SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF

1992

4 MARCH 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT OF 1992

The Committee has the honour to present its First Report of 1992 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 24:

Arts, Sport, Environment and Territories Legislation Amendment Bill 1991

ARTS, SPORT, ENVIRONMENT AND TERRITORIES LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 28 November 1991 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The Bill proposes to amend the following Acts:

- the *Australian Capital Territory (Planning and Land Management) Act 1988*, to:
  - introduce a Ministerial power of direction in relation to the National Capital Plan; and
  - empower the National Capital Planning Authority to charge for planning and related approvals;
- the *Australian Sports Drug Agency Act 1990*, to:
  - ensure the notification of international anti-doping arrangements in the regulations;
  - change the reporting requirements regarding negative test results;
  - exempt the Australian Sports Drug Agency from taxation; and
  - enable the Agency to delegate certain powers to its employees;
- the *Environment Protection (Sea Dumping) Act 1981* and the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*, to enable analysts to give evidence and overcome gaps in evidence in judicial proceedings;

- the *National Parks and Wildlife Conservation Act 1976,* to enable botanic gardens, parks and reserves to be managed under the Act and insert three international agreements into the Schedule;
- the *Norfolk Island Act 1979,* to delegate powers to the Acting and Deputy Administrators when the Administrator is absent; and
- the *Protection of Movable Cultural Heritage Act 1986,* to allow the National Cultural Heritage Committee to approve a recommendation or report without convening a meeting.

The Committee dealt with the Bill in Alert Digest No. 21 of 1991, in which it made various comments. The Minister for the Arts, Sport, the Environment and Territories responded to those comments in a letter dated 26 February 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clause
Schedule - proposed new subsection 65A(3) of the *Australian Sports Drug Agency Act 1990*

In Alert Digest No. 21 of 1991, the Committee noted that the Schedule to the Bill contains, among other things, several proposed amendments to the *Australian Sports Drug Agency Act 1990.* Included in those proposed amendments is a proposed new section 65A. The Committee noted that that proposed new section provides:

> (1) Subject to subsection (3), the Agency is not subject to taxation under an law of the Commonwealth or of a State or Territory.
>
> (2) Subject to subsection (3), the transactions of the Agency in respect of goods for use (whether as goods or in some other form), and not for sale, by the Agency are not

subject to the laws of the Commonwealth relating to sales tax.

(3) The regulations may provide that subsection (1) or (2) does not apply in relation to taxation under a specified law.

The Committee indicated that proposed new subsection 65A(3) is what it would generally consider to be a 'Henry VIII' clause, since, if enacted, it would allow the Governor-General (acting on the advice of the Federal Executive Council) to promulgate regulations to disapply subsections (1) or (2) in relation to taxation under a specified law. The Committee suggested that, in effect, it would allow the amendment of the operation of the primary legislation by subordinate legislation.

The Committee drew Senators' attention to the clause, as it may be considered an inappropriate delegation of legislative power in breach of principle 1(a)(iv) of the Committee's terms of reference.

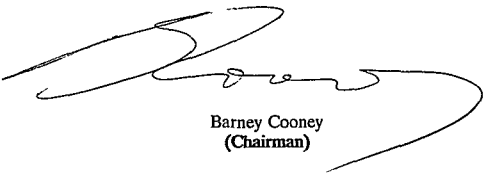
The Minister has responded as follows:

> Provision for regulations to be made to remove, wholly or partly, the tax exemption given by the Act establishing a statutory authority has been made frequently in recent year. Examples include section 50 of the Australian Sports Commission Act 1989, section 30 of the former Australian Sports Commission Act 1985, section 39 of the former Australian Institute of Sport Act 1986, section 48 of the Australian Tourist Commission Act 1987, and section 58 of the Australian Horticultural Corporation Act 1987.

Though the Committee suggests that this is not a good reason, of itself, for including such a clause in this Bill, the Committee notes that the Minister goes on to say:

The reason for such provisions is that they cover future possibilities where it may not be appropriate for bodies such as these to be totally exempt from the specified taxes. For example, State taxation laws could change rapidly and unexpectedly. As a matter of prudence in taxation policy, the provision appears to me to be desirable.

The Committee thanks the Minister for this response.



Barney Cooney
(Chairman)

MINISTER FOR THE ARTS, SPORT, THE ENVIRONMENT AND TERRITORIES

Hon. Ros Kelly M.P.

Phone: (06) 277 7640
Facsimile: (06) 273 4130

26 FEB 1992

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

RECEIVED
27 FEB 1992
Senate Standing Cttee for the Scrutiny of Bills

Dear Senator Cooney Barry,

I refer to Mr Argument's letter of 5 December 1991 and the comments in the attached Scrutiny of Bills Alert Digest on the amendments to the Australian Sports Drug Agency Act 1990 in the Arts, Sport, Environment and Territories Legislation Amendment Bill 1991.

The Committee notes that the proposed new section 65A of the ASDA Act would exempt ASDA from Commonwealth, State and Territory taxation, and exempt ASDA's transactions in respect of goods for use not sale from sales tax. However, regulations could be made to remove these exemptions, as regards taxation under a law specified in the regulations.

Provision for regulations to be made to remove, wholly or partly, the tax exemption given by the Act establishing a statutory authority has been made frequently in recent years. Examples include section 50 of the Australian Sports Commission Act 1989, section 30 of the former Australian Sports Commission Act 1985, section 39 of the former Australian Institute of Sport Act 1986, section 48 of the Australian Tourist Commission Act 1987, and section 58 of the Australian Horticultural Corporation Act 1987.

The reason for such provisions is that they cover future possibilities where it may not be appropriate for bodies such as these to be totally exempt from the specified taxes. For example, State taxation laws could change rapidly and unexpectedly. As a matter of prudence in taxation policy, the provision appears to me to be desirable.

Yours sincerely

Ros Kelly

ROS KELLY

Quality in Life

PARLIAMENT HOUSE, CANBERRA, A C T 2600

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
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(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 1992

The Committee has the honour to present its Second Report of 1992 to the Senate.

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

Construction Industry Reform and Development Bill 1991

Electoral and Referendum Amendment Act 1991

Forest Conservation and Development Bill 1991

CONSTRUCTION INDUSTRY REFORM AND DEVELOPMENT BILL 1991

This Bill was introduced into the Senate on 19 December 1991 by the Minister for Industrial Relations.

The Bill proposes to establish the Construction Industry Development and the Construction Industry Reform Agency.

The Committee dealt with the Bill in Alert Digest No. 1 of 1992, in which it made various comments. The Minister for Industrial Relations responded to those comments in a letter dated 18 March 1992. A copy of that letter is attached to this report.

The Committee notes the Bill passed the Senate on 5 March, with amendments. However, the Minister's response may nevertheless be of interest to Senators. Relevant parts of the response are, therefore, discussed below.

General comment

In Alert Digest No. 1, the Committee noted that clause 55 of the Bill provides for periodic reporting by the proposed Construction Industry Reform Agency. It states:

> **Periodic reports**
> 55.(1) The Agency must, in addition to the requirement to prepare an annual report under section 63M of the *Audit Act 1901* (as applied under subsection 51(1) of this Act) prepare a report in accordance with the regulations for each prescribed period.

(2) The Board must, as soon as possible after a report under subsection (1) is prepared, cause a copy of it to be given to each of the following:

(a) the Minister;
(b) the Minister for Small Business and Customs;
(c) the Minister for Administrative Services;
(d) the Minister for Employment, Education and Training;
(e) the Minister for Health, Housing and Community Services;
(f) the Minister for Defence.

(3) The Board may cause a copy of a report prepared under subsection (1) to be given to the Council.

The Committee noted that, while the clause contained a requirement that the Agency report to various Ministers, there was no obligation to table such reports in the Parliament. The Committee suggested that given that the Agency would be appropriated funds by the Parliament, it would be appropriate for the legislation to contain a requirement that periodic reports by the Agency be tabled in the Parliament.

The Minister has responded as follows:

> The Committee's concerns have been met as a result of an amendment made to the Bill in the Senate on 5 March 1992. The Senate accepted an amendment moved by the Australian Democrats to add sub-clause 55(4) to the Bill. This clause provides:
>
> > The Minister must cause a copy of each periodic report prepared in accordance with this section to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the periodic report.
>
> This tabling requirement endorses the Committee's suggestion that periodic reports of the Construction Industry Development Agency be tabled in the Parliament.

The Committee thanks the Minister for his response and for accepting the amendment referred to, which the Committee notes was passed by the Senate on 5 March.

ELECTORAL AND REFERENDUM AMENDMENT ACT 1991

The Bill for this Act was introduced into the Senate on 12 September 1991 by the Minister for Administrative Services.

The Act gives effect to recommendations made by the Joint Standing Committee on Electoral Matters in its Report No 3 (which flowed from its Inquiry into the Conduct of the 1987 Federal Election and the 1988 Referendums) not already given effect administratively or by regulation.

The Committee dealt with the (then) Bill in Alert Digest No. 16 of 1991, in which it made various comments. The Minister for Administrative Services responded to those comments in a letter dated 25 October 1991. The Minister's response was discussed by the Committee in its *Seventeenth Report of 1991*, in which the Committee made some further comments. The Minister has now responded to those further comments in a letter dated 9 March 1992. A copy of that letter is attached to this Report. Relevant parts of the response are also discussed below.

Reversal of the onus of proof
Clause 42 - proposed new section 140A of the *Referendum (Machinery Provisions) Act 1984*

In Alert Digest No. 16 of 1991, the Committee noted that clause 42 of the (then) Bill proposed to insert a new section 140A into the *Referendum (Machinery Provisions) Act 1984*. That proposed new section provided:

> In proceedings for an offence against section 45 of this Act [which deals with compulsory voting], an averment by the prosecutor

> contained in the information of complaint is taken to be proof of the matter averred in the absence of evidence to the contrary.

The Committee suggested that this was a reversal of the onus of proof, as the provision would (if enacted) require a defendant to prove that matters averred to by the prosecutor were not, in fact, correct. The Committee noted that, ordinarily, it would be incumbent on the prosecution to prove all the matters contained in the averment.

The Committee indicated that it strongly disapproved of this type of provision. In making this statement, the Committee noted that the Senate Standing Committee on Constitutional and Legal Affairs (as it then was), in its influential report entitled The burden of proof in criminal proceedings (Parliamentary paper no 319/1982), also indicated its disapproval of the use of such provisions. The Committee noted that, in that report, the Constitutional and Legal Affairs Committee recommended that '[a]s a matter of legislative policy averment provisions should be kept to a minimum.' (at para 7.16 of the report).

The Committee drew Senators' attention to the provision, as it may have been considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

On 25 October 1991, the Minister responded as follows:

> The new provision is made necessary by the amendments to section 45 of the *Referendum (Machinery Provisions) Act 1984*, which replace the current scheme for the enforcement of compulsory voting with a 'penalty notice' scheme. Under the penalty notice scheme, there will be no requirement on voters to provide a statement of their reasons for failing to vote, nor will there be an offence of failing to reply to notices sent to apparent non-voters. Prosecutions of non-voters who do not take either the option of paying the prescribed $20 penalty or the option of

> offering valid and sufficient reasons for failing to vote would be impracticable without an averment provision of the type proposed, since the prosecution would be unable in any particular case to prove the absence of a valid and sufficient reason for the failure to vote. The reversal of the onus of proof is in effect required because the matters which would be deemed to be proved fall within the specific knowledge of the defendant.

The Committee thanked the Minister for this response, but, for several reasons, the retained its concern about the provision. First, the Committee re-iterated its in-principle objection to the use of such provisions and re-stated its belief that their use should be kept to a minimum.

Second, the Committee noted that, in the Minister's opinion, prosecutions for the relevant offences would be 'impracticable' without an averment provision. However, the Committee noted that this appeared to be largely a result of the penalty notice scheme which was to be put in place by the amendments to section 45 of the *Referendum (Machinery Provisions) Act 1984* to which the Minister referred. The Committee suggested that, in other words, if the scheme were differently framed, these averments might not be required.

Finally, the Committee noted that, according to the Minister's response, the averments would relate to matters which were 'within the specific knowledge of the defendant'. The Committee observed that this meant that, on the scheme proposed, matters peculiarly within the defendant's knowledge were to be deemed to be proved by way of their being averred to by the prosecutor.

For those reasons, the Committee continued to draw Senators' attention to the provision, as it may have been considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

In his letter of 9 March 1992, the Minister has responded to those comments as follows:

> I noted in my letter of 25 October 1991 that prosecutions for failure to vote at a referendum without a valid and sufficient reason would be impracticable in many cases without an averment provision like section 140A, because under the new penalty notice scheme for the enforcement of compulsory voting, there will be no requirement on apparent non-voters to provide a statement of their reasons for failing to vote, nor will there be an offence of failing to reply to a non-voter's notice. The Committee has observed that 'if the scheme were differently framed, these averments might not be required'.

The Minister goes on to say:

> While I sympathise with the Committee's concern over the use of averment provisions, the purpose of the new scheme for the enforcement of compulsory voting is to relieve voters of the requirement to engage in the lengthy correspondence which is a feature of the current enforcement scheme. The retention of the obligation currently placed on all apparent non-voters to show cause why they should not be prosecuted would defeat the purpose of the new scheme. In the absence of that obligation however it will in general be impossible for the lack of a valid and sufficient reason for failure to vote to be proved by direct evidence rather than by averment. It is therefore not clear to me that there is any way in which the use of averments can be avoided short of abandoning the new penalty notice scheme, and the considerable benefits associated with it.
>
> I note furthermore that the existing requirement to show cause why proceedings for failure to vote without a valid and sufficient reason for such failure should not be instituted is in effect a reversal of the onus of proof. Thus the new provision does not amount to a major change in legal policy.

The Minister concludes by saying:

> I should mention that under the new provisions, a prosecution will only be launched against a person who has failed to reply to two penalty notices: a person who has a valid and sufficient reason for failing to vote will be given two opportunities to state it before any possibility arises of a prosecution. It can reasonably be expected that the great bulk of cases in which a person has a valid and sufficient reason for failing to vote will be resolved satisfactorily well before any question of court proceedings relying on an averment arises.

The Committee thanks the Minister for his further response. However, the Committee retains its original concerns about use of this type of provision.

FOREST CONSERVATION AND DEVELOPMENT BILL 1991

This Bill was introduced into the House of Representatives on 28 November 1991 by the Minister for Resources.

The Bill proposes to identify and facilitate the protection of forest areas of significant environmental, cultural and heritage value and facilitate investment by enterprises in major wood processing projects to produce goods for import replacement and/or export.

The Committee dealt with the Bill in Alert Digest No. 21 of 1991, in which it made various comments. The Minister for Resources responded to those comments in a letter dated 9 March 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Non-reviewable decision
Subclause 10(1), clauses 11 to 15 and 17 to 21

In Alert Digest No. 21 of 1991, the Committee noted that subclause 10(1) of the Bill provides:

> If the Minister is satisfied that the conditions imposed by [clauses] 11 to 15 (inclusive) have been met in relation to a particular wood processing project, the Minister must, by instrument in writing, declare that this Act applies to the project.

The Committee noted that clauses 11 to 15 set out five conditions which are to be met, including conditions relating to the dominant purpose of a wood processing

project, the completion of an appropriate assessment process, the enactment of appropriate State laws, etc.

The Committee further noted that a decision by the Minister under subclause 10(1) would not appear to be subject to any form of review on the merits. The Committee suggested that, as a result, such a decision would only appear to be subject to challenge as to its legality under, for example, the *Administrative Decisions (Judicial Review) Act 1975.*

Similarly, the Committee noted that, under clauses 11 to 15, 'the designated Ministers' would be given a discretion to determine whether or not the various conditions set out in those clauses had been met. The Committee noted that the clauses appear to offer no scope for a review of those Ministerial decisions on their merits.

Finally, the Committee noted that clauses 17 to 21 would give 'the designated Ministers' a discretion in relation to certain 'exceptions' under the legislation. The Committee noted that those exceptions would operate against subclause 15(2), which provides that the Commonwealth must not exercise any of its other decision making powers in such a way as to prevent or obstruct a wood processing project. The Committee suggested that the various Ministerial decisions involved did not appear to be subject to any form of review on the merits.

The Committee drew Senators' attention to the clauses, as they may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

The Minister has responded as follows:

> I do not consider the decisions you have referred to would be

> appropriate for review on the merits, as they are decisions made at a high level of government and involve major issues which are likely to attract significant Parliamentary scrutiny. With respect to decisions under this legislation it is appropriate that the Government itself make the final determination with respect to the granting and, in appropriate circumstances, the removal of resource security. It should be the responsibility of the Government, and the Government alone, to defend the merits of such decisions in Parliament and any other forum. Accordingly, decisions under this legislation fit into that narrow category of decisions for which merits review would be inappropriate.

The Minister goes on to say:

> I also note that an essential objective of the Bill is to provide security and certainty to both the forest industry and to the Australian community. At each of the preconditional stages to the grant of resource security by the Prime Minister under subclause 10(1), the relevant designated Minister must decide whether he/she is satisfied or not as to whether the project meets the requirements imposed by these clauses.

The Minister concludes by saying:

> The granting of resource security under the legislation is necessarily an exhaustive process involving extensive consultation with relevant parties. It involves, inter alia, the project being judged eligible, the satisfactory completion of up front assessments and the entering into of legally binding and public agreements between the Commonwealth, State and the enterprise concerned. Following the completion of this process, the need to achieve certainty in decision-making outweighs the benefits of independent merits review. Of course judicial review, through both the prerogative writs and under the Administrative Decisions (Judicial Review) Act remain available for aggrieved persons to challenge the lawfulness of decisions.

The Committee thanks the Minister for this response.

Designation of species as being 'threatened'
Subparagraph 17(3)(a)(i)

In Alert Digest No. 21 of 1991, the Committee noted that clause 17 of the Bill provides that the first exception to the general rule that other Commonwealth laws are not to operate so as to prevent or obstruct a wood processing project is if the designated Ministers are satisfied that major and unforseen environmental or cultural impact will result if the project goes ahead. The Committee noted that subclause 17(2) makes specific provision in relation to threatening species of fauna and flora. Paragraph 17(3)(a) provides that a species of fauna or flora is taken to be 'threatened' for the purposes of subclause (3) if:

> (i) the designated Ministers have, by instrument published in the *Gazette*, declared the species to be a threatened species; or
> (ii) it comes within one of the threatened species set out in the Schedule [to the Act].

The Committee suggested that subparagraph 17(3)(a)(i) may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, as it would allow the designated Ministers to declare a species of fauna or flora to be 'threatened' (and thereby open up the possibility of the security of a wood processing project being subject to an exception) by simply publishing a notice in the *Gazette*. The Committee suggested that, in the circumstances, it may be appropriate for such a declaration to be subject to tabling in both Houses of the Parliament and, perhaps, to disallowance by either House.

The Committee drew Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

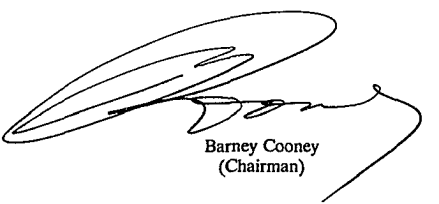
The Minister has responded as follows:

> Subparagraph 17(4) of the Bill requires that the Minister responsible for deciding whether a species is threatened must satisfy himself/herself that there is adequate scientific basis for the declaration and there has been appropriate consultation with the States concerning the declaration and the views of the States have been taken into account. This process will ensure that the appropriate experts are consulted in order to establish a scientific basis for categorising a species as 'threatened'.

The Minister goes on to say:

> I do not believe it would be desirable or appropriate for the Parliament to be involved in establishing whether or not a species is 'threatened' as the process will be based on independent scientific advice. As such, it is appropriate for the decision to be taken by the relevant Minister after consulting the qualified experts and for the Minister to be able to make the declaration immediately after the decision has been taken. Of course it would be up to the Minister to defend his/her action in the Parliament and the Administrative Decisions (Judicial Review) Act would be available for aggrieved persons to challenge the lawfulness of such decisions.

The Committee thanks the Minister for this response. The Committee remains of the view that it would be desirable if the declarations in question were at least tabled in the Parliament, as it is essential that as much effort is made as is practicable to make the content of the declarations known to persons who may be affected by them.



Barney Cooney
(Chairman)

MINISTER FOR INDUSTRIAL RELATIONS

PARLIAMENT HOUSE,
CANBERRA, A.C.T. 2600

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

Dear Senator Cooney

Thank you for your letter of 27 February 1992 in relation to the Construction Industry Reform and Development Bill 1991 (the Bill) which I introduced into the Senate on 19 December 1991.

The Committee's concerns have been met as a result of an amendment made to the Bill in the Senate on 5 March 1992. The Senate accepted an amendment moved by the Australian Democrats to add sub-clause 55 (4) to the Bill. This clause provides:

> -"The Minister must cause a copy of each periodic report prepared in accordance with this section to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the periodic report."

This tabling requirement endorses the Committee's suggestion that periodic reports of the Construction Industry Development Agency be tabled in the Parliament.

Yours fraternally

Peter Cook

19.3.92.

MINISTER ASSISTING THE PRIME MINISTER
FOR PUBLIC SERVICE MATTERS
Telephone: (06) 277 7320 Facsimile (06) 273 4115

SENATOR THE HON. NICK BOLKUS
Minister for Administrative Services

Parliament House
Canberra, A.C.T. 2600
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Senator B Cooney
Chairman
Senate Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Colleague

I am writing in response to the comments on the Electoral and Referendum Amendment Bill 1991 made in the Seventeenth Report of 1991 of the Senate Standing Committee for the Scrutiny of Bills.

Concerns about three aspects of the Bill were raised in the Scrutiny of Bills Alert Digest No. 16 of 1991 (9 October 1991), and I responded to them in my letter of 25 October 1991. One of those aspects remains of concern to the Committee: the reversal of the onus of proof arising from new section 140A of the Referendum (Machinery Provisions) Act 1984.

I noted in my letter of 25 October 1991 that prosecutions for failure to vote at a referendum without a valid and sufficient reason would be impracticable in many cases without an averment provision like section 140A, because under the new penalty notice scheme for the enforcement of compulsory voting, there will be no requirement on apparent non-voters to provide a statement of their reasons for failing to vote, nor will there be an offence of failing to reply to a non-voter's notice. The Committee has observed that "if the scheme were differently framed, these averments might not be required".

While I sympathise with the Committee's concern over the use of averment provisions, the purpose of the new scheme for the enforcement of compulsory voting is to relieve voters of the requirement to engage in the lengthy correspondence which is a feature of the current enforcement scheme. The retention of the obligation currently placed on all apparent non-voters to show cause why they should not be prosecuted would defeat the purpose of the new scheme. In the absence of that obligation however it will in general be impossible for the lack of a valid and sufficient reason for failure to vote to be proved by direct evidence rather than by averment. It is therefore not clear to me that there is any way in which the use of averments can be avoided short of abandoning the new penalty notice scheme, and the considerable benefits associated with it.

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I should mention that under the new provisions, a prosecution will only be launched against a person who has failed to reply to two penalty notices: a person who has a valid and sufficient reason for failing to vote will be given two opportunities to state it before any possibility arises of a prosecution. It can reasonably be expected that the great bulk of cases in which a person has a valid and sufficient reason for failing to vote will be resolved satisfactorily well before any question of court proceedings relying on an averment arises.

Yours sincerely

NICK BOLKUS

9 MAR 1992

MINISTER FOR RESOURCES

The Hon. Alan Griffiths, MP

- 9 MAR 1992

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

Dear Senator Cooney

I refer to the letter of 5 December 1991 from your Committee Secretary, Mr Argument, inviting me to respond to the comments on the *Forest Conservation and Development Bill 1991* contained in the Scrutiny of Bills Alert Digest No. 21 of 1991 (4 December 1991).

Your committee noted that certain decisions under the proposed legislation were not reviewable. I do not consider the decisions you have referred to would be appropriate for review on the merits; as they are decisions made at a high level of government and involve major issues which are likely to attract significant Parliamentary scrutiny. With respect to decisions under this legislation it is appropriate that the Government itself make the final determination with respect to the granting and, in appropriate circumstances, the removal of resource security. It should be the responsibility of the Government, and the Government alone, to defend the merits of such decisions in Parliament and any other forum. Accordingly, decisions under this legislation fit into that narrow category of decisions for which merits review would be inappropriate.

I also note that an essential objective of the Bill is to provide security and certainty to both the forest industry and to the Australian community. At each of the preconditional stages to the grant of resource security by the Prime Minister under subclause 10(1), the relevant designated Minister must decide whether he/she is satisfied or not as to whether the project meets the requirements imposed by these clauses.

The granting of resource security under the legislation is necessarily an exhaustive process involving extensive consultation with relevant parties. It involves, inter alia, the project being judged eligible, the satisfactory completion of up front assessments and the entering into of legally binding and public agreements between the Commonwealth, State and the enterprise concerned. Following the completion of this process, the need to achieve certainty in decision-making outweighs the benefits of independent merits review. Of course judicial review, through both the prerogative writs and under the Administrative Decisions (Judicial Review) Act remain available for aggrieved persons to challenge the lawfulness of decisions.

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In relation to subparagraph 17(3)(a)(i) of the Bill, your committee also noted that it may be appropriate for a declaration of a threatened species of fauna or flora by notice in the Gazette to be subject to tabling in, and perhaps disallowance by, both Houses of the Parliament. Subparagraph 17(4) of the Bill requires that the Minister responsible for deciding whether a species is threatened must satisfy himself/herself that there is adequate scientific basis for the declaration and there has been appropriate consultation with the States concerning the declaration and the views of the States have been taken into account. This process will ensure that the appropriate experts are consulted in order to establish a scientific basis for categorising a species as 'threatened'.

I do not believe it would be desirable or appropriate for the Parliament to be involved in establishing whether or not a species is 'threatened' as the process will be based on independent scientific advice. As such, it is appropriate for the decision to be taken by the relevant Minister after consulting the qualified experts and for the Minister to be able to make the declaration immediately after the decision has been taken. Of course it would be up to the Minister to defend his/her action in the Parliament and the Administrative Decisions (Judicial Review) Act would be available for aggrieved persons to challenge the lawfulness of such decisions.

I have forwarded a copy of this letter to Mr Argument, the Secretary to the Senate Standing Committee for the Scrutiny of Bills.

Yours sincerely

Alan Griffiths

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF

1992

1 APRIL 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 1992

The Committee has the honour to present its Third Report of 1992 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 24:

Australian National University Amendment (Autonomy) Bill 1992

Customs and Excise Legislation Amendment Bill 1992

AUSTRALIAN NATIONAL UNIVERSITY AMENDMENT (AUTONOMY) BILL 1992

This Bill was introduced into the Senate on 4 March 1992 by Senator Tierney as a Private Senator's Bill.

The Bill proposes to ensure that the Council of the Australian National University has the sole responsibility for the application of money appropriated by the Parliament for the purposes of the University and its management.

The Committee dealt with the Bill in Alert Digest No. 3 of 1992, in which it made various comments. Senator Tierney responded to those comments in a letter dated 31 March 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Clause 3

In Alert Digest No. 3, the Committee noted that clause 3 of the Bill proposes to insert two new subsections into section 42 of the *Australian National University Act 1991*. That section deals with the appropriation of money to the University by the Parliament. It also allows the Minister to give directions as to how that money is to be paid to the University.

The Committee noted that proposed new subsections 42(4) and (5) provide:

(4) The power of the Minister under subsection (2) may not be exercised so as to allow any person or body other than the Council effectively to control the application of money payable to the University, or otherwise to abridge the entire control and management of the University vested in the Council by subsection 9(1).

(5) A direction under this section which is contrary to subsection (4), whether given before or after the commencement of that subsection, is of no effect.

The Committee noted that, if enacted, proposed new subsection (5) could operate retrospectively to invalidate a Ministerial direction given prior to the commencement of the new sections.

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

Senator Tierney has provided a detailed response to the Committee's comment, including some further background to the Bill. That background is as follows:

> The Minister for Higher Education and Employment Services has decided that money appropriated by the Parliament to the Australian National University for the purposes of the John Curtin School of Medical Research, which is established under the Act as one of the schools of the University, should be taken out of the control of the Council of the University and placed in the control initially of the National Health and Medical Research Council and now apparently of the Department of Health, Housing and Community Services. I regard this decision as a threat to the autonomy of the University, and the purpose of the bill is to render that decision of no effect and to ensure that a similar decision cannot be taken in the future.
>
> It appears that the Minister has acted under subsection 42(2) of the Act which gives the Minister the power to determine the

amounts in which and the times at which money appropriated by the Parliament for the University is to be paid to the University. The Minister's decision has apparently been carried out by a ministerial direction under this subsection.

As is pointed out in the explanatory memorandum to the bill, it is arguable that this arrangement is contrary to the Act, which provides in subsection 9(1) that the Council has the entire control and management of the University, in subsection 19(4) that the John Curtin School of Medical Research is one of the research schools of the University, and in section 43 that money received by the University, including money appropriated by the Parliament and payable to the University under subsection 42(1), must be applied by the Council solely for the purposes of the University.

The bill seeks to deal with the action of the Minister by amending section 42 of the Act to make it clear that the power of the Minister in that section cannot be used in such a way as to give any person or body other than the Council effective control over the application of money payable to the University, or otherwise to take the control and management of the University or any part of the University out of the hands of the Council. The bill therefore may not alter the substantive law as contained in the Act but merely clarify that law in so far as the Act gives the control and management of the University to the Council.

Having given this background, Senator Tierney goes on to say:

It is quite true, as the Committee notes, that proposed new subsection 42(5) operates retrospectively to invalidate a ministerial direction given prior to the commencement of the bill. The bill is deliberately framed in this way because it appears that the Minister has already given a direction under subsection 42(2) of the Act whereby the money for the John Curtin School of Medical Research has been transferred to the control of the Department of Health, Housing and Community Services. If the bill operated only in relation to future directions under subsection 42(2), therefore, it probably would not have the effect of reversing the decision of the Minister. The bill is therefore deliberately retrospective.

Senator Tierney goes on to say:

> I am surprised that the Committee should suggest, however, that proposed new subsection 42(5) may be considered to trespass unduly on personal rights and liberties. I cannot see any way in which the personal rights and liberties of any person could be affected by the operation of the provision. If the provision operates as intended, the Minister's direction would be of no effect, the control of the funds for the John Curtin School of Medical Research would be returned to the Council of the University, and the Department would no longer have any control over those funds. It may be that the Committee considers that there is some possibility of legal action being taken against the Minister and officers for acting under the Minister's direction. I do not see how any such action could be taken, and I think that the possibility of such action is so remote as not to merit any consideration. It would be possible, of course, to include in the bill a provision to the effect that nobody is liable for any acts done under a ministerial direction which is rendered of no effect by the bill, but I do not think that such a provision is warranted given the unlikelihood of anyone being able to take any legal action.

The Committee thanks Senator Tierney for this detailed response. In making the original comment, the Committee was not concerned by the possibility of legal action (as envisaged by Senator Tierney's response) so much as the risk that a person who has received funds from, say, the National Health and Medical Research Council (NHMRC) could have those funds withdrawn because the payment of the funds to the NHMRC was, pursuant to the proposed amendments, subsequently invalidated. The Committee was concerned that a person receiving funds in such circumstances, in good faith, might be penalised.

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to:

- provide for electronic transmission and lodgement of information concerning imported goods;
- amend the advance reporting regime for ships and aircraft and their cargo, passengers and crew; and
- streamline the claims procedure, accountability and administration of the diesel fuel rebate scheme.

The Committee dealt with the Bill in Alert Digest No. 2 of 1992, in which it made various comments. The Minister for Small Business, Construction and Customs responded to those comments in a letter dated 26 March 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Reversal of the onus of proof
Clause 12 - proposed new subsection 64AE(3) of the *Customs Act 1901*

In Alert Digest No. 2, the Committee noted that clause 12 of the Bill proposes to insert a new section 64AE into the *Customs Act 1901*. The Committee noted that, if enacted, that new section would require the master and owner of a ship or the pilot and owner of an aircraft to answer questions and produce documents in certain circumstances. Failure to do so would carry a $500 penalty. However,

proposed new subsection 64AE(3) goes on to provide:

> It is a defence to a prosecution for an offence against subsection (1) or (2) if the person charged had a reasonable excuse for:
>
> (a) refusing or failing to answer questions asked by a Collector; or
>
> (b) refusing or failing to produce documents when so requested by a Collector.

The Committee suggested that this clause involves a reversal of the onus of proof, as it is ordinarily incumbent on the prosecution to prove all the elements of an offence. The Committee noted that, pursuant to the proposed amendment, if a person had a reasonable excuse for failing to provide such information, it would be incumbent on them to prove it. In making this observation, the Committee noted that it would not be unusual for the provisions relating to the provisions of information to state that it is an offence for a master, pilot or owner to fail, 'without reasonable excuse', to answer a question or produce documents.

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

The Minister has provided the following response:

> As your Committee has noted, proposed subsection 64AE(3) does involve a reversal of the onus of proof. It is considered in this case however, that because the matters to be raised by way of defence by the defendant are peculiarly within the knowledge of the defendant, this reversal of the onus could be considered appropriate.

The Minister goes on to say:

> Section 64AE only applies to ships or aircraft arriving in Australia from a place outside Australia. Therefore, information given to Customs concerning the ship's or aircraft's cargo, passengers, crew or stores is information which the master, pilot or owner would possess but which Customs would not be able to find out without the master, pilot or owner's assistance. In particular, the cargo report concerns information which would not be available to Customs in most circumstances as the source of the information is overseas and beyond the reach of Customs' investigative powers. Given this difficulty, it is considered in this limited circumstance appropriate to have the defendant raise and establish as reasonable the failure to answer questions or to produce requested documents.

The Committee thanks the Minister for this response.

Inappropriate delegation of legislative power
Clause 13 - proposed new paragraph 68(1)(i) of the *Customs Act 1901*

In Alert Digest No. 2, the Committee noted that clause 13 of the Bill proposes to repeal sections 68, 69, 71, 71A and 71B of the *Customs Act 1901*, and to substitute a series of new sections. The Committee noted that proposed new section 68 deals with entry of imported goods. If enacted, it would apply to certain types of goods but not apply to a series of other categories of goods. The Committee noted that proposed paragraph 68(1)(i) provides that the section will not apply to:

> goods that, under the regulations, are exempted from this section, either absolutely or on such terms and conditions as are specified in the regulations.

The Committee suggested that this may be considered an inappropriate delegation of legislative power. If enacted, the paragraph would enable the Governor-General (acting on the advice of the Federal Executive Council) to pass regulations to exempt (either absolutely or conditionally) further goods (ie goods additional to those set out in proposed new paragraphs 68(1)(d) - (h)) from the operation of the section.

The Committee drew Senators' attention to the provision, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has provided the following response:

> ... I do not consider this to be an inappropriate delegation of legislative power. In fact, as set out on pages 16 and 17 of the Explanatory Memorandum's notes on this particular section, the new import entry provision essentially remakes the existing section 68 of the Principal Act, including the current facility to exempt classes or categories of goods from the import entry requirement by subsidiary legislation (see Customs Regulation 42, made pursuant to the head of power in current section 71A of the Customs Act 1901).

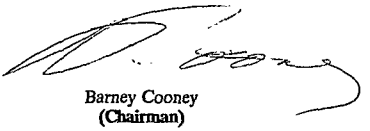
The Minister goes on to say:

> The proposed new section 68 actually brings into the Principal Act all the current exemptions from the import entry requirement contained in Regulation 42 (proposed new paragraphs 68(1)(d-h) refer). Where, however, new fact situations arise which justify a further exemption from the import entry obligation (as indeed, the exemptions which we currently have were added to regulation 42), then it is proposed those situations be catered for via subsidiary legislation under the proposed head of power in new paragraph 68(1)(i).

The Minister concludes by saying:

> I consider such a legislative mechanism to be appropriate for dealing with this type of future event, especially as the parliamentary scrutiny which Regulations are subject to is in my view sufficient to ensure the exemptions are within both the spirit and the letter of the law.

The Committee thanks the Minister for this response and for his assistance with the Bill.



Barney Cooney
(Chairman)

PARLIAMENT OF AUSTRALIA · THE SENATE

SENATOR JOHN TIERNEY
SENATOR FOR NEW SOUTH WALES

31 March 1992

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

Dear Senator Cooney

AUSTRALIAN NATIONAL UNIVERSITY AMENDMENT (AUTONOMY) BILL 1992

I refer to the invitation by the Committee of 26 March 1992 to respond to the comments made in the Committee's *Scrutiny of Bills Alert Digest* No. 3 of 1992 in relation to the Australian National University Amendment (Autonomy) Bill 1992 which I introduced in the Senate on 4 March 1992.

The Committee notes that proposed new subsection 42(5) to be inserted into the *Australian National University Act 1991* by the bill could operate retrospectively, and draws attention to the provision as it may be considered to trespass unduly on personal rights and liberties.

Before responding to these comments, it is necessary that I provide some background information on the bill.

Background to the Bill

The Minister for Higher Education and Employment Services has decided that money appropriated by the Parliament to the Australian National University for the purposes of the John Curtin School of Medical Research, which is established under the Act as one of the schools of the University, should be taken out of the control of the Council of the University and placed in the control initially of the National

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Health and Medical Research Council and now apparently of the Department of Health, Housing and Community Services. I regard this decision as a threat to the autonomy of the University, and the purpose of the bill is to render that decision of no effect and to ensure that a similar decision cannot be taken in the future.

It appears that the Minister has acted under subsection 42(2) of the Act which gives the Minister the power to determine the amounts in which and the times at which money appropriated by the Parliament for the University is to be paid to the University. The Minister's decision has apparently been carried out by a ministerial direction under this subsection.

As is pointed out in the explanatory memorandum to the bill, it is arguable that this arrangement is contrary to the Act, which provides in subsection 9(1) that the Council has the entire control and management of the University, in subsection 19(4) that the John Curtin School of Medical Research is one of the research schools of the University, and in section 43 that money received by the University, including money appropriated by the Parliament and payable to the University under subsection 42(1), must be applied by the Council solely for the purposes of the University.

The bill seeks to deal with the action of the Minister by amending section 42 of the Act to make it clear that the power of the Minister in that section cannot be used in such a way as to give any person or body other than the Council effective control over the application of money payable to the University, or otherwise to take the control and management of the University or any part of the University out of the hands of the Council. The bill therefore may not alter the substantive law as contained in the Act but merely clarify that law in so far as the Act gives the control and management of the University to the Council.

I now proceed to respond to the Committee's comments.

Response to the Committee's comments

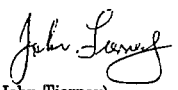
It is quite true, as the Committee notes, that proposed new subsection 42(5) operates retrospectively to invalidate a ministerial direction given prior to the commencement of the bill. The bill is deliberately framed in this way because it appears that the Minister has already given a direction under subsection 42(2) of the Act whereby the money for the John Curtin School of Medical Research has been transferred to the control of the Department of Health, Housing and Community Services. If the bill operated only in relation to future directions under subsection 42(2), therefore, it probably would not have the effect of reversing the decision of the Minister. The bill is therefore deliberately retrospective.

I am surprised that the Committee should suggest, however, that proposed new subsection 42(5) may be considered to trespass unduly on personal rights and liberties. I cannot see any way in which the personal rights and liberties of any person could be affected by the operation of the provision. If the provision operates

as intended the Minister's direction would be of no effect, the control of the funds for the John Curtin School of Medical Research would be returned to the Council of the University, and the Department would no longer have any control over those funds. It may be that the Committee considers that there is some possibility of legal action being taken against the Minister and officers for acting under the Minister's direction. I do not see how any such action could be taken, and I think that the possibility of such action is so remote as not to merit any consideration. It would be possible, of course, to include in the bill a provision to the effect that nobody is liable for any acts done under a ministerial direction which is rendered of no effect by the bill, but I do not think that such a provision is warranted given the unlikelihood of anyone being able to take any legal action.

If the Committee considers that there is some possibility of some such legal action, or that the provision may affect personal rights and liberties in some other way, I would be pleased to be advised of the Committee's thoughts and to consider and respond to them.

Yours sincerely



(John Tierney)

Minister for Small Business, Construction and Customs
The Hon. David Beddall, MP

RECEIVED
27 MAR 1992
Senate Standing C'tte for the Scrutiny of Bills

26 MAR 1992

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

Dear Senator Cooney

I refer to the Scrutiny of Bills Alert Digest No. 2 of 1992, dated 4 March 1992, which contained comments by the Senate Standing Committee for the Scrutiny of Bills on the Customs and Excise Legislation Amendment Bill 1992. Your Committee expressed two concerns with the Bill; the first relating to a reversal of the onus of proof, and the second relating to an alleged inappropriate delegation of legislative power.

a) Reversal of the onus of proof - Clause 12 - proposed new subsection 64AE(3)

Proposed new section 64AE if enacted would require the master and owner of a ship on a voyage to Australia from a place outside Australia or the pilot and owner of an aircraft on a flight to Australia from a place outside Australia to answer questions and to produce documents relating to the ship or aircraft and its cargo, crew, passengers, stores or voyage. It is considered that these new provisions are necessary for Customs to be able to ascertain whether the information it receives from reports under sections 64AA, 64AB or 64AC is correct.

As your Committee has noted, proposed subsection 64AE(3) does involve a reversal of the onus of proof. It is considered in this case however, that because the matters to be raised by way of defence by the defendant are peculiarly within the knowledge of the defendant, this reversal of the onus could be considered appropriate.

Section 64AE only applies to ships or aircraft arriving in Australia from a place outside Australia. Therefore, information given to Customs concerning the ships' or aircraft's cargo, passengers, crew or stores is information which the master, pilot or owner would possess but which Customs would not be able to find

.../2

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MINISTRY FOR INDUSTRY, TECHNOLOGY AND COMMERCE

out without the master, pilot or owner's assistance. In particular, the cargo report concerns information which would not be available to Customs in most circumstances as the source of the information is overseas and beyond the reach of Customs' investigative powers. Given this difficulty, it is considered in this limited circumstance appropriate to have the defendant raise and establish as reasonable the failure to answer questions or to produce requested documents.

b) Inappropriate delegation of legislative power - Clause 13 - proposed new paragraph 68(1)i

In addressing the Committee's second concern, relating to the proposed facility to exempt by regulation future categories of goods from the import entry requirement in proposed new section 68, I do not consider this to be an inappropriate delegation of legislative power. In fact, as set out on pages 16 and 17 of the Explanatory Memorandum's notes on this particular section, the new import entry provision essentially remakes the existing section 68 of the Principal Act, including the current facility to exempt classes or categories of goods from the import entry requirement by subsidiary legislation (see Customs Regulation 42, made pursuant to the head of power in current section 71A of the Customs Act 1901).

The proposed new section 68 actually brings into the Principal Act all the current exemptions from the import entry requirement contained in Regulation 42 (proposed new paragraphs 68(1)(d-h) refer). Where however, new fact situations arise which might justify a further exemption from the import entry obligation (as indeed, the exemptions which we currently have were added to Regulation 42), then it is proposed those situations be catered for via subsidiary legislation under the proposed head of power in new paragraph 68(1)(i).

I consider such a legislative mechanism to be appropriate for dealing with this type of future event, especially as the parliamentary scrutiny which Regulations are subject to is in my view sufficient to ensure the exemptions are within both the spirit and the letter of the law.

I trust the above is of assistance to the Committee.

Yours sincerely

DAVID BEDDALL

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF

1992

29 APRIL 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 1992

The Committee has the honour to present its Fourth Report of 1992 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 24:

Australian National University Amendment (Autonomy) Bill 1992

Corporations Legislation (Evidence) Amendment Bill 1992

Deer Slaughter Levy Bill 1992

Transport and Communications Legislation Amendment Bill 1992

AUSTRALIAN NATIONAL UNIVERSITY AMENDMENT (AUTONOMY) BILL 1992

This Bill was introduced into the Senate on 4 March 1992 by Senator Tierney as a Private Senator's Bill.

The Bill proposes to ensure that the Council of the Australian National University has the sole responsibility for the application of money appropriated by the Parliament for the purposes of the University and its management.

The Committee dealt with the Bill in Alert Digest No. 3 of 1992, in which it made various comments. Senator Tierney responded to those comments in a letter dated 31 March 1992. His response was dealt with in the Committee's Third Report of 1992, in which the Committee made certain further comments. Senator Tierney responded to those further comments in a letter dated 28 April 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Clause 3

In Alert Digest No. 3, the Committee noted that clause 3 of the Bill proposes to insert two new subsections into section 42 of the *Australian National University Act 1991*. That section deals with the appropriation of money to the University by the Parliament. It also allows the Minister to give directions as to how that money is to be paid to the University.

The Committee noted that proposed new subsections 42(4) and (5) provide:

> (4) The power of the Minister under subsection (2) may not be exercised so as to allow any person or body other than the Council effectively to control the application of money payable to the University, or otherwise to abridge the entire control and management of the University vested in the Council by subsection 9(1).
>
> (5) A direction under this section which is contrary to subsection (4), whether given before or after the commencement of that subsection, is of no effect.

The Committee noted that, if enacted, proposed new subsection (5) could operate retrospectively to invalidate a Ministerial direction given prior to the commencement of the new sections.

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

Senator Tierney provided a detailed response to the Committee's comment, including some further background to the Bill. That background is as follows:

> The Minister for Higher Education and Employment Services has decided that money appropriated by the Parliament to the Australian National University for the purposes of the John Curtin School of Medical Research, which is established under the Act as one of the schools of the University, should be taken out of the control of the Council of the University and placed in the control initially of the National Health and Medical Research Council and now apparently of the Department of Health, Housing and Community Services. I regard this decision as a threat to the autonomy of the University, and the purpose of the bill is to render that decision of no effect and to ensure that a similar decision cannot be taken in the future.

It appears that the Minister has acted under subsection 42(2) of the Act which gives the Minister the power to determine the amounts in which and the times at which money appropriated by the Parliament for the University is to be paid to the University. The Minister's decision has apparently been carried out by a ministerial direction under this subsection.

As is pointed out in the explanatory memorandum to the bill, it is arguable that this arrangement is contrary to the Act, which provides in subsection 9(1) that the Council has the entire control and management of the University, in subsection 19(4) that the John Curtin School of Medical Research is one of the research schools of the University, and in section 43 that money received by the University, including money appropriated by the Parliament and payable to the University under subsection 42(1), must be applied by the Council solely for the purposes of the University.

The bill seeks to deal with the action of the Minister by amending section 42 of the Act to make it clear that the power of the Minister in that section cannot be used in such a way as to give any person or body other than the Council effective control over the application of money payable to the University, or otherwise to take the control and management of the University or any part of the University out of the hands of the Council. The bill therefore may not alter the substantive law as contained in the Act but merely clarify that law in so far as the Act gives the control and management of the University to the Council.

Having given this background, Senator Tierney went on to say:

It is quite true, as the Committee notes, that proposed new subsection 42(5) operates retrospectively to invalidate a ministerial direction given prior to the commencement of the bill. The bill is deliberately framed in this way because it appears that the Minister has already given a direction under subsection 42(2) of the Act whereby the money for the John Curtin School of Medical Research has been transferred to the control of the Department of Health, Housing and Community Services. If the bill operated only in relation to future directions under subsection 42(2), therefore, it probably would not have the effect of reversing the decision of the Minister. The bill is therefore deliberately retrospective.

Senator Tierney then went on to say:

> I am surprised that the Committee should suggest, however, that proposed new subsection 42(5) may be considered to trespass unduly on personal rights and liberties. I cannot see any way in which the personal rights and liberties of any person could be affected by the operation of the provision. If the provision operates as intended, the Minister's direction would be of no effect, the control of the funds for the John Curtin School of Medical Research would be returned to the Council of the University, and the Department would no longer have any control over those funds. It may be that the Committee considers that there is some possibility of legal action being taken against the Minister and officers for acting under the Minister's direction. I do not see how any such action could be taken, and I think that the possibility of such action is so remote as not to merit any consideration. It would be possible, of course, to include in the bill a provision to the effect that nobody is liable for any acts done under a ministerial direction which is rendered of no effect by the bill, but I do not think that such a provision is warranted given the unlikelihood of anyone being able to take any legal action.

In its Third Report, the Committee thanked Senator Tierney for his detailed response, but noted that, in making the original comment, it was not concerned by the possibility of legal action (as envisaged by Senator Tierney's response) so much as the risk that a person who had received funds from, say, the National Health and Medical Research Council (NHMRC) could have those funds withdrawn because the payment of the funds to the NHMRC was, pursuant to the proposed amendments, subsequently invalidated. The Committee indicated that it was concerned that a person receiving funds in such circumstances, in good faith, might be penalised.

Senator Tierney has responded to those concerns as follows:

> The Bill would operate solely to prevent the Minister exercising discretion as to how funding appropriated by the Parliament to the Australian National University was allocated by the University.

> The Minister, under s.42 of the Australian National University Act 1991, has never had the power to specifically allocate monies provided to the University by Parliament to individual projects.
>
> Therefore the retrospectivity of the Bill will only apply to ensure that only the ANU Council controls the application of the funding appropriated by the Parliament to the University.

Senator Tierney concludes by saying:

> Individual allocations to projects cannot, therefore, be affected by the retrospectivity of the Bill as it only affects the funding of the University as a whole.

The Committee thanks Senator Tierney for this further response and for his assurance that the amendments cannot operate in the manner contemplated by the Committee.

CORPORATIONS LEGISLATION (EVIDENCE) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to remove certain immunities available to witnesses under the Australian Securities Commission Law and the Corporations Law.

The Committee dealt with the Bill in Alert Digest No. 2 of 1992, in which it made various comments. The Attorney-General responded to those comments in a letter dated 27 April 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

General comment - abrogation of the privilege against self-incrimination

In Alert Digest No. 2, the Committee noted that the Bill contains several proposed amendments which, if enacted, would alter the immunity which several provisions of the existing Corporations Law provide in relation to the giving of information or the production of documents in certain circumstances. The Committee noted that the Explanatory Memorandum to the Bill states:

> Serious difficulties in investigations and prosecutions have been caused by the compensatory provision that neither a person's self-incriminatory statements, nor the signing of a record nor the fact of having produced a book ('use immunity'), nor any information of material derived from, or obtained as a result of, these statements or actions ('derivative use immunity') are admissible in evidence against the person in criminal proceedings and other proceedings for the recovery of a penalty.

It goes on to state:

> The major problems are caused by:
>
> - the derivative use immunity which places an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity; and
>
> - that aspect of the use immunity which prevents the admission into evidence of the fact that a person, having claimed that to do so might tend to be self-incriminatory, has produced a book (which is broadly defined to include virtually all business-related records). This immunity may prevent a person from being linked in the chain of evidence with the documents which establish the commission of a corporate offence, preventing any effective prosecution of that person.

The Committee noted that, in relation to the particular amendments, the Explanatory Memorandum states:

> The proposed amendments to the *Australian Securities Commission Act 1989* provide for the removal of the derivative use immunity available to witnesses giving evidence under compulsion in investigations under that Act, and, for witnesses who have produced a document under claim of potential self-incrimination, of the use immunity currently available in relation to the fact of that production. The proposed amendments would also deny to bodies corporate the benefit of any use or derivative use immunity in proceedings under the Act, since these would be available only to natural persons.
>
> The proposed amendments to section 597 of the Corporations Law (which relates to evidence given under compulsion in examinations before the Court) provide for the removal of the derivative use immunity available to witnesses under the existing subsection 597(12), leaving the use immunity intact. Neither the

use immunity nor the derivative use immunity is to be available to bodies corporate.

Proposed section 1316A is inserted to ensure that in any Corporations Law criminal proceeding a body corporate, whether it is a defendant or not, may not refuse or fail to comply with a requirement to provide evidence on the ground that to do so might tend to be incriminating or to make the body liable to a penalty.

The outline of the amendments concludes by stating:

> The proposed amendments are required to ensure that effective investigation and prosecution of corporate offences is not hindered by inappropriate evidentiary requirements in the particular circumstances of corporate crime. In such cases frequently the perpetrator is the only person having knowledge of the details of complex transactions by which an offence has been committed or concealed, and may consciously use the present immunities, provided by operation of statute, to make a full confession of crimes for which he or she may then not be prosecuted.

The Committee also observed that, by way of further explanation for the proposed amendments, the Attorney-General noted in his Second Reading speech on the Bill that

> The issue was recently re-examined by the Parliamentary Joint Committee on Corporations and Securities, which in its report tabled on 15 November 1991, recommended the removal of the derivative use immunity from the national scheme, together with the use immunity with regard to the fact that a person has produced a document. It also recommended that corporations be expressly excluded from claiming the privilege against self incrimination. These recommendations followed the recognition that the availability of full use/derivative use immunity is threatening to defeat the purpose of significant portions of the corporations legislation.

> This Bill adopts those recommendations by removing the derivative use immunity from subsection 68(3) of the Australian Securities Commission Act 1989 and from subsection 597(12) of the Corporations Law contained in section 82 of the Corporations Act 1989, It removes the immunity in respect of the fact that a person had produced a document from subsection 68(3) of the Australian Securities Commission Act 1989, and confines the availability of the remaining use immunity to natural persons.

The Committee stated that the common law privilege against self-incrimination is a fundamental right and that, as a result, it had, since its inception, maintained a serious concern about provisions which abrogate the privilege. The Committee sent on to say that, while maintaining its concern, however, it had, in the past, accepted that the right might be altered in certain limited circumstances and for good reasons.

The Committee noted that in this instance, the amendment proposed to alter a provision which abrogates the privilege against self-incrimination but which, as it stands, is in a form which it had been prepared to accept. In making that comment, the Committee stated that it was evident from the material which it extracted that arguments have been advanced to support the need for the proposed amendment. Further, the Committee noted that these arguments have, in effect, been endorsed by the majority of the Joint Parliamentary Committee on Corporations and Securities in its recommendation that the immunities be removed. The Committee acknowledged those arguments but also re-stated its in-principle concern that the privilege against self-incrimination is a fundamental right which, in the absence of good reasons, ought not to be interfered with.

In making this comment, the Committee sought the Attorney-General's advice as to whether there might be alternative methods of addressing the problems identified in the Explanatory Memorandum and the Second Reading speech.

The Committee drew Senators' attention to the clauses referred to, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Attorney-General has responded as follows:

> The proposed amendment removes from the relevant legislation certain use and derivative use immunities, which were included as compensation for the abrogation of the privilege against self-incrimination. The current legislation is broadly based on the co-operative scheme companies legislation, under which the privilege against self-incrimination was abrogated, but under which the extensive compensatory use and derivative use immunities provided by the current legislation were not available.

The Attorney-General goes on to say:

> The proposed amendments do not interfere with the privilege against self-incrimination, that privilege having been abrogated by Parliament in relation to Corporations matters for over a decade. The amendments deal only with the level of protection provided by statute as compensation for the loss of the privilege, and are proposed in reliance on the well recognised power of the Parliament to determine what, if any, immunities should be provided in return for the abrogation of the privilege.

The Attorney-General concludes by saying:

> As the problems with the current legislation, identified in the Explanatory Memorandum and the Second Reading Speech, are a direct result of the inclusion in the legislation of the use and derivative use immunities as compensation for the abrogation of the privilege against self-incrimination, there is no alternative method available of addressing them.

The Committee thanks the Attorney-General for his response. The Committee retains the concerns which it originally expressed in relation to the Bill and to the issue of the abrogation of the privilege against self-incrimination.

DEER SLAUGHTER LEVY BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to impose a levy on the slaughter of deer, effective from 1 July 1992, to fund a research and development program.

The Committee dealt with the Bill in Alert Digest No. 2 of 1992, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 16 April 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Subclause 5(1)

In Alert Digest No. 2, the Committee noted that subclause 5(1) of the Bill contains various definitions, including the following:

> **'cold dressed carcase weight'**, in relation to a slaughtered deer, means the weight of its dressed carcase determined in accordance with the regulations;
>
> ...
>
> **'dressed carcase'** has the meaning that is specified in the regulations;
>
> **'hot dressed carcase weight'**, in relation to a slaughtered deer, means the weight of its dressed carcase determined in accordance with the regulations.

These definitions are relevant to clause 7 of the Bill, which provides for the rate of levy to be imposed on the slaughter of deer. The Committee noted that subclauses 7(1) and (2) provide:

> (1) The rate of levy imposed on deer slaughtered at an abattoir where the hot dressed carcase weight of the slaughtered deer is determined is the prescribed amount per kilogram of that weight of each slaughtered deer.
>
> (2) The rate of levy imposed on deer slaughtered at an abattoir where the cold dressed carcase weight of the slaughtered deer is determined is the prescribed amount per kilogram of that weight of each slaughtered deer, multiplied by 1.03.

The Committee suggested that, as a result of the definitions, it would appear that the rate of levy could, in effect, be set by the regulations, because definitions relevant to the levy could be set by the regulations. The Committee suggested that if that was the case, it might be considered an inappropriate delegation of legislative power, as the level of the levy could be regarded as a matter more appropriately dealt with in the primary legislation rather than the regulations.

The Committee drew Senators' attention to the clause, as it may be considered an inappropriate delegation of the legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> During the drafting of the *Deer Slaughter Levy Bill 1992* it was not possible to fully define 'cold dressed carcase weight', 'dressed carcase' and 'hot dressed carcase weight' as there are no industry standards for the preparation of a deer carcase. The uniform language for describing cattle, sheep, goats, and buffaloes, and their carcases, is developed and administered by the Authority for Uniform Specification Meat and Livestock (AUS-MEAT) which is an authority empowered under the *Australian Meat and*

Livestock Act 1977. The Deer Farmers' Federation of Australia (DFFA), the peak deer industry producer body, is currently negotiating with AUS-MEAT to develop standards for deer carcases which, I am informed, should be finalised and published by AUS-MEAT later this year. If AUS-MEAT standards are not finalised by the time the Bill is to come into effect, then a set of interim standards would be incorporated in the Regulations on the advice of the deer industry.

The Minister goes on to say:

> While it is theoretically correct that the total **amount of levy** payable could, in effect, be altered by changing the definition of 'dressed carcase weight', 'dressed carcase', and 'hot dressed carcase weight' in the regulations, the committee is incorrect in its conclusion that the **rate of levy** could be manipulated in this way. Any future variation in levy rates will be through the provisions in clause 7, that is by regulation, following consultations by the Minister for Primary Industries and Energy with the DFFA. Any future operative rate of levy must fall within the legislated maximum rate. The provision to define the 'dressed carcase weight', 'dressed carcase', and 'hot dressed carcase weight' in the regulations is for the purpose of clarifying how the carcase weight of a deer is to be determined and it is not the intention to manipulate the total amount of levy payable.

The Minister concludes by saying:

> If there had been an industry standard for a dressed carcase in relation to deer at the time the *Deer Slaughter Levy Bill 1992* was drafted, the provision to define the standard in the regulations would not have been included in the Bill. Instead, the convention used in other livestock slaughter levies would have been used which, either do not define 'dressed carcase', or define it to be a carcase prepared in accordance with AUS-MEAT specifications. Therefore, the mechanism for defining 'dressed carcase' as proposed in this Bill would appear to offer greater transparency and accountability to levy payers and Parliament.

The Committee thanks the Minister for this detailed response and for his assistance with the Bill.

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to make minor miscellaneous amendments to the following portfolio Acts:

- *Air Navigation Act 1920;*
- *Broadcasting Act 1942;* and
- *Radio Licence Fees Act 1964.*

The Committee dealt with the Bill in Alert Digest No. 2 of 1992, in which it made various comments. The Minister for Shipping and Aviation responded to those comments in a letter dated 2 April 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Insufficient parliamentary scrutiny
Clause 12 - proposed new section 18 of the *Air Navigation Act 1920*

In Alert Digest No. 2, the Committee noted that clause 12 of the Bill proposes to insert a new section 18 into the *Air Navigation Act 1920.* That proposed new section provides:

> The Secretary must cause any determinations made under subsections 13A(3), 14(3A), 15(2C) and 17(1B) to be included in the Aeronautical Information Publications published under section 18 of the *Civil Aviation Act 1988.*

The determinations referred to are provided for in proposed new sections and subsections of the Air Navigation Act which are to be inserted by clauses 7, 8, 9 and 11 of the Bill. They relate to approvals for non-scheduled international flights by Australian aircraft and to certain categories of commercial non-scheduled flights being exempted from the existing requirements of obtaining prior permission.

The Committee noted that these were matters which appeared to be currently dealt with by regulation. The Committee also noted that the effect of the amendments proposed by the Bill would be to allow these matters to be dealt with by a determination by the Secretary. The Committee suggested that, if this was the case, it would be a significant change, as the determinations, unlike the regulations which they replace, would not be subject to any form of Parliamentary scrutiny. In particular, the Committee noted that there would not even be a requirement to table such determinations in the Parliament.

The Committee indicated that it would appreciate the Minister's advice as to whether or not this is the case and, if so, why it was not considered appropriate that the matters to be dealt with by the determinations should be subject to scrutiny by the Parliament. Further, the Committee requested the Minister's advice as to the types of matters which the determinations would cover and the extent to which those matters were limited.

The Committee drew Senators' attention to the provision, as it may have been considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny in breach of principle 1(a)(v) of the Committee's terms of reference.

The Minister has responded as follows:

> All international charter operations require the permission of the Secretary or the approval of the Minister, depending upon whether or not the aircraft concerned possesses the nationality of

> a contracting State to the Chicago Convention. Under current arrangements each charter operation must be approved by the Secretary or the Minister, as the case may be, in accordance with the Government's International Passenger and Freight Charter Guidelines. These Guidelines enable certain categories of charter flights, for example, ad hoc charter flights and livestock charter flights, to receive automatic approval. Such automatic approvals are affected by delegates of the Secretary or the Minister, as the case may be, under authority of the Act and the Regulations.

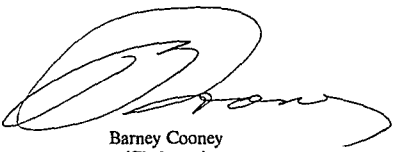
The Minister goes on to say:

> The new provisions are designed to create a more visible basis for exempting some of the commercial charter operations which come within the automatic approval categories in the Charter Guidelines from the requirements to lodge a prior application. The industry will be notified of these exemptions by way of their publication in the Civil Aviation Authority's Aeronautical Information Publication.

The Minister concludes by saying:

> The new provisions do not, however, allow all charter operations to be given blanket approval. Passenger charter programs and charters to and from countries which are subject to foreign policy considerations from time to time (e.g., Iraq, Libya) will continue to be considered on a case-by-case basis under the Government's current passenger charter guidelines.

The Committee thanks the Minister for this detailed response and for his assistance with the Bill.



Barney Cooney
(Chairman)

PARLIAMENT OF AUSTRALIA · THE SENATE

SENATOR JOHN TIERNEY
SENATOR FOR NEW SOUTH WALES

RECEIVED
2 8 APR 1992
Senate Standing Cttee for the Scrutiny of Bills

28 April 1992

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

Dear Senator Cooney

AUSTRALIAN NATIONAL UNIVERSITY AMENDMENT (AUTONOMY) BILL 1992

I refer to the comment by the Committee on page 37 of its Third Report for 1992 regarding the abovementioned Bill.

The Committee states that it had some concerns that the Australian National University Amendment (Autonomy) Bill 1992 could operate to possibly disallow funding received in good faith by a researcher.

The Bill would operate solely to prevent the Minister exercising discretion as to how funding appropriated by the Parliament to the Australian National University was allocated by the University.

The Minister, under s.42 of the Australian National University Act 1991, has never had the power to specifically allocate monies provided to the University by Parliament to individual projects.

Therefore the retrospectivity of the Bill will only apply to ensure that only the ANU Council controls the application of the funding appropriated by the Parliament to the University.

Individual allocations to projects cannot, therefore, be affected by the retrospectivity of the Bill as it only affects the funding of the University as a whole.

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I hope this clarifies any doubt about the effects of the Bill that the Committee may have.

Yours sincerely

Senator John Tierney

Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

CSL92/5561

27 APR 1992

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

Dear Senator Cooney

I refer to Mr Argument's letter of 5 March 1992, drawing my attention to the comments contained in the Scrutiny of Bills Alert Digest No 2 of 1992 (4 March 1992) in relation to the *Corporations Legislation (Evidence) Amendment Bill 1992* , and inviting me to respond to those comments.

I note that the Committee, while acknowledging the arguments in favour of the amendments to the legislation, "restates its in-principle concern that the privilege against self-incrimination is a fundamental right which, in the absence of good reasons, ought not to be interfered with", and invites my advice on whether any alternative methods of addressing the problems identified with the current legislation might be available.

The proposed amendment removes from the relevant legislation certain use and derivative use immunities, which were included as compensation for the abrogation of the privilege against self-incrimination. The current legislation is broadly based on the co-operative scheme companies legislation, under which the privilege against self-incrimination was abrogated, but under which the extensive compensatory use and derivative use immunities provided by the current legislation were not available.

The proposed amendments do not interfere with the privilege against self-incrimination, that privilege having been abrogated by Parliament in relation to Corporations matters for over a decade. The amendments deal only with the level of protection provided by statute as compensation for the loss of the privilege, and are proposed in reliance on the well recognised power of the Parliament to determine what, if any, immunities should be provided in return for the abrogation of the privilege.

As the problems with the current legislation, identified in the Explanatory Memorandum and the Second Reading Speech, are a direct result of the inclusion in the legislation of the use and derivative use immunities as compensation for the abrogation of the privilege against self-incrimination, there is no alternative method available of addressing them.

Yours sincerely

MICHAEL DUFFY

Minister for Primary Industries and Energy
Simon Crean, MP

RECEIVED
28 APR 1992
Senate Standing Cttee for the Scrutiny of Bills

16 APR 1992

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

Dear Senator Cooney

I refer to a letter of 5 March 1992 from Mr Stephen Argument, Secretary, Standing Committee for the Scrutiny of Bills, informing me of the Committee's concerns over the *Deer Slaughter Levy Bill 1992* as introduced into the House of Representatives on 26 February 1992. Enclosed with Mr Argument's letter was a copy of Scrutiny of Bills Alert Digest No 2 of 1992, which contained the Committee's comments on the above Bill on pages 22–23.

The Committee expressed concerns that clause 5(1) of the Bill may be considered an inappropriate delegation of the legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Specifically, the Committee expressed concerns that definitions of 'cold dressed carcase weight', 'dressed carcase', and 'hot dressed carcase weight', in subclause 5(1) are to be defined by regulation and are relevant to clause 7 of the Bill, which provides for the rate of levy to be imposed on the slaughter of deer, and therefore the rate of levy could, in effect, be set by regulation which might be considered an inappropriate delegation of legislative power.

During the drafting of the *Deer Slaughter Levy Bill 1992* it was not possible to fully define 'cold dressed carcase weight', 'dressed carcase' and 'hot dressed carcase weight' as there are no industry standards for the preparation of a deer carcase. The uniform language for describing cattle, sheep, goats, and buffaloes, and their carcases, is developed and administered by the Authority for Uniform Specification Meat and Livestock (AUS-MEAT) which is an authority empowered under the *Australian Meat and Livestock Act 1977*. The Deer Farmers' Federation of Australia (DFFA), the peak deer industry producer body, is currently negotiating with AUS-MEAT to develop standards for deer carcases which, I am informed, should be finalised and published by AUS-MEAT later this year. If AUS-MEAT standards are not finalised by the time the Bill is to come into effect, then a set of interim standards would be incorporated in the Regulations on the advice of the deer industry.

While it is theoretically correct that the total **amount of levy** payable could, in effect, be altered by changing the definition of 'dressed carcase weight', 'dressed carcase', and 'hot dressed carcase weight' in the regulations, the Committee is incorrect in its conclusion that the **rate of levy** could be manipulated in this way. Any future variation in levy rates will be through the provisions in clause 7, that is by regulation, following consultations

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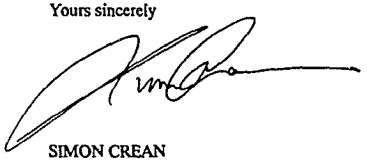
by the Minister for Primary Industries and Energy with the DFFA. Any future operative rate of levy must fall within the legislated maximum rate. The provision to define the 'dressed carcase weight', 'dressed carcase', and 'hot dressed carcase weight' in the regulations is for the purpose of clarifying how the carcase weight of a deer is to be determined and it is not the intention to manipulate the total amount of levy payable.

If there had been an industry standard for a dressed carcase in relation to deer at the time the *Deer Slaughter Levy Bill 1992* was drafted, the provision to define the standard in the regulations would not have been included in the Bill. Instead, the convention used in other livestock slaughter levies would have been used which, either do not define 'dressed carcase', or define it to be a carcase prepared in accordance with AUS-MEAT specifications. Therefore, the mechanism for defining 'dressed carcase' as proposed in this Bill would appear to offer greater transparency and accountability to levy payers and Parliament.

Yours sincerely



SIMON CREAN

RECEIVED
14 APR 1992
Senate Standing Cttee for the Scrutiny of Bills

Minister for
Shipping and Aviation

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-2 APR '92

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

Dear Senator Cooney

Thank you for your letter dated 5 March 1992 attaching a copy of the Scrutiny of Bills Alert Digest No. 2 of 1992 concerning the Transport and Communications Legislation Amendment Bill 1992.

You draw attention to certain amendments to the *Air Navigation Act 1920* (the Act) contained in the Transport and Communications Legislation Amendment Bill 1992 which enable the Secretary or the Minister, as the case may be, to exempt certain categories of commercial non-scheduled (i.e., charter) flights from the requirements of obtaining prior approval. You are concerned that the effect of these amendments is to allow charter approvals to be dealt with by determination rather than by regulation thereby avoiding any form of Parliamentary scrutiny.

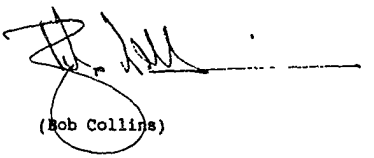
All international charter operations require the permission of the Secretary or the approval of the Minister, depending upon whether or not the aircraft concerned possesses the nationality of a contracting State to the Chicago Convention. Under current arrangements each charter operation must be approved by the Secretary or the Minister, as the case may be, in accordance with the Government's International Passenger and Freight Charter Guidelines. These Guidelines enable certain categories of charter flights, for example, ad hoc charter flights and livestock charter flights, to receive automatic approval. Such automatic approvals are affected by delegates of the Secretary or the Minister, as the case may be, under authority of the Act and the Regulations.

The new provisions are designed to create a more visible basis for exempting some of the commercial charter operations which come within the automatic approval categories in the Charter Guidelines from the requirements

to lodge a prior application. The industry will be notified of these exemptions by way of their publication in the Civil Aviation Authority's Aeronautical Information Publication.

The new provisions do not, however, allow all charter operations to be given blanket approval. Passenger charter programs and charters to and from countries which are subject to foreign policy considerations from time to time (e.g., Iraq, Libya) will continue to be considered on a case-by-case basis under the Governments current passenger charter guidelines.

Yours sincerely



(Bob Collins)

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF

1992

6 MAY 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 1992

The Committee has the honour to present its Fifth Report of 1992 to the Senate.

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

Mutual Assistance in Business Regulation Bill 1992

MUTUAL ASSISTANCE IN BUSINESS REGULATION BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to proposes to enable prescribed Australian agencies, with the Attorney-General's consent, to compel the provision of information documents and sworn testimony in aid of requests from foreign agencies.

The Committee dealt with the Bill in Alert Digest No. 2 of 1992, in which it made various comments. The Attorney-General responded to those comments in a letter dated 29 April 1992. A copy of that letter is attached to this report. Though the Committee notes that the Senate passed the Bill (with amendments) on 30 April 1992, the Attorney-General's response may nevertheless be of interest to Senators. Relevant parts of the response are, therefore, discussed below.

Abrogation of the privilege against self-incrimination
Clause 14

In Alert Digest No. 2, the Committee noted that clause 10 of the Bill, if enacted, would allow 'the Commonwealth regulator' (as defined in clause 3 of the Bill) to require a person or a body corporate to provide information or produce documents in certain circumstances.

The Committee noted that subclause 13(1) provides that a failure to comply with such a requirement, without reasonable excuse, is punishable by imprisonment for 1 years.

Clause 14 provides:

> (1) For the purposes of subsection 13(1), it is not a reasonable excuse for a person to refuse or fail to give information or evidence, or to produce documents, in accordance with a requirement under section 10, that the information, evidence or production of the documents might tend to incriminate the person or make the person liable to a penalty.
>
> (2) Subsection (3) applies if:
>
> (a) before giving information or evidence in accordance with such a requirement, a person claims that the information or evidence might tend to incriminate the person or make the person liable to a penalty; and
>
> (b) the information or evidence might in fact tend to incriminate the person or make the person liable to a penalty.
>
> (3) The information or evidence, as the case may be, is not admissible in evidence against the person in:
>
> (a) a criminal proceeding; or
>
> (b) a proceeding for the imposition of a penalty;
>
> other than a proceeding in respect of the falsity of the information or evidence, as the case may be.

The Committee noted that this is a 'use indemnity', in that it would protect a person from having information provided by them in response to such a requirement used against them in criminal-type proceedings. However, the Committee went on to note that the provision would not protect the person providing the information from such information being used against them *indirectly*, eg as a lead to further evidence of an offence. Protection against such use would be a 'derivative use' indemnity.

As the Committee noted elsewhere in this Alert Digest No. 2, (in relation to the Corporations Legislation (Evidence) Amendment Bill 1992), it has maintained a serious concern about any abrogation of the common law privilege against self-incrimination. However, the Committee had been prepared to accept a degree of interference with this privilege, if that interference is for good reason and if it applies in limited circumstances only. The Committee noted that the so-called 'use/derivative use indemnity' is the best example of an approach to the abrogation of the privilege which it has been prepared to accept. On this basis, the Committee observed that a plain 'use indemnity' is, by definition, not as acceptable, as it provides less protection to an individual whose privilege against self-incrimination is abrogated.

The Committee drew Senators' attention to the clause, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Attorney-General responded as follows:

> The Bill will enable Australian business regulatory agencies to use compulsory powers to acquire information to assist foreign business regulatory agencies in carrying out their functions. It is appropriate that persons required to provide evidence or information under this Bill should be entitled to receive the same level of protection of their civil liberties as would be accorded to them should they be called upon to assist an Australian agency in its own investigations.
>
> Accordingly, the civil liberty safeguards included in the Bill have been closely modelled on similar provisions in the Australian Securities Commission Act 1989 as that Act represents one of the Government's most recent initiatives in relation to the regulation and investigation of business activity.

> In particular, clause 14 of this Bill which deals with self-incrimination is based on section 68 of the ASC Act as proposed to be amended by the Corporations Legislation (Evidence) Amendment Bill 1992 (the Evidence Bill). I have, by separate letter, answered the concerns raised by the Committee in relation to the Evidence Bill. The Committee has acknowledged in the Digest the arguments supporting the need to remove the derivative use immunity from the Australian Securities Commission Act. As noted in the Explanatory Memorandum to the Evidence Bill, the derivative use immunity causes serious difficulties in investigations and prosecutions of corporate malpractice.

The Attorney-General goes on to say:

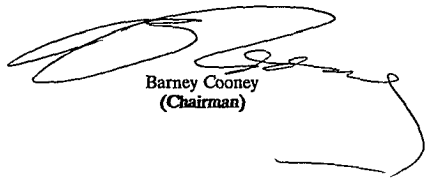
> The Committee has noted in the Digest in relation to the Mutual Assistance in Business Regulation Bill, that it has been prepared to accept a degree of interference with the privilege against self incrimination if it is for good reason and applies in limited circumstances only.
>
> The Mutual Assistance in Business Regulation Bill deals with the enforcement of laws regulating business. It is intended to be used to collect evidence to be used in connection with the application of administrative sanctions, such as the refusal to licence persons to participate as brokers or dealers in the securities markets or the cancellation of such licences.

The Attorney-General concludes by saying:

> As pointed out in relation to the Evidence Bill, a derivative use immunity can severely hamper the investigation of business law offences. It may be that during the course of collecting evidence under this Bill for a foreign regulator, the Australian regulator may uncover information that indicates that criminal conduct has occurred in Australia. It would impose unwarranted restrictions on the investigation and prosecution of such criminal conduct if the Australian agency was precluded

from using material obtained as a result of a person's self-incriminating evidence to investigate and prosecute offences under Australian legislation.

The Committee thanks the Attorney-General for this response.



Barney Cooney
(Chairman)

Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

29 APR 1992

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

Dear Senator Cooney

I have received a copy of the Scrutiny of Bills Alert Digest No.2 of 1992 which refers to the Mutual Assistance in Business Regulation Bill 1992.

The Digest draws attention to the provisions of the Bill dealing with self incrimination and notes that the protection provided by Bill does not prevent the derivative use of self incriminating evidence.

The Bill will enable Australian business regulatory agencies to use compulsory powers to acquire information to assist foreign business regulatory agencies in carrying out their functions. It is appropriate that persons required to provide evidence or information under this Bill should be entitled to receive the same level of protection of their civil liberties as would be accorded to them should they be called upon to assist an Australian agency in its own investigations.

Accordingly, the civil liberty safeguards included in the Bill have been closely modelled on similar provisions in the Australian Securities Commission Act 1989 as that Act represents one of the Government's most recent initiatives in relation to the regulation and investigation of business activity.

In particular, clause 14 of this Bill which deals with self-incrimination is based on section 68 of the ASC Act as proposed to be amended by the Corporations Legislation (Evidence) Amendment Bill 1992 (the Evidence Bill). I have, by separate letter, answered the concerns raised by the Committee in relation to the Evidence Bill. The Committee has acknowledged in the Digest the arguments supporting the need to remove the derivative use immunity from the Australian Securities Commission Act. As noted in the Explanatory Memorandum to the Evidence Bill, the derivative use immunity causes serious difficulties in investigations and prosecutions of corporate malpractice.

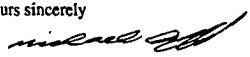
The Committee has noted in the Digest in relation to the Mutual Assistance in Business Regulation Bill, that it has been prepared to accept a degree of interference with the privilege against self incrimination if it is for good reason and applies in limited circumstances only.

The Mutual Assistance in Business Regulation Bill deals with the enforcement of laws regulating business. It is intended to be used to collect evidence to be used in connection with the application of administrative sanctions, such as the refusal to licence persons to participate as brokers or dealers in the securities markets or the cancellation of such licences .

As pointed out in relation to the Evidence Bill, a derivative use immunity can severely hamper the investigation of business law offences. It may be that during the course of collecting evidence under this Bill for a foreign regulator, the Australian regulator may uncover information that indicates that criminal conduct has occurred in Australia. It would

impose unwarranted restrictions on the investigation and prosecution of such criminal conduct if the Australian agency was precluded from using material obtained as a result of a person's self-incriminating evidence to investigate and prosecute offences under Australian legislation.

Yours sincerely



MICHAEL DUFFY

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF

1992

27 MAY 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 1992

The Committee has the honour to present its Sixth Report of 1992 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 24:

National Food Authority Act 1991

Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 1992

NATIONAL FOOD AUTHORITY ACT 1991

The Bill for this Act was introduced into the House of Representatives on 14 May 1991 by the Minister for Aged, Family and Health Services.

The Act establishes the National Food Authority. It makes provision for the membership, staffing, function and powers of the Authority. The Act also prescribes the process by which food standards will be developed, ensuring the participation of consumer, industry and scientific experts in the setting of the standards.

The Committee dealt with the Bill in Alert Digest No. 9 of 1991, in which it made various comments. The Minister for Aged, Family and Health Services responded to those comments in a letter dated 20 May 1992. A copy of that letter is attached to this report. Though the Committee notes that the Bill passed the Senate on 20 June 1991 (and received the Royal Assent on 27 June 1991), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are, therefore, discussed below.

'Henry VIII' clauses
Subclauses 3(1), 31(1), 35(1) and paragraph 39(4)(b)

In Alert Digest No. 9 of 1991, the Committee noted that subclauses 3(1), of the (then) Bill set out various definitions for the purposes of the Bill. 'Food' is defined as including:

> (a) any substance or thing of a kind used or capable of being used as food or drink by human beings; or

(b) any substance or thing of a kind used or capable of being used as an ingredient or additive in, or substance used in the preparation of, a substance or thing referred to in paragraph (a); or

(c) such other substance or thing as is prescribed;

whether or not it is in a condition fit for human consumption, but does not include a therapeutic good within the meaning of the *Therapeutic Goods Act 1989*.

The Committee indicated that paragraph (c) of the definition is what it would ordinarily regard as a 'Henry VIII' clause, as it allows the definition of 'food' set out in the Act to be widened by regulation. The Committee suggested that, as such, it effectively allows the amendment of a piece of primary legislation by way of subordinate legislation.

Section 31 of the Act deals with the reconsideration of draft standards or variations of standards by the National Food Authority. It provides that if the National Food Standards Council returns a draft standard or variation of a standard for reconsideration by the Authority (pursuant to paragraphs 20(1)(d) or 28(1)(d)), the Authority must undertake that reconsideration

as soon as practicable but not later than 12 months or such shorter period as may be prescribed for the purpose of subsection 35(1) after the return of the draft.

The Committee noted that this means that a shorter period for reconsideration can be prescribed by regulation and that, effectively, the operation of the primary legislation can be amended by subordinate legislation.

Section 35 of the Bill deals with the Authority's obligation to make a recommendation to the National Food Standards Council concerning a draft standard or variation of a standard which the Authority has prepared in relation to an application made under Part 3 of the Act. Subsection 35(1) requires the Authority to make such a recommendation

> within 12 months or such shorter period as may be prescribed after the receipt of the application that gave rise to that draft standard or variation.

As with subsection 31(1), the operation of the primary legislation can, in effect, be amended by subordinate legislation.

Section 39 of the Act prescribes the manner in which the Authority is required to deal with confidential commercial information. Subsection 39(1) prohibits a person connected with the Authority from disclosing any confidential commercial information in respect of food that has been acquired by the person in that capacity. However, pursuant to subsection 39(4), the Chairperson of the Authority is able to disclose such information if the Minister certifies that it is in the public interest to do so. The Chairperson is also authorised to disclose information to a person involved in the development of variation of a food standard.

Pursuant to paragraph 39(4)(b), the Chairperson is also able to disclose the information 'to any prescribed authority or person'. If the Governor-General (with the advice of the Federal Executive Council) can, by regulation, prescribe that an authority or person can be given such information, then such a regulation would, in effect, amend the operation of the provision in the legislation prohibiting such disclosure.

In Alert Digest No. 9, the Committee noted that, as a matter of principle, it draws attention to provisions which would allow for the amendment of primary legislation

by means of regulation. In making this comment, the Committee stated that, while there may be reasons advanced for altering legislation in this way, the amendment of legislation is *prima facie* as much a matter for the Parliament as the passage of the legislation in the first instance. Any interference with the Parliament's power in relation to the passage and amendment of legislation is a matter of concern to the Committee.

In the case of the provisions discussed above, the Committee noted that while they would not enable the amendment of the text of the legislation, they would, nevertheless, enable the operation of the legislation to be amended by subordinate legislation. As such, they are the sorts of provisions to which the Committee will continue to draw attention.

In addition to its 'in principle' concerns, the Committee noted that no justification is given for the sections referred to being drafted as they are. For example, in the case of the definition of 'food', the Committee wondered what kinds of substances would be likely to fall outside the definition provided and, therefore, require that regulations be promulgated to declare them as such. In the case of the sections setting time limits on the National Food Authority, the Committee was curious to know the reason why it was necessary that the opportunity exist to shorten this time limit by regulation. Finally, in the case of the disclosure of confidential commercial information, the Committee indicated that it would like to know what kinds of bodies or persons might be authorised to have such information disclosed to them.

The Committee drew Senators' attention to the provisions, as they may have been considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister responded as follows:

In the first instance in subsection 3(1), the definition of "food" provides in paragraph (c) for "such other substance or thing as may be prescribed". This particular provision is designed to cover a grey area that exists between the definition of food in paragraphs (a) and (b) and the definition of a therapeutic good under the Therapeutic Goods Act 1989. The kind of substance that could fall into this area might be a quasi-pharmaceutical (such as a medically supervised diet, herbal treatment and the like) that might be considered to have food value. I consider it prudent that the Act provides for such substances to be prescribed rather than having to enact an amendment to the legislation.

The second and third instances, subsections 31(1) and 35(1) provide that time limits imposed on the National Food Authority may be shortened by regulation. The Government expects food standards to be developed and put in place as expeditiously as possible to assist product innovation within the food industry while protecting public health and safety. In the initial stages the Government recognises that it is most likely that the Authority will take the full twelve months to develop food standards. However, the possibility exists that, as time passes and more experience is gained, the Authority might be able to reduce the implementation time below twelve months. Allowing the time limit to be reduced by regulation ensures that best administrative practice is both implemented by and recognised in the operations of the Authority.

The last instance refers to paragraph 39(4)(b), which allows the Chairperson to disclose confidential commercial information to any prescribed person or authority. The present intention is to prescribe most of the "appropriate government agencies" defined in subsection 3(1) of the Act for the purposes of paragraph 39(4)(b) as they have a vital role to play in contributing to the development of new standards and the review of existing standards. These government agencies include the State and Territory health authorities who enforce the provisions of the Code.

The Minister concludes by saying:

> In each case, I consider the specific provision as drafted to be the most appropriate way of achieving the required flexibility in food regulation while retaining executive responsibility to Parliament. Considering the scope and complexity of the issues covered by the National Food Authority Act, I am satisfied that the Committee's general concerns about the use of Henry VIII clauses does not indicate any practical problems with the operation or administration of that Act.
>
> Despite the effluxion of time since the Committee drew attention to clauses in the then Bill, I felt it important to place on record a response to the Committee's concerns.

The Committee thanks the Minister for his detailed and helpful response. Of course, this response would have been even more helpful, to the Committee and the Senate, if it had been made available prior to the legislation being passed.

SUPERANNUATION LEGISLATION (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister for Finance.

The Bill proposes to amend 28 Acts, to update various provisions relating to superannuation. The amendments are required as a result of the enactment of the *Superannuation Act 1990* and also amendments made to the *Superannuation Act 1976*, with effect from 1 July 1990.

The *Superannuation Act 1990* provided for the establishment of the Public Sector Superannuation Scheme, a new superannuation scheme for Commonwealth employees.

The *Superannuation Act 1976* provides for the Commonwealth Superannuation Scheme, which was previously the main scheme for Commonwealth employees.

The Committee dealt with the Bill in Alert Digest No. 5 of 1992, in which it made various comments. The Minister for Finance responded to those comments in a letter dated 21 May 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 5, the Committee noted that subclause 2(2) of the Bill provides that clause 3 of the Bill is to be taken to have commenced on 1 July 1990. The

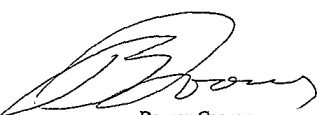
Committee noted that clause 3, if enacted, would give effect to the proposed amendments set out in the Schedule to the Bill.

The Committee noted that the relevant amendments are essentially technical in nature. They make provision for such matters as changing references in other Acts to the *Superannuation Act 1976* to the "Superannuation Act 1990". Clauses 4 to 7 provide for certain transitional arrangements, to cover matters occurring after 1 July 1990. Nevertheless, the Committee indicated that it was concerned that these amendments were not introduced at the same time as the Superannuation Bill 1990 and, further, that it has taken almost two years for the provisions to be introduced. Accordingly, the Committee indicated that it would appreciate the Minister's advice as to why this delay has occurred.

The Minister has provided a detailed response, prepared by his Department, on the reasons for the delay. That response is attached to this Report. However, the Minister sums up the response as follows:

> In view of the technical and consequential nature of the amendments made by the Bill and the demands on the resources of the Office of Parliamentary Counsel to meet the needs of Parliament, I regret that the Government was unable to accord the drafting of this Bill a high priority.

The Committee thanks the Minister for his detailed response.



Barney Cooney
(Chairman)

Hon. Peter Staples MP
Minister for Aged, Family and Health Services

Parliament House
Canberra ACT 2600
Telephone: (06) 277 7220
Facsimile: (06) 273 4146

Portfolio of
Health, Housing
and Community Services

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

20 MAY 1992

Dear Barney

I refer to the comments made in the Standing Committee for the Scrutiny of Bills Alert Digest No 9 of 1991 in respect of the National Food Authority Bill (now the National Food Authority Act 1991). I apologise for the delay in replying but the National Food Authority has been working with the Attorney-General's Department on regulations which could have had a significant impact on the administration of some of the areas of your concern.

The Standing Committee identified four instances in the Bill where "Henry VIII" clauses occur.

In the first instance in subsection 3(1), the definition of "food" provides in paragraph (c) for "such other substance or thing as may be prescribed". This particular provision is designed to cover a grey area that exists between the definition of food in paragraphs (a) and (b) and the definition of a therapeutic good under the Therapeutic Goods Act 1989. The kind of substance that could fall into this area might be a quasi-pharmaceutical (such as a medically supervised diet, herbal treatment and the like) that might be considered to have food value. I consider it prudent that the Act provides for such substances to be prescribed rather than having to enact an amendment to the legislation.

The second and third instances, subsections 31(1) and 35(1) provide that time limits imposed on the National Food Authority may be shortened by regulation. The Government expects food standards to be developed and put in place as expeditiously as possible to assist product innovation within the food industry while protecting public health and safety. In the initial stages the Government recognises that it is most likely that the Authority will take the full twelve months to develop food standards. However, the possibility exists that, as time passes and more experience is gained, the Authority might be able to reduce the implementation time below twelve months. Allowing the time limit to be reduced by regulation ensures that best administrative practice is both implemented by and recognised in the operations of the Authority.

The last instance refers to paragraph 39(4)(b), which allows the Chairperson to disclose confidential commercial information to any prescribed person or authority. The present intention is to prescribe most of the "appropriate government agencies" defined in subsection 3(1) of the Act for the purposes of paragraph 39(4)(b) as they have a vital role to play in contributing to the development of new standards and the review of existing standards. These government agencies include the State and Territory health authorities who enforce the provisions of the Code.

In each case, I consider the specific provision as drafted to be the most appropriate way of achieving the required flexibility in food regulation while retaining executive responsibility to Parliament. Considering the scope and complexity of the issues covered by the National Food Authority Act, I am satisfied that the Committee's general concerns about the use of Henry VIII clauses does not indicate any practical problems with the operation or administration of that Act.

Despite the effluxion of time since the Committee drew attention to clauses in the then Bill, I felt it important to place on record a response to the Committee's concerns.

Yours sincerely

Peter Staples

Minister For Finance
Hon. Ralph Willis M.P.

RECEIVED
25 MAY 1992
Senate Standing C'tte for the Scrutiny of Bills

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

Dear Senator Cooney

I refer to comments made by the Committee and reported in the Scrutiny of Bills Alert Digest No. 5 of 1992 concerning the Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 1992.

The Committee's comments relate to subclause 2(2) of the Bill which provides that clause 3 is to be taken to have commenced on 1 July 1990. Clause 3 would give effect to the proposed amendments to various Acts set out in the Schedule to the Bill. The Committee has expressed concern that the amendments were not introduced at the same time as the Superannuation Bill 1990 and that it has taken almost two years for the provisions to be introduced.

I am attaching a response prepared by my Department to the Committee's comments.

In view of the technical and consequential nature of the amendments made by the Bill and the demands on the resources of the Office of Parliamentary Counsel to meet the needs of Parliament, I regret that the Government was unable to accord the drafting of this Bill a high priority.

Yours sincerely

Ralph Willis

21 MAY 1992

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS: COMMENTS ON THE SUPERANNUATION LEGISLATION (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 1992

INTRODUCTION

1. Comments were made by the Committee and reported in the Scrutiny of Bills Alert Digest No. 5 of 1992 concerning the Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 1992.

2. The Committee's comments relate to subclause 2(2) of the Bill which provides that clause 3 is to be taken to have commenced on 1 July 1990. Clause 3 would give effect to the proposed amendments to various Acts set out in the Schedule to the Bill. In particular, the Committee has expressed concern that the amendments were not introduced at the same time as the Superannuation Bill 1990 and that it has taken almost two years for the provisions to be introduced.

RESPONSE

3. There are a number of factors that have contributed to the delay in the introduction of these amendments.

Workload

4. The Superannuation Bill 1990 was introduced to establish the Public Sector Superannuation Scheme (PSS), a new superannuation scheme for Commonwealth employees. That scheme and amendments to the Superannuation Act 1976 were to be implemented with effect from 1 July 1990 in part to meet the Government's decision that public sector schemes should comply with the Occupational Superannuation Standards from that date.

5. The Superannuation Act 1990 received Royal Assent on 7 June 1990. The Superannuation Legislation Amendment Act 1990 and the Superannuation Benefits (Supervisory Mechanisms) Act 1990 which effected changes to the Superannuation Act 1976 also received Royal Assent on that date.

6. The development of the PSS and the changes to the Superannuation Act 1976, particularly against the need to meet the 1 July 1990 target date, required the full commitment of the available experienced resources before that date, both in the Department of Finance and the Office of Parliamentary Counsel.

Legislative Precedent

7. The Superannuation Bill 1990 also broke new ground by providing for the implementation of the PSS in a Trust Deed and Rules that were scheduled to the Bill. This was consistent with the Occupational Superannuation Standards, but was the first time that such an approach had been submitted for Parliamentary approval.

8. It was by no means certain that Parliament would pass the Bill in that form and any anticipation of consequential amendments at that time may well have been premature.

Extent of the Task

9. Work commenced on the Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 1992 in mid 1990. At that time it was not expected that there would be many Acts that would require amendment. However, preparation of the Bill proved to be a considerable task.

10. An extensive search of legislation revealed some 163 references to the Superannuation Act 1976 or other provisions related to superannuation in 82 Acts. After examination of the legislation and consultation with some 19 other Departments and agencies, the number of Acts apparently requiring amendment when preparation of the drafting instructions for the Bill commenced had been reduced to 35.

11. While the drafting instructions for the Bill were provided to the Office of Parliamentary Counsel by May 1991, there were considerable demands on the resources of that Office to meet the needs of Parliament. That, together with the relative priority placed on the Bill by the Government meant that drafting of the Bill did not commence until January this year.

12. By the time the Bill had been drafted, the number of Acts involved had been reduced to 28. The reduction resulted from intensive examination of the Acts involved as well as the discovery that a number of the Acts had subsequently been changed or repealed.

13. At the same time, amendments to some of the other Acts since July 1990 in some cases increased the number of amendments required to an Act. In other words, the Bill was aimed at a constantly moving target.

Nature of the Amendments

14. As the Committee has noted, the amendments made by the Bill are essentially technical in nature. In general they are changes required to reflect the introduction of the PSS under the Superannuation Act 1990 and changes made to the Superannuation Act 1976 from 1 July 1990.

15. In some cases the amendments are not strictly necessary. For example, many of the amendments that include references to the invalidity retirement provisions of the Superannuation Acts 1976 and 1990 are included for reference purposes only.

16. Those provisions are already applicable under the relevant Superannuation Act. However, the inclusion of those references is considered desirable so as to flag the invalidity retirement requirements and avoid the possibility of administrative error under those Acts.

17. The inclusion of transitional or "savings" provisions in relation to certain of the amendments to four of the Acts is also a prudential measure. No evidence has been presented that anyone has actually been the subject of incorrect administrative action that would be affected by the amendments.

18. However, the particular provisions to which the "savings" provisions relate are those that will have applied to some numbers of employees. It was therefore considered that it would be prudent to include the "savings" provisions to protect anyone who might inadvertently have been the subject of any administrative action that is inconsistent with the amendments.

Department of Finance
May 1992

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

1992

3 JUNE 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 1992

The Committee has the honour to present its Seventh Report of 1992 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 24:

Australian Nuclear Science and Technology Organisation Amendment Bill 1992

Coal Industry Amendment Bill 1992

Migration Amendment Act 1992

Social Security (Family Payments) Amendment Bill 1992

Social Security Legislation Amendment Bill 1992

States and Northern Territory Grant (Rural Adjustment) Amendment Bill 1992

AUSTRALIAN NUCLEAR SCIENCE AND TECHNOLOGY ORGANISATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister for Science and Technology.

The Bill proposes to amend the *Australian Nuclear Science and Technology Organisation Act 1987*, to implement the Government's decision to:

- increase the functions of the Australian Nuclear Science and Technology Organisation (ANSTO), to allow for the conditioning, storage and management of radioactive materials and radioactive wastes and to allow for more commercial operations for ANSTO;
- provide ANSTO with an immunity from specified classes of State and Territory laws and regulations;
- include provisions relating to resignation and termination of appointment of Executive Director;
- provide the National Safety Bureau with independence from ANSTO; and
- make changes of an administrative nature.

The Committee dealt with the Bill in Alert Digest No. 5 of 1992, in which it made various comments. The Minister for Science and Technology responded to those comments in a letter dated 28 May 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Exercise of legislative power insufficiently subject to parliamentary scrutiny / delegation of power to 'a person'
Clause 12

In Alert Digest No. 5, the Committee noted that clause 12 of the Bill proposes to insert a new Part VIIA into the Australian Nuclear Science and Technology Organisation Act. That proposed new Part deals with the establishment, functions, operations, etc. of the Nuclear Safety Bureau. Proposed new section 37U provides:

> 37U(1) The Bureau may submit to the Minister such reports relating to the performance of the Bureau's functions as the Bureau considers appropriate.
>
> (2) The Bureau must submit to the Minister such reports relating to the performance of its functions as the Minister directs.
>
> (3) The Minister may cause a copy of a report received by the Minister under this section to be laid before each House of the Parliament if the Minister considers that the report is of sufficient importance to justify it being brought to the attention of the Parliament.

The Committee noted that, pursuant to proposed new subsection 37U(3), the Minister would have an unfettered discretion to decide which reports of the Bureau are of sufficient importance to justify it being brought to the attention of the Parliament. The Committee sought the Minister's advice as to why it is necessary to give the Minister this discretion.

The Minister's response first gives some background on the Nuclear Safety Bureau:

> The [Nuclear Safety Bureau (NSB)] was established as part of the Australian Nuclear Science and Technology Organisation (ANSTO) under the provisions of the ANSTO Act in 1987. The NSB is responsible for monitoring and reviewing nuclear plant operated by

ANSTO and it reports to the Minister. Under standing arrangements, these reports are prepared on a quarterly basis. The reports are available publicly, on request. As the NSB is currently a part of ANSTO, the ANSTO Act does not require the NSB to prepare an annual report. Nevertheless, the NSB furnishes the Minister with an annual report and this is incorporated into the annual report of the Safety Review Committee (SRC), also established under the provisions of the ANSTO Act. It is a requirement of the ANSTO Act that the SRC's annual report be tabled each year.

Having given this background, the Minister goes on to say:

> The ANSTO Amendment Bill 1992 is intended, inter alia, to establish the NSB as an entity separate from ANSTO. Under the provisions of the proposed new section 37R, the NSB will be required to produce an annual report for tabling in the Parliament each year. The proposed new section 37U follows closely those reporting provisions of the principal Act which apply to the SRC. Those provisions include Ministerial discretion to decide which of the SRC's reports, other than the annual report, are to be tabled in the Parliament.
>
> The NSB's quarterly reports are of a technical nature, with an emphasis on aspects of nuclear reactor engineering. They are not the type of report which it would normally be considered either appropriate or necessary to have tabled in the Parliament. These reports will continue to be available upon request and their substance will be recorded in the NSB's annual report.
>
> Incidents involving the nuclear plant operated by ANSTO will continue to be reported in the NSB's normal quarterly reports and in its annual reports. In this regard, I am already giving consideration to the question of appropriate directions to the NSB under the provisions of section 37D of the Bill (the ANSTO Act does not contain an equivalent provision at present).

The Minister concludes by saying:

> Although the NSB has not produced any special reports to the Minister since its establishment in 1987, it is possible that it will occasionally do so in the future (either at the request of the Minister or at its own volition). The subject matter of these reports could vary considerably, from minor operational details to matters of importance for which tabling in the Parliament would be appropriate. In these circumstances, it does not seem unreasonable for the Minister to have discretion as to which reports warrant the attention of the Parliament.

The Committee thanks the Minister for this response. While the Committee accepts that many of the relevant reports may be trivial, the Committee is, nevertheless, concerned that there is scope for important matters to escape the Parliament's attention.

In Alert Digest No. 5, the Committee also noted that, pursuant to section 42 of the Principal Act, the Minister would be able to delegate to 'a person' the power to decide whether or not a report under proposed new section 37U is of sufficient importance to justify it being tabled in the Parliament. The Committee suggested that, in the circumstances, this may be considered to be inappropriate.

The Minister responded to that comment as follows:

> The Committee has also noted that pursuant to section 42 of the Principal Act, the Minister can delegate to "a person" the power to decide whether or not a report is of sufficient importance to justify it being tabled in the Parliament. From my comments above, it is apparent that the need for such a decision will arise only rarely. It is unlikely, therefore, that the use of section 42 would co-incide with the need to make a decision as to the tabling of a report from the NSB. Moreover, pursuant to section

42(3) of the Principal Act, the delegate is subject to the directions of the Minister.

The Committee thanks the Minister for this response. As the Committee has already indicated above, its concern is that matters of importance may not be brought to the Parliament's attention. While the Minister indicates that the need for a decision under proposed new subsection 37U(3) is likely to be rare, it is equally likely that such exceptional cases are those most likely to warrant the attention of the Parliament.

COAL INDUSTRY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Coal Industry Act 1946*. The amendments are designed to give effect to the Commonwealth and New South Wales Governments' decision to reform the powers, functions and activities of the Joint Coal Board.

The Committee dealt with the Bill in Alert Digest No. 6 of 1992, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 26 May 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Subclause 2(2)

In Alert Digest No. 6 of 1992, the Committee noted that subclause 2(2) of the Bill provides:

> **Commencement**
> 2.(1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.
> (2) Subsection 3(1) commences on a day to be fixed by Proclamation.
> (3) Subsection 3(2) is taken to have commenced on 31 March 1992.

Clauses 1 and 2 of the Bill are formal. The Committee noted that subclause 3(1), if enacted, would give effect to the proposed amendments to the *Coal Industry Act 1946* which are set out in Schedules 1 to 4 of the Bill. Subclause 3(2) would enact the amendments set out in Schedule 5.

The Committee noted that the provision for commencement by Proclamation set out in subclause 2(2) is open-ended. The Committee suggested that, in that respect, it would appear to be in conflict with Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, which provides:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the "fixed time"). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the "repeal" option is followed, there is no limit on the time from Royal Assent

> to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The Committee noted that, by way of explanation for the Proclamation provision in this Bill, the Explanatory Memorandum to the Bill states:

> Clause 2 does not provide for the usual six month limit on Proclamation as commencement of these amendments has to be in parallel with New South Wales' Coal Industry Amendment Act 1992.

The Committee suggested that, on its face, this explanation would appear to satisfy the criterion set out in paragraph 6 of the Drafting Instruction. However, the Committee noted by way of analogy that a similar situation arises in relation to the Coal Mining Industry (Long Service Leave Funding) Bill 1992, which the Committee dealt with elsewhere in Alert Digest No. 6. The Committee noted that subclause 2(2) of that Bill provides:

> Subject to subsection (3), sections 35 and 44 to 49 commence on a day or days to be fixed by Proclamation.

The Explanatory Memorandum to that Bill indicates that (as with this Bill) the commencement of the clauses referred to is dependent on the passage of complementary State legislation and the 6 month time limit contemplated by Drafting Instruction No. 2 is, therefore, inappropriate. Nevertheless, subclause 2(3) of the Coal Mining Industry (Long Service Leave Funding) Bill 1992 goes on to provide:

(3) If a section mentioned in subsection (2) does not commence under that subsection within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

The Committee suggested that a similar approach in the Coal Industry Amendment Bill 1992 would be preferable to the open-ended Proclamation clause which is contained in this Bill. The Committee indicated that it would appreciate the Minister's views on this suggestion.

The Minister has responded as follows:

> No direct comparison should be drawn between the Coal Industry Amendment Bill and the Coal Mining Industry (Long Service Leave Funding) Bill. Unlike the Coal Industry Amendment Bill, the Coal Mining Industry (Long Service Leave Funding) Bill is not dependent upon the passage of parallel State legislation.
>
> The Joint Coal Board is a unique statutory body constituted under Commonwealth and NSW Coal Industry Acts of 1946. Both Acts parallel each other and both commenced on 1 February 1946. The timing of commencement of amendments to the Acts have been coordinated with the State to ensure that the legal basis on which the Board was formed was correct at all times.
>
> The objective of subclause 2(2) is to allow the Commonwealth and State to have the same commencement date for both Amendment Acts. The State Bill was introduced into the State Parliament on 30 April, the same day the Coal Industry Amendment Bill was introduced into the House of Representatives. It is the intention of both the Commonwealth and State Governments that the Acts be proclaimed as soon as possible after Royal Assent to facilitate implementation of the changes to the powers and functions of the Board and of the other arrangements provided for in the amendments.

The Committee thanks the Minister for this response. However, the Committee has some difficulty with the Minister's statement that no direct comparison with the Coal Mining Industry (Long Service Leave Funding) Bill 1992 should be drawn, because that Bill is not dependent on the passage of parallel State legislation. The Explanatory Memorandum to the Coal Mining Industry (Long Service Leave Funding) Bill refers to the commencement of the relevant amendments needing to be 'parallel' to a New South Wales Act. In making its original comment, the Committee assumed that the same general problems would apply in each instance.

Inappropriate delegation of legislative power
Schedule 2 - proposed new section 25 of the *Coal Industry Act 1946*

In Alert Digest No. 6, the Committee noted that Schedule 2 of the Bill contains a series of proposed amendments to the Coal Industry Act which relate to the functions of the Joint Coal Board. The Committee noted that proposed new section 25 provides:

> Until such time as the Commonwealth Minister and the State Minister direct, the Board has the following powers and functions:
>
> (a) to monitor, promote and specify adequate training standards relating to health and safety for workers engaged in the coal industry;
>
> (b) to monitor dust in coal mines;
>
> (c) to collect, collate and disseminate statistics related to the coal industry, other than statistics related to the health and welfare of workers.

The Committee noted that in relation to this proposed new section, the Explanatory Memorandum to the Bill states:

> This new section empowers the Board to continue with its powers and functions in relation to workers' training, dust monitoring and other industry statistics not related to the health and welfare of workers until such time as both the Commonwealth and State Ministers direct.

The Committee suggested that the effect of the proposed new section, if enacted, would be to allow the Commonwealth and State Minister to agree to, in effect, repeal the section or any of its parts. In making this comment, the Committee noted that there is no requirement for the Parliament to be notified of such an action, by the tabling of the relevant direction or otherwise.

The Committee drew Senators' attention to the provision, as it may be considered a delegation of legislative power which is insufficiently subject to parliamentary scrutiny in breach of principle 1(a)(v) of the Committee's terms of reference.

The Minister has responded as follows:

> The above [provision is] considered appropriate because of the joint Commonwealth/State constitution of the Board. It is to be noted that the Board is required to lay before both the Commonwealth and State Parliaments an Annual Report for the financial year. Any change to the Board's functions as set out in proposed new section 25 and the Board's orders would be reported in the Annual Report and therefore open to parliamentary scrutiny this way.

The Committee thanks the Minister for this response. While the Committee accepts that the Parliament may become aware of any changes to the Board's functions and of any orders by virtue of their being reported in the Board's annual report, this

notification would probably occur a significant time after the event. Further, the Committee notes that, in these circumstances, knowledge of an event does not necessarily equate to the event being open to scrutiny.

Exercise of legislative power insufficiently subject to parliamentary scrutiny
Schedule 2 - proposed new section 28 of the *Coal Industry Act 1946*

In Alert Digest No. 6, the Committee noted that Schedule 2 to the Bill contains a proposed new section 28 of the Coal Industry Act, which provides:

> (1) The Board may, with the approval of the Commonwealth Minister and the State Minister, make orders, not inconsistent with this Act or the regulations, for or with respect to the Board's powers and functions under sections 23 and 25 to 27.
>
> (2) The Board may, with the approval of the Commonwealth Minister and the State Minister, by order amend or revoke any order made by the Board.

The Committee noted that proposed new section 28A, if enacted, would require orders made pursuant to proposed new section 28 to be published in the *Gazette* and the State Gazette.

The Committee observed that orders made pursuant to the proposed new section would be, on their face, delegated legislation. They could have significant effect. For example, proposed new subsection 53(1) (which is contained in Schedule 2 to the Bill), provides for a substantial monetary penalty in relation to the failure to comply with an order made under proposed new section 28. The Committee suggested that, this being the case, it would appear to be appropriate that any orders made pursuant to the proposed section be subject to scrutiny by the Parliament.

The Committee noted that, on this point, the Explanatory Memorandum to the Bill states:

> 49. This new section empowers the Board to make orders in regard to its functions as set out in new sections 23 and 25 to 27 inclusive. The Board will need to obtain the approval of both the Commonwealth and State Ministers before making an order. Ministerial approval is also required before the Board can amend or revoke an order.
>
> 50. The order is not, as would normally be the case for such an instrument, disallowable. This is to avoid possible inconsistencies between the Commonwealth and State Parliaments, that is, where one Parliament disallows an order while the other Parliament allows it.

The Committee indicated that, while it accepted that, under the circumstances, a disallowance mechanism might provide difficulties in relation to such orders, it was not satisfactory that, as a result, the orders should not be subject to any form of parliamentary scrutiny. In making this comment, the Committee noted that there were only two governments involved.

The Committee drew Senators' attention to the provision, as it may be considered to *insufficiently subject the exercise of legislative power to parliamentary scrutiny* in breach of principle 1(a)(v) of the Committee's terms of reference.

The Minister responded as follows:

> The above [provision is] considered appropriate because of the joint Commonwealth/State constitution of the Board.

The Committee thanks the Minister for this response. However, the Committee notes that the response essentially re-states what is contained in the Explanatory

Memorandum and does not address the Committee's comments in Alert Digest No. 6.

Privilege against self-incrimination
Schedule 4 - proposed new subsection 53(2) of the *Coal Industry Act 1946*

In Alert Digest No. 6, the Committee noted that Schedule 4 of the Bill proposes to insert a new section 53 into the Coal Industry Act. That proposed new section provides, in part:

> (2) A person must not, without reasonable excuse, refuse to answer any question referred to in section 51.
> Penalty:
> (a) in the case of an individual - $3,000; and
> (b) in the case of a body corporate - $10,000.

> (3) A person must not, without reasonable excuse, fail or refuse to produce any books, records or documents referred to in section 51.
> Penalty:
> (a) in the case of an individual - $3,000; and
> (b) in the case of a body corporate - $10,000.

The Committee indicated its assumption that, in each case, it would be a 'reasonable excuse' for a person to decline to answer questions or produce documents on the grounds that it might tend to incriminate him or her, relying on the common law privilege against self-incrimination. However, the Committee noted that many persons are not aware of this privilege. The Committee, therefore, requested the Minister's advice as to whether there is any provision for a person who is asked questions or required to produce documents in these circumstances to be given a warning about the use that can be made of any information obtained and their rights to decline to answer questions, etc.

The Minister has responded as follows:

> I will write to the NSW Minister who has responsibility for the Joint Coal Board on this matter once the Commonwealth and State Bills are passed through both Parliaments. It is my intention to issue a direction to the Board, jointly with the NSW Minister, requiring its inspectors to notify persons of their common law privilege prior to carrying out duties under new section 53.

The Committee thanks the Minister for this response and notes his intention to issue a direction to the Board on this matter.

MIGRATION AMENDMENT ACT 1992

The Bill for this Act was introduced into the Senate on 19 December 1991 by the Minister Representing the Minister for Immigration, Local Government and Ethnic Affairs.

As originally presented to the Senate, the Bill proposed to amend the *Migration Act 1958,* to:

- make changes to the merits review system;
- distinguish the power to detain a person under the Act;
- increase certain penalty provisions in line with Commonwealth criminal law policy and allow consistent application of pecuniary penalties under the *Crimes Act 1914;* and
- provide that the obligation to endorse a visa or entry permit will be satisfied by an endorsement being recorded in a notified data base.

The Committee dealt with the Bill (as Migration Amendment Bill (No. 4) 1991) in Alert Digest No. 1 of 1992, in which it made no comment.

On 5 May 1992, the House of Representatives substantially amended the Bill, by inserting a new clause 2A which, in turn, inserted a new Division 4BA into Part 2 of the *Migration Act 1958.* That new Division deals with the custody of 'certain non-citizens'.

The Senate passed the Bill, as amended by the House of Representatives, on the same day as the House. As a result, it was not possible for the Committee to give the Senate its views on the proposed amendments prior to passing those amendments. Though the amendments have now passed into law, the Committee offers the following comments.

Discrimination against individuals on the ground of race or national origin
Section 2A - new section 54K of the *Migration Act 1958*: definition of 'designated person'

Section 2A of the Act insets a new Division 4B into the *Migration Act 1958*. Section 54K of this new Division includes a definition of a 'designated person' for the purposes of the Division. That definition is as follows:

> **"designated person"** means a non citizen who:
>
> (a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992; and
>
> (b) has not presented a visa; and
>
> (c) is in Australia and
>
> (d) has not been granted an entry permit; and
>
> (e) is a person to whom the Department has given a designation by:
>
> (i) determining and recording which boat he or she was on; and
>
> (ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat;
>
> and includes a non-citizen born in Australia whose mother is a designated person.

Paragraph (a) of the definition makes it clear that the purpose of the new Division is to make special rules relating to a particular group of people. This may be considered to be contrary to Article 2, paragraph 2 of the International Covenant on Civil and Political Rights, to which Australia is a signatory. The paragraph provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Breach of the separation of powers doctrine
Section 2A - new subsections 54L(1) and 54N(2) of the *Migration Act 1958*

New section 54L of the *Migration Act 1958* provides:

> **Designated persons to be in custody**
> 54L(1) Subject to subsection (2), after commencement, a designated person must be kept in custody.
>
> (2) A designated person is to be released from custody if, and only if, he or she is:
>
> (a) removed from Australia under section 54Q; or
>
> (b) given an entry permit under section 34 or 115.
>
> (3) This section is subject to section 54R.

New section 54N provides, in part:

> **Detention of designated person**
>
> 54N(1) If a designated person is not in custody immediately after commencement, an officer may, without warrant:
>
> (a) detain the person; and
>
> (b) take reasonable action to ensure that the person is kept in custody for the purposes of section 54L.
>
> (2) Without limiting the generality of subsection (1), that subsection even applies to a designated person who was held in a place described in paragraph 11(a) or a processing area before commencement and whose release was ordered by a court.

The combined effect of subsections 54L(1) and 54N(2) is that a person is to be kept in custody despite the fact that a court has ordered their release. this may be regarded as being contrary to the fundamental constitutional principle of the separation of powers. Under this doctrine, the powers f the courts are regarded as equal to and ought not to be subservient to the powers of the Executive and the Legislature.

Arrest without warrant
Section 24 - new subsection 54N(1) of the *Migration Act 1958*

New subsection 54N(1) of the *Migration Act 1958* (reproduced above) empowers an immigration officer to arrest a 'designated person' without warrant. While the Committee notes that the law generally accepts the right of any person (not necessarily a police officer) to arrest a person without warrant, the law does so only in circumstances where the person arrested is committing a serious offence. There is, therefore, a question as to whether an offence pursuant to section 54N(1) is such

an offence.

Denial of access to the courts
Paragraph 54R(3)(e) and section 54S of the *Migration Act 1958*

New section 54R of the *Migration Act 1958* provides:

> **No custody or removal after certain period**
> 54R(1) Sections 54I and 54Q cease to apply to a designated person who was in Australia on 27 April 1992 if the person has been in application custody after commencement for a continuous period of, or periods whose sum is, 273 days.
>
> (2) Sections 54L and 54Q cease to apply to a designated person who was not in Australia on 27 April 1992, if:
>
> (a) there has been an entry application for the person; and
>
> (b) the person has been in application custody, after the making of the application, for a continuous period of, or periods whose sum is, 273 days.
>
> (3) For the purposes of this section, a person is in application custody if:
>
> (a) the person is in custody; and
>
> (b) an entry application for the person is being dealt with;
>
> unless one of the following is happening:
>
> (c) the Department is waiting for information relating to the application to be given by a person who is not under the control of the Department;
>
> (d) the dealing with the application is at a stage

whose duration is under the control of the person or of an adviser or representative of the person;

(e) court or tribunal proceedings relating to the application have been begun and not finalised;

(f) continued dealing with the application is otherwise beyond the control of the Department.

New section 54S provides:

> **Courts must not release designated persons**
> 54S. A court is not to order the release from custody of a designated person.

The combined effect of new paragraph 54R(3)(e) and section 54S is that a 'designated person' is effectively denied access to the courts for the purposes of determining whether or not they should continue to be obtained. This may be considered to be contrary to Article 9, paragraph 4 of the International Convention on Civil and Political Rights, which provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

It may also be contrary to Article 10, paragraph 1, which provides:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The provisions may also be contrary to Article 14, paragraph 1, which provides, in part:

> All persons shall be equal before courts and tribunals.

General comment

By way of a general comment in relation to all the matters discussed above, the Committee notes, at the outset, that these are legislative measures which the Parliament has already considered and, clearly, found to be necessary in the circumstances. As these are matters of particular sensitivity, both in a political and in a public policy sense, the Parliament is the place for decisions in relation to such matters to be taken. The role of the Committee in relation to matters such as this is to ensure, as far as possible, that when the Senate considers legislation, it is aware of the implications of the legislation in terms of the principles which operate as the Committee's terms of reference.

In the present instance, some of the provisions referred to above would, no doubt, have been drawn to the attention of Senators if the Committee had had the opportunity to consider them prior to enactment. As a result of the combined effect of the provisions coming before the Parliament as amendments to a Bill which the Committee had already considered and also the speed with which the legislation was passed, that was, unfortunately, not possible in this case.

The Committee makes one final comment in relation to the matters discussed above. Senators will note that some reliance is placed in those comments on Articles of the International Covenant on Civil and Political Rights. It might be suggested that these are not matters for the Committee and that they are beyond the terms of reference against which the Committee is charged to measure all legislation introduced into the Parliament. The Committee would tend to disagree

with such a suggestion.

Principle 1(a)(i) of the terms of reference requires the Committee to draw attention to provisions which may 'trespass unduly on personal rights and liberties'. This phrase is not defined. However, over a period of years, the Committee has developed, on the basis of precedent, a rough check-list of the kinds of matters to which it will draw attention under the principle. That check-list continues to evolve.

In 'evolving' its check-list, the Committee will have regard to whatever extrinsic material it considers relevant. The International Covenant on Civil and Political Rights is, clearly, relevant to the issue of what constitutes 'personal rights and liberties'. It is especially significant given the fact that Australia is a signatory to the Covenant and, consequently, has certain obligations in relation to the matters dealt with in the Covenant.

SOCIAL SECURITY (FAMILY PAYMENT) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister for Family Support.

The Bill proposes to introduce a new system of social security payments to families with children. The legislation involved is the *Social Security Act 1991* and the *Income Tax Assessment Act 1936*. The integration of family allowance supplement and additional pension and benefit will result in a program of nearly $2 billion, which will assist about 800,000 families or nearly 1½ million children. In addition, family allowance and family allowance supplement will be amalgamated into a single payment with entitlement calculated under a two-step income and asset test.

The Committee dealt with the Bill in Alert Digest No. 7 of 1992, in which it made various comments. The Minister for Family Support responded to those comments in a letter dated 2 June 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Requirement to provide tax file number
Clause 3 - proposed new sections 855 and 856 of the *Social Security Act 1991*

In Alert Digest No. 7, the Committee noted that clause 3 of the Bill proposes to repeal Parts 2.17 and 2.18 of the *Social Security Act 1991* and replace them with 2 new Parts. Proposed new Part 2.17, if enacted, would provide for a 'family payment' in substitution of the 'family allowance' payable under the existing legislation.

The Committee noted that proposed new sections 855 and 856, if enacted, would allow the Secretary of the Department of Social Security to require a recipient of or a claimant for family payment or their partner to provide the Secretary with their tax file number.

The Committee has previously indicated (most recently in Alert Digest No. 10 of 1991, in relation to the Social Security (Disability and Sickness Support) Amendment Bill 1991) that, while such provisions may be seen as necessary to prevent persons defrauding the social security system, they may also be considered as unduly intrusive upon a person's privacy. Accordingly, the Committee drew Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> TFN's are collected from claimants and recipients and their partners for use in the data-matching program authorised by the Data-matching Program (Assistance and Tax) Act 1990. The policy allowing the collection of TFNs has already been sanctioned by Parliament for family allowance and is now simply being transferred into the new family payment. The new TFN provisions for family payment mirror those already contained in the Act in relation to family allowance.

While the Committee accepts that the provisions in question mirror existing provisions relating to the family allowance, the Committee notes that this does not necessarily affect its objection to such provisions.

The Minister goes on to say:

> In income testing family payment and additional family payment, a person's income, and his or her partner's income, is taken into account to determine the rate of payment. The Government decided some time ago to introduce a data-matching program in which the income information that people disclose to agencies such as the Department of Social Security, is to be checked automatically against the income information disclosed to the Australian Taxation Office (ATO) and other paying agencies. For this to be done efficiently and to prevent people defrauding the social security system, both partners' TFNs may be required.

The Minister concludes by saying:

> It should also be noted that these provisions, while requiring people to provide a TFN, also allow the Department to assist in that task. Some people, for example, may have difficulty in obtaining a TFN because of proof of identity requirements. The TFN provisions allow the Department to act as agents for the ATO by accepting applications for TFNs on behalf of the ATO and conducting the necessary proof of identity checks. Since the Department conducts its own proof of identity checks, any inconvenience for clients is minimised and there is no increase in intrusiveness from a practical point of view. Indeed, disabled people, people with language difficulties and new entrants to the workforce such as school leavers should all find benefit in the Department's involvement in the TFN application process.

The Committee thanks the Minister for this response.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister for Social Security.

The Bill proposes to implement changes in the areas of telephone concessions, Job Search Allowance and Newstart Allowance, social security agreements with other countries, debt recovery, the income and assets test, compensation payments and data-matching. The Bill also provides for a number of minor and technical amendments.

The Committee dealt with the Bill in Alert Digest No. 5 of 1992, in which it made various comments. The Committee made some further comments in Alert Digest No. 6 of 1992. The Minister for Social Security responded to those comments in letters dated 5 May and 29 May 1992 respectively. Copies of these letters are attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclauses 2(3) to (10)

In Alert Digest No. 5, the Committee noted that subclauses 2(3) to (10) of the Bill provide that various amendments proposed by the Bill are to operate retrospectively from various dates, the earliest being 1 July 1991. The Committee noted that, according to the Explanatory Memorandum to the Bill, the amendments referred to are essentially either beneficial to social security recipients or else they correct drafting oversights.

However, the Committee noted that the Explanatory Memorandum states that the amendments proposed by Division 14 of Part 2 of the Bill, which deal with recovery of social security debts,

> will validate consents already given by Social Security recipients [in relation to certain instalment deductions] and will provide a statutory basis for previous deductions.

The Committee indicated that it would appreciate some further background from the Minister on these amendments. The Committee indicated that, in particular, it would appreciate advice as to why it is necessary to 'validate' the consents referred to.

The Minister has responded as follows:

> The Department has for many years operated on the basis that people could consent to withholdings being made from their payments to repay a social security debt owed by another person.
>
> This was common in cases where a married couple claimed an invalid pension/disability support pension (for the man) and a wife pension (for the woman). Pending confirmation of the man's medical condition, sickness benefit/allowance was paid so that the couple were receiving an income support payment meantime.
>
> This benefit/allowance was paid at the combined married rate, ie the man received twice the married rate of benefit. This was, and still is, the usual way to pay benefit/allowance.
>
> When the medical issue is resolved and the pensions are granted, the law provides for the pensions to be paid from the date of the original claims. The benefit/allowance paid until then becomes an overpayment under the law. This is necessary to prevent dual payments for the same period.

However, in practice, the arrears of the pensions will cover the overpayment, usually exactly.

A technical problem which was identified in 1991 is that the arrears of wife pension are not available to offset the man's debt. Her pension entitlement is inalienable, even with her consent.

From the clients' point of view, there was no difficulty in these arrangements before the legal problem was identified in 1991. These arrangements have a high level of acceptance from clients. Couples in this situation want overpayments cleared as smoothly as possible. The Department has therefore continued the practice of taking the arrears of wife pension to complete the repayment of the debt, and the legislation proposes to validate the current arrangement, both prospectively and retrospectively.

Other cases like this may occur where a sole parent continues to be paid a sole parent pension after forming a marital relationship. The payment is an overpayment. The partner is often receiving a job search or newstart allowance at the single rate.

It is common for the couple to ask for the woman's debt to be reduced by the arrears of the upward adjustment in the man's allowance to the combined married rate. That is reasonable and a sensible arrangement. The consent provisions would enable that to be done.

Because there is a requirement that people actually consent to this form of debt recovery (which means a voluntary and informed consent), there is not seen to be any difficulty about validating these cases retrospectively.

The Committee thanks the Minister for this response.

Privilege against self-incrimination
Clause 115

In Alert Digest No. 5, the Committee noted that clause 115 of the Bill proposes to repeal various provisions of the *Social Security Act 1991* which abrogate the privilege against self-incrimination. Amendments included in Schedule 1 of the Bill also would amend related provisions, the effect of which is that a person who has a 'reasonable excuse' may decline to give to the Department information requested by it. The Committee noted that one such reasonable excuse is that the information requested may tend to incriminate the person from whom it is sought.

The Committee noted that the overall effect of the amendments is that, unless a person declines to provide information on the grounds of self-incrimination, the information obtained by the Department may be used for any purpose and is admissible as evidence of any criminal conduct on the part of any person - not only the person providing the information.

While the Committee welcomed the proposal to repeal the provisions which abrogate the privilege against self-incrimination, it was also mindful that persons who are requested to provide information may be unaware that they have the right to decline to answer a question or to provide information on the grounds that it may tend to incriminate them. The Committee indicated that it would, therefore, appreciate the Minister's advice as to whether or not persons are advised of their rights before being requested to provide information and whether any warnings are given as to the use to which any information obtained may be put.

The Minister has responded as follows:

> The Department does not generally advise people who are asked to give information that they have the right to decline to answer a question or to provide information on

the grounds that it may incriminate them. The reasons for this are straight-forward.

The Department issues many millions of standard pre-printed forms to clients every year, seeking notification of changes in circumstances and reviewing entitlement. The situation of clients providing self-incriminating information might be thought to have the potential to arise in review forms, but in fact the Department's review forms do not seek self-incriminatory information.

The Department could include in its forms advice that clients need not respond to self-incriminatory questions. However, there is a real risk that this would cause concern to large numbers of clients about answering standard questions which are not self-incriminatory in any way. That would be quite unwarranted and is unnecessary.

When the Department is considering prosecution action, it attempts to interview the client personally. This is done to ensure that the client is correctly identified (eg that the Department is not mistaken and should not be looking at another client with the same name) and so that the client has the opportunity of explaining the situation if he or she wishes to do so. The client is always given the standard formal caution. A client's rights to decline to provide information and to decline to be interviewed are explained.

As a general principle, the Department would not use self-incriminatory information provided without the caution during an interview or which could be regarded as having been unfairly, unreasonably or improperly obtained. The Director of Public Prosecutions scrutinises the information the Department submits for prosecution purposes and would also reject information obtained in that way.

Finally, the court would reject evidence offered which was obtained by unfair or improper means.

The Committee thanks the Minister for this response and notes his advice concerning his Department's practices in relation to interviewing clients.

Concerns raised by Privacy Commissioner
Schedule 2 - proposed new subsection 10(2), (3), (3A), (3B), 11(1) and (2) of the *Data-matching Program (Assistance and Tax) Act 1990*

In Alert Digest No. 5, the Committee also drew Senators' attention to various concerns about the Bill raised by the Privacy Commissioner in a letter to the Committee dated 2 April 1992. The Privacy Commissioner's concerns relate to certain proposed amendments to the *Data-matching Program (Assistance and Tax) Act 1990*, which are contained in Schedule 2 of the Bill. The Committee attached a copy of the Privacy Commissioner's letter to Alert Digest No. 5 for the information of Senators. However, the Committee summarised the Privacy Commissioner's concerns as follows.

The Privacy Commissioner noted that the Schedule proposes to omit subsection 10(2) of the Data-matching Program (Assistance and Tax) Act and replace it with the following new subsection (2):

> Where a source agency receives particular information under Step 1, 4 or 6 of a data matching cycle, the agency must destroy that particular information within 90 days of its receipt unless, within those days:
>
> (a) the agency has considered that particular information and made a decision:
>
> (i) to take action allowed by subsection (1) on the basis of that particular information; or
>
> (ii) to carry out an investigation of the need to take action allowed by subsection (1) on the basis of that particular information; or
>
> (b) the agency has, by using sampling procedures, identified that particular information as information that will form the

basis for the agency:

(i) to take action allowed by subsection (1) on the basis of that particular information; or

(ii) to carry out an investigation of the need to take action allowed by subsection (1) on the basis of that particular information.

The Privacy Commissioner stated:

> ... I am concerned that the text of the proposed amendment is so broadly expressed that an inadequate level of screening could occur. I believe that a systematic process of screening results should occur within the 90 day period. The present language of the amendment would appear to allow agencies routinely to defer any action of this kind being taken at all. This could lead to a situation where large numbers of untested matching results - results which bring together data given confidentially in different settings to government agencies - could remain in circulation for very long periods of time. I regard that as a situation which should be avoided.

The Privacy Commissioner went on to say:

> If agencies feel that bulk deferral of results may sometimes be unavoidable, and wish to put the legal authority for this beyond doubt, I would prefer to have an approach which allowed an extension for say a further 90 days where the Secretary certifies to the Privacy Commissioner that exceptional circumstances exist.

In Alert Digest No. 5, the Committee indicated that it did not necessarily adopt the Privacy Commissioner's interpretation of proposed paragraph 10(2)(b). On the Committee's reading of the proposed new paragraph, an agency must destroy

information within 90 days, unless *within that period of 90 days* the agency has, by using sampling procedures, identified the information as being a basis for action. In other words, an agency cannot defer a sampling process for any more than 90 days.

However, the Committee indicated that it would, nevertheless, appreciate the Minister's views on what the Privacy Commissioner had stated.

The Minister has responded as follows:

> I do not agree with the Privacy Commissioner that the proposed new version of subsection 10(2) "is so broadly expressed that an inadequate level of screening could occur" nor that "the amendment would ... allow agencies routinely to defer any {screening} action being taken at all." I note that the Committee does not necessarily accept the Privacy Commissioner's interpretation of the amendment. I concur with the Committee that there is under the amendment to be an application of sampling procedures within the 90 days period. It should also be noted that an addition to subsection 10(5) for which the Bill provides involves the Privacy Commissioner in the process of arriving at acceptable sampling procedures.

Schedule 2 also proposes to omit subsection 10(3) of the Data-matching Program (Assistance and Tax) Act and substitute the following new subsection (3):

> Subject to subsection (3A), a source agency must commence any action in relation to information it receives under subsection (1) within 12 months from the date that it receives the information from the matching agency.

Proposed new subsection (3A) provides:

> The Secretary to an assistance agency, the Commissioner of Taxation or a Deputy Commissioner of Taxation may grant an extension or extensions of time for up to 12 months each of the 12 month period referred to in subsection (3).

Proposed new subsection (3B) provides:

> The power to grant an extension or extensions of time referred to in subsection (3A) must not, despite any other law, be delegated.

The Privacy Commissioner stated:

> This amendment seeks to allow a decision on extending an investigation beyond 12 months to be made by Deputy Commissioners of Taxation. In the absence of any evidence that the current provision (decision to be taken by Commissioner) is proving unworkable, I can see no reason for the amendment.

He went on to say:

> In passing the Act, Parliament provided that this decision should be made only by Secretaries of Departments and the Commissioner of Taxation, and should not be delegated. I would not expect this provision to create a significant problem, given that it confers a discretion intended to be used occasionally. As with the section 10(2) provision, the clear intention of the legislation is that data-matching results should be dealt with expeditiously.

The Committee noted that these provisions are essentially a re-drafting of the existing subsection 10(3). As the Privacy Commissioner observed, the only change of substance is to allow a Deputy Commissioner of Taxation, as well as the Commissioner of Taxation, the power to grant an extension of time for taking action under subsection 10(1). The Committee stated that this would not appear to be a matter which came within its terms of reference, though the Committee indicated that it would be interested in the Privacy Commissioner's further views if he believes that this is not the case.

The Privacy Commissioner has not provided any further views on this point. However, the Minister has offered the following further information on the proposed amendment:

> The new form of subsection 10(3) is, as the Privacy Commissioner and your Committee comment, largely a tidying up of the old subsection. The only new element is to allow a Deputy Commissioner of Taxation, as well as the Commissioner of Taxation, the power to grant an extension of time for taking action under subsection 10(1). This change was requested by the Treasurer for the following reasons:
>
> - a Deputy Commissioner is an extremely senior officer in the Australian Taxation Office structure; and
>
> - the devolved structure and devolution of authority in the Australian Taxation Office add further to the authority of a Deputy Commissioner.
>
> In essence the Treasurer's view is that a Deputy Commissioner's power and responsibility are so great that no purpose is served in differentiating between them in this context.

The Privacy Commissioner also drew the Committee's attention to some proposed amendments to section 11 of the Data-matching Program (Assistance and Tax) Act

which are contained in Schedule 2 to the Bill. The Committee noted that section 11 currently provides:

> **Notice of proposed action**
>
> 11.(1) Subject to subsection (4), where, solely or partly because of information given in Step 6 of a data matching cycle, an assistance agency considers taking action:
>
> (a) to cancel or suspend any personal assistance to; or
> (b) to reject a claim for personal assistance to; or
> (c) to reduce the rate or amount of personal assistance to; or
> (d) to recover an overpayment of personal assistance made to;
>
> a person, the agency:
>
> (e) must not take that action unless it had given the person written notice:
>
> (i) giving particulars of the information and the proposed action; and
> (ii) stating that the person has 21 days from the receipt of the notice in which to show cause in writing why the action should not be taken; and
>
> (f) must not take that action until the expiration of those 21 days.
>
> (2) Subject to subsection (5), where, solely or partly because of information given in Step 6 of a data matching cycle, the tax agency considers taking action to issue an assessment or an amended assessment of tax to a person, the agency:
>
> (a) must not take that action unless it has given the person written notice:
>
> (i) giving particulars of the information and the proposed action; and

(ii) stating that the person has 21 days from the receipt of the notice in which to show cause in writing why the action should not be taken; and

(b) must not take that action until end of those 21 days.

[The remaining subsections are not relevant in the context of this comment]

The Committee noted that the amendment proposed by the Schedule would apply the same regimen currently operating in relation to information obtained in Step 6 of a data-matching cycle to information obtained in Steps 1 and 4 of a cycle.

In the context of the proposed section 11 amendments, the Privacy Commissioner stated:

> I support ... the proposal to refer in section 10(1)(a) and (b) to another type of administrative action that may be taken on the basis of data-matching results - this being:
>
> > "to correct the personal identity data it [the agency] holds ..."
>
> This amendment allows agencies to make any factual corrections to file-data that come to light in the course of the matching, thereby enabling agencies to fulfil their responsibilities under the Privacy Act in relation to the accuracy and completeness of data.

He went on to say:

> The question then arises as to whether the usual requirement - (s.11) that prior notice of any proposed action be given to individuals - should apply to this new type of administrative action.

> Clearly this would not be appropriate in cases where the correction was trivial, e.g. an incorrect postcode. I am however concerned that some changes to an individual's file could prove more significant and if not notified or checked with the individual lead to significant and potentially adverse consequences. This could for example occur if an assumption were made about a discrepancy in name or address, and a correction made to relevant records. If the assumption was incorrect, this could then result in communications going astray, or in the individual being targeted for action, perhaps even as a result of a later data-matching cycle.
>
> An approach which might relieve agencies of the need to give notice in minor cases but preserve the basic principle of section 11 might be to include a further sub-section in section 11 which would allow the Privacy Commissioner to specify in the guidelines circumstances in which it would be permissible for an agency not to give a section 11 notice of correction of a record arising from data-matching, or to allow for notices of correction to be given promptly after-the-event.

The Privacy Commissioner concluded by saying:

> The principle of section 11 is that individuals should be given notice, and the opportunity to comment, before any action is taken on the basis of a data-matching result. I believe this principle should extend to alteration of records.

The Committee indicated that it agreed that it may be considered to trespass unduly on a person's rights and liberties if, as the Privacy Commissioner points out, that person was not given notice of (and the opportunity to correct) an incorrect amendment of his or her record. Accordingly, the Committee drew Senators' attention to the provision, as it may be considered to be in breach (by omission) of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> The Privacy Commissioner also criticises the amendments because they do not explicitly require a source agency to notify an affected person of an intention to correct the personal identity data it holds on that person. The Privacy Commissioner was represented at discussions on these amendments with the agencies involved in the data-matching program. It was common ground that a provision of the type suggested by the Commissioner would be acceptable. What could not be agreed, however, was a formulation distinguishing between trivial and non-trivial amendments. It was therefore agreed that one solution to the problem would be to leave the question open in the legislation and allow the Privacy Commissioner to cover the matter in his guidelines which have the force of law under section 12 of the Data-matching Program (Assistance and Tax) Act 1990 and which appear in the Schedule to that Act.
>
> I fail to see how this trespasses on rights as there is nothing in the Act to constrain the enactment or content of such a guideline and it will have the same status once in force as would a section of the Act. It is not necessary to pursue the Privacy Commissioner's proposal to advert in section 11 to the guidelines because section 12 already provides plenary powers for the Privacy Commissioner in that regard.

The Committee thanks the Minister for his response and notes the Minister's advice that this is a matter for the Privacy Commissioner to address in his guidelines. The Committee will draw the Minister's response to the attention of the Privacy Commissioner.

Inappropriate delegation of legislative power
Clause 81 - proposed new subsection 1208 of the *Social Security Act 1991*

In Alert Digest No. 6, the Committee noted that clause 81 of the Bill proposes to

amend section 1208 of the *Social Security Act 1991*. That section currently provides:

> (1) The provisions of a **scheduled international social security agreement** have effect despite anything in this Act.
>
> (2) Subsection (1) does not apply to a provision of an agreement before the day on which the agreement enters into force.
>
> (3) Subsection (1) applies to a provision of an agreement only in so far as the provision remains in force and affects the operation of this Act.
>
> (4) An agreement is a **scheduled international social security agreement** if:
>
> (a) the agreement is between Australia and a foreign country; and
>
> (b) the agreement relates to reciprocity in social security matters; and
>
> (c) the text of the agreement is set out in a Schedule to this Act.
>
> (5) A reference in this Act to a **scheduled international social security agreement** includes a reference to a scheduled international social security agreement as amended by further agreements between Australia and the foreign country concerned.

Clause 81 of the Bill proposes to insert a new subsection (4A), which provides:

> (4A) An agreement is also a **scheduled international social security agreement** if:
>
> (a) the agreement is between Australia and the Republic of Austria; and
>
> (b) the agreement relates to reciprocity in social security matters.

The Committee suggested that the effect of this provision, if enacted, would be to allow the Government to over-ride provisions of the Social Security Act on the basis of an agreement between Australia and the Republic of Austria relating to reciprocity in social security matters. The Committee noted that, unlike the existing provision relating to such agreements, there would be no need to include the text of such an agreement in a schedule to the Social Security Act. Indeed, there would appear to be no requirement for the Parliament even to be notified of the existence of such an agreement.

The Committee drew Senators' attention to the clause, as it may be considered an inappropriate delegation of legislative powers, in breach of principle 1(a)(iv) of the Committee's terms of reference.

In a letter received by the Committee on 29 May 1992, the Minister responded as follows:

> Legislation in the Autumn Sittings is necessary to enable the Agreement's implementation later this year. Owing to delays in Austria in meeting its constitutional requirements, the Agreement was not signed by the deadline for inclusion in this Amendment Bill.
>
> The Agreement was signed on 1 April 1992.
>
> Debate on the Bill has been delayed longer than I expected. It is therefore now possible to introduce an amendment to the Bill to provide for scheduling of the Agreement in the normal way. I would prefer to introduce the amendment during Senate debate because of the expected House of Representatives timetable.
>
> Thank you for the Committee's constructive comment.

The Committee thanks the Minister for this response and for agreeing to introduce the amendment foreshadowed.

STATES AND NORTHERN TERRITORY GRANT (RURAL ADJUSTMENT) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to give effect to changes in the provisions of the Rural Adjustment Scheme which were introduced to provide additional assistance measures to farmers experiencing or facing financial difficulties during the rural downturn. These amendments were announced in media statements made by the Minister for Primary Industries and Energy in April and October 1991 and by the Prime Minister in his Economic Statement of 26 February 1992.

The Committee dealt with the Bill in Alert Digest No. 6 of 1992, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 26 May 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclauses 2(2) and (3)

In Alert Digest No. 6, the Minister noted that subclause 2(2) of the Bill provides:

> Sections 6 and 7, subsection 10(1) and sections 11 and 12 are taken to have commenced on 20 December 1991.

Essentially, the clauses referred to relate to the approval and execution of the first amending agreement to the original Agreement under which the Rural Adjustment

Scheme operates.

Subclause 2(3) provides:

> Section 8, subsection 10(2) and section 13 are taken to have commenced on 1 March 1992.

Essentially, these clauses relate to the approval and execution of the second amending agreement.

The Committee noted that the commencement dates nominated in clause 2 appear to relate to the dates on which the first and second amending agreements, respectively, were entered into, though the Committee also noted that neither the Explanatory Memorandum to the Bill nor the Minister's Second Reading speech give any indication as to the relevance of the dates.

The Committee assumed that, given the general intention of the Bill, the retrospectivity proposed by subclauses 2(2) and (3) would be beneficial to persons other than the Commonwealth. However, in the absence of any clear statement to this effect in the Explanatory Memorandum, the Committee indicated that it would appreciate the Minister's confirmation that this is the case.

The Minister's response confirms that this is the case.

General comment

In Alert Digest No. 6, the Committee noted that, at paragraph 3, the Explanatory Memorandum states:

> Under section 27 of the Agreement, these amendments can be introduced through agreement between the Commonwealth and the States prior to amendment of the legislation.

The Committee noted that section 27 of the Agreement provides:

> (1) The operation of the Scheme in relation to all of the States will be reviewed from time to time as appropriate by the Commonwealth and the States in the light of experience in its administration.
>
> (2) Where on a review of the operation of the Scheme the Ministers of the Commonwealth and of the States consider an amendment to the agreement should be made the Commonwealth Minister will seek to have the agreement so amended.

The Committee was unsure as to what is meant by paragraph 3 of the Explanatory Memorandum. The Committee noted that the paragraph appeared to suggest that amendments to the Agreement could be 'introduced' prior to the amendment of the legislation. Section 27 of the Agreement is given as authority for this proposition. The Committee suggested that, on its face, section 27 did not appear to be open to such an interpretation.

The Committee indicated that it would appreciate the Minister's clarification as to what was meant by paragraph 3 of the Explanatory Memorandum.

The Minister has responded as follows:

> When these initiatives were first proposed in April 1991, my Department sought advice from the Attorney-General's Department on the implication of their introduction under the States and Northern Territory Grants (Rural Adjustment) Act 1988.

The Attorney-General's Department advised that

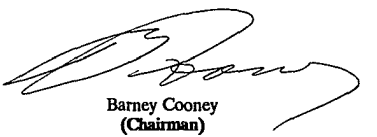
> *The terms of the RAS Agreement could be amended in order to introduce the new forms of assistance without amending the Grants Act. The RAS Agreement itself contemplates amendments (see clauses 10(5) and 27). Clause 27 provides for the review of the Agreement and effectively specifies that any amendment to the Agreement requires the concurrence of the States.*
>
> *However, the view has long been held by this Department that, where an agreement that was itself required to be submitted to the Commonwealth Parliament for approval (as was the RAS Agreement) is amended, any amending agreement ought, as a matter of policy, also to be submitted to the Parliament so that the Parliament may have an opportunity of expressing its view on the amendments. Furthermore, authorizing legislation would provide an opportunity to make it clear that the reference in s.5 of the Grants Act to 'the agreement' is in fact a reference to the agreement as amended from time to time. This would put the question of the availability of money appropriated for the purposes of s.5 beyond doubt.*

Under these arrangements it is possible to introduce new assistance measures through amendment of the Agreement between the Commonwealth and the States without necessarily amending legislation. I have endorsed the view of the Attorney-General's Department, however, that as the initiatives involve the availability of public funds, the amendments to the Agreement should then be authorized by legislation.

Due to the need to provide assistance quickly to farmers, the terms of the RAS Agreement whereby the new provisions could be introduced provided there has been agreement between the Commonwealth and the States, have been applied. I executed the first amending agreement to introduce the Debt Reconstruction with Interest Subsidies (DRIS) and amend the funding arrangements Part B assistance on 20 December 1991 and the second amendment to facilitate the Crop Planting

Scheme on 13 March 1992. State and Territory Ministers responsible for the administration of the Rural Adjustment Scheme (RAS) have all agreed to the amendments and have been instrumental in ensuring that these new assistance measures are provided to farmers in severe financial hardship.

The Committee thanks the Minister for this detailed response.



Barney Cooney
(Chairman)

RECEIVED
28 MAY 1992
Senate Standing Ctte for the Scrutiny of Bills

MINISTER FOR SCIENCE AND TECHNOLOGY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

28 MAY 1992

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

Dear ~~Senator Cooney~~ Barney

The Scrutiny of Bills Alert Digest, edition No.5 of 29 April 1992, contains comment on the Australian Nuclear Science and Technology Organisation Amendment Bill 1992.

At page 6, the Scrutiny of Bills Committee notes that pursuant to proposed new subsection 37U(3), the Minister has an unfettered discretion to decide which reports of the Nuclear Safety Bureau (NSB) are of sufficient importance to justify their being brought to the attention of the Parliament. The Committee sought advice as to why it is necessary to give the Minister this discretion.

The NSB was established as part of the Australian Nuclear Science and Technology Organisation (ANSTO) under the provisions of the ANSTO Act in 1987. The NSB is responsible for monitoring and reviewing nuclear plant operated by ANSTO and it reports to the Minister. Under standing arrangements, these reports are prepared on a quarterly basis. The reports are available publicly, on request. As the NSB is currently a part of ANSTO, the ANSTO Act does not require the NSB to prepare an annual report. Nevertheless, the NSB furnishes the Minister with an annual report and this is incorporated into the annual report of the Safety Review Committee (SRC), also established under the provisions of the ANSTO Act. It is a requirement of the ANSTO Act that the SRC's annual report be tabled each year.

The ANSTO Amendment Bill 1992 is intended, inter alia, to establish the NSB as an entity separate from ANSTO. Under the provisions of the proposed new section 37R, the NSB will be required to produce an annual report for tabling in the Parliament each year. The proposed new section 37U follows closely those reporting provisions of the principal Act which apply to the SRC. Those provisions include Ministerial discretion to decide which of the SRC's reports, other than the annual report, are to be tabled in the Parliament.

The NSB's quarterly reports are of a technical nature, with an emphasis on aspects of nuclear reactor engineering. They are not the type of report which it would normally be considered either appropriate or necessary to have tabled in the Parliament. These reports will continue to be available upon request and their substance will be recorded in the NSB's annual report.

Incidents involving the nuclear plant operated by ANSTO will continue to be reported in the NSB's normal quarterly reports and in its annual reports. In this regard, I am already giving consideration to the question of appropriate directions to the NSB under the provisions of section 37D of the Bill (the ANSTO Act does not contain an equivalent provision at present).

Although the NSB has not produced any special reports to the Minister since its establishment in 1987, it is possible that it will occasionally do so in the future (either at the request of the Minister or at its own volition). The subject matter of these reports could vary considerably, from minor operational details to matters of importance for which tabling in the Parliament would be appropriate. In these circumstances, it does not seem unreasonable for the Minister to have discretion as to which reports warrant the attention of the Parliament.

The Committee has also noted that pursuant to section 42 of the Principal Act, the Minister can delegate to "a person" the power to decide whether or not a report is of sufficient importance to justify it being tabled in the Parliament. From my comments above, it is apparent that the need for such a decision will arise only rarely. It is unlikely, therefore, that the use of section 42 would co-incide with the need to make a decision as to the tabling of a report from the NSB. Moreover, pursuant to section 42(3) of the Principal Act, the delegate is subject to the directions of the Minister.

Yours sincerely

ROSS FREE

Minister for Primary Industries and Energy
Simon Crean, MP

26 MAY 1992

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

Dear Senator Cooney

I refer to Mr Argument's letter of 7 May 1992 to my office and the attached Scrutiny of Bills Alert Digest No. 6 of 1992 (6 May 1992). Mr Argument drew attention to the comments contained in the Digest on the Coal Industry Amendment Bill 1992 and the States and Northern Territory Grant (Rural Adjustment) Amendment Bill 1992.

I note the Committee's comments and queries on the two Bills and am happy to provide the following advice.

Coal Industry Amendment Bill 1992

The Committee raised three issues in regard to the above Bill.

Firstly, the Committee noted that the provision for commencement by Proclamation set out in subclause 2(2) is open-ended. It noted the explanation contained in the Explanatory Memorandum to the Bill which states that the clause does not provide for the usual six month limit on Proclamation as commencement of the amendments has to be in parallel with New South Wales' Coal Industry Amendment Act 1992.

However, the Committee noted that a similar situation arises in relation to the Coal Mining Industry (Long Service Leave Funding) Bill 1992 where the commencement of the clauses referred to is also dependent on the passage of complementary State legislation. Nevertheless, subclause 2(3) of the Bill provides:

> *"(3) If a section mentioned in subsection (2) does not commence under that subsection within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period."*

The Committee suggested that the Coal Industry Amendment Bill adopts a similar approach on commencement.

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No direct comparison should be drawn between the Coal Industry Amendment Bill and the Coal Mining Industry (Long Service Leave Funding) Bill. Unlike the Coal Industry Amendment Bill, the Coal Mining Industry (Long Service Leave Funding) Bill is not dependent upon the passage of parallel State legislation.

The Joint Coal Board is a unique statutory body constituted under Commonwealth and NSW Coal Industry Acts of 1946. Both Acts parallel each other and both commenced on 1 February 1946. The timing of commencement of amendments to the Acts have been coordinated with the State to ensure that the legal basis on which the Board was formed was correct at all times.

The objective of subclause 2(2) is to allow the Commonwealth and State to have the same commencement date for both Amendment Acts. The State Bill was introduced into the State Parliament on 30 April, the same day the Coal Industry Amendment Bill was introduced into the House of Representatives. It is the intention of both the Commonwealth and State Governments that the Acts be proclaimed as soon as possible after Royal Assent to facilitate implementation of the changes to the powers and functions of the Board and of the other arrangements provided for in the amendments.

Secondly, the Committee sought advice on whether a person who is asked questions or required to produce documents under proposed new section 53 will be advised of his or her right to decline on the basis of the common law privilege against self-incrimination.

I note the Committee's concern that many persons are not aware of this common law privilege. I will write to to the NSW Minister who has responsibility for the Joint Coal Board on this matter once the Commonwealth and State Bills are passed through both Parliaments. It is my intention to issue a direction to the Board, jointly with the NSW Minister, requiring its inspectors to notify persons of their common law privilege prior to carrying out duties under new section 53.

Finally, the Committee drew Senators' attention to proposed new section 25 and proposed new section 28. Proposed new section 25 empowers the Board to continue with its powers and functions in relation to mineworkers' training, dust monitoring and the collection of other industry statistics not related to health and welfare until such time as both the Commonwealth and State Ministers direct.

Proposed new section 28 empowers the Board to make orders in regard to its functions after obtaining approval from both Ministers. As explained in the Explanatory Memorandum, the orders are not, as would normally be the case for such instruments, disallowable so as to avoid possible inconsistencies in their consideration by Commonwealth and State Parliaments.

The Committee drew Senators' attention to these two provisions as they may be considered a delegation of legislative power which is insufficiently subject to

parliamentary scrutiny in breach of principle 1(a)(v) of the Committee's terms of reference.

The above provisions are considered appropriate because of the joint Commonwealth/State constitution of the Board. It is to be noted that the Board is required to lay before both the Commonwealth and State Parliaments an Annual Report for the financial year. Any change to the Board's functions as set out in proposed new section 25 and the Board's orders would be reported in the Annual Report and therefore open to parliamentary scrutiny this way.

States and Northern Territory Grant (Rural Adjustment) Amendment Bill 1992

The Committee sought clarification in relation to paragraph 3 of the Explanatory Memorandum for the States and Northern Territory Grants (Rural Adjustment) Amendment Bill 1992.

When these initiatives were first proposed in April 1991, my Department sought advice from the Attorney-General's Department on the implication of their introduction under the States and Northern Territory Grants (Rural Adjustment) Act 1988.

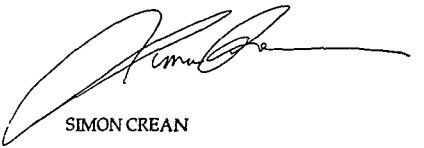
The Attorney-General's Department advised that

> *The terms of the RAS Agreement could be amended in order to introduce the new forms of assistance without amending the Grants Act. The RAS Agreement itself contemplates amendments (see clauses 10(5) and 27). Clause 27 provides for the review of the Agreement and effectively specifies that any amendment to the Agreement requires the concurrence of the States.*
>
> *However, the view has long been held by this Department that, where an agreement that was itself required to be submitted to the Commonwealth Parliament for approval (as was the RAS Agreement) is amended, any amending agreement ought, as a matter of policy, also to be submitted to the Parliament so that the Parliament may have an opportunity of expressing its view on the amendments. Furthermore, authorizing legislation would provide an opportunity to make it clear that the reference in s.5 of the Grants Act to 'the agreement' is in fact a reference to the agreement as amended from time to time. This would put the question of the availability of money appropriated for the purposes of s.5 beyond doubt.*

Under these arrangements it is possible to introduce new assistance measures through amendment of the Agreement between the Commonwealth and the States without necessarily amending legislation. I have endorsed the view of the Attorney-General's Department, however, that as the initiatives involve the availability of public funds, the amendments to the Agreement should then be authorized by legislation.

Due to the need to provide assistance quickly to farmers, the terms of the RAS Agreement whereby the new provisions could be introduced provided there has been agreement between the Commonwealth and the States, have been applied. I executed the first amending agreement to introduce the Debt Reconstruction with Interest Subsidies (DRIS) and amend the funding arrangements Part B assistance on 20 December 1991 and the second amendment to facilitate the Crop Planting Scheme on 13 March 1992. State and Territory Ministers responsible for the administration of the Rural Adjustment Scheme (RAS) have all agreed to the amendments and have been instrumental in ensuring that these new assistance measures are provided to farmers in severe financial hardship.

Yours sincerely



SIMON CREAN

Minister for Local Government
Minister for Family Support

The Hon. David Simmons, MP Federal Member for Calare

RECEIVED
2 JUN 1992
Senate Standing Ctte for the Scrutiny of Bills

- 2 JUN 1992

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

Dear Senator Cooney

On 28 May 1992, your Committee's Secretary drew my attention to the comments in the Bills Alert Digest No 7 (27 May 1992) concerning the Social Security (Family Payments) Amendment Bill 1992 (the amending Bill).

The comments relate to proposed new sections 855 and 856 of the Social Security Act 1991 (the Act), which would be inserted by clause 3 of the amending Bill. These sections would allow the Secretary of the Department of Social Security to require a recipient of, or claimant for, family payment or their partner to provide the Secretary with their tax file number (TFN). The Committee commented that, while such provisions may be considered necessary to prevent people from defrauding the social security system, they may also be regarded as intrusive upon personal privacy.

TFN's are collected from claimants and recipients and their partners for use in the data-matching program authorised by the Data-matching Program (Assistance and Tax) Act 1990. The policy allowing the collection of TFNs has already been sanctioned by Parliament for family allowance and is now simply being transferred into the new family payment. The new TFN provisions for family payment mirror those already contained in the Act in relation to family allowance.

In income testing family payment and additional family payment, a person's income, and his or her partner's income, is taken into account to determine the rate of payment. The Government decided some time ago to introduce a data-matching program in which the income information that people disclose to agencies such as the Department of Social Security, is to be checked automatically against the income information disclosed to the Australian Taxation Office (ATO) and other paying agencies. For this to be done efficiently and to prevent people defrauding the social security system, both partners' TFNs may be required.

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It should also be noted that these provisions, while requiring people to provide a TFN, also allow the Department to assist in that task. Some people, for example, may have difficulty in obtaining a TFN because of proof of identity requirements. The TFN provisions allow the Department to act as agents for the ATO by accepting applications for TFNs on behalf of the ATO and conducting the necessary proof of identity checks. Since the Department conducts its own proof of identity checks, any inconvenience for clients is minimised and there is no increase in intrusiveness from a practical point of view. Indeed, disabled people, people with language difficulties and new entrants to the workforce such a school leavers should all find benefit in the Department's involvement in the TFN application process.

Yours sincerely

David Simmons

DAVID SIMMONS

RECEIVED
5 MAY 1992
Senate Standing Committee for the Scrutiny of Bills

COMMONWEALTH OF AUSTRALIA

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

4 MAY 1992

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

Dear Barney

In Scrutiny of Bills Alert Digest No 5 of 1992 (29 April 1992) your Committee commented on the Social Security Legislation Amendment Bill (the Bill) 1992 and invited my comments. I am happy to provide these, adopting the same headings and order of treatment as appears in the Digest.

Retrospectivity : Subclauses 2(3) to (10)

The Department has for many years operated on the basis that people could consent to withholdings being made from their payments to repay a social security debt owed by another person.

This was common in cases where a married couple claimed an invalid pension/disability support pension (for the man) and a wife pension (for the woman). Pending confirmation of the man's medical condition, sickness benefit/allowance was paid so that the couple were receiving an income support payment meantime.

This benefit/allowance was paid at the combined married rate, ie the man received twice the married rate of benefit. This was, and still is, the usual way to pay benefit/allowance.

When the medical issue is resolved and the pensions are granted, the law provides for the pensions to be paid from the date of the original claims. The benefit/allowance paid until then becomes an overpayment under the law. This is necessary to prevent dual payments for the same period.

However, in practice, the arrears of the pensions will cover the overpayment, usually exactly.

A technical problem which was identified in 1991 is that the arrears of wife pension are not available to offset the man's debt. Her pension entitlement is inalienable, even with her consent.

From the clients' point of view, there was no difficulty in these arrangements before the legal problem was identified in 1991. These arrangements have a high level of acceptance from clients. Couples in this situation want overpayments cleared as smoothly as possible. The Department has therefore continued the practice of taking the arrears of wife pension to complete the repayment of the debt, and the legislation proposes to validate the current arrangement, both prospectively and retrospectively.

Other cases like this may occur where a sole parent continues to be paid a sole parent pension after forming a marital relationship. The payment is an overpayment. The partner is often receiving a job search or newstart allowance at the single rate.

It is common for the couple to ask for the woman's debt to be reduced by the arrears of the upward adjustment in the man's allowance to the combined married rate. That is reasonable and a sensible arrangement. The consent provisions would enable that to be done.

Because there is a requirement that people actually consent to this form of debt recovery (which means a voluntary and informed consent), there is not seen to be any difficulty about validating these cases retrospectively.

Privilege against self-incrimination : Clause 115

The Department does not generally advise people who are asked to give information that they have the right to decline to answer a question or to provide information on the grounds that it may incriminate them. The reasons for this are straight-forward.

The Department issues many millions of standard pre-printed forms to clients every year, seeking notification of changes in circumstances and reviewing entitlement. The situation of clients providing self-incriminating information might be thought to have the potential to arise in review forms, but in fact the Department's review forms do not seek self-incriminatory information.

The Department could include in its forms advice that clients need not respond to self-incriminatory questions. However, there is a real risk that this would cause concern to large numbers of clients about answering standard questions which are not self-incriminatory in any way. That would be quite unwarranted and is unnecessary.

When the Department is considering prosecution action, it attempts to interview the client personally. This is done to ensure that the client is correctly identified (eg that the Department is not mistaken and should not be looking at another client with the same name) and so that the client has the opportunity of explaining the situation if he or she wishes to do so. The client is always given the standard formal caution. A client's rights to decline to provide information and to decline to be interviewed are explained.

As a general principle, the Department would not use self-incriminatory information provided without the caution during an interview or which could be regarded as having been unfairly, unreasonably or improperly obtained. The Director of Public Prosecutions scrutinises the information the Department submits for prosecution purposes and would also reject information obtained in that way.

Finally, the court would reject evidence offered which was obtained by unfair or improper means.

Concerns raised by Privacy Commissioner : Schedule 2 - proposed new subsection 10(2), (3), (3A), (3B), 11(1) and (2) of the Data-Matching Program (Assistance and Tax) Act 1990

I do not agree with the Privacy Commissioner that the proposed new version of subsection 10(2) "is so broadly expressed that an inadequate level of screening could occur" nor that "the amendment would... allow agencies routinely to defer any {screening} action being taken at all." I note that the Committee does not necessarily accept the Privacy Commissioner's interpretation of the amendment. I concur with the Committee that there is under the amendment to be an application of sampling procedures within the 90 days period. It should also be noted that an addition to subsection 10(5) for which the Bill provides involves the Privacy Commissioner in the process of arriving at acceptable sampling procedures.

The new form of subsection 10(3) is, as the Privacy Commissioner and your Committee comment, largely a tidying up of the old subsection. The only new element is to allow a Deputy Commissioner of Taxation, as well as the Commissioner of Taxation, the power to grant an extension of time for taking action under subsection 10(1). This change was requested by the Treasurer for the following reasons:

- a Deputy Commissioner is an extremely senior officer in the Australian Taxation Office structure; and
- the devolved structure and devolution of authority in the Australian Taxation Office add further to the authority of a Deputy Commissioner.

In essence the Treasurer's view is that a Deputy Commissioner's power and responsibility are so great that no purpose is served in differentiating between them in this context.

The Privacy Commissioner also criticises the amendments because they do not explicitly require a source agency to notify an affected person of an intention to correct the personal identity data it holds on that person. The Privacy Commissioner was represented at discussions on these amendments with the agencies involved in the data-matching program. It was common ground that a provision of the type suggested by the Commissioner would be acceptable. What could not be agreed, however, was a formulation distinguishing between trivial and non-trivial amendments. It was therefore agreed that one solution to the problem would be to leave the question open in the legislation and allow the Privacy Commissioner to cover the matter in his guidelines which have the force of law under section 12 of the

Data-matching Program (Assistance and Tax) Act 1990 and which appear in the Schedule to that Act.

I fail to see how this trespasses on rights as there is nothing in the Act to constrain the enactment or content of such a guideline and it will have the same status once in force as would a section of the Act. It is not necessary to pursue the Privacy Commissioner's proposal to advert in section 11 to the guidelines because section 12 already provides plenary powers for the Privacy Commissioner in that regard.

I would be happy to provide further information if you need it.

Yours sincerely

NEAL BLEWETT

COMMONWEALTH OF AUSTRALIA

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

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

Dear Senator Barney Cooney

In Scrutiny of Bills Alert Digest No.6 of 1992 (6 May 1992), your Committee raised concerns on one item in the *Social Security Legislation Amendment Bill 1992* and invited my response.

The item in question is a proposed amendment to section 1208 of the Social Security Act 1991 ('the Act') intended to give legislative force to the Social Security Agreement with Austria.

Legislation in the Autumn Sittings is necessary to enable the Agreement's implementation later this year. Owing to delays in Austria in meeting its constitutional requirements, the Agreement was not signed by the deadline for inclusion in this Amendment Bill.

The Agreement was signed on 1 April 1992.

Debate on the Bill has been delayed longer than I expected. It is therefore now possible to introduce an amendment to the Bill to provide for scheduling of the Agreement in the normal way. I would prefer to introduce the amendment during Senate debate because of the expected House of Representatives timetable.

Thank you for the Committee's constructive comment.

Yours sincerely

NEAL BLEWETT

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF

1992

17 JUNE 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator J Powell
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 1992

The Committee has the honour to present its Eighth Report of 1992 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 24:

Coal Mining Industry (Long Service Leave Funding) Bill 1992

Coal Mining Industry (Long Service Leave) Payroll Levy Bill 1992

Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill 1992

Customs Tariff Amendment Bill 1992

Pooled Development Funds Bill 1992

Primary Industries and Energy Legislation Amendment Bill (No. 2) 1992

Social Security Legislation Amendment Bill 1992

Taxation Laws Amendment Bill (No. 3) 1992

Taxation Laws Amendment (Self Assessment) Bill 1992

Telecommunications (Public Mobile Licence Charge) Bill 1992

Veterans' Affairs Legislation Amendment Bill 1992

COAL MINING INDUSTRY (LONG SERVICE LEAVE FUNDING) BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister Representing the Minister for Industrial Relations.

The Bill was introduced in conjunction with:

- the Coal Mining Industry (Long Service Leave) Payroll Levy Bill 1992
- the Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill 1992
- the States Grants (Coal Mining Industry Long Service Leave) Amendment Bill 1992

These Bills propose to give effect to the Government's proposal to reform the funding of long service leave in the black coal mining industries of New South Wales, Queensland, Western Australia and Tasmania. The proposals were developed in response to the report of the Willett Inquiry, entitled 'Review of Funding Arrangements: Coal Mining Industry Long Service Leave', which was commissioned by the Minister for Industrial Relations in August 1990.

On the basis of these Bills, the Government aims to establish a compulsory, national industry scheme, to fully fund, on an accrual basis, the long service leave entitlements of persons employed in the black coal mining industry by participating producers. In particular, this Bill establishes the framework for the new scheme.

The Committee dealt with the Bill in Alert Digest No. 6 of 1992, in which it made various comments. The Minister for Industrial Relations responded to those

comments in a letter dated 28 May 1992. A copy of that letter is attached to this report. In the letter, the Minister makes the following comments by way of putting his detailed response in context:

> First, the scheme is, as I have already observed, to be run along commercial lines. Apart from providing a legislative framework and for sufficient Ministerial involvement to safeguard the overall integrity of the scheme, the proposed arrangements are broadly the machinery for a joint industry scheme run by and for members of the industry. Accordingly, the degree of government involvement has, in line with the preferences of employer and union representatives, been kept to a minimum.
>
> Secondly, consultation with the industry has been extensive. Both employer representatives and union officials and their respective legal advisers have had the opportunity of commenting n the legislation as it has been developed. I am advised that the industry generally accepts the legislative package and, moreover, has not raised concerns n relation to any of the specific matters referred to by the Committee in its Alert Digest.
>
> Thirdly, I wish to refer to the Committee's concerns regarding the possible infringement of individual rights by some of the policing powers contained in the legislation. I developing the legislation both the Commonwealth and the industry have sought to ensure that the scheme operates efficiently and the integrity of the Fund is protected. To further these objectives, the legislation has been drafted so as to make it possible for the Australian Taxation Office (ATO) to collect levy monies payable under the legislation. As noted in the Explanatory Memorandums, the supervisory powers conferred on the ATO are modelled on those contained in the existing legislation (for instance sections 263 and 264 of the Income Tax Assessment Act 1936 which refer to powers of access to premises and books and to obtain information). The obligations imposed by the legislation on officers of companies participating in the scheme are, in my view, fair. No specialist legal knowledge is assumed although ready access to legal advice might not be

uncommon in organisations participating in the scheme. The obligations imposed are to be commensurate with what I believe to be their usual responsibilities as senior executives.

Relevant parts of the Minister's more specific response are discussed below.

Inappropriate delegation of legislative power
Subclause 4(1)

In Alert Digest No. 6, the Committee noted that subclause 4(1) of the Bill sets out various definitions which are relevant to the Bill. It defines 'eligible employee' as:

(a) a person employed in the black coal mining industry under a relevant industrial instrument the duties of whose employment are carried out at or about a place where black coal is mined; or
(b) a person employed by a company that mines black coal the duties of whose employment (wherever they are carried out) are directly connected with the day to day operation of a black coal mine; or
(c) a person permanently employed on a full-time basis in connection with a mines rescue service for the purposes of the black coal mining industry the duties of whose employment require him or her to be located at a mines rescue station; or
(d) any prescribed person who is, or is any person who is included in a prescribed class of persons who are, employed in the black coal mining industry;

but does not include:

(e) a person the duties of whose employment are performed in South Australia; or
(f) a person who is, or a person who is included in a class of person who are, declared by the regulations not to be an eligible employee or eligible employees for the purposes of this Act.

The Committee noted that, by way of explanation, the Explanatory Memorandum states:

> This provision allows coverage of the scheme to be varied, without the need for further legislation, to take account of changed circumstances including revised work practices and job classifications. The Minister's powers in relation to the scope of the Act are to be exercised on the advice of the Board.

The Committee suggested that paragraphs (d) and (f) may be considered to be an inappropriate delegation of legislative power, as they would allow the Governor-General (acting on the advice of the Federal Executive Council) to issue regulations which would have the effect of amending the definition of 'eligible persons', by either reducing or enlarging the range of persons covered. The Committee stated that, as the definition appears to be central to the Bill, this may be considered to be a matter which is more appropriately dealt with by amendment to the primary legislation.

In making this comment, the Committee noted the extract from the Explanatory Memorandum quoted above but sought from the Minister examples of the kinds of 'changed circumstances' with which the clause is intended to deal.

The Committee drew Senators' attention to the subclause, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> First, by way of general background, I note the inclusion or exclusion of an employee does not affect any obligation which the employer has to that individual; its implication

is for the calculation of levy and reimbursement for the purposes of the scheme. There may be some employees who belong to a particular class of staff (eg managers) whose long service entitlements are separately provided for.

The paragraphs in question supplement the provisions in paragraphs (a),(b) and (c) which are intended to deal with all but a handful of workers, present and future, engaged in the black coal mining industry in the relevant States. Paragraphs (d) and (f) provide for the coverage, or the cessation of coverage, of a handful of persons performing disparate tasks now entitled to, or who may at some future date become entitled, to long service leave pursuant to a relevant industrial instrument and who may not come within any of the identifiable classes specified in the principal provisions.

The Minister goes on to say:

Whilst it is not possible to identify in advance what the precise changes in work practices and work arrangements may be over the projected life of the scheme, the likely sources of such changes may be identified. Principally they are technological change and award restructuring. other changes may stem from restructuring of a company's operations.

Such changes, as well as becoming more common, have been sources of industrial friction and it is therefore necessary to provide a mechanism for dealing with them expeditiously. It is not practical or desirable to go through the lengthy process of amending the Principal Act on each occasion a change of this sort, which may be relatively minor, occurs in the industry. The proposed arrangements are therefore designated to ensure flexibility. At the same time they contain the necessary safeguards to protect the interests of the individuals affected and retaining Parliamentary supervision over the Executive's actions, as the regulations are, of course, disallowable.

The Minister concludes by saying:

> I also point out that the flexibility of the definition was actively pursued by industry groups.

The Committee thanks the Minister for this response.

Delegation of power to 'a person'
Subclause 8(2)

In Alert Digest No. 6, the Committee noted that clause 8 of the Bill sets out the powers of the Coal Mining Industry (Long Service Leave Funding) Corporation which is to be established by the Bill. It provides, in part:

> (1) The Corporation has power to do all things that are necessary or convenient to be done for, or in connection with, the performance of its functions and, in particular, may:
>
> (a) acquire, hold and dispose of real or personal property; and
> (b) enter into contracts; and
> (c) occupy, use and control any land or building owned or leased by the Commonwealth and made available for the purposes of the Corporation; and
> (d) appoint agents and attorneys; and
> (e) do anything incidental to any of its powers.
>
> (2) The power of the Corporation to enter into contracts includes the power to enter into a contract with a person under which that person will administer the [Coal Mining Industry (Long Service Leave)] Fund on behalf of the Board.

The Committee noted that subclause 8(2), if enacted, would allow the Corporation to contract out the administration of the Coal Mining Industry (Long Service Leave) Fund. The Committee suggested that the administration of the Fund would appear to be central to the responsibilities of the Corporation and that, as a result, the proper management of the Fund would appear to be essential in terms of the welfare of the workers whose long service leave entitlements are to be drawn from it. The Committee suggested that, in these circumstances, it may be inappropriate that the Corporation be able, pursuant to subclause 8(2), to enter into a contract with 'a person', with no limit as to the qualification of the person to whom the power can be contracted, under which that person administers the Fund on behalf of the Corporation.

The Committee drew Senators' attention to the provision as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

The Minister has responded as follows:

> I point out that the relevant employer's obligations and worker's entitlements do not stem from the existence of the scheme but from the relevant industrial agreements and individual contracts of employment. The scheme operates on a reimbursement basis with employers able to claim on the Fund for long service leave payments made to eligible employees. The actual entitlement to long service leave is thus not dependent on the state of the Fund. There is, therefore, no connection between "administrative powers" and the rights, liberties or obligations of the employees.
>
> The legislation contains numerous safeguards designed to ensure appropriate protection of the Fund's administration. These include the following:

- the membership of the Board comprises representatives of the industry including employee representatives who are charged with the administration of the Fund;

- subclause 42(1) provides that the Minister may set out principles to be followed in respect of investment of the Fund;

- subclause 42(2) provides that as soon as practicable after the commencement of the scheme, the Board must prepare a plan for investment of the Fund which must be submitted to the Minister;

- clause 39 provides that transactions and affairs relating to the Fund are subject to the relevant provisions of the Audit Act 1091; and

- clause 43 imposes a range of obligations on the Board in respect of the sufficiency of the Fund, reporting requirements and the seeking of actuarial advice.

The Minister concludes by saying:

> Notwithstanding the points noted above, I appreciate the Committee's concerns and I note that it is proposed to ensure by way of regulation that the "person" contracted to administer the Fund has suitable qualifications.

The Committee thanks the Minister for this response and for agreeing to address the Committee's concerns in the regulation.

COAL MINING INDUSTRY (LONG SERVICE LEAVE) PAYROLL LEVY BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister Representing the Minister for Industrial Relations.

The Bill, which is part of a package of Bills, proposes to give effect to the Government's proposal to reform the funding of long service leave in the black coal mining industries of New South Wales, Queensland, Western Australia and Tasmania. The proposals were developed in response to the report of the Willett Inquiry, entitled 'Review of Funding Arrangements: Coal Mining Industry Long Service Leave', which was commissioned by the Minister for Industrial Relations in August 1990.

The Bills propose to implement the Government's aim to establish a compulsory, national industry scheme, to fully fund, on an accrual basis, the long service leave entitlements of persons employed in the black coal mining industry by participating producers. In particular, this Bill proposes to impose a levy upon the wages paid to certain employees in the black coal mining industry.

The Committee dealt with the Bill in Alert Digest No. 6 of 1992, in which it made various comments. The Minister for Industrial Relations responded to those comments in a letter dated 28 May 1992. A copy of that letter is attached to this report. In the letter, the Minister makes the following comments by way of putting his detailed response in context:

> First, the scheme is, as I have already observed, to be run along commercial lines. Apart from providing a legislative

framework and for sufficient Ministerial involvement to safeguard the overall integrity of the scheme, the proposed arrangements are broadly the machinery for a joint industry scheme run by and for members of the industry. Accordingly, the degree of government involvement has, in line with the preferences of employer and union representatives, been kept to a minimum.

Secondly, consultation with the industry has been extensive. Both employer representatives and union officials and their respective legal advisers have had the opportunity of commenting n the legislation as it has been developed. I am advised that the industry generally accepts the legislative package and, moreover, has not raised concerns in relation to any of the specific matters referred to by the Committee in its Alert Digest.

Thirdly, I wish to refer to the Committee's concerns regarding the possible infringement of individual rights by some of the policing powers contained in the legislation. I developing the legislation both the Commonwealth and the industry have sought to ensure that the scheme operates efficiently and the integrity of the Fund is protected. To further these objectives, the legislation has been drafted so as to make it possible for the Australian Taxation Office (ATO) to collect levy monies payable under the legislation. As noted in the Explanatory Memorandums, the supervisory powers conferred on the ATO are modelled on those contained in the existing legislation (for instance sections 263 and 264 of the Income Tax Assessment Act 1936 which refer to powers of access to premises and books and to obtain information). The obligations imposed by the legislation on officers of companies participating in the scheme are, in my view, fair. No specialist legal knowledge is assumed although ready access to legal advice might not be uncommon in organisations participating in the scheme. The obligations imposed are to be commensurate with what I believe to be their usual responsibilities as senior executives.

Relevant parts of the Minister's more specific response are discussed below.

Setting of rate of levy by regulation
Clause 5

In Alert Digest No. 6, the Committee noted that clause 5 of the Bill provides:

> The rate of levy is the prescribed percentage of the eligible wages paid.

Clause 8 provides:

> (1) The Governor-General may make regulations prescribing a percentage for the purposes of section 5.
>
> (2) Before making a regulation under subsection (1), the Governor-General is to take into consideration any advice given to the Minister by the Corporation under the Funding Act.

The Committee noted that there is no limit as to the rate of levy which could be applied by the regulations.

The Committee noted that it has consistently drawn attention to such provisions, on the basis that they leave open the possibility of something being imposed as a 'levy' which, in fact, could amount to a tax. Generally, the Committee prefers in these circumstances, that the maximum rate of levy (or a means of calculating the maximum rate) be set out in the primary legislation.

In making this comment, the Committee noted that clause 7 of the Bill provides that the purpose of the levy is to fund payments made to eligible employees in respect of long service leave. While this statement of purpose may be regarded as some limitation on the rate of the levy, it did not allay the Committee's concerns.

In the same vein, the Committee noted that, in relation to clause 5 of the Bill, the Explanatory Memorandum states:

> The initial rate of the levy is yet to be determined but is unlikely to exceed 6.5 percent of payroll.

Further, the Committee noted that, in his Second Reading speech on the Coal Mining Industry (Long Service Leave Funding) Bill 1992, the Minister stated:

> It is envisaged that the scheme is to be fully funded over a period of ten years including the unfunded liability for leave accrued prior 1 January 1993. Presently, it is estimated the initial levy will be in the vicinity of 6% of payroll. The actual rate of levy will be precisely determined by an actuarial review conducted under the auspices of the Corporation.

These statements did not allay the Committee's concerns either. The Committee noted that, on the face of the Bill, it remained open to the Governor-General, acting on the advice of the Federal Executive Council and taking into account any advice given to the Minister, by the Corporation, pursuant to paragraph 6(c) of the Coal Mining Industry (Long Service Leave Funding) Bill 1992, to make regulations imposing a rate of 'levy' which amounts to a tax. The Committee suggested that if, as the Minister and the Explanatory Memorandum state, a maximum rate of levy is contemplated, then a maximum rate should preferably be provided for in the primary legislation.

The Committee drew Senators' attention to the clause, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> In developing the legislation, consideration was given to including in it a provision limiting the amount of levy. The idea was rejected for the following reasons:
>
> - existing controls were seen as adequate;
>
> - a statutory limit which allowed for an appropriate level of flexibility to be retained would not provide a meaningful protection from the excessive levels of taxation;
>
> - as net funds raised and earnings of the Fund are to be returned to the industry there is no reason for the Commonwealth to impose an excessive rate of levy:
>
> - a specified maximum rate of levy might be misrepresented or misconstrued as being the actual rate; and
>
> - the actual rate (and therefore any notional maximum rate) cannot be determined until a final decision is made in relation to taxation treatment of earnings of the fund.
>
> To conform with the objects of the legislation, the rate must be set on the basis of actuarial advice provided to the Corporation which is comprised of industry representatives [refer to clause 43 of the Coal Mining Industry (Long Service Leave Funding) Bill]. I cannot envisage a situation in which the industry would seek the imposition of an excessive levy on its own operations nor, for reasons that I have already mentioned, is there any reason for the Commonwealth to seek to impose such a charge. I also note the since the rate of levy will be set by regulation parliamentary scrutiny is maintained as a protection.
>
> The industry, whose scheme this is, has not objected to the approach taken.

The Committee thanks the Minister for this response. While the Committee does not believe that the absence of any objection from the industry in question is, of itself, a determining factor, the Committee notes that this is the case.

COAL MINING INDUSTRY (LONG SERVICE LEAVE) PAYROLL LEVY COLLECTION BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister Representing the Minister for Industrial Relations.

The Bill, which is part of a package of Bills, proposes to give effect to the Government's proposal to reform the funding of long service leave in the black coal mining industries of New South Wales, Queensland, Western Australia and Tasmania. The proposals were developed in response to the report of the Willett Inquiry, entitled 'Review of Funding Arrangements: Coal Mining Industry Long Service Leave', which was commissioned by the Minister for Industrial Relations in August 1990.

Through these Bills, the Government aims to establish a compulsory, national industry scheme, to fully fund, on an accrual basis, the long service leave entitlements of persons employed in the black coal mining industry by participating producers. In particular, this Bill proposes to allow for the collection of the levy which is to be imposed by the Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill 1992.

The Committee dealt with the Bill in Alert Digest No. 6 of 1992, in which it made various comments. The Minister for Industrial Relations responded to those comments in a letter dated 28 May 1992. A copy of that letter is attached to this report. In the letter, the Minister makes the following comments by way of putting his detailed response in context:

> First, the scheme is, as I have already observed, to be run

along commercial lines. Apart from providing a legislative framework and for sufficient Ministerial involvement to safeguard the overall integrity of the scheme, the proposed arrangements are broadly the machinery for a joint industry scheme run by and for members of the industry. Accordingly, the degree of government involvement has, in line with the preferences of employer and union representatives, been kept to a minimum.

Secondly, consultation with the industry has been extensive. Both employer representatives and union officials and their respective legal advisers have had the opportunity of commenting n the legislation as it has been developed. I am advised that the industry generally accepts the legislative package and, moreover, has not raised concerns n relation to any of the specific matters referred to by the Committee in its Alert Digest.

Thirdly, I wish to refer to the Committee's concerns regarding the possible infringement of individual rights by some of the policing powers contained in the legislation. I developing the legislation both the Commonwealth and the industry have sought to ensure that the scheme operates efficiently and the integrity of the Fund is protected. To further these objectives, the legislation has been drafted so as to make it possible for the Australian Taxation Office (ATO) to collect levy monies payable under the legislation. As noted in the Explanatory Memorandums, the supervisory powers conferred on the ATO are modelled on those contained in the existing legislation (for instance sections 263 and 264 of the Income Tax Assessment Act 1936 which refer to powers of access to premises and books and to obtain information). The obligations imposed by the legislation on officers of companies participating in the scheme are, in my view, fair. No specialist legal knowledge is assumed although ready access to legal advice might not be uncommon in organisations participating in the scheme. The obligations imposed are to be commensurate with what I believe to be their usual responsibilities as senior executives.

Relevant parts of the Minister's more specific response are discussed below.

Strict liability offences / reversal of the onus of proof
Subclauses 5(1) and (3), clause 10

In Alert Digest No. 6, the Committee noted that subclause 5(1) of the Bill provides:

> A person who employs eligible employees at any time during a month that ends after the commencement of this Act must, within 28 days after the end of that month, make a return of the eligible wages paid by the person to those employees during that month.
> Penalty: $1,000.

Subclause 5(3) provides:

> It is a defence to a prosecution for failure to comply with subsection (1) if the defendant establishes that there was a reasonable excuse for the failure.

The Committee noted that, similarly, clause 10 of the Bill provides, in part:

> (1) If a company, at any time during a financial year of the company, employed eligible employees, the auditor of the company appointed under the Corporations Law must give to the Corporation, not later than 6 months after the end of that year, a certificate stating whether, in the opinion of the auditor, the company has paid all amounts of levy, or amounts of additional levy under section 7, that the company was required to pay in respect of that year.
> Penalty: $1,000.
>
> (2) The Board may give to the auditor of a company that employed eligible employees at any time during a particular period a written notice requiring the auditor to give to the Corporation, not later than 28 days after receiving the notice, a certificate stating whether in the opinion of the auditor, the company has paid all amounts of levy, or amounts of additional levy under

section 7, that the company was required to pay in respect of the first-mentioned period, and, if such a notice is given, the auditor must comply with the notice.
Penalty: $1,000.

(3) If the auditor of a company gives a certificate under subsection (1) or (2) stating that, in the opinion of the auditor, the company has not paid all the amounts of levy, or the amounts of additional levy under section 7, that the company was required to pay in respect of a financial year or other period, the auditor must also state in the certificate in what respect and to what extent, in the auditor's opinion, the company has not paid those amounts.
Penalty: $1,000.

. . .

(6) It is a defence to a prosecution for failure to comply with a provision of this section if the defendant establishes that there was a reasonable excuse for the failure.

The Committee suggested that the offences created by subclauses 5(1) and 10(1), (2) and (3) may be regarded as strict liability offences, as they provide that, if a certain fact exists or a certain event occurs, then an offence has been committed. No further proof on the part of the prosecution would be required, beyond the fact or event alleged.

However, subclauses 5(3) and 10(6), respectively, provide a defence in relation to such an offence, **if the person charged** establishes that there was a reasonable excuse for the failure.

The Committee indicated that it accepted that, as a matter of policy, there are matters which are appropriately dealt with by imposing strict liability and then providing a defence of 'reasonable cause' for failure to meet the obligations

imposed. However, in scrutinising such provisions, the Committee looks to whether the mechanism is appropriate, taking into account all the circumstances of the proposed offence. The Committee also noted that it is mindful of the extent to which such provisions (and their increasing use) create a precedent.

In making these comments, the Committee noted that the provision in question is different to similar criminal offences, which include the lack of reasonable excuse as an element of the offence (ie by stating that it is an offence for a person without reasonable excuse to not do a particular thing - see, for example, subclause 13(8) of this Bill). The Committee suggested that this places the onus of proving that the person charged did not have a reasonable excuse on the prosecution. The Committee indicated that it would appreciate the Minister's advice as to why the offence has been cast differently in this case.

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

The Minister has responded as follows:

> The primary provisions of clauses 5 and 10 place obligations on a person to do an act (ie make a return, comply with a notice, etc). It was considered inappropriate to express a provision in the form "A person must make a return unless the person has a reasonable excuse for not doing so". This would have diluted the emphasis of the positive obligation imposed by the clause. It was therefore considered preferable to express the exception to the obligation (ie, the existence of a reasonable excuse) as a matter of defence if the person is prosecuted for contravening this section.
>
> The onus of proof in subclauses 5(3) and 10(6) is precisely the same as the onus of proof in clause 13(8)

> which provides that a person is not to fail to comply with a notice without reasonable excuse. each formulation places the onus on the defendant of establishing the there was a reasonable excuse. This is appropriate, since whether such an excuse exists is peculiarly within the knowledge of the defendant. It would be impracticable to require the prosecution to negative all possible grounds of excuse.

The Minister goes on to say:

> The Committee is mistaken in stating that the effect of subclause 13(8) is to place on the prosecution the onus of proving that the person charged did not have a reasonable excuse. Section 14 of the Crimes Act makes it clear that the onus in such a case lies on the defendant.

The Committee notes that section 14 of the *Crimes Act 1914* provides:

> **Proof of exceptions etc.**
>
> 14. Where any person is charged, before a court of summary jurisdiction, with an offence against the law of the Commonwealth, any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the section of the law creating the offence, may be proved by the person charged, but need not be specified or negatived in the information, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant.

The Committee thanks the Minister for this response and notes the effect of section 14 of the Crimes Act in this context.

Delegation of power to 'a person'
Subclause 11(2)

In Alert Digest No. 6, the Committee noted that clause 11 of the Bill sets out the functions of the Coal Mining Industry (Long Service Leave Funding) Corporation, which is to be established by the Coal Mining Industry (Long Service Leave Funding) Bill 1992. The Committee noted that subclause 11(1) provides:

> The Corporation has the following functions on behalf of the Commonwealth under this Act:
>
> (a) to receive returns made, or financial statements or certificates given, under this Act; and
> (b) to receive payments of levy made under this Act; and
> (c) to receive payments of additional levy made under section 7; and
> (d) to sue for and recover amounts of levy and amounts of additional levy that have not been paid.

Subclause 11(2) provides:

> The Corporation may, on behalf of the Commonwealth, enter into an agreement with a person authorising that person to perform on behalf of the Commonwealth any one or more of the functions referred to in subsection (1).

The Committee noted that there is no limit as to the 'persons' to whom the Corporation could delegate, pursuant to subclause (2), the important functions set out in subclause (c). The Committee has consistently drawn attention to such unlimited powers of delegation, on the basis that there should be some limit as to

the types of persons to whom the power can be delegated or as to the qualifications or attributes which such persons should have.

The Committee drew Senators' attention to the subclause, as it may be considered to insufficiently exercise the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

The Minister has responded as follows:

> The Committee comments that the provision places no limit on the class of "persons" to whom the Corporation may delegate its powers to collect levies. I note, however, the subclause 9(4) of the Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill allows the Minister to give directions as to how amounts paid to either the corporation of another person re to be dealt with prior to being paid into the consolidated Revenue Fund. This, in conjunction with any duties of care or fiduciary duties, is designed to ensure the integrity and security of the Fund.

The Minister goes on to say:

> Subclause 12(1) provides that persons other than officers of the Australian Taxation Office and Commonwealth Officers who have a written authorisation from the Commissioner of taxation cannot exercise any of the powers of entry and investigation given exclusively to the ATO under the Bill. This provision effectively limits the delegation of relevant Commonwealth powers to officers of the ATO and authorised Commonwealth Officers.
>
> Moreover, Clause 11 of the Coal Mining Industry (Long Service Leave Funding) Bill provides that the Board must prepare guidelines for the management of the affairs of the Corporation.

The Minister goes on to say:

> In the unlikely event of the contract for the collection of the levy not going to the Australian Taxation Office, collection of levy monies would have to occur within such guidelines and without the use of ATO powers.

The Committee thanks the Minister for this response.

Vesting of powers of entry and investigation in 'an officer of the Commonwealth' Subclauses 12(2) and 13(2)

In Alert Digest No. 6, the Committee noted that clause 12 of the Bill provides:

> (1) This section applies if the Corporation enters into an agreement under subsection 11(2) authorising the Commissioner of Taxation to perform a function referred to in subsection 11(1).
>
> (2) An officer of the Commonwealth authorised in writing by the Commissioner of Taxation to exercise powers under this section is entitled at all reasonable times to full and free access to all premises and books for the purpose of performing the function, and for that purpose may make copies of, or take extracts from, any such book.
>
> (3) An officer is not entitled to enter or remain in or on any premises under this section if, on being requested by the occupier of the premises for proof of authority, the officer does not produce his or her authority under subsection (2).
>
> (4) The occupier of any premises entered or proposed to be entered by an officer under subsection (2) must provide the officer with all reasonable facilities and

assistance for the effective exercise of powers under this section.
Penalty: $3,000.

The Committee noted that clause 13 provides, in part:

(1) This section applies if the Corporation enters into an agreement under subsection 11(2) authorising the Commissioner of Taxation to perform a function referred to in subsection 11(1).

(2) The Commissioner of Taxation, or an officer of the Commonwealth authorised in writing by the Commissioner of Taxation to exercise powers under this section, by written notice given to a person, including a person employed by or in connection with a Department, or an authority, of the Commonwealth, of a State or of a Territory, may require the person:

(a) to give to the Commissioner of Taxation or officer such information as the Commissioner of Taxation or officer requires for the purpose of the performance of the function; and

(b) to attend before the Commissioner of Taxation or officer and:
(i) give evidence; and
(ii) produce all books in the possession of the person;
relating to any matters connected with the performance of the function.

(3) The Commissioner of Taxation or authorised officer may require the information or evidence to be given on oath, and either orally or in writing, and for that purpose may administer an oath.

...

(8) A person must not, without reasonable excuse, fail to comply with a notice under subsection (2).
Penalty: $3,000.

...

The Committee observed that clauses 12 and 13, if enacted, would allow for the vesting of significant powers of entry and investigation in 'an officer of the Commonwealth'. The Committee noted that this term is not defined, either in the Bill or in the *Acts Interpretation Act 1901*. The Committee suggested that while, on its face, the meaning of this term might be regarded as being well-known, it may be preferable for the power to be delegated only to an officer of the Corporation or of the Australian Taxation Officer or of any other relevant agencies.

Further, the Committee noted that the effect of subclause 13(2), if enacted, would be to allow the Commissioner of Taxation or 'an officer of the Commonwealth', to require certain persons to provide information or documents. The Committee noted that, pursuant to subclause 13(2), the Commissioner or officer could require the information or documents to be provided under oath and that the Commissioner or officer would be empowered to administer such an oath, if it was required.

The Committee also noted the, pursuant to subclause 13(8), a person must not 'without reasonable excuse' fail to comply with a notice to provide information of documents under subclause 13(2). Failure to comply carries a penalty of $3,000. The Committee presumed that a 'reasonable' excuse would be that the information or documents might tend to incriminate the person providing it. This excuse relies on the common law privilege against self-incrimination. However, the Committee noted that a person required to give evidence or produce documents pursuant to such an order may not be aware of their rights in this regard. The Committee, therefore, sought the Minister's advice as to whether or not there is any provision for a person who is questioned under the circumstances contemplated by clause 13 to be apprised of their rights in this regard.

The Committee drew attention to the clauses, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> The powers of entry and investigation in question may, of course, only be delegated to an officer of the Commonwealth on the written authority of the Commissioner of Taxation. This is only likely to occur where the ATO does not have staff located in immediate proximity of the point of collection. Otherwise the ATO will use its own officers to collect the levy monies.
>
> Given the industry-based membership of the Corporation, I do not consider it appropriate that its officers be given the powers of entry and investigation in question.

The Minister goes on to say:

> The Committee has sought advice as to whether there is any provision for a person who is questioned under the circumstances contemplated by clause 13 to be apprised of their rights in relation to the production of documents and the giving of evidence.
>
> The provisions in question are modelled on similar powers in the Income Tax Assessment Act. I am advised that it is the usual practice of the ATO to administer an appropriate caution against self-incrimination in cases where prosecution for an offence is possible. This practice will be followed in relation to the exercise of powers under this Bill.

The Committee thanks the Minister for this response and notes his advice regarding the administration of cautions.

CUSTOMS TARIFF AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 6 May 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to enact various changes to the *Customs Tariff Act 1987.* Many of the amendments have already been introduced as customs tariff proposals. The purpose of the amendments is to:

- subtract the customs duty component from the New Zealand rate of duty for tobacco products;
- allow for motor vehicle component manufacturers to use directly import credits which they earn under the motor vehicle export facilitation scheme;
- allow certain capital equipment which is technologically more advanced, more efficient or more productive than equipment available from Australian manufacturers to be imported free;
- allow certain materials to be imported duty free for specific end-uses, in order to assist the competitiveness of certain Australian industries;
- change the concessional tariff treatment accorded to goods from Yugoslavia and its Republics;
- amend the definition of off-road and passenger motor vehicles;
- insert new quote tender and tender extension duty rates for textile, clothing and footwear;
- clarify the clearance levels applicable to off-road vehicles;
- reduce the duty on cold-rolled, and clad, plated or coated flat-rolled steel products;

- impose a $12,000 per vehicle duty on imported used or second-hand cars;
- provide a new tariff structure for short stack bicycles;
- clarify the customs co-operation council in relation to the classification of certain goods; and
- provide for a number of technical and administrative changes.

The Committee dealt with the Bill in Alert Digest No. 7 of 1992, in which it made various comments. The Minister for Small Business, Construction and Customs responded to those comments in a letter dated 3 June 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Subclauses 2(12) and (13)

In Alert Digest No. 7, the Committee noted that subclauses 2(12) and (13) of the Bill, if enacted, would allow clauses 3 and 15 of the Bill, respectively to commence either on Proclamation or 12 months after the Bill receives the Royal Assent, whichever occurs first. The Committee noted that, while the Proclamation period is closed, the period specified is in excess of the 6 months 'general rule' provided for in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

The Committee noted that, by way of explanation for the clauses, the Explanatory Memorandum states that the amendments to be made by clauses 3 and 15 are consequential on the amendments to be made to the *Customs Act 1901* by the Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992. The Committee noted that, pursuant to subclause 2(2) of that Bill, the amendments in question would commence not later than 6 months from that Bill receiving the Royal Assent.

The Committee indicated that, in the circumstances, it did not understand why the 12 month period within which commencement must take place is specified in the Bill, rather than some lesser period, (ie a period closer to 6 months). The Committee, therefore, sought the Minister's advice as to why this is the case.

The Minister has responded as follows:

> The relevant clauses in the Customs Tariff Amendment Bill 1992 are consequential upon amendments contained in the Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992 as noted at page 13 of your Alert Digest. Although both Bills were granted essential for passage status this Sittings, the former Bill is accorded a higher priority in terms of Parliamentary debating time because of the requirements to incorporate certain previously notified customs tariff rate alterations in an Act of Parliament within the period specified in sections 226 and 273EA of the Customs Act 1901, that is, 12 months from tabling of the proposal. I am advised the Tariff Bill is currently scheduled for Senate debate on 16 June 1992, whereas the Tariff Concessions and anti-dumping package is only programmed for Senate debate on 24 June 1992.

The Minister goes on to say:

> Since the relevant clauses in the Customs Tariff Amendment Bill 1992 are consequential upon passage of the Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992 however, it was considered prudent to allow for the possibility that the latter Bill may not complete its passage through the Senate before the Autumns Sittings conclude. If that circumstance eventuated, the latter Bill wouldn't commence until some time after the standard 6 month from Royal Assent period, thereby nullifying any consequential amendments contained in the Customs Tariff Amendment Bill 1992. Furthermore, since the

> Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992 contains amendments relating to more than one subject matter and the relevant clauses of the Customs Tariff Amendment Bill 1992 relate to one only of those subjects (being the creation of a new tariff concessions regime), it was considered inappropriate to relate the commencement of the latter clauses to the commencement of the former Bill as a whole. Therefore, on instruction, the Office of Parliamentary Counsel drafted the 12 month commencement provision.

The Committee thanks the Minister for this detailed and helpful response.

POOLED DEVELOPMENT FUNDS BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Bill proposes to set up a mechanism for channelling patient equity capital into eligible 'small and medium-sized' Australian companies. The benchmark for 'small and medium-size' is to be total assets of no more than $30 million. The mechanism for providing funds involves the creation of concessionally-taxed investment companies, which are to be called 'Pooled Development Funds'.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Minister for Industry, Technology and Commerce responded to those comments in a letter dated 16 june 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Subclauses 3(2), 4(1)

In Alert Digest No. 8, the Committee noted that clause 3 of the Bill sets out the objects of the legislation:

> (1) This Act sets up a scheme under which companies and their shareholders can qualify for certain income tax concessions.
>
> (2) The object is to encourage the provision of patient equity capital to small or medium-sized Australian

companies whose primary activities are not excluded activities.

The Committee observed that, on the face of subclause 3(2), it would appear that the concept of 'excluded activities' is central to the legislation.

The Committee noted that 'excluded activity' is defined in subclause 4(1) of the Bill as follows:

> **"excluded activity"** means a prescribed activity.

The Committee suggested that this meant that 'excluded activities' are those activities prescribed as such by regulations issued under clause 76 of the Bill. The Committee suggested that, if it was the case that the concept of 'excluded activities' is central to the Bill, then it may be inappropriate for the definition of the term to be, in effect, left to the regulations.

The Committee drew Senators' attention to the provisions, as they may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> The purpose of these exclusions is to ensure that the companies that are the target of this legislation are not those engaged in property speculation or retailing.
>
> ...
>
> The reason for prescribing the area of exclusion is the need to be able to amend the area of exclusion in a timely manner. If situations arise once the Program is established that require some finetuning of this regulation

> in the light of experience or which justify a tightening of the excluded activities due to possible abuse, then the regulations can be amended quickly.

The Minister goes on to say:

> The Government has widely publicised the extent of the excluded activities. It was set out in the One Nation Statement, the Explanatory Memorandum and in the Second Reading Speech. It has been noted in all the material relating to the introduction of the PDF Program.
>
> I consider that the use of regulations is an appropriate way of dealing with this type of future event, especially as the Parliamentary scrutiny of regulations is in my view sufficient to ensure that the area of exemption is within both the spirit and the letter of the law.

The Committee thanks the Minister for this response.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 6 May 1992 by the Minister Representing the Minister for Primary Industries and Energy.

The Bill is an omnibus Bill for legislation administered within the Primary Industries and Energy portfolio. It proposes to make a number of amendments to existing legislation. The Bill proposes to amend the following Acts:

- *Australian Meat and Live-stock Corporation Act 1987;*
- *Australian Wool Corporation Act 1991;*
- *Australian Wool Realisation Commission Act 1991;*
- *Primary Industries and Energy Research and Development Act 1987;*
- *Primary Industries Levies and Charges Collection Act 1991;*
- *Snowy Mountains Hydro-electric Power Act 1949.*

The Committee dealt with this Bill in Alert Digest No. 7 of 1992, in which it made a general comment on the need to insert certain definitions into the *Primary Industries Levies and Charges Collection 1991.* The Minister for Primary Industries and Energy responded to that comment in a letter dated 16 June 1992. Though the Committee has not had the opportunity to consider the substance of the Minister's response, a copy of the letter is attached to this Report for the information of Senators. The letter is self-explanatory.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister for Social Security.

The Bill proposes to implement changes in the areas of telephone concessions, Job Search Allowance and Newstart Allowance, social security agreements with other countries, debt recovery, the income and assets test, compensation payments and data-matching. The Bill also provides for a number of minor and technical amendments.

The Committee dealt with the Bill in Alert Digest No. 5 of 1992, in which it made various comments. The Committee made some further comments in Alert Digest No. 6 of 1992. The Minister for Social Security responded to those comments in letters dated 5 May and 29 May 1992 respectively. The Minister's responses were dealt with in the Committee's Seventh report of 1992.

On 4 June 1992, te Privacy Commissioner wrote to the Committee in response to the Minister's response to the Committee's comments. A copy of the Privacy Commissioner's letter is attached to this Report. Relevant parts of the letter are also discussed below.

Concerns raised by Privacy Commissioner
Schedule 2 - proposed new subsection 10(2), (3), (3A), (3B), 11(1) and (2) of the *Data-matching Program (Assistance and Tax) Act 1990*

In Alert Digest No. 5, the Committee drew Senators' attention to various concerns

about the Bill raised by the Privacy Commissioner in a letter to the Committee dated 2 April 1992. The Privacy Commissioner's concerns relate to certain proposed amendments to the *Data-matching Program (Assistance and Tax) Act 1990*, which are contained in Schedule 2 of the Bill. The Committee attached a copy of the Privacy Commissioner's letter to Alert Digest No. 5 for the information of Senators. However, the Committee summarised the Privacy Commissioner's concerns as follows.

The Privacy Commissioner noted that the Schedule proposes to omit subsection 10(2) of the Data-matching Program (Assistance and Tax) Act and replace it with the following new subsection (2):

> Where a source agency receives particular information under Step 1, 4 or 6 of a data matching cycle, the agency must destroy that particular information within 90 days of its receipt unless, within those days:
>
> (a) the agency has considered that particular information and made a decision:
>
> (i) to take action allowed by subsection (1) on the basis of that particular information; or
>
> (ii) to carry out an investigation of the need to take action allowed by subsection (1) on the basis of that particular information; or
>
> (b) the agency has, by using sampling procedures, identified that particular information as information that will form the basis for the agency:
>
> (i) to take action allowed by subsection (1) on the basis of that particular information; or

(ii) to carry out an investigation of the need to take action allowed by subsection (1) on the basis of that particular information.

The Privacy Commissioner stated:

> ... I am concerned that the text of the proposed amendment is so broadly expressed that an inadequate level of screening could occur. I believe that a systematic process of screening results should occur within the 90 day period. The present language of the amendment would appear to allow agencies routinely to defer any action of this kind being taken at all. This could lead to a situation where large numbers of untested matching results - results which bring together data given confidentially in different settings to government agencies - could remain in circulation for very long periods of time. I regard that as a situation which should be avoided.

The Privacy Commissioner went on to say:

> If agencies feel that bulk deferral of results may sometimes be unavoidable, and wish to put the legal authority for this beyond doubt, I would prefer to have an approach which allowed an extension for say a further 90 days where the Secretary certifies to the Privacy Commissioner that exceptional circumstances exist.

In Alert Digest No. 5, the Committee indicated that it did not necessarily adopt the Privacy Commissioner's interpretation of proposed paragraph 10(2)(b). On the Committee's reading of the proposed new paragraph, an agency must destroy information within 90 days, unless *within that period of 90 days* the agency has, by using sampling procedures, identified the information as being a basis for action. In other words, an agency cannot defer a sampling process for any more than 90 days.

However, the Committee indicated that it would, nevertheless, appreciate the Minister's views on what the Privacy Commissioner had stated.

The Minister responded as follows:

> I do not agree with the Privacy Commissioner that the proposed new version of subsection 10(2) "is so broadly expressed that an inadequate level of screening could occur" nor that "the amendment would ... allow agencies routinely to defer any {screening} action being taken at all." I note that the Committee does not necessarily accept the Privacy Commissioner's interpretation of the amendment. I concur with the Committee that there is under the amendment to be an application of sampling procedures within the 90 days period. It should also be noted that an addition to subsection 10(5) for which the Bill provides involves the Privacy Commissioner in the process of arriving at acceptable sampling procedures.

The Privacy Commissioner has responded to the Minister's response as follows:

> I accept the impracticality of asking the data-matching agency to assess all results within 90 days. However I am keen to see a serious level of preliminary assessment occur within 90 days, through sampling. I will seek to develop guidelines or arrangements to bring this about.

In Alert Digest No. 5, the Committee noted that Schedule 2 of the Bill also proposes to omit subsection 10(3) of the Data-matching Program (Assistance and Tax) Act and substitute the following new subsection (3):

> Subject to subsection (3A), a source agency must commence any action in relation to information it receives under subsection (1) within 12 months from the date that it receives the information from the matching agency.

Proposed new subsection (3A) provides:

> The Secretary to an assistance agency, the Commissioner of Taxation or a Deputy Commissioner of Taxation may grant an extension or extensions of time for up to 12 months each of the 12 month period referred to in subsection (3).

Proposed new subsection (3B) provides:

> The power to grant an extension or extensions of time referred to in subsection (3A) must not, despite any other law, be delegated.

The Privacy Commissioner stated:

> This amendment seeks to allow a decision on extending an investigation beyond 12 months to be made by Deputy Commissioners of Taxation. In the absence of any evidence that the current provision (decision to be taken by Commissioner) is proving unworkable, I can see no reason for the amendment.

He went on to say:

> In passing the Act, Parliament provided that this decision should be made only by Secretaries of Departments and the Commissioner of Taxation, and should not be delegated. I would not expect this provision to create a significant problem, given that it confers a discretion intended to be used occasionally. As with the section 10(2) provision, the clear intention of the legislation is that data-matching results should be dealt with expeditiously.

In Alert Digest No. 5, the Committee noted that these provisions are essentially a re-drafting of the existing subsection 10(3). As the Privacy Commissioner observed, the only change of substance is to allow a Deputy Commissioner of Taxation, as well as the Commissioner of Taxation, the power to grant an extension of time for taking action under subsection 10(1). The Committee stated that this would not appear to be a matter which came within its terms of reference, though the Committee indicated that it would be interested in the Privacy Commissioner's further views if he believes that this is not the case.

At the time that the Committee reported on the Bill, the Privacy Commissioner had not provided any further views on this point. However, the Minister offered the following further information on the proposed amendment:

> The new form of subsection 10(3) is, as the Privacy Commissioner and your Committee comment, largely a tidying up of the old subsection. The only new element is to allow a Deputy Commissioner of Taxation, as well as the Commissioner of Taxation, the power to grant an extension of time for taking action under subsection 10(1). This change was requested by the Treasurer for the following reasons:
>
> . a Deputy Commissioner is an extremely senior officer in the Australian Taxation Office structure; and
>
> . the devolved structure and devolution of authority in the Australian Taxation Office add further to the authority of a Deputy Commissioner.
>
> In essence the Treasurer's view is that a Deputy Commissioner's power and responsibility are so great that no purpose is served in differentiating between them in this context.

The Privacy Commissioner has responded to the Minister's response as follows:

> Conferring authority on Deputy Commissioners means that a relatively large number of officials will become involved in granting extensions. Restricting the grant of permission to the head of agency (in this instance the commissioner) was meant to underline the seriousness of applying to keep output data any longer than 12 months. An extension of this kind will make it difficult to counter similar demands for devolution from the departmental Secretaries. Changes of this kind weaken the discipline sought to be imposed by the Act.

The Privacy Commissioner goes on to say:

> I note the Committee's query as to whether a provision of this kind falls within its jurisdiction. May I simply offer the observation that in guarding against intrusions into privacy as they relate to the handling of personal information one is inevitably involved in the enumeration of detailed procedural safeguards. All of the detailed provisions of the Data-matching Act fall into this category (similarly, Part IIIA of the Privacy Act dealing with credit reporting). Thus a provision as apparently-administrative as one designating who is entitled to allow data to remain active for longer than the usual period becomes significant in ensuring an adequate level of protection of the right to privacy.

In his letter of 2 April 1992, the Privacy Commissioner also drew the Committee's attention to some proposed amendments to section 11 of the Data-matching Program (Assistance and Tax) Act which are contained in Schedule 2 to the Bill. The Committee noted that section 11 currently provides:

> **Notice of proposed action**
>
> 11.(1) Subject to subsection (4), where, solely or partly because of information given in Step 6 of a data

matching cycle, an assistance agency considers taking action:

(a) to cancel or suspend any personal assistance to; or

(b) to reject a claim for personal assistance to; or

(c) to reduce the rate or amount of personal assistance to; or

(d) to recover an overpayment of personal assistance made to;

a person, the agency:

(e) must not take that action unless it had given the person written notice:

(i) giving particulars of the information and the proposed action; and

(ii) stating that the person has 21 days from the receipt of the notice in which to show cause in writing why the action should not be taken; and

(f) must not take that action until the expiration of those 21 days.

(2) Subject to subsection (5), where, solely or partly because of information given in Step 6 of a data matching cycle, the tax agency considers taking action to issue an assessment or an amended assessment of tax to a person, the agency:

(a) must not take that action unless it has given the person written notice:

(i) giving particulars of the information and the proposed action; and

(ii) stating that the person has 21 days from the receipt of the notice in which to show cause in writing why the action should not be taken; and

(b) must not take that action until end of those 21 days.

[The remaining subsections are not relevant in the context of this comment]

In Alert Digest No. 5, the Committee noted that the amendment proposed by the Schedule would apply the same regimen currently operating in relation to information obtained in Step 6 of a data-matching cycle to information obtained in Steps 1 and 4 of a cycle.

In the context of the proposed section 11 amendments, the Privacy Commissioner stated:

> I support ... the proposal to refer in section 10(1)(a) and (b) to another type of administrative action that may be taken on the basis of data-matching results - this being:
>
> > "to correct the personal identity data it [the agency] holds ..."
>
> This amendment allows agencies to make any factual corrections to file-data that come to light in the course of the matching, thereby enabling agencies to fulfil their responsibilities under the Privacy Act in relation to the accuracy and completeness of data.

He went on to say:

> The question then arises as to whether the usual requirement - (s.11) that prior notice of any proposed action be given to individuals - should apply to this new type of administrative action.
>
> Clearly this would not be appropriate in cases where the correction was trivial, e.g. an incorrect postcode. I am however concerned that some changes to an individual's file could prove more significant and if not notified or checked with the individual lead to significant and potentially adverse consequences. This could for example occur if an assumption were made about a discrepancy in name or address, and a correction made to relevant records. If the assumption was incorrect, this could then result in communications going astray, or in the individual

being targeted for action, perhaps even as a result of a later data-matching cycle.

An approach which might relieve agencies of the need to give notice in minor cases but preserve the basic principle of section 11 might be to include a further sub-section in section 11 which would allow the Privacy Commissioner to specify in the guidelines circumstances in which it would be permissible for an agency not to give a section 11 notice of correction of a record arising from data-matching, or to allow for notices of correction to be given promptly after-the-event.

The Privacy Commissioner concluded by saying:

> The principle of section 11 is that individuals should be given notice, and the opportunity to comment, before any action is taken on the basis of a data-matching result. I believe this principle should extend to alteration of records.

In Alert Digest No. 5, the Committee indicated that it agreed that it may be considered to trespass unduly on a person's rights and liberties if, as the Privacy Commissioner points out, that person was not given notice of (and the opportunity to correct) an incorrect amendment of his or her record. Accordingly, the Committee drew Senators' attention to the provision, as it may be considered to be in breach (by omission) of principle 1(a)(i) of the Committee's terms of reference.

The Minister responded as follows:

> The Privacy Commissioner also criticises the amendments because they do not explicitly require a source agency to notify an affected person of an intention to correct the personal identity data it holds on that person. The Privacy Commissioner was represented at discussions on these amendments with the agencies involved in the data-

> matching program. It was common ground that a provision of the type suggested by the Commissioner would be acceptable. What could not be agreed, however, was a formulation distinguishing between trivial and non-trivial amendments. It was therefore agreed that one solution to the problem would be to leave the question open in the legislation and allow the Privacy Commissioner to cover the matter in his guidelines which have the force of law under section 12 of the Data-matching Program (Assistance and Tax) Act 1990 and which appear in the Schedule to that Act.
>
> I fail to see how this trespasses on rights as there is nothing in the Act to constrain the enactment or content of such a guideline and it will have the same status once in force as would a section of the Act. It is not necessary to pursue the Privacy Commissioner's proposal to advert in section 11 to the guidelines because section 12 already provides plenary powers for the Privacy Commissioner in that regard.

In its Seventh Report, the Committee thanked the Minister for his response and noted the Minister's advice that this was a matter for the Privacy Commissioner to address in his guidelines. The Committee indicated that it would draw the Minister's response to the attention of the Privacy Commissioner.

The Privacy Commissioner has responded as follows:

> The Committee appears to accept the Minister's view that I can deal with the notice-of-correction issue via the guidelines. I have taken the view to date that it is not open to me via the guidelines to deal with matters which have been comprehensively addressed by the text of the Act. For that reason I would not see it as open to me to provide by a guideline for a further notice when the issue of what notices are necessary would appear to have been comprehensively addressed by the Act.

The Privacy Commissioner goes on to say:

> Consequently, to enable me to meet the Minister's indication that he is happy for me to address this matter, I would request the Committee to recommend an extra provision in s.11 empowering me to make guidelines concerning the giving, where appropriate, of notices of correction of address.

While, in its Seventh Report, the Committee was prepared to accept the Minister's advice that this matter could be dealt with by the Privacy Commissioner in his guidelines, the Privacy Commissioner has indicated that he disagrees with the Minister's advice on this matter. The Committee would, therefore, appreciate the Minister's further advice on the points made by the Privacy Commissioner. If, as the Privacy Commissioner states, an amendment to section 11 of the Privacy Act is required, then the Committee suggests that such an amendment should be made. Since the Minister has indicated that it is appropriate for the problem identified by the Privacy Commissioner to be dealt with by the Privacy Commissioner's guidelines, the Committee assumes that the Minister will have no difficulty with amending the legislation to ensure that the Privacy Commissioner can, in fact, deal with the problem in that way.

The Committee, again, thanks the Privacy Commissioner for his useful contribution on this Bill.

TAXATION LAWS AMENDMENT BILL (NO. 3) 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Income Tax Assessment Act 1936* and the *Occupational Superannuation Standards Act 1987*. In particular, the Bill proposes to make changes in the following areas:

- the definition of primary production;
- expenditure on research and development activities;
- Pooled Development Funds
- bad debts;
- tax exempt infrastructure borrowing;
- depreciation on property on leased land;
- traveller accommodation;
- industrial building;
- income-producing structural improvements; and
- development allowance tax deduction.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made certain comments. The Treasurer responded to those comments in a letter dated 17 June 1992. Though the Committee has not had the opportunity to consider the substance of the Treasurer's response, a copy of the letter is attached to this Report for the information of Senators. The letter is self-explanatory.

TAXATION LAWS AMENDMENT (SELF ASSESSMENT) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

The Bill proposes to improve the system of self assessment taxation which Australia has had since 1986. The changes are intended to make that system fairer and more certain for taxpayers.

The Bill proposes changes to the law to:

- introduce a new system of Public and Private Rulings, which are to apply to income tax, Medicare levy, withholding taxes, franking deficit tax and fringe benefits tax;
- introduce a new system of reviewing Private and Public Rulings;
- limit objection rights against an assessment, to prevent a review of matter that is already the subject of a review of a Private Ruling;
- extend the period within which a taxpayer can object against assessments and related determinations, from 60 days to 4 years;
- allow the Commissioner, in making assessments, to rely on statements made by taxpayers made other than in tax returns;
- introduce a new system of penalties for understatements of income tax and franking tax deficit liability;
- introduce a new interest system for underpayments and late payments of income tax;
- reduce late payment penalties, to take into account the new interest system;

- provide deductibility to all taxpayers for interest payments made to the Australian Taxation Office;
- remove, in most cases, the requirement for taxpayers to lodge notices of elections or other notifications with the Commissioner.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made certain comments. The Treasurer responded to those comments in a letter dated 17 June 1992. Though the Committee has not had the opportunity to consider the substance of the Treasurer's response, a copy of the letter is attached to this Report for the information of Senators. The letter is self-explanatory.

TELECOMMUNICATIONS (PUBLIC MOBILE LICENCE CHARGE) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill proposes to impose a charge on the grant of certain public mobile licences under the *Telecommunications Act 1991*. The Bill should be read in conjunction with the Transport and Communications Legislation Amendment Bill (No. 2) 1992. That Bill contains amendments to the Telecommunications Act which, together with this Bill, will enable a fee to be charged for the grant of the third public mobile licence.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 16 June 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Setting of charges by regulation
Paragraph 5(b)

In Alert Digest No. 8, the Committee noted that clause 5 of the Bill provides:

> **Amount of charge**
>
> 5. The amount of the charge payable in respect of the grant of a public mobile licence is such amount as is equal to:

(a) in a case in which tenders were called in respect of the grant of the licence - the amount of the bid:
    (i) submitted by the grantee of the licence under the allocation system relating to the licence; and
    (ii) accepted under that system; or
(b) in any other case - such amount as is calculated in accordance with the regulations.

The Committee noted that, pursuant to paragraph 5(b), the amount of the charge is, in certain circumstances, to be determined in accordance with the regulations. The Committee suggested that, given the importance of the charge, this may be considered a matter which is not appropriately left to the regulations.

In making this comment, the Committee noted that the Long Title to the Bill indicates that the Bill imposes 'a charge in the nature of a tax'. Further, the Committee noted that there is no upper limit set out in the primary legislation as to the rate of the charge, nor is there a method by which such an upper limit could be calculated.

The Committee noted that this is a matter to which it has consistently drawn attention. Accordingly, the Committee drew Senators' attention to the clause, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of references.

The Minister's response begins by giving some further background on the Bill:

> The Government announced in November last year, after considering a report by AUSTEL, that a third public mobile licence should be granted. The Government also announced that the selection of the third mobile licensee will be based on criteria including the bid price, industry

experience and financial strength, industry development commitments and Australian equity participation.

It was realised, however, that the Telecommunications Act does not currently envisage the awarding of a licence as a result of a process which takes account of the price bid for the licence. Accordingly, instructions were prepared for the preparation of amendments to the Telecommunications Act to enable an allocation process to be determined for the grant of a public mobile licence and a fee to be obtained as a result of that process. During the drafting process, the Office of Parliamentary Counsel expressed the view that it was desirable, for the purposes of certainty, to draft a separate Bill imposing the fee as a tax.

Having given this background information, the Minister goes on to say:

Clause 5(a) of the Bill recognises that the amount of the charge for the grant of the third public mobile licence will be, under a tendering system, the amount bid by the grantee of the licence and accepted under the allocation system.

Clause 5(b) deals with a situation where a tendering system is not used. This provision is included in case some other mechanism were to be adopted in the future for the grant of further licences. The Government has announced that the number of public mobile licences will be reviewed in 1995. Where, after the review, a new system that was not tender based was to be put in place for the allocation of future licences (for example - an auction system), paragraph 5(b) requires the amount of the charge to be calculated in accordance with regulations.

The Minister concludes by saying:

The Committee is correct in noting that the legislation does not set out any upper limit for the rate of the charge under paragraph 5(b). However, any limits on the rate of

the charge would appear to be quite inappropriate in legislation designed to encourage competitive bidding for the grant of licences. Furthermore, any regulations which attempted to impose a charge greater than applicants were willing to bid for a licence would be counterproductive, as applicants would not be willing to bid for licences in such circumstances. Any such regulations would also be disallowable by the Parliament. Accordingly, in the context of these provisions, I think that the use of a regulation making power does not involve any issues of real concern.

The Committee thanks the Minister for this detailed and informative response.

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister for Veterans' Affairs.

The Bill is a portfolio Bill, which proposes to introduce a number of technical and minor amendments to the veterans' affairs legislation. The Bill also contains some minor consequential and technical amendments to other legislation. Among the most important measures contained in this Bill are:

- the extension of benefits to members of the Australian Defence Force serving in Cambodia;
- the replacement of the existing voucher system for telephone rental concessions with an annual telephone allowance; and
- changes to the assessment rules for unlisted property trust investments.

The Committee dealt with the Bill in Alert Digest No. 7 of 1992, in which it made various comments. The Minister for Veterans' Affairs responded to those comments in a letter dated 12 June 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclauses 2(2) - (12)

In Alert Digest No. 7, the Committee noted that subclauses 2(2) to (12) of the Bill provide that various amendments proposed by the Bill are to be taken to have commenced on various specified dates, the earliest being 22 May 1986. The

Committee noted that, in all but one instance, the Explanatory Memorandum to the Bill indicates that the amendments in question are either beneficial to persons other than the Commonwealth or correct drafting errors.

The Committee observed that the exception is the amendments proposed by Part 7 of the Schedule to the Bill which, pursuant to subclause 2(6), would be taken to have commenced on 25 June 1991. These amendments relate to Section 74 of the *Veterans' Entitlements Act 1986*, which relates to payments by way of compensation or damages. The Committee observed that the amendments proposed would appear to reduce or extinguish certain pension entitlements under the Veterans' Entitlements Act if that pensioner has received a lump sum payment under section 30 of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*. The Committee suggested that the amendments proposed would, therefore, appear to be prejudicial to such persons. Accordingly, the Committee sought the Ministers' advice as to why the retrospectivity is considered necessary.

The Minister has responded as follows:

> Whilst the amendment may appear to reduce or extinguish pension entitlement, it does provide a favourable assessment for a person who receives a Commonwealth lump sum compensation payment and disability pension for the same condition.

By way of explanation, the Minister goes on to say:

> Rates of pension payable to members of the Defence Force or Peacekeeping Forces and their dependants, may be reduced in specified circumstances where the member, or dependant, is also in receipt of compensation payments.
>
> Section 74 of the Veterans' Entitlements Act details the way in which such payments are treated. Specifically,

subsection 74(3) provides the it:

- a lump sum compensation payment is made; and
- the person is in receipt of disability pension, or is subsequently granted disability pension for the same condition,

the person is deemed to have been in receipt of compensation for life, as determined by the Commonwealth Actuary instructions, from:

- the date of commencement of pension; or
- the date the lump sum is paid,

whichever is the earliest date.

Section 30 of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (CERC Act) enables a current employee who is being paid compensation in weekly payments (of less than $58.05) to commute these payments to a lump sum. Section 137 of the CERC Act allows a similar commutation for a former employee.

Section 74 of the Veterans' Entitlements Act does not take into account these redemptive provisions. A strict interpretation of subsection 74(3) could require retrospective adjustment of disability pension from the date the pension was first paid, even if the pension had previously been adjusted for regular compensation payments received.

To address this matter, the Veterans' Entitlements Act was amended in Autumn 1991 to provide special assessment rules for lump sum compensation payments made under section 137 of the CERC Act (ss74(3A) of the Veterans' Entitlements Act refers). This amendment commenced from 25 June 1991 and ensured that persons electing to commute their compensation fro regular payments to a lump sum were not disadvantaged.

However, at the time of this amendment, the provisions of section 30 of the CERC Act were overlooked.

> Part 7 of the Schedule to the Veterans' Affairs Legislation Amendment Bill 1992 inserts new subsection 74(3B) into the Veterans' Entitlements Act and provides special assessment rules for lump sum compensation payments made under section 30 of the CERC Act (similar to those for section 137 of the CERC Act).

The Minister concludes by saying:

> This minor amendment will provide consistent assessment of Commonwealth lump sum compensation payments under the Veterans' Entitlements Act and the retrospective date will ensure that no person would be disadvantaged by the original amendment referring only to one relevant section of the CERC Act.

The Committee thanks the Minister for this detailed and helpful response.

Barney Cooney
(Chairman)

MINISTER FOR INDUSTRIAL RELATIONS

PARLIAMENT HOUSE,
CANBERRA, A C T 2600

Senator B Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Room S.G. 49.5
Parliament House
Canberra ACT 2600

28 MAY 1992

Dear Senator Cooney,

I refer to comments by the Standing Committee in Scrutiny of Bills Alert Digest No.6 of 1992 in relation to the following Bills:

Coal Mining Industry (Long Service Leave Funding) Bill 1992;

Coal Mining Industry (Long Service Leave) Payroll Levy Bill 1992;

Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill 1992; and

State Grants (Coal Mining Industry Long Service Leave) Amendment Bill 1992.

Background

As you know, the Bills will give effect to the Government's proposals to reform arrangements providing for the funding of long service leave entitlements within the black coal mining industry in New South Wales, Queensland, Western Australia and Tasmania.

The legislation has been developed in co-operation with the relevant States and representatives of employers and workers in the industry.

As was noted in Explanatory Memorandums accompanying the legislation, the Government aims to establish an equitable and compulsory, national industry scheme, which will ultimately fully fund, on an accrual basis, the long service leave entitlements of persons employed in the black coal mining industry by firms covered by the scheme.

The Bills provide for the creation of a statutory corporation to be known as the Coal Mining Industry (Long Service Leave Funding) Corporation.

The Corporation will administer the new scheme and is to advise the Minister on the operation of the Act and the rates of levy to be imposed on employers

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participating in the scheme. Membership of the Corporation is to be drawn from representatives of the industry with employers and unions being represented in equal numbers.

Importantly, the Corporation is to operate along commercial lines although the scheme itself is to be independently reviewed at regular intervals.

Once the scheme is fully funded, responsibility for its operation will be devolved to the industry.

All monies raised by the relevant levy, apart from a relatively small sum which is to be applied to the Commonwealth's costs in establishing the scheme, are to be reimbursed to the industry over the life of scheme. Similarly, the legislation provides that any surplus left in the Fund when direct government involvement ceases is to be returned to the industry.

General Remarks

To put my later comments in context (and to avoid repetition) I ask that the Committee take note of the following factors when considering my detailed response to its comments on the Bills.

First, the scheme is, as I have already observed, to be run along commercial lines. Apart from providing a legislative framework and for sufficient Ministerial involvement to safeguard the overall integrity of the scheme, the proposed arrangements are broadly the machinery for a joint industry scheme run by and for members of the industry. Accordingly, the degree of government involvement has, in line with the preferences of employer and union representatives, been kept to a minimum.

Secondly, consultation with the industry has been extensive. Both employer representatives and union officials and their respective legal advisers have had the opportunity of commenting on the legislation as it has been developed. I am advised that the industry generally accepts the legislative package and, moreover, has not raised concerns in relation to any of the specific matters referred to by the Committee in its Alert Digest.

Thirdly, I wish to refer to the Committee's concerns regarding the possible infringement of individual rights by some of the policing powers contained in the legislation. In developing the legislation both the Commonwealth and the industry have sought to ensure that the scheme operates efficiently and the integrity of the Fund is protected. To further these objectives, the legislation has been drafted so as to make it possible for the Australian Taxation Office (ATO) to collect levy monies payable under the legislation. As noted in the Explanatory Memorandums, the supervisory powers conferred on the ATO are modelled on those contained in existing legislation (for instance sections 263 and 264 of the Income Tax Assessment Act 1936 which refer to powers of access to premises and books and to obtain information). The obligations imposed by the legislation on officers of

companies participating in the scheme are, in my view, fair. No specialist legal knowledge is assumed although ready access to legal advice might not be uncommon in organisations participating in the scheme. The obligations imposed are to be commensurate with what I believe to be their usual responsibilities as senior executives.

Whilst these general remarks do not, of themselves, provide a complete answer to the questions raised by the Committee, I trust they provide useful additional background on the Bills. My response to the points raised by the Committee forms Attachments A–C to this letter. I would be grateful if the Committee would consider these observations in the context of my more general remarks outlined above.

Yours fraternally

Peter Cook

cc Stephen Argument

COAL MINING INDUSTRY (LONG SERVICE LEAVE FUNDING) BILL 1992

"Eligible Employee"

Subclause 4(1) of the Bill includes a definition of 'eligible employee', that is, an employee whose long service leave entitlements are to be covered by the scheme. The Committee draws attention paragraphs (d) and (f) of the definition stating that:

> they would allow the Governor-General (acting on the advice of the Federal Executive Council) to issue regulations which would have the effect of amending the definition of 'eligible persons' (sic), by either reducing or enlarging the range of persons covered.

The Committee also makes reference to the passage in the Explanatory Memorandum which states:

> This provision allows coverage of the scheme to be varied without the need for further legislation, to take account of changed circumstances including revised work practices and job classifications. The Minister's powers in relation to the scope of the Act are to be exercised on the advice of the Board.

In light of these remarks the Committee has invited me to provide examples of the 'changed circumstances' with which the clause is intended to deal.

First, by way of general background, I note that inclusion or exclusion of an employee does not affect any obligation which the employer has to that individual; its implication is for the calculation of levy and reimbursement for the purposes of the scheme. There may be some employees who belong to a particular class of staff (eg managers) whose long service entitlements are separately provided for.

The paragraphs in question supplement the provisions in paragraphs (a),(b) and (c) which are intended to deal with all but a handful of workers, present and future, engaged in the black coal mining industry in the relevant States. Paragraphs (d) and (f) provide for the coverage, or the cessation of coverage, of a handful of persons performing disparate tasks now entitled to, or who may at some future date become entitled, to long service leave pursuant to a relevant industrial instrument and who may not come within any of the identifiable classes specified in the principal provisions.

Whilst it is not possible to identify in advance what the precise changes in work practices and work arrangements may be over the projected life of the scheme, the likely sources of such changes may be identified. Principally they are technological change and award restructuring. Other changes may stem from restructuring of a company's operations.

Such changes, as well as becoming more common, have been sources of industrial friction and it is therefore necessary to provide a mechanism for dealing with them expeditiously. It is not practical or desirable to go through the lengthy

process of amending the Principal Act on each occasion a change of this sort, which may be relatively minor, occurs in the industry. The proposed arrangements are therefore designed to ensure flexibility. At the same time they contain the necessary safeguards to protect the interests of the individuals affected and retaining Parliamentary supervision over the Executive's actions, as the regulations are, of course, disallowable.

I also point out that the flexibility of the definition was actively pursued by industry groups.

Contracting Out Administration of the Fund

Subclause 8(2) allows the Corporation to contract out the administration of the Fund. The Committee is critical of the provision for not laying down requirements as to the qualifications of the person or body engaged to administer the Fund.

The Committee suggests that the provision may conflict with principle 1(a)(ii) of its terms of reference. The basis of this conclusion is that:

> Proper management of the Fund would appear to be essential in terms of the welfare of the workers whose long service leave entitlements are to be drawn from it.(emphasis added)

I point out that the relevant employer's obligations and worker's entitlements do not stem from the existence of the scheme but from the relevant industrial agreements and individual contracts of employment. The scheme operates on a reimbursement basis with employers able to claim on the Fund for long service leave payments made to eligible employees. The actual entitlement to long service leave is thus not dependent on the state of Fund. There is, therefore, no connection between "administrative powers" and the rights, liberties or obligations of the employees.

The legislation contains numerous safeguards designed to ensure appropriate protection of the Fund's administration. These include the following:

- the membership of the Board comprises representatives of the industry including employee representatives who are charged with the administration of the Fund;
- subclause 42(1) provides that the Minister may set out principles to be followed in respect of investment of the Fund;
- subclause 42(2) provides that as soon as practicable after the commencement of the scheme, the Board must prepare a plan for investment of the Fund which must be submitted to the Minister;
- clause 39 provides that transactions and affairs relating to the Fund are subject to the relevant provisions of the Audit Act 1901; and
- clause 43 imposes a range of obligations on the Board in respect of the sufficiency of the Fund, reporting requirements and the seeking of actuarial advice.

Notwithstanding the points noted above, I appreciate the Committee's concerns and I note that it is proposed to ensure by way of regulation that the "person" contracted to administer the Fund has suitable qualifications.

COAL MINING INDUSTRY (LONG SERVICE LEAVE) PAYROLL LEVY BILL

Rate of Levy

The Committee has expressed concern that no maximum rate of levy is provided for under the Bill. In doing so it acknowledges that:

- the Bill provides that the purpose of the levy is to fund payments to eligible employees in respect of long service leave;

- in relation to clause 5 of the Bill, the Explanatory Memorandum states that "[t]he initial levy is yet to be determined but is unlikely to exceed 6.5 percent of payroll";

- in the Second reading Speech on the Coal Mining Industry (Long Service Leave Funding) Bill 1992, the Minister stated:

> It is envisaged that the scheme is to be fully funded over a period of ten years . . . it is estimated the initial levy will be in the vicinity of 6% of payroll. The actual rate of levy will be precisely determined by an actuarial review conducted under the auspices of the Corporation

In developing the legislation, consideration was given to including in it a provision limiting the amount of levy. The idea was rejected for the following reasons:

- existing controls were seen as adequate;

- a statutory limit which allowed for an appropriate level of flexibility to be retained would not provide a meaningful protection from the excessive levels of taxation;

- as net funds raised and earnings of the Fund are to be returned to the industry there is no reason for the Commonwealth to impose an excessive rate of levy;

- a specified maximum rate of levy might be misrepresented or misconstrued as being the actual rate; and

- the actual rate (and therefore any notional maximum rate) cannot be determined until a final decision is made in relation to taxation treatment of earnings of the fund.

To conform with the objects of the legislation, the rate must be set on the basis of actuarial advice provided to the Corporation which is comprised of industry representatives [refer to clause 43 of the Coal Mining Industry (Long Service Leave Funding) Bill]. I cannot envisage a situation in which the industry would seek the

imposition of an excessive levy on its own operations nor, for reasons that I have already mentioned, is there any reason for the Commonwealth to seek to impose such a charge. I also note that since the rate of levy will be set by regulation Parliamentary scrutiny is maintained as a protection.

The industry, whose scheme this is, has not objected to the approach taken.

COAL MINING INDUSTRY (LONG SERVICE LEAVE) PAYROLL LEVY COLLECTION BILL 1992

Strict Liability Offences: Onus of Proof

The Committee has asked for an explanation as to why subclauses 5(3) and 10(6) are in a different form from subclause 13(8). The essential difference is that the first two subclauses require a person **to do** an act while the third subclause requires a person **not to do** an act.

The primary provisions of clauses 5 and 10 place obligations on a person to do an act (ie make a return, comply with a notice, etc). It was considered inappropriate to express a provision in the form "A person must make a return unless the person has a reasonable excuse for not doing so". This would have diluted the emphasis of the positive obligation imposed by the clause. It was therefore considered preferable to express the exception to the obligation (ie, the existence of a reasonable excuse) as a matter of defence if the person is prosecuted for contravening this section.

The onus of proof in subclauses 5(3) and 10(6) is precisely the same as the onus of proof in clause 13(8) which provides that a person is not to fail to comply with a notice without reasonable excuse. Each formulation places the onus on the defendant of establishing that there was a reasonable excuse. This is appropriate, since whether such an excuse exists is peculiarly within the knowledge of the defendant. It would be impracticable to require the prosecution to negative all possible grounds of excuse.

The Committee is mistaken in stating that the effect of subclause 13(8) is to place on the prosecution the onus of proving that the person charged did not have a reasonable excuse. Section 14 of the Crimes Act makes it clear that the onus in such a case lies on the defendant.

Delegation of power to a person
Subclause 11(2)

The Committee comments that the provision places no limit on the class of "persons" to whom the Corporation may delegate its powers to collect levies. I note, however, that subclause 9(4) of the Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill allows the Minister to give directions as to how amounts paid to either the Corporation of another person are to be dealt with prior to being paid into the Consolidated Revenue Fund. This, in conjunction with any duties of care or fiduciary duties, is designed to ensure the integrity and security of the Fund.

Subclause 12(1) provides that persons other than officers of the Australian Taxation Office and Commonwealth Officers who have a written authorisation from the Commissioner of Taxation cannot exercise any of the powers of entry and

investigation given exclusively to the ATO under the Bill. This provision effectively limits the delegation of relevant Commonwealth powers to officers of the ATO and authorised Commonwealth Officers.

Moreover, Clause 11 of the Coal Mining Industry (Long Service Leave Funding) Bill provides that the Board must prepare guidelines for the management of the affairs of the Corporation.

In the unlikely event of the contract for the collection of the levy not going to the Australian Taxation Office, collection of levy monies would have to occur within such guidelines and without the use of ATO powers.

Vesting of powers of entry and investigation in 'an officer of the Commonwealth'

The Committee notes that clauses 12 and 13, if enacted, would allow for the vesting of significant powers of entry in 'an officer of the Commonwealth' and suggests that it may be preferable for the power to be delegated only to an officer of the Corporation or of the ATO or any other relevant agencies.

The powers of entry and investigation in question may, of course, only be delegated to an officer of the Commonwealth on the written authority of the Commissioner of Taxation. This is only likely to occur where the ATO does not have staff located in immediate proximity of the point of collection. Otherwise the ATO will use its own officers to collect the levy monies.

Given the industry-based membership of the Corporation, I do not consider it appropriate that its officers be given the powers of entry and investigation in question.

The Committee has sought advice as to whether there is any provision for a person who is questioned under the circumstances contemplated by clause 13 to be apprised of their rights in relation to the production of documents and the giving of evidence.

The provisions in question are modelled on similar powers in the Income Tax Assessment Act. I am advised that it is the usual practice of the ATO to administer an appropriate caution against self-incrimination in cases where prosecution for an offence is possible. This practice will be followed in relation to the exercise of powers under this Bill.

Minister for Small Business, Construction and Customs

The Hon. David Beddall, MP

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9 JUN 1992

Senate Standing Ctte
for the Scrutiny of Bills

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

-3 JUN 1992

Dear Senator Cooney

I refer to the Scrutiny of Bills Alert Digest No. 7 of 1992, dated 27 May 1992, which contained comments by the Senate Standing Committee for the Scrutiny of Bills on the Customs Tariff Amendment Bill 1992. Your Committee expressed some concern as to why the 12 month period within which commencement must take place is specified in the Bill, rather than some lesser period (closer to 6 months).

The relevant clauses in the Customs Tariff Amendment Bill 1992 are consequential upon amendments contained in the Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992 as noted at page 13 of your Alert Digest. Although both Bills were granted essential for passage status this Sittings, the former Bill is accorded a higher priority in terms of Parliamentary debating time because of the requirements to incorporate certain previously notified customs tariff rate alterations in an Act of Parliament within the period specified in sections 226 and 273EA of the Customs Act 1901, that is, 12 months from tabling of the proposal. I am advised the Tariff Bill is currently scheduled for Senate debate on 16 June 1992, whereas the Tariff Concessions and anti-dumping package is only programmed for Senate debate on 24 June 1992.

Since the relevant clauses in the Customs Tariff Amendment Bill 1992 are consequential upon passage of the Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992 however, it was considered prudent to allow for the possibility that the latter Bill may not complete its passage through the Senate before the Autumns Sittings conclude. If that circumstance eventuated, the latter Bill wouldn't commence until some time after the standard 6 month from Royal Assent period, thereby nullifying any consequential amendments contained in the Customs Tariff Amendment Bill 1992. Furthermore, since the Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992 contains amendments relating to more than one subject matter and the relevant clauses of the Customs Tariff Amendment Bill 1992 relate

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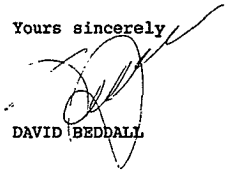
MINISTRY FOR INDUSTRY, TECHNOLOGY AND COMMERCE

to one only of those subjects (being the creation of a new tariff concessions regime), it was considered inappropriate to relate the commencement of the latter clauses to the commencement of the former Bill as a whole. Therefore, on instruction, the Office of Parliamentary Counsel drafted the 12 month commencement provision.

I trust the above is of assistance to the Committee.

Yours sincerely



DAVID BEDDALL

MINISTER FOR INDUSTRY,
TECHNOLOGY AND COMMERCE
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

16 JUN 1992

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

Dear Senator

POOLED DEVELOPMENT FUNDS BILL 1992

I refer to the Scrutiny of Bills Alert Digest No 2 of 1992, dated 3 June 1992, which contained comments by the Senate Standing Committee for the Scrutiny of Bills on the Pooled Development Funds Bill 1992.

The Pooled Development Funds (PDF) Bill establishes a scheme which encourages the investment of patient equity capital to small or medium sized Australian companies whose primary activities are not excluded activities.

The purpose of these exclusions is to ensure that the companies that are the target of this legislation are not those engaged in property speculation or retailing.

Your Committee considers that there is inappropriate delegation of legislative power in the PDF Bill because the 'excluded' activities are not defined in the Bill but are to be prescribed by regulation.

The reason for prescribing the area of exclusion is the need to be able to amend the area of exclusion in a timely manner. If situations arise once the Program is established that require some finetuning of this regulation in the light of experience or which justify a tightening of the excluded activities due to possible abuse, then the regulations can be amended quickly.

The Government has widely publicised the extent of the excluded activities. It was set out in the One Nation Statement, the Explanatory Memorandum and in the Second Reading Speech. It has been noted in all the material relating to the introduction of the PDF Program.

I consider that the use of regulations is an appropriate way of dealing with this type of future event, especially as the Parliamentary scrutiny of regulations is in my view sufficient to ensure that the area of exemption is within both the spirit and the letter of the law.

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

Yours sincerely

John N Button

(John N Button)

Minister for Primary Industries and Energy
Simon Crean, MP

16 JUN 1992

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

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17 JUN 1992
Senate Standing Cttee for the Scrutiny of Bills

Dear Senator Cooney

I refer to a letter from Mr Stephen Argument, Secretary, Senate Standing Committee for the Scrutiny of Bills, informing me of the Committee's concerns over amendments to the *Primary Industries Levies and Charges Collection Act 1991* [PILCC Act] contained in the *Primary Industries and Energy Legislation Amendment Bill (No 2) 1992* as introduced into the House of Representatives on 6 May 1992. The Committee indicated that it was uncertain as to the purpose of the amendments.

The amendments are to rectify minor anomalies concerning the allowing of minimum quantity or minimum monetary thresholds for small producers. Similar provisions were contained in former collection Acts and inadvertently omitted from the PILCC Act in 1991.

The intention of the amendments is to allow small producers a threshold before having to pay levy as well as providing a necessary reduction in the cost of collection of levies. The basis for setting the threshold is not linked to the actual levy rates but is related to the estimated collection costs per levy return. The provisions will permit different thresholds to be prescribed, in consultation with the appropriate industry, for future levy years as economic events change. The initial values prescribed are those originally contained in the repealed Acts.

In most levy or export charge schemes about 85% of income is paid by only 15% of the levy payer population, whereas 40% to 50% of that population would be liable to pay less than the limits proposed. Once the threshold is exceeded then levy would become payable on the total quantity or amount, as the case may be.

With full cost recovery for levy collection operating since 1988/89 there has been an increasing need to ensure economical collection techniques are adopted by my Department. These amendments will allow for a reduction in the administrative burden for small producers by delaying levy payments until the threshold is reached.

Yours sincerely

SIMON CREAN

Parliament House, Canberra ACT 2600. Telephone (06) 277 7520 Facsimile (06) 273 4120

Human Rights Australia

Privacy Commissioner

Our reference 90/464
34k140

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

Dear Senator Cooney

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1992

I refer to the Minister's comments on my concerns.

(1) Section 10(2): I accept the impracticality of asking the data-matching agency to assess all results within 90 days. However I am keen to see a serious level of preliminary assessment occur within 90 days, through sampling. I will seek to develop guidelines or arrangements to bring this about.

(2) Section 10(3): Conferring authority on Deputy Commissioners means that a relatively large number of officials will become involved in granting extensions. Restricting the grant of permission to the head of agency (in this instance the Commissioner) was meant to underline the seriousness of applying to keep output data any longer than 12 months. An extension of this kind will make it difficult to counter similar demands for devolution from the departmental Secretaries. Changes of this kind weaken the discipline sought to be imposed by the Act.

I note the Committee's query as to whether a provision of this kind falls within its jurisdiction. May I simply offer the observation that in guarding against intrusions into privacy as they relate to the handling of personal information one is inevitably involved in the enumeration of detailed procedural safeguards. All of the detailed provisions of the Data-Matching Act fall into this category (similarly, Part IIIA of the Privacy Act dealing with credit reporting). Thus a provision as apparently-administrative as one designating who is entitled to allow data to remain active for longer than the usual period becomes significant in ensuring an adequate level of protection of the right to privacy.

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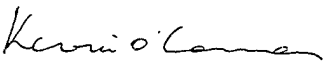
(3) Section 11: The Committee appears to accept the Minister's view that I can deal with the notice-of-correction issue via the guidelines. I have taken the view to date that it is not open to me via the guidelines to deal with matters which have been comprehensively addressed by the text of the Act. For that reason I would not see it as open to me to provide by a guideline for a further notice when the issue of what notices are necessary would appear to have been comprehensively addressed by the Act. Consequently, to enable me to meet the Minister's indication that he is happy for me to address this matter, I would request the Committee to recommend an extra provision in s.11 empowering me to make guidelines concerning the giving, where appropriate, of notices of correction of address.

I would be happy to elaborate on these points if desired.

Yours sincerely



KEVIN O'CONNOR
Privacy Commissioner

4 June 1992

17 JUN 1992

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

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

RECEIVED
17 JUN 1992
Senate Standing Ctte for the Scrutiny of Bills

Dear Senator Cooney

On 4 June 1992, your Committee's Secretary drew attention to its comments on the *Taxation Laws Amendment Bill (No 3) 1992* in its Alert Digest No 8 of 1992.

The comments relate to clause 7 of the Bill. That clause provides that the amendments to the research and development tax concession are to be retrospective to the date of effect of that concession, 1 July 1985. The comments seek my advice as to whether the retrospectivity is likely to affect taxpayers adversely.

The proposed retrospectivity has no substantial adverse effect on taxpayers.

As the Committee accepts, the proposed amendments are intended merely to confirm the existing state of the law. The Government believes this is what the amendments do. They confirm that exploration and prospecting are not automatically research and development, entitled to a possible deduction of more than 100%. This is consistent with the announcement of the R&D concession, the explanatory memorandum that accompanied its introduction, and the consistent administrative views of the Australian Taxation Office and the Industry Development and Research Board, the two bodies that administer the concession.

No deductions previously allowable as R&D will be denied by the amendments. Nor are there any disputes known to the ATO or the IR&DB in which taxpayers claim a deduction only on the basis that exploration and prospecting are as such research and development. So there are no claims on foot which would be precluded by the retrospectivity of the amendment.

Some taxpayers may suffer a tactical detriment. There is a large claim on foot in which the taxpayer claims certain exploration and prospecting activities to be R&D; the Board regards the activities as no more than ordinary exploration and prospecting, with no real R&D element. In that dispute, the taxpayer would have a tactical advantage if the amendment did not preclude argument that all exploration and

prospecting is necessarily R&D. Others, who have made no claim that exploration and prospecting are necessarily R&D, could still do so and would lose the opportunity of pressing such a claim.

The amendment is retrospective because it confirms the original meaning of the provisions. It does so consistently with the first announcement of the provisions, the explanatory memorandum that accompanied them, and the consistent views of the bodies charged with administering the provisions. Taxpayers will be treated after the amendment only as they were told they would be treated before the concession was enacted, and as they have been consistently treated since the provisions were enacted. No transactions will be penalised by being treated in a way of which there was no notice.

Yours sincerely

John Dawkins

17 JUN 1992

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17 JUN 1992
Senate Standing C'tte for the Scrutiny of Bills

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

Dear Senator Cooney

In its Scrutiny of Bills Alert Digest No 8 of 1992 (3 June 1992) the Committee drew attention to proposed new sections 170BA and 170BB being inserted in the Income Tax Assessment Act by clause 22 of the Taxation Laws Amendment (Self Assessment) Bill 1992. The Committee believes that the provisions may be considered to be an inappropriate delegation of legislative power.

The provisions in question, together with proposed sections 170BC, 170BD, 170BE and 170BF of the Income Tax Assessment Act and proposed sections 74A, 74B and 74C of the Fringe Benefits Tax Assessment Act (the second group of sections is being inserted by clause 36 of the Bill), give effect to the proposals in the Government's information paper of August 1991, "Improvements to Self Assessment - Priority Tasks", that public and private rulings by the Commissioner of Taxation would be made binding in law on the Commissioner.

The Bill proposes that a public ruling or a private ruling is to be the Commissioner's opinion of the way in which a tax law or tax laws would apply in relation to a particular arrangement or class of arrangements. In this context, a tax law is a provision of the law under which the extent of a person's liability for income tax or fringe benefits tax is worked out. Binding rulings will not deal with procedural or other provisions that are not used in the ascertainment of liability for income tax or fringe benefits tax.

As requested, I confirm the Committee's understanding, stated at page 45 of the Digest, that the effect of the provisions in the circumstances mentioned there is that an assessment would be made as if the law applied in the way ruled by the Commissioner so as to produce the lower tax liability. In other words, taxpayers would be given a guarantee by the law that a ruling fixes the upper limit of their liability on that issue if, at the time at which liability is established (generally by assessment), the ruling is found to contain an error of law. The position proposed is

similar to that which existed prior to 1986 under section 170 of the Income Tax Assessment Act, which generally did not allow the Commissioner to amend assessments to correct errors of law, except where the taxpayer objected against the assessment. Taxpayers will be entitled under the proposed rulings provisions to object against private rulings. A taxpayer dissatisfied with a public ruling would be entitled to seek a private ruling on the matter and object against that. If the taxpayer did not object against an adverse private ruling that contained an error of law, the provisions in question would be of no effect. The assessment would ignore the ruling.

Neither under the pre-1986 section 170 (it was amended as one of the legislative changes supporting the original move to self-assessment) nor under the proposed rulings provisions could the Commissioner be said to be overriding the taxation law. The most that could be said is that, where the principle of giving taxpayers certainty and early finality in their tax affairs and the principle of collecting the "right" amount of tax are in conflict, the proposed legislative system for rulings favours the former principle - as did section 170 in its earlier form. Section 12D of the Sales Tax Procedure Act is another example of a taxation law that adopts a similar policy. It provides for the remission of sales tax where a taxpayer has paid less than the "right" amount of tax in reliance on an incorrect ruling given by the Commissioner.

The function being exercised by the Commissioner in giving rulings under the proposed arrangements would be - as it is in making assessments - an administrative one, albeit that, in the circumstances in question, the statute would provide for the taxpayer's liability on assessment to be worked out by a different method from the one that would be used if the ruling had not been given. I do not consider that process to involve a delegation of legislative power. The discretionary powers that could be exercised by the Commissioner in giving rulings would be no different from those that are available to the Commissioner now in making assessments. The Commissioner would be required to apply the same principles in interpreting the law for the purposes of giving a ruling as he would for the purposes of making an assessment.

The advice of the Attorney-General's Department is that the proposed provisions would not be invalid on the ground that they involved an abdication of legislative power.

Yours sincerely

John Dawkins

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16 JUN 1992
Senate Standing C'tte for the Scrutiny of Bills

Minister for Transport and Communications

Parliament House
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16 JUN 1992

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 on the Telecommunications (Public Mobile Licence Charge) Bill 1992 contained in the Scrutiny of Bills Alert Digest No. 8 of 1992.

The Committee has raised the concern that under paragraph 5(b) of the Bill, the amount of the charge payable in respect of the grant of a public mobile licence could, in certain circumstances, be determined in accordance with regulations. The Committee is concerned that given the importance of the charge, it perhaps should not be left to regulations.

It may assist the Committee in considering this issue, if I set out some further background in relation to the new Bill. The Government announced in November last year, after considering a report by AUSTEL, that a third public mobile licence should be granted. The Government also announced that the selection of the third mobile licensee will be based on criteria including the bid price, industry experience and financial strength, industry development commitments and Australian equity participation.

It was realised, however, that the Telecommunications Act does not currently envisage the awarding of a licence as a result of a process which takes account of the price bid for the licence. Accordingly, instructions were prepared for the preparation of amendments to the Telecommunications Act to enable an allocation process to be determined for the grant of a public mobile licence and a fee to be obtained as a result of that process. During the drafting process, the Office of Parliamentary Counsel expressed the view that it was desirable, for the purposes of certainty, to draft a separate Bill imposing the fee as a tax.

Clause 5(a) of the Bill recognises that the amount of the charge for the grant of the third public mobile licence will be, under a tendering system, the amount bid by the

grantee of the licence and accepted under the allocation system.

Clause 5(b) deals with a situation where a tendering system is not used. This provision is included in case some other mechanism were to be adopted in the future for the grant of further licences. The Government has announced that the number of public mobile licences will be reviewed in 1995. Where, after the review, a new system that was not tender based was to be put in place for the allocation of future licences (for example - an auction system), paragraph 5(b) requires the amount of the charge to be calculated in accordance with regulations.

The Committee is correct in noting that the legislation does not set out any upper limit for the rate of the charge under paragraph 5(b). However, any limits on the rate of the charge would appear to be quite inappropriate in legislation designed to encourage competitive bidding for the grant of licences. Furthermore, any regulations which attempted to impose a charge greater than applicants were willing to bid for a licence would be counterproductive, as applicants would not be willing to bid for licences in such circumstances. Any such regulations would also be disallowable by the Parliament. Accordingly, in the context of these provisions, I think that the use of a regulation making power does not involve any issues of real concern.

Yours sincerely

(Bob Collins)

Minister for Veterans' Affairs
Ben Humphreys, MP
Member for Griffith

12 JUN 1992

Dear Senator Cooney

On 28 May 1992, the Secretary to your Committee wrote to me drawing attention to the comments of the Committee contained in the Scrutiny of Bills Alert Digest No. 7 in relation to the Veterans' Affairs Legislation Amendment Bill 1992.

The concerns of the Committee arise in respect of the retrospective date of commencement of Part 7 of the Schedule to the Bill. This Part inserts new subsection 74(3B) into the Veterans' Entitlements Act.

Whilst the amendment may appear to reduce or extinguish pension entitlement, it does provide a favourable assessment for a person who receives a Commonwealth lump sum compensation payment and disability pension for the same condition.

Rates of pension payable to members of the Defence Force or Peacekeeping Forces and their dependants, may be reduced in specified circumstances where the member, or dependant, is also in receipt of compensation payments.

Section 74 of the Veterans' Entitlements Act details the way in which such payments are treated. Specifically, subsection 74(3) provides that if:

- a lump sum compensation payment is made; and
- the person is in receipt of disability pension, or is subsequently granted disability pension for the same condition,

the person is deemed to have been in receipt of compensation for life, as determined by the Commonwealth Actuary instructions, from:

- the date of commencement of pension; or
- the date the lump sum is paid,

whichever is the earliest date.

Section 30 of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (CERC Act) enables a current employee who is being paid compensation in weekly payments (of less than $58.05) to commute these payments to a lump sum. Section 137 of the CERC Act allows a similar commutation for a former employee.

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Parliament House, Canberra ACT 2600 Telephone (06) 277 7820 Facsimile (06) 273 4140

Section 74 of the Veterans' Entitlements Act does not take into account these redemptive provisions. A strict interpretation of subsection 74(3) could require retrospective adjustment of disability pension from the date the pension was first paid, even if the pension had previously been adjusted for regular compensation payments received.

To address this matter, the Veterans' Entitlements Act was amended in Autumn 1991 to provide special assessment rules for lump sum compensation payments made under section 137 of the CERC Act (ss74(3A) of the Veterans' Entitlements Act refers). This amendment commenced from 25 June 1991 and ensured that persons electing to commute their compensation from regular payments to a lump sum were not disadvantaged.

However, at the time of this amendment, the provisions of section 30 of the CERC Act were overlooked.

Part 7 of the Schedule to the Veterans' Affairs Legislation Amendment Bill 1992 inserts new subsection 74(3B) into the Veterans' Entitlements Act and provides special assessment rules for lump sum compensation payments made under section 30 of the CERC Act (similar to those for section 137 of the CERC Act).

This minor amendment will provide consistent assessment of Commonwealth lump sum compensation payments under the Veterans' Entitlements Act and the retrospective date will ensure that no person would be disadvantaged by the original amendment referring only to one relevant section of the CERC Act.

I trust the above explanation meets the Committee's concerns. Should you require further information the contact officer in my Department is Carolyn Spiers, Legal Services Group, telephone number 289 6088.

Yours sincerely

BEN HUMPHREYS

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

cc Stephen Argument
Committee Secretary
(SG 49, Parliament House)

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF

1992

24 JUNE 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator J Powell
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT OF 1992

The Committee has the honour to present its Ninth Report of 1992 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 24:

Broadcasting Services Bill 1992

Broadcasting Services (Transitional Provisions and Consequential Amendments) Bill 1992

Primary Industries and Energy Legislation Amendment Bill (No. 2) 1992

Sales Tax Amendment (Transitional) Bill 1992

Taxation Laws Amendment Bill (No. 3) 1992

Taxation Laws Amendment (Self Assessment) Bill 1992

Territories Law Reform Bill 1992

BROADCASTING SERVICES BILL 1992

This Bill was introduced into the Senate on 4 June 1992 by the Minister for Transport and Communications.

The Bill proposes to introduce a large number of changes to the broadcasting industry.

Since 1983, there have been at least 20 substantial amendments to the *Broadcasting Act 1942*. These amendments have mostly been ad hoc in nature, in that they were responses to emerging circumstances rather than anticipating and providing for trends in the provision of broadcasting-type services. The result has been that the Broadcasting Act has become complicated and difficult to follow.

The main features of the Bill are:

- to provide a simple regulatory regime for broadcasting services that applies irrespective of the technical means of delivery;
- to create a new regulatory authority, the Australian Broadcasting Authority (the ABA);
- to provide for a broadcasting planning process which is open to the public and in the course of which social, economic and technical factors are all brought to bear;
- to establish a streamlined licence allocation and renewal process;
- to provide, in relation to commercial broadcasting services, an ownership and control regime;

- to provide for price-based competitive allocation of 'satellite subscription television broadcasting licences';
- to provide for the ABA to determine the program standards that are to apply to commercial and community broadcasting services;
- to provide for the ABA to supervise the development of 'codes of practices' by groups representing the providers of the different types of categories of broadcasting services, to be observed in the conduct of the broadcasting operations of those sections of the broadcasting industry;
- to provide for the ABA to hear complaints from members of the public relating to the broadcasting services provided by the Australian Broadcasting Commission and Special Broadcasting Service if they have failed to resolve satisfactorily a complaint.

The Committee dealt with the Bill in Alert Digest No. 9 of 1992, in which it made various comments. Some of those comments were made on the basis of a submission to the Committee from Blake Dawson Waldron Solicitors, dated 15 June 1992. The Minister for Transport and Communications responded to the Committee's comments in a letter dated 23 June 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Definition of 'associate' - reversal of the onus of proof
Subclause 6(1)

In Alert Digest No. 9, the Committee noted that clause 6 of the Bill sets out various definitions. In subclause 6(1), 'associate' is defined as follows:

> **'associate'**, in relation to a person in relation to control of a licence or a newspaper, or control of a company in

relation to a licence or a newspaper, means:

(a) the person's spouse (including a *de facto* spouse) or a parent, child, brother or sister of the person; or

(b) a partner of the person or, if a partner of the person is a natural person, a spouse or a child of a partner of the person; or

(c) if the person or another person who is an associate of the person under another paragraph receives benefits or is capable of benefiting under a trust - the trustee of the trust; or

(d) a person (whether a company or not) who:

(i) acts, or is accustomed to act; or

(ii) under a contract or an arrangement or understanding (whether formal or informal) is intended or expected to act;

in accordance with the directions, instructions or wishes of, or in concert with, the first-mentioned person or of the first-mentioned person and another person who is an associate of the first-mentioned person under another paragraph; or

(e) if the person is a company - another company if:

(i) the other company is a related body corporate of the person for the purposes of the *Corporations Act 1990;* or

(ii) the person, or the person and another person who is an associate of the person under another paragraph, are in a position to exercise control of the other company;

but:

(f) persons are not associates if the ABA is satisfied that they do not, in any relevant dealings relating to that company, licence or newspaper, act together, and neither of them is in a position to exert influence over the business dealings of the other in relation to that company, licence or newspaper; and

(g) persons are not associates only because of an association between them in relation to their participation in a venture that operates the initial satellite licence.

The Committee referred to the Blake Dawson Waldron submission on the Bill, which states (at page 4):

> The effect of this section is to create a reverse onus of proof, whereby a person falling within one of those categories must prove that they are not an associate of the other person. This is fundamentally repugnant, particularly as the definition of associate is so wide. In accordance with normal legal principles, the ABA should be required to demonstrate that persons act in concert, before finding that they are associates.

The Committee indicated that it agreed with this statement. The Committee suggested that, prima facie, a person would be an 'associate' for the purposes of the legislation if they come within paragraphs (a) to (e) of the definition. The Committee noted that paragraphs (f) and (g) then provide exceptions to the general rule set out in paragraphs (a) to (e). Paragraph (f), in particular, would appear to place the onus of proving that a person should not be treated as an 'associate' for the purposes of the legislation on the person concerned. This may, therefore, be regarded as a reversal of the onus of proof.

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

The Minister has responded as follows:

> This definition is based on a number of provisions,

including various provisions of the Income Tax Assessment Act (see, for example, subsection 26AAB(14) of that Act). It is not, however, as wide as that definition or as the definition in the current Broadcasting Act 1942.

The associate provisions of the Broadcasting Act, which were passed in 1991 (see subsection 90HA(10) and 92EA(10), were introduced because of wide public concern about the influence of the media and the possible use of associates to avoid ownership limits.

The Minister goes on to say:

The definition in the Bill covers certain categories of people who could, in ordinary circumstances, be expected to act in concert. However, there maybe cases where that expectation is not justified. Therefore, the so-called "reversal of the onus" is in fact a relaxation of the previous definition because it allows the ABA to declare, if it is satisfied that 2 persons do not act in concert in a relevant way, that those persons are not associates. Such a declaration could be made of the ABA's own accord or on an application by a person affected.

The Minister concludes by saying:

The Bill does not make it an offence for persons to be associates. Whether or not persons are associates will only be of consequence if it is established that they exercise actual control in potential breach of the ownership and control rules set out in the Bill.

The Committee thanks the Minister for this response.

Non-reviewable decisions
Clause 21

In Alert Digest No. 9, the Committee noted that clause 21 of the Bill, if enacted, would allow the proposed Australian Broadcasting Authority (ABA) to provide, on request, an advisory opinion as to which category of broadcasting services a particular service falls into. This categorisation is relevant in determining whether an individual licence is required for the service, which program standards and codes of practice apply, which licence conditions apply and also in determining various other significant obligations under the legislation. Subclause 21(5) provides:

> If the ABA has given an opinion under this section to the provider of a broadcasting service, neither the ABA nor any other Government agency may, while the circumstances relating to the broadcasting service remain substantially the same as those advised to the ABA in relation to the application for the opinion;
>
> (a) take any action against the provider of the service during the period of 5 years commencing on the day on which the opinion is given on the basis that the service falls into a different category of broadcasting services than that advised in the opinion; or
>
> (b) unless the ABA has made a determination or clarification under section 19 after that opinion was given that places the broadcasting service in a different category - take any action against the provider of the service after the end of that period on the basis that the service falls into a different category of broadcasting services.

The Committee noted that, despite being (pursuant to subclause 21(5)) binding on the ABA and any other Government agency for 5 years, an advisory opinion under clause 21 would not be reviewable, on its merits, by the Administrative Appeals Tribunal (AAT). In making this comment, the Committee noted that a decision

under clause 21 is not a decision listed in clause 203 of the Bill as being subject to review by the AAT.

(The Committee noted that this point was also made in the Blake Dawson Waldron submission, at page 2.)

In making this comment, the Committee accepted that there may be good reasons for these decisions not being open to such review. The Committee accepted that these reasons may relate to the character of the decision-maker (ie the ABA) as much as the character of the decision. The Committee indicated that it would, nevertheless, appreciate the Minister's views.

The Committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

The Minister has responded as follows:

> Opinions by the ABA have no other status than being legal opinions of the regulator. They are only binding on the Commonwealth and the ABA. The person seeking the opinion is free to obtain his or her own legal opinion or act contrary to the conclusion in the opinion given by the ABA. Whether or not an opinion is correct is a matter for the courts.

The Committee thanks the Minister for this response.

Non-reviewable decision
Clause 70

In Alert Digest No. 9, the Committee noted that clause 70 of the Bill, if enacted, would allow the proposed ABA to issue to a person a 'notice', directing them to take whatever action is necessary to cease their breaching of the ownership and control provisions of the Bill, if it is satisfied that the person is in breach of those provisions. It provides:

> (1) If the ABA is satisfied that a person is in breach of a provision of Division 2, 3, 4 or 5, the ABA may, by notice in writing given to:
> (a) the person; or
> (b) if the person is not the licensee and the breach is one that can be remedied by the licensee - the licensee;
> direct the person or the licensee to take action so that the person is no longer in breach of that provision.
>
> (2) The ABA is not to give a notice to a person under subsection (1) in relation to a breach if an approval under section 67 has been given in respect of the breach and the period specified under that section, or an extension of that period, has not expired.
>
> (3) The notice is to specify a period during which the person must take action to ensure that the person is no longer in that position.
>
> (4) The period must be one month, 6 months, one year or 2 years.
>
> (5) If the ABA is satisfied the breach was deliberate and flagrant, the period specified in the notice must be one month.
>
> (6) If the ABA gives a notice under subsection (1) in respect of a breach that the ABA had approved under section 67, the ABA must specify a period of one month in the notice under subsection (1).

(7) If the ABA is satisfied that the person breached the relevant provision as a result of the actions of other persons none of whom is an associate of the person, a period of one year or 2 years must be specified, but such a period must not be specified in other circumstances.

(8) The Parliament recognises that, if a period of one month is specified in a notice, the person to whom the notice is given or another person may be required to dispose of shares in a way, or otherwise make arrangements, that could cause the person a considerable financial disadvantage. Such a result is seen as necessary in order to discourage deliberate and flagrant breaches of this Part.

The Committee noted that, pursuant to clause 72 of the Bill, failure to comply with such a notice is an offence, carrying a penalty of up to $2 million per day (clause 76 of the Bill and section 4K of the *Crimes Act 1914* refer).

The Committee noted that, despite the significant penalties attaching to a failure to comply with a notice issued under clause 70, the issuing of the notice (and the ABA's decision that the person is in breach of the ownership and control provisions) would not be open to review, on the merits, by the AAT. The Committee suggested that, in the circumstances, such an avenue for review might be considered to be appropriate. the Committee stated that, if it is not considered to be appropriate (eg because of the character of either the decision or the decision-maker), it would appreciate the Minister's views as to why.

(The Committee noted that this point was also made in the Blake Dawson Waldron *submission, at pages 3 to 4.)*

The Committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

The Minister has responded as follows:

> The notice provisions form a crucial part of the stepped enforcement regime established by the Bill and outlined in clause 5. The regulatory regime in the Bill removes many of the costly and inefficient day-to-day interventions in the industry. It must therefore provide a sufficiently strong public interest safety net that provides adequate investigative and intervention powers to the ABA and real redressive measures to fix breaches quickly. It is intended that notice provisions be used, along with the cancellation provisions, as a last resort.

The Minister goes on to say:

> It was therefore a deliberate decision not to allow an appeal to the AAT from decisions under these provisions. In effect, making these decisions reviewable would require the AAT to review decisions whether or not to prosecute a person for an offence.

The Minister concludes by saying:

> If, for example, the ABA was of the opinion that a person was in breach of the ownership and control provisions, it would have a choice as to the action it could take. It could ask the DPP to prosecute the person immediately under clause 66, or it could take action under clause 70 to issue a notice to stop the breach. To allow the AAT to review the choice between the two courses of action would be to go beyond the notion that the AAT's function is to act as a "review" Tribunal; rather, it would be tantamount to making the AAT a primary decision maker.

The Committee thanks the Minister for this response.

Non-reviewable decision
Subclause 93(4)

In Alert Digest No. 9, the Committee noted that Division 1 of Part 7 of the Bill deals with the allocation of subscription television broadcasting licences. Clause 93 provides:

> **Minister to determine allocation system**
>
> 93.(1) The Minister is to determine in writing a price-based allocation system for allocating:
>
> (a) a licence to provide subscription television broadcasting services with the use of 4 transponders on a subscription television satellite; and
>
> (b) at least 2 licences to provide subscription television broadcasting services with the use of one transponder on a subscription television satellite.
>
> (2) The licences referred to in paragraph (1)(b) must be made available for allocation at the end of one year after the allocation of the initial satellite licence.
>
> (3) The system so determined may provide that the ABA is to allocate the licences, and may require an application fee.
>
> (4) If the Minister decides, in accordance with the system, that a licence referred to in subsection (1) is to be allocated to a particular person, the Minister may direct the ABA to allocate that licence to that person and, subject to section 97, the ABA must allocate that licence to that person.
>
> (5) If a satellite subscription television broadcasting licence is allocated, the Minister must publish in the *Gazette* the name of the successful applicant and the amount that the applicant agreed to pay to the Commonwealth for the allocation of the licence.

The Committee noted that subclause 93(4), if enacted, would allow the Minister to decide which of the applicants for a subscription television licence is to be granted that licence, subject only to the ABA being satisfied that the applicant is a suitable person. The Committee noted that, while such a decision would presumably have far-reaching financial implications for an unsuccessful applicant, there appears to be no scope in the Bill for an unsuccessful applicant to challenge the Minister's decision. The Committee suggested that, in the circumstances, such a review mechanism might be considered appropriate. The Committee stated that if it was not considered to be appropriate (eg because of the character of either the decision or the decision-maker), it would appreciate the Minister's views as to why.

(The Committee noted that this point was also addressed in the Blake Dawson Waldron submission, at pages 2 to 3. However, the Committee also noted that the submission suggested that Ministerial decisions in this area should be subject to Parliamentary disallowance rather than independent review.)

The Committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

The Minister has responded as follows:

> The successful applicant will be decided by the price-based allocation system determined under clause 93(1). The ABA's decision as to whether the successful applicant is suitable is reviewable (see clause 203).
>
> So far as the price based allocation systems are concerned, there are 2 main reasons for them not being subject to Parliamentary disallowance:
>
> . *Financial disadvantage to applicants* - applicants would have to incur considerable costs in submitting

their bids for licences. They would be reluctant to do this if there were a chance that disallowance could result in a complete change of ground rules. It could be argued that it would be irresponsible to proceed with the allocation process before the disallowance period expired.

- Delay - possible disallowance could mean a delay of up to 6 months in the licence allocation process, thereby delaying the introduction of new services. For subscription television, it could mean that no satellite licences would be allocated until well after 1 October 1992, the Proclaimed date for the lifting of the moratorium on the provision of subscription television broadcasting services.

The Committee thanks the Minister for this response.

Non-reviewable decisions
Clauses 135 and 139

In Alert Digest No. 9, the Committee noted that clause 135 of the Bill provides:

> If the ABA is satisfied that:
> (a) a person is providing:
> (i) a commercial television broadcasting service; or
> (ii) a commercial radio broadcasting service; or
> (iii) a subscription television broadcasting service;
> without a licence to provide that service; or
> (b) a person is providing a community broadcasting service without a licence to provide that service;
> the ABA may, by notice in writing given to the person, direct the person to cease to provide that service.

The Committee noted that, pursuant to clause 136 of the Bill, failure to comply with a notice issued under clause 135 would be an offence, attracting a penalty of up to $2 million per day.

The Committee noted that, despite the substantial penalties involved, the Bill does not appear to provide for a review of the ABA's decision (either that a person is in breach or that the person continues to be in breach of the legislation). The Committee suggested that, in the circumstances, such an avenue of review might be considered appropriate. The Committee stated that, if such review was not considered to be appropriate (eg because of the character of either the decision or the decision-maker), it would appreciate the Minister's views as to why.

(The Committee noted that this point was also addressed in the Blake Dawson Waldron submission, at pages 3 to 4.)

The Committee noted that, similarly, clause 139 of the Bill provides:

> **Notices to stop breaches of conditions of licences, class licences or of codes of practice**
>
> 139.(1) If the ABA is satisfied that:
>
> (a) a commercial television broadcasting licensee, a commercial radio broadcasting licensee or a community broadcasting licensee is breaching a condition of the licence; or
>
> (b) a person who is in a position to exercise control of a commercial television broadcasting licence or a commercial radio broadcasting licence is causing the licensee to breach a condition of the licence; or
>
> (c) a subscription television broadcasting licensee is breaching a condition of a subscription television broadcasting licence; or

(d) a person is providing subscription radio services, subscription narrowcasting services or open narrowcasting services otherwise than in accordance with the relevant class licence;

the ABA may, by notice in writing given to the person, direct the person to take action to ensure that the service is provided in a way that conforms to the requirements of the licence or class licence.

(2) If the ABA is satisfied that a person who is providing subscription radio broadcasting services, subscription narrowcasting services or open narrowcasting services is doing so in deliberate disregard of a code of practice that applies to those services and that is included in the Register of codes of practice, the ABA may, by notice in writing given to the person, direct the person to take action to ensure that those services are provided in accordance with that code of practice.

(3) The notice is to specify a period, not exceeding one month, during which the relevant action must be taken.

The Committee noted that clause 140 provides that a failure to comply with a notice issued under clause 139 is an offence, attracting a penalty of up to $2 million and that, as with clause 135, the relevant ABA decisions would not be open to review by the AAT. The Committee stated that, if such review was not considered to be appropriate (eg because of the character of either the decision or the decision-maker), it would appreciate the Minister's views as to why.

(The Committee noted that this point was also addressed in the Blake Dawson Waldron submission, at pages 3 to 4.)

The Committee drew Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent on non-

reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

The Minister's response on this point is in the same terms as his response to the Committee's comment on clause 70. He said:

> The notice provisions form a crucial part of the stepped enforcement regime established by the Bill and outlined in clause 5. The regulatory regime in the Bill removes many of the costly and inefficient day-to-day interventions in the industry. It must therefore provide a sufficiently strong public interest safety net that provides adequate investigative and intervention powers to the ABA and real redressive measures to fix breaches quickly. It is intended that notice provisions be used, along with the cancellation provisions, as a last resort.
>
> It was therefore a deliberate decision not to allow an appeal to the AAT from decisions under these provisions. In effect, making these decisions reviewable would require the AAT to review decisions whether or not to prosecute a person for an offence.
>
> If, for example, the ABA was of the opinion that a person was in breach of the ownership and control provisions, it would have a choice as to the action it could take. It could ask the DPP to prosecute the person immediately under clause 66, or it could take action under clause 70 to issue a notice to stop the breach. To allow the AAT to review the choice between the two courses of action would be to go beyond the notion that the AAT's function is to act as a "review" Tribunal; rather, it would be tantamount to making the AAT a primary decision maker.

The Committee thanks the Minister for this response.

Publication of reports of private investigations
Clause 177

In Alert Digest No. 10, the Committee noted that Part 13 of the Bill deals with information gathering by the proposed ABA. Division 2 of Part 13 deals with investigations by the ABA. Clause 176 provides:

> (1) The ABA may prepare a report on an investigation, and must prepare a report on an investigation conducted at the direction of the Minister and give a copy of each report conducted at the direction of the Minister to the Minister.
>
> (2) If a report on an investigation relates to conduct that could constitute an offence under this Act or another law of the Commonwealth, the ABA may give a copy of the report or of a part of the report to the Director of Public Prosecutions.

The Committee noted that clause 177 provides:

> (1) Except in the case of a report prepared as a result of an investigation directed by the Minister, the ABA may cause a copy of a report on an investigation to be published.
>
> (2) The Minister may direct the ABA to publish a report on an investigation directed by the Minister.
>
> (3) The ABA is not required to publish, or to disclose to a person to whose affairs it relates, a report or part of a report if the publication or disclosure would:
> (a) disclose matter of a confidential character; or
> (b) be likely to prejudice the fair trial of a person.

The Committee referred to the Blake Dawson Waldron submission in relation to this provision, which states (at page 4):

> Such a procedure is likely to be just as (if not more) damaging to a person's reputation and livelihood than the commencement of criminal proceedings. The stigma attached to publication of such a report will be impossible to remove, given that the investigation which led to the report took place away from the public gaze. In addition, no worthwhile public interest would be served by this procedure. If a private investigation reveals some wrongdoing, the ABA should commence licence action or prosecution proceedings, rather than relying on publication of a report as a form of sanction or threat. For these reasons clause 177 should be deleted.

The Committee indicated that it believed that there was merit in this proposition. The Committee suggested that, if the proposition was correct, the publication of an adverse report on a person could cause great damage to the person's reputation and livelihood and yet, unlike criminal proceedings, the person would not appear to have the capacity to challenge the contents of the report.

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

The Minister has responded as follows:

> This clause is part of a package of provisions designed to ensure that processes under the Bill are kept as public as possible.
>
> While the public interest in the accountability of the ABA prevails over private interests under this clause, there are safeguards in this area. Clause 178 requires the ABA to

consult a person if publication of a report or part of a report would adversely affect the interests of the person. Subclause 177(3) states that the ABA is not required to publish a report or part of a report if the publication would disclose matter of a confidential character or would be likely to prejudice the fair trial of a person. These clauses do not displace the powers of courts to protect confidential material.

The Committee thanks the Minister for this response.

Ministerial control over broadcasting
Paragraph 7(1)(d) of Schedule 2

In Alert Digest No. 9, the Committee noted that Schedule 2 of the Bill sets out certain 'standard conditions' which are to apply to each type of broadcasting service licence. Item 7 of Schedule 2 provides, in part:

> (1) Each commercial television broadcasting licence is subject to the following conditions:
>
> ...
>
> (d) the licensee will, if the Minister, by notice in writing given to the licensee, so requires broadcast, without charge, such items of national interest as are specified in the notice.
>
> ...

The Committee noted that, in relation to this provision, the Blake Dawson Waldron submission states (at pages 4 to 5):

> This paragraph [ie paragraph 7(1)(d)] is based on section

> 104 of the [*Broadcasting Act 1942*]. However, whereas section 104 provides that the Minister may not require a licensee to broadcast items of national interest for more than 30 minutes in any 24 hour period, paragraph 7(1)(d) contains no limitation whatsoever. Such a sweeping power is contrary to basic notions of democracy - at its widest, the power would enable a Government to turn commercial broadcasting into a vehicle for its own information. Although that might be unlikely in the present political climate, it is necessary to limit this power. We submit that the limitation already contained in section 104 should be retained.

The Committee indicated that it believed that there was merit in what the Blake Dawson Waldron submission suggested. The Committee noted that section 104 of the Broadcasting Act currently provides:

> The Minister may, by notice given by telegram or otherwise in writing, require a licensee to broadcast, without charge, such items of national interest as the Minister specifies, but the Minister shall not require the broadcasting of matter for a period in excess of 30 minutes in any period of 24 consecutive hours.

The Committee indicated that it would appreciate the Minister's advice as to why the standard condition contained in paragraph 7(1)(d) of Schedule 2 did not contain the same limitations as section 104 of the existing legislation.

The Minister has responded as follows:

> This power can only relate to matters of national importance. It would only be used in rare circumstances. If those circumstances arose, longer than 30 minutes per day may be necessary. The governments of most western nations reserve a power to require broadcasts of matters of national interest.

The Committee thanks the Minister for this response.

Other matters raised by the Blake Dawson Waldron submission

In Alert Digest No. 9, the Committee noted that the Blake Dawson Waldron submission also set out various other concerns in relation to the Bill which are of more general application. The Committee set those concerns out briefly in the Alert Digest and sought the Minister's views on the matters raised. The concerns, together with the Minister's responses, are set out below.

(i) Accountability of the Australian Broadcasting Authority

The Blake Dawson Waldron submission (at page 1) expressed a general concern about the effect of the wide-ranging powers to be conferred on the ABA, coupled with (according to the submission) the devolution of the 'ultimate Ministerial responsibility for many decisions'. The submission suggested that there were three basic sets of amendments which should be made to the Bill to ensure that the ABA was properly accountable for its actions. They were:

a) the provision for a 'mandatory inquiry procedure' in relation to certain 'critical decisions' (pages 1 to 2 of the submission);
b) an increase in the number of decisions subject to AAT review (page 2 of the submission); and
c) an increase in the scope for Parliamentary scrutiny of decisions by the ABA (pages 2 to 3 of the submission).

The Committee indicated that, while some of the decisions referred to had already been dealt with in its earlier comments, it, nevertheless, believed that there was merit in these general comments. The Committee indicated that it would, therefore, appreciate the Minister's views on the points made in the Blake Dawson Waldron submission under those headings.

On the question of a 'mandatory inquiry procedure', the Minister responded as follows:

> In this regard, it should be noted that the step away from mandatory public inquiries on all matters is a deliberate decision of the Government. Such inquiries are very lengthy and very costly and tend to advantage only well organised and resourced groups who have access to specialist advisers. Those inquiries have been wasteful of the resources of the regulator and made it difficult for it to focus its efforts when issues of real concern arose. This tends to lead to a very legalistic process.
>
> In particular:
>
> - in relation to the [Blake Dawson Waldron] reference to clause 141, it is not considered appropriate to require a public inquiry on suspension or cancellation of a licence because such action would only be taken in relation to breaches that have already been proven in the Federal Court. The ABT currently has the power to suspend or revoke a licence;
>
> - in relation to the other clauses mentioned by BDW in this context, the Bill already contains significant public consultation requirements but, to ensure flexibility, allows the ABA a discretion as to the precise method of that consultation. A full list of public access and accountability provisions in the Bill is attached;

- in relation to program standards, the ABA must, by virtue of clause 124, seek public comment before determining, varying or revoking a standard;

- imposition of licence conditions is a necessary power to allow the regulator to act quickly to stop a breach, eg to constrain a broadcaster from continuing to breach a code;

- frequency allotment and licence area plans will only be formulated as a result of the findings arising out of the public prioritisation process. Clause 17 also requires all these processes to involve wide public consultation.

On the question of AAT appeals, the Minister says:

> Program standards are disallowable. There is no need to add an appeal to the AAT.
>
> In relation to opinions, see the earlier comments.

Finally, on the question of Parliamentary scrutiny, the Minister says:

> So far as clauses 25 and 26 are concerned, the ABA is required by clause 27 to make provision for wide public consultation in exercising those powers. Therefore it is not considered necessary to make these powers subject to disallowance. Similar processes are currently undertaken administratively and are not disallowable. The new process will be far more accessible to interested parties and subject to wide public scrutiny. In any event, these clauses relate to planning of the radiofrequency spectrum, which requires considerable technical skills not generally available. This factor has traditionally been regarded as limiting the effectiveness of parliamentary scrutiny.
>
> So far as price-based allocation systems are concerned, see the earlier comments in relation to clause 93.

The Committee thanks the Minister for these responses.

(ii) Basic rights and notions of fairness

At page 2, the Blake Dawson Waldron submission states:

> The Bill does not expressly provide that the ABA is subject to the requirements of procedural fairness (or natural justice, as it is otherwise known). An established presumption of statutory interpretation is that the exercise of administrative powers is subject to the requirements of procedural fairness. However, it is arguable that in the absence of an express provision confirming those requirements, this presumption has been displaced or weakened by other provisions of the Bill.

The submission goes on to provide the following example:

> For example, clause 167 provides that when making a decision on any matter, the ABA is not limited to a consideration of material made available through an investigation or hearing, but may take into account the knowledge and experience of its members. On one view, this provision would entitle the ABA to make a decision which adversely affects the rights of a person, without putting to the person some information which one of its members had obtained privately or at least otherwise than through the usual investigative or inquiry procedures established by the Bill. Such a result would be fundamentally unfair. A provision which expressly stated that the ABA was subject to the requirements of procedural fairness would remove any doubt. It also does no more than section 80A of the current Broadcasting Act, which provides that the Australian Broadcasting Tribunal is subject to the rules of natural justice. Given the far larger range of powers vested in the ABA, it is important that this provision is retained in the Bill.

The Committee indicated that it believed that there was merit in this suggestion and, accordingly, sought the Minister's views.

The Minister has responded as follows:

> *There is no need to expressly apply the rules of natural* justice. Those rules will apply in the absence of an express provision to the contrary. Clause 167 is not such a provision. It allows members to do certain things but it does not allow them to do so without informing the person affected. Clause 167 is designed to minimise legalistic and unnecessarily costly processes in the procedures of the ABA.

The Committee thanks the Minister for this response.

Under this heading, the submission goes on to say:

> Recent judicial decisions in relation to privilege under the Corporations Law indicate that the questions whether and in what circumstances common law privileges are cut down by legislation is unclear. To avoid expensive and unnecessary litigation, it is important that legislation which *contains powers to compulsorily obtain documents and* receive evidence expressly states the legislative intention regarding privilege. The only relevant provision in the Bill is sub-clause 201(3), which preserves the privilege against self-incrimination. However, the Bill is silent regarding other privileges, such as legal professional privilege, which have long been regarded as basic rights. It is a short and sensible step to amend sub-clause 201(3) so that it applies generally to all privileges. In the absence of this amendment, the express reference to the privilege against self-incrimination might ground an inference that the Bill abrogates other privileges. Such a result would be totally unfair.

Again, the Committee indicated that it believed that there was merit in what the submission stated and, therefore, sought the Minister's views.

The Minister has responded as follows:

> Clause 201(3) was included in the Bill as a result of a previous comment by BDW and by some public interest groups. It was never intended to override legal professional privilege and would not be interpreted by a court as doing so. A court would only regard legal professional privilege as being displaced by an express provision, and even then would only do so reluctantly. It is not clear what other common law privileges (if any) BDW are referring to.

The Committee thanks the Minister for this response.

(iii) Breach notices

The Blake Dawson Waldron submission states (at pages 3 to 4):

> The Bill contains several provisions under which the ABA may issue a person with a notice that the person is in breach of the Act. The notice will require the alleged breach to be rectified within a specified period (clauses 67, 69, 70, 72, 135, 136, 139 and 140). Failure to comply with the notice constitutes an offence. When prosecuting a person for an offence of failure to comply with such a notice, the ABA will not be required to prove that the original breach of the Act (upon which the notice was based) had been committed, nor would it be a defence to such a prosecution to establish that this breach had not occurred.

The Committee noted that it had already dealt with some of the provisions referred to *in its earlier comments.*

The submission goes on to say:

> This procedure is fundamentally unfair. It permits the ABA to administratively determine whether or not a person has breached the Act, without ever being required to prove in a Court of law that the breach had occurred. Although judicial review of the ABA's decision to issue the breach *notice could be sought, the grounds of judicial review* are very limited. Judicial review can be obtained only to correct errors of law, not errors of fact, contained in a decision. Furthermore, in instituting proceedings, an applicant would be required to prove its case, thereby reversing the onus that a prosecuting authority is required to establish that an offence has occurred. Due to the limits of judicial review, it is quite possible for the ABA to wrongly issue a breach notice and for a person to have no redress - even though the ultimate consequence of this process is liability be fined up to $2 million per day.
>
> These notice of breach provisions are unnecessary. In any given situation, a person should be prosecuted for a primary breach of a provision of the Act, rather than a failure to comply with an ABA notice. In our submission they should be deleted from the Bill.

The Committee indicated that it would appreciate the Minister's views on this suggestion and the statements made in the course of making it.

After referring to his earlier comments on clauses 70, 135 and 139 in relation to the issuing of notices by the ABA, the Minister has responded as follows:

> It is generally accepted that serious breaches of broadcasting law should be able to be rectified. These provisions are intended to provide an effective alternative

to prosecution in appropriate cases. For example, where it is necessary to rectify a breach more quickly than a prosecution process would allow.

The Administrative Decisions (Judicial Review) Act will provide an effective mechanism for review of decisions under these provisions. While it may be correct to say that judicial review does not allow a review of some errors of fact, it does allow review of errors of fact relating to jurisdiction. In other words, as the ABA is required to be satisfied of certain matters before it can issue a notice, judicial review could focus on whether or not there were grounds for the ABA to be so satisfied (see ADJR Act sections 5(1)(h) and 5(3)).

It will be possible to seek a review of action under a notice provision because of:

- a breach of natural justice;
- failure to observe proper procedures;
- an error of law;
- a lack of evidence to justify the decision;
- regard to irrelevant considerations;
- a failure to take into account relevant considerations;
- bad faith;
- an unreasonable exercise of power; and
- various other matters.

The Committee thanks the Minister for this response.

(iv) Penalties

The Blake Dawson Waldron submission makes a general observation about the level of the monetary penalties provided for by the Bill. The Committee had already noted in Alert Digest No. 9 that various offence provisions carry a penalty of up to $2 million per day. The submission states (at page 5):

> These astronomical penalties are completely out of kilter with other Commonwealth legislation and any need for a reasonable deterrent. By comparison even the proposed revision of penalties under the Trade Practices Act will establish penalties at a maximum of only $10 million. Penalties under the Trade Practices Act are currently set at a maximum of $250,000. The public interests relating to enforcement of the Trade Practices Act are at least as important as those relating to the Broadcasting Services Bill. There are no reasons for imposing such draconian penalties on broadcasters, the only effect of which would be to drive them into liquidation, when no comparable penalties appear in any other Commonwealth legislation.

The submission goes on to say:

> By comparison, we understand that in the United States the Federal Communications Commission is empowered to impose maximum penalties on an American television network of $US250,000. These penalties must be seen within the context that each American television network is in itself far larger than the entire Australian television industry. In our submission the penalties under the Bill should be reduced to $100,000 per day, which would continue to far exceed the penalties set by any other legislation, with a maximum cap tied to the same penalties as the Trade Practices Act (ie. $250,000 at present).

In the light of these comments, the Committee sought the Minister's views on the level of the penalties provided for by the Bill.

The Minister has responded as follows:

> The penalties are maximum penalties only. Other Acts provide for comparable penalty levels. For example, section 349 of the Telecommunications Act 1991 provides a maximum penalty of $10 million for a contravention of a direction by AUSTEL. The level of penalties in the Bill recognises the seriousness with which offences against broadcasting law are regarded.

The Committee thanks the Minister for this response.

(iv) Prior approval of temporary breaches

Clause 67 of the Bill provides for applications for prior approval of temporary breaches of the provisions of the Bill. In relation to this clause, the Blake Dawson Waldron submission states (at pages 5 to 6):

> There is a commercial need for these provisions and FACTS supports them. Due to the extensive ownership and control provisions of the Bill, a person may be placed in breach of those provisions for some period, in consequence of a commercial transaction.

The submission goes on to say:

> However, the clause is deficient in not allowing for the ABA to approve temporary breaches where an application for approval is made after the relevant agreement or transaction is entered into. There may be circumstances where it is impossible to obtain pre-transaction approval, due to the commercial speed with which a transaction takes place (such as a share transaction). In addition, the requirements of confidentiality often may prevent pre-

> transaction disclosure to the ABA, unless the other party to the transaction consents. In those circumstances the clause should provide for some limited form of post-transaction approval.

The Committee indicated this would not appear to be a matter that falls within its terms of reference. The Committee suggested that, indeed, it was possible that a provision which did provide for 'post-transaction approval' might attract the Committee's attention by virtue of its retrospective operation (though the retrospectivity would presumably be beneficial to persons other than the Commonwealth). The Committee sought the Minister's views.

The Minister has responded as follows:

> Experience with the current Act has shown that provisions for post-transaction approval are likely to be abused. In relation to the matter of confidentiality, agreements between parties should take account of current law.

The Committee thanks the Minister for this response.

Concluding comments

Clearly, this is a complex Bill which, in turn, has attracted some detailed and complicated comments by the Committee. In making these comments, the Committee has been assisted by the submission by Blake Dawson Waldron. That assistance has been both welcome and appreciated. The Committee also appreciates the Minister's detailed and helpful response and the effort which has been made to provide the response within such a short time. The Committee trusts that any subsequent debate in the Senate on the matters raised by the Committee (and by Blake Dawson Waldron) will be assisted by the Minister's response.

BROADCASTING SERVICES (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1992

This Bill was introduced into the Senate on 4 June 1992 by the Minister for Transport and Communications.

The Bill proposes to make certain transitional and consequential provisions, pursuant to the proposed replacement of the regulatory scheme for broadcasting services provided for by the *Broadcasting Act 1942*, with the new scheme proposed by the Broadcasting Services Bill 1992.

The new scheme will cover a wide range of developing services which do not fall within the traditional definition of broadcasting, but which, nevertheless, will have substantial potential to influence public thought and attitudes. This ensures that appropriate controls can be placed on all services of this nature to protect the public interest.

General comment - submission from Blake Dawson Waldron Solicitors

The Committee dealt with this Bill in Alert Digest No. 9 of 1992. In that Alert Digest, the Committee informed the Senate that, on 16 June 1992, it had received a submission on the Bill from Blake Dawson Waldron Solicitors, on behalf of a client. A copy of that submission is attached to this Report for the information of Senators. The submission states (at page 1) that the client would be adversely affected by the Bill, if enacted. The submission further states (at page 1) that a number of other commercial radio licensees in Australia were likely to suffer the same prejudice. A subsequent submission from Blake Dawson Waldron (which is

also attached to this Report), dated 17 June 1992, confirmed the existence of at least one other licensee in a similar position.

The submission of 16 June gives the following background on the problems caused by the Bill:

> Clause 12 of the Transitional Provisions Bill provides that applications for the grant of commercial radio licences or public radio licences may proceed under the Broadcasting Act, notwithstanding the general repeal of that Act effected by clause 27. However, no equivalent provision exists in respect of supplementary FM licence applications. In other words, those applications will cease to exist. The unfairness of this provision is obvious, when it is applied to [the client]. [The client] originally applied for a supplementary licence in accordance with Government policy in 1984. After several changes in that policy, its application was finally referred to the Australian Broadcasting Tribunal late last year. A hearing of its application is scheduled to be held in Cairns on 21 and 22 July 1992. It is possible for the Tribunal to decide to grant [the client] a supplementary licence between the date of that hearing and the date of commencement of the transitional provisions but that decision will have absolutely no legal effect once the transitional provisions commence operation. Consequently, the time, effort and expense in prosecuting the supplementary licence application will have been entirely wasted. In our submission no legislation should operate to destroy rights in this way.

The submission goes on to say:

> We should also indicate that in addition to our client's supplementary licence application, the Tribunal is also considering an application for an independent FM licence for Cairns. Under the transitional provisions, that licence application will proceed. Present Government policy would allow [the client] to convert to FM (if it is not granted a supplementary licence) upon the introduction of the

> independent commercial FM licence. However, both the transitional provisions and the Broadcasting Services Bill are completely silent on the question of conversion of an AM licensee to FM. In our submission the transitional provisions should expressly preserve the current position, under which our client would be entitled to convert to FM upon the introduction of another FM licence.

It continues:

> Clause 39 of the Broadcasting Services Bill provides in essence that in a solus (or one-station) regional market, the incumbent licensee may automatically obtain another licence, if two or more licences are available for allocation. We understand that these provisions were inserted as an alternative to the present supplementary licence scheme. Because the application for a commercial FM licence in Cairns can proceed under the transitional provisions, our client will cease to operate in a solus market at some time in the near future. In that situation clause 39 would have no application to it. Consequently, having been deprived of its right to pursue a supplementary licence application lodged with the Minister some 8 years ago, the Broadcasting Services Bill offers it no alternative path.

Having given this background and made these comments, the submission goes on to recommend (at pages 2 to 3) that:

- the transitional provisions should be amended to permit supplementary licence applications to remain on foot;
- the transitional provisions should be amended to permit regional AM licensees to convert to FM in accordance with current legislation;
- alternatively, clause 39 of the Broadcasting Services Bill should be amended to permit a licensee in [the client's] circumstances to be able to apply for

> another licence under that clause. We appreciate that this latter submission involves a substantive amendment to the Bill. However, it is made to address the problems described above, under which our client and other regional radio licensees will be deprived of their existing rights.

In Alert Digest No. 9, the Committee stated that, if the submission from Blake Dawson Waldron is correct, it was concerned that the transitional provisions in the Bill could operate to the detriment of a person who has an application for a licence on foot. The Committee suggested that this would appear to be contrary to the usual effect of transitional provisions.

In making this comment, the Committee accepted that the question turns largely on the nature of the applicants' existing rights (if, indeed, they could be classified as 'rights') and the extent to which the proposed new legislation would impinge on those rights. The Committee sought the Minister's views on the matters raised by the submission.

The Minister for Transport and Communications responded to this comment in his letter dated 23 June 1992, which has been discussed elsewhere in this report, in relation to the Broadcasting Services Bill 1992. In relation to the Committee's concerns on this Bill, the Minister states:

> The Government intends to move an appropriate amendment to the Bill to take account of the Committee's concerns.

The Committee thanks the Minister for this response and note that he intends to move an amendment to meet the concerns raised by the Committee.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 6 May 1992 by the Minister Representing the Minister for Primary Industries and Energy.

The Bill is an omnibus Bill for legislation administered within the Primary Industries and Energy portfolio. It proposes to make a number of amendments to existing legislation. The Bill proposes to amend the following Acts:

- *Australian Meat and Live-stock Corporation Act 1987;*
- *Australian Wool Corporation Act 1991;*
- *Australian Wool Realisation Commission Act 1991;*
- *Primary Industries and Energy Research and Development Act 1987;*
- *Primary Industries Levies and Charges Collection Act 1991;*
- *Snowy Mountains Hydro-electric Power Act 1949.*

The Committee dealt with the Bill in Alert Digest No. 7 of 1992, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 16 June 1992. A copy of that letter was attached to the Committee's Eighth Report of 1992 (17 June 1992) for the information of Senators, since the Bill was about to be debated by the Senate. The Committee notes that the Senate subsequently passed the Bill on 18 June. The Committee has now had the opportunity to consider the Minister's response, a further copy of which is attached to this report. Relevant parts of the response are also discussed below.

General comment

In Alert Digest No. 6, the Committee noted that Part 6 of the Bill proposes to make certain amendments to the *Primary Industries Levies and Charges Collection Act 1991*. The Committee noted that, in particular, clause 29 of the Bill proposes to insert definitions of 'leviable amount' and 'leviable weight' into section 4 of that Act. The Committee was uncertain as to the need for these definitions in the Act and, therefore, requested the Minister's advice as to the purpose of inserting the definitions.

The Minister has responded as follows:

> The amendments are to rectify minor anomalies concerning the allowing of minimum quantity or minimum monetary thresholds for small producers. Similar provisions were contained in former collection Acts and inadvertently omitted from the PILCC Act in 1991.

The Minister goes on to say:

> The intention of the amendments is to allow small producers a threshold before having to pay levy as well as providing a necessary reduction in the cost of collection of levies. The basis for setting the threshold is not linked to the actual levy rates but is related to the estimated collection costs per levy return. The provisions will permit different thresholds to be prescribed, in consultation with the appropriate industry, for future levy years as economic events change. The initial values prescribed are those originally contained in the repealed Acts.
>
> In most levy or export charge schemes about 85% of income is paid by only 15% of the levy payer population, whereas 40% to 50% of that population would be liable to pay less than the limits proposed. Once the threshold is

> exceeded then levy would become payable on the **total quantity or amount**, as the case may be.

The Minister concludes by saying:

> With full cost recovery for levy collection operating since 1988/89 there has been in increasing need to ensure economical collection techniques are adopted by my Department. These amendments will allow for a reduction in the administrative burden for small producers by delaying levy payments until the threshold is reached.

The Committee thanks the Minister for this response and for his assistance with the Bill.

SALES TAX AMENDMENT (TRANSITIONAL) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

In the 1990-91 Budget, the Government announced that there would be a review of the Wholesale Sales Tax System, with a view to the simplification of that system. On 2 April 1992, the Treasurer announced that the Government had accepted the recommendations of the review which had subsequently taken place and that legislation to implement these recommendations should be introduced in the Parliament during the Autumn Sittings 1992. The new legislation comprises six Bills.

These Bills propose to replace the existing 27 Acts that deal exclusively with Wholesale Sales Tax (WST). The WST legislation has been restructured so that it will be easier to use. The new law has been drafted in plain English.

The primary features of the new legislation are as follows:

- the existing exemption from WST for manufacturers with only a small sales tax liability will be extended to include all taxpayers;
- the existing administrative arrangements which allow unregistered persons, who are entitled to WST exemption, to obtain tax free will be enacted in the new law;
- there will be special provisions to ensure that all costs incurred in connection with the manufacture of goods, and any royalty incurred in connection with goods, are included in the value for WST purposes;
- the new law will contain a general anti-avoidance provision.

This Bill will explain when and how the existing law will cease to apply, and when the new law will commence to apply.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Treasurer responded to those comments in a letter dated 17 June 1992. A copy of that letter was attached to the Committee's Eighth Report of 1992 (17 June 1992) for the information of Senators, since the Bill was about to be debated by the Senate. The Committee notes that the Senate subsequently passed the Bill on 17 June. The Committee has now had the opportunity to consider the Treasurer's response, a further copy of which is attached to this report. Relevant parts of the response are also discussed below.

General comment

In Alert Digest No. 8, the Committee noted that the Schedule to the Bill contains proposed consequential amendments to various Acts. A series of amendments to the *Crimes (Taxation Offences) Act 1980* are proposed. The Committee noted that one of those proposed amendments is to replace the term 'future sales tax' in paragraph 3(2)(b) of that Act with the term 'future old sales tax'.

Paragraph 3(2)(b) currently provides that:

> (b) a reference to future sales tax payable by a company or trustee, in relation to the purpose, or a purpose, of a person in entering into, or the knowledge or belief of a person concerning, an arrangement or transaction, shall be read as a reference to some or all of:
>
> (i) the sales tax (if any) that will become payable by the company or trustee, after the arrangement or transaction is entered into, in

relation to transactions entered into, operations carried out and acts done by the company or trustee before the arrangement or transaction is entered into; and

(ii) the sales tax that may reasonably be expected by that person to become payable by the company or trustee after the arrangement or transaction is entered into:

(A) in relation to likely transactions, operations and acts of the company or trustee; or

(B) by reason of the Commissioner altering the sale value of goods in pursuance of a power to do so conferred on him by some one or other of the Sales Tax Assessment Acts.

The Committee indicated that it would appear that (contrary to first impressions) the effect of the proposed amendment is not to make what is currently 'young' sales tax, 'old' sales tax at some time in the future. Rather, the proposed amendment refers to sales tax which would be imposed in the future under an Act which will shortly terminate. The Committee suggested that this would appear to make something which no longer exists apply to something which has not yet occurred.

The Treasurer has responded to those comments as follows:

> The *[Crimes (Taxation Offences) Act 1980]* applies to make certain actions in relation to the non-payment of tax an offence. Under that Act, it is an offence if a person enters into an arrangement or transaction to secure that a company or trustee will be unable to pay sales tax liable to become due and payable at some future date. This is known as 'future sales tax'.
>
> The amendment proposed is designed to ensure that subsection 3(2) will apply only to future sales tax that becomes payable under the existing law. This will be called 'future old sales tax' to distinguish it from sales tax that will

be payable under the new law. To illustrate, a person may become liable to pay sales tax under the existing law, before the new law comes into operation, but the due date for payment of that tax may be after the new law comes into operation. This is necessary because the existing sales tax law will still remain in force for any taxable acts, transactions or operations that occur before the first taxing day of the new law.

The Treasurer goes on to say:

> The new sales tax legislation will only commence to impose tax on any assessable dealings that occur on or after the first taxing day, which is the first day of the fourth month after the law receives the Royal Assent.
>
> The amendments are necessary to ensure that the provisions of the [Crimes (Taxation Offences)] Act will apply to all sales tax transactions covered by the existing law and the new law. They will apply regardless of whether the 'future sales tax' referred to in that Act is payable under the existing sales tax legislation or the revised sales tax legislation.

The Committee thanks the Treasurer for this helpful response.

TAXATION LAWS AMENDMENT BILL (NO. 3) 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Income Tax Assessment Act 1936* and the *Occupational Superannuation Standards Act 1987.* In particular, the Bill proposes to make changes in the following areas:

- the definition of primary production;
- expenditure on research and development activities;
- Pooled Development Funds
- bad debts;
- tax exempt infrastructure borrowing;
- depreciation on property on leased land;
- traveller accommodation;
- industrial building;
- income-producing structural improvements; and
- development allowance tax deduction.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Treasurer responded to those comments in a letter dated 17 June 1992. A copy of that letter was attached to the Committee's Eighth Report of 1992 (17 June 1992) for the information of Senators, since the Bill was about to be debated by the Senate. The Committee notes that the Senate subsequently passed the Bill on 17 June. The Committee has now had the opportunity to consider the Treasurer's response, a further copy of which is attached to this report.

Relevant parts of the response are also discussed below.

Retrospectivity
Clause 7

In Alert Digest No. 8, the Committee noted that Clause 7 of the Bill provides that the amendments which are to be made by Division 3 of Part 2 of the Bill are to apply to 'activities carried on after 1 July 1985'. The Committee noted that, in relation to this part of the Bill, the Explanatory Memorandum states:

> 2.1. This Bill will amend the *Income Tax Assessment Act 1936* (ITAA) to confirm that prospecting, exploring or drilling for minerals, petroleum or natural gas is not as such research and development (R&D) for the purpose of the special R&D deduction of up to 150% of expenditure.
>
> 2.2. This will make it clear that ordinary exploration, prospecting or drilling expenditure does not qualify for more than full deductions, but will not affect the treatment of R&D activities relevant to the exploration, prospecting, mining or quarrying industries.
>
> ...
>
> 2.11. The law will therefore be amended to confirm that prospecting, exploring or drilling for minerals, petroleum or natural gas is not as such R&D for the purpose of the special R&D deduction, and never has been. [Clause 6]

The Committee suggested that, while it is clear that the proposed (retrospective) amendments are intended to merely confirm the existing state of the legislation, it was not clear whether the retrospectivity was likely to affect taxpayers adversely. The Committee, therefore, sought the Treasurer's advice as to whether or not this was the case.

The Treasurer has responded as follows:

> *The proposed retrospectivity has no substantial adverse* effect on taxpayers.
>
> As the Committee accepts, the proposed amendments are intended merely to confirm the existing state of the law. *The Government believes this is what the amendment do.* They confirm that exploration and prospecting are not automatically research and development, entitled to a possible deduction of more than 100%. This is consistent with the announcement of the [Research and Development] concession, the explanatory memorandum that accompanied its introduction, and the consistent administrative views of the Australian Taxation Office and the Industry Development and Research Board, the two bodies that administer the concession.
>
> No deductions previously allowable as R&D will be denied by the amendments. Nor are there any disputes known to the ATO or the IR&DB in which taxpayers claim a deduction only on the basis that exploration and prospecting are as such research and development. So there are no claims on foot which would be precluded by the retrospectivity of the amendment.

The Treasurer goes on to say:

> Some taxpayers may suffer a tactical detriment. There is a large claim on foot in which the taxpayer claims certain exploration and prospecting activities to be R&D; the Board regards the activities as no more than ordinary exploration and prospecting, with no real R&D element. In that dispute, the taxpayer would have a tactical advantage if the amendment did not preclude argument that all exploration and prospecting is necessarily R&D. Others, who have made no claim that exploration and prospecting are necessarily R&D, could still do so and would lose the opportunity of pressing such a claim.

The Treasurer concludes by saying:

> The amendment is retrospective because it confirms the original meaning of the provisions. It does so consistently with the first announcement of the provisions, the explanatory memorandum that accompanied them, and the consistent views of the bodies charged with administering the provisions. Taxpayers will be treated after the amendment only as they were told they would be treated before the concession was enacted, and as they have been consistently treated since the provisions were enacted. No transactions will be penalised by being treated in a way of which there was no notice.

The Committee thanks the Treasurer for this response. The Committee notes that the Treasurer has advised that while the proposed retrospectivity 'has no substantial adverse effect on taxpayers', some taxpayers 'may suffer a tactical detriment'. While the Committee notes that the Treasurer goes on to explain what he means by this latter statement, the Committee is, nevertheless, a little uncomfortable about the distinction made by the statement.

The Committee thanks the Treasurer for his assistance with the Bill.

TAXATION LAWS AMENDMENT (SELF ASSESSMENT) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

The Bill proposes to improve the system of self assessment taxation which Australia has had since 1986. The changes are intended to make that system fairer and more certain for taxpayers.

The Bill proposes changes to the law to:

- introduce a new system of Public and Private Rulings, which are to apply to income tax, Medicare levy, withholding taxes, franking deficit tax and fringe benefits tax;
- introduce a new system of reviewing Private and Public Rulings;
- limit objection rights against an assessment, to prevent a review of matter that is already the subject of a review of a Private Ruling;
- extend the period within which a taxpayer can object against assessments and related determinations, from 60 days to 4 years;
- allow the Commissioner, in making assessments, to rely on statements made by taxpayers made other than in tax returns;
- introduce a new system of penalties for understatements of income tax and franking tax deficit liability;
- introduce a new interest system for underpayments and late payments of income tax;
- reduce late payment penalties, to take into account the new interest system;

- provide deductibility to all taxpayers for interest payments made to the Australian Taxation Office;
- remove, in most cases, the requirement for taxpayers to lodge notices of elections or other notifications with the Commissioner.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Treasurer responded to those comments in a letter dated 17 June 1992. A copy of that letter was attached to the Committee's Eighth Report of 1992 (17 June 1992) for the information of Senators, since the Bill was about to be debated by the Senate. The Committee notes that the Senate subsequently passed the Bill on 17 June. The Committee has now had the opportunity to consider the Treasurer's response, a further copy of which is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Clause 22 - proposed new sections 170BA and 170BB of the *Taxation Administration Act 1953*

In Alert Digest No. 8, the Committee noted that clause 22 of the Bill proposes to insert a series of new sections into the *Taxation Administration Act 1953* relating to the Taxation Commissioner's 'public rulings' and 'private rulings'. The Committee noted that, basically, a public ruling is a statement issued by the Commissioner in which the Commissioner indicates the Australian Taxation Office's views in relation to the interpretation or the administration of a particular aspect of the taxation laws. Public rulings are issued for the guidance of taxpayers, tax practitioners and officers of the Australian Taxation Office and are of general application.

A private ruling, on the other hand, only applies to the particular circumstances in which it was given. Private rulings are generally sought by taxpayers who are

uncertain about the tax effect of an arrangement that is proposed, commenced or completed.

The Committee noted that, under the provisions of the Bill, it was proposed to make both public rulings and private rulings binding on the Commissioner.

Proposed new section 170BA of the *Taxation Administration Act 1953* provides:

> **Effect of public ruling on tax other than withholding tax**
>
> 170BA.(1) In this section:
>
> **'final tax'**, in relation to a person, means ruling affected tax payable in relation to the person after allowing:
>
> (a) a credit within the meaning of Division 19 of Part III; or
>
> (b) an offset within the meaning of Division 1 of Part IIIAA;
>
> **'ruling affected tax'** means:
>
> (a) income tax; or
>
> (b) franking deficit tax within the meaning Part IIIAA; or
>
> (c) Medicare levy;
>
> but does not include withholding tax;
>
> **'withholding tax'** includes mining withholding tax.
>
> (2) Expressions used in this section have the same meanings as in Part IVAAA of the *Taxation Administration Act 1953.*
>
> (3) Subject to section 170BC, if:
>
> (a) there is a public ruling on the way in which an income tax law applies to a person in relation to an arrangement (**'ruled way'**); and
>
> (b) that law applies to a person in relation to that arrangement in a different way; and
>
> (c) the amount of final tax under an assessment in relation to that person would (apart from this section and section 170BC) exceed what it would have been if that law applied in the ruled way;

the assessment and amount of final tax must be what they would be if that law applied in the ruled way.

Proposed new section 170BB provides:

> **Effect of private rulings on tax other than withholding tax**
> 170BB.(1) In this section:
> **'final tax'** has the same meaning as in section 170BA.
>
> (2) Expressions used in this section have the same meanings as in Part IVAA of the *Taxation Administration Act 1953*.
>
> (3) Subject to sections 170BC, 170BG and 170BH, if:
>
> (a) there is a private ruling on the way in which an income tax law applies to a person in respect of a year of income in relation to an arrangement (**'ruled way'**); and
> (b) that law applies to that person in respect of that year in relation to that arrangement in a different way; and
> (c) the amount of final tax under an assessment in relation to that person would (apart from this section and section 170BC) exceed what it would have been if that law applied in the ruled way;
>
> the assessment and amount of final tax must be what they would be if that law applied in the ruled way.
>
> (4) Subsection (3) applies to an assessment whether or not in respect of the year of income in paragraphs 3(a) and (b).

The Committee suggested that these provisions may be considered to be an inappropriate delegation of legislative power, as it would appear that, in each case, a ruling by the Commissioner could operate to over-ride the taxation law. It appeared to the Committee that if, on the basis of a ruling by the Commissioner,

a lower liability to taxation is calculated than that applicable on the face of the taxation law, the lower figure would apply. The Committee sought the Treasurer's confirmation that this was the case.

The Committee drew Senators' attention to the provisions, as they may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Treasurer has responded as follows:

> The provisions in question, together with proposed sections 170BC, 170BD, 170BE and 170BF of the Income Tax Assessment Act and proposed sections 74A, 74B and 74C of the Fringe Benefits Tax Assessment Act (the second group of sections is being inserted by clause 36 of the Bill), give effect to the proposals in the Government's information paper of August 1991, "Improvements to Self Assessment - Priority Tasks", that public and private rulings by the Commissioner of Taxation would be made binding in law on the Commissioner.
>
> The Bill proposes that a public ruling or a private ruling is to be the Commissioner's opinion of the way in which a tax law or tax laws would apply in relation to a particular arrangement or class of arrangements. In this context, a tax law is a provision of the law under which the extent of a person's liability for income tax or fringe benefits tax is worked out. Binding rulings will not deal with procedural or other provisions that are not used in the ascertainment of liability for income tax or fringe benefits tax.

In response to the Committee's specific query, the Treasurer goes on to say:

> As requested, I confirm the Committee's understanding, stated at page 45 of the Digest, that the effect of the provisions in the circumstances mentioned there is that an assessment would be made as if the law applied in the way

ruled by the Commissioner so as to produce the lower tax liability. In other words, taxpayers would be given a guarantee by the law that a ruling fixes the upper limit of their liability on that issue if, at the time at which liability is established (generally by assessment), the ruling is found to contain an error of law. The position proposed is similar to that which existed prior to 1986 under section 170 of the Income Tax Assessment Act, which generally did not allow the Commissioner to amend assessments to correct errors of law, except where the taxpayer objected against the assessment. Taxpayers will be entitled under the proposed rulings provisions to object against private rulings. A taxpayer dissatisfied with a public ruling would be entitled to seek a private ruling on the matter and object against that. If the taxpayer did not object against an adverse private ruling that contained an error of law, the provisions in question would be of no effect. The assessment would ignore the ruling.

Neither under the pre-1986 section 170 (it was amended as one of the legislative changes supporting the original move to self-assessment) nor under the proposed rulings provisions could the Commissioner be said to be overriding the taxation law. The most that could be said is that, where the principle of giving taxpayers certainty and early finality in their tax affairs and the principle of collecting the "right" amount of tax are in conflict, the proposed legislative system for rulings favours the former principle - as did section 170 in its earlier form. Section 12D of the Sales Tax Procedure Act is another example of a taxation law that adopts a similar policy. It provides for the remission of sales tax where a taxpayer has paid less than the "right" amount of tax in reliance on an incorrect ruling given by the Commissioner.

The Treasurer goes on to say:

The function being exercised by the Commissioner in giving rulings under the proposed arrangements would be - as it is in making assessments - an administrative one, albeit that, in the circumstances in question, the statute would provide for the taxpayer's liability on assessment to

be worked out by a different method from the one that would be used if the ruling had not been given. I do not consider that process to involve a delegation of legislative power. The discretionary powers that could be exercised by the Commissioner in giving rulings would be no different from those that are available to the Commissioner now in making assessments. The Commissioner would be required to apply the same principles in interpreting the law for the purposes of giving a ruling as he would for the purposes of making an assessment.

The advice of the Attorney-General's Department is that the proposed provisions would not be invalid on the ground that they involved an abdication of legislative power.

The Committee thanks the Treasurer for this detailed and helpful response.

TERRITORIES LAW REFORM BILL 1992

This Bill was introduced into the Senate on 27 May 1992 by the Minister Representing the Minister for the Arts and Territories.

The Bill proposes to reform the legal regimes of the Indian Ocean Territories, namely Christmas Island and the Cocos (Keeling) Islands, with effect from 1 July 1992. This will implement in large measure the Government's response, tabled in the House of Representatives on 10 September 1992, to the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Islands in the Sun'.

The Bill will amend the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1955*, so as to:

- repeal current Indian Ocean Territories law (unless specified in the new Schedules);
- apply Western Australian laws in force from time to time (subject to modification by Ordinance, made under the Christmas Island Act or the Cocos (Keeling) Islands Act); and
- extend the operation of Commonwealth laws to the Territories (unless expressed not to extend).

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Minister for the Arts and Territories responded to those comments in a letter dated 18 June 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Delegation of powers to 'a person'
Clauses 6 (proposed new subsection 8D(6) and paragraph 8D(7)(n) of the *Christmas Island Act 1958*) and 16 (proposed new subsection 8D(6) and paragraph 8D(7)(n) of the *Cocos (Keeling) Islands Act 1955*)

In Alert Digest No. 8, the Committee noted that clause 6 of the Bill proposes to repeal Part III of the *Christmas Island Act 1958* and to insert a new Part III. In that proposed new Part, proposed new section 8D deals with various powers and functions which are to be vested under laws of Western Australia which, pursuant to the provisions of the Bill, are to apply to Christmas Island. Subclause 8D(6) provides:

> The Minister may appoint, on such terms and conditions as are determined by the Minister, such persons as the Minister considers necessary to exercise a power under this section.

Subclause 8D(7)(n) provides:

> This subsection applies to the following persons and authorities:
>
> ...
>
> (n) a person appointed by the Minister under subsection (6).

The Committee noted that, similarly, clause 16 of the Bill proposes to repeal Division 1 of Part III of the *Cocos (Keeling) Islands Act 1955* and to substitute a new Division 1.

The Committee noted that, in that proposed new Division, proposed new section 8D deals with the various powers and functions which are to be vested under laws

of Western Australia which, pursuant to the provisions of the Bill, are to apply to the Cocos (Keeling) Islands. Subclause 8D(6) provides:

> The Minister may appoint, on such terms and conditions as are determined by the Minister, such persons as the Minister considers necessary to exercise a power under this section.

Subclause 8D(7)(n) provides:

> This subsection applies to the following persons and authorities:
>
> ...
>
> (n) a person appointed by the Minister under subsection (6).

As a preliminary comment, the Committee suggested that the reference to 'subsection' in proposed new subsection 8D(7) of the Christmas Island Act and proposed new subsection 8D(7) of the Cocos (Keeling) Islands Act should, in fact, be a reference to 'section'.

The Minister responded to that comment as follows:

> The purpose of subsection 8D(7) is to establish a class of persons and authorities, which can then be referred to in subsections 8D(3) to 8D(5), so as to simplify the drafting of those provisions. It would not be desirable to provide that section 8D as a whole applies, in any particular sense, to the class of persons and authorities established by subsection 8D(7): subsection 8D(1), for example, is not intended to have any application to those persons and authorities, except inasmuch as they have powers vested in or delegated to them under subsection 8D(3); subsection 8D(6) applies principally to the Minister, and secondarily

> to persons who need not come within the class established by subsection 8D(7), for the reasons discussed above. So, it is appropriate and intended for subsection 8D(7) only, rather than the whole section, to be expressed to apply to the listed persons and authorities.

The Committee thanks the Minister for this response.

Of greater concern to the Committee was the fact that, if enacted, the provisions referred to would allow the Minister to delegate a range of powers to 'a person', without there being any indication of the qualities or attributes of such a person. The Committee noted that it has consistently maintained that, in such circumstances, there should be a limit on either the powers which can be delegated or the persons (or classes of persons) to whom such powers can be delegated.

The Committee drew Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations subject to insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

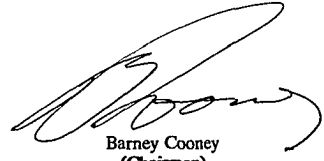
The Minister has responded as follows:

> I am aware of the Committee's position that there should be a limit on either the powers which can be delegated or the persons (or classes of persons) to whom such powers can be delegated. These provisions of the Bill are intended to address this concern, as far as possible, by specifying persons and classes of persons in paragraphs (a) to (m) of new subsections 8D(7). These paragraphs encompass a broad range of persons within the Commonwealth, State or Territory public sectors.

The Minister goes on to say:

> May I assure the Committee that, when considering vesting of powers under applied laws, under new subsections 8D(3), I will prefer to vest powers in a person coming within paragraphs (a) to (m) of new subsections 8D(7). Nonetheless, there may well be circumstances, in these small, remote Territories, where it is necessary or most appropriate to vest powers in a private person or body, to be appointed under new subsections 8D(6). Exercise of powers of certain appeal bodies, which should be seen to be completely independent, would be an example of this.
>
> May I also assure the Committee that a Minister considering vesting powers in a private person would have regard to (while not being bound by) any requirements under the relevant law of Western Australia as to the qualifications or affiliation of the person or persons who may exercise that power in Western Australia.
>
> In summary, I consider that the provisions as drafted are necessary in the special circumstances of the Indian Ocean Territories.

The Committee thanks the Minister for this response and for her assurances.



Barney Cooney
(Chairman)

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23 JUN 1992

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

Dear Senator Cooney

Thank you for your letter of 17 June 1992 inviting me to respond to the Committee's comments on the following Bills:

- Broadcasting Services Bill 1992; and
- Broadcasting Services (Transitional Provisions and Consequential Amendments) Bill 1992.

My detailed response to the Committee's comments are attached.

I trust that my response meets the Committee's concerns. I would be happy to make myself, the drafter of the legislation and officers of my Department available to meet with the Committee to further discuss the matter should the Committee so desire.

Yours sincerely

Bob Collins

COMMENTS ON SCRUTINY OF BILLS ALERT DIGEST ON THE BROADCASTING SERVICES BILL 1992

INTRODUCTION

There has been widespread consultation during the preparation of this Bill, with an exposure draft tabled in the House of Representatives last November and ongoing discussions with the industry and interest groups over the period leading up to Cabinet consideration of it. The revised Bill carefully balances those interests and views and also the public interest considerations involved in broadcasting regulation.

Definition of "associate"

The Committee says that this definition reverses the onus of proof in that it requires a person to disprove that he or she is an associate.

COMMENT: This definition is based on a number of provisions, including various provisions of the Income Tax Assessment Act (see, for example, subsection 26AAB(14) of that Act). It is not, however, as wide as that definition or as the definition in the current Broadcasting Act 1942.

The associate provisions of the Broadcasting Act, which were passed in 1991 (see subsection 90HA(10) and 92EA(10)), were introduced because of wide public concern about the influence of the media and the possible use of associates to avoid ownership limits.

The definition in the Bill covers certain categories of people who could, in ordinary circumstances, be expected to act in concert. However, there may be cases where that expectation is not justified. Therefore, the so-called "reversal of the onus" is in fact a relaxation of the previous definition because it allows the ABA to declare, if it is satisfied that 2 persons do not act in concert in a relevant way, that those persons are not associates. Such a declaration could be made of the ABA's own accord or on an application by a person affected.

The Bill does not make it an offence for persons to be associates. Whether or not persons are associates will only be of consequence if it is established that they exercise actual control in potential breach of the ownership and control rules set out in the Bill.

Clause 21 - Opinions

The Committee queries why opinions given by the ABA under clause 21 are not reviewable by the AAT.

COMMENT: Opinions by the ABA have no other status than being legal opinions of the regulator. They are only binding on the Commonwealth and the ABA. The person seeking the opinion is free to obtain his or her own legal opinion or act contrary to the conclusion in the opinion given by the ABA. Whether or not an opinion is correct is a matter for the courts.

Clauses 70, 135 and 139 - Issue of notices by the ABA

The Committee was concerned that these provisions, which allow the ABA to give notices to persons to stop breaches of the Bill, are not reviewable by the AAT.

COMMENT: The notice provisions form a crucial part of the stepped enforcement regime established by the Bill and outlined in clause 5. The regulatory regime in the Bill removes many of the costly and inefficient day-to-day interventions in the industry. It must therefore provide a sufficiently strong public interest safety net that provides adequate investigative and intervention powers to the ABA and real redressive measures to fix breaches quickly. It is intended that notice provisions be used, along with the cancellation provisions, as a last resort.

It was therefore a deliberate decision not to allow an appeal to the AAT from decisions under these provisions. In effect, making these decisions reviewable would require the AAT to review decisions whether or not to prosecute a person for an offence.

If, for example, the ABA was of the opinion that a person was in breach of the ownership and control provisions, it would have a choice as to the action it could take. It could ask the DPP to prosecute the person immediately under clause 66, or it could take action under clause 70 to issue a notice to stop the breach. To allow the AAT to review the choice between the two courses of action would be to go beyond the notion that the AAT's function is to act as a "review" Tribunal; rather, it would be tantamount to making the AAT a primary decision maker.

Clause 93(4) - Allocation of licences

The Committee pointed out that the Minister's decision under this provision was not reviewable.

COMMENT: The successful applicant will be decided by the price-based allocation system determined under clause 93(1). The ABA's decision as to whether the successful applicant is suitable is reviewable (see clause 203).

So far as the price based allocation systems are concerned, there are 2 main reasons for them not being subject to Parliamentary disallowance:

- Financial disadvantage to applicants - applicants would have to incur considerable costs in submitting their bids for licences. They would be reluctant to do this if there were a chance that disallowance could result in a complete change of ground rules. It could be argued that it would be irresponsible to proceed with the allocation process before the disallowance period expired.

- Delay - possible disallowance could mean a delay of up to 6 months in the licence allocation process, thereby delaying the introduction of new services. For subscription television, it could mean that no satellite licences would be allocated until well after 1 October 1992, the Proclaimed date for the lifting of the moratorium on the provision of subscription television broadcasting services.

Clause 177 - Publication of reports

The Committee thought there could be merit in omitting this clause.

COMMENT: This clause is part of a package of provisions designed to ensure that processes under the Bill are kept as public as possible.

While the public interest in the accountability of the ABA prevails over private interests under this clause, there are safeguards in this area. Clause 178 requires the ABA to consult a person if publication of a report or part of a report would adversely affect the interests of the person. Subclause 177(3) states that the ABA is not required to publish a report or part of a report if the publication would disclose matter of a confidential character or would be likely to prejudice the fair trial of a person. These clauses do not displace the powers of courts to protect confidential material.

Ministerial control over broadcasts - clause 7(1)(d) of Schedule 2

This provision is similar to section 104 of the current Broadcasting Act. The Committee wanted the Minister's advice as to why the 30 minute limitation was removed.

COMMENT: This power can only relate to matters of national importance. It would only be used in rare circumstances. If those circumstances arose, longer than 30 minutes per day may be necessary. The governments of most western nations reserve a power to require broadcasts of matters of national interest.

Other Matters

(i) Accountability of the ABA

(a) Mandatory Inquiries

The Blake Dawson Waldron submission claims that the Bill does not contain sufficient checks on ABA decisions. They say that major ABA decisions should be subject to mandatory public inquiry procedure (as at present). In this regard they point to:

- licence suspension or cancellation (clause 141);

- setting of program standards (clauses 120 and 123);
- imposition of conditions on licences (clauses 43 and 87); and
- frequency allotment plans and licence area plans (clauses 25 and 26).

COMMENT: In this regard, it should be noted that the step away from mandatory public inquiries on all matters is a deliberate decision of the Government. Such inquiries are very lengthy and very costly and tend to advantage only well organised and resourced groups who have access to specialist advisers. Those inquiries have been wasteful of the resources of the regulator and made it difficult for it to focus its efforts when issues of real concern arose. This tends to lead to a very legalistic process.

In particular:

- in relation to the BDW reference to clause 141, it is not considered appropriate to require a public inquiry on suspension or cancellation of a licence because such action would only be taken in relation to breaches that have already been proven in the Federal Court. The ABT currently has the power to suspend or revoke a licence;
- in relation to the other clauses mentioned by BDW in this context, the Bill already contains significant public consultation requirements but, to ensure flexibility, allows the ABA a discretion as to the precise method of that consultation. A full list of public access and accountability provisions in the Bill is attached;
- in relation to program standards, the ABA must, by virtue of clause 124, seek public comment before determining, varying or revoking a standard;

- imposition of licence conditions is a necessary power to allow the regulator to act quickly to stop a breach, eg to constrain a broadcaster from continuing to breach a code;

- frequency allotment and licence area plans will only be formulated as a result of the findings arising out of the public prioritisation process. Clause 27 also requires all these processes to involve wide public consultation.

(b) AAT appeals

BDW claim that the making of program standards (clauses 121 and 123) and the giving of ABA opinions under clauses 21 and 74 should be appealable to the AAT.

COMMENT: Program standards are disallowable. There is no need to add an appeal to the AAT.

In relation to opinions, see the earlier comments.

(c) Parliamentary scrutiny

BDW go on to suggest that a number of powers conferred on the ABA be made disallowable. These are:

- frequency allotment plans and licence area plans (clauses 25 and 26);

- price based allocation systems for allocating commercial and pay TV; and

- licences (clauses 36 and 93).

COMMENT: So far as clauses 25 and 26 are concerned, the ABA is required by clause 27 to make provision for wide public consultation in exercising those powers. Therefore it is not considered necessary to make these powers subject to disallowance. Similar processes are currently undertaken administratively and are not disallowable. The new process will be far more accessible to interested parties and subject to wide public scrutiny. In any event, these

clauses relate to planning of the radiofrequency spectrum, which requires considerable technical skills not generally available. This factor has traditionally been regarded as limiting the effectiveness of parliamentary scrutiny.

So far as price-based allocation systems are concerned, see the earlier comments in relation to clause 93.

(ii) Basic rights and notions of fairness

Natural justice

BDW claim that the Bill has no express recognition of the rules of natural justice and, in particular, that clause 167 (which allows members of the ABA to take into account their own knowledge and experience of any matter) could override the rules of natural justice.

COMMENT: There is no need to expressly apply the rules of natural justice. Those rules will apply in the absence of an express provision to the contrary. Clause 167 is not such a provision. It allows members to do certain things but it does not allow them to do so without informing the person affected. Clause 167 is designed to minimise legalistic and unnecessarily costly processes in the procedures of the ABA.

Common law privileges

BDW claim that clause 201(3), because (for the avoidance of doubt) it specially recognises the privilege against self incrimination, could unwittingly override other privileges, in particular legal professional privilege.

COMMENT: Clause 201(3) was included in the Bill as a result of a previous comment by BDW and by some public interest groups. It was never intended to override legal professional privilege and would not be interpreted by a court as doing so. A court would only regard legal professional privilege as being displaced by an express provision, and even then would only do so reluctantly. It is not clear what other common law privileges (if any) BDW are referring to.

(iii) Breach notices

BDW claim that these provisions set up a procedure that is fundamentally unfair. They claim that this is so because the notice provisions permit the ABA to determine administratively whether a person has breached the Act without ever having to prove in a court of law that a breach occurred. They say that judicial review is not a sufficient safeguard here because errors of fact cannot be corrected on judicial review.

COMMENT: See the earlier comments on clauses 70, 135 and 139 regarding the issue of notices by the ABA.

It is generally accepted that serious breaches of broadcasting law should be able to be rectified. These provisions are intended to provide an effective alternative to prosecution in appropriate cases. For example, where it is necessary to rectify a breach more quickly than a prosecution process would allow.

The Administrative Decisions (Judicial Review) Act will provide an effective mechanism for review of decisions under these provisions. While it may be correct to say that judicial review does not allow a review of some errors of fact, it does allow review of errors of fact relating to jurisdiction. In other words, as the ABA is required to be satisfied of certain matters before it can issue a notice, judicial review could focus on whether or not there were grounds for the ABA to be so satisfied (see ADJR Act sections 5(1)(h) and 5(3)).

It will be possible to seek a review of action under a notice provision because of:

. a breach of natural justice;

. failure to observe proper procedures;

. an error of law;

. a lack of evidence to justify the decision;

. regard to irrelevant considerations;

. a failure to take into account relevant considerations;

- bad faith;
- an unreasonable exercise of power; and
- various other matters.

(iv) Penalties

BDW refer to the fact that the Bill sets out penalties of up to $2 million per day. They say that these are out of kilter with other Commonwealth legislation and any need for a reasonable deterrent.

COMMENT: The penalties are maximum penalties only. Other Acts provide for comparable penalty levels. For example, section 349 of the Telecommunications Act 1991 provides a maximum penalty of $10 million for a contravention of a direction by AUSTEL. The level of penalties in the Bill recognises the seriousness with which offences against broadcasting law are regarded.

(v) Prior approval of temporary breaches

BDW complain that clause 67 does not allow for approval in relation to transactions already entered into. They suggest that requirements of confidentiality could prevent pre-transaction disclosure to the ABA.

COMMENT: Experience with the current Act has shown that provisions for post-transaction approval are likely to be abused. In relation to the matter of confidentiality, agreements between parties should take account of current law.

COMMENTS ON SCRUTINY OF BILLS ALERT DIGEST ON THE *BROADCASTING SERVICES (TRANSITIONAL PROVISIONS AND* CONSEQUENTIAL AMENDMENTS) BILL 1992

The Committee queried whether applications for the grant of supplementary radio licences should be allowed to be completed.

COMMENT: The Government intends to move an appropriate amendment to the Bill to take account of the Committee's concerns.

BROADCASTING SERVICES BILL 1992

PUBLIC ACCESS AND INTEREST PROVISIONS

PART 2 - CATEGORIES OF BROADCASTING SERVICES

Section 19(1)	Determinations of new and clarifications of existing criteria for categories of broadcasting services must be published in the Gazette.
Section 20	Determinations and clarifications under section 19 are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901.

PART 3 - PLANNING OF THE BROADCASTING SERVICES BANDS

Sections 24(1), 24(2)	The Australian Broadcasting Authority (ABA) may set priorities and vary priorities for the preparation of frequency allotment/licence area plans by "notice in writing".
Sections 25(2)	The ABA may vary frequency allotment plans may be varied by notice in writing.
Section 26(2)	The ABA may vary licence area plans by notice in writing.
Sections 27(1), 27(2)	In determining priorities, preparing frequency allotment plans and licence area plans, the ABA must ensure wide public consultation and that records of all advice received by the ABA and all assumptions made by the ABA are available for public inspection.
Sections 30 (1), 30(2)	The ABA may, by notice in writing, determine licence area populations and the Australian population for the purposes of the Act.

Section 31(1)	The Minister may, by notice in writing, reserve capacity for national and community broadcasters.
Section 32	Notices are section 31 are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901.
Section 35	All instruments made by the ABA under Part 3 must be gazetted and copies must be available for purchase.

PART 4 - COMMERCIAL TELEVISION BROADCASTING LICENCES AND COMMERCIAL RADIO BROADCASTING LICENCES

Section 36(4)	Allocations of commercial television or radio broadcasting licences must be gazetted unless a public allocation system is used.
Section 38(1)	The ABA must advertise for applications for commercial television or radio broadcasting licences.
Section 40(4)	Where the ABA decides to allocate licences other than as specified in section 36(1) or designates a licence area under section 40(2), then the ABA must publish in the Gazette details of the allocation or the designation of the licence area.
Sections 43(1), 43(4)	The ABA may, by notice in writing to the licensee, vary or revoke a condition of the license or impose an additional condition. Such variations or revocations must be published by the ABA in the Gazette.
Section 46(2)	The ABA must publish in the Gazette all applications for licence renewal.

PART 5 - CONTROL OF COMMERCIAL BROADCASTING LICENCES

Section 59(5)	The Associated Newspaper Register maintained by the ABA is to be open for public inspection.
Sections 75(1), 75(3)	The ABA is to maintain a register of notifications made under Division 6 of this Part, approvals made under sections 67 and 73, extensions made under sections 68 and 71, and notices made under section 70. This register must be open for public inspection.

PART 6 - COMMUNITY BROADCASTING LICENCES

Section 80(1)	The ABA must advertise for applications for community broadcasting licences.
Section 87(2)(c)	Proposed variations, revocations, or new conditions of community broadcasting licences must be gazetted.
Section 87(4)	Variations and revocations of community broadcasting licences must be gazetted.
Section 90(2)	The ABA must gazette all applications for renewal of community broadcasting licences.

PART 7 - SUBSCRIPTION TELEVISION BROADCASTING LICENCES

Section 93(5)	The Minister must publish in the Gazette the name of the successful satellite subscription television broadcasting licence applicant.
Section 95	The Minister must advertise for applications for satellite subscription television broadcasting licences.

Section 96(3)	The ABA must publish in the Gazette the names of successful applicants for other subscription television broadcasting licences.
Section 98(3)	Any proposed new conditions, variations or revocations of subscription television broadcasting licences must be published in the Gazette.
Section 98(5)	New, varied or revoked subscription television broadcasting licence conditions must be published in the Gazette.
Sections 103(1), 103(4)	The ABA is to maintain a Large Circulation Newspaper Register which is to be open for public inspection.
Section 113(1)	The Minister may, by notice in the Gazette, specify televised events which are to remain free to the public.
Section 113(3)	Notices made under sections 113(1) and 113(2) are to be disallowable instruments.

PART 8 - SUBSCRIPTION BROADCASTING AND NARROWCASTING LICENCES

Section 115	The ABA may, by notice published in the Gazette, determine class licences for subscription and open radio broadcasting and narrow services, and subscription television narrowcasting services.
Section 118(1)	Variations, revocations or new conditions in a class licence must be published in the Gazette.
Section 118(3)	Before publishing a notice under section 118(1), the ABA must publicise its intention to vary a licence, make available for purchase copies of the licence and the

	proposed variation, and consider representations concerning the variation.
Section 119	Class licences and instruments varying them are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901.
PART 9 - PROGRAM STANDARDS	
Section 120(1)	The ABA, by notice in writing, may determine program standards.
Sections 122(1), 122(2)	The ABA is to maintain a register of codes of practice which is to be open for public inspection.
Sections 123(1). 123(2)	The ABA may, by notice in writing, determine a program standard if there is convincing evidence that a code of practice has failed or if the industry fails to implement a code of practice.
Section 124	The ABA must, before determining, varying or revoking a standard, seek public comment.
Section 125	Variations, determinations and revocations of standards must be published in the Gazette and copies must be available for purchase.
Section 126	Standards determined in this Part, and variations and revocations of those standards, are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901.
PART 11 - COMPLAINTS TO THE ABA	
Sections 147(3), 150(3)	The ABA must notify complainants of the results of investigations arising

	from their complaints.
Section 151(2)	If the ABA gives the Minister a written report concerning failure by the ABA or SBS to act on a recommendation made by the ABA, then the Minister must table the report in the House within 7 sitting days of receiving the report.

PART 12 - THE AUSTRALIAN BROADCASTING AUTHORITY

Section 160(2)	The Minister must publish in the Gazette any directions he gives to the ABA.

PART 13 - INFORMATION GATHERING BY THE ABA

Section 170	The ABA may, in conducting an investigation for the purposes of the performance or exercise of any of its functions and powers, call for written submissions from the public.
Section 176	The ABA may prepare a report on an investigation but must do so if the investigation was at the request of the Minister. A copy of each report on hearings conducted at the Minister's direction must be given to the Minister. The ABA may give a copy of a report or part of a report to the Director of Public Prosecutions if it relates to conduct that could constitute an offence under the Act or under another law of the Commonwealth.
Section 185	A hearing conducted by the ABA is to take place in public, except where evidence may be of a confidential nature or a public hearing would not be conducive to the due administration of the Act.
Section 186	If the ABA is to conduct a

	hearing in public, the ABA must give reasonable public notice of the conduct of the hearing.
Sections 194, 195	A person may lodge with the ABA any submissions in writing that the person wishes the ABA to take into account in relation to the subject matter of the hearing. The ABA must take into account any such submissions or any other evidence given to it at a hearing when making a decision to which the evidence or submission relates.
Section 196	A person who wishes to participate in a hearing may be represented at the hearing by another person. If a person is not represented by another person at a hearing, the ABA is to ensure that person is not disadvantaged.
Section 197(1)	If the ABA has completed a hearing, the ABA must prepare and publish a report setting out its findings as a result of the hearing.
Section 203	Subject to this section, an application may be made to the Administrative Appeals Tribunal for a review of a decision set out in column 1 of Attachment A made under the provision of this Act set out in column 2, but such an application may only be made by the person described in column 3.
Section 209(1)	If the ABA gives an opinion under sections 21 (broadcasting service categories) or 74 (control of licences), the ABA must cause a copy of the opinion to be published in the Gazette.

SCHEDULE 3 - ADMINISTRATIVE PROVISIONS APPLICABLE TO THE ABA

Section 9(5)	If an appointment to the Board of the ABA is terminated, the Minister must cause to be tabled in Parliament a statement setting out the reasons for the termination.

TABLE

Column 1 Decision	Column 2 Provision	Column 3 Person who may apply
Declaration that a program is not an Australian drama program	Subsection 6(3)	The producer of the program
Refusal to allocate licence	Subsection 40(1)	The applicant
That a person is not a suitable applicant or licensee (Commercial)	Subsection 41(2)	The person
Variation of licence conditions or imposition of new conditions (Commercial)	Subsection 43(1)	The licensee
Refusal to approve higher percentage of foreign directors	Subsection 58(2)	The licensee
To enter a newspaper in Register	Subsection 59(3)	The publisher of a newspaper or a commercial television broadcasting licensee in the relevant licence area
Refusal to remove newspaper from Register	Subsection 59(4)	The publisher of a newspaper or a commercial television broadcasting licensee in the relevant licence area
Refusal to approve temporary breach or determination of period of approval	Subsection 67(4)	The applicant for approval
Refusal to extend time for compliance	Subsection 68(2)	The applicant
Refusal to extend time for compliance	Subsection 71(3)	The applicant
Refusal to permit licensee to operate second service	Subsection 73(2)	The licensee or another person who is interested in operating the licence

TABLE—continued

Refusal to extend period for operating second service	Subsection 73(3)	The licensee
That a person is not a suitable applicant or licensee (Community)	Subsection 83(2)	The person
Variation of licence conditions or imposition of new conditions (Community)	Subsection 87(1)	The licensee
Refusal to allocate licence	Subsection 96(1)	The applicant
That a person is not a suitable applicant or licensee	Subsection 97(2)	The person
Variation of conditions or imposition of new conditions	Subsection 98(2)	The licensee
To enter a newspaper in the Register	Subsection 103(2)	The publisher
Refusal to remove newspaper from the Register	Subsection 103(3)	The publisher
Variation of class licence conditions or imposition of new conditions	Subsection 118(1)	A person operating under the class licence
Refusal to include a code of practice in the Register	Subsection 121(4)	The relevant industry group
Suspension or cancellation of licence	Subsection 141(1)	The licensee

Notification of decisions to include notification of reasons and appeal rights

204. If the ABA makes a decision that is reviewable under section 203, the ABA is to include in the document by which the decision is notified:

(a) a statement setting out the reasons for the decision; and

(b) a statement to the effect that an application may be made to the Administrative Appeals Tribunal for a review of the decision.

COMMENTS ON SCRUTINY OF BILLS ALERT DIGEST ON THE BROADCASTING SERVICES (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1992

The Committee queried whether applications for the grant of supplementary radio licences should be allowed to be completed.

COMMENT: The Government intends to move an appropriate amendment to the Bill to take account of the Committee's concerns.

Facsimile transmission from

BLAKE DAWSON WALDRON
SOLICITORS

Date	15 June 1992	Grosvenor Place 225 George Street Sydney NSW 2000 Australia
Our ref/File no	JFF.PRM.6459/91	
Your ref/File no		
To	Mr Stephen Argument Secretary to the Senate Standing Committee for the Scrutiny of Bills PARLIAMENT HOUSE CANBERRA	Telephone (02) 258 6000 Int + 61 2 258 6000 Telex AA22867 DWN DX 355 Sydney
Facsimile no	06 277 3289	Facsimile (02) 258 6999

Dear Mr Argument,

BROADCASTING SERVICES BILL

As you are aware we act for the Federation of Australian Commercial Television Stations, which represents all commercial television licensees in Australia.

We refer to your discussions with Mr Paul Mallam of this office. Please find attached a submission that we have been instructed to provide to the Committee. If you or any members of the Committee require any additional information, please do not hesitate to telephone Paul Mallam on 02 258 6065.

We would like to thank the Committee for the opportunity to make this submission and we trust that it assists the Committee's deliberations.

Yours faithfully,

Blake Dawson Waldron

If you do not receive 9 pages (including this page) please telephone or fax immediately.
Our fax operator's telephone number is (02) 258 6666.

SUBMISSIONS ON THE BROADCASTING SERVICES BILL
TO THE SENATE STANDING COMMITTEE
FOR THE SCRUTINY OF BILLS

Executive Summary

The Broadcasting Services Bill ("the Bill") contains the following deficiencies:

- The Australian Broadcasting Authority is not sufficiently accountable.
- Basic rights are not recognised or properly protected.
- The penalties established under the Bill are disproportionately high.

Accountability of ABA

- The ABA will exercise a wide range of powers which will mould the future structure of, and the services provided by, Australia's electronic media. However, despite the width of those powers, the Bill does not contain sufficient checks on ABA decisions. Major ABA decisions should be subject to a mandatory public inquiry procedure, to ensure transparency in the ABA's decision making processes, public confidence in the outcome of those processes and an appropriate level of public accountability. Those decisions should include:

  (a) licence suspensions or cancellations (cl. 141);

  (b) the setting of program standards (cl. 120 and 123);

  (c) the imposition of conditions on licences (cl. 43 and 87);

  (d) frequency allotment plans and licence area plans (cl. 25 and 26).

- In addition, each of the following instruments will have such far-reaching consequences that they should be disallowable instruments, required to be laid before the Parliament:

  (a) frequency allotment plans and licence area plans (cl. 25 and 26);

  (b) the price based allocation system determined by the ABA in respect of commercial licences (cl. 36);

  (c) the price based allocation system determined by the Minister in respect of subscription television broadcasting licences (cl. 93).

- The AAT appeal mechanisms at cl. 203 should be expanded to include decisions which set program standards (cl. 120 and 123) and opinions given by the ABA (cl. 21 and 74).

Protection of Rights

- The Bill contains no express recognition of the rules of natural justice and only limited recognition of common law privileges. Provisions should be inserted which clearly preserve those rights.

- Under various provisions a person could be prosecuted on the basis of an ABA notice alleging a breach of the Act, without any requirement that the ABA prove in a Court of law that the breach occurred (cl. 67, 69, 70, 72, 135, 136, 139 and 140). Those provisions cut down the safeguards normally recognised by criminal law and should be deleted.

- Provisions in respect of "associates" reverse the onus of proof by requiring a person to disprove that he or she is an associate of some other person (cl. 6). This is contrary to the normal rule that a regulator or prosecuting authority be required to prove each element of its case. These provisions should be deleted.

- The ABA's power to publish a report of a private investigation will be destructive of reputations and livelihoods and should be deleted (cl. 177).

- The Minister's power to require licensees to broadcast matters of national interest is entirely unfettered (para 7(1)(d) of Schedule 2). It should be subject to the same restrictions as currently apply to that power.

Criminal Penalties

- Penalties will accrue at $2 million per day (or $730 million per year). This is totally out of proportion to any necessary deterrent. The maximum penalties imposed under the Bill should be reduced.

Other Matters

- Provisions which allow temporary approval of a breach of the Act only before the breach is committed are potentially unworkable (cl. 67). They should also allow for temporary approval to be given after entry into the transaction which caused the breach.

An extensive review of the Bill has been undertaken, in consultation with junior and senior Counsel. FACTS is able at short notice to provide the Committee with draft provisions which would overcome the problems identified above. Alternatively, FACTS would also be able at short notice to meet with the Committee.

A more detailed analysis of these issues is attached.

Blake Dawson Waldron
for and on behalf of the
Federation of Australian Commercial Television Stations

15 June, 1992

SUBMISSIONS ON THE BROADCASTING SERVICES BILL

ACCOUNTABILITY OF ABA

Few bodies in Australia exercise such a wide array of powers as will be conferred on the ABA, with such far ranging consequences for Australian society, and with so few accountability mechanisms. ABA decisions will dictate the future "look" of Australian culture, as well as having long-term effects on industry investment, production levels and employment.

The ABA will exercise far more powers than the current Australian Broadcasting Tribunal. For example, nearly all planning and licensing powers will be vested in the ABA, whereas under the present Broadcasting Act planning powers are exercised by the Minister. The conferral of very wide powers on the ABA, together with the loss of ultimate Ministerial responsibility for many decisions, requires a regulatory framework which ensures ABA accountability.

The ABA is not subject to any of the detailed procedures under which the Australian Broadcasting Tribunal operates. Although those procedures obviously require some streamlining, the Bill's basic thrust is to do away with them completely. However, in our submission this approach places far too much emphasis on the exercise of unfettered administrative powers, at the expense of individual rights.

An appropriate balance between individual rights and administrative efficiency could be maintained by the inclusion of a handful of simple provisions in the Bill.

Mandatory Inquiry Procedure

There are a number of critical decisions by the ABA which could affect an extremely diverse range of interests, including large scale industry investment and the nature of electronic media services received by Australian audiences. Under the Bill as presently drafted those decisions could be made in private, and in some cases even without public consultation.

These critical decisions include:

(a) the suspension or cancellation of licences (clause 141);

(b) the imposition of licence conditions (clauses 43 and 87);

(c) the setting of program standards (clauses 120 and 123);

(d) the publication of frequency allotment plans and licence area plans (clauses 25 and 26).

In our submission each of those decisions should be subject to a mandatory inquiry procedure, which facilitates public scrutiny of the ABA and also permits affected persons, including licensees, to present relevant evidence and submissions to the ABA. It is only through such an inquiry process that properly informed decisions, in which the public can have full confidence, can be guaranteed.

AAT Review

The rights to AAT appeal at clause 203 are deficient in at least two respects. Firstly, there is no right of AAT review of a decision to impose program standards on licensees (clauses 120 and 123). The program standards set by the ABA are perhaps the most important of its responsibilities. Curiously, the Bill provides for AAT review of the ABA's refusal to register a code of practice but not for a decision to impose a standard. Under the Bill codes of practice are intended to be a substitute for standards. If AAT review is available in respect of a code of practice, then it is logically consistent for the same rights to apply in respect of a decision to impose program standards.

Secondly, the ABA under clauses 21 and 74 has power to give opinions which will bind it to act in accordance with that opinion for the next five years. Consequently, the giving of an opinion is an extremely important decision. For example, an adverse ABA opinion will effectively act as a veto to a proposed commercial transaction for which an opinion has been obtained. The absence of AAT review will discourage persons from seeking ABA opinions, whereas the intent of the legislation is that licensees and others should use this avenue. ABA opinions should therefore be subject to AAT review.

Increased Parliamentary Scrutiny

It is also in the public interest that the Bill provide some Parliamentary scrutiny of frequency allotment plans, licence area plans, the ABA's price based allocation system in respect of commercial licences and the Minister's price based allocation in respect of satellite Pay TV licences. As the legislation is presently drafted the only accountability in respect of these decisions is a requirement for public consultation prior to the preparation of licence area plans and frequency allotment plans. This requirement does no more than reflect current Departmental practice in respect of the equivalent powers now exercised by the Minister under the Broadcasting Act. However, the political responsibility borne by the Minister in respect of these decisions will be lost, upon their conferral on the ABA. To ensure some degree of accountability, those decisions should be made by disallowable instrument, in order to ensure some Parliamentary scrutiny of them.

Although the powers to determine price-based allocation systems stand in a somewhat different category, those systems will provide the framework for future entry to the industry. That framework will establish the criteria for allocation of commercial licences and satellite Pay TV licences, and therefore involve issues of national importance. Given the pivotal nature of those systems, there is at the very least a need for them also to be made by disallowable instrument. We stress that it is not suggested that individual licence allocation decisions should be subject to

Parliamentary scrutiny, but the system under which those decisions will be made. Indeed, there is a strong case that those systems should be established by delegated legislation. The requirement that they be made by disallowable instrument provides a minimum level of protection.

BASIC RIGHTS AND NOTIONS OF FAIRNESS

The Bill does not expressly provide that the ABA is subject to the requirements of procedural fairness (or natural justice, as it is otherwise known). An established presumption of statutory interpretation is that that the exercise of administrative powers is subject to the requirements of procedural fairness. However, it is arguable that in the absence of an express provision confirming those requirements, this presumption has been displaced or weakened by other provisions of the Bill. For example, clause 167 provides that when making a decision on any matter, the ABA is not limited to a consideration of material made available through an investigation or hearing, but may take into account the knowledge and experience of its members. On one view, this provision would entitle the ABA to make a decision which adversely affects the rights of a person, without putting to the person some information which one of its members had obtained privately or at least otherwise than through the usual investigative or inquiry procedures established by the Bill. Such a result would be fundamentally unfair. A provision which expressly stated that the ABA was subject to the requirements of procedural fairness would remove any doubt. It also does no more than section 80A of the current Broadcasting Act, which provides that the Australian Broadcasting Tribunal is subject to the rules of natural justice. Given the far larger range of powers vested in the ABA, it is important that this provision is retained in the Bill.

Recent judicial decisions in relation to privilege under the Corporations Law indicate that the questions whether and in what circumstances common law privileges are cut down by legislation is unclear. To avoid expensive and unnecessary litigation, it is important that legislation which contains powers to compulsorily obtain documents and receive evidence expressly states the legislative intention regarding privilege. The only relevant provision in the Bill is sub-clause 201(3), which preserves the privilege against self-incrimination. However, the Bill is silent regarding other privileges, such as legal professional privilege, which have long been regarded as basic rights. It is a short and sensible step to amend sub-clause 201(3) so that it applies generally to all privileges. In the absence of this amendment, the express reference to the privilege against self-incrimination might ground an inference that the Bill abrogates other privileges. Such a result would be totally unfair.

Breach Notices

The Bill contains several provisions under which the ABA may issue a person with a notice that the person is in breach of the Act. The notice will require the alleged breach to be rectified within a specified period (clauses 67, 69, 70, 72, 135, 136, 139 and 140). Failure to comply with the notice constitutes an offence. When prosecuting a person for an offence of failure to comply with such a notice, the ABA will not be

required to prove that the original breach of the Act (upon which the notice was based) had been committed, nor would it be a defence to such a prosecution to establish that this breach had not occurred.

This procedure is fundamentally unfair. It permits the ABA to administratively determine whether or not a person has breached the Act, without ever being required to prove in a Court of law that the breach had occurred. Although judicial review of the ABA's decision to issue the breach notice could be sought, the grounds of judicial review are very limited. Judicial review can be obtained only to correct errors of law, not errors of fact, contained in a decision. Furthermore, in instituting proceedings, an applicant would be required to prove its case, thereby reversing the onus that a prosecuting authority is required to establish that an offence has occurred. Due to the limits of judicial review, it is quite possible for the ABA to wrongly issue a breach notice and for a person to have no redress - even though the ultimate consequence of this process is liability be fined up to $2 million per day.

These notice of breach provisions are unnecessary. In any given situation, a person should be prosecuted for a primary breach of a provision of the Act, rather than a failure to comply with an ABA notice. In our submission they should be deleted from the Bill.

Associates

"Associate" is defined in sub-clause 6(1) so as to deem certain categories of persons to be associates of other persons unless the ABA is satisfied that they do not exert relevant influence over the business dealings of each other. The effect of this section is to create a reverse onus of proof, whereby a person falling within one of those categories must prove that they are not an associate of the other person. This is fundamentally repugnant, particularly as the definition of associate is so wide. In accordance with normal legal principles, the ABA should be required to demonstrate that persons act in concert, before finding that they are associates.

Publication of Reports

Clause 177 of the Bill empowers the ABA to publish a report of a private investigation. Such a procedure is likely to be just as (if not more) damaging to a person's reputation and livelihood than the commencement of criminal proceedings. The stigma attached to publication of such a report will be impossible to remove, given that the investigation which led to the report took place away from the public gaze. In addition, no worthwhile public interest would be served by this procedure. If a private investigation reveals some wrongdoing, the ABA should commence licence action or prosecution proceedings, rather than relying on publication of a report as a form of sanction or threat. For these reasons clause 177 should be deleted.

Ministerial Control Over Broadcasts

Paragraph 7(1)(d) of Schedule 2 empowers the Minister to require a licensee to broadcast such items of national interest as he specifies. This paragraph is based on

section 104 of the Broadcasting Act. However, whereas section 104 provides that the Minister may not require a licensee to broadcast items of national interest for more than 30 minutes in any 24 hour period, paragraph 7(1)(d) contains no limitation whatsoever. Such a sweeping power is contrary to basic notions of democracy - at its widest, the power would enable a Government to turn commercial broadcasting into a vehicle for its own information. Although that might be unlikely in the present political climate, it is necessary to limit this power. We submit that the limitation already contained in section 104 should be retained.

PENALTIES

Various clauses of the Bill create penalties of up to $2 million per day (or $730 million per year) for breaches of the Bill in respect of a commercial television licence. These astronomical penalties are completely out of kilter with other Commonwealth legislation and any need for a reasonable deterrent. By comparison even the proposed revision of penalties under the Trade Practices Act will establish penalties at a maximum of only $10 million. Penalties under the Trade Practices Act are currently set at a maximum of $250,000. The public interests relating to enforcement of the Trade Practices Act are at least as important as those relating to the Broadcasting Services Bill. There are no reasons for imposing such draconian penalties on broadcasters, the only effect of which would be to drive them into liquidation, when no comparable penalties appear in any other Commonwealth legislation.

By comparison, we understand that in the United States the Federal Communications Commission is empowered to impose maximum penalties on an American television network of $US250,000. These penalties must be seen within the context that each American television network is in itself far larger than the entire Australian television industry. In our submission the penalties under the Bill should be reduced to $100,000 per day, which would continue to far exceed the penalties set by any other legislation, with a maximum cap tied to the same penalties as the Trade Practices Act (ie. $250,000 at present).

OTHER MATTERS

Clause 67 permits persons to apply for prior approval of temporary breaches of the Bill. There is a commercial need for these provisions and FACTS supports them. Due to the extensive ownership and control provisions of the Bill, a person may be placed in breach of those provisions for some period, in consequence of a commercial transaction. However, the clause is deficient in not allowing for the ABA to approve temporary breaches where an application for approval is made after the relevant agreement or transaction is entered into. There may be circumstances where it is impossible to obtain pre-transaction approval, due to the commercial speed with which a transaction takes place (such as a share transaction). In addition, the requirements of confidentiality often may prevent pre-transaction disclosure to the

ABA, unless the other party to the transaction consents. In those circumstances the clause should provide for some limited form of post-transaction approval.

Blake Dawson Waldron
for and on behalf of the
Federation of Australian Commercial
Television Stations

15 June 1992

BLAKE DAWSON WALDRON
SOLICITORS

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16 June 1992

Mr Stephen Argument
Secretary to the Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2601

Dear Mr Argument,

BROADCASTING SERVICES BILL

We act for Trans Media Holdings Pty Limited.

By way of background to this submission our client wholly owns the licensees of commercial radio licences 4CA Cairns, 4TO Townsville and 4MK Mackay, amongst other interests. It is also a very experienced media company and, consequently, has a vital interest in the Broadcasting Services Bill.

The purpose of this letter is to make a short submission to the Committee on some aspects of the Broadcasting Services Bill and the transitional provisions in the Broadcasting Services (Transitional Provisions and Consequential Amendments) Bill ("the Transitional Provisions Bill") which will unfairly deprive our client of various rights. We understand that a number of other commercial radio licensees in Australia are likely to suffer the same prejudice.

Mr Stephen Argument
Secretary to the Senate Standing Committee
for the Scrutiny of Bills 16 June 1992

We are instructed to make the following submissions:

1. Clause 12 of the Transitional Provisions Bill provides that applications for the grant of commercial radio licences or public radio licences may proceed under the Broadcasting Act, notwithstanding the general repeal of that Act effected by clause 27. However, no equivalent provision exists in respect of supplementary FM licence applications. In other words, those applications will cease to exist. The unfairness of this provision is obvious, when it is applied to 4CA. 4CA originally applied for a supplementary licence in accordance with Government policy in 1984. After several changes in that policy, its application was finally referred to the Australian Broadcasting Tribunal late last year. A hearing of its application is scheduled to be held in Cairns on 21 and 22 July 1992. It is possible for the Tribunal to decide to grant 4CA a supplementary licence between the date of that hearing and the date of commencement of the transitional provisions but that decision will have absolutely no legal effect once the transitional provisions commence operation. Consequently, the time, effort and expense in prosecuting the supplementary licence application will have been entirely wasted. In our submission no legislation should operate to destroy rights in this way.

2. We should also indicate that in addition to our client's supplementary licence application, the Tribunal is also considering an application for an independent FM licence for Cairns. Under the transitional provisions, that licence application will proceed. Present Government policy would allow 4CA to convert to FM (if it is not granted a supplementary licence) upon the introduction of the independent commercial FM licence. However, both the transitional provisions and the Broadcasting Services Bill are completely silent on the question of conversion of an AM licensee to FM. In our submission the transitional provisions should expressly preserve the current position, under which our client would be entitled to convert to FM upon the introduction of another FM licence.

3. Clause 39 of the Broadcasting Services Bill provides in essence that in a solus (or one-station) regional market, the incumbent licensee may automatically obtain another licence, if two or more licences are available for allocation. We understand that these provisions were inserted as an alternative to the present supplementary licence scheme. Because the application for a commercial FM licence in Cairns can proceed under the transitional provisions, our client will cease to operate in a solus market at some time in the near future. In that situation clause 39 would have no application to it. Consequently, having been deprived of its right to pursue a supplementary licence application lodged with the Minister some 8 years ago, the Broadcasting Services Bill offers it no alternative path.

We submit that:

1. The transitional provisions should be amended to permit supplementary licence applications to remain on foot;

2. The transitional provisions should be amended to permit regional AM licensees to convert to FM in accordance with current legislation;

3. Alternatively, clause 39 of the Broadcasting Services Bill should be amended to permit a licensee in 4CA's circumstances to be able to apply for another licence under that clause. We appreciate that this latter submission involves a substantive amendment to the Bill. However, it is made to address the problems described above, under which our client and other regional radio licensees will be deprived of their existing rights.

We wish to thank the Committee for this opportunity to put a submission before it. Should you or any member of the Committee have any queries, Paul Mallam of this office may be contacted on 02 258 6577.

Yours faithfully,

Blake Dawson Waldron

BLAKE DAWSON WALDRON

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17 June 1992

Mr Stephen Argument
Secretary to the Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2601

Dear Mr Argument,

BROADCASTING SERVICES BILL

We act for Radio Albury-Wodonga Limited.

Our client is the licensee of commercial radio licence 2AY Albury-Wodonga.

The purpose of this letter is to draw to the Committee's attention a serious, presumably unintended consequence flowing from some aspects of the Broadcasting Services Bill ("BSB") and the transitional provisions in the Broadcasting Services (Transitional Provisions and Consequential Amendments) Bill ("the Transitional Provisions Bill"). That consequence will unfairly deprive our client of its existing rights to obtain a licence under the Broadcasting Act. We understand that a number of other commercial radio licensees in Australia are likely to suffer the same prejudice.

We are instructed to make the following submissions:

1. Clause 12 of the Transitional Provisions Bill provides that pending applications for the grant of commercial radio licences or public radio licences may proceed under the

Broadcasting Act, notwithstanding the general repeal of that Act effected by clause 27. However, no equivalent provision exists in respect of supplementary FM licence applications. In other words, those applications will cease to exist. The unfairness of this provision is obvious, when it is applied to 2AY. Its application for a supplementary licence was referred to the Australian Broadcasting Tribunal by the Minister less than two months ago. The Tribunal is currenting conducting an inquiry into that application. Immediately, however, upon the Bills coming into force, the application ceases to exist. The time, effort and expense in prosecuting the supplementary licence application will have been entirely wasted. In our submission no legislation should operate to destroy rights in this way, particularly when the same legislation operates so as to preserve the rights of a competitor (see below).

2. We should also indicate that in addition to our client's supplementary licence application, the Tribunal is also considering an application for an independent FM licence for Albury-Wodonga to a third party. Under the transitional provisions, that licence application is entitled to proceed. Present Government policy would allow 2AY to convert to FM (if it is not granted a supplementary licence) upon the introduction of the independent commercial FM licence. However, both the transitional provisions and the Broadcasting Services Bill are completely silent on the question of conversion of an AM licensee to FM. In our submission the transitional provisions should also expressly preserve the current position, under which our client would be entitled to convert to FM upon the introduction of another FM licence operated by a third party, as well as preserving 2AY's entitlement to prosecute its supplementary licence application.

3. Clause 39 of the BSB provides in essence that in a solus (or one-station) regional market, the incumbent licensee may automatically obtain another licence, if two or more licences are available for allocation. We understand that these provisions were inserted as an alternative to the present supplementary licence scheme. Because the application for a commercial FM licence in Albury-Wodonga can proceed under the transitional provisions, our client could cease to operate in a solus market at some time in the near future. In that situation clause 39 would have no application to our client. Consequently, having been deprived of its right to pursue a supplementary licence application, the BSB offers our client no alternative path.

We submit that:

1. The transitional provisions should be amended to permit supplementary licence applications to remain on foot;

2. The transitional provisions should be amended to permit regional AM licensees to convert to FM in accordance with current legislation.

Mr Stephen Argument
Secretary to the Senate Standing Committee
for the Scrutiny of Bills

17 June 1992

We wish to thank the Committee for this opportunity to put a submission before it. Should you or any member of the Committee have any queries, Paul Mallam of this office may be contacted on 02 258 6577.

Yours faithfully,

Blake Dawson Waldron

Minister for Primary Industries and Energy
Simon Crean, MP

16 JUN ...

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

RECEIVED
17 JUN 1992
Senate Standing Cttee for the Scrutiny of Bills

Dear Senator Cooney

I refer to a letter from Mr Stephen Argument, Secretary, Senate Standing Committee for the Scrutiny of Bills, informing me of the Committee's concerns over amendments to the *Primary Industries Levies and Charges Collection Act 1991* [PILCC Act] contained in the *Primary Industries and Energy Legislation Amendment Bill (No 2) 1992* as introduced into the House of Representatives on 6 May 1992. The Committee indicated that it was uncertain as to the purpose of the amendments.

The amendments are to rectify minor anomalies concerning the allowing of minimum quantity or minimum monetary thresholds for small producers. Similar provisions were contained in former collection Acts and inadvertently omitted from the PILCC Act in 1991.

The intention of the amendments is to allow small producers a threshold before having to pay levy as well as providing a necessary reduction in the cost of collection of levies. The basis for setting the threshold is not linked to the actual levy rates but is related to the estimated collection costs per levy return. The provisions will permit different thresholds to be prescribed, in consultation with the appropriate industry, for future levy years as economic events change. The initial values prescribed are those originally contained in the repealed Acts.

In most levy or export charge schemes about 85% of income is paid by only 15% of the levy payer population, whereas 40% to 50% of that population would be liable to pay less than the limits proposed. Once the threshold is exceeded then levy would become payable on the total quantity or amount, as the case may be.

With full cost recovery for levy collection operating since 1988/89 there has been an increasing need to ensure economical collection techniques are adopted by my Department. These amendments will allow for a reduction in the administrative burden for small producers by delaying levy payments until the threshold is reached.

Yours sincerely

SIMON CREAN

Parliament House, Canberra ACT 2600. Telephone: (06) 277 7520 Facsimile: (06) 273 4120

17 JUN 1992

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

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

Dear Senator

I refer to the Scrutiny of Bills Alert Digest No. 8 of 1992 (3 June 1992) concerning the Sales Tax Amendment (Transitional) Bill 1992.

The Committee has raised concerns about the effect of proposed amendments of the *Crimes (Taxation Offences) Act 1980* (C (TO) Act) contained in the Sales Tax Amendment (Transitional) Bill 1992. In particular, it was concerned that-

> "..the proposed amendment refers to sales tax which would be imposed in the future under an Act which will shortly terminate. This would appear to make something which no longer exists apply to something which has not yet occurred."

The existing sales tax law will not terminate with the commencement of the new law.

The C (TO) Act applies to make certain actions in relation to the non-payment of tax an offence. Under that Act, it is an offence if a person enters into an arrangement or transaction to secure that a company or trustee will be unable to pay sales tax liable to become due and payable at some future date. This is known as 'future sales tax'.

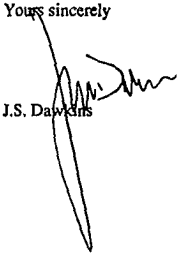
The amendment proposed is designed to ensure that subsection 3(2) will apply only to future sales tax that becomes payable under the existing law. This will be called 'future old sales tax' to distinguish it from sales tax that will be payable under the new law. To illustrate, a person may become liable to pay sales tax under the existing law, before the new law comes into operation, but the due date for payment of that tax may be after the new law comes into operation. This is necessary because the existing sales tax law will still remain in force for any taxable acts, transactions or operations that occur before the first taxing day of the new law.

The new sales tax legislation will only commence to impose tax on any assessable dealings that occur on or after the first taxing day, which is the first day of the fourth month after the law receives the Royal Assent.

The amendments are necessary to ensure that the provisions of the C (TO) Act will apply to all sales tax transactions covered by the existing law and the new law. They will apply regardless of whether the 'future sales tax' referred to in that Act is payable under the existing sales tax legislation.

I trust these comments satisfactorily address the Committee's concerns.

Yours sincerely



J.S. Dawkins

17 JUN 1992

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

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

RECEIVED
17 JUN 1992
Senate Standing Ctte for the Scrutiny of Bills

Dear Senator Cooney

On 4 June 1992, your Committee's Secretary drew attention to its comments on the *Taxation Laws Amendment Bill (No 3) 1992* in its Alert Digest No 8 of 1992.

The comments relate to clause 7 of the Bill. That clause provides that the amendments to the research and development tax concession are to be retrospective to the date of effect of that concession, 1 July 1985. The comments seek my advice as to whether the retrospectivity is likely to affect taxpayers adversely.

The proposed retrospectivity has no substantial adverse effect on taxpayers.

As the Committee accepts, the proposed amendments are intended merely to confirm the existing state of the law. The Government believes this is what the amendments do. They confirm that exploration and prospecting are not automatically research and development, entitled to a possible deduction of more than 100%. This is consistent with the announcement of the R&D concession, the explanatory memorandum that accompanied its introduction, and the consistent administrative views of the Australian Taxation Office and the Industry Development and Research Board, the two bodies that administer the concession.

No deductions previously allowable as R&D will be denied by the amendments. Nor are there any disputes known to the ATO or the IR&DB in which taxpayers claim a deduction only on the basis that exploration and prospecting are as such research and development. So there are no claims on foot which would be precluded by the retrospectivity of the amendment.

Some taxpayers may suffer a tactical detriment. There is a large claim on foot in which the taxpayer claims certain exploration and prospecting activities to be R&D; the Board regards the activities as no more than ordinary exploration and prospecting, with no real R&D element. In that dispute, the taxpayer would have a tactical advantage if the amendment did not preclude argument that all exploration and

prospecting is necessarily R&D. Others, who have made no claim that exploration and prospecting are necessarily R&D, could still do so and would lose the opportunity of pressing such a claim.

The amendment is retrospective because it confirms the original meaning of the provisions. It does so consistently with the first announcement of the provisions, the explanatory memorandum that accompanied them, and the consistent views of the bodies charged with administering the provisions. Taxpayers will be treated after the amendment only as they were told they would be treated before the concession was enacted, and as they have been consistently treated since the provisions were enacted. No transactions will be penalised by being treated in a way of which there was no notice.

Yours sincerely

John Dawkins

17 JUN 1992

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

RECEIVED

17 JUN 1992

Senate Standing Cttee for the Scrutiny of Bills

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

Dear Senator Cooney

In its Scrutiny of Bills Alert Digest No 8 of 1992 (3 June 1992) the Committee drew attention to proposed new sections 170BA and 170BB being inserted in the Income Tax Assessment Act by clause 22 of the Taxation Laws Amendment (Self Assessment) Bill 1992. The Committee believes that the provisions may be considered to be an inappropriate delegation of legislative power.

The provisions in question, together with proposed sections 170BC, 170BD, 170BE and 170BF of the Income Tax Assessment Act and proposed sections 74A, 74B and 74C of the Fringe Benefits Tax Assessment Act (the second group of sections is being inserted by clause 36 of the Bill), give effect to the proposals in the Government's information paper of August 1991, "Improvements to Self Assessment - Priority Tasks", that public and private rulings by the Commissioner of Taxation would be made binding in law on the Commissioner.

The Bill proposes that a public ruling or a private ruling is to be the Commissioner's opinion of the way in which a tax law or tax laws would apply in relation to a particular arrangement or class of arrangements. In this context, a tax law is a provision of the law under which the extent of a person's liability for income tax or fringe benefits tax is worked out. Binding rulings will not deal with procedural or other provisions that are not used in the ascertainment of liability for income tax or fringe benefits tax.

As requested, I confirm the Committee's understanding, stated at page 45 of the Digest, that the effect of the provisions in the circumstances mentioned there is that an assessment would be made as if the law applied in the way ruled by the Commissioner so as to produce the lower tax liability. In other words, taxpayers would be given a guarantee by the law that a ruling fixes the upper limit of their liability on that issue if, at the time at which liability is established (generally by assessment), the ruling is found to contain an error of law. The position proposed is

similar to that which existed prior to 1986 under section 170 of the Income Tax Assessment Act, which generally did not allow the Commissioner to amend assessments to correct errors of law, except where the taxpayer objected against the assessment. Taxpayers will be entitled under the proposed rulings provisions to object against private rulings. A taxpayer dissatisfied with a public ruling would be entitled to seek a private ruling on the matter and object against that. If the taxpayer did not object against an adverse private ruling that contained an error of law, the provisions in question would be of no effect. The assessment would ignore the ruling.

Neither under the pre-1986 section 170 (it was amended as one of the legislative changes supporting the original move to self-assessment) nor under the proposed rulings provisions could the Commissioner be said to be overriding the taxation law. The most that could be said is that, where the principle of giving taxpayers certainty and early finality in their tax affairs and the principle of collecting the "right" amount of tax are in conflict, the proposed legislative system for rulings favours the former principle - as did section 170 in its earlier form. Section 12D of the Sales Tax Procedure Act is another example of a taxation law that adopts a similar policy. It provides for the remission of sales tax where a taxpayer has paid less than the "right" amount of tax in reliance on an incorrect ruling given by the Commissioner.

The function being exercised by the Commissioner in giving rulings under the proposed arrangements would be - as it is in making assessments - an administrative one, albeit that, in the circumstances in question, the statute would provide for the taxpayer's liability on assessment to be worked out by a different method from the one that would be used if the ruling had not been given. I do not consider that process to involve a delegation of legislative power. The discretionary powers that could be exercised by the Commissioner in giving rulings would be no different from those that are available to the Commissioner now in making assessments. The Commissioner would be required to apply the same principles in interpreting the law for the purposes of giving a ruling as he would for the purposes of making an assessment.

The advice of the Attorney-General's Department is that the proposed provisions would not be invalid on the ground that they involved an abdication of legislative power.

Yours sincerely

John Dawkins

The Hon Wendy Fatin MP
Minister for the Arts and Territories
Minister Assisting the Prime Minister for the Status of Women

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

Dear Senator Cooney,

I refer to your Committee's comments in Alert Digest No. 8 of 1992, tabled in the Senate on 3 June 1992, in relation to the Territories Law Reform Bill, which was introduced on my behalf into the Senate on 27 May 1992.

Commencement by Proclamation (clause 2)

I note that your Committee drew attention to the 12 month period within which certain clauses of the Bill may be proclaimed to commence, and the fact that this is in excess of the 6 month "general rule". I also note that your Committee accepted the explanation for this provision in my Explanatory Memorandum to the Bill, and that your Committee accordingly made no further comment on these provisions.

Delegation of powers to "a person" (clauses 6 and 16)

Your Committee stated that it is concerned that new subsection 8D(6), together with new paragraph 8D(7)(n) (and new subsection 8D(3)), of each of the Christmas Island Act 1958 and the Cocos (Keeling) Islands Act 1955,

> would allow the Minister to delegate a range of powers to "a person", without there being any indication of the qualities or attributes of such a person.

I am aware of the Committee's position that there should be a limit on either the powers which can be delegated or the persons (or classes of persons) to whom such powers can be delegated. These provisions of the Bill are intended to address this concern, as far as possible, by specifying persons and classes of persons in paragraphs (a) to (m) of new subsections 8D(7). These paragraphs encompass a broad range of persons within the Commonwealth, State or Territory public sectors.

May I assure the Committee that, when considering vesting of powers under applied laws, under new subsections 8D(3), I will prefer to vest powers in a person coming within paragraphs (a) to (m) of new subsections 8D(7). Nonetheless, there may well be circumstances, in these small, remote Territories, where it is necessary or most appropriate to vest powers in a private

PARLIAMENT HOUSE, CANBERRA 2600, AUSTRALIA TEL (06) 277 7360 FAX (06) 273 4125

person or body, to be appointed under new subsections 8D(6). Exercise of powers of certain appeal bodies, which should be seen to be completely independent, would be an example of this.

May I also assure the Committee that a Minister considering vesting powers in a private person would have regard to (while not being bound by) any requirements under the relevant law of Western Australia as to the qualifications or affiliation of the person or persons who may exercise that power in Western Australia.

In summary, I consider that the provisions as drafted are necessary in the special circumstances of the Indian Ocean Territories.

I note in closing that your Committee also made a passing comment suggesting that the reference to 'subsection' in the opening words of new subsection 8D(7) should be a reference to 'section'. The purpose of subsection 8D(7) is to establish a class of persons and authorities, which can then be referred to in subsections 8D(3) to 8D(5), so as to simplify the drafting of those provisions. It would not be desirable to provide that section 8D as a whole applies, in any particular sense, to the class of persons and authorities established by subsection 8D(7): subsection 8D(1), for example, is not intended to have any application to those persons and authorities, except inasmuch as they have powers vested in or delegated to them under subsection 8D(3); subsection 8D(6) applies principally to the Minister, and secondarily to persons who need not come within the class established by subsection 8D(7), for the reasons discussed above. So, it is appropriate and intended for subsection 8D(7) only, rather than the whole section, to be expressed to apply to the listed persons and authorities

Yours sincerely

18/6/92.

WENDY FATIN

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF

1992

19 AUGUST 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator J Powell
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT OF 1992

The Committee has the honour to present its Tenth Report of 1992 to the Senate.

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

Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992

Social Security Legislation Amendment Act 1992

Superannuation Guarantee (Administration) Bill 1992

Trade Practices Amendment Act 1992

BROADCASTING SERVICES (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) ACT 1992

The Bill for this Act was introduced into the Senate on 4 June 1992 by the Minister for Transport and Communications.

The Act makes certain transitional and consequential provisions, pursuant to the proposed replacement of the regulatory scheme for broadcasting services provided for by the *Broadcasting Act 1942*, with the new scheme provided for by the *Broadcasting Services Act 1992*.

The new scheme covers a wide range of developing services which do not fall within the traditional definition of broadcasting, but which, nevertheless, have substantial potential to influence public thought and attitudes. The new scheme is intended to ensure that appropriate controls can be placed on all services of this nature to protect the public interest.

The Bill was passed by the Senate (with amendments) on 24 June 1992 and by the House of Representatives on 26 June 1992. It received the Royal Assent on 9 July 1992. Nevertheless, the Committee makes the following further comment on the legislation.

General comment - submission from Blake Dawson Waldron Solicitors

The Committee dealt with the (then) Bill in Alert Digest No. 9 of 1992 and in its Ninth Report of 1992. In that Alert Digest and in that Report, the Committee informed the Senate that it had received submissions on the Bill from Blake Dawson Waldron Solicitors, on behalf of various clients. Copies of the submissions were attached to the Alert Digest and Report for the information of Senators. Amendments made in the Senate addressed concerns raised in two of those submissions.

The Committee has now received a further submission from Blake Dawson Waldron dated 14 July 1992 on behalf of another client. A copy of that submission, which essentially comprises a letter which Blake Dawson Waldron has written to the Minister for Transport and Communications, is attached to this Report for the information of Senators.

On its face, the fact situation described by Blake Dawson Waldron appears to indicate that the legislation in question trespasses unduly on the rights of the client concerned. The Committee would, therefore, appreciate the Minister's views on the Blake Dawson Waldron letter.

The Bill for this Act was introduced into the House of Representatives on 2 April 1992 by the Minister for Social Security.

The Act implements changes in the areas of telephone concessions, Job Search Allowance and Newstart Allowance, social security agreements with other countries, debt recovery, the income and assets test, compensation payments and data-matching. The Act also provides for a number of minor and technical amendments.

The Committee dealt with the Bill in Alert Digest No. 5 of 1992, in which it made various comments. The Committee made some further comments in Alert Digest No. 6 of 1992. The Minister for Social Security responded to those comments in letters dated 5 May and 29 May 1992 respectively. The Minister's responses were dealt with in the Committee's Seventh Report of 1992.

On 4 June 1992, the Privacy Commissioner wrote to the Committee in response to the Minister's responses to the Committee's comments. A copy of the Privacy Commissioner's letter is attached to this Report. The Committee dealt with the letter in its Eighth Report of 1992, in which it made various further comments. The Minister for Social Security responded to those comments in a letter dated 14 July 1992. A copy of that letter is also attached to this Report. Relevant parts of the response are also discussed below.

Concerns raised by Privacy Commissioner
Schedule 2 - proposed new subsections 11(1) and (2) of the *Data-matching Program (Assistance and Tax) Act 1990*

In his letter of 2 April 1992, the Privacy Commissioner drew the Committee's attention to (among other things) some proposed amendments to section 11 of the

Data-matching Program (Assistance and Tax) Act 1990 which were contained in Schedule 2 to the (then) Bill. The Committee noted that the (then) existing section 11 provided:

> **Notice of proposed action**
>
> 11.(1) Subject to subsection (4), where, solely or partly because of information given in Step 6 of a data matching cycle, an assistance agency considers taking action:
>
> (a) to cancel or suspend any personal assistance to; or
>
> (b) to reject a claim for personal assistance to; or
>
> (c) to reduce the rate or amount of personal assistance to; or
>
> (d) to recover an overpayment of personal assistance made to;
>
> a person, the agency:
>
> (e) must not take that action unless it had given the person written notice:
>
> (i) giving particulars of the information and the proposed action; and
>
> (ii) stating that the person has 21 days from the receipt of the notice in which to show cause in writing why the action should not be taken; and
>
> (f) must not take that action until the expiration of those 21 days.
>
> (2) Subject to subsection (5), where, solely or partly because of information given in Step 6 of a data matching cycle, the tax agency considers taking action to issue an assessment or an amended assessment of tax to a person, the agency:
>
> (a) must not take that action unless it has given the person written notice:
>
> (i) giving particulars of the information and the proposed action; and
>
> (ii) stating that the person has 21 days from the receipt of the notice in which

to show cause in writing why the action should not be taken; and

(b) must not take that action until end of those 21 days.

[The remaining subsections are not relevant in the context of this comment]

In Alert Digest No. 5, the Committee noted that the amendment proposed by the Schedule would apply the same regimen currently operating in relation to information obtained in Step 6 of a data-matching cycle to information obtained in Steps 1 and 4 of a cycle.

In the context of the proposed section 11 amendments, the Privacy Commissioner stated:

> *I support ... the proposal to refer in section 10(1)(a) and* (b) to another type of administrative action that may be taken on the basis of data-matching results - this being:
>
> > "to correct the personal identity data it [the agency] holds ..."
>
> This amendment allows agencies to make any factual corrections to file-data that come to light in the course of the matching, thereby enabling agencies to fulfil their responsibilities under the Privacy Act in relation to the accuracy and completeness of data.

He went on to say:

> The question then arises as to whether the usual requirement - (s.11) that prior notice of any proposed action be given to individuals - should apply to this new type of administrative action.
>
> Clearly this would not be appropriate in cases where the correction was trivial, e.g. an incorrect postcode. I am however concerned that some changes to an individual's file could prove more significant and if not notified or checked with the individual lead to significant and

> potentially adverse consequences. This could for example occur if an assumption were made about a discrepancy in name or address, and a correction made to relevant records. If the assumption was incorrect, this could then result in communications going astray, or in the individual being targeted for action, perhaps even as a result of a later data-matching cycle.
>
> An approach which might relieve agencies of the need to give notice in minor cases but preserve the basic principle of section 11 might be to include a further sub-section in section 11 which would allow the Privacy Commissioner to specify in the guidelines circumstances in which it would be permissible for an agency not to give a section 11 notice of correction of a record arising from data-matching, or to allow for notices of correction to be given promptly after-the-event.

The Privacy Commissioner concluded by saying:

> The principle of section 11 is that individuals should be given notice, and the opportunity to comment, before any action is taken on the basis of a data-matching result. I believe this principle should extend to alteration of records.

In Alert Digest No. 5, the Committee indicated that it agreed that it might be considered to trespass unduly on a person's rights and liberties if, as the Privacy Commissioner points out, that person was not given notice of (and the opportunity to correct) an incorrect amendment of his or her record. Accordingly, the Committee drew Senators' attention to the provision, as it may have been considered to be in breach (by omission) of principle 1(a)(i) of the Committee's terms of reference.

The Minister responded to that comment as follows:

> The Privacy Commissioner also criticises the amendments because they do not explicitly require a source agency to notify an affected person of an intention to correct the

> personal identity data it holds on that person. The Privacy Commissioner was represented at discussions on these amendments with the agencies involved in the data-matching program. It was common ground that a provision of the type suggested by the Commissioner would be acceptable. What could not be agreed, however, was a formulation distinguishing between trivial and non-trivial amendments. It was therefore agreed that one solution to the problem would be to leave the question open in the legislation and allow the Privacy Commissioner to cover the matter in his guidelines which have the force of law under section 12 of the Data-matching Program (Assistance and Tax) Act 1990 and which appear in the Schedule to that Act.
>
> I fail to see how this trespasses on rights as there is nothing in the Act to constrain the enactment or content of such a guideline and it will have the same status once in force as would a section of the Act. It is not necessary to pursue the Privacy Commissioner's proposal to advert in section 11 to the guidelines because section 12 already provides plenary powers for the Privacy Commissioner in that regard.

In its Seventh Report, the Committee thanked the Minister for his response and noted the Minister's advice that this was a matter for the Privacy Commissioner to address in his guidelines. The Committee indicated that it would draw the Minister's response to the attention of the Privacy Commissioner.

The Privacy Commissioner responded to those comments as follows:

> The Committee appears to accept the Minister's view that I can deal with the notice-of-correction issue via the guidelines. I have taken the view to date that it is not open to me via the guidelines to deal with matters which have been comprehensively addressed by the text of the Act. For that reason I would not see it as open to me to provide by a guideline for a further notice when the issue of what notices are necessary would appear to have been comprehensively addressed by the Act.

The Privacy Commissioner went on to say:

> Consequently, to enable me to meet the Minister's indication that he is happy for me to address this matter, I would request the Committee to recommend an extra provision in s.11 empowering me to make guidelines concerning the giving, where appropriate, of notices of correction of address.

In its Eighth Report, the Committee noted that while (in its Seventh Report) it had been prepared to accept the Minister's advice that this matter could be dealt with by the Privacy Commissioner in his guidelines, the Privacy Commissioner had now indicated that he disagreed with the Minister's advice on this matter. The Committee indicated that it would, therefore, appreciate the Minister's further advice on the points made by the Privacy Commissioner.

The Committee went on to suggest that if, as the Privacy Commissioner stated, an amendment to section 11 of the Privacy Act was required, then such an amendment should be made. The Committee noted that, since the Minister had already indicated that it was appropriate for the problem identified by the Privacy Commissioner to be dealt with by the Privacy Commissioner's guidelines, the Minister would presumably have no difficulty with amending the legislation to ensure that the Privacy Commissioner could, in fact, deal with the problem in that way.

The Minister has responded to those comments as follows:

> Advice from the Legal Services Group in my Department remains that the Privacy Commissioner can issue section 12 guidelines in the circumstances of the Bill. However, to ensure a more authoritative view the Legal Services Group has asked the Attorney-General's Department for formal advice by the end of July. I will provide you with a copy of that advice when it arrives.

The Committee thanks the Minister for this response and for his undertaking to provide the Committee with a copy of the advice. When that advice has been supplied to the Committee, it will be drawn to Senators' attention.

SUPERANNUATION GUARANTEE (ADMINISTRATION) BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Treasurer.

The Bill proposes to implement the Government's decision, announced in the 1991-92 Budget, to impose a tax on an employer where the employer provides superannuation support below a minimum levy. The purpose of the Bill is to encourage employers to provide a minimum level of superannuation support for employees.

All employers are potentially liable for the tax. However, the tax will not apply if the employer has provided the minimum level of superannuation support for each employee, or if the employer is exempt in respect of a particular employee.

General comment: 'Legislation by press release'

This Bill was amended by the Senate on 24 June 1992 and was returned to the House of Representatives, with a schedule of the amendments made by the Senate, on that day. The schedule of amendments incorrectly included four amendments which were not, in fact, agreed to by the Senate. The presence of those amendments in the schedule was not detected when the House of Representatives agreed to the Bill (as amended by the Senate) later on that day and indeed, was not detected until after both Houses rose for the winter adjournment, on 25 June 1992.

On 1 July 1992, the Australian Taxation Commissioner issued a media release on the Superannuation Guarantee Scheme which said, in part:

> The Superannuation Guarantee legislation was expected to receive Royal Assent yesterday. However, due to a

> clerical error, four of the Senate amendments in the Superannuation Guarantee (Administration) Bill returned to the House had not, in fact, been made by the Senate. As a consequence and notwithstanding the clear intention of the House to agree to the Bill in identical form to that passed by the Senate, the Bill has not, at this stage, been agreed to by both Houses in identical form.
>
> When Parliament resumes on 18 August 1992 it is expected that procedural steps will be taken to correct this technical problem and the Bill will be presented for Royal Assent soon after that date.
>
> The Commissioner of Taxation has advised employers that in these circumstances they should act on the basis that the Superannuation Guarantee scheme will operate as planned from 1 July 1992.

This is, clearly, an example of 'legislation by press release'. Notwithstanding the particular set of facts that prompted the Commissioner's media release, the Commissioner has, in effect, requested taxpayers to comply with the law as (he says) it will be rather than as it is. Further, the Committee notes that if, indeed, the Bill receives Royal Assent shortly after the resumption of Parliament, it will operate with a slight degree of retrospectivity. However, the Committee notes that this is a taxation bill and that, for practical reasons, the Senate has previously been prepared to accept a degree of retrospective operation in relation to taxation legislation, as is evident from the resolution of 8 November 1988 (see *Journals of the Senate*, No. 109, 8 November 1988, pp 1104-5). Accordingly, the Committee makes no further comment on the Bill.

The Bill for this Act was introduced into the Senate on 26 May 1992 by the Minister for Justice.

The Act introduces into Australia a strict product liability regime, based on the 1985 European Community Product Liability Directive, by way of amendments to the *Trade Practices Act 1974*. It provides a regime of strict liability, whereby a person who is injured or suffers property damage as a result of a defective product, has a right to compensation against the manufacturer, without the need to prove negligence on the part of the manufacturer.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Minister for Consumer Affairs responded to those comments in a letter dated 10 July 1992. Though the Committee notes that the Bill was passed by the Senate on 3 June 1992, the Minister's response may, nevertheless, be of interest to Senators. A copy of the letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

Survival of liability actions
Clause 4 - proposed new section 75AH of the *Trade Practices Act 1974*

In Alert Digest No. 8, the Committee noted that clause 4 of the (then) Bill proposed to insert a new Part VA into the *Trade Practices Act 1974*. That new Part deals with the liability of manufacturers and importers for defective goods. New section 75AH provides:

> **Survival of liability actions**
> 75AH. A law of a State or Territory about the survival of causes of action vested in persons who die applies to actions under section 75AD, 75AE, 75AF or 75AG.

The Committee noted that the Trade Practices Act contained no similar provision in relation to the survival of liability in relation to other actions under that Act. The Committee indicated that it would, therefore, appreciate the Attorney-General's advice as to the effect of the amendment on the rest of the Trade Practices Act. The Committee indicated that, in particular, it would appreciate the Attorney-General's advice as to whether the insertion of the proposed new section would mean that, on the basis of the legal doctrine of *expressio unius personae vel rei, est exclusio alterius* (ie the express reference to survival of liability in respect of the actions nominated operates to exclude survival of liability in respect of all other actions under the Act) would operate.

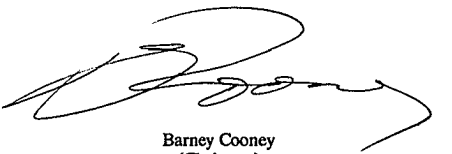
The Minister for Consumer Affairs has responded as follows:

> The question of the application of provisions in State and Territory laws to Federal actions is a complex one. To my knowledge, the issue of the application of State and Territory survivorship provisions to actions under the Trade Practices Act 1974 ("the Act") has never arisen. This is probably because the greatest usage of the legislation has been by corporate bodies and issues of survivorship of rights upon the death of a plaintiff have therefore not arisen. Of course, under the new regime, the question of the application of these State and Territory laws is more likely to be of importance.

The Minister goes on to say:

> As you will probably be aware, the Bill has now been passed by both the Senate and the House of Representatives. In both Chambers, the Government has indicated its intention that section 75AH should not disturb any legal rights which may already exist in this area. That notwithstanding, should the government conclude that this provision may have an effect on existing rights, appropriate legislative amendments will be made.

The Committee thanks the Minister for this response and for her assurance that appropriate amendments will be made if the provision is found to affect any existing rights.



Barney Cooney
(Chairman)

Facsimile transmission from

BLAKE DAWSON WALDRON
SOLICITORS

Date	14 July 1992	Grosvenor Place 225 George Street Sydney NSW 2000 Australia
Our ref/File no	JFF:PRM:50/92	
Your ref/File no		
To	Mr Stephen Argument Senate Standing Committee for the Scrutiny of Bills Parliament House CANBERRA	Telephone (02) 258 6000 Int + 61 2 258 6000 Telex AA22867 DWN DX 365 Sydney
Facsimile no	(06) 277 3289	Facsimile (02) 258 6999

Dear Stephen,

Conversion of 3SR to FM

Further to our conversation of yesterday, I attach a copy of a letter sent this morning to Senator Collins.

Please telephone me if I can be of any further assistance.

Kind regards,

If you do not receive _____ pages (including this page) please telephone or fax immediately.
Our fax operator's telephone number is (02) 258 6666.

BLAKE DAWSON WALDRON
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YOUR REF | OUR REF JFF:50/92 | WRITER'S DIRECT LINE 258 6067

14 July 1992

Senator The Hon. Bob Collins
Minister for Transport and Communications
Parliament House
CANBERRA ACT 2600

Dear Minister,

Conversion of 3SR to FM

We act for Messrs Anthony D'Aloia and John Spark, receivers and managers of the assets and undertaking of Hanor Pty Limited, which owns and operates commercial radio station 3SR Shepparton.

We are writing to draw to your attention an extremely serious unintended consequence arising out of the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992 ("BST Act").

The Government's policy on conversion of AM radio stations to FM in regional markets is to allow an incumbent AM licensee the opportunity to convert to FM (upon payment of the relevant fee) at or after the date on which an independent radio licence commences broadcasting on FM. The present difficulty arises because section 14A of the BST Act preserves the opportunity of AM licensees to convert to FM only in circumstances where a commercial radio licence is granted under section 12 of that Act.

Senator The Hon. Bob Collins
Minister for Transport and Communications 14 July 1992

With respect to 3SR's situation, a commercial radio licence was granted to SUN FM in Shepparton some time ago. The grant of that licence, however, is not one to which the provisions of section 12 of the BST Act apply. Accordingly, section 14A will not operate to allow 3SR the opportunity to convert at all. The provisions of section 14A will effectively operate so as to prohibit 3SR from converting.

In March 1989, 3SR lodged an application to convert to FM. Unfortunately, the financial position of 3SR prevented that application from proceeding. In December 1991, 3SR was placed in receivership. Negotiations are now well advanced between our clients and a third party which would allow the station to be sold out of receivership. It had been expected that contracts would be exchanged this month and completed in about September. Obviously enough, this would not have allowed 3SR sufficient time to complete the conversion process prior to 1 October, the expected date of commencement of the BST Act.

The third party has, however, suspended negotiations pending a resolution to the question of whether 3SR will retain the opportunity to convert to FM under the BST Act. We are instructed that there are virtually no prospects of selling 3SR in circumstances where it cannot convert to FM under the BST Act. In those circumstances, the station would cease to operate and all of the 25 staff presently employed would lose their jobs. The public would also lose a commercial radio service.

The situation is critical. We urge you to consider the introduction of an amendment to the BST Act in the Budget sittings so as to extend the opportunity under section 14A to AM licensees to convert to FM to cover 3SR's position. Please contact Mr Ford of this office if you require any further information.

Yours faithfully,

COMMONWEALTH OF AUSTRALIA

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

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

14 JUL 1992

Dear Barney

At page 217 of the Scrutiny of Bills Eighth Report of 1992 (17 June 1992) you requested my further advice on certain points made by the Privacy Commissioner about the Social Security Legislation Amendment Bill 1992 (the Bill). The prime issue was whether the Privacy Commissioner can issue guidelines under section 12 of the Data-Matching Program (Assistance and Tax) Act 1990 (the Act) on a matter on which the Act is silent or on which the Act deals comprehensively.

Advice from the Legal Services Group in my Department remains that the Privacy Commissioner can issue section 12 guidelines in the circumstances of the Bill. However, to ensure a more authoritative view the Legal Services Group has asked Attorney-General's Department for formal advice by the end of July. I will provide you with a copy of that advice when it arrives.

Yours sincerely

NEAL BLEWETT

Minister for Consumer Affairs
The Hon Jeannette McHugh MP

102918:jm

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

13 JUL 1992

Dear Senator Cooney

Trade Practices Amendment Bill 1992

I refer to the comments of your Committee in the Scrutiny of Bills Alert Digest of 3 June 1992 concerning the above Bill.

The Committee has asked whether the inclusion of clause 75AH (providing for the application of State and Territory laws about the survival of actions to cases under the new regime) will mean that such laws have no application in cases brought under the rest of the regime.

The question of the application of provisions in State and Territory laws to Federal actions is a complex one. To my knowledge, the issue of the application of State and Territory survivorship provisions to actions under the Trade Practices Act 1974 ("the Act") has never arisen. This is probably because the greatest usage of the legislation has been by corporate bodies and issues of survivorship of rights upon the death of a plaintiff have therefore not arisen. Of course, under the new regime, the question of the application of these State and Territory laws is more likely to be of importance.

As you will probably be aware, the Bill has now been passed by both the Senate and the House of Representatives. In both Chambers, the Government has indicated its intention that section 75AH should not disturb any legal rights which may already exist in this area. That notwithstanding, should the Government conclude that this provision may have an effect on existing rights, appropriate legislative amendments will be made.

Thank you once again for your interest in this important Bill.

Yours sincerely

Jeannette McHugh

Jeannette McHugh

cc. Stephen Argument

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

1992

9 SEPTEMBER 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT OF 1992

The Committee has the honour to present its Eleventh Report of 1992 to the Senate.

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

Migration Amendment Act (No. 3) 1992

The Bill for this Act was introduced into the House of Representatives on 27 May 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill was introduced with the Migration Agents Registration (Application) Levy Bill 1992 and the Migration Agents Registration (Renewal) Levy Bill 1992. These Bills proposed to establish a comprehensive regime to regulate the conduct of migration agents.

This Act provides a wide definition for migration agents. The central feature of the new regime is that it requires migration agents to be registered on a Register of Migration Agents, which is to be maintained by the Secretary of the Department of Immigration, Local Government and Ethnic Affairs.

It is now a criminal offence to practise as a migration agent without being registered.

The Committee dealt with the (then) Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Minister for Justice and Minister Assisting the Minister for Immigration responded to those comments in a letter received 2 September 1992. Though the Committee notes that the Bill was passed by the Senate on 22 June 1992, the Minister's response may, nevertheless, be of interest to senators. A copy of the Minister's letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

Disciplinary proceedings
Section 4 - new paragraph 114ZE(g) of the *Migration Act 1958*

Section 4 of the Act inserts a new Part 2A into the *Migration Act 1958*. That new Part deals with migration agents and the provision of 'immigration assistance'.

New section 114ZE deals with discretionary cancellation or suspension of migration agents' registration. It provides:

> The [Migration Agents Registration] Board may:
> (a) cancel the registration of a registered agent by removing his or her name from the register; or
> (b) suspend his or her registration; or
> (c) caution him or her;
> if it becomes satisfied that:
> (d) the agent's application for registration was known by the agent to be false or misleading in a material particular; or
> (e) the agent becomes bankrupt;
> (f) the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance; or
> (g) an individual related by employment to the agent is not a person of integrity; or
> (h) the agent has not complied with the Code of Conduct prescribed under section 114ZR.

In Alert Digest No. 8, the Committee indicated that it was concerned by paragraph (g) above, which would allow the Migration Agents Registration Board to cancel the registration of a migration agent if 'an individual related by employment to the agent is not a person of integrity'. The Committee noted that, while the phrase 'related by employment' is defined in new section 114D, there is no indication as to who would come within the definition of being 'not a person of integrity'. The Committee suggested that the provision would, therefore, appear to impose on migration agents an obligation which is both onerous and, at the same time, vague.

In making this comment, the Committee noted a similar requirement in new section 114V, which sets out the qualifications for registration as a migration agent. New subsection 114V(2) provides:

> An applicant for registration as a migration agent must not be registered if the application is dealt with by the [Migration Agents Registration] Board and the Board is satisfied that:
>
> (a) the applicant is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance; or
>
> (b) the applicant:
>
> (i) is related by employment to an individual who is not a person of integrity; and
>
> (ii) should not be registered because of the fact described in subparagraph (i).

Under this provision, the prohibition against registration relies not only on the 'relation by employment' to an individual who is 'not a person of integrity' but also the relevance of this fact to whether or not the agent should be registered. The Committee suggested that the duty imposed on agents in new paragraph 114ZE(g) would appear to be more onerous.

The Committee requested the Minister's advice as to the need for the onerous obligations to be imposed on migration agents by new paragraph 114ZE(g). Further, the Committee requested the Minister's advice as to why a different test is to be applied in relation to new paragraph 114ZE(g) as compared to new paragraph 114V(2)(b).

The Minister has responded as follows:

> The purpose of the provision is explained in the Explanatory Memorandum (paragraphs 13 and 14) in the following terms:
>
> > ... in deciding whether an applicant for registration or a registered agent is a fit and proper person to be a migration agent, it may be appropriate to consider persons associated with

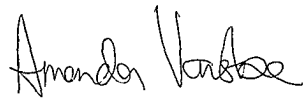
> the applicant or migration agent. This is particularly the case where a person who would not be permitted to become a registered migration agent may seek to evade this restriction by operating through other registered agents.

> The question of whether an individual is a 'person of integrity' will of course depend on a subjective assessment of particular facts and circumstances. The Migration Agents Registration Board has a discretion to exercise in this area and I am confident that the Board will exercise that discretion responsibly. It should also be noted that the decisions of the Board will be reviewable by the Administrative Appeals Tribunal. It is, therefore, very unlikely that the term 'person of integrity' could be used in an arbitrary or unfair way in the context of this legislation.

As to the question of the different tests, the Minister has said:

> I do not regard the tests under the paragraphs as being different in substance. The Board has a discretion, in relation to both initial registration and cancellation or suspension of registration, to take into account the fact that a person, 'related by employment' to an applicant or agent, is not a person of integrity. The drafting of the two sections is slightly different but the effect of the sections is the same, ie to vest a discretion in the Board.
>
> I am not in a position to comment on the factors the Board will take into account in exercising its discretion. As you would appreciate, the Board, once established, will be a separate authority and will need to develop its own procedures. I would imagine, however, that the results of police and corporate checks will be among the factors taken into account.

The Committee thanks the Minister for this response.



Amanda Vanstone
(Deputy Chairman)

Minister for Justice
Minister Assisting the Minister for Immigration
Senator the Hon. Michael Tate

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

Dear Senator Cooney

I refer to the Senate Scrutiny of Bills Alert Digest No 8 of 1992 which was referred to the Minister for Immigration, Local Government and Ethnic Affairs by the Secretary of your Committee.

The Alert Digest contains comments on the Migration Amendment Bill (No 3) 1992 which has now been passed by the Parliament.

Your Committee seeks advice as to the need for paragraph 114ZE(g). That paragraph permits the Migration Agents Registration Board to cancel or suspend the registration of an agent who is 'related by employment' to a person who is not a 'person of integrity'. Your Committee notes that, although 'related by employment' is defined in section 114D, there is no indication of who would not be regarded as a 'person of integrity'.

The purpose of the provision is explained in the Explanatory Memorandum (paragraphs 13 and 14) in the following terms:

> "...in deciding whether an applicant for registration or a registered agent is a fit and proper person to be a migration agent, it may be appropriate to consider persons associated with the applicant or migration agent. This is particularly the case where a person who would not be permitted to become a registered migration agent may seek to evade this restriction by operating through other registered agents."

Parliament House, Canberra, A.C.T. 2600 Tel: (06) 277 7260 Fax: (06) 273 4136

The question of whether an individual is a 'person of integrity' will of course depend on a subjective assessment of particular facts and circumstances. The Migration Agents Registration Board has a discretion to exercise in this area and I am confident that the Board will exercise that discretion responsibly. It should also be noted that the decisions of the Board will be reviewable by the Administrative Appeals Tribunal. It is, therefore, very unlikely that the term 'person of integrity' could be used in an arbitrary or unfair way in the context of this legislation.

The other matter on which your Committee seeks advice concerns the reason for 'a different test' applying in relation to paragraph 114ZE(g) as compared to paragraph 114V(2)(b). I do not regard the tests under the paragraphs as being different in substance. The Board has a discretion, in relation to both initial registration and cancellation or suspension of registration, to take into account the fact that a person, 'related by employment' to an applicant or agent, is not a person of integrity. The drafting of the two sections is slightly different but the effect of the sections is the same, ie to vest a discretion in the Board.

I am not in a position to comment on the factors the Board will take into account in exercising its discretion. As you would appreciate, the Board, once established, will be a separate authority and will need to develop its own procedures. I would imagine, however, that the results of police and corporate checks will be among the factors taken into account.

Yours sincerely

(Michael Tate)

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF

1992

16 SEPTEMBER 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from **Standing Order 24**

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(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT OF 1992

The Committee has the honour to present its Twelfth Report of 1992 to the Senate.

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

Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992

Coal Industry Amendment Act 1992

Crimes (Ships and Fixed Platforms) Bill 1992

Social Security Legislation Amendment Act 1992

BROADCASTING SERVICES (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) ACT 1992

The Bill for this Act was introduced into the Senate on 4 June 1992 by the Minister for Transport and Communications.

The Act makes certain transitional and consequential provisions, pursuant to the proposed replacement of the regulatory scheme for broadcasting services provided for by the *Broadcasting Act 1942,* with the new scheme provided for by the *Broadcasting Services Act 1992.*

The new scheme covers a wide range of developing services which do not fall within the traditional definition of broadcasting, but which, nevertheless, have substantial potential to influence public thought and attitudes. The new scheme is intended to ensure that appropriate controls can be placed on all services of this nature to protect the public interest.

The Bill was passed by the Senate (with amendments) on 24 June 1992 and by the House of Representatives on 26 June 1992. It received the Royal Assent on 9 July 1992.

The Committee most recently dealt with the Act in its Tenth Report of 1992, in which it made certain comments on the basis of a letter from Blake Dawson Waldron Solicitors. The Minister for Transport and Communications responded to those comments in a letter dated 10 September 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

General comment - submission from Blake Dawson Waldron Solicitors

The Committee dealt with the (then) Bill in Alert Digest No. 9 of 1992 and in its Ninth Report of 1992. In that Alert Digest and in that Report, the Committee informed the Senate that it had received submissions on the Bill from Blake

Dawson Waldron Solicitors, on behalf of various clients. Copies of the submissions were attached to the Alert Digest and Report for the information of Senators. Amendments made in the Senate addressed concerns raised in two of those submissions.

The Committee subsequently received a further submission from Blake Dawson Waldron (dated 14 July 1992) on behalf of another client. A copy of that submission, which essentially comprises a letter which Blake Dawson Waldron has written to the Minister for Transport and Communications, is attached to this Report for the information of Senators.

In its Tenth Report, the Committee suggested that, on its face, the fact situation described by Blake Dawson Waldron appeared to indicate that the legislation in question might be considered to trespass unduly on the rights of the client concerned. The Committee, therefore, sought the Minister's views on the Blake Dawson Waldron letter.

The Minister has responded as follows:

> Subsection 89D(5) of the *Broadcasting Act 1942* was inserted by the *Broadcasting Amendment Act (No 2) 1991* to allow non metropolitan AM commercial radio licensees to apply for conversion to FM.
>
> Section 15 of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* was included at, and complies with, the request of the industry body, the Federation of Australian Radio Broadcasters. It was not intended to do more than preserve that right of conversion in the special case of a non metropolitan AM commercial radio licensee faced with competition from a new FM licensee in circumstances where they have no chance to use the Broadcasting Act provision, ie where the competitive licence application is determined after the commencement of the new Act.

The Minister goes on to say:

> A deliberate policy choice was made by the Government not to extend AM/FM conversion rights into the new Act. The technical specifications of services are a matter for the Australian Broadcasting Authority (ABA) under its power to make licence area plans (see section 26 of the new Act). Allowing a right of AM/FM conversion would severely limit the ability of the ABA to plan the FM frequencies in non metropolitan areas since sufficient frequencies would have to be reserved to allow for conversion by *all* current AM *licensees. That may not* present a problem in some non metropolitan areas, but it *certainly would in others.*
>
> *Section 15 of the Transitional Act is intended to preserve* the ability of licensees to make a choice when faced with *new competition, not to give a perpetual right to convert,* whatever the planning priorities, to licensees who have chosen not to exercise that right under the current Act.

The Minister goes on:

> To date, 3SR has chosen not to exercise its right to convert. It has also chosen not to apply for a supplementary licence, which, if granted, would give it an additional FM service. A large number of other non metropolitan AM commercial radio licensees have also chosen not to take up the opportunity to convert.
>
> The receivers are obviously not content with the opportunities offered under the new Act to seek conversion on planning grounds through input to the licence area plan processes of the ABA or to seek a second competitive licence in the area on a price based allocation basis (see sections 54 and 40 of the new Act).
>
> It seems likely that they feel that a right to convert would enhance the prospects for sale of the service.

The Minister concludes by saying:

> I see no reason why the ability of the ABA to plan the provision of additional FM services to non metropolitan radio markets should be compromised by giving open ended rights to current licensees to convert. The aim of the new Act is, after all, to increase the level of service to all Australians, not primarily to protect the commercial interests of incumbent AM commercial radio licensees.
>
> I do not believe that the legislation in any way trespasses on the rights of the receivers of 3SR and, therefore, do not consider that the amendment they advocate is justified.

The Committee thanks the Minister for this response.

The Bill for this Act was introduced into the House of Representatives on 30 April 1992 by the Minister for Primary Industries and Energy.

The Act amends the *Coal Industry Act 1946*. The amendments are designed to give effect to the Commonwealth and New South Wales Governments' decision to reform the powers, functions and activities of the Joint Coal Board.

The Committee dealt with the (then) Bill in Alert Digest No. 6 of 1992, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 26 May 1992. The Committee dealt with the response in its Tenth Report of 1992, in which it made further comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 7 September 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Subclause 2(2)

In Alert Digest No. 6 of 1992, the Committee noted that subclause 2(2) of the (then) Bill provided:

> Commencement
> 2.(1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.
> (2) Subsection 3(1) commences on a day to be fixed by Proclamation.
> (3) Subsection 3(2) is taken to have commenced on 31 March 1992.

Clauses 1 and 2 of the Bill are formal. The Committee noted that subclause 3(1), if enacted, would give effect to the proposed amendments to the *Coal Industry Act*

1946 which are set out in Schedules 1 to 4 of the Bill. Subclause 3(2) enacts the amendments set out in Schedule 5.

The Committee noted that the provision for commencement by Proclamation set out in subclause 2(2) was open-ended. The Committee suggested that, in that respect, it would appear to be in conflict with Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, which provides:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the "fixed time"). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the "repeal" option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned

above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The Committee noted that, by way of explanation for the Proclamation provision in this Bill, the Explanatory Memorandum to the Bill stated:

> Clause 2 does not provide for the usual six month limit on Proclamation as commencement of these amendments has to be in parallel with New South Wales' Coal Industry Amendment Act 1992.

The Committee suggested that, on its face, this explanation would appear to satisfy the criterion set out in paragraph 6 of the Drafting Instruction. However, the Committee noted by way of analogy that a similar situation arose in relation to the Coal Mining Industry (Long Service Leave Funding) Bill 1992, which the Committee dealt with elsewhere in Alert Digest No. 6. The Committee noted that subclause 2(2) of that Bill provided:

> Subject to subsection (3), sections 35 and 44 to 49 commence on a day or days to be fixed by Proclamation.

The Explanatory Memorandum to that Bill indicated that (as with the Bill with which it was then dealing) the commencement of the clauses referred to was dependent on the passage of complementary State legislation and the 6 month time limit contemplated by Drafting Instruction No. 2 was, therefore, inappropriate. The Committee noted that, nevertheless, subclause 2(3) of the Coal Mining Industry (Long Service Leave Funding) Bill 1992 went on to provide:

> (3) If a section mentioned in subsection (2) does not commence under that subsection within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

The Committee suggested that a similar approach in the Coal Industry Amendment Bill 1992 would be preferable to the open-ended Proclamation clause which was contained in the Bill. The Committee indicated that it would appreciate the Minister's views on this suggestion.

In his letter of 26 May 2992, the Minister responded to those comments as follows:

> No direct comparison should be drawn between the Coal Industry Amendment Bill and the Coal Mining Industry (Long Service Leave Funding) Bill. Unlike the Coal Industry Amendment Bill, the Coal Mining Industry (Long Service Leave Funding) Bill is not dependent upon the passage of parallel State legislation.
>
> The Joint Coal Board is a unique statutory body constituted under Commonwealth and NSW Coal Industry Acts of 1946. Both Acts parallel each other and both commenced on 1 February 1946. The timing of commencement of amendments to the Acts have been coordinated with the State to ensure that the legal basis on which the Board was formed was correct at all times.
>
> The objective of subclause 2(2) is to allow the Commonwealth and State to have the same commencement date for both Amendment Acts. The State Bill was introduced into the State Parliament on 30 April, the same day the Coal Industry Amendment Bill was introduced into the House of Representatives. It is the intention of both the Commonwealth and State Governments that the Acts be proclaimed as soon as possible after Royal Assent to facilitate implementation of the changes to the powers and functions of the Board and of the other arrangements provided for in the amendments.

In its Tenth Report the Committee thanked the Minister for this response but noted that it had some difficulty with the Minister's statement that no direct comparison with the Coal Mining Industry (Long Service Leave Funding) Bill 1992 should be drawn, because that Bill was not dependent on the passage of parallel State legislation. The Committee noted that the Explanatory Memorandum to the

Coal Mining Industry (Long Service Leave Funding) Bill referred to the commencement of the relevant amendments needing to be 'parallel' to a New South Wales Act. The Committee noted that, in making its original comment, it assumed that the same general problems would apply in each instance.

The Minister has responded to those comments as follows:

> I am pleased to advise the Committee that arrangements were made with the NSW Government for a common date of 7 August 1992 to Proclaim both the State and Commonwealth Coal Industry Amendment Acts, and this action has been completed.

The Committee thanks the Minister for this further response.

Inappropriate delegation of legislative power
Schedule 2 - proposed new section 25 of the *Coal Industry Act 1946*

In Alert Digest No. 6, the Committee noted that Schedule 2 of the (then) Bill contained a series of proposed amendments to the Coal Industry Act which relate to the functions of the Joint Coal Board. The Committee noted that proposed new section 25 provides:

> Until such time as the Commonwealth Minister and the State Minister direct, the Board has the following powers and functions:
>
> (a) to monitor, promote and specify adequate training standards relating to health and safety for workers engaged in the coal industry;
>
> (b) to monitor dust in coal mines;
>
> (c) to collect, collate and disseminate statistics related to the coal industry, other than statistics related to the health and welfare of workers.

The Committee noted that in relation to this proposed new section, the Explanatory Memorandum to the Bill states:

> This new section empowers the Board to continue with its powers and functions in relation to workers' training, dust monitoring and other industry statistics not related to the health and welfare of workers until such time as both the Commonwealth and State Ministers direct.

The Committee suggested that the effect of the proposed new section, if enacted, would be to allow the Commonwealth and State Minister to agree to, in effect, repeal the section or any of its parts. In making this comment, the Committee noted that there was no requirement for the Parliament to be notified of such an action, by the tabling of the relevant direction or otherwise.

The Committee drew Senators' attention to the provision, as it may have been considered a delegation of legislative power which is insufficiently subject to parliamentary scrutiny in breach of principle 1(a)(v) of the Committee's terms of reference.

In his letter of 26 May 1992, the Minister responded to those comments as follows:

> The above [provision is] considered appropriate because of the joint Commonwealth/State constitution of the Board. It is to be noted that the Board is required to lay before both the Commonwealth and State Parliaments an Annual Report for the financial year. Any change to the Board's functions as set out in proposed new section 25 and the Board's orders would be reported in the Annual Report and therefore open to parliamentary scrutiny this way.

In its Tenth Report, the Committee thanked the Minister for this response but made some further comments. While it accepted that the Parliament may become aware of any changes to the Board's functions and of any orders by virtue of their being reported in the Board's annual report, the Committee noted that this notification would probably occur a significant time after the event. Further, the

Committee noted that, in these circumstances, knowledge of an event does not necessarily equate to the event being open to scrutiny.

The Minister has responded to those comments as follows:

> In view of the Committee's concerns on this matter, I will undertake to advise Parliament in the event that the State Minister and I agree to modify the powers of the Board under Section 25 of the Act.

The Committee thanks the Minister for this further response and for his undertaking.

Exercise of legislative power insufficiently subject to parliamentary scrutiny
Schedule 2 - proposed new section 28 of the *Coal Industry Act 1946*

In Alert Digest No. 6, the Committee noted that Schedule 2 to the (then) Bill contained a proposed new section 28 of the Coal Industry Act, which provides:

> (1) The Board may, with the approval of the Commonwealth Minister and the State Minister, make orders, not inconsistent with this Act or the regulations, for or with respect to the Board's powers and functions under sections 23 and 25 to 27.
>
> (2) The Board may, with the approval of the Commonwealth Minister and the State Minister, by order amend or revoke any order made by the Board.

The Committee noted that proposed new section 28A, if enacted, would require orders made pursuant to proposed new section 28 to be published in the *Gazette* and the State Gazette.

The Committee observed that orders made pursuant to the proposed new section would be, on their face, delegated legislation. The Committee noted that they could have significant effect. For example, proposed new subsection 53(1) (which is

contained in Schedule 2 to the Bill), provides for a substantial monetary penalty in relation to the failure to comply with an order made under proposed new section 28. The Committee suggested that, this being the case, it would appear to be appropriate that any orders made pursuant to the proposed section be subject to scrutiny by the Parliament.

The Committee noted that, on this point, the Explanatory Memorandum to the Bill states:

> 49. This new section empowers the Board to make orders in regard to its functions as set out in new sections 23 and 25 to 27 inclusive. The Board will need to obtain the approval of both the Commonwealth and State Ministers before making an order. Ministerial approval is also required before the Board can amend or revoke an order.
>
> 50. The order is not, as would normally be the case for such an instrument, disallowable. This is to avoid possible inconsistencies between the Commonwealth and State Parliaments, that is, where one Parliament disallows an order while the other Parliament allows it.

The Committee indicated that, while it accepted that, under the circumstances, a disallowance mechanism might provide difficulties in relation to such orders, it was not satisfactory that, as a result, the orders should not be subject to any form of parliamentary scrutiny. In making this comment, the Committee also noted that there were only two governments involved in this case.

The Committee drew Senators' attention to the provision, as it may have been considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny in breach of principle 1(a)(v) of the Committee's terms of reference.

In his letter of 26 May 1992, the Minister responded to that comment as follows:

> The above [provision is] considered appropriate because of the joint Commonwealth/State constitution of the Board.

In its Tenth Report, the Committee thanked the Minister for this response but noted that the response essentially re-stated what was contained in the Explanatory Memorandum and did not address the Committee's comments in Alert Digest No. 6.

The Minister has responded to that comment as follows:

> I note the Committee's appreciation of the difficulty of having a disallowance mechanism in these cases. In order to accommodate the Committee's concerns, I will undertake to advise Parliament in the event that the State Minister and I agree to the Board making new Orders.

The Committee thanks the Minister for his further response and for his undertaking.

Privilege against self-incrimination
Schedule 4 - proposed new subsection 53(2) of the *Coal Industry Act 1946*

In Alert Digest No. 6, the Committee noted that Schedule 4 of the (then) Bill proposed to insert a new section 53 into the Coal Industry Act. That proposed new section provides, in part:

> (2) A person must not, without reasonable excuse, refuse to answer any question referred to in section 51.
> Penalty:
> (a) in the case of an individual - $3,000; and
> (b) in the case of a body corporate - $10,000.
>
> (3) A person must not, without reasonable excuse, fail or refuse to produce any books, records or documents referred to in section 51.
>
> Penalty:
> (a) in the case of an individual - $3,000; and
> (b) in the case of a body corporate - $10,000.

The Committee indicated its assumption that, in each case, it would be a 'reasonable excuse' for a person to decline to answer questions or produce documents on the grounds that it might tend to incriminate him or her, relying on the common law privilege against self-incrimination. However, the Committee noted that many persons are not aware of this privilege. The Committee, therefore, requested the Minister's advice as to whether there was any provision for a person who is asked questions or required to produce documents in these circumstances to be given a warning about the use that can be made of any information obtained and their rights to decline to answer questions, etc.

In his letter of 26 May 1992, the Minister responded to that comment as follows:

> I will write to the NSW Minister who has responsibility for the Joint Coal Board on this matter once the Commonwealth and State Bills are passed through both Parliaments. It is my intention to issue a direction to the Board, jointly with the NSW Minister, requiring its inspectors to notify persons of their common law privilege prior to carrying out duties under new section 53.

In its Tenth Report the Committee thanked the Minister for this response and noted his intention to issue a direction to the Board on this matter.

The Minister has now provided the following further response:

> The power for Ministers to issue such an order was not available to us until the Proclamation of the Acts on 7 August 1992. I have now written to my State counterpart seeking his agreement to progress this matter.

The Committee thanks the Minister for this response and for his assistance on these matters.

CRIMES (SHIPS AND FIXED PLATFORMS) BILL 1992

This Bill was introduced into the Senate on 25 June 1992 by the Minister for Justice.

The Bill proposes to give effect to the Convention for the Suppression of Unlawful Acts Against Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against Fixed Platforms Located on the Continental Shelf. Both instruments were done in Rome in 1988. They fill an important gap in the present international regime to prevent and suppress maritime terrorism.

The Committee dealt with the Bill in Alert Digest No. 10 of 1992, in which it made various comments. The Attorney-General responded to those comments in a letter dated 9 September 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Offence provisions
Clauses 12, 14, 15, 16 and 17

In Alert Digest No. 10, the Committee noted that clause 12 of the Bill provides:

> Destroying or damaging navigational facilities
> 12. A person must not destroy or seriously damage maritime navigational facilities or seriously interfere with their operation if that act is likely to endanger the safe navigation of a private ship.
> Penalty: 15 years imprisonment.

The Committee noted that, in the course of debate on the Bill in the Senate on 19 August 1992, Senators Hill and Spindler suggested that, on the face of the provision, there would be no requirement for the prosecution to prove that a person charged with an offence under the provision actually *intended* to do the acts constituting the offence.

The Committee noted that the offences provided for in clauses 14 to 17 of the Bill are similarly couched. Those clauses provide:

> Causing death
> 14. A person who kills a person in connection with the commission or attempted commission of an offence against any of sections 8 to 13 is guilty of an offence.
> Penalty: Life imprisonment.
>
> Causing grievous bodily harm
> 15. A person who causes grievous bodily harm to a person in connection with the commission or attempted commission of an offence against any of sections 8 to 13 if guilty of an offence.
> Penalty: 15 years imprisonment.
>
> Causing injury to a person
> 16. A person who injures a person in connection with the commission or attempted commission of an offence against any of sections 8 to 13 is guilty of an offence.
> Penalty: 10 years imprisonment.
>
> Threatening to endanger a ship
> 17.(1) A person must not threaten to do an act that would constitute an offence against section 9, 10 or 12 with intent to compel an individual, a body corporate or a body politic to do or refrain from doing an act, if that threat is likely to endanger the safe navigation of the ship concerned.
> Penalty: 2 years imprisonment.
> (2) For the purpose of this section, a person is taken to threaten to do an act if the person makes any statement or does anything else indicating, or from which it could reasonably be inferred, that it is his or her intention to do that act.

The Committee noted that these provisions may be contrasted with clause 13 of the Bill, which provides:

> Giving false information
> 13. A person must not knowingly endanger the safe

navigation of a private ship by communicating false information.
Penalty: 15 years imprisonment. [emphasis added]

In making this comment, the Committee noted that Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, which these provisions seek to implement, makes it an offence for a person to 'unlawfully and intentionally' do the various acts referred to. The Committee also noted that when Senators Hill and Spindler raised their concerns in the Senate, the Minister for Justice indicated that the concerns appeared to be legitimate. The Committee, therefore, sought the Attorney-General's views on the concerns raised by Senators Hill and Spindler.

The Attorney-General has responded as follows:

> The scheme of the Bill is such that there are two main types of offence. The first is inherently dangerous to the safe navigation of a ship and does not require separate proof of the likelihood of such danger. This group includes hijacking and destruction of ships. The second type of offence requires that the offender know that the act constituting the offence is likely to endanger the safe navigation of a ship. This group includes damaging a ship or its cargo and acts of violence. The damage required for these offences is not limited to serious damage. Clause 13, for example, is only limited by the requirement that the offender knows the safe navigation of a ship will be endangered. It would not be appropriate for the high penalties contemplated by the Bill to be imposed for these offences unless they were limited by such a requirement of knowledge of the consequences of the act prohibited.

The Attorney-General goes on to say:

> Clause 12 does not fall within either of these groups. As the Minister for Justice pointed out during the Second Reading debate, the inherently serious nature of the offence distinguishes it from those, like section 13, where

it is necessary to prove knowledge. It is sufficient that the prosecution should have to prove a likelihood of danger to the safe navigation of a private ship flowing from the offending acts. It should be noted that the clause is limited in its application to acts of destruction, serious damage and serious interference.

The offences created by clauses 14 to 16 are 'incidental' offences, which require proof of one of the other offences. It is the connection with the main offence that adds to the seriousness of the act. That is not to say, however, that these offences are not serious in themselves. An example of such an incidental act of violence is the murder by the *Achille Lauro* hijackers of Leon Klinghoffer. That act did not itself endanger the safe navigation of the ship but was one of the most serious offences intended to be proscribed by the drafters of the Convention. Any element of endangering the safe navigation of a ship will, where necessary, have been proved in relation to the main offence.

Clause 17 creates the offence of threatening to commit certain other offences. The offence is only committed where the threat itself is likely to endanger the safe navigation of a ship. Accordingly, it is only in very limited circumstances and where a very serious threat has been made that an offence has been committed under this clause. It is not necessary or appropriate to include a requirement of knowledge of the consequences of the threat itself, as well as the knowledge of the consequences of the act threatened.

The Committee thanks the Attorney-General for this response.

Delegation of powers to 'a person authorised by the Attorney-General'
Subclause 30(1), clause 32

In Alert Digest No. 10, the Committee noted that subclause 30(1) of the Bill provides:

> **Written consent of Attorney-General required**
> 30.(1) A prosecution for an offence:

(a) against Division 1 of Part 2 or Part 3; or
(b) arising under section 5 or 7 of the *Crimes Act 1914* in relation to an offence against any of sections 8 to 16 and sections 21 to 27;

may not be begun except with the consent of the Attorney-General or of a person authorised by the Attorney-General to give consent.

Clause 32 provides:

Evidence of certain matters

32. A certificate by the Attorney-General, or a person authorised by the Attorney-General to give such a certificate, stating any of the following:

(a) that a specified State was, at specified times, a Convention of Protocol State;
(b) the extent to which a specified Convention or Protocol State had, at specified times, extended its jurisdiction under Article 6(2) of the Convention or Article 3(2) of the Protocol;
(c) that specified waters were, at a specified time:
    (i) within the internal waters or territorial sea, or above the continental shelf, or Australia or of a specified foreign country; or
    (ii) beyond the territorial sea of Australia and of any foreign country;

is, for the purposes of any proceedings under this Act, evidence of the facts stated in the certificate.

The Committee noted that, in the case of subclause 30(1), the Attorney-General would be able to authorise 'a person' to give the consent for the prosecution of various offences which, otherwise, would only be able to be given by the Attorney-General him/herself. Similarly, the Committee noted that, in the case of clause 32, the Attorney-General would be able to authorise 'a person' to certify various matters on his or her behalf. The Committee also noted that there is no limit on the persons or classes of persons who could be so authorised.

The Committee suggested that, in the circumstances, it may be considered appropriate that the Attorney-General's power of authorisation be limited, either by reference to particular office-holders (eg to members of the Senior Executive

Service) or to persons holding particular qualifications. Accordingly, the Committee drew Senators' attention to the clauses, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

The Attorney-General has responded as follows:

> Clauses 30 and 32 enable me to authorise a person to give consents and certificates. Such persons would be acting on my behalf, rather than exercising an independent discretion as a delegate. I note, however, that under subsection 17(2) of the *Law Officers Act 1964* I am able to delegate these powers to the holder of an office specified in the instrument of delegation.
>
> I anticipate that these powers would only be used in very limited circumstances. I may wish to authorise the Director of Public Prosecutions or one of his senior officers to exercise my power to consent to prosecute in some circumstances. The other possibility is that I may wish to enable a State authority to institute proceedings in some circumstances. In the latter case, authorisations would be made on the basis of arrangements to be made with the States and it would be difficult and inappropriate to specify the offices in advance.

The Attorney-General concludes by saying:

> The power to authorise the giving of certificates is most likely to be exercised in favour of the Secretary to the Department of Foreign Affairs and Trade but there may be circumstances when some other person is appropriate. Because of the very limited nature of the power to be conferred, an exception to the general principle would seem to be justified.

The Committee thanks the Attorney-General for this response and for his assistance on these matters.

The Bill for this Act was introduced into the House of Representatives on 2 April 1992 by the Minister for Social Security.

The Act implements changes in the areas of telephone concessions, Job Search Allowance and Newstart Allowance, social security agreements with other countries, debt recovery, the income and assets test, compensation payments and data-matching. The Act also provides for a number of minor and technical amendments.

The Committee dealt with the Bill in Alert Digest No. 5 of 1992, in which it made various comments. The Committee made some further comments in Alert Digest No. 6 of 1992. The Minister for Social Security responded to those comments in letters dated 5 May and 29 May 1992 respectively. The Minister's responses were dealt with in the Committee's Seventh Report of 1992.

On 4 June 1992, the Privacy Commissioner wrote to the Committee in response to the Minister's responses to the Committee's comments. The Committee dealt with the letter in its Eighth Report of 1992, in which it made various further comments. The Minister for Social Security responded to those comments in a letter dated 14 July 1992. The Committee dealt with that response in its Tenth Report of 1992. The Minister has now provided a further response, a copy of which is attached to this Report.

Concerns raised by Privacy Commissioner
Schedule 2 - proposed new subsections 11(1) and (2) of the *Data-matching Program (Assistance and Tax) Act 1990*

In a letter dated 2 April 1992, the Privacy Commissioner drew the Committee's attention to (among other things) some proposed amendments to section 11 of the *Data-matching Program (Assistance and Tax) Act 1990* which were contained in Schedule 2 to the (then) Bill. The Committee noted that the (then) existing

section 11 provided:

> Notice of proposed action
>
> 11.(1) Subject to subsection (4), where, solely or partly because of information given in Step 6 of a data matching cycle, an assistance agency considers taking action:
>
> (a) to cancel or suspend any personal assistance to; or
> (b) to reject a claim for personal assistance to; or
> (c) to reduce the rate or amount of personal assistance to; or
> (d) to recover an overpayment of personal assistance made to;
>
> a person, the agency:
>
> (e) must not take that action unless it had given the person written notice:
> (i) giving particulars of the information and the proposed action; and
> (ii) stating that the person has 21 days from the receipt of the notice in which to show cause in writing why the action should not be taken; and
> (f) must not take that action until the expiration of those 21 days.
>
> (2) Subject to subsection (5), where, solely or partly because of information given in Step 6 of a data matching cycle, the tax agency considers taking action to issue an assessment or an amended assessment of tax to a person, the agency:
>
> (a) must not take that action unless it has given the person written notice:
> (i) giving particulars of the information and the proposed action; and
> (ii) stating that the person has 21 days from the receipt of the notice in which to show cause in writing why the action should not be taken; and
> (b) must not take that action until end of those 21 days.

[The remaining subsections are not relevant in the context of this comment]

In Alert Digest No. 5, the Committee noted that the amendment proposed by the Schedule would apply the same regimen currently operating in relation to information obtained in Step 6 of a data-matching cycle to information obtained in Steps 1 and 4 of a cycle.

In the context of the proposed section 11 amendments, the Privacy Commissioner *stated*:

> I support ... the proposal to refer in section 10(1)(a) and (b) to another type of administrative action that may be taken on the basis of data-matching results - this being:
>
> > "to correct the personal identity data it [the agency] holds ..."
>
> This amendment allows agencies to make any factual corrections to file-data that come to light in the course of the matching, thereby enabling agencies to fulfil their responsibilities under the Privacy Act in relation to the accuracy and completeness of data.

He went on to say:

> The question then arises as to whether the usual requirement - (s.11) that prior notice of any proposed action be given to individuals - should apply to this new type of administrative action.
>
> Clearly this would not be appropriate in cases where the correction was trivial, e.g. an incorrect postcode. I am however concerned that some changes to an individual's file could prove more significant and if not notified or checked with the individual lead to significant and potentially adverse consequences. This could for example occur if an assumption were made about a discrepancy in name or address, and a correction made to relevant records. If the assumption was incorrect, this could then result in communications going astray, or in the individual being targeted for action, perhaps even as a result of a later data-matching cycle.

> An approach which might relieve agencies of the need to give notice in minor cases but preserve the basic principle of section 11 might be to include a further sub-section in section 11 which would allow the Privacy Commissioner to specify in the guidelines circumstances in which it would be permissible for an agency not to give a section 11 notice of correction of a record arising from data-matching, or to allow for notices of correction to be given promptly after-the-event.

The Privacy Commissioner concluded by saying:

> The principle of section 11 is that individuals should be given notice, and the opportunity to comment, before any action is taken on the basis of a data-matching result. I believe this principle should extend to alteration of records.

In Alert Digest No. 5, the Committee indicated that it agreed that it might be considered to trespass unduly on a person's rights and liberties if, as the Privacy Commissioner points out, that person was not given notice of (and the opportunity to correct) an incorrect amendment of his or her record. Accordingly, the Committee drew Senators' attention to the provision, as it may have been considered to be in breach (by omission) of principle 1(a)(i) of the Committee's terms of reference.

The Minister responded to that comment as follows:

> The Privacy Commissioner also criticises the amendments because they do not explicitly require a source agency to notify an affected person of an intention to correct the personal identity data it holds on that person. The Privacy Commissioner was represented at discussions on these amendments with the agencies involved in the data-matching program. It was common ground that a provision of the type suggested by the Commissioner would be acceptable. What could not be agreed, however, was a formulation distinguishing between trivial and non-trivial amendments. It was therefore agreed that one solution to the problem would be to leave the question

> open in the legislation and allow the Privacy Commissioner to cover the matter in his guidelines which have the force of law under section 12 of the Data-matching Program (Assistance and Tax) Act 1990 and which appear in the Schedule to that Act.
>
> I fail to see how this trespasses on rights as there is nothing in the Act to constrain the enactment or content of such a guideline and it will have the same status once in force as would a section of the Act. It is not necessary to pursue the Privacy Commissioner's proposal to advert in section 11 to the guidelines because section 12 already provides plenary powers for the Privacy Commissioner in that regard.

In its Seventh Report, the Committee thanked the Minister for his response and noted the Minister's advice that this was a matter for the Privacy Commissioner to address in his guidelines. The Committee indicated that it would draw the Minister's response to the attention of the Privacy Commissioner.

The Privacy Commissioner responded to those comments as follows:

> The Committee appears to accept the Minister's view that I can deal with the notice-of-correction issue via the guidelines. I have taken the view to date that it is not open to me via the guidelines to deal with matters which have been comprehensively addressed by the text of the Act. For that reason I would not see it as open to me to provide by a guideline for a further notice when the issue of what notices are necessary would appear to have been comprehensively addressed by the Act.

The Privacy Commissioner went on to say:

> Consequently, to enable me to meet the Minister's indication that he is happy for me to address this matter, I would request the Committee to recommend an extra provision in s.11 empowering me to make guidelines concerning the giving, where appropriate, of notices of correction of address.

In its Eighth Report, the Committee noted that while (in its Seventh Report) it had been prepared to accept the Minister's advice that this matter could be dealt with by the Privacy Commissioner in his guidelines, the Privacy Commissioner had now indicated that he disagreed with the Minister's advice on this matter. The Committee indicated that it would, therefore, appreciate the Minister's further advice on the points made by the Privacy Commissioner.

The Committee went on to suggest that if, as the Privacy Commissioner stated, an amendment to section 11 of the Privacy Act was required, then such an amendment should be made. The Committee noted that, since the Minister had already indicated that it was appropriate for the problem identified by the Privacy Commissioner to be dealt with by the Privacy Commissioner's guidelines, the Minister would presumably have no difficulty with amending the legislation to ensure that the Privacy Commissioner could, in fact, deal with the problem in that way.

In his letter dated 14 July 1992, the Minister responded to those comments as follows:

> Advice from the Legal Services Group in my Department remains that the Privacy Commissioner can issue section 12 guidelines in the circumstances of the Bill. However, to ensure a more authoritative view the Legal Services Group has asked the Attorney-General's Department for formal advice by the end of July. I will provide you with a copy of that advice when it arrives.

The Minister has now provided the Committee with a copy of an advice from the Attorney-General's Department which supports the view taken by his Department. A copy of that advice is attached to this Report for the information of Senators.

The Committee thanks the Minister for his assistance in this matter.

Amanda Vanstone

Amanda Vanstone
(Deputy Chairman)

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11 SEP 1992
Senate Standing Ctte for the Scrutiny of Bills

Minister for Transport and Communications

Parliament House
Canberra ACT 2600
Australia
Tel. (06) 277 7200
Fax. (06) 273 4106

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

10 SEP 1992

Dear ~~Senator Cooney~~

Thank you for the Committee's Report of 19 August 1992 on the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992.

Subsection 89D(5) of the Broadcasting Act 1942 was inserted by the Broadcasting Amendment Act (No 2) 1991 to allow non metropolitan AM commercial radio licensees to apply for conversion to FM.

Section 15 of the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992 was included at, and complies with, the request of the industry body, the Federation of Australian Radio Broadcasters. It was not intended to do more than preserve that right of conversion in the special case of a non metropolitan AM commercial radio licensee faced with competition from a new FM licensee in circumstances where they have no chance to use the Broadcasting Act provision, ie where the competitive licence application is determined after the commencement of the new Act.

A deliberate policy choice was made by the Government not to extend AM/FM conversion rights into the new Act. The technical specifications of services are a matter for the Australian Broadcasting Authority (ABA) under its power to make licence area plans (see section 26 of the new Act). Allowing a right of AM/FM conversion would severely limit the ability of the ABA to plan the FM frequencies in non metropolitan areas since sufficient frequencies would have to be reserved to allow for conversion by all current AM licensees. That may not present a problem in some non metropolitan areas, but it certainly would in others.

Section 15 of the Transitional Act is intended to preserve the ability of licensees to make a choice when faced with new competition, not to give a perpetual right to convert, whatever the planning priorities, to licensees who have chosen not to exercise that right under the current Act.

To date, 3SR has chosen not to exercise its right to convert. It has also chosen not to apply for a supplementary licence, which, if granted, would give it an additional FM service. A large number of other non metropolitan AM commercial radio licensees have also chosen not to take up the opportunity to convert.

The receivers are obviously not content with the opportunities offered under the new Act to seek conversion on planning grounds through input to the licence area plan processes of the ABA or to seek a second competitive licence in the area on a price based allocation basis (see sections 54 and 40 of the new Act).

It seems likely that they feel that a right to convert would enhance the prospects for sale of the service.

I see no reason why the ability of the ABA to plan the provision of additional FM services to non metropolitan radio markets should be compromised by giving open ended rights to current licensees to convert. The aim of the new Act is, after all, to increase the level of service to all Australians, not primarily to protect the commercial interests of incumbent AM commercial radio licensees.

I do not believe that the legislation in any way trespasses on the rights of the receivers of 3SR and, therefore, do not consider that the amendment they advocate is justified.

Yours sincerely

(Bob Collins)

Facsimile transmission from

BLAKE DAWSON WALDRON
SOLICITORS

Date	14 July 1992	Grosvenor Place 225 George Street Sydney NSW 2000 Australia
Our ref/File no	JFF:PRM:50/92	
Your ref/File no		
To	Mr Stephen Argument Senate Standing Committee for the Scrutiny of Bills Parliament House CANBERRA	Telephone (02) 258 6000 Int + 61 2 258 6000 Telex AA22867 DWN DX 365 Sydney
Facsimile no	(06) 277 3289	Facsimile (02) 258 6999

Dear Stephen,

Conversion of 3SR to FM

Further to our conversation of yesterday, I attach a copy of a letter sent this morning to Senator Collins.

Please telephone me if I can be of any further assistance.

Kind regards,

If you do not receive _____ pages (including this page) please telephone or fax immediately.
Our fax operator's telephone number is (02) 258 6666

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YOUR REF | OUR REF JFF:50/92 | WRITER'S DIRECT LINE 258 6067

14 July 1992

Senator The Hon. Bob Collins
Minister for Transport and Communications
Parliament House
CANBERRA ACT 2600

Dear Minister,

Conversion of 3SR to FM

We act for Messrs Anthony D'Aloia and John Spark, receivers and managers of the assets and undertaking of Hanor Pty Limited, which owns and operates commercial radio station 3SR Shepparton.

We are writing to draw to your attention an extremely serious unintended consequence arising out of the **Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992** ("BST Act").

The Government's policy *on conversion of AM radio stations to FM in regional markets* is to allow an incumbent AM licensee the opportunity to convert to FM (upon payment of the relevant fee) at or after the date on which an independent radio licence commences broadcasting on FM. The present difficulty arises because section 14A of the BST Act preserves the opportunity of AM licensees to convert to FM only in circumstances where a commercial radio licence is granted under section 12 of that Act.

Senator The Hon. Bob Collins
Minister for Transport and Communications 14 July 1992

With respect to 3SR's situation, a commercial radio licence was granted to SUN FM in Shepparton some time ago. The grant of that licence, however, is not one to which the provisions of section 12 of the BST Act apply. Accordingly, section 14A will not operate to allow 3SR the opportunity to convert at all. The provisions of section 14A will effectively operate so as to prohibit 3SR from converting.

In March 1989, 3SR lodged an application to convert to FM. Unfortunately, the financial position of 3SR prevented that application from proceeding. In December 1991, 3SR was placed in receivership. Negotiations are now well advanced between our clients and a third party which would allow the station to be sold out of receivership. It had been expected that contracts would be exchanged this month and completed in about September. Obviously enough, this would not have allowed 3SR sufficient time to complete the conversion process prior to 1 October, the expected date of commencement of the BST Act.

The third party has, however, suspended negotiations pending a resolution to the question of whether 3SR will retain the opportunity to convert to FM under the BST Act. We are instructed that there are virtually no prospects of selling 3SR in circumstances where it cannot convert to FM under the BST Act. In those circumstances, the station would cease to operate and all of the 25 staff presently employed would lose their jobs. The public would also lose a commercial radio service.

The situation is critical. We urge you to consider the introduction of an amendment to the BST Act in the Budget sittings so as to extend the opportunity under section 14A to AM licensees to convert to FM to cover 3SR's position. Please contact Mr Ford of this office if you require any further information.

Yours faithfully,

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Minister for Primary Industries and Energy
Simon Crean, MP

- 7 SEP

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

Dear Senator Cooney

I refer to Mr Argument's memorandum of 9 June 1992 addressed to my Senior Adviser, enclosing a copy of the Committee's Seventh Report dated 3 June 1992.

I would like to offer you some additional comments on the issues raised by the Committee in relation to the Coal Industry Amendment Bill 1992.

Date of Proclamation

The Committee was concerned about the open-ended nature of the date of Proclamation for the Bill.

I am pleased to advise the Committee that arrangements were made with the NSW Government for a common date of 7 August 1992 to Proclaim both the State and Commonwealth Coal Industry Amendment Acts, and this action has been completed.

Inappropriate delegation of legislative power

The Committee was concerned that the provision in the Bill relating to the Board's temporary powers (training, dust monitoring and industry statistics) could allow Ministers to effectively repeal the section, or any of its parts, (if and when they agreed to the Board ceasing the temporary functions).

I previously suggested to the Committee that any change to these functions would be reported in the Board's Annual Report when it was tabled in Parliament. I appreciate the Committee's view that such notification in the Annual Report would probably be after the event, and that "knowledge of an event does not necessarily equate to the event being open to scrutiny."

In view of the Committee's concerns on this matter, I will undertake to advise Parliament in the event that the State Minister and I agree to modify the powers of the Board under Section 25 of the Act.

Insufficient parliamentary scrutiny of Board Orders

The Committee was concerned that the Bill allowed the Board to make Orders with Ministerial approval, but without scrutiny by Parliament.

Parliament House, Canberra ACT 2600. Telephone: (06) 277 7520. Facsimile: (06) 273 4120

I note the Committee's appreciation of the difficulty of having a disallowance mechanism in these cases. In order to accommodate the Committee's concerns, I will undertake to advise Parliament in the event that the State Minister and I agree to the Board making new Orders.

Privilege against self-incrimination

The Committee noted that section 53 of the Bill requires that persons must not, without reasonable excuse, refuse to answer questions, fail to produce books, records etc.

The Committee indicated its assumption that, in each case, it would be a 'reasonable excuse' for a person to decline to answer questions or produce documents on grounds that it might tend to incriminate him or her, relying on the common law privilege against self-incrimination. The Committee noted many people are unaware of this privilege and asked whether there is any provision for a person to be given a warning about the use that can be made of any information and their rights to decline to answer questions etc.

I advised the Committee that I would write to the NSW Minister once the Bills were passed to arrange for a direction to be issued to the Board, jointly with the NSW Minister, requiring its inspectors to notify persons of their common law privilege prior to carrying out duties under section 53.

The power for Ministers to issue such an order was not available to us until the Proclamation of the Acts on 7 August 1992. I have now written to my State counterpart seeking his agreement to progress this matter.

I hope these additional comments will assist the Committee.

Yours sincerely

SIMON CREAN

Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

91031892:LA

8 SEP 1992

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

Dear Senator Cooney

I refer to comments in the Scrutiny of Bills Alert Digest No. 10 of 1992 dated 19 August 1992 concerning the Crimes (Ships and Fixed Platforms) Bill 1992. My views on your concerns are set out below.

Offence Provisions

Clause 12 of the Bill creates an offence where a person destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if that act is likely to endanger the safe navigation of a private ship. Clause 13 creates an offence of knowingly endangering the safe navigation of a private ship by communicating false information. Clauses 14, 15 and 16 create offences incidental to other offences under the Bill. Clause 17 creates an offence of threatening to commit an offence against some other provision of the Bill if that threat is likely to endanger the safe navigation of the ship concerned.

The scheme of the Bill is such that there are two main types of offence. The first is inherently dangerous to the safe navigation of a ship and does not require separate proof of the likelihood of such danger. This group includes hijacking and destruction of ships. The second type of offence requires that the offender know that the act constituting the offence is likely to endanger the safe navigation of a ship. This group includes damaging a ship or its cargo and acts of violence. The damage required for these offences is not limited to serious damage. Clause 13, for example, is only limited by the requirement that the offender knows the safe navigation of a ship will be endangered. It would not be appropriate for the high penalties contemplated by the

Bill to be imposed for these offences unless they were limited by such a requirement of knowledge of the consequences of the act prohibited.

Clause 12 does not fall within either of these groups. As the Minister for Justice pointed out during the Second Reading debate, the inherently serious nature of the offence distinguishes it from those, like section 13, where it is necessary to prove knowledge. It is sufficient that the prosecution should have to prove a likelihood of danger to the safe navigation of a private ship flowing from the offending acts. It should be noted that the clause is limited in its application to acts of destruction, serious damage and serious interference.

The offences created by clauses 14 to 16 are 'incidental' offences, which require proof of one of the other offences. It is the connection with the main offence that adds to the seriousness of the act. That is not to say, however, that these offences are not serious in themselves. An example of such an incidental act of violence is the murder by the *Achille Lauro* hijackers of Leon Klinghoffer. That act did not itself endanger the safe navigation of the ship but was one of the most serious offences intended to be proscribed by the drafters of the Convention. Any element of endangering the safe navigation of a ship will, where necessary, have been proved in relation to the main offence.

Clause 17 creates the offence of threatening to commit certain other offences. The offence is only committed where the threat itself is likely to endanger the safe navigation of a ship. Accordingly, it is only in very limited circumstances and where a very serious threat has been made that an offence has been committed under this clause. It is not necessary or appropriate to include a requirement of knowledge of the consequences of the threat itself, as well as the knowledge of the consequences of the act threatened.

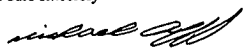
Delegation of Powers

Clauses 30 and 32 enable me to authorise a person to give consents and certificates. Such persons would be acting on my behalf, rather than exercising an independent discretion as a delegate. I note, however, that under subsection 17(2) of the *Law Officers Act 1964* I am able to delegate these powers to the holder of an office specified in the instrument of delegation.

I anticipate that these powers would only be used in very limited circumstances. I may wish to authorise the Director of Public Prosecutions or one of his senior officers to exercise my power to consent to prosecute in some circumstances. The other possibility is that I may wish to enable a State authority to institute proceedings in some circumstances. In the latter case, authorisations would be made on the basis of arrangements to be made with the States and it would be difficult and inappropriate to specify the offices in advance.

The power to authorise the giving of certificates is most likely to be exercised in favour of the Secretary to the Department of Foreign Affairs and Trade but there may be circumstances when some other person is appropriate. Because of the very limited nature of the power to be conferred, an exception to the general principle would seem to be justified.

Yours sincerely



MICHAEL DUFFY

COMMONWEALTH OF AUSTRALIA

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

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

Dear Barney

In the Tenth Report of 1992 of the Senate Standing Committee for the Scrutiny of Bills you refer at page 370 to my undertaking to provide a copy of advice from the Attorney General's Department on one aspect of the powers of the Privacy Commissioner.

The Attorney-General's Department has now provided advice and I am pleased to attach a copy. I note that it supports the view I have previously put to your Committee.

Yours sincerely

NEAL BLEWETT

ATTORNEY-GENERAL'S DEPARTMENT

RECEIVED
25 AUG 1992
Principal Adviser (LSG)

Civil Law Division

92127766

14 August 1992

Michael Sassella
Principal Adviser
Legal Services Group
Department of Social Security
Box 7788
CANBERRA MAIL CENTRE ACT 2610

Dear Michael

DATA-MATCHING PROGRAM (ASSISTANCE AND TAX) ACT 1990: PRIVACY COMMISSIONER'S POWER TO ISSUE GUIDELINES

I refer to your letter of 7 July 1992 in which you sought advice concerning the power of the Privacy Commissioner to issue guidelines under the *Data-matching Program (Assistance and Tax) Act 1990* ('the Act'). The specific issue is the validity of a guideline requiring source agencies to give notice to an affected individual where personal identity data is updated in accordance with subparagraphs 10(1)(a)(v) and 10(1)(b)(ii) of the Act. For the purposes of this advice, I will refer to such a guideline as a "notice guideline". I apologise for the delay in replying.

Advice

2. Your questions and my short answers are as follows:

(1) Q. Can the Privacy Commissioner issue a guideline on a matter comprehensively addressed by the text of the Act?

A. No.

(2) Q. If the answer to question (1) is "no", is the issue of notice to be given under section 11 in respect of a proposal to change a person's personal identity data comprehensively addressed by the text of the Act?

A. No.

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(3) **Q.** In the present context can the Privacy Commissioner issue a guideline on the notice requirements attendant on a proposal to change a person's personal identity data?

A. Yes.

Reasons

Background

3. The guidelines issued by the Privacy Commissioner under section 12 of the Data-matching Program (Assistance and Tax) Act are a form of subordinate legislation. The primary question in this case relates to the circumstances in which subordinate legislation will be inconsistent with the principal Act under which it is made.

4. Pearce in *Delegated Legislation* (Butterworths, 1977) says that the "cover the field" test of inconsistency (as used for the purposes of section 109 of the *Constitution*) is the appropriate test in relation to delegated legislation. He paraphrases at page 185 the words of Dixon J in *Victoria v The Commonwealth* (1937) 587 CLR 618 at 630 as the test of whether there is inconsistency between a statute and delegated legislation. That test is:

> "when delegated legislation, if valid, would alter, impair or detract from the operation of an Act, then to that extent it is invalid. Moreover, where it would appear, from the terms, the nature or the subject matter of an Act, that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for delegated legislation to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Act and so as inconsistent."

In my view this represents the current state of the law in this area.

5. Even if delegated legislation is inconsistent with an Act, it may override that Act where it is the intention of the Parliament that it should do so. This view was taken in *Hotel Esplanade Pty Ltd v City of Perth* [1964] WAR 51, where Hale J said, *obiter*, in relation to by-laws overriding section 177 of the Licensing Act 1911-1961 (WA), "it may be that a by-law making power expressed in sufficiently absolute terms would support a by-law which would itself override s.177".

Would a notice guideline impair the operation of the Act?

7. To be valid, any notice guideline must not alter, impair or detract from the operation of the Act. In this instance, I understand the guideline would seek to place a limit on some of the updating which can occur under subsection 10(1). That limit would not in any way prevent valid updating action from occurring but would merely delay that action for any period set out in a notice guideline. Such a guideline could not, of course, be unreasonable in the sense of impairing the operation of the Act. In my opinion, therefore, a reasonable notice guideline would not alter, impair or detract from the operation of subsection 10(1) to an extent that would make the guideline invalid.

8. I said above that a "reasonable" notice guideline would not be invalid on the basis of impairing the operation of the Act. To be reasonable, I think such a guideline would have to prescribe a reasonable period and probably should not apply to all updating. A reasonable period would, for example, be the 28 days which applies to notices given under section 11.

9. The kinds of updating which could be subject to a notice guideline would probably be those which are significant and potentially threaten an individual's rights. For example, it would not in my view be reasonable for a notice guideline to require notice to be given for minor updating of personal identity data such that the cost of giving the notice would outweigh any benefit which would accrue from the updating. That would defeat the operation of that part of section 10 which allows updating. The factors which would need to be taken into account in determining the reasonableness of any notice guideline in terms of the updating to which it would apply would be:

- the cost/benefit of giving the notice;
- the significance of the impact the updating could have on an individual's rights.

Does section 11 "cover the field"?

10. Section 11 requires source agencies to give individuals written notice of any action proposed to be taken under paragraphs 10(1)(a) and (b) except for the updating action under subparagraphs 10(1)(a)(v) and 10(1)(b)(ii). The Act is silent as to the giving of notice where updating action is to be taken by an agency. The question is whether section 11 is intended to be a complete statement of the notices which source agencies are required to give under the Act. In the Privacy Commissioner's words this question is whether the issue of notices is comprehensively addressed by the text of the Act.

11. In my view, the terms of section 11 do not indicate that it was intended to be a complete statement of the circumstances in which notices would need to be issued by source agencies. As I said above, the section is silent on the issue of notices where updating occurs. There is nothing also to suggest that a guideline could not deal with a matter such as notice where updating occurs. The Privacy Commissioner has a broad power under section 12 of the Act to issue guidelines relating to the matching of data under the Act. It seems quite clear from the existing guidelines and the interim guidelines in Schedule 1 of the Act that this is not limited to matters concerned with the actual process by which data is matched on computer. Rather, the guidelines, it seems, can deal with a wide range of issues relating to the data-matching scheme established by the Act.

12. In this regard, I note that there are several issues dealt with in the current guidelines and the interim guidelines in Schedule 1 which cover matters specifically dealt with in the Act. For example, subsection 10(4) deals with the issue of a separate permanent registers of individuals. That issue is also covered in some detail by guidelines 7.1 to 7.4 of the current guidelines. Similarly, the destruction of data in the hands of a source agency is dealt with in subsection 10(2) of the Act and also in guideline 6.2 of the guidelines. This all indicates that the guidelines can deal with issues which are also dealt with by the Act, provided, of course, that they do not impair the operation of the Act or that a particular field is not covered by a provision of the Act.

13. My view that section 11 does not cover the field in relation to notices is reinforced by the views expressed by the Minister for Social Security when the recent amendments to allow updating were proceeding through Parliament (via the *Social Security Legislation Amendment Act 1992*). There is nothing in the second reading speech for that Act or the Parliamentary debates which indicates the view of Parliament on this issue. However, the 7th and 8th alert digests of the Senate Standing Committee for the Scrutiny of Bills clearly shows the view of the Minister for Social Security that it was intended that the guidelines could include a notice guideline. If it could be said that there is some ambiguity on this point, the alert digests are something which may be taken into account in interpretation of the Act (see paragraph 15AB(2)(c) of the *Acts Interpretation Act 1901*).

14. If you have any questions or would like to discuss any of these comments, please contact Andrew England on 250 6433.

Yours sincerely

Joan Sheedy
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Human Rights Branch

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

1992

7 OCTOBER 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT OF 1992

The Committee has the honour to present its Thirteenth Report of 1992 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 24:

Development Allowance Authority Amendment Bill 1992

Disability Discrimination Bill 1992

Migration Amendment Act 1992

DEVELOPMENT ALLOWANCE AUTHORITY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 20 August 1992 by the Parliamentary Secretary to the Prime Minister.

The Bill proposes to amend the *Development Allowance Authority Act 1992*, to increase the flexibility of the legislation to ensure that a more consistent approach is available to the various types of prospective applicant for the development allowance. The amendments provide flexibility for claiming the development allowance authority and, in particular, in passing the $50 million threshold.

The Committee dealt with the Bill in Alert Digest No. 11 of 1992, in which it made various comments. The Minister Assisting the Treasurer responded to those comments in a letter dated 6 October 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 11, the Committee noted that subclause 2(2) of the Bill provides that, with the exceptions of clauses 1, 2 and 37, the Bill is to commence 'immediately after the commencement of the *Development Allowance Authority Act 1992*'. That Act (which is the Principal Act in this instance) commenced on 30 June 1992.

The Committee noted that while the Bill, if enacted, would have a retrospective operation, clearly, the degree of retrospectivity would be relatively slight. Further, the Committee noted that the Minister's Second Reading speech on the Bill indicated that the amendments are either beneficial to individuals or 'neutral' in character. However, the Committee also noted that the Principal Act is being amended within 4 months of being passed. The Committee indicated that it would, therefore, appreciate the Minister's advice as to why amendments are required so soon after passage of the Principal Act.

The Minister has responded as follows:

> The policy decision that there would be a Development Allowance was announced in the One National Statement in late February of this year. The legislation required to implement this policy was, of necessity, lengthy, detailed and technically complicated with cross-links to the Income Tax legislation. It had to provide for a set of specific qualifying conditions that could be universally applied to large investment projects ($50 million or more) across a wide range of complex commercial arrangements within many industries.
>
> After the legislation was passed and industry began to come to grips with the detail procedures and test these against various 'live' project situations, some administrative problems emerged. They were mainly in two broad areas in which the legislation did not allow sufficient flexibility to applicants for the Development Allowance in the way projects could be structured in order to qualify.
>
> When the Treasurer was made aware of these unnecessary obstacles to applicants, he was anxious to ensure that they be removed as soon as possible. He therefore set in train arrangements to have the appropriate amendments sought in the Budget Session.

The Committee thanks the Minister for this response.

DISABILITY DISCRIMINATION BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister for Health, Housing and Community Services.

The Bill proposes to introduce national legislation to make unlawful discrimination against people with disabilities in certain circumstances. The Bill makes unlawful discrimination on the grounds of disability in the areas of:

- employment;
- education;
- the provision of goods, services and facilities;
- accommodation;
- the disposal of land;
- the activities of clubs;
- sport;
- the administration of Commonwealth laws and programs; and
- in requests for certain information

Harassment of a person on the grounds of disability is also made unlawful.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Attorney-General responded to those comments in a letter dated 16 September 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Power to appoint / delegate power to 'a person'
Subclause 74(1), paragraphs 121(1)(d) and (2)(b)

In Alert Digest No. 8, the Committee noted that Part 4 of the Bill provides for inquiries and civil proceedings to be undertaken in relation to certain alleged unlawful acts. Division 2 of Part 4 provides for inquiries to be conducted by the

Disability Discrimination Commissioner, who is to be appointed pursuant to clause 113 of the Bill.

The Committee noted that clauses 74 and 75 of the Bill, if enacted, would empower the Commissioner to convene 'compulsory conferences' in relation to alleged unlawful acts. Subclause 74(1) provides:

> Subject to section 85, for the purpose of inquiring into an act, and endeavouring to settle the matter to which the act relates, under section 71, the Commissioner may, by notice in writing, direct the persons referred to in subsection (2) of this section to attend, at a reasonable:
>
> (a) time; and
>
> (b) place;
>
> specified in the notice, a conference presided over by the Commissioner or a person appointed by the Commissioner.
>
> [Clauses 71 and 85 are not relevant for the purposes of this comment]

This subclause would allow the Commissioner to appoint 'a person' to preside over a compulsory conference. There is no indication as to the qualities or attributes which such a person should have.

The Committee noted that it had regularly drawn attention to such provisions, on the basis that the discretion to appoint 'a person' should be limited either by reference to the qualities or attributes which such a person should possess or by reference to the designation or office which such a person should hold (ie by limiting it to members of the Senior Executive Service or the staff of the Human Rights and Equal Opportunity Commission).

Similarly, the Committee noted that Clause 121 of the Bill provides:

> (1) The Commission may, by writing under its seal, delegate to:
>
> (a) a member of the Commission; or
>
> (b) the Commissioner; or

(c) a member of the staff of the Commission; or
(d) another person or body of persons;
all or any of the powers conferred on the Commission under this Act, other than powers in connection with the performance of the functions that, under section 67, are to be performed by the Commissioner on behalf of the Commission.

(2) The Commissioner may, by writing signed by the Commissioner, delegate to:
(a) a member of the staff of the Commission; or
(b) any other person or body of persons;
approved by the Commission, all or any of the powers exercisable by the Commissioner under this Act.

The Committee noted that, pursuant to clauses 121(1)(d) and (2)(b), the Human Rights an Equal Opportunity Commission and the Disability Discrimination Commissioner, respectively, would be able to delegate (with one limitation) all or any of their powers under the Bill to 'any other person or body of persons'. The Committee stated that, as with subclause 74(1), it was a matter of concern that there was no limit on the persons to whom those powers could be delegated. The Committee suggested that there should preferably by reference to the qualities and attributes which such persons should possess.

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

The Attorney-General has responded as follows:

> The provisions in question, Subclause 74(1) and Clause 121 are the same as exist in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Human Rights and Equal Opportunity Commission Act 1986*. I have sought advice from the Human Rights and Equal Opportunity Commission on their experience with the existing provisions and they have indicated their view that the provisions have worked well and are necessary to

allow for the flexibility they require in the appointment of various persons to assist the Commission in its work.

The Commission has indicated that in the complaints process the most appropriate means available are utilised to achieve the conciliation of complaints. In the vast majority of cases, this process is carried out by trained conciliators employed by the Commission. However, given that the subject matter of complaints vary widely it is sometimes necessary to appoint persons who have particular expertise in certain fields. In the Commission's view any limitation on the power to appoint or to delegate to 'a person' would be too restrictive to the detriment of the conciliation of complaints or would need to be so broad as to be meaningless.

The Attorney-General goes on to say:

In relation to what are termed 'Hearing Commissioners' appointed to assist the Commission in the actual hearing of complaints the practice up to now has been to appoint legally qualified persons and in fact Clause 80 of the Bill requires that hearings under the Bill are to be conducted by either a single member who is legally qualified or by two or more members where the person presiding must be legally qualified.

Appointments of 'Hearing Commissioners' only takes place after approval by Cabinet upon my recommendation. Whilst there has not been an appointment other than of a person who is legally qualified it is possible that as the functions of the Commission expand with the introduction of this legislation it may well be necessary to appoint a person who may, for example, be medically qualified or qualified in a related discipline.

The Attorney-General concludes by saying:

Whilst I appreciate that broadly drawn provisions such as those in this Bill are not generally desirable, I believe that given the diverse nature of the matters dealt with by the

Commission and the fact that most complaints are dealt with by the mechanism of conciliation it is necessary for the Bill to have these provisions. Without this flexibility the operations of the Commission may well be seriously affected.

The Committee thanks the Attorney-General for this response.

MIGRATION AMENDMENT ACT 1992

The Bill for this Act was introduced into the Senate on 19 December 1991 by the Minister Representing the Minister for Immigration, Local Government and Ethnic Affairs.

As originally presented to the Senate, the Bill proposed to amend the *Migration Act 1958,* to:

- make changes to the merits review system;
- distinguish the power to detain a person under the Act;
- increase certain penalty provisions in line with Commonwealth criminal law policy and allow consistent application of pecuniary penalties under the *Crimes Act 1914;* and
- provide that the obligation to endorse a visa or entry permit will be satisfied by an endorsement being recorded in a notified data base.

The Committee dealt with the Bill (as Migration Amendment Bill (No. 4) 1991) in Alert Digest No. 1 of 1992, in which it made no comment.

On 5 May 1992, the House of Representatives substantially amended the Bill, by inserting a new clause 2A which, in turn, inserted a new Division 4BA into Part 2 of the *Migration Act 1958.* That new Division deals with the custody of 'certain non-citizens'.

The Senate passed the Bill, as amended by the House of Representatives, on the same day as the House. As a result, it was not possible for the Committee to give the Senate its views on the proposed amendments prior to the Senate's passing those amendments. However, though the amendments had passed into law, the Committee made some comments in its Seventh Report of 1992. The Minister for

Immigration, Local Government and Ethnic Affairs responded to those comments in a letter dated 17 September 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Discrimination against individuals on the ground of race or national origin
Section 2A - new section 54K of the *Migration Act 1958*: definition of 'designated person'

In its Seventh Report, the Committee noted that section 2A of the Act insets a new Division 4B into the *Migration Act 1958*. Section 54K of this new Division includes a definition of a 'designated person' for the purposes of the Division. That definition is as follows:

> "designated person" means a non citizen who:
>
> (a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992; and
> (b) has not presented a visa; and
> (c) is in Australia and
> (d) has not been granted an entry permit; and
> (e) is a person to whom the Department has given a designation by:
> (i) determining and recording which boat he or she was on; and
> (ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat;
>
> and includes a non-citizen born in Australia whose mother is a designated person.

The Committee noted that paragraph (a) of the definition makes it clear that the purpose of the new Division is to make special rules relating to a particular group of people. The Committee suggested that this may be considered to be contrary to Article 2, paragraph 1 of the International Covenant on Civil and Political Rights, to which Australia is a signatory. The paragraph provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Minister has responded as follows:

> Although the definition of a designated person will in most cases apply to persons who arrive by boat from the South East Asian region, in its application there is no explicit or implicit discrimination against persons of any particular nationality or other background. Since its enactment, the Amendment Act has been utilised to authorise the detention of nationals from Cambodia, the People's Republic of China, Bangladesh, Indonesia and Poland.

The Committee thanks the Minister for this response.

Breach of the separation of powers doctrine
Section 2A - new subsections 54L(1) and 54N(2) of the *Migration Act 1958*

In its Seventh Report, the Committee noted that new section 54L of the *Migration Act 1958* provides:

> **Designated persons to be in custody**
> 54L(1) Subject to subsection (2), after commencement, a designated person must be kept in custody.
>
> (2) A designated person is to be released from custody if, and only if, he or she is:
> (a) removed from Australia under section 54Q; or
> (b) given an entry permit under section 34 or 115.

(3) This section is subject to section 54R.

New section 54N provides, in part:

> *Detention of designated person*
>
> 54N(1) If a designated person is not in custody immediately after commencement, an officer may, without warrant:
>
> (a) detain the person; and
>
> (b) take reasonable action to ensure that the person is kept in custody for the purposes of section 54L.
>
> (2) Without limiting the generality of subsection (1), that subsection even applies to a designated person who was held in a place described in paragraph 11(a) or a processing area before commencement and whose release was ordered by a court.

The Committee suggested that the combined effect of subsections 54L(1) and 54N(2) is that a person is to be kept in custody despite the fact that a court has ordered their release. The Committee suggested that this may be regarded as being contrary to the fundamental constitutional principle of the separation of powers. The Committee noted that, under this doctrine, the powers of the courts are regarded as equal to and ought not to be subservient to the powers of the Executive and the Legislature.

The Minister has responded as follows:

> As I have indicated above, the validity of sections 54L, 54N and 54R are presently being considered by the High Court.
>
> In relation to your concern that sections 54L, 54N and 54R breach the separation of powers doctrine, I draw your attention to the argument of the Commonwealth Solicitor General before the High Court. The Solicitor General has argued that the Amendment Act does not interfere with the classic attributes of judicial power, which involves the court, when called upon to decide a

> controversy between parties, making an inquiry concerning the law as it is, and the facts as determined, resulting in a binding and authoritative decision. As the Amendment Act does not direct or restrict the discretion or judgement of the judiciary to decide matters according to law I do not believe that subsections 54L(1) and 54N(2) breach the separation of powers doctrine.

The Committee thanks the Minister for this response.

Arrest without warrant
Section 24 - new subsection 54N(1) of the *Migration Act 1958*

In its Seventh Report, the Committee noted that new subsection 54N(1) of the *Migration Act 1958* (which has already been reproduced above) empowers an immigration officer to arrest a 'designated person' without warrant. While the Committee noted that the law generally accepts the right of any person (not necessarily a police officer) to arrest a person without warrant, the law does so only in circumstances where the person arrested is committing a serious offence. The Committee suggested that there was, therefore, a question as to whether an offence pursuant to section 54N(1) was such an offence.

The Minister has responded as follows:

> The Committee is concerned that generally the law only accepts the arrest of a person without a warrant in circumstances where the person arrested is committing a serious offence. I draw your attention to the fact that the power to detain and keep a designated person in custody is civil, and not criminal, in nature. Thus, the issue is not whether the power to detain or hold in custody should be operable pursuant to a serious offence, as subsection 54N does not rely upon an offence having been committed. Rather, the detention power relies upon a person being a designated person, which in turn relies upon a person's lack of authority to travel to, and be physically present in, Australia.

> The point is accepted that a power to detain and hold a person in custody, whether it is civil or criminal in nature, ought only to be authorised where such is necessary. This is especially so where there is no facility to establish that the exercise of the power in the particular circumstances is justified, as in the case where a warrant has been issued.
>
> The Government believes that there is a compelling policy justification for the power in subsection 54N(1). The control of the movement of persons across Australia's borders relies upon the systematic identification and processing of all persons seeking to enter Australia in accordance with the legislative scheme of the Act and Regulations. Of particular concern to the Government is that the release of boat people into the community would undermine its position in determining their refugee status or entry claims. The provisions were also enacted to send a clear signal that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.

The Committee thanks the Minister for this response.

Denial of access to the courts
Paragraph 54R(3)(e) and section 54S of the *Migration Act 1958*

In its Seventh Report, the Committee noted that new section 54R of the *Migration Act 1958* provides:

> No custody or removal after certain period
>
> 54R(1) Sections 54I and 54Q cease to apply to a designated person who was in Australia on 27 April 1992 if the person has been in application custody after commencement for a continuous period of, or periods whose sum is, 273 days.
>
> (2) Sections 54L and 54Q cease to apply to a designated person who was not in Australia on 27 April 1992, if:

(a) there has been an entry application for the person; and

(b) the person has been in application custody, after the making of the application, for a continuous period of, or periods whose sum is, 273 days.

(3) For the purposes of this section, a person is in application custody if:

(a) the person is in custody; and

(b) an entry application for the person is being dealt with;

unless one of the following is happening:

(c) the Department is waiting for information relating to the application to be given by a person who is not under the control of the Department;

(d) the dealing with the application is at a stage whose duration is under the control of the person or of an adviser or representative of the person;

(e) court or tribunal proceedings relating to the application have been begun and not finalised;

(f) continued dealing with the application is otherwise beyond the control of the Department.

New section 54S provides:

Courts must not release designated persons

54S. A court is not to order the release from custody of a designated person.

The Committee suggested that the combined effect of new paragraph 54R(3)(e) and section 54S is that a 'designated person' effectively would be denied access to the courts for the purposes of determining whether or not they should continue to be detained. The Committee suggested that this may be considered to be contrary to Article 9, paragraph 4 of the International Convention on Civil and Political Rights, which provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The Committee suggested that it may also be contrary to Article 10, paragraph 1, which provides:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The Committee suggested that the provisions may also be contrary to Article 14, paragraph 1, which provides, in part:

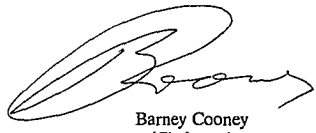
> All persons shall be equal before courts and tribunals.

The Minister has responded as follows:

> The Committee is concerned that paragraph 54R(3)(e) and section 54S of the Act deny designated persons access to the courts, contrary to Article 9, paragraph 4 of the International Covenant on Civil and Political Rights. Article 9 has two essential elements. First, any detention should be according to law. Second, a detainee is entitled to test the lawfulness of detention in a court and, if it is found to be unlawful, be released.
>
> The detention provisions circumscribe the circumstances in which a person's detention is lawful, specifying, in section 54S, that a court shall not otherwise release the person from detention. That is, under Division 4B of the Act, a court may order the release of a person detained under section 54L where it has determined that the detainee does not in fact fall within the class of persons to whom that section applies. It does not purport to deprive the courts of jurisdiction to review the legality of any act done or decision taken by the Minister or an officer of the Government.

> However, the point is taken that unless a person whom has been designated under Division 4B of the Act is able to establish that they do not fall within the detention provisions, they have no avenue of relief in the courts. The enactment of this mechanism was considered necessary by the Government in order to remedy the situation where, notwithstanding the lack of any legal status to be in the Australian community, the courts have released persons into the Australian community. As stated above, of particular concern to the Government in relation to boat people is that their release into the community would undermine ... its position in relation to the determination of refugee claims and the entry of boat people into Australia.

The Committee thanks the Minister for this response and for his assistance on this matter.



Barney Cooney
(Chairman)

TREASURER
PARLIAMENT HOUSE
CANBERRA 2600

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

6 OCT 1992

Dear Senator Cooney

I refer to "Scrutiny of Bills Alert Digest No 11 of 1992" dated 9 September 1992, in which your Committee has sought the Treasurer's advice as to why the Development Allowance Authority Act 1992 has required amendments so soon after its passage in the Autumn 1992 Session.

The policy decision that there would be a Development Allowance was announced in the One Nation Statement in late February of this year. The legislation required to implement this policy was, of necessity, lengthy, detailed and technically complicated with cross-links to the Income Tax legislation. It had to provide for a set of specific qualifying conditions that could be universally applied to large investment projects ($50 million or more) across a wide range of complex commercial arrangements within many industries.

After the legislation was passed and industry began to come to grips with the detail procedures and test these against various "live" project situations, some administrative problems emerged. They were mainly in two broad areas in which the legislation did not allow sufficient flexibility to applicants for the Development Allowance in the way projects could be structured in order to qualify.

When the Treasurer was made aware of these unnecessary obstacles to applicants, he was anxious to ensure that they be removed as soon as possible. He therefore set in train arrangements to have the appropriate amendments sought in the Budget Session.

Yours sincerely

Peter Baldwin
Minister Assisting the Treasurer

RECEIVED
18 SEP 1992
Senate Standing C'tte
on the Scrutiny of Bills

Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

16 SEP 1992

Senator Barney Cooney
Chairman
Senate Standing Committee For
The Scrutiny Of Bills
Parliament House
CANBERRA ACT

Dear Senator Cooney

I refer to the Alert Digest produced by your Committee being No 8 of 1992 dated 3 June. In that Alert Digest a number of matters were raised concerning the Disability Discrimination Bill 1992.

The main concerns expressed by the Committee relate to the power to appoint persons to do certain tasks under the Bill and the power to delegate. In both cases no particular qualifications are set out as to the persons who can be so appointed or as to the persons to whom delegations can be made.

The provisions in question, Subclause 74(1) and Clause 121 are the same as exist in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Human Rights and Equal Opportunity Commission Act 1986*. I have sought advice from the Human Rights and Equal Opportunity Commission on their experience with the existing provisions and they have indicated their view that the provisions have worked well and are necessary to allow for the flexibility they require in the appointment of various persons to assist the Commission in its work.

The Commission has indicated that in the complaints process the most appropriate means available are utilised to achieve the conciliation of complaints. In the vast majority of cases, this process is carried out by trained conciliators employed by the Commission. However, given that the subject matter of complaints vary widely it is sometimes necessary to appoint persons who have particular expertise in certain fields. In the Commission's view any limitation on the power to appoint or to delegate to 'a person' would be too restrictive to the detriment of the conciliation of complaints or would need to be so broad as to be meaningless.

In relation to what are termed 'Hearing Commissioners' appointed to assist the Commission in the actual hearing of complaints the practice upto now has been to appoint legally qualified persons and in fact Clause 80 of the Bill requires that hearings under the Bill are to be

conducted by either a single member who is legally qualified or by two or more members where the person presiding must be legally qualified.

Appointments of 'Hearing Commissioners' only takes place after approval by Cabinet upon my recommendation. Whilst there has not been an appointment other than of a person who is legally qualified it is possible that as the functions of the Commission expand with the introduction of this legislation it may well be necessary to appoint a person who may, for example, be medically qualified or qualified in a related discipline.

Whilst I appreciate that broadly drawn provisions such as those in this Bill are not generally desirable, I believe that given the diverse nature of the matters dealt with by the Commission and the fact that most complaints are dealt with by the mechanism of conciliation it is necessary for the Bill to have these provisions. Without this flexibility the operations of the Commission may well be seriously affected.

Yours sincerely

MICHAEL DUFFY

RECEIVED
25 SEP 1992
Senate Standing Ctte for the Scrutiny of Bills

MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

17 SEP 1992

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

Dear Senator Cooney

I refer to the Committee's report (No. 7) on Migration Amendment Bill No. 1 of 1992. In relation to the your particular concerns my response is as follows.

At the outset you should note that the validity of new sections 54L, 54N and 54R of the Amendment Act, prescribing the circumstances in which boat people may be detained, are presently the subject of a constitutional challenge in the High Court. Notwithstanding the legal proceedings I have offered a response on this issue.

(1) **Discrimination against individuals on the ground of race or national origin. Section 2A - new section 54K of the Migration Act 1958: definition of a "designated person"**

The Committee is concerned that section 54K of the Amendment Act is discriminatory. The definition of a designated person applies to persons who travel by boat to Australia without lawful authority to do so. However, the provision does not discriminate, technically or in its operation, on the grounds of race, colour or ethnic or national origin. Nor does the provision discriminate on other grounds referred to in Article 2, paragraph 1 of the International Covenant on Civil and Political Rights. In this regard it is assumed that the Committee's reference to Article 2, paragraph 2 of the Convention is intended to be a reference to Article 2, paragraph 1.

Although the definition of a designated person will in most cases apply to persons who arrive by boat from the South East Asian region, in its application there is no explicit or implicit discrimination against persons of any particular nationality or other background. Since its enactment, the Amendment Act has been utilised to authorise the detention of nationals from Cambodia, the People's Republic of China, Bangladesh, Indonesia and Poland.

(2) **Breach of the separation of powers doctrine. Section 2A - new subsections 54L(1) and 54N(2) of the Migration Act 1958**

As I have indicated above, the validity of sections 54L, 54N and 54R are presently being considered by the High Court.

In relation to your concern that sections 54L, 54N and 54R breach the separation of powers doctrine, I draw your attention to the argument of the Commonwealth Solicitor General before the High Court. The Solicitor General has argued that the Amendment Act does not interfere with the classic attributes of judicial power, which involves the court, when called upon to decide a controversy between parties, making an inquiry concerning the law as it is, and the facts as determined, resulting in a binding and authoritative decision. As the Amendment Act does not direct or restrict the discretion or judgement of the judiciary to decide matters according to law I do not believe that subsections 54L(1) and 54N(2) breach the separation of powers doctrine.

(3) **Arrest without warrant. Section 24 - new subsection 54N(1) of the Migration Act 1958**

The Committee is concerned that generally the law only accepts the arrest of a person without a warrant in circumstances where the person arrested is committing a serious offence. I draw your attention to the fact that the power to detain and keep a designated person in custody is civil, and not criminal, in nature. Thus, the issue is not whether the power to detain or hold in custody should be operable pursuant to a serious offence, as subsection 54N does not rely upon an offence having been committed. Rather, the detention power relies upon a person being a designated person, which in turn relies upon a person's lack of authority to travel to, and be physically present in, Australia.

The point is accepted that a power to detain and hold a person in custody, whether it is civil or criminal in nature, ought only to be authorised where such is necessary. This is especially so where there is no facility to establish that the exercise of the power in the particular circumstances is justified, as in the case where a warrant has been issued.

The Government believes that there is a compelling policy justification for the power in subsection 54N(1). The control of the movement of persons across Australia's borders relies upon the systematic identification and processing of all persons seeking to enter Australia in accordance with the legislative scheme of the Act and Regulations. Of particular concern to the Government is that the release of boat people into the community would undermine its position in determining their refugee status or entry claims. The provisions were also enacted to send a clear signal that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.

(4) **Denial of access to the courts. Paragraph 54R(3)(e) and section 54S of the Migration Act 1958**

The Committee is concerned that paragraph 54R(3)(e) and section 54S of the Act deny designated persons access to the courts, contrary to Article 9, paragraph 4 of the International Covenant on Civil and Political Rights. Article 9 has two essential elements. First, any detention should be according to law. Second, a detainee is entitled to test the lawfulness of detention in a court and, if it is found to be unlawful, be released.

The detention provisions circumscribe the circumstances in which a person's detention is lawful, specifying, in section 54S, that a court shall not otherwise release the person from detention. That is, under Division 4B of the Act, a court may order the release of a person detained under section 54L where it has determined that the detainee does not in fact fall within the class of persons to whom that section applies. It does not purport to deprive the courts of jurisdiction to review the legality of any act done or decision taken by the Minister or an officer of the Government.

However, the point is taken that unless a person whom has been designated under Division 4B of the Act is able to establish that they do not fall within the detention provisions, they have no avenue of relief in the courts. The enactment of this mechanism was considered necessary by the Government in order to remedy the situation where, notwithstanding the lack of any legal status to be in the Australian community, the courts have released persons into the Australian community. As stated above, of particular concern to the Government in relation to boat people is that their release into the community would undermine the its position in relation to the determination of refugee claims and the entry of boat people into Australia.

I hope that this letter adequately addresses your concerns.

Yours sincerely

Gerry Hand

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

1992

14 OCTOBER 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR
THE SCRUTINY OF BILLS

FOURTEENTH REPORT OF 1992

The Committee has the honour to present its Fourteenth Report of 1992 to the Senate.

The Committee takes this opportunity to respond to certain recommendations contained in the 36th Report of the Senate Committee of Privileges.

36TH REPORT OF THE SENATE COMMITTEE OF PRIVILEGES

On 25 June 1992, the Senate Committee of Privileges tabled its 36th Report, entitled *Possible improper interference with a witness and possible misleading evidence before the National Crime Authority Committee.* That report contains various recommendations, two of which are of particular interest to the Committee. They are:

> 3. That care should be taken, during passage through the Parliament of legislation which may include provisions comparable to those which have caused concern, to resolve any conflict between provisions which lay down guidelines for accountability of bodies to the Parliament and obligations to protect confidential information and privacy. [paragraph 3.26 of the Report]
>
> 4. That it might be appropriate for the Senate Standing Committee for the Scrutiny of Bills to draw such provisions to the attention of members of the Parliament. [paragraph 3.27 of the Report]

Before dealing with the recommendations themselves, it is useful to set out briefly the background to the recommendations and, in particular, to refer to the provisions that have 'caused concern'. Section 51 of the *National Crime Authority Act 1984* is a secrecy provision. It provides:

> Secrecy
>
> 51.(1) This section applies to:
>
> (a) a member of the Authority; and
>
> (b) a member of the staff of the Authority.
>
> (2) A person to whom this section applies who, either directly or indirectly, except for the purposes of this Act

or otherwise in connection with the performance of his duties under this Act, and either while he is or after he ceases to be a person to whom this section applies:

(a) makes a record of any information; or

(b) divulges or communicates to any person any information;

being information acquired by him by reason of, or in the course of, the performance of his duties under this Act, is guilty of an offence punishable on summary conviction by a fine not exceeding $5,000 or imprisonment for a period not exceeding 1 year, or both.

(3) A person to whom this section applies shall not be required to reproduce in any court any document that has come into his custody or control in the course of, or by reason of, the performance of his duties under this Act, or to divulge or communicate to a court a matter or thing that has come to his notice in the performance of his duties under this Act, except where the Authority, or a member or acting member in his official capacity, is a party to the relevant proceeding or it is necessary to do so:

(a) for the purpose of carrying into effect the provisions of this Act; or

(b) for the purposes of a prosecution instituted as a result of an investigation carried out by the Authority in the performance of its functions.

(4) In this section:

"court" includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

"member of the staff of the Authority" means:

(a) a person referred to in the definition of "member of the staff of the Authority" in subsection 4(1); or

(b) a person who assists, or performs services for or on behalf of, a legal practitioner appointed under section 50 in the performance of the legal practitioner's duties as counsel to the Authority;

"produce" includes permit access to, and "production" has a corresponding meaning.

Section 55 of the National Crime Authority Act deals with the duties of the Parliamentary Joint Committee on the National Crime Authority. It provides:

Duties of the Committee

55.(1) The duties of the Committee are:

(a) to monitor and to review the performance by the Authority of its functions;

(b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the Authority or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

(c) to examine each annual report of the Authority and report to the Parliament on any matter appearing in, or arising out of, any such annual report;

(d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the Authority; and

(e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.

(2) Nothing in this part authorises the Committee:

(a) to investigate a matter relating to a relevant criminal activity; or

(b) to reconsider the findings of the Authority in relation to a particular investigation.

It has been suggested that there is a conflict between the two provisions. The Privileges Committee referred to that conflict at paragraph 3.19 of its Report:

> It may be noted that the question of the [Parliamentary Joint Committee's] powers under the Act had been a source of conflict between the PJC on the one hand and the Authority on the other since the inception of the Authority under the chairmanship of Mr Justice Stewart. Where the blame lies for the difficulties which have arisen is not clear. Indeed, it may be that the Parliament should share the blame for not making its intentions absolutely clear. Whatever the case, the PJC had cause, even in its first report, presented in 1985, to advise both Houses of the Parliament of the difficulties in establishing an acceptable working relationship between the two bodies. Evidence was given during the hearing that the pattern established by the earlier Authority was continued by the Chairman and members appointed from 1 July 1989.

Given this background, it is clear that provisions of the kind referred to in recommendation 3 might come within paragraph 1(a)(i) of the Committee's terms of reference, as possibly trespassing unduly on personal rights and liberties. It may also be readily accepted that there ought not to be any possibility of conflict in legislation between secrecy provisions and provisions relating to the accountability of public bodies to the Parliament.

Having considered the Privileges Committee's recommendations, the Committee has decided to raise the issue with the First Parliamentary Counsel, as the Committee considers that it may be expedient for the First Parliamentary Counsel to issue a Drafting Instruction on this point. Such a Drafting Instruction could state that if a secrecy provision along the lines of section 51 of the National Crime Authority Act is to be included in a Bill, the provision should specify not only the circumstances in which confidential information might be divulged to a court (see subsection 51(3)

of that Act) but also the circumstances in which such information might be divulged to a House of Parliament or a Committee thereof. The Committee believes that such an action would then overcome the difficulties of interpretation adverted to in paragraph 3.22 of the Privileges Committee report.

The Committee informs the Senate that it has reached this conclusion without endorsing the view that the meaning and scope of sections 51 and 55 of the National Crime Authority Act is unclear. However, bearing in mind the difficulties that continue to arise in this area, the Committee believes that it would assist all concerned if a mechanism such as that suggested above were put in place in order to avoid further problems in the future.

Barney Cooney
(Chairman)

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF

1992

4 NOVEMBER 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 1992

The Committee has the honour to present its Fifteenth Report of 1992 to the Senate.

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

Health and Community Services Legislation Amendment Bill (No. 2) 1992

Student Assistance Amendment Bill 1992

Telecommunications (Interception-Carriers) Act 1992

HEALTH AND COMMUNITY SERVICES LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 16 September by the Minister for Higher Education and Employment for the Minister for Aged, Family and Health Services.

The Bill proposes to amend a number of Acts, namely:

- the *Aged and Disabled Persons Care Act 1954,* to increase equity with regard to hostel subsidies by providing higher subsidies for financially disadvantaged persons;
- the *Health Insurance Act 1973,* to close a loophole which would enable a child, in respect of whom family allowance is not being paid because of the income or assets test, to be declared a disadvantaged person and thus be issued with a Health Care Card and receive pharmaceutical benefits at the concessional rate of patient contribution;
- the *National Health Act 1953,* to introduce a system of Approvals in Principle for recurrent funding when a nursing home is built or rebuilt. The aim is to improve the quality of nursing home buildings, and hence to improve the quality of care. There are also a number of other amendments to this Act.

The Committee dealt with the Bill in Alert Digest No. 13 of 1992, in which it made no comment. However, Senator Patterson has drawn the Committee's attention to a matter contained in the Bill. Accordingly, the Committee makes the following comment.

Retrospectivity
Clause 22 - proposed new subsections 40AFE(1A), (3), (4), (4A), (6) and (7) of the *National Health Act 1953*

Clause 22 of the Bill proposes to amend section 40AFE of the *National Health Act 1953*. That section sets out the Secretary's power to review the classification of a nursing home patient. This classification is relevant in the context of the benefits payable to the patient.

Subsection 40 AFE(3) currently provides:

> (3) If the Secretary revokes the classification and substitutes a higher classification, the revocation and substitution shall be regarded as having taken effect on such date, being a date not later than the date of the revocation, as the Secretary fixes.

Subsection 40AFE(4) provides:

> (4) If the Secretary revokes the classification and substitutes a lower classification, the revocation and substitution take effect on the date of the revocation.

Subsection 40AFE(6) provides:

> (6) For the purposes of subsections (3) and (4), a classification is lower or higher than another according as it represents a lesser or greater need of nursing and personal care.

As the Act stands, a lower classification (which a patient would presumably regard as a decision adverse to them) can only operate from the date that the original (ie the higher) classification was revoked. However, a higher classification (which a patient would presumably regard as a decision favourable to them) can operate from a date prior to the revocation. Under the Act as it stands, therefore, the only decisions which can operate retrospectively are those which benefit the patient.

Clause 22 of the Bill proposes first to insert a new subsection (1A) into section 40AFE. It provides:

> (1A) A review by the Secretary of a patient's classification must be undertaken in accordance with the principles.

The principles in question are principles which, under subsection 40AFA(3), the Minister may promulgate in relation to the classification of nursing home patients.

Paragraph 22(b) then proposes to omit subsections 40AFE(3) and (4) and replace them with 3 new subsections, which provide:

> (3) If the Secretary revokes the classification ('original classification') and substitutes a higher or lower classification ('substituted classification'), the revocation and substitution are to be regarded as taking effect as set out in the principles.
>
> (4) The principles may provide that a substituted classification takes effect from the day that the original classification took effect.
>
> (4A) If:
> (a) a patient classification is in force at the time this Act commences; and
> (b) after this Act commences, the Secretary revokes that original classification and substitutes a lower classification;
>
> the revocation and substituted classification take effect on the date of revocation.

Paragraph 22(c) then proposes to omit subsection 40AFE(6) and replace it with the following new subsections:

> (6) For the purposes of subsection (3), a classification is lower or higher than another classification if it represents a lesser or greater need of nursing and personal care than that other classification.

(7) In this section:
'principles' means the principles determined by the Minister under subsection 40AFA(3).

The Explanatory Memorandum to the Bill offers the following explanation in relation to the amendments proposed by paragraph 22(b):

> Paragraph (b) amends section 40AFE to require that a reclassification take effect as set out in the principles formulated under subsection 40AFA(3). It also enables those principles to provide for the date of effect of a reclassification to be the date of the original classification.

It goes on to say:

> However, it also ensures that this backdating does not apply to reviews of classifications which are determined prior to the commencement of this provision where a lower classification is substituted. In these cases, where a lower classification is substituted for an original classification made prior to the commencement of this provision, the lower classification will only take effect from the date of revocation.

If this latter extract is correct, it is clear that if a review of a classification has taken place prior to the commencement of the new provisions and a lower (ie detrimental to the patient) classification is substituted, that lower classification can only take effect from the date of the revocation. In other words, it cannot be made to operate retrospectively.

However, the Committee is concerned by what may be possible in relation to reviews which are determined after the commencement of the proposed new subsections. It would appear that, under the proposed new subsections, a reclassification which is determined after the commencement of those new subsections could be expressed to operate retrospectively, whether the reclassification is beneficial to the patient or not. If this is the case, it is a matter of great concern to the Committee. The Committee would, therefore, appreciate

the Minister's advice as to whether or not this is the case.

The Committee takes this opportunity to thank Senator Patterson for her comments on the Bill.

STUDENT ASSISTANCE AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 October 1992 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the *Student Assistance Act 1973,* to introduce an AUSTUDY/ABSTUDY Financial Supplement (the financial supplement) from 1 January 1993, and to give legislative effect to the annual indexation of certain parameters to the AUSTUDY scheme. The Bill also amends the *Data-matching Program (Assistance and Tax) Act 1990,* the *Income Tax Assessment Act 1936* and the *Taxation (Interest on Overpayments) Act 1983,* to provide for repayments of the financial supplement through the taxation system.

The Committee dealt with the Bill in Alert Digest No. 14 of 1992, in which it made various comments. The Minister for Higher Education and Employment Services responded to those comments in a letter dated 1 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Subclause 4(3)

In Alert Digest No 14, the committee noted that subclause 4(3) of the Bill proposes to insert a series of new definitions into section 3 of the *Student Assistance Act 1973.* They include:

> . . .
>
> 'adjusted parental income', for the purposes of Part 4A, has the meaning given by the regulations;
>
> . . .

> 'prescribed benefit', for the purposes of Part 4A, in relation to the AUSTUDY scheme or the ABSTUDY scheme, means a benefit under the scheme concerned that is declared by the regulations to be a prescribed benefit for the purposes of that Part;
>
> . . .

The Committee noted that the definitions in question appear to be central to the determination of which students are eligible to participate in the financial supplement scheme which, in turn, is the primary subject of the Bill. The Committee suggested that, if this was the case, it may be considered inappropriate to leave such an important matter to the regulations which, while they would be subject to disallowance by either House of the Parliament, would be placed beyond the Parliament's capacity to amend the subject matter dealt with.

The Committee drew Senators' attention to the provisions, as they may be considered to involve an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has provided the following response:

> I agree it would normally be preferable for central concepts such as these to be specified in an Act, rather than in regulations under an Act. A different approach has been adopted in the present case, however, because of the special features of the student assistance schemes. Although the AUSTUDY scheme is established by the *Student Assistance Act 1973*, section 7 of the Act merely provides that benefits are to be paid in accordance with the regulations, so that the scheme rules are contained in the AUSTUDY Regulations. The ABSTUDY scheme is not a legislated scheme and details of the scheme are specified by Ministerial guidelines. It was therefore considered inappropriate for the Act to define concepts that relate to existing provisions already contained in the regulations (for AUSTUDY) and Ministerial guidelines (for ABSTUDY).

The Minister goes on to say:

> It would be a major undertaking to rework the legislative basis for the schemes as they are very complex. For example, the rules need to take account of the various studies undertaken by beneficiaries ranging from school children to graduate students, and assistance is subject to income and assets test applying to students and parents or spouses.

The Minister concludes by saying:

> I would add that one of the expressions in question, 'adjusted family income', is particularly complex, involving the kinds of income taken into account, the deductions allowed for dependent children, and concessions to the normal income period where parental income has fallen. As the provisions dealing with these matters are already contained in the AUSTUDY Regulations, it is appropriate to include the definition of 'adjusted family income' in the same legislation.

The Committee thanks the Minister for this response. While the Committee accepts that there is a certain logic in the Bill relying on terms which are already defined in the regulations (and, therefore, presumably known to those affected by them), on the basis that this may be regarded as promoting consistency, the Committee is, nevertheless, concerned by the content of the Minister's response. In particular, the Committee is concerned by the proposition that the scheme in question is 'not a legislated scheme', relying as it does on regulations and Ministerial guidelines. For this reason, the Committee encourages the Minister to give serious consideration to the re-working of the legislative basis of the various schemes to which his response refers. While this would no doubt involve a great deal of time and effort, the Committee suggests that the benefits both to the Parliament and to those dealing with the schemes would make such effort worthwhile.

TELECOMMUNICATIONS (INTERCEPTION–CARRIERS) ACT 1992

The Bill for this Act was introduced into the Senate on 24 June 1992 by the Minister for Transport and Communications.

The Act is intended to remedy a problem created with respect to the definition of 'carrier' appearing in the *Telecommunications (Interception) Act 1979*. The Act will have the effect of continuing in operation during the relevant period of the definition of 'carrier' and an associated term that were in force immediately prior to the relevant period, and applying the new definition of 'carrier' immediately after the relevant period.

This Bill was passed by the Senate on 24 June 1992 and by the House of Representatives on 25 June 1992. It received the Royal Assent on 9 July 1992.

The Committee dealt with the Act in Alert Digest No. 10 of 1992, in which it made various comments. The Attorney-General responded to those comments in a letter dated 30 October 1992. Although the legislation in question is already an Act, the Attorney-General's response may nevertheless be of interest to Senators. A copy of the letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

General comment: Retrospectivity

In Alert Digest No. 10, the Committee noted that, though the Act is expressed to operate from Royal Assent, the various substantive provisions of the Act operate from dates as early as 30 June 1991. The Committee noted that the Explanatory Memorandum indicates that the provisions in question relate to a drafting problem and are intended to ensure the continued legality of warrants for the interception of telecommunications. While the Committee had no reason to question what is

contained in the Explanatory Memorandum, the Committee indicated that it was concerned about the issues which this situation raised.

The Committee stated that the interception of personal communications represented a serious invasion of personal privacy. A warrant to intercept such communications gives permission to interfere with that privacy. The Committee stated that, in its view, a warrant should only be given when the proper procedures have been complied with and only after the seriousness of the alleged suspected offence has been weighed against the need to protect the individual's right to privacy.

In relation to the amendments in question, the Committee was concerned that (as the Attorney-General's Second Reading speech states) warrants appear to have been issued and executed in circumstances where there were doubts about their validity. While the Committee noted that, according to the Attorney-General's Second Reading speech, this is merely a 'technical' defect, the Committee was concerned that the use of this terminology glossed over the fact that warrants which have authorised the invasion of privacy may have been invalidly issued.

The Attorney-General has responded as follows:

> In relation to the sentiment expressed in the first paragraph quoted above, I wish to express my agreement with the Committee's views, and to record the fact that the Act made no change whatsoever to the Interception Act's provisions relating to the criteria to be satisfied before a warrant may be issued. That is to say, the substantive law on the issue and execution of warrants under the Interception Act has not been affected by the Act.

The Attorney-General goes on to say:

> It is because that substantive law was left unchanged and because of the nature of the problem which they were designed to overcome that the provisions of the Act may,

accurately in my view, be said to be of a 'technical' nature. The need for the Act arose because of a deficiency in the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1991*. As part of the amendments to Commonwealth legislation made necessary by the enactment of the *Telecommunications Act 1991*, the Transitional Provisions Act included a provision (subsection 7(2)) which authorised the continued operation of carriers existing at the time of the Transitional Provisions Act's commencement until the grant of carrier licences under the *Telecommunications Act 1991*. Subsection 7(2) commenced on 1 July 1992, and licences were issued to the three carriers (Telecom, OTC and Aussat) at the end of November 1991.

At the same time, the Transitional Provisions Act amended the definition of 'carrier' in the Interception Act (and other Commonwealth legislation) to refer to the new classes of carriers licensed under the *Telecommunications Act 1991*. The fact that there was a hiatus of five months before the issue of carrier licences created the problems in the Interception Act which the Act was designed to overcome.

Those problems were that, while the Interception Act's prohibition of the interception of telecommunications continued unaffected by the commencement of the Transitional Provisions Act (because the operation of that prohibition does not depend on the definition of 'carrier'), the provisions relating to the issue of warrants (which authorise the interception of services which enable communications to be carried over systems 'operated by a carrier'), on one view, appear to have had no operation in law in the period from 1 July 1991 until the issue of carrier licences in November 1991.

The Attorney-General goes on to say:

Such an outcome was not the Government's intention. Neither could it be said to have been contemplated by the Parliament: if it were, Parliament, in enacting the provisions referred to, would thus have incidentally but

intentionally vitiated the Interception Act's provisions for lawful interceptions - a proposition which is not sustainable. Rather, the intention was that the provisions in the Transitional Provisions Act should enable the continued operation of carriers and Commonwealth legislation that referred to them in an uninterrupted transition to the regulatory regime provided for under the *Telecommunications Act 1991*. As I have shown, that intention was not effected by the relevant provisions.

In considering the implications of these problems for the Interception Act, the Government decided that any possibility that a prosecution might fail because of a technical defect in the Transitional Provisions Act should be removed by giving the Parliament the opportunity to enact correcting legislation which more accurately gave effect to the intention behind the two 1991 Acts. I should mention that it is by no means certain that any prosecutions would fail had the Act not been enacted. Arguments to the contrary include the fact that section 75 of the Interception Act provides for the admissibility of intercepted information where there is an insubstantial defect in the issue of a document purporting to be a warrant, in the execution of a warrant or in the purported execution of a document purporting to be a warrant.

As I have mentioned, other Commonwealth legislation has been affected by the way in which the Transitional Provisions Act was expressed, and I understand that further amending legislation designed to overcome problems in other statutes will shortly be introduced by my colleague the Minister for Transport and Communications.

The Committee thanks the Attorney-General for this detailed response. As the Committee retains its concern about the issuing of the 'invalid' (but for this Act) warrants, the Committee would appreciate the Attorney-General's further advice as to the number of warrants affected (ie validated) by the amendments.

Barney Cooney
(Chairman)

The Hon. Peter Baldwin MP
Minister for Higher Education and Employment Services

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2 NOV 1992
Senate Standing C'tee for the Scrutiny of Bills

- 1 NOV 1992

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

Dear Senator Cooney Barney

I refer to the Committee's comments about the Student Assistance Amendment Bill 1992 (Alert Digest No. 14 of 1992).

The Committee has expressed concern that the Bill seeks to have some expressions defined in regulations under the Student Assistance Act, rather than in the Act itself. As the Committee has noted, these expressions are used in deciding whether a student is eligible to apply for the AUSTUDY/ABSTUDY Supplement.

I agree it would normally be preferable for central concepts such as these to be specified in an Act, rather than in regulations under an Act. A different approach has been adopted in the present case, however, because of the special features of the student assistance schemes. Although the AUSTUDY scheme is established by the Student Assistance Act 1973, section 7 of the Act merely provides that benefits are to be paid in accordance with the regulations, so that the scheme rules are contained in the AUSTUDY Regulations. The ABSTUDY scheme is not a legislated scheme and details of the scheme are specified by Ministerial guidelines. It was therefore considered inappropriate for the Act to define concepts that relate to existing provisions already contained in the regulations (for AUSTUDY) and Ministerial guidelines (for ABSTUDY).

It would be a major undertaking to rework the legislative basis for the schemes as they are very complex. For example, the rules need to take account of the various studies undertaken by beneficiaries ranging from school children to graduate students, and assistance is subject to income and assets test applying to students and parents or spouses.

Parliament House Canberra ACT 2600 Telephone: (06) 277 7540

I would add that one of the expressions in question, "adjusted family income", is particularly complex, involving the kinds of income taken into account, the deductions allowed for dependent children, and concessions to the normal income period where parental income has fallen. As the provisions dealing with these matters are already contained in the AUSTUDY Regulations, it is appropriate to include the definition of "adjusted family income" in the same legislation.

Yours sincerely

Peter Baldwin

Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

30 OCT 1992

92206386

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 Scrutiny of Bills Alert Digest No. 10 of 1992 which contains comments by the Committee on the *Telecommunications (Interception–Carriers) Act 1992*('the Act'). While, as the digest notes, the Act received the Royal Assent and came into operation on 9 July 1992, I think it appropriate for me to respond to the Committee's comments on the Act.

The comments focus on the way in which the Act operates to put beyond doubt the authority conferred by warrants issued under the *Telecommunications (Interception) Act 1979* ('the Interception Act') during the 'licensing time' defined in subsection 3(3) of the Act. The substantive part of the Committee's comments were as follows -

> The interception of personal communications represents a serious invasion of personal privacy. A warrant to intercept such communications gives permission to interfere with that privacy. In the Committee's view, a warrant should only be given when the proper procedures have been complied with and after the seriousness of the alleged offence has been weighed against the need to protect the individual's right to privacy.
>
> In relation to the amendments in question, the Committee is concerned that ... warrants appear to have been issued and executed in circumstances where there are doubts about their validity. While the Committee notes that, according to the Attorney-General's Second Reading speech, this is merely a 'technical' defect, the Committee is concerned that the use of this terminology glosses over the fact that warrants which have authorised the invasion of privacy may have been invalidly issued.

In relation to the sentiment expressed in the first paragraph quoted above, I wish to express my agreement with the Committee's views, and to record the fact that the Act made no change whatsoever to the Interception Act's provisions relating to the criteria to be satisfied before a warrant may be issued. That is to say, the substantive law on the issue and execution of warrants under the Interception Act has not been affected by the Act.

It is because that substantive law was left unchanged and because of the nature of the problem which they were designed to overcome that the provisions of the Act may, accurately in my view, be said to be of a 'technical' nature. The need for the Act arose because of a deficiency in the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1991*. As part of the amendments to Commonwealth

legislation made necessary by the enactment of the *Telecommunications Act 1991*, the Transitional Provisions Act included a provision (subsection 7(2)) which authorised the continued operation of carriers existing at the time of the Transitional Provisions Act's commencement until the grant of carrier licences under the *Telecommunications Act 1991*. Subsection 7(2) commenced on 1 July 1992, and licences were issued to the three carriers (Telecom, OTC and Aussat) at the end of November 1991.

At the same time, the Transitional Provisions Act amended the definition of 'carrier' in the Interception Act (and other Commonwealth legislation) to refer to the new classes of carriers licensed under the *Telecommunications Act 1991*. The fact that there was a hiatus of five months before the issue of carrier licences created the problems in the Interception Act which the Act was designed to overcome.

Those problems were that, while the Interception Act's prohibition of the interception of telecommunications continued unaffected by the commencement of the Transitional Provisions Act (because the operation of that prohibition does not depend on the definition of 'carrier'), the provisions relating to the issue of warrants (which authorise the interception of services which enable communications to be carried over systems 'operated by a carrier'), on one view, appear to have had no operation in law in the period from 1 July 1991 until the issue of carrier licences in November 1991.

Such an outcome was not the Government's intention. Neither could it be said to have been contemplated by the Parliament: if it were, Parliament, in enacting the provisions referred to, would thus have incidentally but intentionally vitiated the Interception Act's provisions for lawful interceptions – a proposition which is not sustainable. Rather, the intention was that the provisions in the Transitional Provisions Act should enable the continued operation of carriers and Commonwealth legislation that referred to them in an uninterrupted transition to the regulatory regime provided for under the *Telecommunications Act 1991*. As I have shown, that intention was not effected by the relevant provisions.

In considering the implications of these problems for the Interception Act, the Government decided that any possibility that a prosecution might fail because of a technical defect in the Transitional Provisions Act should be removed by giving the Parliament the opportunity to enact correcting legislation which more accurately gave effect to the intention behind the two 1991 Acts. I should mention that it is by no means certain that any prosecutions would fail had the Act not been enacted. Arguments to the contrary include the fact that section 75 of the Interception Act provides for the admissibility of intercepted information where there is an insubstantial defect in the issue of a document purporting to be a warrant, in the execution of a warrant or in the purported execution of a document purporting to be a warrant.

As I have mentioned, other Commonwealth legislation has been affected by the way in which the Transitional Provisions Act was expressed, and I understand that further amending legislation designed to overcome problems in other statutes will shortly be introduced by my colleague the Minister for Transport and Communications.

Yours sincerely

MICHAEL DUFFY

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF

1992

11 NOVEMBER 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT OF 1992

The Committee has the honour to present its Sixteenth Report of 1992 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 24:

Migration Laws Amendment Bill 1992

MIGRATION LAWS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 19 August 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to establish a legislative scheme to enhance the delivery of annual migration programs. The proposed scheme will provide the Minister with a flexible power to publish in the *Gazette* an upper limit or cap on the number of visas in a specified class. The Bill will provide that certain classes in the Preferential Family category will not be affected.

The Bill also corrects a minor technical error in the *Migration Amendment Act (No. 2) 1991.*

The Committee dealt with the Bill in Alert Digest No. 11 of 1992, in which it made various comments. The Minister for Immigration, Local Government and Ethnic Affairs responded to those comments in a letter dated 12 October 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Ministerial determinations not subject to parliamentary scrutiny
Clause 6 - proposed new section 28A of the *Migration Act 1958*

In Alert Digest No. 11, the Committee noted that clause 6 of the Bill proposes to insert a new Subdivision AA into Division 2 of Part 2 of the *Migration Act 1958.* That proposed new subdivision includes a proposed new section 28A, which provides:

> Limit on visas
> 28A. The Minister may, by notice in the *Gazette,* determine the maximum number of:
> (a) the visas of a specified class; or
> (b) the visas of specified classes;
> that may be granted in a specified financial year.

The Committee noted that there would be no requirement to table a determination pursuant to this proposed new section in the Parliament and that, further, there would be no scope for the Parliament to scrutinise such a determination. The Committee suggested that, in the circumstances, it may be considered that determinations under the proposed new section should be subject to tabling in and disallowance by each House of the Parliament.

The Committee drew Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

The Minister has responded as follows:

> Whilst I fully accept the general principle that constraints on the making of delegated legislation are a necessary safeguard against abuse, I do not consider that such safeguards are necessary in this instance. Gazettal is the appropriate mechanism: it allows for flexibility, speed, the acknowledgment of public concerns and most importantly does not alter an applicant's substantive entitlement to a visa.
>
> The migration program is regularly monitored to ensure that program numbers are not exceeded. However, fluctuations in demand do occur and are often difficult to predict. In these instances urgent action may be necessary to prevent overruns in the program. The Gazette notice is the preferred method for setting caps because of the speed with which the cap can be implemented, adjusted and lifted.
>
> The publication in the Gazette of program numbers in specified visa classes places that program in the public domain so that public concerns can be taken into account. The Gazettal mechanism is flexible and responsive, permitting timely adjustment or variation in response to public concerns.
>
> Gazettal is the method used to trigger the two existing capping powers, that contained in existing section 23(3A) and that contained in existing s.28 of the Migration Act.

The Minister goes on to say:

> The first of these powers is subject to parliamentary scrutiny. It is a power to make regulations prescribing a criterion that the grant of the visa would not cause the number of visas in that class granted in that financial year to exceed the number fixed by Gazette notice. It is appropriate that the exercise of this power be subject to disallowance because, unlike the other proposed capping power, applications whose grants are blocked by the cap are regarded as never having been made. An unsuccessful applicant must reapply, and pay a new fee where prescribed, to be considered in the next year's program. The proposed capping power does not affect the applicant's entitlement to a grant, its only effect could be to delay that grant.

The Minister concludes by saying:

> In summary, while I have noted the concerns of the Committee I maintain my view that the Gazettal notice mechanism in proposed section 28A is sufficiently responsive to public and parliamentary concerns and has the advantages of speed with no adverse impact on an applicant's substantive entitlements.

The Committee thanks the Minister for this response.

Barney Cooney
(Chairman)

MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

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

12 OCT 1992

Dear Senator Cooney

I refer to comments in the Scrutiny of Bills Alert Digest No.11 of 1992 dated 9 September 1992 concerning proposed section 28A of the Migration Act in clause 6 of the Migration Laws Amendment Bill 1992. The Committee was concerned that the power to determine by Gazette notice an upper limit of visas in specified classes that may be granted is not subject to a tabling requirement and may insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Whilst I fully accept the general principle that constraints on the making of delegated legislation are a necessary safeguard against abuse, I do not consider that such safeguards are necessary in this instance. Gazettal is the appropriate mechanism: it allows for flexibility, speed, the acknowledgment of public concerns and most importantly does not alter an applicant's substantive entitlement to a visa.

The migration program is regularly monitored to ensure that program numbers are not exceeded. However, fluctuations in demand do occur and are often difficult to predict. In these instances urgent action may be necessary to prevent overruns in the program. The Gazette notice is the preferred method for setting caps because of the speed with which the cap can be implemented, adjusted and lifted.

The publication in the Gazette of program numbers in specified visa classes places that program in the public domain so that public concerns can be taken into account. The Gazettal mechanism is flexible and responsive, permitting timely adjustment or variation in response to public concerns.

Gazettal is the method used to trigger the two existing capping powers, that contained in existing section 23(3A) and that contained in existing s.28 of the Migration Act

The first of these powers is subject to parliamentary scrutiny. It is a power to make regulations prescribing a criterion that the grant of the visa would not cause the number of visas in that class granted in that financial year to exceed the number fixed by Gazette notice. It is

appropriate that the exercise of this power be subject to disallowance because, unlike the other proposed capping power, applications whose grants are blocked by the cap are regarded as never having been made. An unsuccessful applicant must reapply, and pay a new fee where prescribed, to be considered in the next year's program. The proposed capping power does not affect the applicant's entitlement to a grant, its only effect could be to delay that grant.

In summary, while I have noted the concerns of the Committee I maintain my view that the Gazettal notice mechanism in proposed section 28A is sufficiently responsive to public and parliamentary concerns and has the advantages of speed with no adverse impact on an applicant's substantive entitlements.

Yours sincerely

Gerry Hand

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF

1992

25 NOVEMBER 1992

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT OF 1992

The Committee has the honour to present its Seventeenth Report of 1992 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 24:

Antarctic (Environment Protection) Legislation Amendment Bill 1992

Child Support Legislation Amendment Bill (No. 2) 1992

Endangered Species Protection Bill 1992

Industrial Chemicals (Notification and Assessment) Amendment Bill (No. 2) 1992

Mutual Recognition Bill 1992

Seafarers Rehabilitation and Compensation Bill 1992

Seafarers Rehabilitation and Compensation Levy Bill 1992

Vocational Education and Training Funding Bill 1992

ANTARCTIC (ENVIRONMENT PROTECTION) LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Minister for the Arts, Sport, the Environment and Territories.

The Bill proposes to amend the *Antarctic Treaty (Environment Protection) Act 1980,* to give the force of law in Australia to obligations arising from the Protocol on Environmental Protection (the Madrid Protocol) to the Antarctic Treaty. Australia adopted the Madrid Protocol on 4 October 1991. The Protocol provides for comprehensive protection of the Antarctic environment and includes a prohibition on mining. The Bill also makes a number of minor amendments.

The Committee dealt with the Bill in Alert Digest No. 15 of 1992, in which it made various comments. The Minister for the Arts, Sport, the Environment and Territories responded to those comments in a letter dated 22 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Reversal of the onus of proof
Clause 20 - proposed new subsection 21A(4) of the *Antarctic Treaty (Environment Protection) Act 1980*

In Alert Digest No. 15, the Committee noted that clause 20 of the Bill proposes to insert a new section 21A into the *Antarctic Treaty (Environment Protection) Act 1980.* That proposed new section provides:

> **Unauthorised activities**
> 21A.(1) In this section:
> **'activity'** means an activity to which Part 3 applies.
>
> (2) If a person knowingly or recklessly carries on an activity in the Antarctic without an authorisation of the Minister under Part 3, the person is guilty of an

offence punishable on conviction by a fine not exceeding $100,000.

(3) If:
(a) the Minister authorised under Part 3 the carrying on of an activity in the Antarctic subject to a condition being complied with; and
(b) a person knowingly or recklessly carries on the activity without the condition being complied with;

the person is guilty of an offence punishable on conviction by a fine not exceeding $100,000.

(4) In a prosecution of a person for an offence against subsection (1) or (2), it is a defence if the person proves:
(a) that the activity was carried on in an emergency:
(i) to save a person from death or serious injury; or
(ii) to secure the safety of a ship or aircraft or the safety of equipment or facilities of high value; or
(iii) to protect the environment; or
(b) that the person was authorised to carry on the activity under a law of a contracting party.

(5) An offence against subsection (1) or (2) is an indictable offence.

(6) Despite subsection (5), a court of summary jurisdiction, may hear and determine proceedings in respect of an offence against subsection (1) or (2) if satisfied that it is proper to do so and the defendant and the prosecutor consent.

(7) If, under subsection (6), a court of summary jurisdiction convicts a person of an offence against subsection (1) or (2), the penalty that the court may impose is a fine not exceeding:
(a) in the case of an individual—$10,000; or
(b) in the case of a body corporate—$50,000.

The Committee suggested that proposed new subsection 21A(4) may be considered a reversal of the onus of proof. Under the proposed new subsection,

if the defence to an alleged breach of the section is that the relevant activity was carried on in an emergency or with the authority of a law of one of the parties to the Madrid Protocol, it would be up to the person raising that defence to prove those matters.

The Committee indicated that this may be considered a reversal of the onus of proof because it is ordinarily incumbent upon the prosecution to prove all the elements of an offence. Applying this principle to the present case, it would ordinarily be incumbent on the prosecution to prove that the activity in question was not carried on in circumstances recognised as a defence to an alleged offence under the legislation.

In making this comment, the Committee noted that it has previously been prepared to accept similar clauses in situations where the defences provided for are, necessarily, peculiarly within the knowledge of the defendant. The Committee indicated that this acceptance has generally been made largely on the basis that, in those circumstances, it is not practicable to require that the prosecution prove matters which can more easily be attested to by the defendant. The Committee was not convinced that this is the case in relation to the present Bill.

Further, the Committee was curious to know what is contemplated by proposed new paragraph 21A(4)(b). In particular, the Committee sought the Minister's advice as to the sorts of circumstances where a person might need to avail him or herself of the defence provided by the paragraph.

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

The Minister has responded as follows:

> In the case where an emergency has arisen and it is necessary for an activity to be carried out without the necessary authorisation, it would be difficult for the prosecution to prove that an emergency, in whatever

> form that it may take, had not arisen. An emergency, which for example was due to the Antarctic's notoriously bad weather, would be a defence to an alleged offence but in most cases the circumstances would be peculiarly within the knowledge of the defendant only and could more easily be attested to by such a defendant.
>
> An authorisation from another Contracting Party (there are currently 36 signatories to the Madrid Protocol) would also be peculiarly within the knowledge of the defendant as such authorisation would have been issued under the law of another country. It would be very costly and time consuming for the prosecution to contact all the relevant authorities to discount this defence whereas the defendant is readily able to provide evidence that such authorisation had been obtained.
>
> Thus in each case I strongly believe that the reversal of proof is justified.

On the question of a person's defence being that he or she had been authorised by a contracting party, the Minister offered the following further information:

> The provision reflects the jurisdictional complexities that exist in Antarctica. While Australia lays claim to some 42% of Antarctica this claim is not recognised by all Treaty Parties. However, all Antarctic Treaty Parties, including Australia, have adopted the practice of recognising authorisations of other Parties. An example of the circumstances where a person may need to avail him or herself of the defence is where a national of another Contracting Party may wish to carry out an activity in the Australian Antarctic Territory, such activity having been authorised under the law of that country.

The Committee thanks the Minister for this helpful response.

General comment

In Alert Digest No. 15, the Committee also suggested that the reference in proposed new subsections 21A(4) to (7) (inclusive) to 'an offence against subsection (1) or (2)' should, in fact, refer to 'an offence against subsection (2) or (3)'. The Minister has acknowledge that this is correct and has advised the Committee that the errors were rectified by way of amendments to the Bill in the House of Representatives.

CHILD SUPPORT LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the following 3 Acts as set out below:

- the *Administrative Decisions (Judicial Review) Act 1977:*

  - Schedule 1 to the Act will be amended to include decisions under Part 6A of the *Child Support (Assessment) Act 1989* as decisions to which the Act does not apply.

- the *Child Support (Assessment) Act 1989:*

  - the child support formula will be amended to incorporate the concept of 'substantial access' to a child;

  - the definition of an 'approved form' will be amended;

  - the application of the Act will be extended to include Queensland;

  - amendments will allow the Child Support Registrar a degree of flexibility to choose a taxable income that is considered appropriate for use in the child support formula when one is not available;

  - provisions setting out the effect of income estimates and the revocation of estimates will be removed from the Act. Regulations will be able to be promulgated for that purpose.
    Other changes to improve the operation of income estimates are also included;

- a penalty will be imposed where an estimate or estimates of income are less than the actual income returned;

- the grounds for departure will be extended to include high costs of access to a child or another person who is not part of the child support assessment;

- the Registrar will be allowed to disclose to a law enforcement officer that a threat has been made against a person if there is reason to believe the threat is evidence that an offence has been or may be committed; and

- a number of minor errors and omissions in amendments in the *Child Support Legislation Amendment Act 1992* are to be corrected.

- the *Child Support (Registration and Collection) Act 1988:*

  - the definition of an 'approved form' will be amended;

  - the Child Support Registrar will be allowed to disclose to a law enforcement officer that a threat has been made against a person if there is reason to believe that the threat is evidence that an offence has been or may be committed;

  - new claimants for additional family payment will be allowed to opt for private collection of maintenance;

  - the penalty imposition will be modified, by removing the flat penalty amount and substituting a *pro rata* per annum amount on the total amount outstanding at the end of each month;

- the ownership of all child support overpayments will be changed from the Secretary of the Department of Social Security to the Child Support Registrar;

- the grounds of objection against a decision of the Child Support Registrar will be extended to credit an amount of maintenance against a liability;

- a statement or averment will be allowed as *prima facie* evidence of a matter in a prosecution;

- the regulation-making power will be amended to allow Regulations to be made specifying how payments received may be applied by the Child Support Registrar.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made various comments. The Treasurer responded to those comments in a letter dated 25 November 1992. Though the Committee has not had the opportunity to consider the substance of the response, a copy of the Treasurer's letter is attached to this report, as the Committee understands that the Bill is scheduled for debate by the Senate shortly. The Committee's original comments on the Bill are also reproduced below for the information of Senators.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 16, the Committee noted that subclause 2(2) of the Bill provides that clauses 36 and 39 of the Bill are to be taken to have commenced on 1 June 1988. Those provisions to propose to amend the *Child Support (Registration and Collection) Act 1988.* The Committee noted that the date nominated for commencement of the proposed amendments is the date on which that Act commenced.

The Explanatory Memorandum to the Bill indicates that the changes proposed by the amendments are technical in nature and that the retrospectivity will have

'no impact on clients' (paragraph 15.9). Accordingly, the Committee made no further comment on the provision.

Delegation of power to 'a person'
Clause 28 - proposed new subsection 149(1A) of the *Child Support (Assessment) Act 1989*

In Alert Digest No. 16, the Committee noted that clause 28 of the Bill proposes to insert a new subsection (1A) into section 149 of the *Child Support (Assessment) Act 1989*. Section 149 deals with delegation of the powers of the Child Support Registrar. It provides:

> **Delegation**
> 149.(1) The Registrar may, in writing, delegate all or any of the Registrar's powers or functions under this Act to:
> (a) a Deputy Registrar; or
> (b) the Secretary to the Department of Social Security; or
> (c) an officer or employee of:
> (i) the branch of the Australian Public Service under the direct control of the Registrar (whether as Registrar or Commissioner); or
> (ii) the Department of Social Security.
>
> (2) A delegation under subsection (1) may be made subject to a power of review and alteration by the Registrar, within a period specified in the delegation, of acts done under the delegation.
>
> (3) A delegation under subsection (1) continues in force even though there has been a change in the occupancy of, or there is a vacancy in, the office of Registrar, but, for the purposes of the application of subsection 33(3) of the *Acts Interpretation Act 1901* in relation to such a delegation, nothing in any law is to be taken to preclude the revocation or variation of the delegation by the same or a subsequent holder of the office.

Proposed new subsection 149(1A) provides:

> (1A) [W]ithout limiting the generality of subsection (1), the Registrar may also, in writing, delegate all or any of the Registrar's powers or functions to a person engaged by the Registrar for the purposes of Part 6A.

In relation to this proposed amendment, the Explanatory Memorandum states:

> Section 149 is amended to allow the Registrar to delegate all or any of his powers under the Act to a person who is not an employee of the Australian Public Service and is engaged for the purposes of Part 6A.

The Committee noted that the Explanatory Memorandum also indicates (by implication) that this amendment is either a 'correction' or a 'necessary consequential' amendment arising out of the *Child Support Legislation Amendment Act 1992.*

On the basis of the material which it had examined, it was not immediately clear to the Committee how the need for the amendment arose. Given the Committee's general opposition to provisions which allow for the delegation of powers to 'a person', the Committee sought the Minister's advice as to which of the Child Support Registrar's powers under Part 6A of the Child Support (Assessment) Act are to be delegated and also why it is considered necessary to be able to delegate those powers in this way.

Evidence by averment
Clause 38 - proposed new section 111A of the *Child Support (Registration and Collection) Act 1988*

In Alert Digest No. 16, the Committee noted that clause 38 of the Bill proposes to insert a new section 111A into the *Child Support (Registration and Collection) Act 1988.*

It provides:

> Averments
>
> 111A.(1) In a prosecution for an offence against this Act, a statement or averment contained in the information, claim or complaint in *prima facie* evidence of the matter so stated or averred.
>
> (2) This section applies in relation to any matter so stated or averred:
>
> (a) even if evidence is given in support or rebuttal of the matter stated or averred; and
>
> (b) even if the matter averred is a mixed question of law and fact, but, in that case, the statement or averment is *prima facie* evidence of the fact only.
>
> (3) Any evidence given in support or rebuttal of a matter so stated or averred must be considered on its merits, and the credibility and probative value of such evidence is neither increased nor diminished because of this section.
>
> (4) This section:
>
> (a) does not apply to a statement or averment of the intent of a defendant; and
>
> (b) does not lessen or affect any burden of proof otherwise falling on a defendant.

The Committee noted that the issue of averments was dealt with by the Senate Standing Committee on Constitutional and Legal Affairs (as it then was) in its 1982 report, entitled *The burden of proof in criminal proceedings* (Parliamentary paper no. 319 of 1982). In that report, the Constitutional and Legal Affairs Committee offered the following definition of an averment:

> An averment is a provision in a statute providing that where the prosecutor alleges certain facts the allegation is *prima facie* evidence of the matter averred, or that those facts should be taken to be proved unless the accused calls evidence to the contrary. The effect of an averment provision is to place the onus of proof with regard to the matter averred on the defendant, and in

> the case of *Baxter v Ah Way* (1909) 10 CLR 212, Higgins J declared that the word 'averment' covers the essential part of the offence, and not merely technical averments preliminary or final. (at page 65 of the report)

The Committee noted that, after some discussion of the use of averments in legislation, the Legal and Constitutional Affairs Committee made the following recommendations concerning their continued use. Those recommendations were that:

(a) As a matter of legislative policy averment provisions should be kept to a minimum.

(b) The Parliament should enact legislation to ensure that existing and future averment provisions are only resorted to by prosecutors in the following circumstances:
  (i) where the matter which the prosecution is required to prove is formal only and does not in itself relate to any conduct on the part of the defendant; or
  (ii) where the matter in question relates to conduct of the defendant alleged to constitute an ingredient in the offence charged and is peculiarly within the defendant's knowledge.

(c) When seeking to rely upon averment provisions, prosecutors should have regard to the following criteria:
  (i) averments should be so stated that they are sufficient in law to constitute the charge;
  (ii) the facts and circumstances constituting the offence should be stated fully and with precision;
  (iii) the Crown should not aver matters of law or matters of mixed fact and law;
  (iv) averments should not amend or alter the rules of pleading or those regulating the statement of the offence;

(v) averments should be restricted to the ingredients of the charge and information should not contain evidentiary material. (at pages 73-4 of the report)

Applying those considerations to the present case, it was not clear to the Committee that the sorts of matters which are to be averred will be either formal only or else peculiarly within the knowledge of the defendant, as contemplated by paragraph (b) above. Similarly, it was not clear that the matters which would be capable of being proved by averment would be restricted to the ingredients of the charge, as contemplated by subparagraph (c)(v) above.

In the light of the Constitutional and Legal Affairs Committee's recommendations, and given this Committee's long-standing and 'in principle' objection to the use of averment provisions, the Committee drew Senators' attention to the provision, as it may be considered to trespass on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

ENDANGERED SPECIES PROTECTION BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Arts, Sport, the Environment and Territories.

The Bill proposes to provide a framework for the protection of endangered and vulnerable species and ecological communities by:

- promoting the recovery of species and ecological communities that are endangered or vulnerable;

- preventing other species and ecological communities from becoming endangered;

- reducing conflict in land management, through readily understood mechanisms relating to the conservation of species and ecological communities that are endangered;

- providing for public involvement in, and promoting understanding of, the conservation of such species and ecological communities; and

- encouraging cooperative management for the conservation of such species and ecological communities.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made various comments. The Minister for the Arts, Sport, the Environment and Territories responded to those comments in a letter dated 13 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Clause 2

In Alert Digest No. 16, the Committee noted that clause 2 of the Bill provides:

> **Commencement**
> 2.(1)This Act commences on a day to be fixed by Proclamation.
> (2) If this Act does not commence under subsection (1) within the period of 9 months commencing on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

The Committee noted that, while the period within which the legislation is to be proclaimed (and, therefore, is to commence) is explicitly limited by subclause 2(2), the period specified (ie 9 months) is longer than the 6 month 'general rule' provided for in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Committee also noted that the Explanatory Memorandum gives no indication as to why a longer period has been chosen in this instance.

The Committee indicated that it would appreciate the Minister's advice as to why a 9 month period has been specified for commencement in this instance.

The Minister has responded as follows:

> This is done in order to ensure that extensive administrative procedures can be properly put in place to administer this innovative piece of Commonwealth legislation and at the same time to allow proper consultation with other affected agencies to ensure their full understanding of the implementation of the legislation.
>
> It is, I believe, important that this legislation works smoothly and effectively from the outset, and for that reason I trust the Committee will find this acceptable.

The Committee thanks the Minister for this response.

INDUSTRIAL CHEMICALS (NOTIFICATION AND ASSESSMENT) AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the Senate on 15 October 1992 by the Minister for Industrial Relations.

The Bill proposes to amend the *Industrial Chemicals (Notification and Assessment) Act 1989*, to implement the main recommendations of a report made this year, following a review by consultants into the regulatory impact of the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) on industry. The major theme of the recommendations and the Bill is to reduce the regulatory burden to industry of NICNAS.

The Committee dealt with the Bill in Alert Digest No. 15 of 1992, in which it made various comments. The Minister for Industrial Relations responded to those comments in a letter dated 19 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Clause 8 - proposed new section 20B of the *Industrial Chemicals (Notification and Assessment) Act 1989*

In Alert Digest No. 15, the Committee noted that clause 8 of the Bill proposes to insert a new Division 4 into the *Industrial Chemicals (Notification and Assessment) Act 1989*. That proposed new Division, if enacted, would provide for an amnesty period in relation to the inclusion of certain 'eligible chemicals' on the Australian Inventory of Chemical Substances.

Proposed new section 20B sets out the parameters of the amnesty period. It provides:

> For the purposes of this Division, the amnesty period is the period beginning at the commencement of this

Division and ending on such day as is prescribed in the regulations.

The Committee suggested that, given the importance of the closing date of the amnesty to the operation of the scheme, this may be considered to be a matter which is not appropriately left to the regulations. Indeed, the date on which the amnesty period is to cease may be considered to be a matter which is properly the subject of primary legislation, in which form it would be open to substantive amendment by either House of the Parliament.

The Committee noted that, as the Bill stands, it would be open for the Executive Government not to prescribe an end to the amnesty at all, leaving the amnesty open-ended and, in so doing, defeating one of the objects of the Principal Act. The Committee indicated that it regarded this as unsatisfactory.

The Committee drew Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> I wish to inform the Committee that the drafting of proposed new section 20B of the *Industrial Chemicals (Notification and Assessment) Act 1989* does not reflect the Government's preferred position. The Government would have preferred to specify a period for the amnesty in the Bill rather than by regulation.
>
> However, at the time of the Bill's introduction into the Senate on 15 October 1992, there was disagreement between the Chemical Confederation of Australia, the Australian Council of Trade Unions and the Government as to the period of the amnesty. There was no disagreement that an amnesty period of some length would be provided for.
>
> As agreement has now been reached on a two year period for the amnesty, I propose an amendment to the Bill in the Senate to specify the period of two years in

> the legislation. Finally, I should also mention that in my Second Reading Speech on the Bill I indicated a review of the extent of compliance with the inclusion of eligible chemicals on the Australian Inventory of Chemical Substances would take place at the end of the two year period. This may lead to an extension of time for the amnesty.

The Committee thanks the Minister for this response and notes that its concerns about the clause have now been addressed.

MUTUAL RECOGNITION BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister Assisting the Prime Minister.

The Bill proposes to enable the enactment of uniform legislation for the mutual recognition by the States and Territories of each other's differing regulatory standards regarding goods and occupations. The Bill forms part of a legislative scheme that involves the enactment of legislation by the States and Territories and then by the Commonwealth.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made various comments. The Minister Assisting the Prime Minister responded to those comments in a letter dated 23 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Clause 2

In Alert Digest No. 16, the Committee noted that clause 2 of the Bill provides that the various substantive provisions of the Bill are to commence on a day or days to be fixed by Proclamation. The Committee noted that, contrary to the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, there is no time limit fixed, within which such a Proclamation must be issued. The Committee went on to note that, while it was clear from the Explanatory Memorandum that the operation of the Bill depends on the enactment of State and Territory legislation (an issue which is relevant in the context of Drafting Instruction No. 2), the Explanatory Memorandum did not give this as the reason for the open-ended Proclamation clause. The Committee suggested that if it was, in fact, the reason for the provision being open-ended, it would be of assistance to the Parliament if the Explanatory Memorandum made this clear.

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

The Minister has responded as follows:

> I draw to the Committee's attention the fact that a proclamation date has been provided in the Explanatory Memorandum to the Bill, though perhaps not in the customary place. Paragraph 6 on page 2 of the Explanatory Memorandum points to the Agreement Relating to Mutual Recognition signed by Heads of Government on 11 May 1992, under which it was agreed - as stated in the Explanatory Memorandum - proclamation of the Bill should occur by 1 March 1993.
>
> The notes on individual clauses in the Explanatory Memorandum do not, in addressing clause 2 of the Bill, refer back to the date specified in paragraph 6 as the date by which the legislation is to be proclaimed. In this context, I note that to avoid confusion the Explanatory Memoranda in relation to the individual clauses for the Commonwealth Bill and the States' and Territories' Bills are identical as far as possible.
>
> I have nonetheless addressed the Committee's concern by ensuring that the extrinsic material puts the matter beyond doubt. In my closing remarks to the Second Reading Debate on the Bill on 12 November 1992 in the House of Representatives, I stated that the intention is for the legislation ... to be proclaimed by 1 March 1993.

The Committee thanks the Minister for this response. The Committee notes that its original concern was that that part of the Explanatory Memorandum relating to the open-ended commencement clause did not refer to what the Committee assumed to be the reasons for the clause being open-ended. While the Minister's response has directed the Committee's attention to the relevant parts of the Explanatory Memorandum (for which the Committee is grateful), it has also raised further concerns. In particular, the Committee is concerned that the

Minister suggests that the material in the Explanatory Memorandum and the Second Reading debate put the question of the commencement of the clauses 'beyond doubt'. The Committee does not agree. While the inclusion of various explanatory statements in the extrinsic material is, of course, informative, it is in no way binding. The fact remains that the proclamation (and, therefore, the commencement) of the Bill is entirely within the discretion of the Executive Government, the issue which Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 seeks to both address and alleviate.

SEAFARERS REHABILITATION AND COMPENSATION BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Parliamentary Secretary to the Minister for Employment, Education and Training.

The Bill proposes to replace the *Seamen's Compensation Act 1911* and establish a new system of compensation for seafarers who are injured in the course of their employment in the maritime industry.

The proposed *Seafarers Rehabilitation and Compensation Act 1992* implements the Government's decision to reform seafarers compensation, along the lines of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988.*

The Committee dealt with the Bill in Alert Digest No. 15 of 1992, in which it made various comments. The Minister for Shipping and Aviation Support responded to those comments in a letter dated 24 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Abrogation of individuals' right to sue in relation to employment-related injuries Clause 54

In Alert Digest No. 15, the Committee noted that clause 54 of the Bill provides:

> **Employee not to have right to bring action for damages against employer etc. in certain cases**
>
> 54.(1) Subject to section 55, a person does not have a right to bring an action or other proceedings against his or her employer, or an employee of the employer in respect of:
>
> (a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the employer would,

apart from this subsection, be liable (whether vicariously or otherwise) for damages; or

(b) *the loss of, or damage to, property used by an* employee resulting from such an injury.

(2) Subsection (1) applies whether that injury, loss or damage occurred before or after the commencement of this section.

(3) Subsection (1) does not apply in relation to an action or proceeding instituted before the commencement of this section.

The Committee noted that clause 55 provides:

Actions for damages–election by employees

55.(1) If:

(a) compensation is payable under section 39, 40 or 41 in respect of an injury to an employee; and

(b) the employee's employer or another employee would, apart from subsection 54(1), be liable for damages for any non-economic loss suffered by the employee because of the injury;

the employee may make an election in accordance with subsection (2) to institute an action or proceeding against the employer or other employee for damages for that non-economic loss.

(2) An election:

(a) must be made before an amount of compensation is paid to an employee under section 39, 40 or 41 in respect of the injury; and

(b) must be given to the employer in respect of the injury; and

(c) must be in writing.

(3) An election is irrevocable.

(4) If an employee makes an election:

(a) subsection 54(1) does not apply in relation to an action or other proceeding subsequently instituted by the employee against the employer

or another employee for damages for the non-economic loss to which the election relates; and

(b) compensation is not payable after the date of the election under section 39, 40 or 41 in respect of the injury.

(5) In any action or proceeding instituted because of an election made by an employee, the court is not to award the employee damages of an amount exceeding $138,570.52 for any non-economic loss suffered by the employee.

The Committee noted that the effect of clause 54, if enacted, would be to take away the right of an employee (as defined by clause 4 of the Bill) to sue his or her employer in relation to certain employment-related injuries. It would apply to such injuries whether they were suffered before or after the commencement of the legislation. The Committee noted that, in that sense, the Bill would not only take away rights but that it had the capacity to do so retrospectively.

The Committee observed that, on its face, the Bill would appear to involve a serious trespass on the rights of persons affected by the Bill, as it proposed to take away certain long-standing common law rights. In making this comment, the Committee noted that the stated intention of the Bill is to replace employees' existing rights to compensation with a new statutory scheme, along similar lines to that available to Commonwealth employees under the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*. The Committee noted that it was implicit that the proposed new scheme is intended to be beneficial to employees. However, the Committee concluded that whether or not this is, in fact, the case was not appropriately a matter for judgment by the Committee.

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

The Minister has responded as follows:

> As the Committee notes, clause 54 of the Seafarers Rehabilitation and Compensation Bill 1992 is similar to section 44 of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*. There are also similar provisions abrogating common law rights in the workers compensation legislation of Victoria, South Australia and the Northern Territory.
>
> In recent years there has been widespread recognition that common law is not the most appropriate way of dealing with work-related injuries.
>
> It is relevant to note that Professor Harold Luntz, in his Review of Seamen's Compensation 1988, recommended (page 228):
>
> > That the Seafarers Rehabilitation and Compensation Act should abrogate the common law action for damages. Such a step involves the recognition that the common law action is a compensatory mechanism whose time has passed. It is the fact of disability that should provide the justification for compensation not some extraneous requirement such as that of fault. In a system which provides ongoing compensation for loss of earnings during the time of incapacity until the normal age of retirement; provides full recompense for medical, hospital, rehabilitation and like expenses; and provides an impairment benefit, structured according to the degree of impairment, as a means of dealing with non-economic losses, the continued existence of a parallel remedy which is not only economically inefficient as a means of delivering benefits but is also actively destructive of efforts at rehabilitation, cannot be justified.

The Minister goes on to say:

> In response to the Committee's further concern that the provision has the capacity to remove common law rights

> retrospectively, I would draw attention to clause 13 of the Seafarers Rehabilitation and Compensation (*Transitional Provisions and Consequential* Amendments) Bill 1992.
>
> This clause allows a period of six months for an employee who has suffered an injury (or property loss or damage) before the commencing day, to bring an action against his or her employer or a fellow employee.

The Committee thanks the Minister for this response and for drawing the Committee's attention to clause 13 of the Seafarers Rehabilitation and Compensation (Transitional Provision and Consequential Amendments) Bill 1992. As to the substance of the Minister's response to the question of common law rights being abrogated, the Committee simply notes that the fact that a similar approach has been adopted in other instances or other jurisdictions will not necessarily, of itself, alter the Committee's original objection to a provision.

SEAFARERS REHABILITATION AND COMPENSATION LEVY BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Parliamentary Secretary to the Minister for Employment, Education and Training.

The Bill proposes to introduce a levy, the purpose of which is to enable the Commonwealth to recover the costs incurred by the Seafarers Rehabilitation and Compensation Authority in providing rehabilitation and compensation benefits to injured employees who would not otherwise be able to obtain entitlements under the proposed *Seafarers Rehabilitation and Compensation Act 1992.*

The Committee dealt with the Bill in Alert Digest No. 15 of 1992, in which it made various comments. The Minister for Shipping and Aviation Support responded to those comments in a letter dated 24 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Setting of rate of levy by regulation
Clause 5

In Alert Digest No. 15, the Committee noted that clause 5 of the Bill provides:

> The rate of levy imposed on each seafarer berth [which is defined in clause 3 of the Seafarers Rehabilitation and Compensation Bill 1992] is such amount as is prescribed [in the regulations].

The Committee noted that it has consistently drawn attention to provisions which allow a levy to be set in this way, principally on the basis that a 'levy' could be set at such a level that it may properly be regarded as a tax, which makes it a matter more appropriately dealt with in primary legislation. The Committee noted that, in the past, it had indicated that if it was necessary for the Government to be able

to set the rate of a levy by regulation in order to maintain a degree of flexibility, then the primary legislation should provide for either a maximum rate of levy or a method of calculating such a maximum rate.

The Committee went on to note that, in the present case, such a course of action may be considered impractical. The Committee noted that it was clear from the Explanatory Memorandum to the Bill that a levy will only be imposed in this instance if the Minister is unable to establish a 'Fund' (which is, in turn, to be indemnified by an authorised insurer) to meet the insurance requirements of the Seafarers Rehabilitation and Compensation Bill 1992. In that case, the Seafarers Rehabilitation and Compensation Authority (to be established by clause 103 of the Seafarers Rehabilitation and Compensation Bill) would be responsible for such insurance, thereby requiring the levy to be imposed in order to meet the ensuing liabilities.

The Committee observed that it was clear from this scenario that the levy provided for in the Bill is in the nature of a safety-net. It was also fairly clear to the Committee that, until such time as the need to impose a levy actually arises, the Minister would have difficulty in nominating a logical amount as the maximum rate of levy. The Committee also noted that, under the Bill, it would remain open to either House of the Parliament to disallow a regulation which set a rate of levy at an unacceptably high level.

While the Committee noted the reasoning put forward in support of the provision being drafted in its current form, it retained a concern that the Bill, if enacted, would give an open-ended power to impose a levy on employers. Accordingly, the Committee suggested that, at the very least, the Bill might be amended to include a provision limiting the rate of the levy to 'an amount no more than that required to meet the payments to be made out of the Fund and the cost of administering the Fund'.

The Committee drew Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> I have no objections to the general thrust of [the amendment suggested by the Committee] as the purpose of the levy will only be to ensure the Authority has sufficient funds to properly discharge its liabilities to seafarers. However, the correct reference should be to the 'Authority', rather than the 'Fund'. A reference to the Authority rather than the Fund would be consistent with clause 101 of the Seafarers Rehabilitation and Compensation Bill 1992 (which provides that references to the Fund should be read as references to the Authority if the Minister makes a declaration under clause 100).
>
> As the levy provisions are essentially a contingency arrangement (to be applied only in the event that the body corporate is not approved to be the Fund or the approval of the body corporate is revoked), I propose that this amendment not be effected at this time but undertake that an appropriate amendment will be included in the next available legislative vehicle.

The Committee thanks the Minister for this response and notes his undertaking to amend the legislation as suggested by the Committee if it becomes necessary to utilise the levy provisions.

VOCATIONAL EDUCATION AND TRAINING FUNDING BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Employment, Education and Training.

The Bill proposes to provide funds for expenditure on technical and further education/vocational education and training in respect of the 1993-95 triennium.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made various comments. The Minister for Employment, Education and Training responded to those comments in a letter dated 24 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Subclauses 2(2) and (3)

In Alert Digest No. 16, the Committee noted that clause 2 of the Bill provides for the commencement of the Bill. It provides:

> (1) This Act, except for Part 3, commences on the day on which it receives the Royal Assent.
>
> (2) Subject to subsection (3), Part 3 commences on a day to be fixed by Proclamation, being a day not earlier than the day on which the *Australian National Training Authority Act 1992* commences and not later than 31 December 1993.
>
> (3) If the commencement of Part 3 is not fixed by a Proclamation published in the *Gazette* before 31 December 1993, Part 3 is repealed on that day.

The Committee noted that, in accordance with the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, what would

otherwise be an open-ended proclamation provision in subclause 2(2) is restricted by subclause 2(3). However, the Committee also noted that the relevant time period is in excess of the 6 month period specified by Drafting Instruction No. 2 and that, in addition, the Explanatory Memorandum gives no indication as to the need for the longer period. The Committee indicated that it would, therefore, appreciate the Minister's advice as to why the longer period is necessary.

The Committee drew Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> The [Australian National Training] Authority is a key part of a new National Vocational Education and Training System. The agreed Statement on the new National System is included in the schedule to the Australian National Training Authority Bill 1992 (the ANTA Bill), which was introduced at the same time as the [Vocational Education and Training] Funding Bill [the VET Funding Bill].
>
> The Statement provides that the new System will come fully into effect on 1 January 1994. As I explained in my second reading speech on 4 November 1992, considerable preparation will be required to ensure that the new planning and funding arrangements are properly in place by that date. For this reason, the Government has moved to establish the Authority immediately, with the endorsement of all States and Territories, by introducing the ANTA Bill.

The Minister goes on to say:

> The Government has also acted to reflect in legislation its triennial funding commitment to vocational education and training, through the simultaneous introduction of the VET Funding Bill. However, in accordance with the agreement reached with the States and Territories,

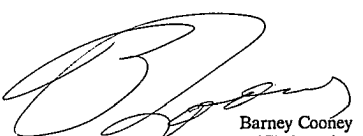
there is no requirement for the funds appropriated by that Bill to pass to the Authority before 1 January 1994. That is, there is no requirement for Part 3 of the VET Funding Bill to come into force before the end of 1993.

In addition, the operation of the new Authority, and the broader National System within which it will operate, will in some aspects be underpinned by complementary State and Territory legislation. The Committee will note references to such State and Territory legislation in the provisions of the ANTA Bill, the Explanatory Memorandum for that Bill and in my second reading speech. The need for such legislation is also referred to in the agreed Statement on the new National System.

The Minister concludes by saying:

It is desirable for all such legislation to be in place before Commonwealth funds pass to the Authority and become subject to the allocation and payment processes provided for in the ANTA Bill. While States and Territories are committed to necessary legislative action, some have indicated that it may not be possible to have legislation enacted in the first half of 1993. For this reason, the VET Funding Bill provides for the maximum possible time for States and Territories to enact legislation relating to the operations of the Authority and the new National System before any funds flow to the Authority for the period commencing on 1 January 1994.

The Committee thanks the Minister for this response.



Barney Cooney
(Chairman)

MINISTER FOR THE ARTS, SPORT, THE ENVIRONMENT AND TERRITORIES

Hon. Ros Kelly M.P.

Phone: (06) 277 7640
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22 NOV 1992

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

RECEIVED
24 NOV 1992
Senate Standing C'ttee for the Scrutiny of Bills

Dear Senator Cooney

I refer to your Committee's comments on the Antarctic (Environment Protection) Legislation Amendment Bill 1992 as contained in the Scrutiny of Bills Alert Digest No 15 of 1992 (4 November 1992).

Clause 20 of the Bill proposes to insert new subsection 21A(4) into the *Antarctic Treaty (Environment Protection) Act 1980* to provide for offences relating to Part 3, Environmental Impact Assessment. New subsection 21A(2) will create an offence of knowingly or recklessly carrying on an activity in the Antarctic for which an authorisation is required within the meaning of Part 3, without the required authorisation. New subsection 21A(3) provides that an offence is committed where the Minister has authorised the carrying out in the Antarctic of an activity subject to a condition being complied with and a person has knowingly or recklessly carried out the activity without complying with a condition in the authorisation.

As noted by the Committee, proposed ~~by~~ new subsection 21A(4) reverses the onus of proof in relation to defences to these offences.

In the case where an emergency has arisen and it is necessary for an activity to be carried out without the necessary authorisation, it would be difficult for the prosecution to prove that an emergency, in whatever form that it may take, had not arisen. An emergency, which for example was due to the Antarctic's notoriously bad weather, would be a defence to an alleged offence but in most cases the circumstances would be peculiarly within the knowledge of the defendant only and could more easily be attested to by such a defendant.

An authorisation from another Contracting Party (there are currently 36 signatories to the Madrid Protocol) would also be peculiarly within the knowledge of the defendant as such authorisation would have been issued under the law of another country. It would be very costly and time consuming for the prosecution to contact all the relevant authorities to

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PARLIAMENT HOUSE, CANBERRA, A.C.T. 2600

discount this defence whereas the defendant is readily able to provide evidence that such authorisation had been obtained.

Thus in each case I strongly believe that the reversal of proof is justified.

Your Committee has also asked what is contemplated by proposed new paragraph 21A(4)(b). The provision reflects the jurisdictional complexities that exist in Antarctica. While Australia lays claim to some 42% of Antarctica this claim is not recognised by all Treaty Parties. However, all Antarctic Treaty Parties, including Australia, have adopted the practice of recognising authorisations of other Parties. An example of the circumstances where a person may need to avail him or herself of the defence is where a national of another Contracting Party may wish to carry out an activity in the Australian Antarctic Territory, such activity having been authorised under the law of that country.

Finally, I refer to your comment in relation to the drafting errors in new subsections 21A(4) to (7) (inclusive). These errors have been rectified by a Government moved amendment in the House of Representatives on 4 November 1992 (Hansard, p. 2530). However, I appreciate you drawing the matter to my attention.

Yours sincerely

ROS KELLY

25 NOV 1992

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

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

Dear Senator Cooney

Child Support Legislation Amendment Bill (No.2) 1992

I am responding to the comments made by the Committee concerning the above Bill which was introduced into the Senate on 10 November 1992.

The Committee was concerned about a retrospective application at Clause 2(2). The recovery of overpayments incurred under the Child Support Legislation has been to date the responsibility at law of the Department of Social Security (DSS). In practice however they have not been in a position to monitor and recover amounts and, as a result, there has been an informal arrangement that the Child Support Agency do all of that work. This has been contrary to law and has been drawn to the attention of the Agency by the Commonwealth Ombudsman.

Even before this advice from the Ombudsman the arrangement had been reconsidered at Joint Steering Committee meetings of the operational agencies and a decision taken to recommend an amendment to the law. If the Child Support Registrar is to continue to recover overpayments he must have the legal authority to recover in his own right.

Rather than have some overpayments the responsibility of DSS and all new ones the responsibility of the Registrar it was thought prudent to have all with the Agency. To do so, the proposed amendment is to be taken to have commenced on 1 June 1988, the date the Act started. To do otherwise would mean DSS would have to set up a system to monitor and recover the early overpayments when in fact the Agency already has this in hand and has been dealing with clients on these matters.

As far as the clients are concerned there is no change and there are no adverse effects of the retrospectivity in this particular instance.

The Committee also sought advice concerning Clause 28 as to why this type of delegation is thought to be necessary and to specify the powers that will be delegated to "a person" under Part 6A.

In fact the amendment is to delegate to "a person engaged for the purposes of Part 6A".

The need for this special delegation arises out of the creation of the special child support administrative review process inserted in the legislation by the Child Support Legislation Amendment Act No.13 1992. It was always the intention that this process, which was set up to replace court hearings, would be, as far as practicable, independent from the Child Support Agency itself (other than for the provision of clerical support staff) and it would need to be seen to be independent. Specialists would be engaged by the Registrar for the purposes of Part 6A and to all intents and purposes they are employees of the Registrar, but not APS officers. That is not to say that some persons could in fact be officers of the APS if they were otherwise qualified to perform the review function.

The Child Support Registrar has already engaged a number of specialists as casual employees of the Taxation Office so that he can delegate the necesary powers. All who have been engaged are appropriately qualified to hear applications for review and all are either barristers or solicitors working privately in the field of family law. They do not wish to be employed as APS officers in the long term, nor is it the Government's wish that they should have to be APS employees, but they have for the time being agreed to that arrangement until the delegation power can be amended. In the future there could well be a mix of both "persons engaged for the purposes of Part 6A" and "full or part time APS employees" undertaking reviews of child support assessments.

Under section 149 the Registrar cannot delegate to these specialist persons who are not APS employees and to this extent the inclusion of Part 6A in the Act by Act No.13 in 1992 was deficient by not amending the delegations at that time to reflect the fact non APS people would be engaged for that purpose.

The Registrar will delegate his power to make determinations under Part 6A [s.98C(1)], to persons known locally as "Child Support Review Officers". The power to refuse to make a determination will also be delegated (s.98F and the new s.98EA [Clause 22 in the Bill in question]). The Child Support Registrar will also delegate his power to obtain information under the Act (s.161) if information is not forthcoming and is necessary for the purpose of making or not making a determination.

Lastly, the Committee raised the matter of evidence by averment. I am very much aware of the Constitutional and Legal Affairs Committee's recommendations concerning evidence by averment and note that the report related to criminal proceedings. The proceedings undertaken by the Agency are of course civil rather than criminal and result in a pecuniary fine and not a gaol sentence.

Notwithstanding, the intention behind the proposal to insert such a provision in the child support legislation is one to allow the prosecution to aver fact only and so assist the court and both parties in the carriage of any prosecution where the fact is not or should not be disputed. The outcome of prosecutions can

ultimately be directly connected to the ability of the Agency to collect support for children in single parent families.

The explanatory memorandum states that the Agency through the averment provisions does not wish to deny a person natural justice (nor can it) nor does it want to do more under the proposed provisions than to state in the information that a particular matter is fact, eg, a notice to obtain information issued on a certain date, a final notice issued on a certain date or a summons issued on certain date. These types of matters are procedural and factual and they do not infer any type of conduct or intention by a defendant. It would be abnormal to mix matters of law and fact in an averment in a child support prosecution but in the event they are mixed the proposed provision states the averment is prima facie evidence of the fact only.

Moreover, if a matter that is averred is challenged by the defendant eg, a notice was not received, the court must consider any evidence provided on its merits. It then becomes a matter for the defendant and the prosecution to attempt to "tip the scales" in their own favour. The evidence submitted will determine the outcome and the value of that evidence is not affected by the averment provision.

The motivation for the change is to simplify for the court the process of establishing fact in a prosecution when that fact should not be in question. To the extent that it is not challenged the averment provisions will do that but if a fact is challenged normal processes will apply.

I trust that the above information will clarify for Senators the thrust and intention of the amendments in question.

Yours sincerely

John Dawkins

MINISTER FOR THE ARTS, SPORT, THE ENVIRONMENT AND TERRITORIES

Hon. Ros Kelly M.P.

Phone: (06) 277 7640
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13 November 1992

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

Dear Senator Cooney, Barney,

In Bills Alert Digest No. 16, the Committee has noted that the final date for commencement of the Endangered Species Protection Bill is 9 months after the Act receives Royal Assent, rather than the 6 months provided as a general rule.

This is done in order to ensure that extensive administrative procedures can be properly put in place to administer this innovative piece of Commonwealth legislation and at the same time to allow proper consultation with other affected agencies to ensure their full understanding of the implementation of the legislation.

It is, I believe, important that this legislation works smoothly and effectively from the outset, and for that reason I trust the Committee will find this acceptable.

Yours sincerely,

Ros Kelly

ROS KELLY

PARLIAMENT HOUSE, CANBERRA, A.C.T. 2600

RECEIVED
23 NOV 1992
Senate Standing Cttee for the Scrutiny of Bills

MINISTER FOR INDUSTRIAL RELATIONS

PARLIAMENT HOUSE,
CANBERRA, A.C.T. 2600

19 NOV 1992

The Hon Senator B Cooney MP
Chairperson
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Barney,

I write in response to observations made in your Committee's Alert Digest No 15 of 1992 in relation to the *Industrial Chemicals (Notification and Assessment) Amendment Bill (No.2) 1992* (the Bill).

I wish to inform the Committee that the drafting of proposed new section 20B of the *Industrial Chemicals (Notification and Assessment) Act 1989* does not reflect the Government's preferred position. The Government would have preferred to specify a period for the amnesty in the Bill rather than by regulation.

However, at the time of the Bill's introduction into the Senate on 15 October 1992, there was disagreement between the Chemical Confederation of Australia, the Australian Council of Trade Unions and the Government as to the period of the amnesty. There was no disagreement that an amnesty period of some length would be provided for.

As agreement has now been reached on a two year period for the amnesty, I propose an amendment to the Bill in the Senate to specify the period of two years in the legislation. Finally, I should also mention that in my Second Reading Speech on the Bill I indicated a review of the extent of compliance with the inclusion of eligible chemicals on the Australian Inventory of Chemical Substances would take place at the end of the two year period. This may lead to an extension of time for the amnesty.

Yours fraternally,

Peter Cook

MINISTER ASSISTING THE PRIME MINISTER
FOR PUBLIC SERVICE MATTERS
Telephone: (06) 277 7320 Facsimile: (06) 273 4115

MINISTER ASSISTING
THE PRIME MINISTER
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

23 NOV 1992

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

Dear Senator Cooney

I am replying to your letter of 12 November 1992 in which you drew attention to the Committee's comments in Alert Digest No. 16 of 1992 (11 November 1992) on clause 2 of the *Mutual Recognition Bill 1992*.

The Committee has commented that the proclamation provision in clause 2 is open-ended because no date is specified and that this may delegate legislative power inappropriately.

I draw to the Committee's attention the fact that a proclamation date has been provided in the Explanatory Memorandum to the Bill, though perhaps not in the customary place. Paragraph 6 on page 2 of the Explanatory Memorandum points to the Agreement Relating to Mutual Recognition signed by Heads of Government on 11 May 1992, under which it was agreed - as stated in the Explanatory Memorandum - proclamation of the Bill should occur by 1 March 1993.

The notes on individual clauses in the Explanatory Memorandum do not, in addressing clause 2 of the Bill, refer back to the date specified in paragraph 6 as the date by which the legislation is to be proclaimed. In this context, I note that to avoid confusion the Explanatory Memoranda in relation to the individual clauses for the Commonwealth Bill and the States' and Territories' Bills are identical as far as possible.

I have nonetheless addressed the Committee's concern by ensuring that the extrinsic material puts the matter beyond doubt. In my closing remarks to the Second Reading Debate on the Bill on 12 November 1992 in the House of Representatives, I stated that the intention is for the legislation is to be proclaimed by 1 March 1993.

Yours sincerely

ROSS FREE

24 NOV 1992

Senate Standing Ctte for the Scrutiny of Bills

MINISTER FOR SHIPPING AND AVIATION SUPPORT

PARLIAMENT HOUSE
CANBERRA ACT 2600

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

24 NOV 1992

Dear Senator Cooney Barney

I am writing in response to the concerns raised by the Committee in the Scrutiny of Bills Alert Digest, No.15 of 4 November 1992.

Abrogation of individual's rights to sue in relation to employment-related injuries (clause 54 of the Seafarers Rehabilitation and Compensation Bill 1992)

As the Committee notes, clause 54 of the *Seafarers Rehabilitation and Compensation Bill 1992* is similar to section 44 of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*. There are also similar provisions abrogating common law rights in the workers compensation legislation of Victoria, South Australia and the Northern Territory.

In recent years there has been widespread recognition that common law is not the most appropriate way of dealing with work-related injuries.

It is relevant to note that Professor Harold Luntz, in his Review of Seamen's Compensation 1988, recommended (page 228):

> "That the Seafarers Rehabilitation and Compensation Act should abrogate the common law action for damages. Such a step involves the recognition that the common law action is a compensatory mechanism whose time has passed. It is the fact of disability that should provide the justification for compensation not some extraneous requirement such as that of fault. In a system which provides ongoing compensation for loss of earnings during the time of incapacity until the normal age of retirement; provides full recompense for medical, hospital, rehabilitation and like expenses; and provides an impairment benefit, structured according to the degree of impairment, as a means of dealing with non-economic losses, the continued existence of a parallel remedy which is not only economically inefficient as a means of delivering benefits but is also actively destructive of efforts at rehabilitation, cannot be justified."

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In response to the Committee's further concern that the provision has the capacity to remove common law rights retrospectively, I would draw attention to clause 13 of the *Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Bill 1992*.

This clause allows a period of six months for an employee who has suffered an injury (or property loss or damage) before the commencing day, to bring an action against his or her employer or a fellow employee.

Setting of rate of levy by regulation (clause 5 of the Seafarers Rehabilitation and Compensation Levy Bill)

The Committee raised the concern that clause 5 of the *Seafarers Rehabilitation and Compensation Levy Bill 1992* contains an open-ended power to impose a levy on employers.

The Committee has suggested an amendment limiting the rate of levy to "an amount no more than that required to meet the payments to be made out of the Fund and the cost of administering the Fund".

I have no objections to the general thrust of this amendment as the purpose of the levy will only be to ensure the Authority has sufficient funds to properly discharge its liabilities to seafarers. However, the correct reference should be to the "Authority", rather than the "Fund". A reference to the Authority rather than the Fund would be consistent with clause 101 of the *Seafarers Rehabilitation and Compensation Bill 1992* (which provides that references to the Fund should be read as references to the Authority if the Minister makes a declaration under clause 100).

As the levy provisions are essentially a contingency arrangement (to be applied only in the event that the body corporate is not approved to be the Fund or the approval of the body corporate is revoked), I propose that this amendment not be effected at this time but undertake that an appropriate amendment will be included in the next available legislative vehicle.

Offences relating to returns (clause 7 of the Seafarers Rehabilitation and Compensation Levy Collection Bill 1992)

I note the Committee's comments in relation to the abrogation of privilege against self-incrimination in clause 7 of the *Seafarers Rehabilitation and Compensation Levy Collection Bill 1992*. However, as the Committee notes, this provision is strictly limited.

Yours fraternally

Peter Cook

Minister for Employment, Education and Training
Parliament House, Canberra, ACT, 2600

24 NOV 1992

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 comments in the Scrutiny of Bills Alert Digest (No. 16 of 1992) in relation to subclause 2(3) of the *Vocational Education and Training Funding Bill 1992* (the VET Funding Bill).

The Committee has asked for an explanation of the provision for a period extending to 31 December 1993 for the proclamation of Part 3 of the proposed Act. Part 3 provides for the passage of funds to the Australian National Training Authority.

The Authority is a key part of a new National Vocational Education and Training System. The agreed Statement on the new National System is included in the schedule to the Australian National Training Authority Bill 1992 (the ANTA Bill), which was introduced at the same time as the VET Funding Bill.

The Statement provides that the new System will come fully into effect on 1 January 1994. As I explained in my second reading speech on 4 November 1992, considerable preparation will be required to ensure that the new planning and funding arrangements are properly in place by that date. For this reason, the Government has moved to establish the Authority immediately, with the endorsement of all States and Territories, by introducing the ANTA Bill.

The Government has also acted to reflect in legislation its triennial funding commitment to vocational education and training, through the simultaneous introduction of the VET Funding Bill. However, in accordance with the agreement reached with the States and Territories, there is no requirement for the funds appropriated by that Bill to pass to the Authority before 1 January 1994. That is, there is no requirement for Part 3 of the VET Funding Bill to come into force before the end of 1993.

In addition, the operation of the new Authority, and the broader National System within which it will operate, will in some aspects be underpinned by complementary State and Territory legislation. The Committee will note references to such State and Territory legislation in the provisions of the ANTA Bill, the Explanatory Memorandum for that Bill and in my second reading speech . The need for such legislation is also referred to in the agreed Statement on the new National System.

It is desirable for all such legislation to be in place before Commonwealth funds pass to the Authority and become subject to the allocation and payment processes provided for in the ANTA Bill. While States and Territories are committed to necessary legislative action, some have indicated that it may not be possible to have legislation enacted in the first half of 1993. For this reason, the VET Funding Bill provides for the maximum possible time for States and Territories to enact legislation relating to the operations of the Authority and the new National System before any funds flow to the Authority for the period commencing on 1 January 1994.

I hope that this information will assist the Committee in its further consideration of the Bill.

Yours sincerely

KIM C. BEAZLEY

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF

1992

2 DECEMBER 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT OF 1992

The Committee has the honour to present its Eighteenth Report of 1992 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 24:

Banking Legislation Amendment Bill 1992

Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992

Child Support Legislation Amendment Bill (No. 2) 1992

Migration Reform Bill 1992

BANKING LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 15 October 1992 by the Minister Assisting the Treasurer.

The Bill is consistent with, and partly gives effect to, the Government's decision (announced in its One Nation statement), to liberalise foreign bank entry and allow foreign banks to apply to establish authorised branch operations in Australia. Under the proposed amendments, foreign banks will not be permitted to accept retail deposits. Foreign banks wishing to accept retail deposits will be required to establish a subsidiary.

The Committee dealt with the Bill in Alert Digest No. 15 of 1992, in which it made various comments. The Treasurer responded to those comments in a letter dated 27 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Subclauses 2(4) and (5)

In Alert Digest No. 15, the Committee noted that clause 2 of the Bill deals with the commencement of the various parts of the Bill. It provides:

> Commencement
>
> 2.(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
>
> (2) Subsections 4(2) and 5(1) and sections 16, 17 and 34 commence on a day to be fixed by Proclamation, being a day not earlier than the day on which the State Act commences.
>
> (3) If the provisions referred to in subsection (2) do not commence under that subsection within the period of 6 months beginning on the day on which the State

Act commences, they commence on the first day after the end of that period.

(4) Subsections 4(3) and 5(2) commence on a day to be fixed by Proclamation.

(5) Part 3 commences on a day to be fixed by Proclamation.

(6) In this section:
'State Act' means an Act of New South Wales that refers to the Parliament the matter of State banking in so far as it applies to State Bank of New South Wales Limited.

The Committee noted that (unlike subclause 2(2)) subclauses 2(4) and (5), if enacted, would give the Executive Government an open-ended discretion regarding the proclamation (and, therefore, the commencement) of the relevant substantive provisions. The Committee noted that this was contrary to the 'general rule' provided for by Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

In making this comment, the Committee noted that the Explanatory Memorandum to the Bill was of limited assistance in explaining why it was necessary for the provisions in question to be expressed in terms contrary to the 'general rule'. Under the heading 'Clause 5 - Application of Act', it offers the following information in relation to the proposed amendments to which subclause 2(4) relates:

> 6. Subclause 5(1) inserts in the [*Banking Act 1959*] a new subsection 6(1A) which provides that Part II (other than Division 1), Part V, and sections 61, 62, 64, 65, 68 and 69 of the Act apply to State Bank Limited. The subclause is to come into force as set out in subclauses 2(2) and 2(4). The new subsection 6(1A) is so drafted because the Commonwealth will have no legislative power to apply Division 1 of Part II of the Act to State Bank Limited for so long as subsection 6(1) of the proposed State Act referring State banking powers to the Commonwealth remains in force.

> 7. Subclause 5(2) amends subsection 6(1A) of the Act to provide that all of Part II and section 63 of the Act are to apply to State Bank Limited. This subclause is expressed to come into force (see subclause 2(4)) on a day to be fixed by Proclamation. For lack of power, the subclause may not, however, come into force before subsection 6(1A) of the proposed State Act ceases to have effect; but, as the proposed State Act has not yet been enacted, it is not possible in subclause 2(4) to relate the Proclamation date to the date on which subsection 6(1) of the proposed State Act will cease to have effect.

The Committee noted that paragraph 7 above appears to be suggesting that the commencement of the provisions to which subclause 2(4) of the Bill relates is dependent on the passage of a State Act and the subsequent ceasing to have effect of a provision of that Act. The Committee noted that such a situation seemed irrational. If there was logic to the proposition, the Explanatory Memorandum did not assist the Committee in divining it.

The Committee noted that no explanation was offered in relation to the open-ended commencement of Part 3 of the Bill, to which subclause 2(5) relates.

The Committee stated that it maintained an 'in principle' objection to open-ended commencement provisions, as they involve the Parliament leaving the commencement (or non-commencement) of legislation properly passed by the Parliament to the discretion of the Executive Government. In the Committee's view, Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 sets out a proper and reasonable scheme governing the use of such provisions. The Committee noted that the 'general rule' provided by that scheme had not been adhered to in this case.

The Committee drew Senators' attention to the provisions, as they may be considered to be an inappropriate delegation of legislative powers in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Treasurer's response to the Committee's comments is addressed to each of the 2 main concerns raised by the Committee. In relation to the Committee's comments on subclause 2(4), the Treasurer states:

> The New South Wales (NSW) Government has introduced into the NSW Parliament the Commonwealth Powers (State Banking) Bill 1992 (the NSW Bill). The purpose of that legislation is to refer to the Commonwealth the powers of the State Parliament relating to State banking insofar as it applies in relation to the State Bank of NSW (the State Bank). This is to be done in two stages.
>
> Clause 5 of the NSW Bill provides that the matter of State banking insofar as it applies in relation to the State Bank, to the extent that it is not already within the powers of the Commonwealth, is referred to the Commonwealth Parliament for a period that may be determined by Proclamation. Subclause 6(1) of the NSW Bill, however, withholds from that referral any power that would allow the Commonwealth to prevent the State Bank from carrying on banking business without an authorisation from the Commonwealth. Subclause 6(2) of the NSW Bill provides that 'subsection 6(1) ceases to have effect on a day to be appointed by Proclamation for the purposes of this section'. (A copy of the State Bill is attached [and appears at the end of this Report].)
>
> After the NSW Bill is enacted, NSW proposes to have formal discussions with the Reserve Bank to ensure that the State Bank is in a position to comply with all the prudential requirements that authorised banks are required to meet. A date will be proclaimed for the purposes of subclause 6(2) of the NSW Bill only when those discussions have been concluded.

The Treasurer goes on to say:

> As a consequence of that two-tier approach in the proposed State legislation, clause 5 of the Commonwealth Bill makes the relevant provisions of

the *Banking Act 1959* applicable to the State Bank in two steps.

Subclause 5(1) provides that certain provisions of the *Banking Act 1959,* but not Division 1 of Part II (*Authority to carry on banking business*), apply to the State Bank. That subclause is to commence (subclause 2(2)) on a proclaimed date after the State Act comes into force.

Subclause 5(2) makes separate provision for Division 1 of Part II (and section 63) of the Banking Act to apply to the State Bank. This subclause can only, however, come into force after subclause 6(1) of the State Act (the provision restricting the conferral of full powers on the Commonwealth) ceases to have effect.

Subclause 2(4) of the Commonwealth Bill is expressed to give an open-ended discretion to the Governor-General regarding the proclamation of a date for the commencement of subclause 5(2) because, as the State legislation is not yet enacted, no reference can be made to any of its proposed provisions to set the parameters within which the Governor-General could proclaim the commencement date.

In relation to the Committee's comments on subclause 2(5), the Treasurer states:

> The reason why the commencement date was not specified in the legislation is that it was dependent on a resolution being passed by the annual general meeting of the Commonwealth Bank's (CBA) shareholders to amend the CBA's Articles of Association dealing with payment of dividends. The date of the annual general meeting was not known at the time the Bill was drafted. This amendment to the CBA's Articles of Association is to align the Articles of Association with the amendment to the Commonwealth Banks Act contained in Part 3 of the Bill.
>
> The CBA's annual general meeting of shareholders was held on 28 october 1992. The meeting passed a resolution to amend the CBA's Articles of Association.

> This means that Part 3 of the Bill can commence immediately after the Bill is passed by Parliament. Accordingly, Part 3 of the Bill will be proclaimed as soon as possible after the Bill receives Royal Assent.

The Committee thanks the Treasurer for this detailed and helpful response.

BROADCASTING SERVICES (SUBSCRIPTION TELEVISION BROADCASTING) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Transport and Communications.

The Bill proposes to implement the Government's decisions on subscription television broadcasting ('Pay TV'), following consideration of the recommendations of the Senate Select Committee on Subscription Television Broadcasting's recommendations. This is to be achieved by amending the *Broadcasting Services Act 1992,* to include the new Part 7 provided for in the Bill.

The Bill is part of the process of reform commenced in the Broadcasting Services Act and it should be read in the context of the reforms of that Act. It:

- provides a licensing and regulatory regime for the provision of subscription television broadcasting services that can be delivered using any technology (for example cable, microwave or satellite);

- provides for the licensing of individual subscription television broadcasting services;

- puts in place a regime for services delivered by a 'subscription television broadcasting satellite', ie a satellite operated by AUSSAT Pty Ltd under its telecommunications carrier licence (AUSSAT is a subsidiary of OPTUS Communications Ltd), by providing for:

  - the allocation by a price-based allocation process of two licences ('licence A' and 'licence B') each to provide up to four subscription television broadcasting services;

  - the allocation of a licence ('licence C') to a subsidiary of the Australian Broadcasting Corporation that allows the provision of up to two subscription television broadcasting services;

- an ownership and control regime that applies until 1 July 1997 and imposes limits on the ownership and control of licence A; and

- introduces measures that will provide consumer protection including:

  - mandating the use of digital technology for the delivery of satellite services to, in part, avoid consumer confusion, and the cost and risk caused by competing or superseded technologies;

  - requiring access by any satellite operator to customer reception equipment, so that customers will only need one set of reception equipment to be able to receive any or all services.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 1 December 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Non-reviewable decisions
Clause 3 - proposed new Part 7 of the *Broadcasting Services Act 1992*

In Alert Digest No. 16, the Committee noted that clause 3 of the Bill proposes to insert a new Part 7 into the *Broadcasting Services Act 1992,* which currently does not contain a Part 7. The proposed new Part 7 deals with the allocation of subscription television broadcasting licences and the conditions to be applicable to such licences. It also sets out 'rules' in relation to ownership and control of media outlets.

The Committee noted that proposed new Part 7, if enacted, would give the Minister the power to allocate licences and to impose conditions on those licences (proposed section 93). It would give the Australian Broadcasting Authority the power to allocate licences after 1997 (proposed section 96). It contains provisions relating to a company's suitability to be allocated a licence (proposed section 98).

Other provisions relate to the conditions applicable to subscription television broadcasting licences (proposed sections 99 - 103). The Committee observed that decisions under various of the sections clearly had the capacity to have a significant impact on the persons or corporations affected by them and might be considered to be appropriately the subject of independent review.

The Committee noted that section 204 of the Broadcasting Services Act currently provides that various nominated sections of the Act are open to review by the Administrative Appeals Tribunal. The nominated provisions include subsections 98(1), 99(2), 100(2), 105(2) and 105(3).

The Committee observed that, in its present form, the Act does not contain subsections with those numbers. The Committee suggested that this would appear to be an error which has arisen as a result of the excision of Part 7 from the original version of the Broadcasting Services Bill 1992. However, in addition, the Committee noted that the relevant provisions of the proposed new Part 7 do not appear to correspond with those which appeared in the original version of the Broadcasting Services Bill. Consequently, the provisions which would be open to review pursuant to section 204 of the Broadcasting Services Act are not, in fact, the provisions which (arguably) should be open to review.

The Committee assumed that this was essentially a drafting error and, therefore, sought the Minister's advice as to whether or not it was the case.

The Minister has responded as follows:

> The potential problem of removing the right to review of nominated provisions arising from the renumbering aspect of the Broadcasting Services (Subscription Television Broadcasting) Amendment Act is recognised.
>
> The *Transport and Communications Amendment Act (No. 3) 1992* amends sections 204 of the *Broadcasting Services Act [1992]* to realign the numbers.

The Committee thanks the Minister for this response and notes that the relevant provisions of the Transport and Communications Amendment Bill (No. 3) 1992 were referred to in the Committee's comments on that Bill (contained in Alert Digest No. 17).

CHILD SUPPORT LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the following 3 Acts as set out below:

- the *Administrative Decisions (Judicial Review) Act 1977:*

  - Schedule 1 to the Act will be amended to include decisions under Part 6A of the *Child Support (Assessment) Act 1989* as decisions to which the Act does not apply.

- the *Child Support (Assessment) Act 1989:*

  - the child support formula will be amended to incorporate the concept of 'substantial access' to a child;

  - the definition of an 'approved form' will be amended;

  - the application of the Act will be extended to include Queensland;

  - amendments will allow the Child Support Registrar a degree of flexibility to choose a taxable income that is considered appropriate for use in the child support formula when one is not available;

  - provisions setting out the effect of income estimates and the revocation of estimates will be removed from the Act. Regulations will be able to be promulgated for that purpose.

Other changes to improve the operation of income estimates are also included;

- a penalty will be imposed where an estimate or estimates of income are less than the actual income returned;

- the grounds for departure will be extended to include high costs of access to a child or another person who is not part of the child support assessment;

- the Registrar will be allowed to disclose to a law enforcement officer that a threat has been made against a person if there is reason to believe the threat is evidence that an offence has been or may be committed; and

- a number of minor errors and omissions in amendments in the *Child Support Legislation Amendment Act 1992* are to be corrected.

- the *Child Support (Registration and Collection) Act 1988:*

  - the definition of an 'approved form' will be amended;

  - the Child Support Registrar will be allowed to disclose to a law enforcement officer that a threat has been made against a person if there is reason to believe that the threat is evidence that an offence has been or may be committed;

  - new claimants for additional family payment will be allowed to opt for private collection of maintenance;

  - the penalty imposition will be modified, by removing the flat penalty amount and substituting a *pro rata* per annum amount on the total amount outstanding at the end of each month;

- the ownership of all child support overpayments will be changed from the Secretary of the Department of Social Security to the Child Support Registrar;

- the grounds of objection against a decision of the Child Support Registrar will be extended to credit an amount of maintenance against a liability;

- a statement or averment will be allowed as *prima facie* evidence of a matter in a prosecution;

- the regulation-making power will be amended to allow Regulations to be made specifying how payments received may be applied by the Child Support Registrar.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made various comments. The Treasurer responded to those comments in a letter dated 25 November 1992. That letter was received by the Committee after its last meeting and, consequently, was not formally considered in the context of the Committee's Seventeenth Report. However, as the Bill was scheduled for debate shortly after that Report was tabled, the Committee included a copy of the letter in the Report without making any assessment of the Treasurer's response.

The Committee has now considered the substance of the response. A further copy of the Treasurer's letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 16, the Committee noted that subclause 2(2) of the Bill provides that clauses 36 and 39 of the Bill are to be taken to have commenced on 1 June 1988. Those provisions propose to amend the *Child Support (Registration and Collection) Act 1988.* The date nominated for commencement of the proposed amendments is the date on which that Act commenced.

The Committee noted that the Explanatory Memorandum to the Bill indicates that the changes proposed by the amendments are technical in nature and that the retrospectivity will have 'no impact on clients' (paragraph 15.9). Accordingly, the Committee made no further comment on the provision. However, the Treasurer has offered the following further information in relation to the provisions:

> The Committee was concerned about a retrospective application at Clause 2(2). The recovery of overpayments incurred under the Child Support Legislation has been to date the responsibility at law of the Department of Social Security (DSS). In practice however they have not been in a position to monitor and recover amounts and, as a result, there has been an informal arrangement that the Child Support Agency do all of that work. This has been contrary to law and has been drawn to the attention of the Agency by the Commonwealth Ombudsman.
>
> Even before this advice from the Ombudsman the arrangement had been reconsidered at Joint Steering Committee meetings of the operational agencies and a decision taken to recommend an amendment to the law. If the Child Support Registrar is to continue to recover overpayments he must have the legal authority to recover in his own right.

The Treasurer goes on to say:

> Rather than have some overpayments the responsibility of DSS and all new ones the responsibility of the Registrar it was thought prudent to have all with the Agency. To do so, the proposed amendment is to be taken to have commenced on 1 June 1988, the date the Act started. To do otherwise would mean DSS would have to set up a system to monitor and recover the early overpayments when in fact the Agency already has this in hand and has been dealing with clients on these matters.

The Treasurer concludes:

> As far as the clients are concerned there is no change and there are no adverse effects of the retrospectivity in this particular instance.

The Committee thanks the Treasurer for this further information and for the assurance that the retrospectivity does not adversely affect persons other than the Commonwealth.

Delegation of power to 'a person'
Clause 28 - proposed new subsection 149(1A) of the *Child Support (Assessment) Act 1989*

In Alert Digest No. 16, the Committee noted that clause 28 of the Bill proposed to insert a new subsection (1A) into section 149 of the *Child Support (Assessment) Act 1989*. Section 149 deals with delegation of the powers of the Child Support Registrar. It provides:

> Delegation
> 149.(1) The Registrar may, in writing, delegate all or any of the Registrar's powers or functions under this Act to:
> (a) a Deputy Registrar; or
> (b) the Secretary to the Department of Social Security; or
> (c) an officer or employee of:
> (i) the branch of the Australian Public Service under the direct control of the Registrar (whether as Registrar or Commissioner); or
> (ii) the Department of Social Security.
>
> (2) A delegation under subsection (1) may be made subject to a power of review and alteration by the Registrar, within a period specified in the delegation, of acts done under the delegation.
>
> (3) A delegation under subsection (1) continues in force even though there has been a change in the

occupancy of, or there is a vacancy in, the office of Registrar, but, for the purposes of the application of subsection 33(3) of the *Acts Interpretation Act 1901* in relation to such a delegation, nothing in any law is to be taken to preclude the revocation or variation of the delegation by the same or a subsequent holder of the office.

Proposed new subsection 149(1A) provides:

> (1A) [W]ithout limiting the generality of subsection (1), the Registrar may also, in writing, delegate all or any of the Registrar's powers or functions to a person engaged by the Registrar for the purposes of Part 6A.

In relation to this proposed amendment, the Explanatory Memorandum states:

> Section 149 is amended to allow the Registrar to delegate all or any of his powers under the Act to a person who is not an employee of the Australian Public Service and is engaged for the purposes of Part 6A.

The Committee noted that the Explanatory Memorandum also indicated (by implication) that this amendment is either a 'correction' or a 'necessary consequential' amendment arising out of the *Child Support Legislation Amendment Act 1992*.

On the basis of the material which the Committee examined, it was not immediately clear how the need for this amendment arose. The Committee indicated that, given its general opposition to provisions which allow for the delegation of powers to 'a person', it would appreciate the Minister's advice as to which of the Child Support Registrar's powers under Part 6A of the Child Support (Assessment) Act are to be delegated and also why it was considered necessary to be able to delegate those powers in this way.

After noting that the delegation is to 'a person engaged for the purposes of Part 6A' and not simply to 'a person', the Treasurer states:

> The need for this special delegation arises out of the creation of the special child support administrative review process inserted in the legislation by the *Child Support Legislation Amendment Act 1992*. It was always the intention that this process, which was set up to replace court hearings, would be, as far as practicable, independent from the Child Support Agency itself (other than for the provision of clerical support staff) and it would need to be seen to be independent. Specialists would be engaged by the Registrar for the purposes of Part 6A and to all intents and purposes they are employees of the Registrar, but not APS officers. That is not to say that some persons could in fact be officers of the APS if they were otherwise qualified to perform the review function.

The Treasurer goes on to say:

> The Child Support Registrar has already engaged a number of specialists as casual employees of the Taxation Office so that he can delegate the necessary powers. All who have been engaged are appropriately qualified to hear applications for review and all are either barristers or solicitors working privately in the field of family law. They do not wish to be employed as APS officers in the long term, nor is it the Government's wish that they should have to be APS employees, but they have for the time being agreed to that arrangement until the delegation power can be amended. In the future there could well be a mix of both 'persons engaged for the purposes of Part 6A' and 'full or part time APS employees' undertaking reviews of child support assessments.
>
> Under section 149 the Registrar cannot delegate to these specialist persons who are not APS employees and to this extent the inclusion of Part 6A in the Act by [*Child Support Legislation Amendment Act 1992*] was deficient by not amending the delegations at that time

to reflect the fact non APS people would be engaged for that purpose.

The Treasurer concludes by saying:

> The Registrar will delegate his power to make determinations under Part 6A [s.98C(1)], to persons known locally as 'Child Support Review Officers'. The power to refuse to make a determination will also be delegated (s.98F and the new s.98EA [Clause 22 in the Bill in question]). The Child Support Registrar will also delegate his power to obtain information under the Act (s.161) if information is not forthcoming and is necessary for the purpose of making or not making a determination.

The Committee thanks the Treasurer for this detailed and helpful response.

Evidence by averment
Clause 38 - proposed new section 111A of the *Child Support (Registration and Collection) Act 1988*

In Alert Digest No. 16, the Committee noted that clause 38 of the Bill proposed to insert a new section 111A into the *Child Support (Registration and Collection) Act 1988*. It provides:

> Averments
>
> 111A.(1) In a prosecution for an offence against this Act, a statement or averment contained in the information, claim or complaint is *prima facie* evidence of the matter so stated or averred.
>
> (2) This section applies in relation to any matter so stated or averred:
>
> (a) even if evidence is given in support or rebuttal of the matter stated or averred; and
>
> (b) even if the matter averred is a mixed question of law and fact, but, in that case, the statement or averment is *prima facie* evidence of the fact only.

(3) Any evidence given in support or rebuttal of a matter so stated or averred must be considered on its merits, and the credibility and probative value of such evidence is neither increased nor diminished because of this section.

(4) This section:
(a) does not apply to a statement or averment of the intent of a defendant; and
(b) does not lessen or affect any burden of proof otherwise falling on a defendant.

The Committee noted that the issue of averments was dealt with by the Senate Standing Committee on Constitutional and Legal Affairs (as it then was) in its 1982 report, entitled *The burden of proof in criminal proceedings* (Parliamentary paper no. 319 of 1982). In that report, the Constitutional and Legal Affairs Committee offered the following definition of an averment:

> An averment is a provision in a statute providing that where the prosecutor alleges certain facts the allegation is *prima facie* evidence of the matter averred, or that those facts should be taken to be proved unless the accused calls evidence to the contrary. The effect of an averment provision is to place the onus of proof with regard to the matter averred on the defendant, and in the case of *Baxter v Ah Way* (1909) 10 CLR 212, Higgins J declared that the word 'averment' covers the essential part of the offence, and not merely technical averments preliminary or final. (at page 65 of the report)

After some discussion of the use of averments in legislation, the Legal and Constitutional Affairs Committee made the following recommendations concerning their continued use. Those recommendations were that:

(a) As a matter of legislative policy averment provisions should be kept to a minimum.

(b) The Parliament should enact legislation to ensure that existing and future averment

provisions are only resorted to by prosecutors in the following circumstances:

(i) where the matter which the prosecution is required to prove is formal only and does not in itself relate to any conduct on the part of the defendant; or

(ii) where the matter in question relates to conduct of the defendant alleged to constitute an ingredient in the offence charged and is peculiarly within the defendant's knowledge.

(c) When seeking to rely upon averment provisions, prosecutors should have regard to the following criteria:

(i) averments should be so stated that they are sufficient in law to constitute the charge;

(ii) the facts and circumstances constituting the offence should be stated fully and with precision;

(iii) the Crown should not aver matters of law or matters of mixed fact and law;

(iv) averments should not amend or alter the rules of pleading or those regulating the statement of the offence;

(v) averments should be restricted to the ingredients of the charge and information should not contain evidentiary material. (at pages 73-4 of the report)

Applying these considerations to the present case, it was not clear to this Committee that the sorts of matters which are to be averred will be either formal only or else peculiarly within the knowledge of the defendant, as contemplated by paragraph (b) above. Similarly, it was not clear that the matters which would be capable of being proved by averment would be restricted to the ingredients of the charge, as contemplated by subparagraph (c)(v) above.

In the light of the Constitutional and Legal Affairs Committee's recommendations, and given this Committee's long-standing and 'in principle' objection to the use of averment provisions, the Committee drew Senators' attention to the provision, as

it may be considered to trespass on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Treasurer has responded as follows:

> I am very much aware of the Constitutional and Legal Affairs Committee's recommendations concerning evidence by averment and note that the report related to criminal proceedings. The proceedings undertaken by the Agency are of course civil rather than criminal and result in a pecuniary fine and not a gaol sentence.
>
> Notwithstanding, the intention behind the proposal to insert such a provision in the child support legislation is one to allow the prosecution to aver fact only and so assist the court and both parties in the carriage of any prosecution where the fact is not or should not be disputed. The outcome of prosecutions can ultimately be directly connected to the ability of the Agency to collect support for children in single parent families.

The Treasurer goes on to say:

> The explanatory memorandum states that the Agency through the averment provisions does not wish to deny a person natural justice (nor can it) nor does it want to do more under the proposed provisions than to state in the information that a particular matter is fact, eg, a notice to obtain information issued on a certain date, a final notice issued on a certain date or a summons issued on certain date. These types of matters are procedural and factual and they do not infer any type of conduct or intention by a defendant. It would be abnormal to mix matters of law and fact in an averment in a child support prosecution but in the event they are mixed the proposed provision states the averment is prima facie evidence of the fact only.
>
> Moreover, if a matter that is averred is challenged by the defendant eg, a notice was not received, the court must consider any evidence provided on its merits. It then becomes a matter for the defendant and the

> prosecution to attempt to 'tip the scales' in their own favour. The evidence submitted will determine the outcome and the value of that evidence is not affected by the averment provision.

The Treasurer concludes by saying:

> The motivation for the change is to simplify for the court the process of establishing fact in a prosecution when that fact should not be in question. To the extent that it is not challenged the averment provisions will do that but if a fact is challenged normal processes will apply.

The Committee thanks the Treasurer for this response. However, the Committee must re-state its objection to the use of averment clauses. In doing so, the Committee notes that the Treasurer's response indicates that the proceedings to which the clause in question relates are 'civil' rather than criminal. The Committee is puzzled as to what the Treasurer means by this. Proposed new section 111A explicitly relates to 'prosecution[s] for an offence against this Act'. The *Child Support (Registration and Collection) Act 1988* contains offences which are clearly criminal offences. An offence under section 121(1) of the Act, for example, carries a penalty, on conviction, of a $5 000 fine or imprisonment for 12 months, or both.

The Committee would appreciate the Treasurer's further comments.

MIGRATION REFORM BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes major changes to the *Migration Act 1958*. The changes will replace the existing legislative framework which regulates entry to, and stay in, Australia, as well as the detention and removal of non-citizens who are in Australia unlawfully. It proposes to provide a new and greatly-extended basis for merits review of immigration decisions and to provide, for the first time, independent determinative merits review of refugee-related decisions.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made various comments. The Minister for Immigration, Local Government and Ethnic Affairs responded to those comments in a letter dated 30 November 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Delegation of power to 'a person'
Clause 35 - proposed new subsection 176(3) of the *Migration Act 1958*

In Alert Digest No. 16, the Committee noted that clause 35 of the Bill proposes to add 2 new subsections to section 176 of the Migration Act. Section 176 currently provides:

> Delegation
>
> 176.(1) The Minister may, by writing signed by him or her, delegate to a person any of the Minister's powers under this Act.
>
> (2) The Secretary may, by writing signed by him or her, delegate to a person any of the Secretary's powers under this Act.

Proposed new subsections 176(3) and (4) provide:

> (3) If an application for a visa that has a health criterion is made, the Minister may:
>
> (a) delegate to a person the power to consider and decide whether that criterion is satisfied; and
>
> (b) consider and decide, or delegate to another person the power to consider and decide, all other aspects of the application.
>
> (4) To avoid doubt, if there is a delegation described in paragraph (3)(a) in relation to an application for a visa:
>
> (a) Subdivision AB of Division 2 of Part 2 has effect accordingly; and
>
> (b) for the purposes of subsection 26ZF(1), the Minister is satisfied or not satisfied that the health criterion for the visa has been satisfied if the delegate who was given that delegation is so satisfied or not so satisfied, as the case may be.

The Committee noted that it has consistently drawn attention to provisions which allow power to be delegated to 'a person'. It is the Committee's view that such powers, particularly when they have the capacity to affect personal rights and liberties, should either be exercised by the person to whom they are given or, if they have to be delegated, by members of an ascertainable class of persons. That class of persons should be defined either by reference to the holders of a particular office or to the qualifications or attributes of the persons to whom the power is to be delegated.

The Committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

The Minister has responded as follows:

> I note the Committee's concern that the new power of delegation, as with the existing power of delegation,

> allows delegations to be made to a 'person'. I am sympathetic to the view that generally speaking, powers which have the capacity to affect personal rights and liberties should either be exercised by the person to whom they are given or, if they must be delegated, by a class of persons defined either by reference to the holders of a particular office or to the qualifications or attributes of the persons to whom the power is to be delegated.

The Minister goes on to say:

> However, the special nature of the regulation of migration presents circumstances which necessitate a wider delegation power. A very large number of the decisions taken by this Department are taken at overseas posts. An effective means to promote efficiency at overseas posts and reduce costs associated with the overseas operations of this Department has been to delegate various migration powers to officers of other Departments (such as the Department of Foreign Affairs and Trade) or to locally engaged staff, who are not 'officers' of this Department or the Commonwealth generally.
>
> Additionally, with the incidence of unauthorised boat arrivals at various islands being territories of Australia, or in remote areas of mainland Australia it has been necessary to delegate powers under the *Migration Act 1958* to members of various law enforcement agencies or other persons in positions of authority (for example, the Administrator of Norfolk Island) in those areas at least until such time as officers of Department arrive there. The class of person to whom it may be necessary to delegate powers is thus very wide, and has not been readily ascertainable in advance.

The Minister concludes by saying:

> The new power under proposed subsection 176(3) to delegate the power to make decisions in respect of health criteria will be exercised in respect of applicants

> from all over the world. It would not be economically feasible to station a Commonwealth medical officer in every country in which applications are made, and it is practical that the Department be allowed to rely on the services [of] local doctors or appropriately qualified health care workers to make these decisions. While I appreciate the Committee's concerns, I believe it is appropriate in this instance that the delegation power in respect of these persons not be restricted by references to attributes or qualifications that necessarily vary from country to country.

The Committee thanks the Minister for this response. While it acknowledges the points made by the Minister about the efficiency and cost benefits of being able to delegate powers to 'a person', the Committee retains its concern that this power of delegation is virtually unlimited. In making this comment, the Committee questions whether there might be some practical way to limit the power *without* placing undue pressures on the Department in terms of costs and efficiency.

Barney Cooney
(Chairman)

27 NOV 1992

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

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30 NOV 1992

Senate Standing C'tte for the Scrutiny of Bills

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

Dear Senator Cooney

BANKING LEGISLATION AMENDMENT BILL 1992

I refer to comments contained in the Scrutiny of Bills Alert Digest No. 15 of 1992 (4 November 1992 concerning the Banking Legislation Amendment Bill 1992 (the Bill).

I would be grateful if the following information concerning commencement dates referred to in the Bill is included in a future Report to the Senate.

Comments on the provisions to which subclauses 2(4) and (5) of the Bill relates:

The New South Wales (NSW) Government has introduced into the NSW Parliament the *Commonwealth Powers (State Banking) Bill 1992* (the NSW Bill). The purpose of that legislation is to refer to the Commonwealth the powers of the State Parliament relating to State banking insofar as it applies in relation to the State Bank of NSW (the State Bank). This is to be done in two stages.

Clause 5 of the NSW Bill provides that the matter of State banking insofar as it applies in relation to the State Bank, to the extent that it is not already within the powers of the Commonwealth, is referred to the Commonwealth Parliament for a period that may be determined by Proclamation. Subclause 6(1) of the NSW Bill, however, withholds from that referral any power that would allow the Commonwealth to prevent the State Bank from carrying on banking business without an authorisation from the Commonwealth. Subclause 6(2) of the NSW Bill provides that "subsection 6(1) ceases to have effect on a day to be appointed by Proclamation for the purposes of this section". (A copy of the State Bill is attached.)

After the NSW Bill is enacted, NSW proposes to have formal discussions with the Reserve Bank to ensure that the State Bank is in a position to comply with all the prudential requirements that authorised banks are required to meet. A date will be proclaimed for the purposes of subclause 6(2) of the NSW Bill only when those discussions have been concluded.

As a consequence of that two-tier approach in the proposed State legislation, clause 5 of the Commonwealth Bill makes the relevant provisions of the *Banking Act 1959* applicable to the State Bank in two steps.

Subclause 5(1) provides that certain provisions of the *Banking Act 1959*, but not Division 1 of Part II (Authority to carry on banking business), apply to the State Bank. That subclause is to commence (subclause 2(2)) on a proclaimed date after the State Act comes into force.

Subclause 5(2) makes separate provision for Division 1 of Part II (and section 63) of the Banking Act to apply to the State Bank. This subclause can only, however, come into force after subclause 6(1) of the State Act (the provision restricting the conferral of full powers on the Commonwealth) ceases to have effect.

Subclause 2(4) of the Commonwealth Bill is expressed to give an open-ended discretion to the Governor-General regarding the proclamation of a date for the commencement of subclause 5(2) because, as the State legislation is not yet enacted, no reference can be made to any of its proposed provisions to set the parameters within which the Governor-General could proclaim the commencement date.

Comments on the commencement of Part 3 of the Bill, to which subclause 2(5) relates:

The reason why the commencement date was not specified in the legislation is that it was dependent on a resolution being passed by the annual general meeting of the Commonwealth Bank's (CBA) shareholders to amend the CBA's Articles of Association dealing with payment of dividends. The date of the annual general meeting was not known at the time the Bill was drafted. This amendment to the CBA's Articles of Association is to align the Articles of Association with the amendment to the *Commonwealth Banks Act* contained in Part 3 of the Bill.

The CBA's annual general meeting of shareholders was held on 28 October 1992. The meeting passed a resolution to amend the CBA's Articles of Association. This means that Part 3 of the Bill can commence immediately after the Bill is passed by Parliament. Accordingly, Part 3 of the Bill will be proclaimed as soon as possible after the Bill receives Royal Assent.

I trust that this explanation clarifies the issues raised by the Committee in relation to the Bill.

Yours sincerely

John Dawkins

COMMONWEALTH POWERS (STATE BANKING) BILL 1992

NEW SOUTH WALES

TABLE OF PROVISIONS

COMMONWEALTH POWERS (STATE BANKING) BILL 1992

NEW SOUTH WALES

No. , 1992

A BILL FOR

An Act to refer to the Parliament of the Commonwealth certain matters relating to State Bank Limited.

pco DRAFT BILL b91-87.doc Tue Jul 28 08:28:47 1992

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Commonwealth Powers (State Banking) Act 1992.

Commencement

2. This Act commences on a day to be appointed by proclamation.

Object

3. The object of this Act is to remove the constitutional barrier which prevents the Parliament of the Commonwealth from legislating with respect to State banking carried on within the limits of the State by State Bank Limited or a subsidiary of that company.

Definitions

4. In this Act:

"**Bank**" means State Bank Limited, and includes a subsidiary of that company (within the meaning of the Corporations Law) and also includes that company under any altered name;

"**State banking**" means State banking as referred to in section 51 (xiii) of the Commonwealth Constitution.

Reference of matters relating to the Bank

5. The matter of State banking (but only in so far as it applies in relation to the Bank), to the extent to which it is not otherwise included in the legislative powers of the Parliament of the Commonwealth, is referred to the Parliament of the Commonwealth for a period commencing on the day on which this Act commences and ending on the day fixed, pursuant to section 7, as the day on which the reference under this Act is to terminate, but no longer.

Excluded matters

6. (1) The reference under section 5 does not include any matter so far as it would confer powers to make provision for or with respect to all or any of the following matters:

(a) prohibiting the Bank (whether specifically or as part of a provision of more general application) from carrying on banking business unless it is in possession of an authority (however described) to do so under a law of the Commonwealth;

(b) granting, suspending, cancelling or otherwise dealing with such an authority in relation to the Bank.

(2) Subsection (1) ceases to have effect on a day to be appointed by proclamation for the purposes of this section.

Termination of reference

7. The Governor may, at any time, by proclamation, fix a day as the day on which the reference under this Act is to terminate.

Crown bound

8. This Act binds the Crown.

RECEIVED
1 DEC 1992
Senate Standing Ctte for the Scrutiny of Bills

Minister for Transport and Communications

Parliament House
Canberra ACT 2600
Australia
Tel. (06) 277 7200
Fax. (06) 273 4106

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

1 DEC 1992

Dear Senator Cooney

I refer to your pages 19 and 20 of the Bills Alert Digest number AD16/92. The potential problem of removing the right to review of nominated provisions arising from the renumbering aspect of the Broadcasting Services (Subscription Television Broadcasting) Amendment Act is recognised.

The Transport and Communications Amendment Act (no 3) 1992 amends sections 204 of the Broadcasting Services Act to realign the numbers.

Thank you for your concern.

Yours sincerely

(Bob Collins)

25 NOV 1992

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

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

Dear Senator Cooney

Child Support Legislation Amendment Bill (No.2) 1992

I am responding to the comments made by the Committee concerning the above Bill which was introduced into the Senate on 10 November 1992.

The Committee was concerned about a retrospective application at Clause 2(2). The recovery of overpayments incurred under the Child Support Legislation has been to date the responsibility at law of the Department of Social Security (DSS). In practice however they have not been in a position to monitor and recover amounts and, as a result, there has been an informal arrangement that the Child Support Agency do all of that work. This has been contrary to law and has been drawn to the attention of the Agency by the Commonwealth Ombudsman.

Even before this advice from the Ombudsman the arrangement had been reconsidered at Joint Steering Committee meetings of the operational agencies and a decision taken to recommend an amendment to the law. If the Child Support Registrar is to continue to recover overpayments he must have the legal authority to recover in his own right.

Rather than have some overpayments the responsibility of DSS and all new ones the responsibility of the Registrar it was thought prudent to have all with the Agency. To do so, the proposed amendment is to be taken to have commenced on 1 June 1988, the date the Act started. To do otherwise would mean DSS would have to set up a system to monitor and recover the early overpayments when in fact the Agency already has this in hand and has been dealing with clients on these matters.

As far as the clients are concerned there is no change and there are no adverse effects of the retrospectivity in this particular instance.

The Committee also sought advice concerning Clause 28 as to why this type of delegation is thought to be necessary and to specify the powers that will be delegated to "a person" under Part 6A.

In fact the amendment is to delegate to "a person engaged for the purposes of Part 6A".

The need for this special delegation arises out of the creation of the special child support administrative review process inserted in the legislation by the Child Support Legislation Amendment Act No.13 1992. It was always the intention that this process, which was set up to replace court hearings, would be, as far as practicable, independent from the Child Support Agency itself (other than for the provision of clerical support staff) and it would need to be seen to be independent. Specialists would be engaged by the Registrar for the purposes of Part 6A and to all intents and purposes they are employees of the Registrar, but not APS officers. That is not to say that some persons could in fact be officers of the APS if they were otherwise qualified to perform the review function.

The Child Support Registrar has already engaged a number of specialists as casual employees of the Taxation Office so that he can delegate the necesary powers. All who have been engaged are appropriately qualified to hear applications for review and all are either barristers or solicitors working privately in the field of family law. They do not wish to be employed as APS officers in the long term, nor is it the Government's wish that they should have to be APS employees, but they have for the time being agreed to that arrangement until the delegation power can be amended. In the future there could well be a mix of both "persons engaged for the purposes of Part 6A" and "full or part time APS employees" undertaking reviews of child support assessments.

Under section 149 the Registrar cannot delegate to these specialist persons who are not APS employees and to this extent the inclusion of Part 6A in the Act by Act No.13 in 1992 was deficient by not amending the delegations at that time to reflect the fact non APS people would be engaged for that purpose.

The Registrar will delegate his power to make determinations under Part 6A [s.98C(1)], to persons known locally as "Child Support Review Officers". The power to refuse to make a determination will also be delegated (s.98F and the new s.98EA [Clause 22 in the Bill in question]). The Child Support Registrar will also delegate his power to obtain information under the Act (s.161) if information is not forthcoming and is necessary for the purpose of making or not making a determination.

Lastly, the Committee raised the matter of evidence by averment. I am very much aware of the Constitutional and Legal Affairs Committee's recommendations concerning evidence by averment and note that the report related to criminal proceedings. The proceedings undertaken by the Agency are of course civil rather than criminal and result in a pecuniary fine and not a gaol sentence.

Notwithstanding, the intention behind the proposal to insert such a provision in the child support legislation is one to allow the prosecution to aver fact only and so assist the court and both parties in the carriage of any prosecution where the fact is not or should not be disputed. The outcome of prosecutions can

ultimately be directly connected to the ability of the Agency to collect support for children in single parent families.

The explanatory memorandum states that the Agency through the averment provisions does not wish to deny a person natural justice (nor can it) nor does it want to do more under the proposed provisions than to state in the information that a particular matter is fact, eg, a notice to obtain information issued on a certain date, a final notice issued on a certain date or a summons issued on certain date. These types of matters are procedural and factual and they do not infer any type of conduct or intention by a defendant. It would be abnormal to mix matters of law and fact in an averment in a child support prosecution but in the event they are mixed the proposed provision states the averment is prima facie evidence of the fact only.

Moreover, if a matter that is averred is challenged by the defendant eg, a notice was not received, the court must consider any evidence provided on its merits. It then becomes a matter for the defendant and the prosecution to attempt to "tip the scales" in their own favour. The evidence submitted will determine the outcome and the value of that evidence is not affected by the averment provision.

The motivation for the change is to simplify for the court the process of establishing fact in a prosecution when that fact should not be in question. To the extent that it is not challenged the averment provisions will do that but if a fact is challenged normal processes will apply.

I trust that the above information will clarify for Senators the thrust and intention of the amendments in question.

Yours sincerely

John Dawkins

RECEIVED
1 DEC 1992
Senate Standing Ctte for the Scrutiny of Bills

MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

30 NOV 1992

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

Dear Senator Cooney

I refer to the Committee's report (No. 16) on the Migration (Delayed Visa Applications) Bill 1992, the Migration Laws Amendment Bill (No. 2) of 1992 and the Migration Reform Bill 1992. In relation to your concerns about clause 35 of the Migration Reform Bill 1992, which proposes new subsection 176(3) of the Migration Act 1958, my response is as follows.

I note the Committee's concern that the new power of delegation, as with the existing power of delegation, allows delegations to be made to a "person". I am sympathetic to the view that generally speaking, powers which have the capacity to affect personal rights and liberties should either be exercised by the person to whom they are given or, if they must be delegated, by a class of persons defined either by reference to the holders of a particular office or to the qualifications or attributes of the persons to whom the power is to be delegated.

However, the special nature of the regulation of migration presents circumstances which necessitate a wider delegation power. A very large number of the decisions taken by this Department are taken at overseas posts. An effective means to promote efficiency at overseas posts and reduce costs associated with the overseas operations of this Department has been to delegate various migration powers to officers of other Departments (such as the Department of Foreign Affairs and Trade) or to locally engaged staff, who are not "officers" of this Department or the Commonwealth generally.

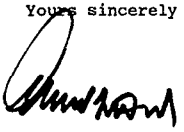
Additionally, with the incidence of unauthorised boat arrivals at various islands being territories of Australia, or in remote areas of mainland Australia it has been necessary to delegate powers under the Migration Act 1958 to members of various law enforcement agencies or other persons in positions of authority (for example, the Administrator of Norfolk Island) in those areas at least until such time as officers of

Department arrive there. The class of person to whom it may be necessary to delegate powers is thus very wide, and has not been readily ascertainable in advance.

The new power under proposed subsection 176(3) to delegate the power to make decisions in respect of health criteria will be exercised in respect of applicants from all over the world. It would not be economically feasible to station a Commonwealth medical officer in every country in which applications are made, and it is practical that the Department be allowed to rely on the services on local doctors or appropriately qualified health care workers to make these decisions. While I appreciate the Committee's concerns, I believe it is appropriate in this instance that the delegation power in respect of these persons not be restricted by references to attributes or qualifications that necessarily vary from country to country.

I hope that this letter adequately addresses your concerns.

Yours sincerely



Gerry Hand

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINETEENTH REPORT

OF

1992

9 DECEMBER 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINETEENTH REPORT OF 1992

The Committee has the honour to present its Nineteenth Report of 1992 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 24:

Corporate Law Reform Bill 1992

Health Insurance (Quality Assurance Confidentiality) Amendment Bill 1992

Tobacco Advertising Prohibition Bill 1992

CORPORATE LAW REFORM BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Attorney-General.

The Bill proposes to amend Corporations Law as it relates to directors' duties, related party transactions, corporate insolvency, stock exchange settlement procedures and miscellaneous other provisions.

Among other things, the Bill implements a number of recommendations contained in the report of the Senate Standing Committee on Legal and Constitutional Affairs, entitled 'Company Directors' Duties', the report of the Australian Law Reform Commission, entitled 'General Insolvency Inquiry' and the report of the Companies and Securities Advisory Committee, entitled 'Corporate Financial Transactions'.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made various comments. The Attorney-General responded to those comments in a letter dated 3 December 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Reversal of the onus of proof
Clause 27 - proposed new subsection 243ZE(6) of the Corporations Law

In Alert Digest No. 16, the Committee noted that clause 27 of the Bill proposes to insert a new part 3.2A into the Corporations Law. That proposed new Part includes a proposed new section 243ZE which, if enacted, would make it an offence for a related party of a public company (as defined by proposed new subsection 243F) to receive a benefit from the public company or a child entity of the public company (as defined by proposed new subsection 243D).

Subsection 243ZE(6) then provides:

> In a proceeding against a person for:
> (a) a contravention of subsection (2); or
> (b) a contravention of subsection (2) because of section 243ZG, 1317DB, 1317DC or 1317DD [which, respectively, deem a) offences by non-legal persons, b) involvement in the commission of an offence, c) offences committed partly within and partly outside the jurisdiction and d) offences in other jurisdictions to be offences for the purposes of proposed Part 9.4B of the Corporations Law];
> it is a defence if it is proved that the person was unaware of a fact or circumstance essential to the contravention of subsection 243H(1) or (2), as the case requires.

The Committee indicated that this is what it would generally regard as a reversal of the onus of proof, as it would ordinarily be incumbent on the prosecution to prove that a person charged was aware of the circumstances essential to the contravention of the relevant subsections.

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

The Attorney-General has responded as follows:

> Clause 17 of the Bill inserts into the Corporations Law a new Part 9.4B, entitled 'Civil and Criminal Consequences of Contravening Civil Penalty Provisions'. The new Part implements the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs in its report on 'Company Directors' Duties' that criminal liability under the companies legislation not apply in the absence of criminality and that civil penalties be provided in the companies legislation for breaches where no criminality is involved.

> In implementing this recommendation, the Government has ensured that related parties of public companies should not be exposed to criminal liability in relation to an alleged contravention of subsection 243ZE(2) unless the prosecution is able to demonstrate beyond reasonable doubt that the contravention of the provision was committed:
>
> (a) knowingly, intentionally or recklessly; and
>
> (b) with a dishonest intent.
>
> Proposed subsection 1317FA(1) has the effect that where a person is charged with an offence against subsection 243ZE(2), the prosecution will be required to show knowledge, intention or recklessness on the part of the defendant in relation to each of the circumstances essential to the contravention of subsections 243H(1) or (2), as the case may be, as well as the presence of a dishonest intent.
>
> As a practical matter, in the context of such a prosecution, the proof of those elements would make the defence provided by subs.243ZE(6) unarguable. That subsection will only have a practical operation in relation to a civil action, where it will not be required to prove the specific mental elements established by subsection 1317FA(1).

The Attorney-General goes on to discuss the role of the proposed subsection in civil cases:

> Where there is no criminality involved, the Bill will enable a Court, on proof that a related party of a public company has contravened subsection 243ZE(2), to make a civil penalty order in relation to the person. The Court will also be able to make an order that the related party pay compensation to the public company.
>
> Applications for a civil penalty or compensation order will be civil matters, and no criminal sanctions will be involved.

Generally, a civil penalty order will only involve the making of a declaration of contravention. Such a declaration will act merely as a trigger for an order that the contravening party pay compensation to the company. Where the breach is a serious one, however, the Court will also be able to levy a pecuniary penalty. Further, where the Court is satisfied that the contravening party is not a fit and proper person to remain a director, it will be able to disqualify the party from managing a corporation.

Consistently with the Senate Committee's recommendation, no element of dishonesty is required to establish a civil penalty contravention on the part of a related party, though persons other than the related party will only be exposed to a civil penalty order if they are shown to be knowingly or recklessly involved in the contravention.

The related parties of a public company will include its directors and other persons (for example, holding companies) whose relationship with the public company is such that they would be well placed to know that a financial benefit received by them came from the public company. I therefore consider that it is appropriate, in relation to a civil action, that a related party seeking to retain the financial benefit and avoid a civil penalty or civil compensation order should bear the onus of showing a lack of awareness of a fact or circumstance essential to the contravention. The position is analogous to that of the innocent buyer of stolen property who, in an action for the recovery of the goods by their original owner, has the onus of showing that the purchase was made in good faith for value and without notice of the defect in the seller's title to the goods.

The Committee thanks the Attorney-General for this detailed and helpful response.

HEALTH INSURANCE (QUALITY ASSURANCE CONFIDENTIALITY) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Health, Housing and Community Services.

The Bill proposes to promote the undertaking of a range of quality assurance activities in relation to the provision of health services, relating to certain funding or payments by the Commonwealth under the *Health Insurance Act 1973* and the *National Health Act 1953*. This will be done by providing for statutory confidentiality and immunity protection in respect of quality assurance activities declared by the Minister by a disallowable instrument, in accordance with specified criteria, as declared quality assurance activities for the purposes of the Bill.

The Bill will amend the *Health Insurance Act 1973*, by including of a new Part VC in relation to quality assurance activities in connection with the provision of applicable health services.

The Bill would prohibit the disclosure of information known solely as a result of declared quality assurance activities to another person and also the disclosure of such information or the production of relevant documents to a court. However, the Bill would permit the Minister to authorise disclosure of information about conduct that may constitute a serious criminal offence. The Bill will not preclude the disclosure of information which does not identify (either expressly or by implication) a particular individual or individuals.

The Bill will provide statutory immunity from civil proceedings to members of committees carrying out declared quality assurance activities. Statutory immunity will only attach to persons who engage in good faith in declared quality assurance activities in circumstances where the rights or interests of other people who provide health services are adversely affected. A committee will be obliged to act within the law of procedural fairness, as the only action which will lie against committee members is an action for breach of the rules.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made no comment on the Bill. However, the Committee has subsequently received a letter from Senator Patterson, which raises a concern about a clause in the Bill. A copy of that letter is attached to this report. Senator Patterson's concern is also discussed below.

Retrospectivity
Clause 3 - proposed new section 106N of the *Health Insurance Act 1973*

Clause 3 of the Bill proposes to insert a new Part VB into the *Health Insurance Act 1973*. The proposed new Part deals with quality assurance confidentiality, which involves the undertaking of certain 'quality assurance activities' (which are intended to evaluate the quality of health services) and the provision of statutory confidentiality and immunity in relation to those activities.

Proposed new section 106M, if enacted, would prohibit (subject to certain exceptions) the disclosure of information that has been acquired solely as a result of a 'quality assurance activity'. The penalty for a breach of this section would be imprisonment for 2 years.

Proposed new section 160N then provides:

> If it appears to the Minister that information that became known after the commencement of this Part solely as a result of a declared quality assurance activity relates to conduct, ***whether the conduct took place before or after that commencement,*** that may have been a serious offence against a law (whether written or unwritten) in force in any State or Territory, the Minister may, by signed writing, authorise the information to be disclosed in a way stated in the instrument of authority for the purposes of law enforcement, a Royal Commission or any other prescribed purpose. [emphasis added]

Senator Patterson has pointed out that this proposed new section involves a degree of retrospectivity, as it would apply in relation to certain conduct committed before or after the commencement of the new section. In support of this point, Senator

Patterson has provided the Committee with copies of submissions from the Australian Medical Association Limited and the Royal Australian College of General Practitioners. Copies of those submissions are also attached to this report.

While the Committee accepts Senator Patterson's point about the retrospective aspect of the proposed new section's operation, the Committee notes that the 'serious offences' referred to would have had to have been serious offences at the time that they were committed and that, in that respect, the provision could not be considered to be *retrospectively making unlawful something which was previously* lawful. The Committee also notes that it may be considered inappropriate that serious offences that come to light as a result of a quality assurance activity should not be able to be prosecuted because of the confidentiality provisions contained in the Bill. However, in making this comment, the Committee seeks the Minister's advice as to whether there is currently (ie apart from the provisions of this Bill) any statutory or other legal prohibition against such information being divulged and used in the way contemplated by proposed new section 160N.

The Committee thanks Senator Patterson for her comments on the Bill.

TOBACCO ADVERTISING PROHIBITION BILL 1992

This Bill was introduced into the Senate on 25 November 1992 by the Minister for Justice.

The Bill proposes to repeal the *Smoking and Tobacco Products Advertising (Prohibition) Act 1989* and to establish a complete ban on tobacco advertising to be phased in over the period 1 July 1993 to 31 December 1995.

The Bill creates an offence for the publication (which includes display) or broadcast of the following forms of advertising for cigarettes and other tobacco products:

- sponsorship of sporting and cultural events (covering both naming of the event and publicity at the event);
- outside billboards or illuminated signs; and
- use of tobacco brand names, logos etc. on non-tobacco products.

Certain forms of advertising will be granted exceptions including;

- words etc. on products, packaging and business documents and on premises of tobacco products' manufacturers;
- anti-smoking campaign messages;
- communications of information within the tobacco industry; and
- ordinary activities of public libraries, tertiary educational institution libraries and libraries of Commonwealth, State or Territory authorities.

Tobacco advertising in imported periodicals will be exempt.

The Committee dealt with the Bill in Alert Digest No. 18 of 1992, in which it made various comments. The Minister for Aged, Family and Health Services responded to those comments in a letter dated 8 December 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Reversal of the onus of proof
Subclauses 2(1) and 22(1), clauses 24 and 25 and subclause 31(3)

In Alert Digest No. 18, the Committee noted that clause 15 of the Bill, if enacted, would prohibit the publication of tobacco advertisements in Australia (subject to certain exceptions) on or after 1 July 1993. The penalty for failing to comply with this prohibition would be a $12 000 fine.

Subclause 21(1) provides:

> It is a defence to a prosecution of a person for an offence against subsection 15(1), (2) or (3) in respect of the publication of a tobacco advertisement if the person proves that:
>
> (a) the publication was under a contract or arrangement entered into before 1 April 1992 for the sponsorship of an event, activity or service; and
>
> (b) if the terms of the contract or arrangement, in so far as they relate to things other than the period to which it applies, were varied on or after 1 April 1992 and before the publication–if the contract or arrangement had not been so varied, the publication could still be said to
>
> have been under the contract or arrangement; and
>
> Note: Even if the period to which the contract or arrangement applies has been varied, paragraphs (c) and (d) must still be satisfied.
>
> (c) if the advertisement was published in connection with a cricket match, or a series of cricket matches–the advertisement was

published before 1 May 1996; and

(d) if paragraph (c) does not apply—the advertisement was published before 1 January 1996; and

(e) before the publication of the advertisement, each of the parties to the contract or arrangement notified the Minister, in writing, of:

(i) the date on which the contract or arrangement was entered into; and

(ii) particulars of the contract or arrangement in so far as it relates to the publication of tobacco advertisements, including the circumstances of publication of the advertisements and the nature of the advertisements.

The Committee suggested this may be considered to involve a reversal of the onus of proof, as the onus would be on a person charged with an offence to prove that they are not guilty, by reason of one of the defences provided for in paragraphs 21(1)(a) to (e).

The Committee noted that subclause 22(2) provides:

> It is a defence to a prosecution of a person for an offence against subsection 15(1), (2) or (3) in respect of the display of a tobacco advertising sign if the person proves that:
>
> (a) the sign was displayed under a contract or arrangement entered into before 1 April 1992; and
>
> (b) if the terms of the contract or arrangement were varied on or after 1 April 1992—if the contract or arrangement had not been so varied, the display of the sign could still be said to have been under the contract or arrangement;
>
> and

(c) the display of the sign was permitted by regulations made for the purposes of subsection (2).

The Committee suggested that this may also be regarded as a reversal of the onus of proof.

The Committee noted that clause 23 of the Bill, if enacted, would create an offence of knowingly or recklessly importing into Australia a publication which has been excluded from the exemption provided by subclause 17(1). Clause 24 then provides:

> It is a defence to a prosecution of a person for an offence against section 23 in respect of the importation of a periodical if the person proves that the periodical was imported for the person's private use.

The Committee suggested that, similarly, this may be regarded as a reversal of the onus of proof.

Clause 25 provides:

> It is a defence to a prosecution of a person for an offence against section 23 in respect of the importation of a periodical if the person proves that the periodical was imported for the purpose of its inclusion in the collection of an exempt library.

This also may be regarded as a reversal of the onus of proof.

Finally, the Committee noted that clause 31 provides:

> (1) If a partnership that is a regulated corporation commits an offence against this Act, that offence is taken to have been committed by each of the partners.
>
> (2) If an unincorporated body that is a regulated corporation commits an offence against this Act, that

offence is taken to have been committed by the controlling officer or controlling officers of the body.

Subclause 31(3) then provides:

> In a prosecution for an offence a partner or controlling officer is so taken to have committed, it is a defence if the partner or controlling officer proves that the partner or controlling officer:
>
> (a) did not aid, abet, counsel or procure the act or omission constituting the offence; and
>
> (b) was not in any way (whether directly or indirectly or by act or omission) knowingly concerned in, or party to, the act or omission constituting the offence.

Subclause 31(4) provides:

> In this section:
> **"controlling officer"**, in relation to an unincorporated body, means a person who has authority to determine, or who has control over:
>
> (a) the general conduct of the affairs of the body; or
>
> (b) the conduct of that part of the affairs of the body in relation to which the act or omission constituting the offence occurred.

The Committee suggested that subclause 31(3) above may be regarded as a reversal of the onus of proof.

The Committee noted that, in the past, it has been prepared to accept the reversing of the onus of proof in this way, on the basis that the matters which constitute the defence are peculiarly within the knowledge of the person charged and that, in all the circumstances of the case, the prosecution could not reasonably be expected to disprove their existence. The Committee was not convinced that this is so in relation to each of the provisions referred to above.

In making this comment, the Committee acknowledged that, in relation to clause 31, the Explanatory Memorandum states:

> This clause provides for the imputing of *mens rea* to partnerships and unincorporated bodies in relation to offences against the Bill. Each partner (or controlling officer of the unincorporated body) is held responsible for offences committed by the partnership (or unincorporated body) unless the partner (or controlling officer) is able to prove that he or she was not knowingly involved, or a party to, the act or omission constituting the offence.
>
> The provisions of this clause are a statement of the liability of partners or controlling officers of unincorporated bodies. It is necessary, therefore, to provide a defence for the 'innocent' partner or controlling officer in order to avoid them being held responsible for something outside their control. The matters to be proved would be peculiarly within the knowledge of the defendant and it would be extremely difficult for the prosecution to prove the partner or controlling officer claiming to be 'innocent' was knowingly involved. Therefore, the onus of proof has been placed on the partner or controlling officer.

Nevertheless, the Committee drew attention to the fact that the clause involves a reversal of the onus of proof.

The Committee drew Senators' attention to subclauses 21(1) and 22(1), clauses 24 and 25 and subclause 31(3), as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> As indicated in the Explanatory Memorandum (in particular in the general outline), this reversal is intended. Where it occurs, the information required to be proved (eg particulars of a contract or knowledge of an action) concerns matters peculiarly within the knowledge of the

> defendant. Thus, the information could be relatively simply presented by the defendant but it would be difficult and costly for the prosecution to prove guilt beyond reasonable doubt.

The Committee thanks the Minister for this response, which essentially re-states the reasons given in the Explanatory Memorandum for reversing the onus of proof in the relevant provisions. On their face, these reasons seem quite acceptable. However, the Committee is concerned that, on the basis of similar reasons, there is an increasing tendency to reverse the onus in relation to such provisions. While the justification given, in most cases, appears reasonable, the Committee notes that the same justification is equally applicable in relation to murder and other serious offences. The expanding use of the reversal of onus in legislation is, therefore, a matter of great concern to the Committee.

General comment

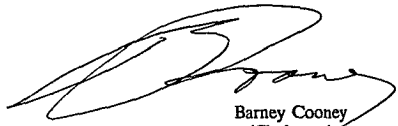
In Alert Digest No. 18, the Committee noted that subclause 31(2) refers to offences by 'an unincorporated body that is a regulated corporation'. The Committee indicated that it would appreciate the Minister's further advice as to the types of bodies that would come within this definition.

The Minister has responded as follows:

> The second issue is a request for information about the types of bodies that could be described as 'an unincorporated body that is a regulated corporation'. These bodies are unincorporated bodies established by a law of the Commonwealth. A current example is the council governing the grain industry, established as a Primary Industry Council.
>
> Subclause 31(2) was included for completeness. Although current bodies established by a law of the Commonwealth which may be involved in tobacco advertising (eg the Special Broadcasting Service) are generally incorporated,

bodies established in the future may fall within the definition and their activities should be subject to the Bill, when enacted.

The Committee thanks the Minister for this response.



Barney Cooney
(Chairman)

Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

- 3 DEC 1992

92063043/107930

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

Dear Senator Cooney

I refer to the Alert Digest No. 16 of 1992 issued by the Senate Standing Committee for the Scrutiny of Bills, and in particular to the comments made by the Committee at pages 30-31 of the Digest concerning the Corporate Law Reform Bill 1992.

The Committee's concerns

The Committee has indicated that proposed subsection 243ZE(6) of the Corporations Law is what the Committee would generally regard as a reversal of the onus of proof, and that it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

As noted by the Committee, subsection 243ZE(6) provides that in proceedings against a related party of a public company for a contravention of subsection 243ZE(2), it is a defence if it is proved that the related party was "unaware of a fact or circumstance essential to the contravention" of proposed subsections 243H(1) or (2), as the case requires.

Summary of response

For reasons set out below, the defence in subsection 243ZE(6) is of practical relevance only to civil actions. I therefore consider that it does not trespass unduly on personal rights and liberties.

Reasons

Clause 17 of the Bill inserts into the Corporations Law a new Part 9.4B, entitled "Civil and Criminal Consequences of Contravening Civil Penalty Provisions". The new Part implements the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs in its report on "Company Directors' Duties" that criminal liability under the companies legislation not apply in the absence of criminality and that civil penalties be provided in the companies legislation for breaches where no criminality is involved.

In implementing this recommendation, the Government has ensured that related parties of public companies should not be exposed to criminal liability in relation to an alleged contravention of subsection 243ZE(2) unless the prosecution is able to demonstrate beyond reasonable doubt that the contravention of the provision was committed:

(a) knowingly, intentionally or recklessly; and

(b) with a dishonest intent.

Proposed subsection 1317FA(1) has the effect that where a person is charged with an offence against subsection 243ZE(2), the prosecution will be required to show knowledge, intention or recklessness on the part of the defendant in relation to each of the circumstances essential to the contravention of subsections 243H(1) or (2), as the case may be, as well as the presence of a dishonest intent.

As a practical matter, in the context of such a prosecution, the proof of those elements would make the defence provided by subs.243ZE(6) unarguable. That subsection will only have a practical operation in relation to a civil action, where it will not be required to prove the specific mental elements established by subsection 1317FA(1).

Role of subsection in civil cases

Where there is no criminality involved, the Bill will enable a Court, on proof that a related party of a public company has contravened subsection 243ZE(2), to make a civil penalty order in relation to the person. The Court will also be able to make an order that the related party pay compensation to the public company.

Applications for a civil penalty or compensation order will be civil matters, and no criminal sanctions will be involved.

Generally, a civil penalty order will only involve the making of a declaration of contravention. Such a declaration will act merely as a trigger for an order that the contravening party pay compensation to the company. Where the breach is a serious one, however, the Court will also be able to levy a pecuniary penalty. Further, where the Court is satisfied that the contravening party is not a fit and proper person to remain a director, it will be able to disqualify the party from managing a corporation.

Consistently with the Senate Committee's recommendation, no element of dishonesty is required to establish a civil penalty contravention on the part of a related party, though persons other than the related party will only be exposed to a civil penalty order if they are shown to be knowingly or recklessly involved in the contravention.

The related parties of a public company will include its directors and other persons (for example, holding companies) whose relationship with the public company is such that they would be well placed to know that a financial benefit received by them came from the public company. I therefore consider that it is appropriate, in relation to a civil action, that a related party seeking to retain the financial benefit and avoid a civil penalty or civil compensation order should bear the onus of showing a lack of

awareness of a fact or circumstance essential to the contravention. The position is analogous to that of the innocent buyer of stolen property who, in an action for the recovery of the goods by their original owner, has the onus of showing that the purchase was made in good faith for value and without notice of the defect in the seller's title to the goods.

Yours sincerely

MICHAEL DUFFY

PARLIAMENT OF AUSTRALIA · THE SENATE

SENATOR KAY PATTERSON
SENATOR FOR VICTORIA

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for the Scrutiny of Bills

3 December 1992

Mr Stephen Argument
Scrutiny of Bills Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Argument

I would like to bring to the Committee's attention an element of retrospectivity in clause 106N of the Health Insurance (Quality Assurance Confidentiality) Amendment Bill 1992.

I appreciate that the Committee has already provided a report on this Bill but note that it has not commented on this aspect of the clause 106N.

Accordingly, if the matter is within the Committee's province, I would request that the Committee examine and report on the operation of the clause.

I have also enclosed for the Committee's consideration a copy of some comments made by the Australian Medical Association Limited and the Royal Australian College of General Practitioners on the operation of this clause.

Yours faithfully

Kay Patterson

(Dr) Kay Patterson
Liberal Senator for Victoria

KP:vm

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HEALTH INSURANCE (QUALITY ASSURANCE CONFIDENTIALITY) AMENDMENT BILL

The Federal Council of the AMA at its meeting on October 31, 1992 moved the following motions:

That Federal Council in accordance with policies 267-271, 275 and 277 reiterates its commitment to the principles of quality assurance but emphsises that quality assurance programs can only be successful if all information furnished to quality assurance committees is assured of absolute privilege. With regard to the Health Insurance (Quality Assurance Confidentiality) Bill (27.10.92), Federal Council

i) **rejects clause 106N which allows the Minister to retrospectivley withdraw privilege**

ii) **believes that clause 106Q should be ammended so that only genuine quality assurance activities are immune from suit and not other activities such as accreditation and credentialling**

That Federal Council rejects draft Health Insurance (Quality Assurance Confidentiality) Bill (27.10.92)

Document 794/4/92, which comments on the Bill is attached.

information reinforced and slightly supplemented by the quality assurance activity. Arguably, in that case he could not be forced to disclose the part of the information which he had learned solely as a result of the activity, but he could be forced to disclose the other information.

The proposed section 106M(1) is presumably intended to prevent a person who participated in a quality assurance activity from disclosing information to a court voluntarily. However, that is not absolutely clear, and is another possible gap in the protective framework. As mentioned above, that subsection does not impose any prohibition other than on a person who was engaged in the quality assurance activity. It does not extend to a person who in some other way has become aware of the information.

Disclosure Authorised by Minister

The proposed section 106N gives the Minister a broad discretion to override the prohibition on disclosure of information coming out of a declared quality assurance activity, and to authorise such disclosure where the peer review inquiry or other quality assurance activity" relates to conduct ... that may have been an indictable offence". An indictable offence is simply a more serious offence of the sort heard in Supreme Courts or District or County Courts as opposed to Magistrates or Local Courts.

The medical profession deals with life and death issues daily. In respect of any surgical death, for example, it would be possible to argue that the conduct of those involved in the surgery "may have involved an indictable offence" e.g. may have involved negligence amounting to manslaughter or other serious criminal offence.

Also objectionable about the proposed section 106N is that the disclosure which the Minister can authorise is not limited, for example, to prosecuting authorities. The Minister may authorise the information to be disclosed "in a way stated in the instrument of authority". He could, for example, authorise its disclosure by tabling in the Parliament, to be used in civil court proceedings, or by publication in a newspaper.

Arguably, there should be an absolute embargo on statements made in the context of a peer review being used against the person who made the statement, either in civil or criminal proceedings. Otherwise, candour in peer reviews is likely to be greatly inhibited, with consequent adverse impact on their usefulness.

Peer Review

Arguably the Bill should be amended to require that, to be declared, quality assurance activities must be genuine peer reviews; and that they must be initiated by practitioners, rather than being imposed on practitioners, for example by Commonwealth, State or Territory governments authorities. That latter amendment would involve narrowing the proposed section 106L 3 a

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29 November 1992

The Honorable Brian Howe, MP
Deputy Prime Minister and
Minister for Health, Housing & Community Services
Parliament House
CANBERRA ACT 2600

Dear Mr Howe,

The Council of the RACGP has today registered concern about one section of the proposed Health Insurance (Quality Assurance Confidentiality) Amendment Act 1992. Council resolved -

> **'RACGP Council is concerned that Section 106N of the proposed Health Insurance (Quality Assurance Confidentiality) Amendment Act 1992 may impair the purpose of the Act.'**

This section of the Act allows legal access to "immune" information where the Minister decides the information may relate to a "serious offence".

In explanation - Council is of the opinion that total "immunity" of information granted under the Act is essential for the purpose of the Act. Quality Assurance mechanisms are designed to allow the most comprehensive enquiry to improve the performance of health professionals.

Practitioners need to be able to explore issues thoroughly. They need to speculate and to express opinions and suspicions. Where this involves people (identifiable practitioners or cases), this exploratory examination can be seriously impeded if there is a possibility of use of the material in litigation. On the other hand, the processes of Quality Control - to address adverse outcomes - still remain. Records and processes are available to monitor performance and to allow for correction through litigation/prosecution in the event of adverse outcomes.

The capacity to explore all options and opinions is needed in quality assurance to attain best performance. Quality Assurance is concerned with the information contained in records and committee proceedings used for Quality Control. However, Quality Assurance extends beyond Quality Control into areas of marked uncertainty which require a much wider examination to ensure best performance and outcome.

As we believe the Bill is already with the Senate, we ask that you consider our concerns urgently. I am prepared to meet with you at short notice if this would be of assistance in clarifying this important issue. I have sent a copy of this letter to the President of the Senate.

Yours faithfully,

Peter Stone
President

Hon. Peter Staples MP
Minister for Aged, Family and Health Services

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Portfolio of
Health, Housing
and Community Services

- 8 DEC 1992

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

Dear Senator Cooney

TOBACCO ADVERTISING PROHIBITION BILL 1992

I am writing in response to issues raised by the Scrutiny of Bills Committee in connection with the Tobacco Advertising Prohibition Bill 1992 as described in alert digest number AD18/92.

The first issue concerns the reversal of onus of proof contained in some clauses of the Bill. As indicated in the Explanatory Memorandum (in particular in the general outline), this reversal is intended. Where it occurs, the information required to be proved (eg particulars of a contract or knowledge of an action) concerns matters peculiarly within the knowledge of the defendant. Thus, the information could be relatively simply presented by the defendant but it would be difficult and costly for the prosecution to prove guilt beyond reasonable doubt.

The second issue is a request for information about the types of bodies that could be described as 'an unincorporated body that is a regulated corporation'. These bodies are unincorporated bodies established by a law of the Commonwealth. A current example is the council governing the grain industry, established as a Primary Industry Council.

Subclause 31(2) was included for completeness. Although current bodies established by a law of the Commonwealth which may be involved in tobacco advertising (eg the Special Broadcasting Service) are generally incorporated, bodies established in the future may fall within the definition and their activities should be subject to the Bill, when enacted.

I hope this information is of assistance to the Committee in its further deliberations.

Yours sincerely

Peter Staples

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWENTIETH REPORT

OF

1992

16 DECEMBER 1992

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWENTIETH REPORT OF 1992

The Committee has the honour to present its Twentieth Report of 1992 to the Senate.

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

Aboriginal Councils and Associations Amendment Bill 1992

Trade Practices Amendment Act 1992

ABORIGINAL COUNCILS AND ASSOCIATIONS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Aboriginal and Torres Strait Islander Affairs.

The Bill proposes to amend the *Aboriginal Councils and Associations Act 1976,* to provide a mechanism whereby Aboriginal and Torres Strait Islander groups may incorporate as Councils or Associations in a relatively uncomplicated and inexpensive manner. Associations can be formed for a wide variety of purposes including business enterprises. No Councils have been incorporated to date, however, the Councils provisions are intended to provide for community services for Aboriginals and Torres Strait Islanders living within specific Council areas. As incorporated bodies, these groups are eligible for funding from the Aboriginal and Torres Strait Islander Commission and from other Government agencies.

Since the Act came into operation in 1978, there has been considerable non compliance with the accountability provisions of the Act. The proposed amendments are directed at increasing the level of accountability and facilitating oversight of the affairs of incorporated bodies.

The Committee dealt with the Bill in Alert Digest No. 16 of 1992, in which it made various comments. The Minister for Aboriginal and Torres Strait Islander Affairs responded to those comments in a letter dated 14 December 1992. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Delegation of power to 'a person'
Clause 4 - proposed amendment to section 9 of the *Aboriginal Councils and Associations Act 1976*

In Alert Digest No. 16, the Committee noted that clause 4 of the Bill proposed to amend section 9 of the *Aboriginal Councils and Associations Act 1976.* That section currently provides:

Delegation by Registrar

9.(1) The Registrar may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to a Deputy Registrar any of his powers under this Act, other than this power of delegation.

(2) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Registrar.

(3) A delegation under this section does not prevent the exercise of a power by the Registrar.

A Deputy Registrar, like a Registrar, is a person appointed by the Minister under section 4 of the Act.

Clause 4 of the Bill proposes to delete the reference to 'Deputy Registrar' in subsection 9(1) and replace it with 'person'. If enacted, this would allow the Registrar to delegate his or her powers under the Act to 'a person'.

In Alert Digest No. 16, the Committee noted that it had consistently drawn attention to such provisions, on the basis that the authority to delegate powers in this way should be limited to, say, the holders of a particular office (as they are in the original section).

By way of explanation for the proposed amendment, the Explanatory Memorandum to the Bill simply states:

> The reason for this extension is because of the remote geographical location of many Aboriginal locations.

The Committee suggested that, of itself, this explanation would not appear to be a compelling reason for amending the relevant provision of the Act, noting that, presumably, the remoteness of the locations was a factor taken into account when the original provision was passed. The Committee suggested that if experience had shown the original provision to be impractical, it was not the answer simply

to amend the Act to allow the Registrar to delegate any or all of his or her powers under the Act to 'a person'.

In making this comment, the Committee indicated its presumption that the Minister had some idea of the sorts of persons to whom the power is likely to be delegated and suggested, therefore, that (if the amendment really was necessary) there should be some attempt to identify the relevant classes of persons in the legislation.

The Committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

The Minister has responded as follows:

> I agree that as a general proposition there should be appropriate limits placed on powers of delegation of statutory powers. I note the Committee's comment about remoteness being a consideration when the delegation provision was first made. However the remoteness of the locations in which the powers need to be exercised is, in the context of the Bill, now a more compelling consideration than was the case when the original delegation was passed. This is because the Registrar's powers in relation to organisations, many of which are in remote locations, have been considerably enhanced. These enhanced powers include investigation, inspection and arbitration.

The Minister goes on to say:

> The Committee is correct in assuming that I have some idea of the persons to whom the power is likely to be delegated. I would expect that, where possible, government employees, employees of statutory bodies (for example Land Councils) and professional people would be delegates. Again, however, because of the remoteness of many organisations I do not think it is

> practicable to identify all of the classes of persons who may be delegates. For example, a delegation might be given to a respected Aboriginal community leader who possessed greater intimacy with local issues than a Canberra based Registrar. Any delegation would be a single purpose delegation, limited in scope and for a specific duration.

The Committee thanks the Minister for this response and notes his assurance that the delegations will be limited, both in scope and duration.

Reversal of the onus of proof
Clauses 5 and 14 - proposed new subsections 38(7) and (8) and 59(7) and (8) of the *Aboriginal Councils and Associations Act 1976*

In Alert Digest No. 16, the Committee noted that clause 5 of the Bill proposed to amend section 38 of the Aboriginal Councils and Associations Act. That section provides for the keeping of records and the preparation of balance sheets and income and expenditure statements in relation to Aboriginal Councils.

Clause 5 of the Bill proposes to omit subsections 38(2), (3) and (4) and to replace them with a series of new subsections which, if enacted, would impose a more onerous reporting regime on Councils. Proposed new subsection 38(7) provides:

> If the Council fails, without reasonable excuse, to comply with a provision of this section, each councillor is guilty of an offence punishable, on conviction, by a fine not exceeding $200.

Proposed new subsection (8) then provides:

> In a prosecution of a person for an offence against subsection (7) arising out of a contravention of a provision of this section, it is a defence if the person proves that he or she:
>
> (a) did not aid, abet, counsel or procure the contravention; and

(b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention.

The Committee indicated that proposed new subsection (8) involved what it would generally consider to be a reversal of the onus of proof as it would ordinarily be incumbent on the prosecution to prove that each individual member of a Council was knowingly involved in the commission of an offence against the Act. However, pursuant to proposed new subsection 38(8), it would be incumbent on a member of a Council in relation to which a charge pursuant to the proposed new section 38 has been laid to prove that they were not in any way involved with the commission of the offence. Consequently, in the Committee's opinion, this involved a reversal of the onus of proof.

The Committee noted that, similarly, section 59 of the Aboriginal Councils and Associations Act sets out certain reporting obligations in relation to Incorporated Aboriginal Associations. Clause 14 of the Bill proposes to make a series of amendments to those obligations, including the insertion of proposed new subsections 59(7) and (8), which provide:

(7) If the Governing Committee fails, without reasonable excuse, to comply with a provision of this section, each member of the Committee is guilty of an offence punishable, on conviction, by a fine not exceeding $200.

(8) In a prosecution of a person for an offence against subsection (7) arising out of a contravention of a provision of this section, it is a defence if the person proves that the person:

(a) did not aid, abet, counsel or procure the contravention; and

(b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention.

The Committee indicated that, as with proposed new subsection 38(8) above, proposed new subsection 59(8) contained what it would generally consider to be a reversal of the onus of proof.

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

The Minister has responded as follows:

> At the outset I should explain that the policy objective of clause 5 of the bill is to make it more likely that the financial reporting provisions are complied with so that the executives of the organisations are more accountable for the manner in which they handle finances.
>
> In light of the need of that policy objective to make each member of the Council or the Governing Committee responsible for the accounts, records and financial statements of the Council or Committee respectively, it was necessary to provide a defence for the member who was not involved in the business of the body at the relevant time, for instance through absence from the country or illness in hospital.

The Minister goes on to say:

> Further, the provisions relate to financial obligations of the bodies concerned and the liability imposed is likened to the responsibility of partners for the debts and financial obligations of the partnership. In this case this kind of obligation is imposed by statute and it is therefore necessary to provide a statutory defence for the 'innocent' member in order to rebut the presumption created. The matters which would go to proof of the defence, on the balance of probabilities, are matters which will be peculiarly within the knowledge of the defendant as well as being difficult and costly for the prosecution to negative beyond

> reasonable doubt. The reversed onus is in my view therefore justified in this case. I understand that this approach is consistent with the principles normally applied by the Senate Committee.
>
> There are a number of precedents for this kind of defence in other areas where financial obligations are imposed. I refer the Committee to sections 165 and 166 of the *Fringe Benefits Tax Assessment Act 1986* and subsections 11A(5) and 11B(6) of the *Training Guarantee (Administration) Act 1990.*

The Minister concludes by saying:

> Finally I draw the Committee's attention to the relatively low level of penalty attaching to these offences, the regulatory nature of the obligations created and the fact that the defences provide an excuse for what might otherwise be a situation of strict liability made necessary by the policy objective I have referred to above.

The Committee thanks the Minister for this response.

Abrogation of the privilege against self-incrimination
Clauses 5, 16, 21 - proposed new subsections 39(7), 60(7) and 68(3) of the *Aboriginal Councils and Associations Act 1976*

In Alert Digest No. 16, the Committee noted that clause 5 of the Bill proposed to repeal section 39 of the Aboriginal Councils and Associations Act and to replace it with a proposed new section 39. The Committee noted that the existing section 39 sets out the Registrar's powers in relation to the audit of the records and balance sheets of Aboriginal Councils. The proposed new section 39 sets out a more general power to examine the 'documents' of an Aboriginal Council. Proposed new subsection 39(4), if enacted, would allow a person authorised by the Registrar to

> require any person to answer such questions, and

> produce such documents in the possession of the person, or to which the person has access, as the authorised person considers necessary for the purposes of this section.

Proposed new subsection 39(5) provides for a fine of up to $200 for failing to comply with a requirement under proposed new subsection (4). Proposed new subsection (6) provides for a fine of up to $1 500 for making a false or misleading statement in relation to a requirement to answer questions, etc under proposed new subsection (4).

Proposed new subsection 39(7) provides:

> A person is not excused from answering a question or producing a document when required to do so under subsection (4) on the ground that the answer to the question, or the production of the document, might tend to incriminate the person or make the person liable to a penalty, but the answer, the production of the document, or anything obtained as a direct or indirect consequence of the answer or the production, is not admissible in evidence against the person in any proceedings, other than proceedings for an offence against this section.

The Committee noted that this proposed new subsection contained an abrogation of the privilege against self-incrimination. However, as the use (direct or indirect) of any information obtained in this manner would be limited to proceedings under the provision in question, the proposed new subsection is in a form which the Committee had previously been prepared to accept.

The Committee noted that clause 16 of the Bill proposed to repeal and replace section 60 of the Aboriginal Councils and Associations Act. Proposed new section 60, if enacted, would impose similar obligations in relation to the examination of documents of Incorporated Aboriginal Associations. The Committee noted that proposed new subsection 60(7) would, similarly, abrogate the privilege against self-incrimination in relation to a requirement that a person answer questions or

produce documents. However, as with proposed new subsection 39(7), it is in a form which the Committee had previously been prepared to accept.

The Committee noted that clause 21 of the Bill, if enacted, would repeal and replace section 68 of the Aboriginal Councils and Associations Act. Both the existing section and the proposed new section deal with investigations of Aboriginal Corporations by the Registrar. Proposed new subsection 68(2) provides:

> For the purposes of [an] investigation, the Registrar may, by notice in writing given to a person whom the Registrar believes to have some knowledge of the affairs of the corporation, require that person to attend before the Registrar at a time and place specified in the notice and there to answer such questions, and produce such documents in the possession of the person, or to which *the person has access, as the Registrar considers* necessary.

Proposed new subsection 68(3) then provides:

> A person is not excused from answering a question or producing a document when required to do so under subsection (4) on the ground that the answer to the question, or the production of the document, might tend to incriminate the person or make the person liable to a penalty, but the answer, the production of the document, or anything obtained as a direct or indirect consequence of the answer or the production, is not admissible in evidence against the person in any proceedings, other than proceedings for an offence against subsection 69(2).

The Committee noted that there is no subsection (4) and that, presumably, the proposed new subsection is actually referring to subsection (1). That being the case, the Committee noted that, while proposed new subsection 68(3) involves an abrogation of the privilege against self-incrimination, it is in a form which it had previously been prepared to accept. Accordingly, the Committee made no further comment on proposed new subsections 39(7), 60(7) and 68(3).

The Minister has responded as follows:

> I note the Committee's comments on clauses 5, 16 and 21 and the Committee's further comments that these clauses are in a form which the Committee has previously been prepared to accept.
>
> In my view these clauses achieve an appropriate balance between, on the one hand, increased levels of accountability on the part of Aboriginal organisations and the need to protect personal rights and liberties on the other.

As to the apparent drafting error in proposed new subsection 68(3), the Minister states:

> It is noted that clause 21 of the Bill contains an error and the matter will be taken up with the drafter.

The Committee thanks the Minister for this response and for his assistance with the Bill.

The Bill for this Act was introduced into the Senate on 26 May 1992 by the Minister for Justice.

The Act introduces into Australia a strict product liability regime, based on the 1985 European Community Product Liability Directive, by way of amendments to the *Trade Practices Act 1974*. It provides a regime of strict liability, whereby a person who is injured or suffers property damage as a result of a defective product, has a right to compensation against the manufacturer, without the need to prove negligence on the part of the manufacturer.

The Committee dealt with the Bill in Alert Digest No. 8 of 1992, in which it made various comments. The Minister for Consumer Affairs responded to those comments in a letter dated 10 July 1992. That letter was dealt with in the Committee's Tenth Report of 1992.

A further response has now been received from the Office of the Minister for Consumer Affairs dated 3 December 1992. A copy of the letter is attached to this report for the information of Senators. Relevant parts of the response are also discussed below.

Survival of liability actions
Clause 4 - proposed new section 75AH of the *Trade Practices Act 1974*

In Alert Digest No. 8, the Committee noted that clause 4 of the (then) Bill proposed to insert a new Part VA into the *Trade Practices Act 1974*. That new Part deals with the liability of manufacturers and importers for defective goods. New section 75AH provides:

> **Survival of liability actions**
> 75AH. A law of a State or Territory about the survival of causes of action vested in persons who die

applies to actions under section 75AD, 75AE, 75AF or 75AG.

The Committee noted that the Trade Practices Act contained no similar provision in relation to the survival of liability in relation to other actions under that Act. The Committee indicated that it would, therefore, appreciate the Attorney-General's advice as to the effect of the amendment on the rest of the Trade Practices Act. The Committee indicated that, in particular, it would appreciate the Attorney-General's advice as to whether the insertion of the proposed new section would mean that, on the basis of the legal doctrine of *expressio unius personae vel rei, est exclusio alterius* (ie the express reference to survival of liability in respect of the actions nominated operates to exclude survival of liability in respect of all other actions under the Act) would operate.

The Minister for Consumer Affairs responded as follows:

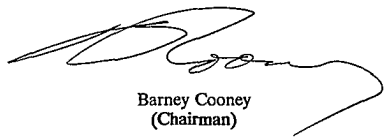
> The question of the application of provisions in State and Territory laws to Federal actions is a complex one. To my knowledge, the issue of the application of State and Territory survivorship provisions to actions under the Trade Practices Act 1974 ("the Act") has never arisen. This is probably because the greatest usage of the legislation has been by corporate bodies and issues of survivorship of rights upon the death of a plaintiff have therefore not arisen. Of course, under the new regime, the question of the application of these State and Territory laws is more likely to be of importance.

The Minister went on to say:

> As you will probably be aware, the Bill has now been passed by both the Senate and the House of Representatives. In both Chambers, the Government has indicated its intention that section 75AH should not disturb any legal rights which may already exist in this area. That notwithstanding, should the government conclude that this provision may have an effect on existing rights, appropriate legislative amendments will be made.

In the Tenth Report, the Committee thanked the Minister for this response and for her assurance that appropriate amendments would be made if the provision was found to affect any existing rights. The further response from the Minister's office attaches an advice from the Attorney-General's Department which indicates that (in the opinion of the Department) the provisions will not affect existing rights. A copy of the advice is also attached to this report.

The Committee thanks the Minister for her further assistance with this legislation.



Barney Cooney
(Chairman)

MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
Minister Assisting the Prime Minister for Aboriginal Reconciliation

THE HON ROBERT TICKNER MP

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

Dear Senator Cooney

I refer to the Scrutiny of Bills Alert Digest No 16 of 1992 (11 November 1992) and to the letter from the Secretary of your Committee dated 12 November 1992 concerning the Aboriginal Councils and Associations Amendment Bill 1992 ("the Bill").

I wish to offer the following comments upon the comments made in that letter.

Delegation of power to 'a person'

I agree that as a general proposition there should be appropriate limits placed on powers of delegation of statutory powers. I note the Committee's comment about remoteness being a consideration when the delegation provision was first made. However the remoteness of the locations in which the powers need to be exercised is, in the context of the Bill, now a more compelling consideration than was the case when the original delegation was passed. This is because the Registrar's powers in relation to organisations, many of which are in remote locations, have been considerably enhanced. These enhanced powers include investigation, inspection and arbitration.

The Committee is correct in assuming that I have some idea of the persons to whom the power is likely to be delegated. I would expect that, where possible, government employees, employees of statutory bodies (for example Land Councils) and professional people would be delegates. Again, however, because of the remoteness of many organisations I do not think it is practicable to identify all of the classes of persons who may be delegates. For example, a delegation might be given to a respected Aboriginal community leader who possessed greater intimacy with local issues than a Canberra based Registrar. Any delegation would be a single purpose delegation, limited in scope and for a specific duration.

Reversal of the onus of proof

At the outset I should explain that the policy objective of clause 5 of the bill is to make it more likely that the financial reporting provisions are complied with so that the executives of the organisations are more accountable for the manner in which they handle finances.

In light of the need of that policy objective to make each member of the Council or the Governing Committee responsible for the accounts, records and financial statements of the Council or Committee respectively, it was necessary to provide a defence for the member who was not involved in the business of the body at the relevant time, for instance through absence from the country or illness in hospital.

Further, the provisions relate to financial obligations of the bodies concerned and the liability imposed is likened to the responsibility of partners for the debts and financial obligations of the partnership. In this case this kind of obligation is imposed by statute and it is therefore necessary to provide a statutory defence for the 'innocent' member in order to rebut the presumption created. The matters which would go to proof of the defence, on the balance of probabilities, are matters which will be peculiarly within the knowledge of the defendant as well as being difficult and costly for the prosecution to negative beyond reasonable doubt. The reversed onus is in my view therefore justified in this case. I understand that this approach is consistent with the principles normally applied by the Senate Committee.

There are a number of precedents for this kind of defence in other areas where financial obligations are imposed. I refer the Committee to sections 165 and 166 of the Fringe Benefits Tax Assessment Act 1986 and subsections 11A(5) and 11B(6) of the Training Guarantee (Administration) Act 1990.

Finally I draw the Committee's attention to the relatively low level of penalty attaching to these offences, the regulatory nature of the obligations created and the fact that the defences provide an excuse for what might otherwise be a situation of strict liability made necessary by the policy objective I have referred to above.

Abrogation of the privilege against self-incrimination

I note the Committee's comments on clauses 5, 16 and 21 and the Committee's further comments that these clauses are in a form which the Committee has previously been prepared to accept.

In my view these clauses achieve an appropriate balance between, on the one hand, increased levels of accountability on the part of Aboriginal organisations and the need to protect personal rights and liberties on the other.

Amendment

It is noted that clause 21 of the Bill contains an error and the matter will be taken up with the drafter.

I trust the above information will meet the Committee's concerns.

Yours sincerely

ROBERT TICKNER

Office of the Minister for Consumer Affairs
The Hon. Jeannette McHugh MP

105055:jm

- 3 DEC 1992

RECEIVED
9 DEC 1992
Senate Standing C'tee for the Scrutiny of Bills

Mr Stephen Argument
Secretary
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

TRADE PRACTICES AMENDMENT ACT 1992

I refer to our previous correspondence concerning the Committee's comments on the above Act.

I now enclose for your information a copy of advice received from the Attorney-General's Department. In the light of this advice, Departmental Officers consider that there is no need to amend the Act.

Delia Rickard
Senior Adviser

Parliament House, Canberra, A.C.T. 2600 Tel. (06) 277 7790 Fax (06) 273 4075

ATTORNEY-GENERAL'S DEPARTMENT

Office of General Counsel

OGC 92/46088

Mr Ray Temperley
Director
Consumer Legislation
Federal Bureau of Consumer Affairs

TRADE PRACTICES AMENDMENT ACT 1992 ('THE AMENDMENT ACT'), S.4; TRADE PRACTICES ACT 1974 ('THE TRADE PRACTICES ACT'), SS.75AD(F) & 75AH - IMPACT ON ANY PRE-EXISTING RIGHTS CONFERRED IN RESPECT OF THE TRADE PRACTICES ACT BY STATE AND TERRITORY FATAL INJURIES LAW AND THOSE STATE AND TERRITORY LAWS WHICH GOVERN THE SURVIVAL OF RIGHTS OF ACTION VESTED IN PERSONS WHO DIE ('STATE AND TERRITORY SURVIVAL LAW')

I refer to your minute of 11 November 1992 concerning the above matter.

Background

2. On 9 July 1992 s.4 of the Amendment Act inserted Part VA (ss.75AA - 75AS) into the Trade Practices Act. This new Part has established in Australia a strict product liability regime based on the 1985 European Community Product Liability Directive. Broadly speaking, it provides a regime of strict liability, whereby a person who is injured or suffers property damage as a result of a defective product manufactured by a corporation ('the manufacturer') has a right to compensation against the manufacturer without the need to prove negligence on the part of the manufacturer.

3. Two significant provisions within Part VA are ss.75AD(f) and 75AH.

4. Section 75AD gives an individual the right to be compensated by the manufacturer for loss suffered by the individual as a result of injury caused by defective goods.

5. Where an individual dies because of a 'wrongful act', State and Territory laws provide that certain dependents of the deceased person may claim for specified classes of damages through the administrator or executor of the estate. Section 75AD(f) provides that, where an individual dies as a result of injuries caused by defective goods, these State and Territory laws will apply to an action taken under Part VA.

6. Section 75AD(f) operates in conjunction with s.75AH. It provides that State and Territory survival law applies to actions brought under Part VA.

7. I note that on 23 June 1992 this Office advised the Office of Parliamentary Counsel

that it was not, strictly speaking, necessary to include provisions like ss.75AD(f) and 75AH in the Trade Practices Act in order to attract the relevant State and Territory law because, if the Act did not expressly provide for the application of the State or Territory law in question, s.79 of the *Judiciary Act 1903* would operate to 'pick up' that law and apply it to proceedings as Federal law. Notwithstanding this, it was decided to include ss.75AD(f) and 75AH in the Act.

8. The full text of ss.75AD and 75AH is as follows:

'75AD. If:
(a) a corporation, in trade or commerce, supplies goods manufactured by it; and
(b) they have a defect; and
(c) because of the defect, an individual suffers injuries;
then:
(d) the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and
(e) the individual; may recover that amount by action against the corporation; and
(f) if the individual dies because of the injuries - a law of a State or Territory about liability in respect of the death of individuals applies as if:
(i) the action were an action under the law of the State or Territory for damages in respect of the injuries; and
(ii) the defect were the corporation's wrongful act, neglect or default.'

'75AH. A law of a State or Territory about the survival of causes of action vested in persons who die applies in actions under section 75AD, 75AE, 75AF or 75AG.'

Question and Short Answer

9. Your question and my short answer is as follows:

Q1: Does the inclusion of ss.75AD(1)(f) and 75AH (providing, respectively, for the application of State and Territory fatal injuries law and survival law to cases under the new product liability regime) in Part VA of the Trade Practices Act mean, by application of the syntactical presumption 'expressio unius est exclusio alterius' ('an express reference to one matter indicates that other matters are excluded')('the *expressio unius* doctrine'), that such State and Territory laws cannot apply in respect of actions brought under the remaining Parts of the Act?

A: No.

Reasons

10. Syntactical presumptions like the *expressio unius* doctrine 'are no more than aids to understanding a writer's intention and can be readily discarded if there is any suggestion that a different meaning is intended' (Pearce and Geddes, *Statutory Interpretation in Australia*, 3rd ed. 1988, chap 4, paras.4.13, 4.22).

11. In my opinion there are sufficient indications in the Trade Practices Act and the relevant extrinsic material that the *expressio unius* doctrine (and the related *expressum facit cessare tacitum* doctrine [Pearce para.4.23]) should not apply in respect of the matters covered in ss.75AD(f) and 75AH.

12. Turning first to the text of the Trade Practices Act itself, the most important of these indicators is s.75AR. In brief, this provision provides that Part VA of the Act 'is not intended to exclude or limit the concurrent operation of any law ... in force in a State or Territory'(s.75AR(1)) and is 'is not to be taken to limit, restrict or otherwise affect any right or remedy a person would have had if [Part VA] had not been enacted [my emphasis]'(s.75AR(2)).

13. The Explanatory Memorandum to the*Trade Practices Amendment Bill 1992* ('the Bill') (para.75, page 18) explains s.75AR in the following terms:

> 'It is intended that the rights contained in the new Part VA should be in addition to a claimant's pre-existing rights, whether they be by way of contract, tort or a statutory right under a Commonwealth, State or Territory law. Section 75AR therefore provides that Part VA does not in any way exclude, limit or otherwise affect such rights.'

14. Sections 75AD(f) and 75AH will, of course, operate subject to s.75AR. When read in the light of s.75AR it seems to me that the two could not be construed so as to extinguish rights which a person would have had (under any Part of the Trade Practices Act) if Part VA had not been enacted. It follows in my opinion that the *expressio unius* doctrine (and the *expressum facit* doctrine) cannot apply in relation to the contents of ss.75AD(f) and 75AH.

15. I note, for the sake of completeness, that this view is reinforced by comments made concerning s.75AH by Ministers in both Chambers of Parliament. That is, on 3 June 1992 (*Hansard*, Senate, p.3375) the Minister for Justice made the following remarks in response to a question from Senator Powell concerning clause 75AH of the Bill:

> 'I think Senator Powell is asking whether, because it expressly provided for in relation to this product liability part of the Trade Practices Act as proposed, that has any implications for the survivability of causes of action, or the application of State laws providing for the survivability of causes of action which arise under other parts of the Trade Practices Act ...'
>
> '... It is certainly not the intention to disturb any existing provision or rule of interpretation which would allow the application of these State Acts, if they do apply, apart from the insertion of this particular provision ... All I can say is that it is not the intention by inserting this provision about survival of liability to disturb any existing rights that do exist, if indeed they do exist, in relation to other parts of the Trade Practices Act'.

16. Similarly, on 24 June 1992 (Representatives, p.3707) the Minister for Consumer Affairs made the following comments in reply to a speech made by Mr Costello:

> ' ... when this Bill was considered by the Senate Standing Committee on Scrutiny of Bills, that Committee raised a question about the effect of a particular provision of the Bill on the operation of the rest of the Trade Practices Act. If passed by Parliament, the provision would have the effect of providing that State and Territory laws about the survival of the right to take legal action after the actual claimant has died will apply to actions taken under the new regime.
>
> 'The Senate Committee has asked whether, because the Bill expressly includes a right of action, it negates, by implication, this right in relation to the rest of the Trade

Practices Act ... As Senator Tate has already stated, it is certainly not the Government's intention to disturb any existing provision or rule of interpretation which would allow these State and Territory laws to apply to this or any other part of the Trade Practices Act aside from the insertion of this particular provision. I note the comment of the honourable senators, conscious of the fact that the views I express on behalf of the Goverment can be taken into account by the courts when interpreting legislation.'

17. If I can assist further in this matter please do not hesitate to contact me.

Richard Sadleir
Counsel

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24 November 1992