a decision was an improper exercise of power. This includes taking irrelevant considerations into account, failing to take relevant considerations into account and the exercise of a power in bad faith. Another important ground of review is that there has been a breach of the rules of natural justice. These appeal grounds would appear to be adequate in the circumstances.



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 1989

4 OCTOBER 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF 1989

4 OCTOBER 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF 1989

The Committee has the honour to present its Fifteenth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Child Support (Assessment) Act 1989

Industrial Chemicals (Notification and Assessment) Bill 1989

Law and Justice Legislation Amendment Bill 1989

Privacy Amendment Bill 1989

CHILD SUPPORT (ASSESSMENT) BILL 1989

INDUSTRIAL CHEMICALS (NOTIFICATION AND ASSESSMENT) BILL 1989

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1989

THE USE OF 'OUGHT REASONABLY TO HAVE KNOWN' AS A STANDARD OF CRIMINAL LIABILITY

The Committee has noted in clauses of the Child Support (Assessment) Act 1989, the Law and Justice Legislation Amendment Bill 1989 and most recently the Industrial Chemical (Notification and Assessment) Bill 1989, the use of the term 'ought reasonably to have known' as a standard of criminal liability.

The relevant provisions are

> Child Support (Assessment) Act 1989 - subsection 100 (2)
>
> Law and Justice Legislation Amendment Bill 1989 - proposed sections 85ZKA and 85ZKB of the Crimes Act 1914
>
> Industrial Chemicals (Notification and Assessment) Bill 1989 - subclause 64(3) and clause 82.

The Child Support (Assessment) Act and the Law and Justice Legislation Amendment Bill were reported in the Twelfth Report of 1989 (30 August 1989) and the Industrial Chemicals (Notification and Assessment) Bill was commented upon in Alert Digest No.12 of 1989 (27 September 1989).

The view of the Committee in relation to the Law and Justice Legislation Amendment Bill in the Twelfth Report was that proposed sections 85ZKA and 85ZKB of the Crimes Act would impose criminal liability on a person who has a state of mind that was *something less than guilty knowledge, and that in establishing a* criminal offence on the basis of what a person 'ought reasonably to have known' the bill removes the element of mens rea in criminal offences.

The Committee has considered the detailed response of the Attorney-General to the Committee's comments on the Law and Justice Legislation Amendment Bill, dated 11 July 1989 and attached to the Twelfth Report of the Committee.

The Attorney-General kindly provided two officers from the Criminal Law and Law Enforcement Division of his Department to attend the most recent Committee meeting and the Committee had the opportunity to discuss the matter with those officers. The Committee has also examined the Review of Commonwealth Criminal Law Discussion Paper No.21 of May 1989 titled General Principles Relating to Criminal Responsibility, especially Chapter 4 (page 24) which is titled the mental element.

The concept of mens rea, or the appropriate mental element required to establish criminal conduct, was in the common law a *constituent part of any statutory offence.* Section 4 of the Commonwealth Crimes Act 1914 provides

> 'The principles of the common law with respect to criminal liability shall, subject to the Act, apply in relation to offences against this Act'

unless having regard to the language of the statute or its subject matter the presumption is rebutted. The discussion paper at paragraph 4.1 on p.24 quotes the case of Sherras v De Rutzen [1895] 1 Q.B. 918 at p.921

> 'There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.'

The discussion paper points out that the matter was discussed by the High Court in He Kaw Teh v The Queen (1985) 157 C.L.R. 523 and this case was mentioned by the Attorney-General in his response to the Committee on the Law and Justice Legislation Amendment Bill.

The necessary mental element can be constituted not only by a state of mind, but also a failure to comply with a standard of conduct (e.g. gross negligence) or a combination of a guilty state of mind and a failure to comply with a proper standard (e.g. recklessness).

A satisfactory definition of mens rea has not been assisted by the large number of statutory terms used to describe the appropriate mental state.

There should be cogent reasons for making people criminally liable on the basis of a standard of 'ought reasonably to have known' rather than guilty intent. A person should not be convicted unless all the elements of the offence are proved beyond reasonable doubt. The requirement to prove a mental element should not be weakened other than in special circumstances.

One of the matters the Committee takes into account in considering any provision that imposes criminal liability is the protection of the community as a whole. The protection of the community from industrial chemicals in the **Industrial Chemicals (Notification and Assessment) Bill** is a matter to which the Committee gives great weight.

On the other hand the Committee is concerned to protect privacy from the unauthorised use of call-switching devices which is the basis of clause 8 of the Law and Justice Legislation Amendment Bill which inserts new sections 85ZKA and 85ZKB of the Crimes Act 1914.

In examining clauses of bills that impose liability based on what a person ought reasonably to have known, the Committee will carefully examine to what extent the provision unacceptably trespasses on personal rights and liberties, in reducing the requirements of the proof of the mental element of an offence.

The Committee will balance the trespass on personal rights and liberties with the need to protect the general public from unacceptable actions, or hazards, or from a deleterious effect on public health, safety or rights.

Subsection 100(1) of the Child Support (Assessment) Act

This subsection establishes an offence punishable on conviction by a term of imprisonment not exceeding 6 months, for a person who makes a statement to an officer that is false or misleading in a material particular or which by the omission of some matter is rendered misleading.

Liability is imposed under subsection 100(2) which states,

> In a prosecution of a person for an offence against subsection (1) if, having regard to:
>
> (a) the person's abilities, experience, qualifications and other attributes; and

(b) all the circumstances surrounding the alleged offence;

the person ought reasonably to have known that the statement to which the prosecution relates was false or misleading in a material particular, the person is taken to have known that the statement was false or misleading in a material particular.

Although the Act has now passed the Senate, the Committee seeks the views of the Minister as to the reasons for the provision.

An acceptable use of the Standard
Clause 8 - Law and Justice Legislation Amendment Bill

Clause 8 of the Law and Justice Legislation Amendment Bill inserts proposed subsections 85ZKA(1) and 85ZKB(1) of the Crimes Act 1914 and imposes a penalty of 5 years imprisonment on a person who manufactures, advertises, displays or offers for sale, sells or possesses either a call-switching or interception device or apparatus.

Proposed subsections 85ZKA(2) and 85ZKB(2) involve a lessened standard of criminal liability based on a person's abilities, experience, qualifications and other attributes and all the circumstances surrounding the alleged contravention of the subsections.

The Committee is prepared to accept the use of a reduced mental element in the proposed sections in view of the necessity to protect both public and personal privacy from the use of call-switching and interception devices.

The Committee is prepared to accept a similarly drafted provision imposing criminal liability in **subclause 64(3)** of the **Industrial Chemicals (Notification and Assessment) Bill 1989** in view of the following:

1. the circumstances of the introduction of the chemical may change in a manner that involves health, safety and environment protection,

2. the provision includes non-compliance with a set of circumstances fully known to the person who introduces the chemical,

3. the circumstances of the offence are limited by the terms of **paragraphs 64(2) (a) to (e)**,

4. a person has a period of 28 days to comply with the requirements of the subclause.

However, the Committee regards it as inappropriate that the lessened mental element should apply to **paragraph 64(2)(f)** which imposes liability where a prescribed event has happened.

A person should not be subject to liability for an offence that can be established by a later regulation.

The Committee sees it as essential that a complete set of administrative guidelines relating to the circumstances outlined in **paragraph 64(2)(a) to (e)** be made publicly available before any person is charged under the provision.

Clause 82 of the Industrial Chemicals (Notification and Assessment) Bill states

Knowledge of chemical to which charge relates.

> For the purposes of this Act, a person is taken to have known that a chemical in respect of whose introduction the person has been charged with an offence was, at the time of the introduction, a chemical of the kind to which the charge relates if, having regard to:
>
> (a) the person's abilities, experience, qualifications and other attributes; and
>
> (b) all the circumstances surrounding the alleged offence;
>
> the person ought reasonably to have known, at the time of the introduction, that the chemical was a chemical of that kind.

The **Explanatory Memorandum** states in paragraph 79 that,

> This clause clarifies that a person cannot use as a defence that they were unaware of being in contravention of the provisions of the Bill that relate to the introduction of the chemical if they ought reasonably to have known.

The Committee seeks the views of the Minister as to the reasons for this provision being drafted in the terminology of 'ought reasonably to have known'.

Committee Policy

Where the provisions of any bill impose a criminal penalty following a conviction based on the lessened mental element of 'ought reasonably to have known' the Committee will only accept such provisions where it is clearly established that in respect of balancing the preservation of personal rights and liberties against the protection of the community, the lessened mental element is appropriate in the circumstances.

PRIVACY AMENDMENT BILL 1989

The Committee noted in its **Thirteenth Report of 1989** that policy changes of the magnitude of those contemplated by proposed subsection 11B(2) of the bill should be incorporated within an amending bill as the primary source of legislation.

The Minister informed the Committee that the proposed subsection allows a corporation that is prima facie a credit provider within the terms of the legislation to be determined by regulation not to be a credit provider. The regulation would be subject to disallowance and required to be notified in the Gazette and laid before each House of the Parliament within 15 days of being made.

In the Minister's view, it is essential that the proposed regulatory scheme for the credit reporting industry be able to adapt to the changing circumstances of credit providers. **Subsection 11B(2)** is a technical device to enable proper regulation of the credit industry, so that only those corporations that are substantially credit providers have access to a data base maintained by a credit reporting agency.

The ***Privacy Commissioner*** *will be responsible for supervising the* credit reporting industry, and in a position to monitor the status of credit providers.

The need for the change to be by regulation

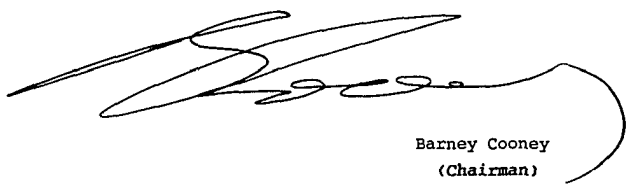
The Privacy Commissioner is required to develop a Code of Conduct for the credit industry after consultation with the industry and the community. By means of the Code and the supervision of the credit reporting industry the Privacy Commissioner can identify those bodies that no longer provide credit. The Privacy Commissioner is able to advise the Minister of the necessity of a regulation to exempt the relevant bodies.

Policy changes to be made by amending bills

The Minister has assured the Committee that the provision would not be used to change the policy set out in the bill and that any possible change of policy relating to consumer and commercial credit providers will be incorporated in an amending bill.

The Committee thanks the Minister for his informative response which the Committee regards as appropriate in the circumstances.

The response of the Minister is attached to this Report.



Barney Cooney
(Chairman)

4 October 1989

SENATOR THE HON. NICK BOLKUS
Minister for Consumer Affairs
Minister Assisting the Treasurer for Prices

Parliament House
Canberra, A.C.T. 2600
Telephone: (062) 77 7380

JAL89/9016:JAM

Senator B. Cooney
Chair
Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Barney

I refer to your Committee's views concerning the Privacy Amendment Bill 1989 set out in the Committee's Thirteenth Report.

The Committee has reported that it considers that policy changes of the magnitude of those proposed by the particular provision (subsection 11B(2) of the Bill) should be incorporated within an amending bill or the primary source of legislation.

In my previous letter to the Committee, I noted that it was the intention of proposed subsection 11B(2) that it would enable a corporation, which prima facie would be a credit provider within the terms of the legislation, to be determined by regulation not to be a credit provider. Such a regulation would be required to be notified in the Gazette and laid before each House of the Parliament within 15 sitting days of their making. It could be disallowed by either House.

The purpose of subsection 11B(2) is to give some flexibility to the regulatory scheme for determining who are credit providers as consumer credit is provided by a wide range of bodies for whom the nature of business can rapidly change.

It is essential that the proposed regulatory scheme for the credit reporting industry be able to be adapt to the changing circumstances of credit providers. The provision in question is a technical device to enable proper regulation of the credit reporting industry ie to only allow those credit providers who are substantially in the business of providing credit to have access to a database maintained by a credit reporting agency.

The Privacy Commissioner who will have responsibility for supervising the credit reporting industry will be in a position to monitor the status of credit providers. In this regard, I note that he is required to develop a Code of Conduct for the industry in close consultation with industry, privacy, and community groups. Through the Code and his supervision of the credit reporting industry, the Privacy Commissioner will be able to clearly identify those bodies who are no longer providing credit and will be able to advise the responsible Minister of the need for a regulation to be recommended by the Executive Council to the Governer-General.

The Commissioner must be in a position whereby he can seek an immediate response in relation to a body which was formerly a credit provider. It should be noted that while a body remains classified as a credit provider it can obtain access to individuals' credit files. Where such a body is no longer providing credit it can continue to access an individuals' credit file use and disclose credit reports or personal information derived from those reports until it is excluded from being a credit provider by proposed s.11B(2). In effect, it can defeat the whole purpose of the legislation which is to provide privacy protection for individuals in relation to their personal credit records by restricting access to those records to providers of credit and other specified bodies. The relative speed with which regulations can be made would seem to indicate that they are a more appropriate vehicle than a bill to meet this need.

Also, I can assure the Committee that the provision in question would not be used to change the policy set out under the Bill. Any possible change of policy in relation to consumer and commercial credit providers would be incorporated in an amending bill.

Yours sincerely

NICK BOLKUS

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT OF 1989

25 OCTOBER 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF 1989

25 OCTOBER 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) *inappropriately delegate legislative power; or*

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

CONTENTS

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF 1989

The Committee has the honour to present its Sixteenth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Australian Federal Police Amendment Bill 1989

Crimes (Superannuation Benefits) Bill 1989

Hazardous Waste (Regulation of Exports and Imports) Bill 1989

Industrial Chemicals (Notification and Assessment) Bill 1989

AUSTRALIAN FEDERAL POLICE AMENDMENT BILL 1989

This bill was introduced into the House of Representatives on 17 August 1989 by the Attorney-General.

The bill proposes to facilitate the recovery of Commonwealth funded superannuation benefits already paid to members of the Australian Federal Police (AFP) convicted of corruption. The bill will enable the Director of Public Prosecutions to obtain restraining orders against property of members or former members of the AFP where it is likely that they may be convicted of a corruption offence.

The Committee commented on this bill and the Crimes (Superannuation Benefits) Bill 1989 in Alert Digest No.10 of 1989 (30 August 1989). The Acting Attorney-General has incorporated his comments on both bills in a single response.

PRESUMPTION OF GUILT
Proposed paragraph 42C(1)(b)

The Committee commented that the proposed paragraph may be regarded as creating a presumption of guilt by reason of the fact that a person has absconded after a warrant has been issued for his or her arrest.

Clause 9 of the bill which inserts proposed paragraph 46(2)(b) requires a court to be satisfied that the person might have been convicted of an offence. The Committee commented that the onus of proof to be required by the court is the civil standard of balance of probabilities and not the criminal standard of beyond reasonable doubt. The only evidence available to the court would be that of the prosecution.

The Minister has informed the Committee that the proposed paragraph is in similar terms to **proposed paragraph 6(1)(b)** of the **Crimes (Superannuation Benefits) Bill 1989**. Both provisions are similar to **subsection 5(1)** of the Proceeds of Crime Act 1989.

The above provisions would establish that a person is taken to be convicted of an offence if the person absconds in connection with the offence.

The Minister has informed the Committee that the intention of the legislative scheme provided for in the bill, is to prevent a person who has absconded from justice being eligible to receive Commonwealth funded benefits (either through a superannuation scheme or from consolidated revenue).

The Minister has informed the Committee that in the circumstances set out in **clause 4** of the bill an application for a superannuation order can be made against an absconder. This is achieved by providing that in those circumstances an absconder is 'taken to have been convicted of a corruption offence'.

The purpose of the deemed conviction as outlined by the Minister is to enable a superannuation order to be made against an absconder. The absconder remains liable to be dealt with for the criminal offence.

The Minister has further informed the Committee that before making a superannuation order in respect of an absconder the Court must be satisfied on two issues. Firstly, on the balance of probabilities, the person has absconded. Secondly, the Court is required to be satisfied, having regard to all the evidence, that a reasonable jury properly instructed could reasonably find the person guilty of the offence. The Minister stresses that the only

purpose of the provision is to enable a superannuation order to be made against an absconder. In the Minister's view there is no presumption of guilt, nor is there a finding of guilt against the absconder.

The Committee thanks the Minister for his response and trusts that it will assist the Senate when it comes to consider the bill.

The Minister's response is attached to this Report.

CRIMES (SUPERANNUATION BENEFITS) BILL 1989

This bill was introduced into the House of Representatives on 17 August 1989.

The bill proposes to provide for the restraint of property and the recovery of superannuation benefits that have been paid to a Commonwealth employee convicted of corruption and sentenced to more than 12 months imprisonment. The bill is intended to cover parliamentarians and Commonwealth employees and complements the **Australian Federal Police Amendment Bill** which contains similar provisions.

The Committee commented on this bill in **Alert Digest No.10** of 1989. The Acting Attorney-General has incorporated his response to this bill with his response to the **Australian Federal Police Amendment Bill.**

PRESUMPTION OF GUILT
Proposed Paragraph 6(1)(b)

Proposed paragraph 6(1)(b) is in the same form as **proposed paragraph 42c(1)(b)** of the **Australian Federal Police Amendment Bill. Proposed paragraph 19(2)(b)** of this bill is the equivalent of **proposed paragraph 46(2)(b)** of the **Australian Federal Police Amendment Bill.**

The Committee draws the attention of the Senate to the response of the Minister to the bill which the Committee commented upon in respect of the **Australian Federal Police Amendment Bill.**

PART II OF THE BILL

The Committee noted that **Part II** of the **Super Bill** is to the same effect as **Division 2** of **Part VA** of the *Australian Federal Police Act 1979* inserted by the *Australian Federal Police Legislation Amendment Act 1989*. The Minister has confirmed the view of the Committee on this point and indicated that the issues have been addressed in the Explanatory Memorandum.

HAZARDOUS WASTE (REGULATION OF EXPORTS AND IMPORTS) BILL 1989

This Bill was introduced into the House of Representatives on 6 September 1989 by the Minister representing the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The bill proposes to provide for the issuing of permits to control the import and export of hazardous wastes to ensure they are disposed of by an environmentally acceptable method. The bill will also enable Australia to meet the requirements of the 'Basel *Convention on the Control of Transboundary Movements of Hazardous* Wastes and their Disposal'. Other obligations of the Convention, which Australia can become a party to once this legislation is in effect, fall within the responsibilities of State and Territory Governments and will be contained in complementary State and Territory waste management legislation.

The Committee commented on this bill in **Alert Digest No.12** of 1989 (27 September 1989) and has received a response from the Minister.

CAN AN INSPECTOR INSPECT HOUSEHOLD WASTE
Clause 4 - The definition of Household Waste

The Committee was concerned that as hazardous waste is defined to include household waste and its incinerated residue, an inspector would be able, pursuant to the exercise of powers under Part V of the bill, to inspect domestic premises.

The Minister has responded that he shares the Committee's concern at any intrusion into domestic premises but does not envisage that it will occur. The Minister has informed the Committee that 'household waste' refers to a type of waste and that the expectation is that shipments of waste will originate solely from commercial or industrial premises. In the case of household waste the Minister anticipates that it will derive from major municipal waste facilities, or incinerators.

In the opinion of the Minister the Basel Convention contemplates controlling the international movement of household waste, and it would be irresponsible to exclude the import or export of household waste from the enforcement mechanisms of the bill.

The Committee accepts the Minister's view that inspectors should have the same powers for household waste as for other waste. However, the Committee would prefer to see domestic premises excluded from the provisions of the bill.

FISHING EXPEDITIONS BY INSPECTORS
Subclause 48(4)

The Committee was concerned that a warrant granted pursuant to the provisions of **subclause 48(4)** allowed an inspector to seize things other than the evidence which the inspector was authorised to seize.

The Committee noted that the power was limited to the seizure of things the inspector believed, on reasonable grounds, may be otherwise concealed, lost or destroyed, or used in committing, continuing or repeating an offence.

The concern of the Committee was that the terms of the warrant may allow an inspector to go on a 'fishing expedition' for evidence.

The Minister has responded to the Committee in considerable detail with respect to the modes of entry available to the inspector under the bill, and the differences between an offence warrant and a monitoring warrant.

The Minister states that a monitoring warrant is applicable where an occupant has refused or withdrawn consent to entry by an inspector. The monitoring warrant is available where it can be established that entry by an inspector is required to ensure compliance with the statute.

A monitoring warrant has the following features,

a. it is available where it is necessary to enable lawful entry to inspect premises to ensure compliance with the bill;

b. it can be acted upon more than once, at any time, for a period of up to 6 months from the date of issue;

c. it does not authorise seizure as this power is inconsistent with its function and the requirements attached to its issue.

An offence warrant by comparison,

a. is only available where an inspector has reasonable grounds to suspect that an offence is or has been committed contrary to the provisions of the statute;

b. is valid for a period of one month;

c. enables the exercise of intrusive and coercive powers consistent with its purpose;

d. is spent once exercised, that is, it allows only one entry to the premises;

e. requires an inspector seeking the warrant to form a reasonable suspicion that evidence relating to the commission of a particular offence is available on the premises to be searched, and to satisfy a magistrate to that effect.

The Minister states that the additional power of seizure is required where an inspector discovers evidence of the commission of an offence other than that to which the warrant relates, or evidence which is not encompassed within the terms of the warrant. Thus, in the Minister's view, it is necessary for an inspector to be able to seize such additional evidence to prevent it being hidden, lost, or destroyed or otherwise used in committing, continuing or repeating an offence. The procedural requirements attached to the issue of an offence related warrant prevent the additional power of seizure being a means of 'fishing' for evidence. There is, in the procedures for the issue of an offence related warrant and the additional power of seizure, a system that in the view of the Minister,

> provides a reasonable balance between the rights of the individual and the possibility of concealment of evidence.

The Committee thanks the Minister for his detailed and informative response.

The Committee brings the matters raised to the attention of the Senate.

PERIOD OF EFFECT OF OFFENCE RELATED WARRANTS
Proposed Paragraph 51(d)(4)

The Committee thanks the Minister for his undertaking that the period of an offence related warrant will be limited to one week, rather than the period of one month set out in proposed paragraph 51(d)(4) of the bill.

TELEPHONE WARRANTS - An invasion of privacy
Clause 52

The Minister has responded that procedure for obtaining a warrant by telephone is required in circumstances of urgency. An inspector who has entered premises by consent, or with a monitoring warrant, may find it necessary to obtain such a telephone warrant where the inspector is concerned at the possible loss of evidence. The inspector is required to satisfy a magistrate that the warrant should be issued.

The Committee was concerned that a telephone warrant can be obtained without undergoing the normal process of appearing before a judicial officer.

As the form of the warrant is required for entry to the premises an inspector would not be able to send the form of the warrant to the Magistrate until after it is executed. The Minister has indicated that the bill will be amended to limit the period of validity of the warrant to one week.

The Committee thanks the Minister for his response which is attached to this report.

INDUSTRIAL CHEMICALS (NOTIFICATION AND ASSESSMENT) BILL 1989

The bill proposes to establish a national scheme for the notification and assessment of industrial chemicals to aid in the protection of people at work, public health and the environment. New industrial chemicals will be assessed prior to their introduction and existing chemicals will be assessed on a priority basis. Chemicals used solely for agricultural and veterinary purposes are subject to existing legislation and are excluded from this bill.

The bill is being jointly sponsored by the **Minister for the Arts, Sport, the Environment, Tourism and Territories and the Minister for Industrial Relations.**

The Committee commented on this bill in **Alert Digest No.12** of **1989** (27 September 1989) and has received a response from the Minister for the Arts, Sport, the Environment, Tourism and Territories.

IS THIS A CRIMINAL OFFENCE
Subclause 64(2) - Requirement to Notify Director

The subclause creates a series of criminal offences with a maximum fine of $12,000. The provisions require a person introducing a chemical to notify the Director of Chemical Notification and Assessment of certain matters. These matters include any alteration in the change of the function or the amount of the chemical being introduced, or a likely change in the method of manufacture of the chemical.

The Minister has informed the Committee that in the **Second Reading Speech** in the House of Representatives on 6 September 1989, the Minister for Industrial Relations stated that it was intended to form a tripartite advisory committee within the National Occupational Health and Safety Commission to advise on certain aspects of the scheme to be established by the bill. The tripartite committee will be responsible for publishing Guidance Notes explaining the steps required to comply with the legislation. The Guidance Notes will be published before the scheme commences and will be supplemented by seminars for notifiers.

The Committee thanks the Minister for his response on this aspect of the subclause which meets the concerns of the Committee.

The Committee remains concerned however that **paragraph 64(2)(f)** allows criminal offences to be prescribed by later regulation, and that such matters should be included in an amending bill.

OUGHT REASONABLY TO HAVE KNOWN AS A STANDARD OF PROOF

The Committee was concerned with the imposition of criminal liability by use of the term 'ought reasonably to have known'. As the Committee stated in its **Fifteenth Report of 1989** (4 October 1989) the Committee will examine all such provisions to ensure that they clearly balance the preservation of personal rights and liberties against the protection of the community.

The Minister has responded and states that based on the views of **Brennan J** in the case of **He Kaw Teh v The Queen** (157 CLR 523 at p.575), the effect of applying the principle is,

> that an implication can be drawn from all the circumstances surrounding the doing of the prescribed act that the particular person before the court had the requisite state of mind (i.e. guilty intent).

The Minister has informed the Committee that the usefulness of assessment reports for recommending safety precautions is dependent on the quality of the information provided to the Director, and that it is important that the information in the assessment is kept current.

The basic principle underlying the bill is that the import or manufacture of potentially toxic chemicals imposes a responsibility on the importer or manufacturer to minimise the hazard of the relevant chemicals. Manufacturers or importers are required to provide the information sought in the bill and have all new chemicals assessed before their introduction.

Introducers have an obligation to inform themselves of any development relating to hazards posed by the chemicals they have introduced, and to provide such information to the Director.

The purpose of **subclause 64(3)** and **clause 82** is, as stated by the Minister, to ensure that introducers meet their responsibilities relating to the provision of information to the Director.

The Minister has informed the Committee,

> Thus, the Government considers that in this particular case, the public interest in ensuring the effective and timely provision of

> information on chemical hazards, taken together with the obligations which should already exist on the introducers of potentially toxic chemicals, justify imposing this onus [sic] standard of proof.

The Committee thanks the Minister for his response and trusts it will be of assistance to Senators when debating the bill.

FISHING EXPEDITIONS
Subclause 87(5)

The Committee noted in **Alert Digest No.12** that the subclause was in the same terms as **subclause 48(4)** of the **Hazardous Waste Bill**. The Minister has responded in the same terms as his response to the Hazardous Waste Bill.

The Committee requests that the period for which an offence related warrant is valid be reduced to one week in accord with the response of the Minister to the Hazardous Waste Bill.

LEGAL PROCEEDINGS NOT TO LIE
Clause 101

The Committee noted that this clause proposes a particularly wide immunity from legal suit for the Commonwealth.

The Minister has responded that most, if not all, of the information on which a chemical is assessed will be provided by the introducer, either the manufacturer or importer, who applied for notification and assessment. The Commonwealth will accept such information in good faith as the Director will be able to verify only a fraction of the information provided.

The Minister states that in developing the legislation the Government had to balance various factors. These included the need to provide timely advice to the community and to industry of the hazards of a particular chemical and the benefits of the public and industry having access to it, against Commonwealth resources available to assess the scientific and other information available.

In respect of the balance between the right of a person to sue the Commonwealth and the necessity to achieve the desired effects of the legislation, the Minister has stated,

> Thus, the Government decided that on balance, in this case, the public benefits in having timely hazard assessments outweighed the *nonetheless very important right of an* aggrieved individual to initiate a common law action against the Commonwealth for negligence and deceit.

The Minister points out that a similar provision exists in section 45 of the Agricultural and Veterinary Chemicals Act 1988.

The Committee is concerned at any provision that may remove the right of a person to an action at law for negligence. However, the Committee notes the reasons advanced by the Minister for clause 101 being drafted in this manner.

The Committee draws the provision to the attention of the Senate.

Subclause 105(3)

The Committee noted that this provision allowed the Schedule to the bill to be amended by an instrument published in the Chemical Gazette.

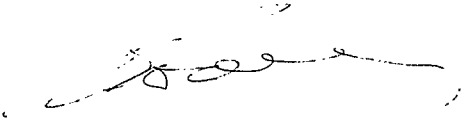
The Committee has no comment on the clause but notes the Minister's response that

> The Government agrees that legislation should not, as a matter of general principle, be amended by subordinate legislation, unless there are specific reasons why that is the more appropriate course in a particular instance.

SETTING FEES BY REGULATION
Subclause 110(1)

The Committee thanks the Minister for his confirmation that the level of fees charged under the bill is not to exceed the amount necessary to cover the costs of the services provided.

The Committee is grateful to the Minister for his informed and detailed response which is attached to this report.



Barney Cooney
(Chairman)

25 October 1989

LAW REFORM COMMISSION OF VICTORIA

The Committee is interested in any matter designed to improve the clarity and quality of drafting in Bills and Acts. In its Eighth Report of 1989 (31 May 1989) the Committee noted the draft Report of the Victorian Law Reform Commission on its project aimed at improving the standard of information given to Members of Parliament in relation to bills.

The Committee has now received the Draft Credit Bill 1989 which the Law Reform Commission is putting forward as model principal legislation and which the Commission has made available to Members and Honourable Senators.

The Committee hopes in the near future to host a seminar involving Professor David St.L.Kelly, Chairman of the Law Reform Commission, and Emeritus Professor Douglas Whalan, legal adviser to the Senate Standing Committee for Regulations and Ordinances, which will cover many of the issues raised contained in the Draft Credit Bill.

The Committee thanks the Victorian Law Reform Commission for making the Draft Credit Bill 1989 available.

ACTING ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

26 SEP 1989

CLE89/9260:CM

Dear Barney

I refer to the comments of the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning the Crimes (Superannuation Benefits) Bill 1989 (Super Bill) and the Australian Federal Police Amendment Bill 1989 (AFP Bill) contained in Alert Digest No.10 of 1989. I thank the Committee for its interest in this matter. This response seeks to address the Committee's concerns regarding both Bills as the relevant provisions are in substantially similar terms.

Absconders

The Committee drew attention to paragraph 6(1)(b) of the Super Bill and paragraph 42C(1)(b) of the AFP Bill which are in similar terms. They provide that a person is taken to be convicted of an offence if the person absconds in connection with the offence. The provisions are similar to subsection 5(1) of the Proceeds of Crime Act 1987 (Proceeds Act).

The Committee also expressed concern about paragraph 19(2)(b) of the Super Bill and paragraph 46(2)(b) of the AFP Bill. These provisions are also in similar terms and are based on section 17 of the Proceeds Act. They provide that where an absconder is taken to have been convicted of a corruption offence a court must not make a superannuation order in relation to the person unless it is satisfied on the balance of probabilities that the person has in fact absconded.

The starting point for the scheme contained in the Super Bill is that it is conviction based. Thus, as a threshold issue it is necessary for a person to have been convicted of a corruption offence. In the absence of any express provision in the legislation, the consequence of a person absconding would be that the Commonwealth (through a superannuation scheme or from consolidated revenue) would be under a legal

duty to pay, or continue to pay, benefits to that person notwithstanding that the person is not amenable to justice. Such a consequence undermines the legislation and is unacceptable. The Super Bill, like the Proceeds Act, provides for a regime to deal with this situation.

The substance of the regime is that in certain circumstances set out in clause 4 an application for a superannuation order can be made in relation to an absconder. An absconder is thereby included in the class of persons against whom a superannuation order may be made. This is achieved by the device of providing that, in certain circumstances, an absconder is to be "taken to have been convicted of a corruption offence". This 'deemed conviction' only operates for one purpose and that is to enable a superannuation order to be made against the person. The person remains liable to be dealt with for the criminal offence and there are no other consequences which flow from such deeming and there is no "presumption of guilt".

Before making a superannuation order in relation to an absconder the court must be satisfied of two issues. Firstly, on the balance of probabilities, that the person has in fact absconded. Clearly this will be the case where person has not answered bail, and all reasonable steps to locate the person have been unsuccessful. Secondly, the Court must be satisfied, having regard to all the evidence that a reasonable jury properly instructed could lawfully find the person guilty of the offence. This is the standard of proof required to commit a person for trial, the committal test. To require proof beyond reasonable doubt would be to require a trial in the absence of the accused which would be contrary to our principals of justice. Again I stress that the only purpose of the provisions is to enable a superannuation order to be made against an absconder. There is no 'presumption of guilt', nor is there a finding of guilt against the absconder.

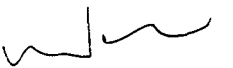
I would also like to draw the Committee's attention to other provisions relating to absconders in the Super Bill. It is always open to the absconder, at any time, to return and face the charges. If the absconder is, after appearing in court, not convicted (eg where charges are withdrawn dismissed or the defendant is acquitted); or is convicted but is not sentenced to more than twelve months imprisonment; or is convicted and is sentenced to more than twelve months imprisonment and that conviction is quashed or the sentence reduced to less than twelve months imprisonment; then the superannuation order is automatically revoked and the person is entitled to compensation (see clause 23).

The above comments are equally applicable to the scheme of the AFP Bill.

Part 2 of the Super Bill

I confirm that the Attorney-General's response to comments in the Eighth Report of 1989 about Division 2 of Part VA of the Australian Federal Police Act 1979, inserted by the Australian Federal Police Legislation Amendment Act 1989, is also relevant to the equivalent provisions in Part 2 of the Super Bill. You will note that these issues have also been addressed at paragraphs 2 and 111 in the Explanatory Memorandum for the Super Bill.

Yours sincerely



(Michael Tate)

Senator Barney Cooney
Chairperson
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

MINISTER FOR THE ARTS, SPORT, THE ENVIRONMENT, TOURISM AND TERRITORIES

30 OCT 1989

Senator B Cooney
Chairman
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the Committee's consideration of the Industrial Chemicals (Notification & Assessment) Bill 1989.

As you know, the Minister for Industrial Relations and I are jointly sponsoring this Bill. Since I will be handling the Bill in the Senate, it seemed most appropriate for me to respond to the matters raised by the Committee in its consideration of the Bill. Accordingly, comments on the matters raised in Scrutiny of Bills Alert Digest No 12 of 1989 are set out below.

Subclause 64(2) - Requirement to Notify Director

I confirm that guidelines will be published to clarify the terms "significantly" and "is likely to change".

As indicated by the Minister of Industrial Relations in his Second Reading Speech in the House of Representatives on 6 September 1989, it is intended to establish a tripartite advisory committee within the National Occupational Health and Safety Commission to advise on certain matters in relation to the scheme set out in the Bill.

One of the matters will be the publication of a Guidance Note for Notifiers which will explain the steps needed to comply with the legislation in clear and practical terms.

It is intended to publish the Guidance Note in advance of the commencement of the scheme and to supplement it with seminars for notifiers. These seminars will enable further advice to be given and will give notifiers the opportunity to clarify any matters further.

Subclause 64(3) and Clause 82 - Standard of Proof

The following comments are made in relation to the criterion of liability set out in subclause 64(3) and clause 82.

A similar form of words was used in the Law and Justice Amendment Bill 1989 and commented upon by the Senate Committee. In his response to the Committee dated 11 July 1989, the Attorney-General advised that the form of words was designed to cover knowledge, recklessness and wilful blindness. In sofar as wilful blindness can be considered a type of recklessness the provision goes no further than covering knowledge and recklessness.

The formulation is aimed at what Brennan J in He Kaw Teh v The Queen (157 CLR 523 at 575) calls the "circumstances attendant on the doing of the physical act involved". In essence the provision seeks to reflect the second general principle of Brennan J's four principle test. The effect of applying this principle is that an implication can be drawn from all the circumstances surrounding the doing of the prescribed act that the particular person before the court had the requisite state of mind (ie guilty intent).

With these comments on the substantive legal effect of the provisions, I now comment on their application in this Bill.

The usefulness of the assessment reports and the associated recommendations for safety precautions will depend heavily on the quality of the information available to the Director and his/her assessors.

It is particularly important that the assessments remain valid over time - ie that both changed circumstances and new concerns are taken into account.

This onus falls on both the Director and introducers in respect of the chemicals they manufacture or import. In many instances, a particular introducer is likely to be aware of developments or changed circumstances which would not otherwise be known to the Director. If the scheme is to work, introducers must be required to pass this information on to the Director.

A basic principle underlying the Bill is that people who choose to manufacture or import chemicals, many of which may be very toxic, have a responsibility to minimise the hazards of those chemicals. Hence, the requirement to provide the information set out in the Bill and have all new chemicals assessed before they can be introduced.

This responsibility must not be narrowly construed. In particular, it is considered that introducers have an obligation to ensure that they become aware of any developments which relate to the hazards posed by their chemicals. Having become aware of any such information, it needs to be passed on to the Director. This is the purpose of subclauses 64(3) and clause 82.

Thus, the Government considers that in this particular case, the public interest in ensuring the effective and timely provision of information on chemical hazards, taken together with the obligations which should already exist on the introducers of potentially toxic chemicals, justify imposing this onus standard of proof.

Subclause 87(5) - Searches pursuant to a Warrant

Within regulatory schemes, there are three modes of entry to premises: entry by consent; entry pursuant to a monitoring warrant to ascertain compliance with the statute; and entry to investigate a suspected offence against the statute.

Where entry without the consent of the occupier is required, or where the consent of the occupier has been withdrawn after entry has been obtained, a monitoring warrant is available in circumstances where it can be established that entry is reasonably necessary for ascertaining compliance with the statute in question. A monitoring warrant may be acted upon once, or more than once, at any time of the day or night during a period of six months from the date of issue of the warrant, and is intended to enable lawful entry to premises for the purpose of inspection to ensure that the statute is being complied with. A monitoring warrant does not authorise the exercise of any other intrusive powers; it is designed - in the absence of the consent of the occupier - purely to facilitate the normal inspection process of looking at things, documents and the like so as to assess compliance with the statute. The warrant remains in force for the specified period and authorises multiple entry to the subject premises.

An offence warrant is, on the other hand, available where the inspector has reasonable grounds for suspecting that an identifiable offence has been, or is being, committed against the statute in question. An offence warrant must be executed within a period of one month from the date of issue and enables the exercise of intrusive and coercive powers consistent with its purpose. An offence warrant requires the inspector or officer executing the warrant to form a suspicion, based on reasonable grounds, that there is evidence relating to the commission of a particular offence on the premises proposed to be entered and searched, and to satisfy the magistrate to that effect. The latter requirement constitutes the procedural safeguard preceding the exercise of the intrusive and coercive powers referred to. The warrant is spent once executed (ie once entry is gained to the subject premises).

Accordingly, the powers that may be exercised pursuant to the warrants are not the same. A monitoring warrant cannot authorise seizure because the exercise of such a power is, as noted, inconsistent with its purpose and the less stringent safeguards which attach to its issue. Thus, a monitoring warrant cannot be used to "fish" for evidence.

It is consistent with criminal law policy to provide that where in the course of exercising powers under an offence related warrant a person discovers evidence of the commission of an offence, not being the offence to which the warrant relates, or other evidence relating to the offence to which the warrant relates, the person may seize the evidence in order to prevent its concealment, loss or destruction. In the absence of such a power the evidence may be concealed, removed or destroyed while an offence warrant is being obtained. Where the instructing Department considers that on policy grounds it is necessary to obtain an offence related warrant in circumstances of urgency provision may by made for that warrant to be obtained by telephone, with of course, the appropriate procedural safeguards.

Given the procedural requirements relating to the issue of the offence related warrant the additional power to seize referred to above is not a means of fishing for evidence and the additional power provides a reasonable balance between the rights of the individual and the possibility of concealment of evidence.

Clause 101 - Legal Proceedings not to Lie

When a particular chemical is assessed under the Bill, most, if not all, of the information upon which that assessment is based will have been provided by the introducer (ie the importer or manufacturer) who made the notification and assessment application. The Director will not be in a position to independently verify much of the information provided by the introducer. The Commonwealth accepts it in good faith.

It is therefore not appropriate to hold the Commonwealth liable. That responsibility must rest with the introducer who provided the information.

In developing the legislation, it was necessary to balance:

- the need to provide the community in general, workers, industry and government regulators with timely advice on the hazards of a particular chemical;
- the needs of industry and the benefits to the public in having timely access to chemicals; and
- the Commonwealth resources available to undertake assessments, the information provided and the scientific knowledge of the hazards of the chemical.

Many chemicals are inherently toxic substances. Information on the specific hazards and safety precautions for a particular chemical can be crucial. While it is important that the hazard assessments are thorough, the legislation will not meet its objectives - it will not provide the desired public benefits - if the assessments are forced to be couched in extremely general, cautious terms so as to avoid the possibility of a negligence claim.

Thus, the Government decided that on balance, in this case, the public benefits in having timely hazard assessments outweighed the nonetheless very important right of an aggrieved individual to initiate a common law action against the Commonwealth for negligence or deceit.

Consistent with this, there is an equivalent provision in the sister legislation, the Agricultural and Veterinary Chemicals Act 1988.

As an aside, the Bill contains extensive appeal provisions whereby a person can appeal to the Administrative Appeals Tribunal on decisions made under the legislation. In particular, the assessment report on a particular chemical can be the subject of an appeal to the Administrative Appeals Tribunal by not only the introducer concerned, but any other person as well.

Subclause 105(3) - Amendment of the Schedule

The Government agrees that legislation should not, as a matter of general principle, be amended by subordinate legislation, unless

there are specific reasons why that is the more appropriate course in a particular instance. Like the Committee, the Government agrees that this is such a case. The Schedule may require regular updating as scientific knowledge and experience advances. It is important that it can be updated quickly and that such updates are widely disseminated so that all interested parties are aware of the changes.

It is equally important that Parliament retains its ability to scrutinize any Schedule amendments.

Clause 105 is designed to meet both these objectives.

Subclause 110(1) - Setting fees otherwise than in an Act

As pointed out by the Committee, there is an upper limit on the fees that can be charged under the Bill - that is, the fees are not to go beyond what is necessary to recover the costs of services provided.

Your sincerely

Graham Richardson

GRAHAM RICHARDSON

MINISTER FOR THE ARTS, SPORT, THE ENVIRONMENT, TOURISM AND TERRITORIES

23 OCT 1989

Senator B Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the comments of the Committee in the Scrutiny of Bills' Alert Digest No 12 of 1989 on the Hazardous Waste (Regulation of Exports and Imports) Bill 1989.

Your Committee raised a number of specific matters.

1. CAN AN INSPECTOR INSPECT HOUSEHOLD WASTE?

I appreciate the Committee's concern that inspectors should not intrude into domestic premises. I agree. I do not envisage this occurring.

The term "household waste" refers to a type of waste: not waste in the possession of a householder. It is highly unlikely that individual householders will export or import household wastes from their own domestic premises. On the contrary, I expect that shipments of waste will derive solely from commercial or industrial premises. Thus, for instance, I anticipate that exported household waste will derive from major municipal waste disposal facilities or incinerators.

Consequently, the Bill provides that, in exercising powers under the Act, inspectors will treat household waste in the same manner as other waste. The Bill contemplates exporting or importing waste, including household waste, on a scale unlikely to derive (directly) from domestic premises. As you will appreciate, the inspectors' powers, like the offences, apply only to exporters and importers.

Further, the Basel Convention clearly contemplates controlling the international movement of household waste. It would be inconsistent to exclude the export or import of this type of waste from the enforcement mechanisms of the Bill. Consequently, inspectors' powers in relation to household wastes are, and should be, the same as for other categories of waste.

2. FISHING EXPEDITIONS BY INSPECTORS?

Within regulatory schemes, there are three modes of entry to premises: entry by consent; entry pursuant to a monitoring warrant to ascertain compliance with the statute; and entry to investigate a suspected offence against the statute.

Where entry without the consent of the occupier is required, or where the consent of the occupier has been withdrawn after entry has been obtained, a monitoring

warrant is available in circumstances where it can be established that entry is reasonably necessary for ascertaining compliance with the statute in question. A monitoring warrant may be acted upon once, or more than once, at any time of the day or night during a period of six months from the date of issue of the warrant, and is intended to enable lawful entry to premises for the purpose of inspection to ensure that the statute is being complied with. A monitoring warrant does not authorise the exercise of any other intrusive powers; it is designed – in the absence of the consent of the occupier – purely to facilitate the normal inspection process of looking at things, documents and the like so as to assess compliance with the statute. The warrant remains in force for the specified period and authorises multiple entry to the subject premises.

An offence warrant is, on the other hand, available where the inspector has reasonable grounds for suspecting that an identifiable offence has been, or is being, committed against the statute in question. An offence warrant normally must be executed within a period of one month from the date of issue and enables the exercise of intrusive and coercive powers consistent with its purpose. An offence warrant requires the inspector or officer executing the warrant to form a suspicion, based on reasonable grounds, that there is evidence relating to the commission of a particular offence on the premises proposed to be entered and searched, and to satisfy the magistrate to that effect. The latter requirement constitutes the procedural safeguard preceding the exercise of the intrusive and coercive powers referred to. The warrant is spent once executed (ie once entry is gained to the subject premises).

Accordingly, the powers that may be exercised pursuant to the warrants are not the same. A monitoring warrant cannot authorise seizure because the exercise of such a power is, as noted, inconsistent with its purpose and the less stringent safeguards which attach to its issue. Thus, a monitoring warrant cannot be used to 'fish' for evidence.

It is consistent with criminal law policy to provide that where in the course of exercising powers under an offence related warrant a person discovers evidence of the commission of an offence, not being the offence to which the warrant relates, or other evidence relating to the offence to which the warrant relates, the person may seize the evidence in order to prevent its concealment, loss or destruction. In the absence of such a power the evidence may be concealed, removed or destroyed while an offence warrant is being obtained. Given the procedural requirements relating to the issue of the offence related warrant the additional power to seize referred to above is not a means of fishing for evidence and the additional power provides a reasonable balance between the rights of the individual and the possibility of concealment of evidence.

3. PERIOD OF EFFECT OF OFFENCE RELATED WARRANT

It is agreed that an offence warrant should not remain in effect for longer than one week. The Bill will be amended accordingly.

4. TELEPHONE WARRANTS – AN INVASION OF PRIVACY?

Clause 52 is intended to provide for the seizure of evidence where, for example, in circumstances of urgency in the course of executing a monitoring warrant, the inspector discovers evidence of the commission of an offence and the occupier does not consent to the removal of the evidence, or where there is an apprehension by the inspector that evidence of an offence may be concealed, removed or destroyed while an offence warrant is being obtained, provision may be made for the obtaining

of an offence warrant by telephone. Application for an offence warrant by telephone may, of course, be made from the premises in question, thereby preventing the removal or destruction of the evidence.

The telephone warrant provision does not require the inspector to send the form of the warrant and the duly sworn information to the magistrate until 'the day after the day of expiry or execution of the warrant (whichever is earlier)' as the form of the warrant is required to obtain entry to the premises.

The provision is only applicable where there are circumstances of urgency. As a matter of practicality it would be up the informant to satisfy the magistrate as to the circumstances of urgency.

It is agreed that a telephone warrant should not remain in effect for longer than one week. The Bill will be amended accordingly.

5. POWER TO AMEND THE SCHEDULE BY REGULATION

The Committee's comments have been noted.

Yours sincerely

Graham Richardson

GRAHAM RICHARDSON

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT OF 1989

1 NOVEMBER 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1989

1 NOVEMBER 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

CONTENTS

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1989

The Committee has the honour to present its Seventeenth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Goat Fibre Levy Bill 1989

Goat Fibre Levy Collection Bill 1989

GOAT FIBRE LEVY BILL 1989

This bill was introduced into the House of Representatives on 30 August 1989 by the Minister for Primary Industries and Energy.

The bill proposes to impose a levy rate of 1.5% (with a maximum rate of 5.0%) on the sale of goat fibre to finance research similar to that in operation for other rural industries.

The Committee commented on the bill in **Alert Digest No.11** (6 September 1989) and **Alert Digest No.12** (27 September 1989) and has received a response to its comments from the Minister.

EXTENSION OF DEFINITION OF 'LEVIABLE FIBRE' AND 'SALE VALUE'
Clause 4

The Committee expressed concern that the terms of the definitions of **'leviable fibre'** and **'sale value'** could be amended by regulation.

The Minister has responded that the definitions of **'leviable fibre'** and **'sale value'** are included in a levy bill because they affect the incidence of tax. A levy bill being a taxation Act can only be amended by another taxation bill.

In his response the Minister states that the goat fibre industry is a new and developing industry that is undergoing significant developmental and marketing changes. These industry changes in the view of the Minister are largely of a technical nature that are appropriately dealt with by regulation. To ensure that the maximum amount of goat fibre is subject to levy to further relevant research programs the changes to the definitions need to be made quickly through regulation.

The Committee does not accept the view that changes to the definitions must be made so quickly that they should not be incorporated in an amending levy bill.

The provision is brought to the attention of the Senate in that by allowing definitions to be amended by regulations the provision may inappropriately delegate legislative power.

The response of the Minister is attached to this Report.

GOAT FIBRE LEVY COLLECTION BILL 1989

This bill was introduced into the House of Representatives by the Minister for Primary Industries and Energy on 30 August 1989.

The bill proposes to enable the collection of the levy imposed by the Goat Fibre Levy Bill. Levies will be paid into the Australian Special Rural Research Fund.

The Committee commented on the bill in Alert Digest No.11 of 1989 and Alert Digest No.12 of 1989 and has received a response from the Minister.

General Comment

The Committee noted that clause 3 of the Goat Fibre Levy Bill stated that the Goat Fibre Levy Collection Bill is incorporated and is to be read as one with the Goat Fibre Levy Bill, but there is no similar provision in the Goat Fibre Levy Collection Bill.

The Minister has responded that this practice follows the normal conventions common to the drafting of tax and collection bills consistent with sections 53 and 55 of the Constitution.

The Committee is aware of the constitutional matters outlined by the Minister, but is of the view that the Goat Fibre Levy Collection Bill should incorporate a provision similar to clause 3 of the Goat Fibre Levy Bill. This step would make the inter-relationship of the bills clear to those reading them.

DEFINITION OF GOAT'S FIBRE-SELLING BROKER
Subclause 3(1)

The Committee noted that the definition of a goat's fibre selling broker appeared to contemplate a goat selling its own fibre. The Minister has responded that the syntax is technically correct and the phrase is in common use in the industry.

The Committee thanks the Minister for his response but points out that consistent usage should not be confused with correct usage. The terms would be made appropriate drafted as the goat-fibre selling broker.

WORKING OUT WHAT IS A LEVIABLE AMOUNT
Clause 9

The Committee was concerned that the relationship between the definition of `**leviable amount**' in **clause 4** of the **Goat Fibre Levy Collection Bill** and the exemption from levy in **clause 9** of the **Goat Fibre Levy Bill** was difficult to establish.

The Minister has responded that the **Goat Fibre Levy Bill** provides for the imposition of levy and exemptions from that imposition. The reference in **clause 9** of the **Goat Fibre Levy Bill** includes a reference to the threshold leviable amount, which, when read in conjunction with the **Goat Fibre Levy Collection Bill**, indicates that a grower would not pay any levy unless the grower produced sufficient goat fibre to attract a levy of $50 per year.

The Committee thanks the Minister for his response but is of the view that having to consult two bills to establish the threshold leviable amount would cause persons reading the bill an unnecessary amount of difficulty.

DEFINITION OF MAGISTRATE TO INCLUDE 'JUSTICE OF THE PEACE'
Subclause 3(1)

The definition of 'magistrate' in **subclause 3(1)** to include 'justice of the peace' allows a search warrant to be issued by a justice of the peace pursuant to **clause 12** of the bill.

The Committee expressed its strong view that the practice of having search warrants issued by justices of the peace was inappropriate. The issue of a search warrant by other than a magistrate or judge is not acceptable to the Committee, except where a warrant may be required in a very remote country area.

The Minister has responded to the Committee,

> This clause was drafted to include justices of the peace because goat production [sic] occurs widely in the pastoral zone. In some of these remote locations it may not be possible to contact a magistrate.

The Committee regards justices of the peace as lay persons whose role in contemporary Australia should not include issuing warrants to officials of the State to search private property.

The Committee draws the definition of magistrates in **subclause 3(1)** of the bill to the attention of the Senate in that it may trespass unduly on personal rights and liberties.

TIME FOR PAYMENT TO BE ALTERED BY REGULATION
Subclauses 4(1)(2)(3) and (4)

The Committee noted the period allowed for the payment of levy pursuant to the subclauses was 28 days or 'such other period as may be prescribed'. The Committee was prepared to accept the alteration of the period by regulation provided it was not reduced from 28 days.

The Minister has informed the Committee that levy is collected at the point of sale, and as much of the goat fibre is sold electronically, immediate transfer of levy to the Australian Special Rural Research Fund is possible. Consequently 28 days can be considered a generous period to enable levy to be paid.

The Committee thanks the Minister for his response.

APPOINTMENT OF AUTHORISED PERSON
Clause 15

The Committee noted that the clause allowed the Secretary to appoint an 'authorised person' without indicating what attributes or occupation such persons may be expected to hold.

The Minister has responded to the Committee,

> The appointee is usually a public servant, but the person appointed will tend to be a person who can most effectively undertake the particular task required.

The Committee thanks the Minister for his response but is of the view that all clauses delegating administrative powers should contain appropriate restrictions and qualifications.

The Committee stated in paragraph 2.24 p.25 of its 1985/86 Annual Report (Parliamentary Paper No.443/1987)

> The Committee has also continued to press, under this principle, for the imposition of appropriate restrictions and qualifications in clauses providing for the delegation of administrative powers. The Committee has had considerable success in this area, both in terms of amendments being made to clauses for which it has drawn attention and in terms of its comments being taken into account in the drafting of new bills.

The insertion of appropriate restrictions in clauses delegating administrative power either as to the powers which may be delegated or as to the persons to whom they may be delegated, ensures that the legislation better reflects the Government's intentions, and makes the public at large better informed about the scope and exercise of the powers conferred by the bill.

Clause 15 is brought to the attention of the Senate in that it may inappropriately delegate administrative power.

The response of the Minister is attached to this report.

Barney Cooney
(Chairman)

1 November 1989

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
THE HON. JOHN KERIN, M.P.

Parliament House,
Canberra ACT 2600
Telephone (062) 77 7520
Facsimile (062) 73 4120

Senator BC Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
Canberra ACT 2600

Dear Senator Cooney

I refer to your Committee's letters of 7 and 28 September 1989 commenting on aspects of the Goat Fibre Levy Bill 1989 and the Goat Fibre Levy Collection Bill 1989.

A detailed response to the Committee's queries is attached.

Yours fraternally

John Kerin

Goat Fibre Levy Bill

1. Clause 4 - Extension of definition of 'leviable fibre' and 'sale value' by regulation.

The Committee is of the view that changes to bills by regulation should only be possible when the changes are essentially technical or consequential in nature and seeks the views of the Minister as to why amendments to these definitions cannot be included in a portfolio omnibus bill.

Response: The definitions of "leviable fibre" and "sale value" are included in the Levy Bill (a "taxation" bill), because these definitions affect the incidence of tax. A taxation Act can be amended only by another taxation Act, and therefore cannot be amended by a general or portfolio omnibus bill.

The Levy Bill has been drafted to provide that definitions can be amended by regulations, for the following reasons. The goat fibre industry in Australia is a newly emerging industry, and significant technical developments and changes in production and marketing are occurring in the industry. To the extent that these changes are of a largely "technical" nature, any consequential changes required in legislation would be most appropriately dealt with through regulations. It is important that changes should be made quickly through regulations, so that the maximum amount of goat fibre is subject to levy, to meet the interests of the industry in furthering relevant research programs.

Goat Fibre Levy Collection Bill 1989

1. Sub-clause 3(1) - Definition of goat's fibre-selling broker

The Committee notes that the definition refers to a 'goat's fibre-selling broker'. The provision should be drafted so as to not contemplate a goat authorising a broker to sell its own fibre.

Response: The syntax is technically correct, and the phrase used is the one in common use in the industry. The broker is involved in selling, but never owning, the fibre.

2. Sub-clause 3(1) - Definition of leviable amount

A. The Committee regards provisions that leave the maximum amount of levy to be set by later regulation as unacceptable.

The maximum amount of levy to be paid should be able to be ascertained from the provisions of the primary legislation.

Response: The maximum rate of the levy is specified in Clause 6 of the Levy Bill itself, at 5% of the sale value of goat fibre. The actual rate of levy is industry determined, and can vary from 0% to 5% as the industry wishes. Industry has requested a starting percentage of 1.5% of sale value. The "leviable amount" of $50 referred to in the Levy Collection Bill is a threshold value of the levy for collection purposes (ie the levy is only collected when the threshold is reached). In order to be able to adjust this threshold level taking into account factors such as inflation, regulations are needed to retain flexibility. I note that the Committee subsequently accepted this point, provided the threshold is not lowered below $50.

B. The Committee is concerned that it is difficult for anyone reading the Bills to ascertain the connection between the exemption set out in clause 9 of the Levy Bill and the definition of leviable amount in the Collection Bill and that the Explanatory Memorandum does not clearly set out the relationship between those items. The Committee asks why the definition of leviable amount and exemptions from such amounts can (not?) be set out more clearly.

Response: The Levy Bill provides for the imposition of the levy and for exemptions from that imposition. Clause 9 of the Levy Bill includes a reference to the threshold "leviable amount". This indicates, when read in conjunction with the Levy Collection Bill, that a grower would not pay any levy unless the sale value of the fibre was sufficient to attract at least $50 levy in a year. However, it should be noted that when the total amount of levy payable reaches or exceeds $50, the whole of the sale value of the fibre is liable for levy; ie the first $50 of sale value is not free from levy.

C. The Committee notes that clause 3 of the Levy Bill states that the Collection Bill is incorporated and shall be read as one with the Levy Bill but points out that there is no similar provision contained in the Levy Collection Bill.

Response: This is consistent with the normal convention common to the drafting of tax and collection bills and is consistent with Sections 53 and 55 of the Constitution governing the content of bills.

3. Sub-clause 3(1) - Definition of magistrate to include justice of the peace.

The view of the Committee is that justices of the peace are not judicial officers, and that the issue of search warrants should be confined to judicial officers.

Response: This clause was drafted to include justices of the peace because goat production occurs widely in the pastoral zone. In some of these remote locations it may not be possible to contact a magistrate.

4. Sub-clauses 4(1), (2), (3) and (4) - Time for payment may be amended by regulation

The period allowed for payment of levy is 28 days or 'such other period as is prescribed'. The Committee is prepared to accept that the subclauses be amended by regulation, but is of the opinion that the period allowed for payment of levy should not be less than 28 days.

Response: The intention is to specify an appropriate period for brokers and dealers to transfer levy payment to the Australian Special Rural Research Fund (ASSRF). Levy is collected at point of sale and as the vast majority of goat fibre is sold electronically, immediate transfer of levy to ASRRF is a possibility. A period of 28 days after the close of the 3-month quarter means that brokers and dealers may be holding levy funds for up to 4 months. 28 days could be seen to be generous in this light.

5. Clause 15 - Appointment of authorised person.

The clause permits the Secretary to appoint 'a person' as an authorised person, without any indication of the attributes or occupation that such persons might be expected to hold. The clause may be in breach of principle 1(a)(v) of the Committee's terms of reference and constitute an inappropriate delegation of legislative power.

Response: The appointee is usually a public servant, but the person appointed will tend to be a person who can most effectively undertake the particular task required.

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1989

22 NOVEMBER 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1989

22 NOVEMBER 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1989

The Committee has the honour to present its Eighteenth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Industry, Technology and Commerce Legislation Amendment Bill (No.2) 1989

Therapeutic Goods Bill 1989

Therapeutic Goods (Charges) Bill 1989

University of Canberra Bill 1989

CONTENTS

INDUSTRY, TECHNOLOGY AND COMMERCE LEGISLATION AMENDMENT BILL (NO. 2) 1989

This bill was introduced in the House of Representatives on 4 October 1989 by the Minister for Land Transport and Shipping Support.

The bill proposes omnibus amendments to the:

- Australian Industry Development Corporation Act 1970
- Bounty (Ships) Act 1989
- Designs Act 1906
- Patents Act 1952
- Patents, Trade Marks, Designs and Copyright Act 1939 and
- Trade Marks Act 1955

The Committee commented on the Bill in **Alert Digest No. 14 of 1989** and has received a response from the Minister for Industry, Technology and Commerce.

LIMITING THE OPERATION OF THE DESIGN ACT BY REGULATION
Proposed subsection 27B(10)

The Committee commented that proposed subsection 27B(10) of the Designs Act 1906 would allow the definition of 'relevant act' to be circumscribed and thereby effectively limited by regulation.

The Minister has responded that there is currently no provision for extensions of time in the Act. Proposed

section 27B is designed to permit extensions of time for a broad range of matters under the Design Act, but that regulations may be required to exclude certain time limits.

The Minister states that there is a balance between dealing with applications as quickly as possible and having the rights of applicants arbitrarily terminated due to minor procedural matters. The Registrar of Designs will consult with interested groups who are users of the system when preparing regulations to exclude time limits from the operation of proposed section 27B.

The Committee draws the response of the Minister to the attention of the Senate.

ATTENDANCE ON A DAY, TIME AND PLACE
Paragraph 41(2)(C)

Paragraph 41(2)(C) of the bill would allow the making of regulations empowering the Registrar to require an applicant who wishes to be heard, to appear for the purpose of being heard on a day and at a time and place specified by the Registrar. The Committee requested that the time, day and place of the appearance should be reasonable in all the circumstances.

The Minister states that Design Regulations 14, 16 and 17 set out the procedure to be followed when the Registrar is not satisfied that a design is registrable under the Act.

When the Registrar objects to the registration of a design the applicant is entitled to be heard personally or to be represented by an agent before the Registrar either registers or rejects an application.

The regulations provide that Registrar must give the applicant written notice of his entitlement to be heard, and that the applicant is required to be given 10 days notice of the date, time and place of the hearing.

The Committee thanks the Minister for his response which is attached to this Report.

THERAPEUTIC GOODS BILL 1989

This Bill was introduced into the House of Representatives on 5 October 1989 by the Minister for Housing and Aged Care.

The bill proposes to provide national controls for therapeutic goods, commonly used in the prevention, diagnosis, cure or alleviation of disease, ailment, defect or injury. The bill will apply to corporations who import, export, manufacture or supply therapeutic goods and to persons who import, export, trade interstate, or provide goods to the Commonwealth.

Primarily, this bill will provide for the:

- determination of standards for therapeutic goods;
- establishment of an Australian register of therapeutic goods which are approved for import, export and supply; and
- licensing of Australian manufacturers of therapeutic goods.

The Committee commented on the bill in **Alert Digest No 14 of 1989** (25 October 1989) and has received a response from the Minister.

DETERMINING MANUFACTURING PRINCIPLES BY GAZETTE ORDER

The Committee noted that subclause 10(1) of the bill would allow the Minister to publish orders in the Gazette.

The provisions of subclause 36(1) would allow the Minister to determine manufacturing principles which could then be published in the Gazette as an Order. The Orders will be

subject to disallowance and the Committee suggested that the manufacturing principles should be in the form of regulations.

The Minister has responded that orders that are gazetted pursuant to subclause 10(1) are technical documents which frequently contain details of assay methods and requirements both for classes of goods and individual products. It is necessary in the Minister's view that the Orders be provided as separate documents. There are currently about 25 such Orders.

Manufacturing principles to be made pursuant to subclause 36(1) will be primarily codes of goods manufacturing practice. Such codes are required to be understood by factory personnel and are presented in 'laymans terms'.

The Minister is of the opinion that the current practice of gazetting the Orders which are disallowable instruments, allows for scrutiny by Parliament and provides the flexibility to make timely changes to Orders and codes of goods manufacturing practice.

The Committee thanks the Minister for his response but is of the opinion that to have the codes of goods manufacturing practice incorporated in regulations would not affect the flexibility of the system or the ability of the Orders to be altered in a timely fashion.

Regulations which are professionally drafted by the Attorney-General's Department, consolidated, published and numbered can only assist in improving the standard and clarity of the Orders whilst making them accessible to those required to use them.

PERIOD OF VALIDITY OF OFFENCE RELATED WARRANTS
Paragraph 50(4)(d)

The Committee noted its concern that a warrant obtained from a Magistrate on the basis that a particular thing may be at a specified place within the next 72 hours could remain valid for a period of up to one month. The Minister has informed the Committee that the paragraph will be amended so that an offence related warrant will cease to have effect one week after being issued.

PERIOD OF VALIDITY OF WARRANT OBTAINED BY TELEPHONE.
Subclause 51(6)

The Committee noted that a warrant obtained by telephone in urgent circumstances could remain valid for up to one month.

The Committee thanks the Minister for his undertaking that the bill will be amended to provide that a warrant obtained by telephone will cease to have effect after one week.

The response of the Minister is attached to this Report.

THERAPEUTIC GOODS (CHARGES) BILL 1989

The bill was introduced into the House of Representatives on 5 October 1989 by the Minister for Housing and Aged Care.

The Bill proposes to provide for annual charges for the registration and listing of therapeutic goods, and for the licensing of manufacturers of licensed goods in Australia under the Therapeutic Goods Bill 1989.

The Committee commented on this bill in **Alert Digest No. 14 of 1989** and has received a response from the Minister.

FIXING CHARGES BY REGULATION
Subclause 4(1)

The Committee noted that subclause 4(1) would permit the amount of certain annual charges to be fixed by regulation, with no upper limit to the charges specified in the bill.

The Committee requested that the Minister insert a provision in the bill to reflect his comment in the Second Reading Speech that the level of charges would be set at no more than half the cost of the program.

In his response the Minister states that an Industry-Government Consultative Committee has been established to provide advice on the scale of charges. The Committee includes members of four different industry associations and, in the Minister's opinion, the level of industry input to the fee structure means that it is not necessary to provide the amendment requested by the Committee.

The Committee notes the matters raised by the Minister concerning the level of industry input to the determination of charges. The Committee does not regard it as appropriate that the amount of an annual charge can be fixed by regulation with no upper limit to the charge specified in the bill. The most appropriate means to ensure that the upper limit of a charge is not set by the regulations is to amend the bill to set a maximum level for the relevant charges.

The Minister's response is attached to this Report.

UNIVERSITY OF CANBERRA BILL 1989

This bill was introduced into the House of Representatives on 26 October 1989 by the Minister for Employment, Education and Training.

The bill proposes to establish the University of Canberra which will replace the Canberra College of Advanced Education. The University will be established under the sponsorship of Monash University.

The Committee commented on the bill in **Alert Digest No. 15 of 1989** (1 November 1989) and has received a response from the Minister.

MINISTERIAL GUIDELINES
Subclause 31(1) of the bill

Subclause 31(1) would permit the Minister to issue guidelines relating to the statute making powers of the University in relation to fees payable to the University pursuant to subparagraphs 40(2)(t)(i)to(ix). Subclause 40(2) requires the guidelines to be in writing and published in the Gazette.

The Committee requested that the Ministerial guidelines be tabled before Parliament as disallowable instruments.

The Minister has informed the Committee that the guidelines on fees which will be issued under subclause 31(1) are of a general nature and are the same as those issued under the Higher Education Funding Act 1988 to all State and Territory higher education institutions.

In the view of the Minister it would be inappropriate for the guidelines to be subject to disallowance with respect to the University of Canberra whilst they would still continue for all other higher education institutions.

The Committee draws the subclause to the attention of the Senate.

UNIVERSITY STATUTES
Clause 42

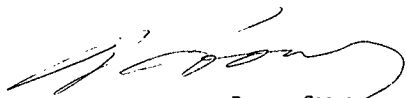
Clause 42 provides that Statutes passed by the University Council are required to be approved by the Governor-General and notified in the Gazette, and tabled before Parliament.

The Committee requested that the Statutes be tabled and subject to disallowance.

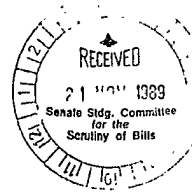
The Minister has responded that to require the Statutes of the new University to be tabled would be to condone political interference in the management of higher education institutions.

The Minister has advised the Committee that the Government has announced a proposal to develop a Charter on institutional autonomy and academic freedom. The Charter is intended to ensure that institutions are free from interference in matters such as course content, assessment, research, staff appointments, etc. The Minister is of the view that to make the University of Canberra Statutes subject to disallowance would threaten institutional authority and jeopardise the Commonwealth's efforts to secure state and territory agreement on the issue.

The Committee thanks the Minister for his response which is attached to this Report.



Barney Cooney
(Chairman)
22 November 1989



89/724
PMT

Senator B C Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the Committee's comments concerning the Industry, Technology and Commerce Legislation Amendment Bill (No.2) 1989 made in the Scrutiny of Bills Alert Digest No.14 of 1989 (25 October 1989).

There are two matters of concern to the Committee. The first relates to new subsection 27B(10) of the Designs Act 1906 proposed in clause 22 of the Bill. The Committee believes that the provisions of the proposed subsection would allow the definition of "relevant act" to be circumscribed and thereby effectively limited by means of regulation. It seeks my views on why it is necessary to amend the definition of "relevant act" in this fashion.

There is presently no provision for extensions of time in the Designs Act. Present sections 27B and 27C provide a rather cumbersome mechanism for restoration of design applications which lapse because of failure to meet a particular time limit.

New section 27B proposed in clause 22 of the Bill has a more general operation. It permits extensions of time for doing a broad range of acts under the Designs Act and Regulations, but it is not appropriate for every time limit to be extendable. Regulations may therefore need to be made for the purposes of new section 27B so as to exclude certain time limits from the extension provisions.

There are already a number of regulations which provide for extensions of time in one way or another. It would be a burden on applicants, industry and the Designs Office to have one kind of extension added to other kinds. Extensions of time are necessary, but they can act against the interests of applicants if they enable the registration procedure to be delayed unnecessarily.

There is a balance of interests to be considered. On the one hand, expeditious handling of applications is desirable. On the other, applicants should not have their rights terminated arbitrarily because of some trifling procedural difficulty. The Registrar of Designs will bear these things in mind when he prepares a proposal for regulations to exclude time limits from the operation of section 27B. The interest groups who represent the users of the system will be consulted in the preparation of the proposal. Any exclusions will therefore need to be carefully justified.

The second matter of concern to the Committee stems from the provisions of new paragraph 41(2)(e) of the Designs Act proposed in clause 30(b) of the Bill.

Paragraph 41(2)(e) of the Designs Act, as proposed in the Bill, would allow the making of regulations empowering the Registrar of Designs to require an applicant who wishes to be heard, to appear for the purpose of being heard on a day, and at a place and time specified by the Registrar.

The Committee has requested that the paragraph be amended so that the time, day and place of a hearing are required to be reasonable in all the circumstances.

The provisions of paragraphs 41(2)(e) of the Designs Act should be read in the light of existing regulation 17 of the Designs Regulations. That regulation, together with regulations 14 and 16, sets out the procedures to be followed where the Registrar is not satisfied that a design is registrable under the Designs Act or that an applicant for registration of a design is entitled to make the application. Regulation 17 will need to be revised to take account of paragraph 41(2)(e), but I do not intend that the procedure will change significantly.

The procedure goes to great lengths to ensure that applicants' rights are protected. Broadly speaking, where an objection to the registration of a design is taken by the Registrar, the applicant concerned is entitled to be heard personally, or to be represented by his or her agent, before the Registrar decides to (register or) refuse to register the design. The regulations provide that the Registrar must give the applicant written notice of the applicant's entitlement to be heard. If the applicant informs the Registrar that he or she desires to be heard, the provisions ensure that the applicant is given at least 10 days notice of the date, time and place for the hearing.

I believe that it is appropriate for the Act to set out the general position, leaving it up to the regulations to specify the details. I am happy to give an undertaking that the regulations will continue to afford applicants a right to be heard in line with natural justice principles. Interest groups will be consulted in the preparation of regulations to be made for the purposes of the new provision in the Act.

Yours sincerely

John N Button

(John N Button)

Contact: Philip Thomas
Phone: 83 2097

Hon. Peter Staples MP
Minister for Housing and Aged Care

Parliament House
Canberra ACT 2600
Telephone: (062) 72 1211
Facsimile: (062) 73 2018

Portfolio of
Community Services
and Health

Senator B.C. Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

Thank you for the opportunity to respond to the Committee's comments on the Therapeutic Goods Bill 1989 and the Therapeutic Goods (Charges) Bill 1989 (Scrutiny of Bills Alert Digest No 14 of 1989).

THERAPEUTIC GOODS BILL

Gazette orders that determine manufacturing principles

Subclause 10(1). Orders are technical documents which frequently contain details of assays methods and requirements both for classes of goods and individual products. It is necessary to provide Orders as separate documents and at the present time there are about 25 Orders. Gazetting these standards as Orders has proved to be an efficient process under the Therapeutic Goods Act 1966 with the Orders being readily obtainable from my Department.

Subclause 36(1). Manufacturing principles are primarily codes of goods manufacturing practice. These codes must be read and understood by factory personnel and like many other countries, are presented in laymans terms.

It is necessary to have the flexibility to make timely changes to Orders and Codes of GMP. This is provided by the current procedure as well as giving appropriate scrutiny by Parliament

Offence related warrants- period of validity

Paragraph 50(4)(d) and subclause 51(6).

The warrant provisions in the Bill were drafted according to the policy developed by the Attorney-General's Department. Unfortunately the change in policy regarding the duration of offence-related warrants coincided with the passage of the Bill through the House of Representatives. The Bill will be amended so that the offence-related warrant will cease to have effect not more than one week after the issue.

THERAPEUTIC GOODS (CHARGES) BILL 1989

Charges to be fixed by regulations

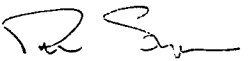
Subclause 4(1)

The following provisional annual charges were presented to Cabinet -

Listable goods		$ 50
Registrable goods		
Prescription		$ 150
Non prescription		$ 350
Manufacturers licence	up to	$8,300

An Industry-Government Consultative Committee has been established to periodically advise me on the scale of charges. Representatives of the Australian Pharmaceutical Manufacturers Association, the Australian Medical Devices and Diagnostics Association, the Proprietary Association of Australia and the Nutritional Foods Association are on the Committee. In view of the level of industry input with the fee structure, I do not consider it necessary to amend the Bill.

Yours sincerely



Peter Staples

Minister for Employment, Education and Training
Parliament House, Canberra, ACT, 2600

20 NOV 1989

Senator B C Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Australian Senate
Parliament House
Canberra ACT 2600

Dear Senator Cooney

I refer to the Scrutiny of Bills Alert Digest No 15 of 1989 (1 November 1989) which provides comments on the University of Canberra Bill 1989.

The Ministerial guidelines on fees which will be issued under subclause 31(1) are of a general nature and are to be the same as those which are issued under the Higher Education Funding Act 1988 and apply to all State and Territory higher education institutions. It would be inappropriate for the Ministerial guidelines issued to be subject to disallowance in the case of one institution, the new university, and yet continue to apply to all other higher education institutions.

The proposal to require Statutes of the new university to be disallowable would in effect condone political interference into the management of higher education institutions. Recently I announced that the Government proposes to develop a Charter on institutional autonomy and academic freedom to ensure that institutions are free from interference in relation to such matters as course content, methods of assessment, conduct of research, staff appointments and the free expression of views and opinions. In short, I do not support the Committee's proposal since it would threaten institutional autonomy and would jeopardise the Commonwealth's efforts to secure the agreement of the States and Territories on this important issue.

I would appreciate my comments being incorporated into the Committee's report to the Senate.

J S Dawkins

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINETEENTH REPORT

OF 1989

29 NOVEMBER 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINETEENTH REPORT

OF 1989

29 NOVEMBER 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINETEENTH REPORT

OF 1989

The Committee has the honour to present its Nineteenth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Australian Wine and Brandy Corporation Amendment Act 1989

Customs and Excise Legislation Amendment Bill (No. 4) 1989

Pasture Seed Levy Act 1989

Primary Industries and Energy Legislation Amendment Bill (No. 3) 1989

Primary Industries and Energy Research and Development Bill 1989

Social Security and Veterans' Affairs Legislation Amendment Bill (No. 3) 1989

CONTENTS

AUSTRALIAN WINE AND BRANDY CORPORATION AMENDMENT ACT 1989

The Act was introduced into the House of Representatives on 25 October by the Minister for Primary Industries and Energy, and passed the Senate on 2 November 1989. The Act received the Royal Assent on 23 November 1989.

The Act provides for the implementation of a wine label integrity program by the Australian Wine and Brandy Corporation, and makes consequential amendments necessitated by the Wine Grapes Levy Amendment Bill 1989.

The bill was commented upon in Alert Digest No. 15 of 1989 (1 November 1989) and the Committee has received a response from the Minister.

PERIOD OF OFFENCE RELATED WARRANT
Proposed Section 39ZF

The Committee commented that an offence related warrant is issued by a Magistrate on the basis of the possible existence of evidence relating to the commission of a label offence on specified wine premises within the next 72 hours. The warrant can remain valid for a period of up to one month. The Committee suggested that the warrant should not remain valid for longer than the period within which the evidence may be located on the premises.

The Minister has responded that the Department acted on the advice of the Attorney-General's Department. The Label Integrity Program is an entirely new initiative and the Department will examine the operation of the 72 hour period during which the evidence is expected to be on the premises. The Department will also monitor the one month period for which an offence related warrant may remain valid and will propose any necessary changes.

The Committee thanks the Minister for his response but remains of the view that the period for which the warrant has effect should be strictly limited.

RETENTION OF EVIDENCE
Paragraph 39ZG(1)(c)

The Committee stated that a person who is entitled to inspect documents seized by an inspector should be entitled to make copies of those documents. The Minister has agreed that businesses should be able to photocopy essential business documents held by inspectors. The Corporation will accordingly instruct inspectors to permit such copying.

The Committee thanks the Minister for his response which is attached to this Report.

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL (NO. 4) 1989

This bill was introduced into the House of Representatives on 2 November 1989 by the Minister Representing the Minister for Industry, Technology and Commerce.

The bill is an omnibus bill proposing a series of amendments to the Customs Act 1901 and the Excise Act 1901. The bill also proposes to effect a series of repeals of unproclaimed sections of three Customs and Excise Amendment Acts.

The Committee commented on the bill in Alert Digest No. 16 of 1989 (22 November 1989) and has received a response from the Minister.

GENERAL COMMENT
Repeal of unproclaimed provisions

The Committee notes that the bill proposes to repeal certain unproclaimed legislation relating to the Customs Amendment Act 1981, Customs and Excise Amendment Act 1982 and the Customs and Excise Legislation Amendment Act 1985. The Committee welcomes any initiative that repeals unproclaimed legislation.

REVIEW OF DECISIONS
Clauses 20 - 22

Clauses 20 - 22 of the bill refer to decisions in respect of commercial tariff concessions.

The Comptroller of Customs makes decisions on applications but is required to refer certain applications to the Minister for decision. The decisions are all of commercial significance and the Committee sought advice from the Minister as to what process exists for review of the decisions on the merits.

The Minister has responded that the decisions relate to commercial tariff concessions orders under existing Part XVA of the Customs Act. The decisions are not subject to merits review by the Administrative Appeals Tribunal but are subject to judicial scrutiny pursuant to section 5 the Administrative Decisions (Judicial Review) Act 1977.

Decisions refusing a commercial tariff concession have not been subject to Administrative Appeals Tribunal Review at any stage, but in the Minister's view the rights of applicants are protected by review by the courts pursuant to the provisions of the Administrative Decisions (Judicial Review) Act.

The response of the Minister is attached to this Report.

PASTURE SEED LEVY ACT 1989

The Act was introduced into the House of Representatives on 4 October 1989 by the Minister for Land Transport and Shipping Support, and was commented upon by the Committee in Alert Digest No. 14 of 1989 (25 October 1989). The Act was passed by the Senate on 2 November 1989, and received the Royal Assent on 23 November 1989.

The Act provides for the imposition of a levy on certain pasture seed produced in Australia to finance the industry contribution to a pasture seed research scheme. The levy applies initially to certified seed of medic, clover and lucerne and lucerne cultivars.

The Committee has received a response from the Minister.

INCORPORATING THE PASTURE SEED LEVY ACT 1989 AND THE PASTURE SEED LEVY COLLECTION ACT 1989

The Committee noted that what is now section 3 of the Pasture Seed Levy Act (Levy Act) incorporates the Pasture Seed Levy Collection Act (the Collection Act) with the Levy Act but there was no corresponding provision in the Collection Act.

The Committee requested the advice of the Minister as to whether the Collection Act could be amended to alleviate the problem.

The Minister has responded that the Acts are drafted in a manner consistent with the normal convention common to the drafting of such legislation and with sections 53 and 55 of the Constitution governing the content of revenue and taxation bills.

The Committee notes the response of the Minister but is of the opinion that Levy Collection bills should be drafted so as to make persons aware that they are incorporated with an associated Levy bill.

AMENDMENT OF THE LEGISLATION BY REGULATION

The Committee noted that what is now section 9 of the Act allows the Minister to amend the Schedule to the Act by an instrument published in the Gazette. The provision allows the amount of levy to be varied by delegated legislation.

The Minister has responded that subsection 9(3) of the Act provides for a maximum amount of levy of $50 per tonne. The maximum amount of levy has been recommended by the growers organisation which is the Grains Council of Australia.

The Minister considers that the alteration of the Schedule by Ministerial instrument rather than by regulation is considered justified on the basis of administrative efficiency. The initial list provided by the growers organisation includes 78 cultivars. The Minister envisages that there will be a regular and continuing need for additions and deletions to the Schedule and changes to the rate of levy. This need will arise as the values of individual cultivars change and new cultivars are introduced into the market.

The Minister points out that the relevant instruments altering the Schedule are disallowable by the Parliament and that section 14 of the Levy Collection Act requires the Secretary to make any changes to the Schedule publicly available.

Subsection 9(2) of the Act requires that the recommendations of the growers organisation are to be taken into account before any changes are made to the Schedule.

The Committee notes the response of the Minister, but points out that incorporating changes to the Schedule in regulations would ensure that the changes are properly drafted, consolidated, numbered, published and publicly available. The experience of the Committee is that changes made by regulation need not be any more administratively complex or slower to become law.

The provisions of the Act are brought to the attention of the Senate notwithstanding that the legislation has passed the Senate.

The response of the Minister is attached to this Report.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL (NO.3) 1989

This bill was introduced into the House of Representatives on 4 October 1989 by the Minister for Land Transport and Shipping Support.

The bill is an omnibus bill for legislation administered within the Primary Industries and Energy portfolio. It proposes to amend 11 and repeal 4 Acts.

The Committee commented on the bill in **Alert Digest No.14** of 1989 (25 October 1989) and has received a response from the Minister for Primary Industries and Energy.

TABLING OF RESEARCH AND DEVELOPMENT PLANS
Proposed Clause 13

The Committee requested that the Minister consider tabling research and development plans made pursuant to section 95 of the Wool Marketing Act 1987.

The Minister has responded that the Australian Wool Corporation covers much of its research and development activities in its annual report.

The more detailed research plans prepared in consultation with the Minister set the direction of wool industry development. The Minister considers these plans are in-house working documents which are commercial-in-confidence. Accordingly the Minister considers tabling the research plans before Parliament as undesirable.

The Committee draws the response of the Minister to the attention of the Senate.

REJECTION OF NOMINATION TO RESEARCH COUNCIL
Proposed subsection 109B(5) and proposed section 109E

The Committee sought the Ministers views as to whether a person rejected by the Minister for membership of the Research Council could receive a copy of the reasons for that rejection.

The Minister has responded that he supplies the reasons for any rejection to the Selection Committee. The Chairman of the Selection Committee notifies persons as to the fate of their application and has the discretion to release to a nominee the reasons for the rejection.

In the Minister's view there is nothing in the Act preventing the release of reasons to candidates who fail to be selected by the Selection Committee or have had their nomination rejected by the Minister.

The Committee thanks the Minister for his response which is attached to this Report.

PRIMARY INDUSTRIES AND ENERGY RESEARCH AND DEVELOPMENT BILL 1989

This bill was introduced into the House of Representatives on 4 October 1989 by the Acting Minister for Primary Industries and Energy.

The bill proposes to establish Research and Development Corporations in respect of primary industries (including energy), replacing the present research councils and committees administering the allocation of research and development program funds. The Corporations' objective will be to improve the funding of primary industries research and development in order to increase the economic, environmental and social benefits to the rural and wider community. The bill proposes to establish a Rural Industries Research and Development Corporation to assume the functions presently covered by the Australian Special Rural Research Fund and those Research Councils established under the Rural Industries Research Act 1985.

The Committee commented on the bill in **Alert Digest** No 14 of 1989 (25 October 1989) and has received a response from the Minister.

ADDITIONAL FUNCTIONS
Subclause 4(1) Paragraph 11(f) and clause 149

The Committee noted that subclause 4(1) of the bill defines the Act to include the regulations which are in turn defined to include orders made pursuant to clause 149. The orders are to be disallowable instruments.

Paragraph 11(f) of the bill would allow for additional functions to be conferred on a Research and Developmental Corporation by this legislation or any other legislation.

The Committee was concerned at the wide range of additional functions that could be granted to Research and Development Corporations by this mechanism. The Committee also noted that this legislative arrangement may make it difficult for the public to ascertain the precise functions a Research and Development Corporation may actually possess at a given time.

The Minister has responded that the basis for the provision is to provide for timely response to unforseeable circumstances. The bill requires that regulations and orders are not to be inconsistent with the bill and consequently substantial changes to the provisions of the bill are unlikely to be made. It is not intended that orders will be used to expand or alter the operations of Research and Development Corporations. The orders may forseeably be used to resolve administrative difficulties within or between corporations. The Minister points out that any orders that are made will be the outcome of consultation with the representative organisations.

The Committee notes the Minister's response but points out that the provision will enable the expansion or alteration of the functions of Research and Development Corporations by means of orders.

TABLING OF RESEARCH AND DEVELOPMENT PLANS

The Committee requested that the Minister explain why Research and Development plans are not tabled before Parliament and whether it is possible to table the plans.

The Minister has responded that the relevant strategic plans can, and often do, contain commercially sensitive information. The need for strict accountability is recognised and provided for through the tabling of annual reports and the direct reporting requirements placed on Corporation Chairpersons.

TERMINATION OF APPOINTMENT OF NOMINATED DIRECTORS AND CHAIRPERSONS
Clause 73

The Committee sought the Minister's views of the possibility of a chairperson or nominated director being given the opportunity to `show cause' to the Minister why their appointment should not be terminated.

The Minister has responded that terminations of appointments are a matter for his direct consideration and states he will consult extensively with the industries concerned, the corporations and concerned individuals prior to proceeding to terminate an appointment.

The Committee thanks the Minister for his response but is of the opinion that a person who may have an appointment terminated should be given the opportunity to put their case to the Minister. This is particularly so in the instance of paragraph 73(1)(a) where an appointment may be terminated for misbehaviour or physical or mental incapacity.

TABLING OF RESEARCH AND DEVELOPMENT COUNCIL PLANS

The Committee sought the Minister's views on the possibility of tabling the research and development plans of Research and Development Corporations once the Minister had approved them.

The Minister has responded that the plans will be likely to contain commercial-in-confidence information. The annual reports are required to be tabled and there are direct reporting requirements placed on the Chairpersons of Corporations.

MEMBERSHIP OF RESEARCH AND DEVELOPMENT COUNCILS AND CORPORATIONS
Clauses 129, 130 and 131

The Committee sought the Minister's views on the possibility of a person whose nomination for membership of a Research and Development Corporation or Council has been rejected by the Minister receiving a copy of the reasons for that rejection.

The Minister has responded that a nomination for appointment is a matter between the Minister and the Selection Committee with the concerned individual not being aware of the nomination. The reasons of the Minister for rejecting a Selection Committee nominee will be forwarded to the Selection Committee.

The Committee thanks the Minister for his response.

MINISTERIAL DIRECTIONS TO A RESEARCH AND DEVELOPMENT CORPORATION
Clause 142

The Committee sought to have Ministerial Directions to a Research and Development Corporation tabled before Parliament. The Committee acknowledged that directions either containing commercially sensitive information or the tabling of which would be contrary to the public interest, should be not be required to be tabled.

The Minister has responded that the directions are intended to be used to solve disputes between Corporations, Councils and representative organisations. Any direction issued will follow extensive consultation between the organisations concerned.

The Minister has undertaken to table the directions provided they are not commercially sensitive.

The Committee thanks the Minister for his response which is attached to this Report.

SOCIAL SECURITY AND VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL (NO.3) 1989

The bill was introduced into the House of Representatives on 5 October 1989 by the Minister for Social Security.

The bill proposes to amend the:

- Child Support (Assessment) Act 1989
- Child Support (Registration and Collection) Act 1988
- Income Tax Assessment Act 1936
- Seamen's War Pensions and Allowances Act 1988
- Social Security Act 1947
- Taxation Administration Act 1957, and
- Veterans' Entitlements Act 1986

to implement measures announced in the 1989-90 Budget and several other program refinements of an administrative nature. The bill also contains measures to improve the effectiveness of the Child Support Scheme.

The Committee commented on the bill in Alert Digest No 14 of 1989 (25 October 1989), and has received a response from the Minister.

POWERS OF SECRETARIES
Proposed section 3A of the Social Security Act
Proposed section 11A of the Veterans' Entitlements Act

The Committee noted that proposed section 3A of the Social Security Act and proposed section 11A of the Veterans' Entitlements Act would allow the respective Departmental Secretaries to make wide ranging enquiries into the private lives of beneficiaries who reside under the same roof but claim to be living separately.

In particular, the Committee noted that proposed paragraph 3A(d) of the Social Security Act and proposed paragraph 11A(d) of the Veterans' Entitlements Act will require the relevant Secretary when forming an opinion that two people are living together in a 'marriage-like' relationship, or for the purpose of defining 'de facto spouse' or 'married person', to have regard to all the circumstances of the relationship including any sexual relationship.

The Committee sought the views of the Minister on any possible invasions into personal privacy by the provision .

The Minister has responded that the proposed sections specify which matters decision makers must take into account in determining issues of marital status. Marital status has long been a determinant for both rate and eligibility under the Act.

The range of matters relevant to assessing marital status was established by the Federal Court in Lambe v. Director-General of Social Services (1981) 4 ALD 362. In the Minister's opinion the provisions in the two Acts are a codification of the existing law and do not broaden the nature of the enquiries departmental officers are required to undertake in administering the two Acts.

The Minister states that Clause 28 of the bill inserts proposed section 3A as part of a package including proposed section 43A. Proposed Section 43A creates an obligation to provide information about domestic circumstances which will be able to be met by a person seeking benefits by responding to a questionnaire and attending a follow-up interview, rather than filling in the prescribed form currently required pursuant to subsection 163(2) of the Social Security Act.

Proposed Section 43A will require the Secretary of the Department, and delegated departmental officers to make a decision on an application for benefits as soon as the applicant has supplied all the information they are able to

provide. The Minister has informed the Committee that once a person has been deemed eligible to receive a sole parent's pension there can be no further investigation into that person's domestic circumstances for at least 12 weeks, unless the Secretary has reason to believe that the circumstances may have changed in a manner specified in the legislation. Currently a notice to provide general information under Section 167 of the Act can be issued at any time, and the administrative investigations are not limited by legislation.

In the opinion of the Minister, the changes will result in a clearer, more structured and less arbitrary procedure for determining entitlements. Applicants will have a much clearer view of the test applied by the Department to determine marital status.

The Committee notes the detailed and informative response from the Minister and appreciates that the changes to the legislation will provide a more structured and less intrusive system of determining and administering certain forms of benefit. However the Committee is concerned that in having regard to sexual relationships between a couple to determine whether people are living in a 'marriage-like relationship' or to determine a 'de facto spouse' the provision may intrude upon personal privacy.

MEANING OF SUBCLAUSE
Subclause 28(6)

Subclause 28(6) states

> The Secretary must not form the opinion that the pensioner or claimant is not living with the other person in a marriage-like relationship unless, having regard to all of the matters specified in the paragraphs of section 3A, the weight of evidence supports formation of an opinion that the pensioner or

claimant is not living in a marriage-like relationship with the other person.

The Committee commented that the subclause contained three negatives and asked the Minister whether the provision could not be better expressed.

The Minister has responded that the clause inserts proposed subsection 43A(6) into the Principal Act. The basis of proposed subsections 43A(6) and (8) is contained in the case of McDonald v. Director-General of Social Security (1984) ALD 6, in particular, the judgement of Mr Justice Woodward at pages 6 and 9.

The Minister states that, in the light of Mr Justice Woodward's judgement, proposed subsections 43(6) and (8) when read with proposed subsections 43A(5) and (7) have the effect that where all relevant information is available a decision maker shall make a decision in accordance with the weight of the evidence.

The Committee thanks the Minister for this detailed explanation of how the provision operates but remains of the view that the section could be more clearly expressed.

CLAIMS DEEMED NOT TO HAVE BEEN LODGED

Subclause 28(12) deems a claim that has been submitted not to have been lodged if certain information sought by the Secretary has not been provided within 14 days. The Committee sought a clarification of what rights of review were available to a person whose claim was deemed not to have been lodged.

The Minister has responded that the provision will apply only to a person claiming a sole person's pension who has failed to give the Secretary the information required. The information is required by notice given under proposed subsection 43A(4)

and is to be supplied within 14 days. If the information is not supplied the Secretary is considered not to have received the information necessary to assess the claim and a new claim is required to be lodged.

An applicant is entitled to have the Social Security Appeals Tribunal review a decision that the person failed to supply the relevant information.

The provision will prevent people denying information to the Department and then appealing to the Social Security Appeals Tribunal where the information is provided. This in effect makes the Tribunal the primary decision maker.

The Committee thanks the Minister for his comprehensive response but is of the opinion that deeming an application that has been submitted not to have been lodged is likely to make it more difficult for applicants to obtain benefits.

OBTAINING A TAX FILE NUMBER
Proposed section 138A of the Social Security Act

Proposed section 138A of the Social Security Act will enable the Secretary to obtain the tax file number of an applicant for unemployment or sickness benefit under pain of denying him or her a pension.

The Minister has responded that the proposed legislation does not require either existing recipients or future applicants for the relevant social security benefit to apply for a tax file number.

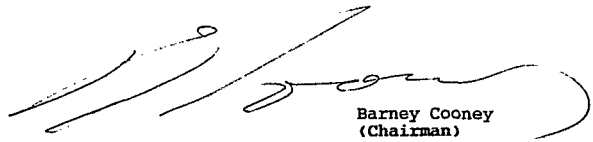
Currently applicants who decline to supply the Department with a tax file number may have their benefit reduced by 50.25% as the Department withholds income tax at the highest marginal rate plus a Medicare levy. The new provision will require the Department to withhold 100% of the benefit which in the

Minister's view will provide a greater incentive for persons to supply their tax file number.

The Minister points out that the new provisions will give his Department the opportunity to assist many clients who currently have difficulties in obtaining tax file numbers because of the proof of identity requirements. The Department of Social Security will act as the agent of the Australian Taxation Office by accepting applications and conducting the required proof of identity checks. As the Department currently conducts proof of identity checks for its own purposes, the new administrative arrangements will not create any increased intrusion into personal privacy.

The Committee notes that the new provisions will apply exclusively to recipients of sickness and social security benefits. These two groups are the only members of Australian society subject to the penalty of 100% withholding of benefits for not providing tax file numbers.

The response from the Minister is attached to this Report.



Barney Cooney
(Chairman)

29 November 1989

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
THE HON. JOHN KERIN, M.P.

Parliament House,
Canberra ACT 2600
Telephone (062) 77 7520
Facsimile (062) 73 4120

21/11/89

Senator BC Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to your Committee's comments contained in the Scrutiny of Bills Alert Digest No. 15 of 1989 (1 November 1989) concerning the Australian Wine and Brandy Corporation Bill 1989.

This Bill passed unamended through the House of Representatives on Wednesday 1 November 1989 and through the Senate on the following day.

A detailed response to the Committee's comments is attached.

Yours fraternally

John Kerin

RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Australian Wine and Brandy Corporation Amendment Act 1989

Period of offence related warrant (section 39 ZF)

Before issuing an offence warrant, a magistrate must be satisfied that possible evidence relating to the commission of a label offence will be on specified wine premises within the next 72 hours. The Committee considers that a warrant should not remain valid for longer than the period within which the evidence may be located on the premises. The Committee considers that to protect a person's privacy, the period for which an offence warrant remains valid should be reduced from up to a month to no longer than a week.

Response: I appreciate the Committee's concern to ensure that an offence warrant remains valid no longer than is necessary. Section 39ZF reflects advice from the Attorney General's Department that, to ensure consistency in drafting of warrant provisions, the precedent set in the Hazardous Wastes (Regulation of Exports and Imports) Bill should be followed. As the Label Integrity Program is an entirely new initiative, my Department will closely monitor its operation to determine whether the 72 hour period during which evidence is expected on the premises and the one month period for validity of offence warrants is appropriate and will propose any necessary changes.

The legislation already provides some protection for personal privacy by enabling a magistrate to prescribe the hours during day or night when entry may be made to premises.

Retention of evidence (paragraph 39 ZG (1)(c))

The Committee believes that a person who is entitled to inspect documents seized by an inspector, should also be entitled to make copies of those documents.

Response: I agree with the Committee that businesses should be able to photocopy essential business documents held by inspectors. The Corporation has advised it will instruct its inspectors to permit such copying.

MINISTER FOR INDUSTRY,
TECHNOLOGY AND COMMERCE
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

28 NOV 1989

Senator Barney Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I am writing in response to the Scrutiny of Bills Alert Digest No.22, dated 22 November 1989, which contained comments by the Senate Standing Committee for the Scrutiny of Bills on Clauses 20-22 of the Customs and Excise Legislation Amendment Bill (No.4) 1989 and specifically sought to establish what process exists for review of decisions on commercial tariff concession orders.

The process of administrative review of decisions taken under the new commercial tariff concession scheme is the same as presently exists in respect of decisions on commercial tariff concession orders taken under the existing Part XVA of the Customs Act 1901. Such decisions are not amenable to review on the merits by the Administrative Appeals Tribunal but rather are subject to judicial scrutiny via an order for review under section 5 of the Administrative Decisions (Judicial Review) Act 1977. It should, however, be emphasised that decisions to refuse a commercial tariff concession order have never been subject to review by the Administrative Appeals Tribunal and continue to be outside the jurisdiction of that Tribunal. Nevertheless, as I have stated, an applicant's rights are protected through the mechanism of review by the courts under the Administrative Decisions (Judicial Review) Act 1977.

I trust this provides the information sought by the Committee.

Yours sincerely

John N Button

John N. Button

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
THE HON. JOHN KERIN, M.P.

Parliament House,
Canberra ACT 2600
Telephone (062) 77 7520
Facsimile (062) 73 4120

21.11.89

Senator BC Cooney
Chairman
Standing Committee for
the Scrutiny of Bills
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the extract from the Scrutiny of Bills Alert Digest No. 14 of 1989 concerning the Pasture Seed Levy Bill 1989. Your Committee drew attention to Clauses 3 and 9 of the Bill.

Clause 3 of the Pasture Seed Levy Bill requires that the Pasture Seed Levy Collection Bill be incorporated with the Levy Bill. The Committee was concerned that there was no corresponding incorporation provision in the Levy Collection Bill.

I am advised that the Bills as drafted are consistent with the normal convention common to the drafting of tax and collection bills and with Sections 53 and 55 of the Constitution governing the content of Bills. Having regard to that advice, and to the requirement for speedy passage of the Bill in the interest of pasture seed growers, I concur with the decision that it proceed without amendment.

Clause 9 of the Levy Bill gives authority to the Minister to vary the Schedule to the Act by instrument. The Schedule establishes the species and cultivars of leviable seed under the legislation and the rate of levy for each cultivar. The Committee was concerned that variations by instrument may inappropriately delegate legislative power and expressed the view that alterations to the Schedule should be by way of regulation. The Committee claimed, incorrectly, that no maximum levy rate was set in the Bill.

The need for the Bill to prescribe a maximum levy rate is acknowledged. The rate of $50 per tonne stipulated in the legislation had been recommended by the growers' organisation, which for the purposes of this legislation is the Grains Council of Australia. The maximum rate will apply to all leviable seeds, irrespective of any differences in operative rates.

Alterations to the Schedule by instrument, rather than by regulation, is considered to be justified in this case on the basis of administrative efficiency. The initial list of cultivars provided by the growers' organisation covers 78 cultivars. It is envisaged that there will be a regular need for additions and deletions of cultivars to the Schedule and changes to levy rates, as the value of individual cultivars changes over time and new cultivars are released onto the market. The growers' organisation requested a flexible means of levy determination for this reason.

I consider that the legislation as drafted makes adequate provision for the expression of Parliamentary authority. Subclause 9(4) gives Parliament the express right to disallow the instrument.

The legislation also incorporates a number of safeguards to protect the interests of levy payers in regard to alterations of the Schedule by instrument. Clause 14 of the Levy Collection Bill ensures the public is informed on amendments to the Schedule by requiring the Secretary to the Department to make publicly available the necessary information. In regard to any changes to the instrument there is also the requirement that recommendations by the growers' organisation (subclause 9(2)) be taken into account.

Yours fraternally

John Kerin

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
THE HON. JOHN KERIN, M.P.

Parliament House,
Canberra ACT 2600
Telephone (062) 77 7520
Facsimile (062) 73 4120

24 NOV 1989

Senator BC Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
Canberra ACT 2600

Dear Senator Cooney

I refer to the Committee's comments, in the Scrutiny of Bills Alert Digest No. 14 of 1989, on aspects of the Primary Industries and Energy Legislation Amendment Bill (No.3) 1989.

A detailed response to the Committee's queries is attached.

Yours fraternally

John Kerin

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL (NO.3) 1989

Clause 13 amendment to section 95 of the Wool Marketing Act 1987

Comment: The Committee asks the Minister to explain why the research and development plans are not tabled before Parliament, and whether it is possible to table the plans.

Response: The Corporation's research and development activities are covered in some detail in the Australian Wool Corporation Annual Report as is required under Section 110 of the Wool Marketing Act 1987. At this time the Parliament has the opportunity to review the performance of this organisation.

The more detailed research plans which are prepared in consultation with the Minister through the Wool Council of Australia set the direction of industry development. As such they are in-house working documents, considered to be Commercial-in-Confidence. For this reason they are not available for public scrutiny and their exposure to the Parliament would be undesirable.

Proposed subsections 109B(5) and 109E

Comment: The Committee seeks the Minister's views as to the possibility of a person rejected by the Minister for membership of the Research Council, receiving a copy of the reasons for that rejection.

Response: Reasons for rejection of nominees by the Minister are given in writing to the Selection Committee by the Minister. The responsibility for notifying nominees that their applications have been successful or unsuccessful lies with the Chairman of the Selection Committee. Release of any reasons given for rejection of the nominee by the Minister or the Committee are at the discretion of the Chairman. There is nothing in the Act which either compels or prohibits the release of such reasons, either for candidates who fail to be selected by the Committee or nominees rejected by the Minister.

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
THE HON. JOHN KERIN, M.P.

Parliament House,
Canberra ACT 2600
Telephone (062) 77 7520
Facsimile (062) 73 4120

Senator BC Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

21/11/89

Dear Senator Cooney

I refer to your Committee's comments contained in the Scrutiny of Bills Alert Digest No. 14 of 1989 (25 October 1989) concerning the following legislation:

Pasture Seed Levy Bill 1989

Primary Industries and Energy Legislation Amendment Bill 1989

Primary Industries and Energy Research and Development Bill

I have forwarded my responses to both the Pasture Seed Levy Bill and the Primary Industries and Energy Legislation Amendment Bill (No.3) 1989 seperately.

I address the remainder of my comments to the Primary Industries and Energy Research and Development Bill 1989.

1. Sub-clause 4(1), Clause 11(f) and Clause 149 - Additional Functions.

   The Committee is concerned that a Ministerial order may grant a Research and Development Corporation a wide range of additional functions.

   Response: The provision for orders is included to provide for timely response to unforeseeable circumstances, and these are subject to Parliamentary scrutiny in the same way as regulations. The Bill states that regulations and orders are not to be inconsistent with the Bill and therefore substantial changes to its provisions are unlikely to be made. Certainly it

is not intended that orders be applied where the operation of R&D Corporations will be altered or expanded, but they could foreseeably be applied to resolve administrative disputes within or between Corporations. Where orders are made, however, they will be the outcome of consultation with representative organisations.

2. Clauses 19 and 20 - Tabling of Research and Development Plans

The Committee asks why research and development plans are not tabled before Parliament, and whether it is possible to table the plans.

Response: The strategic planning and accountability provisions of the Bill are largely based on the provisions within the Rural Industries Research Act 1985 in respect of Research Councils. Strategic plans can, and do, frequently contain information that is commercially sensitive between the Councils and the researchers. The commercial nature of R&D Corporations will increase the commercial-in-confidence content of the plans. The need for strict accountability, however, is recognised and provided for through the tabling of annual reports, and direct reporting requirements placed on Corporation Chairpersons.

3. Clause 73 - Termination of Appointment.

The Committee regards it as appropriate and equitable that a Chairperson or nominated director be given the opportunity to put their view to the Minister prior to their appointment being terminated, possibly by the inclusion of a provision requiring them to "show cause" to the Minister why their appointment should not be terminated.

Response: Whilst appointment and termination of appointment matters are for the direct consideration of the Minister, these processes will follow extensive consultation with industry bodies, the Corporations themselves and concerned individuals. Termination of appointments would not be considered without due consultation.

4. Clause 101 - Tabling of Research and Development Council Plans

The Committee requests that the Minister table the Research and Development plans of the relevant Research and Development Councils before Parliament, or explain to the Committee why the plans cannot be tabled once they have been approved.

Response: Whilst not being Corporations themselves, Research and Development Councils will have access to Corporation powers through the Rural Industries Research and Development Corporation and will, therefore, pursue research activities likely to involve commercial-in-confidence information. The response to Clause 19 and 20 in paragraph 2 also stands for Clause 101.

5. Clauses 124, 130 and 133 - Membership of Research and Development Councils and Corporations.

The Committee seeks the Minister's views as to the possibility of a person rejected by the Minister for membership of a Research and Development Corporation receiving a copy of the reasons for that rejection.

Response: The rejection of a nomination for appointment to a Council or Corporation is a matter between the Minister and the Selection Committee and the individual concerned would not, at this stage, be aware of his nomination. It is intended, however, that where the Minister rejects a nomination put forward by the Selection Committee, reasons for that rejection will be provided to the Committee who may then embark upon a further course of action.

6. Clause 142 - Direction to a Research and Development Corporation.

The Committee seeks to have directions tabled before Parliament as soon as they are issued, unless they are commercially sensitive or their tabling be contrary to the public interest pursuant to the provisions of sub-clause 142(3).

Response: The use of directions is intended as a tool of last resort so that the Minister may resolve disputes between Corporations, Councils or representative organisations. Directions made by the Minister would follow an extensive consultation process with representative organisations, Corporations and Councils concerned. Where the directions are not commercially sensitive, I will accept responsibility for tabling these at the earliest opportunity.

Yours fraternally

John Kerin

COMMONWEALTH OF AUSTRALIA

MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

02 NOV 1989

Senator B C Cooney
Chairman
Standing Committee for the
Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

On 26 October 1989 your Committee's Secretary drew to attention the comments made by the Committee about the Social Security and Veterans' Affairs Legislation Amendment Bill (No 3) 1989 (the Bill).

The Committee raised four different concerns with the Bill.

The first of these was that the proposed sections 3A of the Social Security Act 1947 and 11A of the Veterans' Entitlements Act 1986 may excessively intrude into personal privacy of individuals.

The proposed sections specify matters which decision makers must take into account in determining marital status issues. Marital status has long been a determinant for both rate and eligibility under the Social Security Act (and the Veterans' Entitlements Act) and the range of matters specified in the new provisions as relevant to assessing marital status has been established by the Federal Court in Lambe v Director-General of Social Services (1981) 4 ALD 362. In other words, this is a codification of the existing law which does not in any way broaden the nature of the enquiries departmental officers must undertake in administering the two Acts.

The effect of the proposed sections will be a clearer, more structured and less arbitrary process of determining people's entitlements, in that clients and potential clients of the two Departments will be able to see more readily the nature of the test the Departments must apply in determining marital status and what information is relevant to that test.

Further, the proposed section 3A is part of a package including the proposed section 43A of the Social Security Act, inserted by clause 28 of the Bill. Given that sole parent's pension, which is aimed at helping people who are bringing up children alone, cannot be paid to persons who are living in a marriage-like relationship, my Department must form an opinion whether a marriage-like relationship exists in order to determine entitlement to that pension. In this context, section 43A would provide for a more structured, consistent approach which would be an improvement on current more ad hoc processes which are based on the general power to obtain information in section 163 of the Social Security Act.

For example, new section 43A will create an obligation to provide information about one's domestic circumstances. This obligation will be able to be met by responding to a questionnaire and attending a follow-up interview, rather than having to fill in a prescribed form as provided by subsection 163(2). Again, the Committee would be aware that an effect of subsection 163(5) is to abrogate common law privileges (see Pyneboard v Trade Practices Commission (1983) 45 ALR 609). No equivalent provision occurs in proposed section 43A.

Further, the proposed legislation will place a specific duty on the Secretary of my Department and his or her delegates to make a decision once the person has supplied all the relevant information he or she can (rather than leaving the person in question "in limbo" while various investigations might continue). The proposed legislation will also guarantee that once the Secretary or a delegate has decided under section 43A that the person is entitled to sole parent's pension, there will be no further investigation of that person's domestic circumstances for at least 12 weeks, unless the Secretary has reason to believe that those circumstances have changed in a manner specified in the legislation. By contrast, a notice under section 163 can be issued at any time and administrative investigations are currently not limited by legislation.

The Committee also commented that subclause 28(6) of the Bill, ie the proposed subsection 43A(6) of the Principal Act, was difficult to comprehend, asked if it could be better expressed and sought an explanation about how that provision was intended to operate.

Essential context to proposed subsections 43A(6) and (8) is the decision of the Full Federal Court in the case of McDonald v Director-General of Social Security (1984) 6 ALD 6 in which Justice Woodward stated at 9 and 11:

> "the onus (or burden) of proof is a common law concept, developed with some difficulty over many years, to provide answers to certain practical problems of litigation between parties in a court of law ..."
>
> "the use outside courts of law of the legal rules governing this part of the law of evidence should be approached with great caution ..."
>
> "facts may be peculiarly within the knowledge of a party to an issue, and a failure by that party to produce evidence as to those facts may lead to an unfavorable inference being drawn - but it is not helpful to categorize this common sense approach to evidence as an example of an evidential onus of proof."

In the light of this, the proposed subsections 43(6) and (8) read with proposed subsections 43A(5) and (7) have the effect that where all relevant information is available a decision maker shall make a decision one way or the other in accordance with the weight of the evidence. However, in those cases where the evidence does not support the conclusion that a person is 'unmarried' payment must cease.

Some have suggested that the proposed provisions will impose a standard of proof on pensioners higher than that which ordinarily applies.

This suggestion misses two points made clearly by Sir Owen Dixon in Briginshaw v Briginshaw (1938) 60 CLR 336. First, at pages 360-361 the effect of an equivalent phrase 'preponderance of evidence' is spelt out in an example cited from Starkie's Law of Evidence:

> "in many cases of a civil nature where the right is dubious and the claims of the contesting parties are supported by evidence nearly equipoised a mere preponderance of evidence on either side may be sufficient to turn the scale. This happens, as it seems where no presumption of law, or prima facie right, operates in favour of either party."

Second, as you would be aware the major thesis of the judgments in that case is that questions of proof are not arid or mechanical questions but rather are practical questions of whether a decision maker is in fact persuaded one way or the other.

Thus, where as a practical matter a decision maker concludes a person is 'unmarried' payment will commence or continue. Where the decision maker concludes the person is 'married' payment will not be granted or will cease. The proposed subsections 43A(6) and (8) would only apply where as a practical matter the decision maker cannot decide either way - and therefore cannot decide that a person is eligible for pension.

Next, the Committee enquired as to what rights of review, if any, were available to a claimant whose claim is taken not to have been lodged - the proposed new subsection 43A of the Principal Act, inserted by clause 28 of the Bill, refers. This provision would apply only to a person claiming sole parent's pension who failed to give the Secretary the information required by a notice under new subsection 43A(4) within the prescribed time, ie within 14 days after he or she was given that notice. In effect, if they failed to give the Secretary the information necessary to enable the Secretary to assess their claim, they would need to lodge a fresh claim if they wanted to re-test their eligibility for sole parent's pension. The person would be entitled to have reviewed any decision that he or she had failed to provide information required. The Committee will be aware that the Social Security Act 1947 provides rights of appeal to the Social Security Appeals Tribunal (SSAT) - and prohibits representation of the Department at hearings of the SSAT.

This provision will have the effect that applicants for pension will not be able to fail to provide required information to the Department and then appeal to the SSAT and provide information to the SSAT without any opportunity for the Department to scrutinize or test the information. It will thereby avoid the situation of the SSAT becoming in effect a primary decision maker in this category of case.

Finally, the Committee was also concerned that the proposed section 138A of the Principal Act (inserted by clause 42 of the Bill) may unduly intrude on the private lives of individuals and sought my views on this point.

In my view, the proposed legislation does not force either existing recipients of or new applicants for the affected social security benefits to apply for a tax file number (TFN). As is the case currently, whether an individual recipient or claimant provides my Department with a TFN is entirely a voluntary matter.

Under the current provisions of the Principal Act, persons declining to supply a TFN to my Department are liable to have their benefit reduced by 50.25%. This arises through the application of current provisions which oblige the Department to withhold income tax at the highest marginal rate (currently 49%) plus a Medicare levy (currently 1.25%). In effect, the proposed provision raises the relevant penalty from 50.25% to 100%.

In other words, while procedures for claiming benefits and associated processes will not be more intrusive of individuals' privacy under the proposed legislation, there will be arguably a greater incentive for persons to volunteer their TFN.

On the other hand, the new provisions would provide an opportunity for my Department to assist many of its clients who currently have problems with TFN provisions. Some individuals, for example, have difficulty in obtaining a TFN because of proof of identity (POI) requiremnts. Following the enactment of the proposed legislation, my Department would act as an agent of the Australian Taxation Office (ATO) to assist clients who are having difficulty in obtaining a TFN by accepting applications on behalf of the ATO and conducting the necessary POI checks. As my Department, in any event, conducts POI checks for its own purposes, these administrative arrangements would not constitute any increased intrusiveness from the

client's point of view. Indeed, disabled people, persons with language difficulties and new entrants to the workforce, eg school leavers, should all find benefit in my Department's involvement in TFN aplication process.

Yours sincerely

BRIAN HOWE

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWENTIETH REPORT

OF 1989

6 DECEMBER 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWENTIETH REPORT

OF 1989

6 DECEMBER 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWENTIETH REPORT

OF 1989

The Committee has the honour to present its Twentieth Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Australian Federal Police Legislation Amendment Bill (No. 2) 1989

Industry Commission Bill 1989

Social Security and Veterans' Affairs Legislation Amendment Bill (No. 4) 1989

Student Assistance Amendment Bill (No. 2) 1989

CONTENTS

AUSTRALIAN FEDERAL POLICE LEGISLATION AMENDMENT BILL (No. 2) 1989

This Bill was introduced into the Senate on 4 October 1989 by the Minister for Justice and passed both Houses on 30 November 1989.

The bill proposes to amend the Australian Federal Police Act 1979 to:

- provide for the appointment of staff under the Australian Federal Police Act, rather than the Public Service Act 1922,
- provide the Commissioner with Chief Executive powers in relation to the composition of the AFP and terms and conditions of service of staff,
- replace tenure with a fixed term appointment for all staff, and
- entitle staff to an adjustment payment which recognises the fixed term nature of that person's appointment.

The Committee commented on the bill in **Alert Digest No. 14** of 1989 (25 October 1989) and has received a response from the Minister.

WHO SHOULD DETERMINE REMUNERATION AND ALLOWANCES
Proposed new subsection 20(2A)

Clause 15 of the bill inserts proposed new subsection 20(2A) of the Australian Federal Police Act 1979. The proposed subsection would give the Commissioner the discretion to determine a Deputy Commissioner's remuneration and allowances which is currently a function of the Remuneration Tribunal.

The Minister has responded that the remuneration, allowances, leave and terms and conditions of Deputy

Commissioners are currently contained in four different provisions of the Australian Federal Police Act 1979. The scheme proposed in the bill rationalises the determination of remuneration and allowances by providing that these can be determined by the Commissioner. The Minister points out that Telecom, OTC and other employment regimes have analogous arrangements, where the Chief Executive is responsible for setting the terms and conditions of all other executive and non-executive employees within the organisation.

The Minister states that the Commissioner is well placed to set salaries in relation to other positions in the Federal Police and that the Deputy Commissioners fully support the policy. Any determination made by the Commissioner will be subject to Ministerial guidelines which will require consultation in accordance with the Government co-ordination arrangements for statutory authorities.

The Committee draws the response of the Minister to the attention of the Senate.

MAKING POLICE POLICY PUBLIC
Proposed new subsections 30(5) and 33(2) - power to give guidelines

The Committee requested that written guidelines given by the Minister to the Commissioner pursuant to proposed subsections 30(5) and 33(2) should be tabled before Parliament.

The Minister states that during parliamentary debate on the Australian Federal Police Act 1979 he agreed to table a direction made pursuant to subsection 13(2) of that Act. The precedent established in tabling that direction has been followed with all subsequent directions.

The Minister has assured the Committee that he will table all directions made pursuant to proposed subsections 30(5) and 33(2) in accordance with the assurance he gave during the Senate debate on the bill. The matter of tabling Ministerial amendments will be considered in future amendments to the Australian Federal Police Act 1979.

The Committee thanks the Minister for the assurance given in his response which is attached to this Report.

INDUSTRY COMMISSION BILL 1989

This Bill was introduced into the House of Representatives on 2 November 1989 by the Minister Assisting the Treasurer.

The bill proposes to establish an Industry Commission to replace the Industries Assistance Commission, the Inter-State Commission and the Business Regulation Review Unit. The Commission's functions will be to hold public inquiries on matters referred to it by the Government.

The Committee commented on the bill in **Alert Digest No. 16 of 1989** (22 November 1989) and the bill was introduced into the Senate on 23 November 1989.

The Committee brings the following provisions of the bill to the attention of the Senate.

POLICY GUIDELINES
Subclause 8(2)

Clause 8 requires the Commission to have regard to the desire of the Commonwealth Government in performing its functions. Subclause 8(2) requires the Commission to have regard to any matters notified to it by the Minister in writing.

The Committee suggests that matters notified by the Minister to the Commission be tabled before the Parliament.

REPORT OF THE COMMISSION
Clause 9

Subclause 9(1) requires the Minister to table a report of an inquiry by the Commission before the Parliament within 25 sitting days of receiving the report. Subclause 9(2) allows

the report to be delayed for a specified period on the recommendation of the Commission. The Committee suggests that the recommended period of the delay should be stated and Parliament informed of the reasons for the delay.

AMOUNT OF FINE
Subclause 15(2)

The penalty for failing to comply without reasonable excuse with a notice served under subsection 15(2) is imprisonment for six months or the corresponding fine fixed by section 4B of the Crimes Act 1914. The Committee is of the view that the maximum fine should be stated in the principal legislation and not in the Crimes Act.

COPIES OF DOCUMENTS
Proposed Section 23

Proposed section 23 would give the Commission power to take and keep possession of copies of documents, and allow people entitled to inspect them to do so. The Committee regards it as equitable that persons entitled to inspect the documents be allowed to make copies of them.

REVERSAL OF ONUS OF PROOF
Clause 26

Clause 26 of the bill prohibits the prejudice of employment where a person gives assistance to the Commission. Subclause 26(2) reverses the onus of proof by requiring a person charged with an offence under the clause to prove that the prejudice did not arise as a result of the assistance rendered to the Commission.

The clause is brought to the attention of the Senate in that by reversing the onus of proof it may trespass unduly on individual rights and liberties.

MEMBERSHIP OF THE COMMISSION
Clause 28

Subclause 28(1) states that the Commission is to consist of a Chairperson and between four and eight other Commissioners. The bill does not state what qualifications, criteria or experience the Chairperson and Commissioners should possess. The Explanatory Memorandum sheds no light on the matter. In the opinion of the Committee the criteria for the appointment of the Chairperson and any other Commissioners should be clearly set out in the bill.

REMOVAL OF COMMISSIONER OR ASSISTANT COMMISSIONER
Clause 38

Clause 38 provides for a suspension which can lead to the removal of a Commissioner or Assistant Commissioner for 'proved misbehaviour or incapacity'. A statement of the grounds for suspension is to be laid before both Houses of Parliament and if they both declare that the person should be restored to office, then the Governor-General is to terminate the suspension.

The Committee notes the provision is different from standard provisions of this type, such as clause 52 of the bill which states in relation to current members of the Inter-State Commission that members can only

> be removed from office as a Commissioner by the Governor-General on an address from both Houses of the Parliament in the same session praying for removal on the ground of proved misbehaviour or incapacity, but the person is not to be removed otherwise.

The Committee brings the clause to the attention of the Senate.

SOCIAL SECURITY AND VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL (NO.4) 1989

This Bill was introduced into the House of Representatives on 2 November 1989 by the Minister for Social Security.

This is an omnibus Bill proposing a series of amendments to ten Acts. The main changes involve a restructuring of the overlap between the Pension Income Test and taxation, alterations to the method of assessment of annuities and superannuation pensions under the Income Test, changes to rent assistance and amendments to the Young Homeless Allowance, the Job Search Allowance and other areas of benefits for youth.

The Committee commented on this bill in **Alert Digest No. 16** of 1989 (22 November 1989) and has received a response from the Minister.

PENSIONABLE AGE
Paragraphs 21(o), 92(m) and 98(c)

Paragraph 21(o) of the bill would amend section 3 of the Social Security Act 1947 to provide that the pensionable age is 65 for a man and 60 for a woman.

Paragraph 92(m) of the bill would amend proposed section 35 of the Veterans' Entitlements Act 1986 to establish that the pensionable age is 60 for a male veteran and 55 for a female veteran, or 65 and 60 respectively if the man or woman is not a veteran.

Paragraph 98(c) of the bill would amend subsection 43(4) of the Veterans' Entitlements Act to provide that in order to qualify for a service pension on grounds of invalidity a person has to be aged 60 years if a woman and 65 years if a man.

The Minister has responded that the provisions defining 'pensionable' age are technical in nature and serve only as a convenience to relocate a concept currently used in both Acts.

The Committee notes the Minister's response but regards different pensionable ages for men and women as discriminatory.

EXCLUSION OF SOCIAL SECURITY APPEALS TRIBUNAL REVIEW
Clauses 71 and 72

Clauses 71 and 72 propose amendments to sections 178 and 182 respectively of the Social Security Act. The effect of the amendments is to exclude determinations made by the Secretary relating to certain foreign currency matters and the date of effect for re-assessed exchange rates, from review by the Social Security Review Tribunal.

The Minister has confirmed the view of the Committee that the exclusion of these technical matters from external review by clauses 71 and 72 of the bill does not affect the substantive rights of applicants or persons receiving a benefit.

The Committee thanks the Minister for his response which is attached to this Report.

STUDENT ASSISTANCE AMENDMENT BILL (NO. 2) 1989

This bill was introduced into the House of Representatives on 26 October 1989 by the Minister for Employment, Education and Training.

The bill makes minor technical amendments and proposes to:

- extend the application of existing provisions of the Principal Act relating to the prevention of fraud and the recovery of overpayments,
- impose payable interest on outstanding debts incurred under Austudy, Postgraduate Awards and other non-legislated schemes,
- enable ministerial guidelines to be set to give guidance in the exercise of various administrative powers under the Principal Act.

The Committee commented upon the bill in **Alert Digest No. 15** of 1989 (1 November 1989) and has received a response from the Minister.

REVIEW OF DECISIONS
Subclause 16(2)

Subclause 16(2) would empower the Minister to determine certain matters relevant to the payment of benefits. The Committee suggested that the Ministerial determinations should be guidelines pursuant to proposed Section 30H of the bill and hence disallowable instruments pursuant to Section 46A of the Acts Interpretation Act 1901.

The Minister has responded that proposed section 30H deals with decisions under Part VA of the legislation while subclause 16(2) is in Part IVA of the bill. Part IVA deals with the manner of paying student assistance granted under the Student Assistance Act.

The Minister states that he accepts the concern of the Committee that the determination should be subject to parliamentary review. The Minister proposes to seek an amendment to the Principal Act that will make determinations made under subclause 16(2) subject to disallowance.

The Committee thanks the Minister for his response.

RECOUPING OVERPAYMENTS AND
WAIVER AND WRITE OFF OF OVERPAYMENTS
Proposed sections 30B, 30E and proposed subsection 30G(2)

Proposed sections 30B, 30E and proposed subsection 30G(2) deal with the offsetting of debts against current entitlements, the approval of interest free periods, writing off and waiving overpayments and approving arrangements to repay overpayments by instalments.

The Committee asked the Minister to detail what avenues for review exist for decisions made pursuant to these provisions.

The Minister has responded that the view of the Government is that once an overpayment is identified steps to recover the overpayment should proceed as expeditiously as possible. Therefore the bill does not include provision for external review of decisions relating to overpayment.

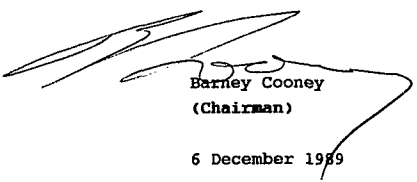
The Minister points out that his department has a strong policy of re-examining a person's situation where a debtor wishes to discuss matters with the department. Decisions regarding the existence or amount of an overpayment under the Student Assistance Act are reviewable by the Student Assistance Review Tribunal and then the Administrative Appeals Tribunal. A debtor will be able to seek a review under the Administrative Decisions (Judicial Review) Act 1977 and have the matter investigated by the Ombudsman.

It is intended to introduce external appeals for the non-legislated scheme for Aboriginal students, and to introduce legislation to bring the Assistance for Isolated Children Scheme within the Student Assistance Act and thus subject to the jurisdiction of the Student Assistance Review Tribunal and the Administrative Appeals Tribunal.

As decisions relating to the recovery of overpayment are not to be subject to external review, the bill provides for Ministerial guidelines on decisions concerning overpayments.

The Minister has also indicated that the bill will not devolve the administration of Postgraduate Assistance Awards to individual institutions. Research Awards are no longer offered under the Student Assistance Act and award holders are being encouraged to transfer to the new institution-based research scholarships.

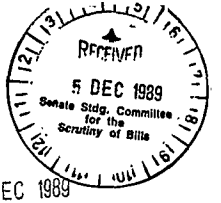
The Committee thanks the Minister for his response which is attached to this Report.



Barney Cooney
(Chairman)

6 December 1989

Minister for Justice
Senator The Hon. Michael Tate



5 - DEC 1989

Dear Senator Cooney

I refer to a letter of 26 October 1989 from Mr Calcraft, Committee Secretary, to my Senior Private Secretary concerning comments contained in the Scrutiny of Bills Alert Digest No.14 of 1989 (25 October 1989) regarding the Australian Federal Police Legislation Amendment Bill (No 2) 1989 ("the Bill").

The Committee expressed concern in two areas:

1. Determination of Deputy Commissioners' Remuneration

The Committee noted Clause 15 of the Bill inserts proposed new sub section 20(2A) of the Australian Federal Police Act 1979. The proposed sub section would give the Commissioner the discretion to determine a Deputy Commissioner's remuneration and allowances which has until now been a function of the Remuneration Tribunal (see section 20 of the Australian Federal Police Act).

At present, the determination of terms and conditions of service from the Office(s) of Deputy Commissioner is provided for within the Australian Federal Police Act 1979 as follows:

- Section 20(1) - Remuneration as determined by the Remuneration Tribunal
- Section 20(2) - Such allowances as prescribed
- Section 21 - Leave of absence on such terms and conditions as the Minister determines
- Section 19(1A) - Terms and conditions while performing duties of the Commissioner as determined by the Minister

The Bill rationalises the determination of remuneration and allowances (s.20(1) and (2)) by providing that these be determined by the Commissioner. This arrangement is analogous to other comparable employment regimes (e.g. Telecom, OTC, ACTEW, ASIO) where apart from the Chief Executive's terms and conditions of appointment and remuneration, the Chief Executive is responsible for setting the terms and conditions of all other executive and non-executive employees within the organisation.

Parliament House, Canberra, A.C.T. 2600. Tel.(062) 77 7260, Fax. (062) 73 4136.

Another advantage of requiring the Commissioner to determine Deputy Commissioner remuneration is that the Commissioner is well placed to set salaries in relation to other positions in the AFP. Presently with Deputy Commissioner salaries being determined by the Remuneration Tribunal and Assistant Commissioner salaries being related to police executive salaries there is no direct relativity between the two and undesirable anomalies can arise.

The current Deputy Commissioners support this change in policy. They have written to the Secretary of the Attorney-General's Department indicating they believe it is important, under the fixed term appointment and unified workforce proposals, they be treated in a common fashion with respect to the setting of their terms and conditions of employment.

Of course, determinations made by the Commissioner under the Bill are subject to Ministerial guidelines which will require consultation in accordance with the Government's co-ordination arrangements for Statutory Authorities. All appointments to the Office of Deputy Commissioner will continue to remain subject to Government approval (an appointment by the Governor-General-in-Council).

2. Tabling of Ministerial Guidelines

The second aspect of the Bill causing concern for the Committee was the Minister's power to give written guidelines to the Commissioner under proposed new subsection 30(5) and 33(2). The Committee is of the view that all written policy guidelines by the Minister to the Commissioner should be tabled before the Parliament.

Attention has focussed on this important issue before. During the Parliamentary debate on the Australian Federal Police Act 1979 ("the Act") the then Minister advised the House of Representatives that he intended making a direction pursant to Section 13(2) and tabling that direction in the Parliament. This was done and established a precedent whereby all subsequent directions made pursuant to that section have been tabled.

You will recall that during the debate on the current Bill on 27 October 1989 I assured the Senate that I would continue the practice of my predecessors in tabling directions pursuant to subsection 13(2) of the Act and also included in that assurance any directions given pursuant to clauses 30(5) and 33(2) of the Bill. I also reaffirm the assurance I made then to the Senate that I will review the need to provide for the tabling of ministerial directions when giving consideration to future amendments to the Australian Federal Police Act 1979.

I trust this background concerning both issues raised by the Committee eases the concerns of Committee members in relation to the Bill.

Yours sincerely

(Michael Tate)

Senator B C Cooney
Chairman
Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

COMMONWEALTH OF AUSTRALIA

MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

Senator B C Cooney
Chairman
Standing Committee for the Scrutiny
of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

On 23 November 1989 your Committee's Secretary drew to attention comments made by the Committee concerning the Social Security and Veterans' Affairs Legislation Amendment Bill (No 4) 1989 (the Bill).

The Committee raised two concerns with the Bill.

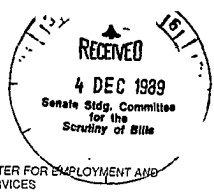
The Committee commented that the proposed amendments relating to pensionable age, as effected by paragraphs 21(o), 92(m) and 98(c) of the Bill, were discriminatory in their use of different ages for men and women.

The age differentials between men and women described in the above provisions are not new to either the Social Security Act 1947 or the Veterans' Entitlements Act 1986 and are merely restated by the amendments. The provisions defining "pensionable age" are technical in nature and serve only as a convenience to relocate a concept currently used in both Acts.

The Committee also commented on clauses 71 and 72 of the Bill which exclude determinations made by the Secretary relating to certain foreign currency matters from review by the Social Security Appeals Tribunal. As indicated by the Committee, the proposed changes made by these clauses are technical in nature. The proposed changes do not affect the substantive rights of clients.

Yours sincerely

BRIAN HOWE



Employment, Education and Training

THE HON. PETER DUNCAN M.P.

OFFICE OF MINISTER FOR EMPLOYMENT AND EDUCATION SERVICES
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600
(062) 77 7540

Senator B C Cooney
Chairman
Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

30 NOV 1989

Dear Barney

I am writing in response to comments made by the Standing Committee for the Scrutiny of Bills on the Student Assistance Amendment Bill (No. 2) 1989 in Alert Digest No. 15 of 1989.

REVIEW OF DECISIONS (Subclause 16(2))

The Committee has asked that any matter determined pursuant to subclause 16(2) be made as a Ministerial guideline under proposed section 30H. This would ensure that the matter would be subject to Parliamentary disallowance.

This does not seem possible on the basis of the present Bill. Section 30H deals with decisions under the new Part VA, which deals with student assistance overpayments in general, while section 16(2) is being placed in the new Part IVA and deals only with the manner of paying student assistance granted under the Student Assistance Act.

I accept, however, the Committee's concern that determinations under section 16(2) should be subject to Parliamentary review. I therefore propose seeking an amendment next year to make section 16(2) determinations subject to disallowance.

RECOUPING OVERPAYMENTS AND WAIVER AND WRITE OFF OF OVERPAYMENTS (Proposed sections 30B, 30E, 30G(2))

The Committee has asked about the review provisions available for decisions under proposed new sections 30B, 30E and 30G(2). These deal with the offsetting of debts against current entitlements, the approval of interest-free periods, the write off and waiver of overpayments, and the approval of arrangements to repay overpayments by instalments.

The Government considers that, once an overpayment is identified, recovery should proceed as expeditiously as possible in a similar manner to normal commercial practice. The Bill therefore does not include provision for external reviews of decisions relating to the recovery of overpayments.

However, I would add that the Department has a strong policy of re-examining a person's situation where a debtor wishes to discuss his or her case with the Department.

Further, decisions about the existence or amount of an overpayment under the Student Assistance Act are reviewable by the Student Assistance Review Tribunal (SART) and then by the Administrative Appeals Tribunal (AAT). Further, it is proposed to introduce external appeals for the non-legislated student assistance schemes for Aboriginal students. It is also proposed to introduce legislation next year to bring the Assistance for Isolated Children Scheme within the Student Assistance Act, and so within the jurisdiction of the SART and the AAT.

A debtor will also be able to seek a review under the Ombudsman Act and the Administrative Decisions (Judicial Review) Act.

As decisions relating to the recovery of overpayments will not be subject to external review, the Bill provides (in proposed section 30H) for Ministerial guidelines on decisions concerning the recovery of overpayments. As the Second Reading Speech indicated, guidelines will be introduced as soon as possible relating to the writing off, waiver and recovery by instalments of overpayment, and to the approval of interest free periods.

OTHER COMMENT

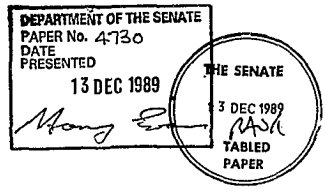
The Alert Digest described the Bill as ceasing the administration of the Postgraduate Research Awards under the Principal Act and devolving this responsibility to individual institutions. This will not be achieved by the present Bill.

The Government is no longer offering new Research Awards under the Student Assistance Act, while existing Research Award holders are being encouraged to relinquish their Awards and transfer to the new, institution-based research scholarships at a higher stipend. Funding enabling institutions to provide postgraduate research scholarships will be provided through special purpose payments under the Higher Education Funding Act.

Thank you for the opportunity to comment on these matters.

Yours sincerely

PETER DUNCAN



SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWENTY-FIRST REPORT

OF 1989

13 DECEMBER 1989

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWENTY-FIRST REPORT

OF 1989

13 DECEMBER 1989

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator K. Patterson (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator J. McGauran
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative power; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(2) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWENTY-FIRST REPORT

OF 1989

The Committee has the honour to present its Twenty-first Report of 1989 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Aboriginal Land Rights (Northern Territory) Amendment Bill 1989

Australian Heritage Commission (National Estate Protection) Amendment Bill 1989

Courts and Tribunals Administration Amendment Bill 1989

Crimes Legislation Amendment Bill (No. 2) 1989

Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1989

Higher Education Funding Amendment Bill (No. 3) 1989

Housing Assistance Bill 1989

States Grants (TAFE Assistance) Bill 1989

Taxation Laws Amendment Bill (No. 5) 1989

CONTENTS

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 31 October 1989 by the Minister for Aboriginal Affairs.

The bill proposes to provide for the grant of certain areas of stock routes and reserves to Aboriginal Land Trusts, to expand the range of Aboriginal organisations to which Land Councils may distribute moneys, restore an exemption from consent provisions in relation to the Eastern Areas of Groote Eylandt, change the arrangements for mining on Aboriginal land and make other minor consequential amendments to the Lands Acquisition Act 1989.

The Committee commented on the bill in Alert Digest No. 16 of 1989 (22 November 1989). The bill was introduced into the Senate on 22 November 1989.

The Committee has received a response from the Minister.

APPOINTING AN ARBITRATOR
Clause 15

Clause 15 of the bill inserts proposed section 68A, which deals with access to Aboriginal land through alienated Crown land. Where agreement cannot be reached on an appropriate access route the Minister is required to appoint an impartial arbitrator.

The Minister has stated that the Northern Territory Government has legislated to provide the access which would have been provided by clause 15. The clause will be withdrawn from the bill.

AMENDING THE SCHEDULE BY REGULATION
Clause 16

Clause 16 inserts proposed section 77C which would allow regulations to amend Schedule 1 of the bill by modifying any description of an area of land in Part 2 or 3 of that Schedule.

The Committee sought an explanation from the Minister as to why it is necessary to allow the Schedule to the bill to be amended by regulation.

The Minister has responded that much of the land described in Parts 2 and 3 of the Schedule has not been subject to comprehensive survey. The land which it is proposed to include in the new parts of the Schedule is part of a compromise solution between the Commonwealth and Northern Territory governments. The agreement between the governments is part of the Memorandum of Agreement with respect to excision of land for Aboriginal people living on pastoral properties.

The Minister states that the Memorandum requires the Commonwealth to introduce the legislation in this sitting.

The Minister states in his Second Reading Speech that the clause is to allow for minor corrections to descriptions of land which previously have not been accurately described. The provision is not intended to permit major changes to the area of land to be granted and the power will not be available once the land has been granted.

The Committee thanks the Minister for his response which is attached to this Report.

AUSTRALIAN HERITAGE COMMISSION (NATIONAL ESTATE PROTECTION) AMENDMENT BILL 1989

This Bill was introduced into the Senate on 22 November 1989 as a Private Senator's Bill by Senator Dunn.

The purpose of this Bill is to amend the Australian Heritage Commission Act 1975 to allow for regulations to be made to control certain actions by corporations within the National Estate. The bill relies on the Commonwealth's power with respect to foreign corporations and trading or financial corporations and its powers with respect to the peoples of the Aboriginal race.

The Committee commented on this bill in **Alert Digest No. 17** of 1989 (29 November 1989) and has received a response from Senator Dunn.

GENERAL COMMENT

The Committee noted that the terms of this bill are particularly unclear and as a consequence the bill is difficult to understand.

Senator Dunn has responded that the bill was prepared in accordance with her instructions by the Parliamentary Draftsman and that the bill can be understood by those practised in reading and interpreting legislation.

The Committee is of the opinion that as the bill introduces criminal offences which can lead to fines of up to $100,000, it should be drafted in clear terms. It is not just persons practised in reading and interpreting legislation who are required to read the legislation and abide by its provisions.

Proposed section 30A states:

> Taking of certain action prohibited
>
> "30A.(1) Where the Governor-General is satisfied that the doing of a particular act in any place, or in a particular place, that is in the Register will adversely affect, or might adversely affect to a significant degree, any place that is in the Register, or that particular place, as the case may be, as part of the national estate, the Governor-General may make regulations prohibiting the doing of that act in any place that is in the Register, or in that particular place, as the case may be, by a corporation.
>
> "(2) Where the Governor-General is satisfied that the doing of an act outside any place, or a particular place, that is in the Register will adversely affect, or might adversely affect to a significant degree, places that are in the Register, or that particular place, as the case may be, as part of the national estate, the Governor-General may make regulations prohibiting the doing of that act outside any place that is in the Register, or outside that particular place, as the case may be, by a corporation.
>
> "(3) A corporation shall not do, or cause or permit to be done, an act or thing the doing of which is prohibited by regulations made for the purposes of subsection (1) or (2).
>
> Penalty: $100,000."

In the opinion of the Committee this provision could be more clearly written.

GRANTING TOO WIDE A POWER
Proposed sections 30A and 30B

Proposed sections 30A and 30B will allow for the creation of criminal offences by means of regulation. The Committee is concerned that the bill allows too wide and vague a power for the creation of criminal offences bearing high penalties. Senator Dunn has responded that the criminal offences and the maximum penalties are to be created by the bill. The regulations will define the details of both the prohibited areas and activities. The actual scope of the provisions

including the class of person and activities which may be sanctioned, the classes of lands affected and the penalties are set out in the bill.

In the opinion of the Committee persons and corporations required to comply with the provisions of the bill and facing criminal sanctions if they fail to do so, should be able to establish the nature of the relevant offence from the bill as the principal legislation.

The Committee brings the proposed subsections of the bill to the attention of the Senate as it regards the power to create criminal offences as not being subject to sufficiently defined parameters.

The response from Senator Dunn is attached to this Report.

COURTS AND TRIBUNALS ADMINISTRATION AMENDMENT BILL 1989

This Bill was introduced into the House of Representatives on 2 November 1989 by the Attorney-General.

The bill proposes to confer administrative independence on the Administrative Appeals Tribunal, the Family Court of Australia and the Federal Court of Australia. The bill would make the Chief Judges of the Family Court of Australia and the Federal Court of Australia and the President of the Administrative Appeals Tribunal responsible for managing the administrative affairs of their respective bodies.

The Committee commented on the bill in **Alert Digest No. 16 of 1989** (22 November 1989). The bill passed the Senate on 23 November 1989.

The Committee has received a response from the Minister.

TERMINATION OF APPOINTMENT
Clauses 5, 13 and 15

Clauses 5, 13 and 15 insert proposed section 24K of the Administrative Appeals Tribunal Act 1975, proposed section 38K of the Family Law Act 1975 and proposed section 18K of the Federal Court Act 1976 respectively. The proposed sections provide for the termination by the Governor-General of the appointment of the Registrars of the Administrative Appeals Tribunal and the Federal Court, and the Chief Executive Officer of the Family Court `for misbehaviour or physical or mental incapacity'. Each of these grounds involves elements of subjective judgement and no provision exists for the relevant officers to be given an opportunity to show that their appointment should not be terminated.

The Minister has responded that the Report of the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals raised similar issues to those of the Committee on the matter of the adequacy of the standard removal provisions. As the bill has already passed the Senate the Minister considers the appropriate course is to allow the government to give further consideration to the matter in formulating its response to the Joint Select Committee Report.

The Minister's response is drawn to the attention of the Senate.

SELF-INCRIMINATION
Clauses 5, 13 and 15

Clauses 5, 13 and 15 of the bill insert proposed sections 24T, 38U and 18U of the respective Acts. The provisions deal with audit and require a person to produce information with the threat of conviction in the absence of a reasonable excuse for failing to do so. The Committee suggested that the provisions be amended to require that a person has to comply with the provision only to the extent that a person is able to do so.

The Minister has responded that to amend the provisions in the manner suggested by the Committee would not add anything to the provisions.

The Committee thanks the Minister for his response which is attached to the Report.

CRIMES LEGISLATION AMENDMENT BILL (NO. 2) 1989

This Bill was introduced into the House of Representatives on 5 October 1989 by the Attorney-General.

The bill proposes to review the Commonwealth sentencing legislation and the laws governing Federal offenders found unfit to be tried or not guilty on the grounds of mental illness. The bill also:

- repeals the Commonwealth Prisoners Act 1967,
- amends the Crimes Act 1914 to consolidate all the general sentencing legislation in that Act,
- amends the Cash Transaction Reports Act 1988, and
- amends the National Crime Authority Act 1984.

The Committee commented on the bill in **Alert Digest No. 14 of 1989** (25 October 1989) and has since received a reply from the Minister. The bill was introduced into the Senate on 21 November 1989.

COMMENCEMENT DATES
Subclauses 2(3) to 2(9)

By virtue of subclauses 2(3) to 2(9) of the bill, certain provisions are to commence immediately after various provisions of the Cash Transaction Reports Act 1988. This Act is to commence on Proclamation with no time limit fixed within the Act.

The Committee sought the view of the Minister as to whether the Cash Transaction Reports Act could be amended to provide that it commences at the latest within six months of Royal Assent being given to the bill.

The Minister has responded that sections 16 and 17 of the Cash Transaction Reports Act 1988 were proclaimed in a Special Gazette of 15 November 1989 to commence on 1 January 1990 and that sections 7-15 will commence on 1 July 1990. Only sections 18-24 of the Act remain to be proclaimed.

Sections 18-24 of the Act deal with the verification of the identity of proposed signatories to accounts with cash dealers. The bill inserts a proposed subsection 24(8) to enable an alternative system of account verification to be prescribed for identifying cash dealers.

The Minister states that to permit relevant consultation to take place to enable accounts verification of the highest standard whilst retaining commercial viability for cash dealers, it is necessary to retain the flexibility that stems from the present commencement provisions of the Cash Transaction Reports Act. The Minister indicates that he shares the Committee's view that the remaining provisions of the Act should be proclaimed as soon as possible and hopes that this may occur before 1 September 1990.

THE ATTORNEY-GENERAL'S DISCRETION
Paragraph 19AN(1)(c)
Proposed sections 19AP, 19AV, 20BE, 20BF, 20BK, 20BL and 20BM

The above listed paragraph and proposed sections would give the Attorney-General a discretion, reviewable only as to legality, with regard to parole orders, release of prisoners on licence, cancelling parole or licence, and matters relating to persons acquitted by reason of mental illness.

The Committee noted that the reasons the discretions are to rest with the Attorney-General were not outlined in the Explanatory Memorandum.

The Minister has responded that the decisions relate to matters that are an integral part of the criminal justice system that are not appropriate for review other than as to legality.

The Minister points out that people detained within the system have been through a comprehensive court process which fully examines the offence and the circumstances of the person before the court before making sentencing decisions.

The bill provides mandatory six months review for persons detained at the Governor-General's pleasure which protects mentally ill persons who may not have the capacity to apply for early release.

The Committee thanks the Minister for his response which is attached to this Report.

CRIMES (TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES) BILL 1989

This Bill was introduced into the House of Representatives on 2 November 1989 by the Attorney-General.

The bill proposes to provide for the Commonwealth Government to meet its obligations under the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as part of the process of ratification of the Convention. The main function of the bill is to extend Australia's extra-territorial jurisdiction in accordance with Article 4 of the Convention.

The bill was considered by the Committee in **Alert Digest No. 16 of 1989** (22 November 1989) and introduced into the Senate on 30 November 1989.

EVIDENTIARY ONUS OF PROOF
Clause 17

The Committee notes that clause 17 contains a reversal of the evidential onus of proof under which a person who possesses or imports a trafficable quantity of drugs is presumed to have the drugs for 'the purpose of sale or supply'. The Committee notes the existence of similar provisions in other Acts relating to offences concerning the possession, sale or supply of drugs, but brings the clause to the attention of the Senate in that it may trespass unduly on individual rights and liberties.

HIGHER EDUCATION FUNDING AMENDMENT BILL (NO. 3) 1989

This Bill was introduced into the House of Representatives on 2 November 1989 by the Minister for Employment, Education and Training.

The bill proposes to amend the Higher Education Funding Act 1988 to provide as a condition of payments made under the Act, that States will not take any action to prevent or hinder the imposition or collection of fees by higher education institutions for organisations representing the interests of students.

The Committee commented on the bill in **Alert Digest No. 16 of 1989** (22 November 1989). The bill was introduced into the Senate on 4 December 1989.

DETERMINATIONS BY THE MINISTER
Clause 3

Clause 3 of the bill inserts proposed section 107A under which a State is not to prevent the imposition by government bodies of fees for student organisations. The Minister will be able to determine that an amount is payable by the Commonwealth to an institution in a State for an organisation representing the interests of students.

The Committee is of the view that the determinations made by the Minister should be tabled before Parliament.

HOUSING ASSISTANCE BILL 1989

This Bill was introduced into the House of Representatives on 1 November 1989 by the Minister for Community Services and Health.

The bill proposes to authorise a new Commonwealth State Housing Agreement between the Commonwealth and the States, the Northern Territory and the Australian Capital Territory. The agreement would relate to the provision of housing assistance for rental housing and for home purchase and would operate for ten years from 1 July 1989.

The bill was commented upon by the Committee in **Alert Digest No. 16 of 1989** (22 November 1989) and introduced into the Senate on 23 November 1989.

DETERMINATIONS BY MINISTER
Clause 19

The clause would allow the Minister to make determinations under the bill and there appears to be no criteria for the exercise of the Minister's power. The Committee is of the opinion that the Ministerial determinations should be tabled before Parliament.

STATES GRANTS (TAFE ASSISTANCE) BILL 1989

This Bill was introduced into the House of Representatives on 26 October 1989 by the Minister for Employment, Education and Training.

The bill proposes to appropriate $328.896 million for the funding of technical and further education in the States and Territories in 1990.

The Committee commented on the bill in **Alert Digest No. 15 of 1989** (1 November 1989) and has since received a reply from the Minister. The bill was introduced into the Senate on 21 November 1989.

MINISTERIAL DETERMINATIONS
Clauses 10,13 and 14

Clauses 10,13 and 14 provide for the Minister to make determinations for recurrent or capital expenditure within the sums specified in the bill.

The determinations are disallowable pursuant to clause 20 and are in accord with the usual pattern for such determinations for tertiary institutions.

Clause 21 allows the Minister to delegate all or any powers under the bill to any officer in the Department. The Committee expressed the view that the delegation should be limited to the Secretary and members of the Senior Executive Service and seeks the views of the Minister on the matter.

The Minister has responded that the power to make determinations for recurrent or capital expenditure and

delegate the powers is similar in effect to preceding legislation including the States Grants (Technical and Further Education Assistance) Act 1987.

The Minister states that he is responsible for the exercise of delegated legislation and that the powers have only been delegated to the Secretary and Senior Executive Service officers at Level 4 or above.

The Committee thanks the Minister for his response but suggests that the exercise of the delegation be subject to legislative criteria.

The Minister's response is attached to this Report.

TAXATION LAWS AMENDMENT BILL (NO. 5) 1989

This Bill was introduced into the House of Representatives on 2 November 1989 by the Minister Assisting the Treasurer.

The bill proposes to amend the Income Tax Assessment Act 1936 to change the way Income Tax is paid by companies, superannuation funds, approved deposit funds and pooled superannuation trusts and to introduce various measures announced in the Budget on 15 August 1989.

The Committee commented on this bill in **Alert Digest No. 16 of 1989** (22 November 1989). The bill passed the Senate on 7 December 1989.

AMENDMENT OF DETERMINATIONS
Clause 15

Clause 15 of the bill inserts a proposed new subsection 160AK(2) so that a determination of credit made under Division 19 of Part III of the Act cannot be amended after the end of four years from the original determination, except to correct a calculation error or mistake of fact or as a consequence of a variation in, or a credit or refund of Australian or foreign tax.

The effect of the amendment is to authorise the Commissioner to amend determinations to decrease or increase an amount of credit for any reason within four years of the date of the original determination. The period was previously three years.

The Committee regards the possible decrease of a taxpayer's credit after four years rather than the current three year period as being to the detriment of taxpayers and brings the

matter to the attention of the Senate although the bill has passed both Houses of Parliament.

Barney Cooney
(Chairman)

13 December 1989

MINISTER FOR ABORIGINAL AFFAIRS
CANBERRA A.C.T. 2600

Dear Barney

12 DEC 1989

I refer to the Scrutiny of Bills Alert Digest No 22 of 1989 dated 22 November concerning the Aboriginal Land Rights (Northern Territory) Amendment Bill 1989.

In relation to the comments of the Committee concerning clause 15 of the Bill I would indicate that the Northern Territory Government has now legislated to provide the access which would have been provided by clause 15. This clause will be withdrawn by the Government in the Committee stage debate in the Senate.

The Committee asks why clause 16 of the Bill is necessary. Essentially it is required because whilst some technical descriptions are available for the land described in the new parts 2 and 3 to Schedule 1 much of the land has not been the subject of comprehensive survey. The land proposed to be included in the new parts to Schedule 1 represents part of a compromise solution worked out between the Commonwealth and the Northern Territory Governments as part of the Memorandum of Agreement on the issue of excisions for Aboriginal people living on pastoral properties. That memorandum calls for the Commonwealth to introduce its package of legislation in the current sittings.

I would also point out that the provisions allows for modification only and to quote from the Second Reading Speech tabled in the Senate on 22 November:

"This power is provided to allow for minor corrections of descriptions of the land where further survey or other evidence suggests that the boundaries have not been accurately described. The provision is not intended to permit major changes to the area of land to be granted and the power will not be available after the land has actually been granted."

I trust this explanation will satisfy your Committee's concerns.

Yours sincerely

Gerry Hand

Senator B C Cooney
Chairman
Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

PARLIAMENT OF AUSTRALIA · THE SENATE

IRINA DUNN
INDEPENDENT SENATOR FOR NSW

PARLIAMENT HOUSE
CANBERRA
A.C.T. 2600
TEL (062) 77 3745
FAX (062) 77 3315
77 1387

COMMONWEALTH PARLIAMENT OFFICES
MORGAN GRENFELL BUILDING
56-70 PHILLIP STREET
BOX 36, G.P.O.
SYDNEY, N.S.W. 2001
TEL. (02) 241 2711
FAX: (02) 271 2812

6 December 1989

Mr Ben Calcraft
Secretary
Standing Committee for
Scrutiny of Bills
Telelift 20.4
PARLIAMENT HOUSE

Dear Secretary

Australian Heritage Commission (National Estate Protection) Amendment Bill 1989

I was most interested, if a little surprised, to read the published comments in the Scrutiny of Bills Alert Digest No 17 referring to the abovementioned Bill introduced into the Senate by me on 22 November 1989.

My Bill was prepared in accordance with my instructions by the Parliamentary Draughtsman and in every respect meets that authority's usual high standard.

I do not believe the Bill is "particularly unclear" and "difficult to understand" as stated in your Alert. It certainly can be understood by those practised in reading and interpreting legislation, including one eminent constitutional lawyer who has commented to me that "it would easily survive a constitutional challenge". The Bill, at only ten pages, is also a model of brevity.

Your Committee's objection to "the creation of criminal offences by means of regulation" could lead readers into believing that this is what my Bill does. In fact the criminal offences (breaches of specified provisions of the Bill) and the maximum penalties in each instance (financial and penal) are to be created by the Act and are not some "wide and vague power" to be left to be determined in regulations. The regulations would define the details of the prohibited areas and the prohibited activities, but the scope of the prohibitions, including the

classes of persons, and activities which may be sanctioned, the classes of lands affected and the penalties are clearly set out in the terms of the Bill.

In adopting the approach my Bill is not unlike the World Heritage Properties Conservation Act (but perhaps less open to charges of vagueness than that Act) which was drafted under instructions by the Government and passed by the Parliament in 1983. That Act in section 9 (1) (h) prohibits activities (except with the consent of the Minister) which are not set out in the Act but which may be prescribed by regulations, in respect of lands which are also not defined in the Act but which may be proclaimed by the Governor General. The High Court in Commonwealth v Tasmania 46 ALR 625 had no difficulty with these arrangements and upheld the validity of that Act.

Should you or any of the member of your Committee require further assistance, I will be pleased to give it.

Yours sincerely

IRINA DUNN

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

CSD89/17670:SB

- 6 DEC 1989

Dear Senator

I refer to the Committee's Report on the Courts and Tribunals Administration Amendment Bill 1989. The Committee raised two matters in relation to the Bill.

The first matter related to the provisions of the Bill which provided for the removal from office by the Governor-General of the Registrars of the Administrative Appeals Tribunal and the Federal Court and the Chief Executive Officer of the Family Court for misbehaviour or physical or mental incapacity.

The removal from office provisions are standard provisions. I note that the Committee's concerns raise similar issues to proposals contained in the Report of the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals, which was tabled in the Senate on 30 November. The Joint Select Committee's proposals are also addressed to the adequacy of these types of standard provisions. As the Courts and Tribunals Administration Amendment Bill has already been passed by the Senate, the appropriate course would now seem to be for the Government to give further consideration to this matter in the broader context of formulating its response to the Joint Select Committee Report.

The second matter raised by the Committee relates to provisions of the Bill which require a person to furnish information to the Auditor-General or persons authorised by the Auditor-General. Failure by the person to provide that information, without reasonable excuse, is an offence. The Committee's proposal, that the provisions be amended to require that a person has to comply with the provisions only to the extent that he or she is able to do so, does not appear to add anything to the provision, as inability to furnish information or furnish all information would be a reasonable excuse.

Yours sincerely

(Lionel Bowen)

Senator B Cooney
Chairman
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

CLE89/16175

- 6 DEC 1989

Dear Barney

Scrutiny of Bills Alert Digest No 14/1989
Crimes Legislation Amendment Bill (No 2) 1989

Alert Digest No 14/1989 contains remarks on the Crimes Legislation Amendment Bill (No 2) 1989 (the Crimes No 2 Bill), which was introduced into the Senate on 21 November 1989. The Scrutiny of Bills Committee has reported the following matters in relation to the Crimes No 2 Bill:

- The Committee sought my views whether the Cash Transaction Reports Act 1988, which is amended by the Crimes No 2 Bill, can be amended to provide that it commence at the latest within 6 months of Royal Assent being given to the Crimes No 2 Bill; and

- Various proposed amendments to the Crimes Act 1914, included in the package of amendments reforming Commonwealth law on sentencing, confer a discretion upon the Attorney-General. The Committee notes that the reasons for the discretion being conferred upon the Attorney-General are not outlined in the Explanatory Memorandum.

I would like to make some remarks on the Committee's comments and I would hope that these remarks will alleviate any concerns that the Committee may have on each of the above aspects of the Bill.

Cash Transaction Reports Act

Various provisions of the Cash Transaction Reports Act were recently proclaimed to commence during 1990. These proclamations were noted in the Special Gazette of 15 November 1989, and they proclaimed the commencement of sections 16 and 17 of the Act on 1 January 1990 and sections 7-15 on 1 July 1990. As a result only sections 18-24 of the Act remain to be proclaimed.

Sections 18-24 of the Act deal with account verification (ie the verification of the identity of proposed signatories to accounts with cash dealers). The Crimes No 2 Bill makes a series of amendments to these provisions of the Cash Transaction Reports Act. In particular, clause 43 of the Bill will insert a new subsection 20(8) into the Act which will enable an alternative system of account verification to be prescribed by regulation for "identifying cash dealers". The procedural detail of this alternative method will be contained in the regulations.

The requirement for account verification is central to the legislative aims of countering the underground cash economy, tax evasion and money laundering. It is essential that the regime for account verification should be of high integrity from the law enforcement point of view, whilst also being commercially viable from the point of view of cash dealers. Clearly these aims will be met only through extensive consultation with all concerned.

Accordingly, whilst I share the Committee's view that the provisions of the Cash Transaction Reports Act should be proclaimed as soon as possible, I feel that it would be unwise to forego the flexibility that flows from the present provisions in the Cash Transaction Reports Act as to commencement. However, I am confident that the remaining provisions of the Act will in fact be proclaimed to commence by 1 September 1990 and, hopefully, sooner than that.

Review of the Attorney-General's Discretion

The Attorney-General's decisions covered by the proposed sections 19AN, 19AP, 19AV, 20BE, 20BF, 20BK, 20BL, and 20BM of the Crimes Act deal with the conditional release of persons sentenced to imprisonment or detained for a specified period pursuant to a order made by a court in the exercise of its criminal jurisdiction. Accordingly, these decisions relate to matters which are, in my view, an integral part of the criminal justice system and not appropriate for review, other than as to legality.

People who are within that system and are detained have their case considered by a comprehensive court process which involves a careful examination of the facts and circumstances surrounding the alleged offence, the circumstances of the person before the court and the sentencing or disposition options.

Decisions under section 20BE and 20BK, relate to orders for the detention of persons either because a court has found a prima facie case exists, but the person is unlikely to be fit to stand trial within 12 months of the making of the detention order, or; the person is acquitted on the grounds of mental illness (ie a jury has found that the person committed the act or omission constituting the offence but was incapable of

having the requisite accompanying state of mind). Further the court must have determined that the detention of the person was warranted in all the circumstances. Previously, such persons were detained during the Governor-General's pleasure without any statutory requirement for review. However, the Bill provides for a mandatory 6 monthly review by the Attorney-General. The statutory review, (which does not preclude earlier review) has been included to protect mentally ill persons who may not have the capacity to apply for early release in the way a prisoner may apply for release on licence. Accordingly, decisions under sections 20BE, 20BK and similar provisions are as much a part of the criminal process as decisions relating to release on parole or licence.

Yours sincerely

(Lionel Bowen)

Senator Barney Cooney
Chairperson
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT

Minister for Employment, Education and Training
Parliament House, Canberra, ACT, 2600

Senator B C Cooney
Chairman
Standing Committee for the
Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

11 DEC 1989

Dear Senator Cooney

I refer to the Scrutiny of Bills Alert Digest No. 15 of 1989 (1 November 1989) which provides comments on the States Grants (TAFE Assistance) Bill 1989.

The provisions of the Bill which allow the Minister to make determinations for recurrent or capital expenditure (Clauses 10, 13 and 14) and delegate these powers pursuant to clause 21 are not inconsistent with those under preceding legislation, including the States Grants (Technical and Further Education Assistance) Act 1989.

I consider that clause 21 is appropriate in its present form since I accept responsiblity for the exercise of delegated power through signing the instrument which nominates my delegates. In practice, I have only delegated powers pursuant to section 20 of the 1989 Act or its predecessors, to the Secretary and members of the Senior Executive Service at Level 4 or above.

Yours sincerely

J S Dawkins