SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

1995

1 FEBRUARY 1995

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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

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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

FIRST REPORT OF 1995

The committee presents its First Report of 1995 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:

Weapons of Mass Destruction (Prevention of Proliferation) Bill 1994

Weapons of Mass Destruction (Prevention of Proliferation) Bill 1994

This bill was introduced into the Senate on 9 November 1994 by the Minister for Defence.

The bill proposes to prevent Australian assistance being given to programs for the development of weapons of mass destruction programs. It does not extend to exports of goods covered by the Customs (Prohibited Exports) Regulations.

Reversal of onus of proof
Subclause 14(7)

In Alert Digest No. 17 of 1994, the committee noted that subclause 14(7) provides:

> **(7)** In a prosecution for an offence for supplying or exporting goods or providing services in contravention of section 9, 10 or 11, it is a defence if it is proved that the goods were supplied or exported, or the services were provided, in compliance with conditions contained in a notice in force under this section.

The committee sought the Minister's advice on the usefulness and appropriateness of sub-clause 14(7).

On analysis, there seemed to be a problem in how the offence provisions operate with respect to permits under clause 13 and notices under clause 14.

Clause 13 allows the Minister to issue a permit to supply or export goods or provide services (designated actions) where the Minister is satisfied that such designated actions would not be contrary to Australia's international or treaty obligations or the national interest. Clause 14, however, allows the Minister, where the Minster considers that a clause 13 permit could not be given, to issue a notice allowing such actions subject to conditions stated in the notice.

Clauses 9, 10 and 11 provide for prohibition of the designated actions except where they are authorised by a permit under clause 13 and further provide for designated actions without permit or in contravention of a condition stated in a permit to be offences. Subclauses 9(2), 10(2) and 11(2) provide that the respective clauses operate subject to subclause 14(7).

Clause 14, however, has its own offence provision - subclause 14(6) - which prohibits the designated actions in contravention of a notice or of a condition in a notice.

It seemed to the committee that the intention of providing the defence in subclause 14(7) is to clarify that where the Minister cannot give a permit under clause 13 but issues a notice under clause 14, a person should not be exposed to prosecution under clauses 9, 10 and 11 because no permit exists. Obviously, if no permit exists, the alternative charge under clauses 9, 10 and 11 of acting contrary to a condition in a permit cannot be laid.

The committee was concerned that subclause 14(7) should need to be invoked in a prosecution under clauses 9, 10 or 11.

It seemed inappropriate to prosecute someone for not having a permit where the Minister has considered that a permit cannot be issued but instead the Minister has issued a notice. It is even more inappropriate where the law provides a specific offence for not complying with the notice.

The committee was of the opinion that if consideration was being given to prosecuting someone for acting without a permit, it should be incumbent on the prosecution to find out whether a notice has been issued. If it then seems that the conditions of the notice have not been complied with, prosecution should proceed only under subclause 14(6). The committee sought the Minister's advice on this matter.

Pending the Minister's advice, 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.

On this issue, the Minister has responded as follows:

> The committee's comments concerning the bill, drawing attention to a possible reversal of the onus of proof through the operation of subclause 14(7) have been given careful consideration. It has been decided that the bill should be amended to meet this concern.
>
> The following background on the inclusion of subclause 14(7) might be helpful. Subclause 14(7) was added late in the drafting of the bill, to provide assurance that there would not be an overzealous approach to prosecutions under the legislation. In particular, the subclause was intended to preclude the possibility of a prosecution being mounted against a person who has acted in compliance with conditions specified by the Minister in a notice issued under 14(2)(a). We continue to believe such protection should be included in the legislation, but agree that the Senate committee has a point in

its suggestion that current language for subclause 14(7) could be read as reversing the onus of proof on this one possible element in a prosecution. To correct this, it has been decided that the Government will move amendments to the bill in time for the second reading debate. The amendments would result in the deletion of the current subclause 14(7) and the addition of language to the clauses 9, 10 and 11 (the key clauses setting out the principal offences to be created by the bill) making clear that an offence is not committed if the person supplying or exporting goods, or providing a service, in situations covered by the planned legislation, acts in compliance with conditions stated in a Ministerial notice issued to that person under 14(2).

The committee thanks the Minister for his assistance with this bill noting the amendments to be made to meet the committee's concern.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SECOND REPORT

OF

1995

8 FEBRUARY 1995

SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 1995

The committee presents its Second Report of 1995 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:

Health and Other Services (Compensation) Bill 1994

Health and Other Services (Compensation) Bill 1994

This bill was introduced into the House of Representatives on 16 November 1994 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill is one of a package to address double dipping in health and community service programs by compensable people. The bill provides for:

- the recovery of medicare and nursing home benefits paid for services in respect of a compensable injury prior to compensation becoming payable;

- the Health Insurance Commission to act as the Commonwealth's agent for the recovery of benefits; and

- a requirement that all insurers and other compensation payers notify the Health Insurance Commission of all claims lodged for compensation where liability is not accepted within six months of the date of claim.

The committee dealt with this bill in Alert Digest No. 18 of 1994, in which it made various comments. The Minister for Human Services and Health responded to those comments in a letter dated 25 January 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Abrogation of legal professional privilege
Proposed new paragraph 38(3)(a)

In Alert Digest No. 18 of 1994, the committee noted that proposed new paragraph 38(3)(a), if enacted, would preclude a person from relying on a claim of legal professional privilege as a reason for not complying with a notice under section 36 to give information or produce a document.

Paragraph 38(3)(a) provides :

> **(3)** For the purposes of subsection (1), a person is not taken to have reasonable excuse for refusing or failing to comply with a notice under section 36 only because:
>
> (a) the information or document is, or could be, subject to a claim of privilege that would prevent the information being given in evidence, or the document being produced as evidence, in proceedings before a court of tribunal;

The committee noted the reasons for the provision given on page 28 of the

explanatory memorandum which states:

> Subclause 38(3) provides that the fact that the information or document which is sought is or could be subject to legal professional privilege does not, of itself, constitute a reasonable excuse for failing to comply with a notice issued under clause 36. Similarly, a contractual obligation not to relay the information or document to any third party is not a "reasonable excuse" for failing to comply with a requirement to provide information under clause 36. These provisions are an important feature of this Bill because they will improve the transparency of settlements and judgements in compensation cases.

The committee questioned whether the advantages to be gained from this provision outweigh the trespass on the right to maintain confidentiality in client-solicitor relationships.

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.

On this issue, the Minister has responded as follows:

> In relation to the abrogation of legal professional privilege, one problem with administering the existing provisions contained in the *Health Insurance Act 1973* and the *National Health Act 1953* which are aimed at preventing double dipping by compensable people has been the difficulty in accessing information about the terms of compensation awards. The existing provisions can be and are circumvented because of recourse to the protection afforded by legal privilege.
>
> The provisions of the *Health and Other Services (Compensation) Bill 1994* have been framed to address this existing problem.

The committee thanks the Minister for this explanation but is of the opinion that further consideration may be profitable.

The Explanatory Memorandum indicates that the bill is designed to address the problem of double dipping in health and community services programs by compensable people.

The committee, however, is concerned that the proposed legislation to address that mischief does not seem to take sufficiently into account the complexities of common law damages awards, the adequacy of those statutory schemes that in some jurisdictions have replaced common law damages and, ultimately, the ongoing philosophical debate on how the cost of injury is best borne by the community. A

further complicating factor is the perception by Commonwealth and State governments that attempts continue to be made to shift the burden from one to the other.

The committee acknowledges the reasoning behind abrogating legal professional privilege, but continues to question whether what is to be gained is worth the loss of that privilege. There is always a healthy tension between the attractiveness of a convenient solution to a problem and the experience that resulted in the establishment of this committee: experience that attractive solutions sometimes have a downside of trespassing unduly on personal rights and liberties.

The committee suggests that there are reasons for not abrogating the privilege.

First, the rationale that the Commonwealth must always be paid back in full can be questioned. Indeed, there are indications in the bill itself that it is inappropriate always to recover in full. For example, clause 27, subclauses 8(2) and (3) provide that the amount recoverable may be reduced to less than the amount paid by way of medicare benefits.

Secondly, the information obtained by abrogating legal professional privilege may give rise to further problems in deciding under section 18(1) of the *Health Insurance Act 1973* what conclusions to draw from the documents obtained as a result of the abrogation.

Thirdly, there is already an alternative mechanism in the bill for obtaining some of the required information and the committee suggests that a similar mechanism could be inserted to obtain other information without the need to abrogate the privilege.

First reason: priority of the Commonwealth: Subclauses 8(2) and (3) and Clause 27

Where a judgment specifies an amount for past medical care and the amount of medicare benefits paid exceed the specified amount, subclause 8(3) provides that the excess is not recoverable.

Where compensation is reduced for contributory negligence, subclause 8(2) would reduce accordingly the amount to be recovered for medicare benefits already paid.

Both these provisions acknowledge what is widely held that the common law damages system does not always deliver adequate compensation. Where a person is not adequately compensated the question arises whether the Commonwealth ought always to be fully compensated for amounts which the Commonwealth has expended on the injured person. Subclauses 8(2) and (3) indicate a willingness to accept less than the full amount - a position equating with the changes to bankruptcy law that saw the Commonwealth relinquish its privileged position of primacy of priority

among creditors.

Clause 27 is another provision recognising the possible inadequacy of a compensation payment. It provides that where the amount to be repaid under the *Social Security Act 1991* together with the amount to be repaid in relation to medicare benefits under this bill exceeds the amount obtained by the injured person in a judgment or settlement, the amount to be repaid under this bill will be reduced by the excess.

Under clause 27, the total amount awarded to the injured person goes to the Commonwealth, even if the judge has awarded specific amounts for pain and suffering, future economic loss and future medical expenses. This means that a person, who is already being inadequately compensated, does not retain the amounts awarded specifically for heads of damage other than past medical expenses and past economic loss.

Clause 27, therefore, while not pursuing a debtor for an amount higher than the lump sum awarded, also raises the question whether the Commonwealth ought to be compensated for amounts which the Commonwealth has expended on the injured person, if recovery of such amounts ignores the issue of whether the injured person has been adequately compensated.

Second reason: problems arising from the information obtained

Under proposed section 36, the Managing Director of the Health Insurance Commission could obtain the relevant files relating to a compensation claim from both the compensable person's solicitor and the insurance company's solicitor. Little difficulty will arise where the files agree on the amount of damages to be paid in respect of the various heads of damage and a settlement is reached reflecting that amount.

It is, however, in the nature of adversarial litigation that documents in the respective solicitors' files relating to the assessment of damages to be paid will vary greatly. A not unknown scenario would be that the insurer's solicitor estimates a payment of $90 000, the claimant's solicitor is asking for $150 000 and, after two days in court which go badly for the claimant, an out-of-court settlement is reached for $50 000. In such a case, on what document will the decision maker rely in order to deem an amount to relate to medical expenses for which medicare benefits have been paid or may become payable and on which the prevention of double dipping is to be based? If the claimant's solicitor, for example, had assessed past and future medical expenses at $30 000 (20% of his total assessment) should the amount to be deemed be reduced to 20% of
$50 000?

In these circumstances, documents obtained as a result of abrogating legal profession privilege add to the difficulty of deciding what amount should be deemed to have been awarded in respect of medical expenses.

Third reason: alternative mechanisms

Paragraph 38(3)(a), if enacted, would preclude a person from relying on a claim of legal professional privilege as a reason for not complying with a notice under section 36 to give information or produce a document.

Clauses 17 and 18 of this bill provide a mechanism for the Health Insurance Commission to ascertain what benefits have been paid by the Commission in respect of the injury the subject of the compensation claim. Under clause 17 the claimant is given a notice specifying all medicare benefits paid to the claimant since the date of the injury and the claimant is required to specify which of those benefits were in respect of the injury. If the claimant fails to do so clause 18 provides that all the benefits will be deemed to have been in respect of the injury.

This mechanism gives the Commission a reasonable avenue for obtaining relevant information without the need to impugn professional legal privilege under paragraph 38(3)(a).

It does not, however, necessarily give easy access to the details of what the bill describes as a 'reimbursement arrangement'. This is defined in the bill and covers the arrangement which may be entered into by agreement that the compensation payer will foot all future medical expenses relating to the compensable injury. An alternative to abolishing legal professional privilege might be to follow a similar mechanism to section 18, and presume that such an arrangement exists unless the compensated person supplies different details. In other words, no future medicare payments in respect of treatment for the injury unless it is shown that no reimbursement arrangement exists.

The committee seeks the Minister's further consideration of this issue.

Pending the Minister's response, the committee continues to draw 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.

Abrogation of the privilege against self-incrimination
Proposed new subsection 38(4)

In Alert Digest No. 18 of 1994, the committee noted that this proposed section, if enacted, would abrogate the privilege against self-incrimination for a person required to answer questions or produce documents under section 36.

The committee questioned whether the advantages to be gained from this provision outweigh the trespass on personal rights in the abrogation of the privilege against self-incrimination.

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.

On this issue, the Minister has responded as follows:

> In relation to the abrogation of the privilege against self-incrimination, the Bill does require a person to provide information or produce a document, even if it may incriminate them. However, a person who is required to give information or produce a document is given the protection of subclause 38(5). That subclause states that, in any criminal proceedings against such a person, evidence relating to the information given or document produced cannot be used against the person. Further, evidence of any information, document or thing obtained as a result of the person having given information or produced a document cannot be used against the person. However, subclause (5) does not protect a person who is prosecuted for a failure to comply with a requirement under the legislation to give information or produce a document.
>
> The provisions are required to prevent circumvention of the identification and recovery provisions contained in the legislation.

The committee thanks the Minister for this response.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 1995

The committee presents its Third Report of 1995 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:

Corporations Law (Securities & Futures) Amendment Bill 1994
Prawn Export Promotion Bill 1994
Road Transport Reform (Dangerous Goods) Bill 1994
Veterans' Affairs Legislation Amendment Bill (No. 3) 1994

Corporations Law (Securities & Futures) Amendment Bill 1994

This bill was introduced into the Senate on 5 December 1994 by the Minister for Environment, Sport and Territories.

The bill proposes to permit regulations to prescribe particular exchange-traded agreements and to regulate such agreements as if they were securities or futures contracts.

The committee dealt with this bill in Alert Digest No. 6 of 1994, in which it made various comments. The Attorney-General responded to those comments in a letter dated 27 June 1994. The committee also dealt with this bill in Alert Digest No. 1 of 1995, in which the committee repeated its previous comments. The Attorney-General responded to those comments in a letter dated 16 February 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Clauses 4 and 6

In Alert Digest No. 1 of 1995, the committee noted that proposed section 72A of the Corporations Law, to be inserted by clause 4, and proposed section 92A of the Corporations Law, to be inserted by clause 6, were the subject of comment by the committee, in Alert Digest No. 6 of 1994, when similar clauses were included in the Corporations Legislation Amendment Bill 1994. The committee took the view that the proposed sections may be an inappropriate delegation of legislative power, as the definition of a futures contract and a security, for the purposes of the Corporations Law, may to some extent, be determined by regulations and not in the primary legislation. The proposed provisions also would enable the Corporations Law to be modified by regulation. The proposed sections were withdrawn from the earlier bill in the course of its being debated in the House of Representatives.

On 27 June 1994, the Attorney-General responded to the comments of the committee in Alert Digest No. 6 of 1994 as follows:

> The Committee has sought my advice on the matters raised by the submission from Mr Michael G Hains which is attached to the Digest.
>
> I wish to advise the Committee that the Government has decided not to proceed with the amendments proposed by item nos 4 to 8 and item 21 of Schedule 8. The amendments in question are to the definitions of "securities" and "futures contract", to facilitate the trading of equity based instruments having the characteristics of

both equity and futures products.

> The amendments were included in the Bill, as an urgent measure, following the public exposure of the draft Bill and before its introduction. I acted quickly to incorporate the amendments in the Bill at that stage, following representations by the Australian Stock Exchange ("ASX") stressing their importance and urgency. The ASX stated that they wished to be able to trade an important new product from 1 July this year. However, I have now been informed by the ASX that they will not be in a position to trade this product until later in the year.
>
> In light of that, I decided to withdraw the amendments so that further consultation can be undertaken with industry representatives. An amendment to this effect was moved on behalf of the Government and agreed to by the House of Representatives during the course of the second reading debate in the House.

In Alert Digest No. 1 of 1995, the committee noted that, as clauses 4 and 6 of this bill, if enacted, would still enable the regulations to modify the Corporations Law and the definitions of a futures contract and a security to be determined by regulation rather than by primary legislation, the concerns of the committee expressed in the earlier Alert Digest had not been addressed.

The committee, therefore, drew Senators' attention to the provisions, as they 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, in part, as follows;

> The Bill will enable the regulations to prescribe particular agreements and then by regulation to apply selected provisions of Chapters 7 or 8 of the Corporations Law to those agreements and disapply inappropriate provisions so as to provide a comprehensive regulatory re_ime for their trading. Prescribed agreements will be regulated as if they were either securities or futures contacts. The Bill will permit the trading of new securities and futures industry products to take place on a more flexible basis than is presently possible under the Corporations Law.
>
> The need for the amendments has arisen because of the development of products by the ASX and the SFE which have characteristics in common with both equities and futures. The securities and futures industries have evolved in ways that were not envisaged when the basic legislative structures governing them were enacted.
>
> Financial markets and the needs of their users are evolving in ways that were not envisaged during the 1980s. New and innovative

products continue to be developed and traded by derivatives markets. The government's policy is to encourage our securities and futures markets to compete in global markets. In order to meet the changing needs of users of these markets and to allow continuing development of new products and market techniques it is necessary for the legislation governing these markets to be able to be adapted to changing circumstances and new products.

Essentially the regulation making power in this Bill does this. It permits the Law to be modified to make the regulatory framework responsive, flexible and adaptable while, at the same time, not reducing investor protection. Provided adequate safeguards are in place to ensure the protection of investors and the integrity of financial markets, the Government needs to be able to respond to requests by exchanges to trade new products. I am advised that it would be impractical to attempt to set out criteria for the exercise of the power to prescribe products as product innovation and market developments cannot be predicted.

The regulation making power is not as broad as is contended. It is restricted in its application to the securities and futures industries applying only to exchange traded products. It has no application to other markets such as the over the counter derivatives markets.

I note also in passing that there are similar powers to those proposed in the Bill already being used in the Corporations Law. Provisions such as these are needed to enable the Law to be modified and adapted so as to be applicable to new financial products and transactions.

In conclusion, the regulation making power will only be used where it can be demonstrated that the ordinary operation of the Corporations Law is not appropriate and will of necessity be limited to a narrow range of products.

The committee thanks the Minister for this response and his detailed assistance with the bill.

Prawn Export Promotion Bill 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Minister for Justice.

The bill proposes to provide for the collection, management and expenditure of the funds collected by the imposition of a prawn boat levy and prawn export charge to fund the promotion of sea-caught Australian prawns in overseas markets.

The committee dealt with this bill in Alert Digest No. 1 of 1995, in which it made various comments. The Minister for Resources responded to those comments in a letter dated 21 February 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Penalty Interest Rates
Clause 17

In Alert Digest No. 1 of 1995, the committee noted that Clause 17 sets the penalty for late payment of the prawn boat levy and the prawn export charge imposed by the cognate Bills at 2% a month, compounding monthly. This means an annualised rate of 24% but an effective annual rate of 26.82%. This rate is so in excess of current commercial rates of interest that it may be regarded as so exorbitant as to trespass unduly on personal rights. Such a rate of interest is associated with sharks rather than prawns. It might be noted that, although clause 17 sets out such a severe late payment penalty, no late payment penalty at all is incurred by the Commonwealth or the Fisheries Research and Development Corporation if either is dilatory in refunding overpaid moneys under clause 20. The committee sought the Minister's advice whether a formula could be drafted that might tie the rate of interest for the late payment penalty more closely with current business rates.

The committee, therefore, 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.

On this issue, the Minister has responded as follows:

> The provisions of the Bill referred to by your Committee are essentially identical to those appearing in sub-section 15(1) and section 24 of the *Primary Industries Levies and Charges Collection Act 1991* (PILCC Act). Generally speaking, the PILCC Act was intended to be the vehicle by which funds are collected from primary industries that are required to make contributions to the Commonwealth Government. This Act was designed to enable more cost-effective and efficient levy collection techniques to be utilised in

the primary industry portfolio. It is only for technical reasons related to the fact that the prawn boat levy is not a levy on a produced commodity that the PILCC Act is not to be used to collect the levy and charge in this instance. However, all features of the PILCC Act that can apply to prawn boat levy and prawn export charge collection have been adopted in the drafting of the Prawn Export Promotion Bill.

Both the PILCC Act and the Bill set out a compounding interest rate of 2% per month as the penalty for the non-payment of levy. This level of penalty has been judged appropriate to act as a deterrent to late payment and to ensure that the administrative costs of the collecting organisation following up late payments are not borne by other levy payers. If the penalty interest rate were at or near parity with commercial interest rates, it would provide an incentive for levy payers to retain levy moneys, either to earn marginal net interest on them or to benefit from them as a de facto cash loan from the Commonwealth. This would clearly be undesirable.

The committee thanks the Minister for this response.

Abrogation of the right not to incriminate oneself
Subclause 22(2)

In Alert Digest No. 1 of 1995, the committee noted that subclause 22(2), if enacted, would abrogate the right not to incriminate oneself for a person required to submit a return or information under clause 21.

Clause 21 provides that an authorised person may require a person to furnish a return or information in relation to matters relevant to the operation of the Act.

The committee was concerned about the implications of these clauses. The committee acknowledged that it is a legitimate use of administrative power to obtain information for the purposes of administering the proposed legislation. However, it seemed that the same clause is also the source of authority to investigate criminal offences in relation to avoiding paying the levy or avoiding paying the full amount owing by submitting a false or misleading return. If this is so, the committee was of the opinion that a person should retain the right to remain silent on the grounds that he or she might incriminate himself or herself where an investigation of that person's conduct, which could result in prosecution, is being carried out.

Further, the committee was concerned about the appropriateness of abrogating the right not to incriminate oneself in the circumstances dealt with in this bill. While acknowledging that in some circumstances, such as national security or irreversible damage to the Great Barrier Reef, the need to obtain information may be seen as

prevailing over the right not to incriminate oneself, the committee questioned whether the advantages to be gained by this provision outweigh the trespass on personal rights in abrogating that right.

Accordingly, the committee sought the Minister's advice on whether clauses could be drafted distinguishing the power to seek returns or information for the ordinary purposes of collecting the levy from the power to seek information for the purposes of investigating breaches. The committee also sought the Minister's advice on whether he anticipates such gross non-compliance with paying the levy that the right not to incriminate oneself must be abrogated because other compliance measures would be inadequate to collect it and whether the levy of itself outweighs the serious trespass on personal rights of abrogating the right not to incriminate oneself.

The committee, therefore, 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 view of the Committee's concern about sub-clause 22(2), the question has been raised as to whether clauses could be drafted distinguishing between the power to seek returns or information from a potential levy payer for the ordinary purposes of collecting levy from the power to seek information from the same person for the purpose of investigating breaches. I am advised that the distinction the Committee seeks would be very difficult, if not impossible, to draw in legislation. Furthermore, to hedge the power under clause 21 with qualifications would merely make it more difficult to use the power even for the "ordinary purposes of collecting levy". If, whenever a request for information were made, the requesting authority could be required to justify its action as being within the stated criteria, the provision would, in practical terms, be of little use.
>
> The Committee has also asked whether I anticipate gross non-compliance with the obligation to pay levy. It is not a matter of my anticipating any particular reaction by levy payers. As I have already pointed out, the Prawn Export Promotion Bill has been drafted so as to bring the relevant levies under the same collection arrangements as apply to other primary industry levies. Those arrangements, embodied in the PILCC Act, were set in place as recently as 1991. I am not aware of any objection to section 23 or 24 of the PILCC Act when it was before Parliament, nor, I am advised, have there been complaints about these sections from industry organisations in any commodity area to which the Act applies. Furthermore, the Prawn Export Promotion Bill has been prepared at the instigation of, and in close consultation with, the prawn fishing industry. It gives effect to an industry promotion

scheme and the details of the Bill were approved by the board of Directors and legal advisers of the Australian Prawn Promotion Association. Any action to water down the rigour of the re_ime under which the levy is to be collected would amount to undermining a delicately negotiated consensus between the government and the prawn fishing industry.

Any decision to amend clause 21 or 22 of the Bill would necessitate a review of the equivalent provisions of the PILCC Act. In the absence of expressions of concern by those affected by the PILCC Act, I would be reluctant to undertake such a review at this stage.

The committee thanks the Minister for this response.

Road Transport Reform (Dangerous Goods) Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to regulate the transport of dangerous goods by road in the Australian Capital Territory and Jervis Bay Territory. Adopting legislation to be passed by the States and the Northern Territory will create a legislative scheme for the making, administration and enforcement of uniform or consistent national regulations relating to the road transport of dangerous goods.

The committee dealt with this bill in Alert Digest No. 1 of 1995, in which it made various comments. The Minister for Transport responded to those comments in a letter dated 9 February 1995. A copy of that letter is attached to this report an relevant parts of the response are discussed below.

Abrogation of the privilege against self-incrimination
Clause 23

In Alert Digest No. 1 of 1995, the committee noted that clause 23, if enacted, would abrogate the privilege against self-incrimination for a person required to answer a question under clause 18.

The committee further noted that subclause 18(11) provides that an authorised officer may, in order to find out whether this Act is being complied with, direct a person to answer questions that may help the authorised officer. While acknowledging that in some circumstances, such as the spillage of materials that may be extremely hazardous, the need to get accurate information may be paramount, the committee questioned whether in all the circumstances covered by the provision the advantages to be gained by the provision outweigh the trespass on personal rights in the abrogation of the privilege against self-incrimination. For example, there are many minor matters that must be complied with under the Act. Information about these would not be of sufficient importance to warrant the abrogation of the privilege.

Accordingly, the committee sought the minister's advice on whether a more discriminating provision could be drafted that would distinguish between less important matters and those where there is a belief on reasonable grounds that a dangerous situation exists. In this respect the committee noted the difference between subclauses 18(1) and 18(2), where more extensive power is given on the reasonable belief in the existence of a dangerous situation.

Pending the Minister's advice, 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.

On this issue, the Minister has responded as follows:

> The power of an authorised officer under subclause 18(11) to direct a person to answer questions asked by the authorised officer is not unlimited, but only applies "*in order to find out whether this Act is being complied with...*".
>
> In addition, the Bill makes it clear that the purpose of the clause 23 of the bill is to allow officers to obtain information to enable them to monitor compliance with the legislation and thereby to minimise or prevent the occurrence of dangerous situations, and not to entrap individuals. Answers to questions asked by an authorised officer under clause 18 cannot be used in evidence against a person (except as evidence that a person failed to answer a question without reasonable excuse under clause 22).
>
> It is necessary for authorised officers to be able to gain as much information about a particular situation involving dangerous goods as quickly as possible, as the consequences of a delay, for example in relation to the spillage of a toxic chemical, could have significant effects on third parties and the environment. Therefore, officers must be able to seek answers from persons in relation to compliance with the legislation in order to assess whether a dangerous situation does in fact exist, or may develop, and so that remedial or preventative action may be taken as soon as possible. Were a person able to decline to answer questions on the grounds of self incrimination, then authorised officers would be precluded from access to information that may be essential to the prevention of incidents involving dangerous goods.
>
> The power to direct answers to questions is substantively different from the more intrusive power to enter premises. It is likely that unless officers can ask such questions, and persons be required to answer them, officers would be unable to gain vital information that would prevent the possible breach of the legislation until after a dangerous situation had in fact occurred. A person's refusal to answer a question would not of itself provide reasonable grounds to believe that a dangerous situation existed, thus preventing the officer from exercising other powers.
>
> The provisions of the Bill which require answers to questions but limit the admissibility of those answers as evidence represent a balance between the need of regulators to obtain information about potentially dangerous situations as soon as possible with the rights of individuals to not be required to incriminate themselves in criminal

proceedings.

The committee thanks the Minister for this response.

Veterans' Affairs Legislation Amendment Bill (No. 3) 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the following Acts:

- *Social Security and Repatriation Legislation Amendment Act (No. 2) 1984* to give the Repatriation Commission the power to retain or dispose, at its discretion, the Anzac Hostel in Victoria; and
- *Veterans' Entitlements Act 1986* to:

  - give the Repatriation Commission power to suspend or cancel service pension or income support supplement when the claimant or pensioner has failed to comply with certain notices;

  - clarify the provisions relating to the provision of tax file numbers to the Secretary;

  - enable certain documents to be accepted as *prima facie* evidence by the courts;

  - provide the cessation date for Cambodia as an operational area; and

  - make minor technical amendments.

The Committee dealt with this bill in Alert Digest No. 1 of 1995, in which it made various comments. The Minister for Veterans' Affairs responded to those comments in a letter dated 16 February. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Tax file numbers
Clauses 4 to 10: Response to AAT decision

In Alert Digest No. 1 of 1995, the committee noted that Clauses 4-10 were proposed because of the decision of the Administrative Appeals Tribunal in *Re Malloch and Secretary, Department of Social Security.* The explanatory memorandum states that the Tribunal held that the relevant provisions did not preclude payment to a person who has no tax file number and has no intention of getting one, despite being requested to do so by the Department.

The committee sought the Minister's advice on why the provision of tax file numbers is necessary in this class of cases.

The committee, therefore, 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:

> Your Committee noted that clauses 4-10 of the Bill propose to amend the tax file number provisions to require a person who has no tax file number, and has no intention of getting one despite being requested by the Department to do so, to request the Commissioner for Taxation to provide a tax file number and for the person to then provide it to the Secretary. As noted by the Committee, this change is in response to the Administrative Appeals Tribunal Decision in *re Malloch and Secretary, Department of Social Security*.
>
> This amendment follows on from a similar amendment to the Social Security Act inserted by the *Social Security Legislation Amendment Act No. 2 of 1994.* In this respect, I invite your attention to the response to your Committee from the Parliamentary Secretary of the Department of Social Security on 30 May 1994 to a similar request from the Committee for an explanation of the need for this amendment when the Social Security Act was being amended.
>
> The reasons why the changes to the Veterans' Entitlements Act are necessary are essentially the same as for the Department of Social Security.
>
> The Department of Veterans' Affairs requests clients to provide tax file numbers to enable it to check details of other payments under the data matching program, thereby ensuring that persons do not defraud the Commonwealth. This is the only reason for which a tax file number is requested. The savings from the data matching program are substantial and experience suggests that the program and the tax file number requirement are of value in deterring people from claiming or continuing to receive payments to which they are not entitled.
>
> I would also draw your attention to the fact that the provision of tax file numbers is not compulsory. Indeed, the proposed amendments to the Veterans' Entitlements Act make it clear, as they are required to do by the Privacy Commissioner, that the Department may request, but not compel, a person to provide his or her tax file number to the Department.

> As pointed out in the explanatory memorandum to the Bill, the amendments are framed in such a way as to preserve the "voluntary quotation" principle as an integral part of the tax file number scheme. This puts beyond doubt those provisions which make payment of pension conditional on satisfying the tax file number requirements. However, it also makes it quite clear that the decision on whether or not to provide a tax file number, rests with the individual.

The committee thanks the Minister for this response.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

OF

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SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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

FOURTH REPORT OF 1995

The committee presents its Fourth Report of 1995 to the Senate.

The committee reports to the Senate on the following which the committee has examined in the light of principles 1(a)(i) to (v) of Standing Order 24:

Communications and the Arts Legislation Amendment Bill 1994

Employment Services Act 1994

Communications and the Arts Legislation Amendment Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the following Acts:

- *Australian Broadcasting Corporation Act 1983* to remove the requirement for the ABC to obtain Ministerial approval prior to entering into certain contracts and lease back arrangements;

- *Australian Film, Television and Radio School Act 1973* to make administrative changes relating to the School Council;

- *Broadcasting Services Act 1992* to:

  - clarify drafting anomalies;

  - express maximum financial penalties in terms of 'penalty units';

  - amend definitions relating to Australian drama content requirements; and

  - clarify certain penalty provisions and enforcement powers of the Australian Broadcasting Authority;

- *Radiocommunications Act 1992* to implement a new apparatus licensing regime and make other operational changes required since the Spectrum Management Agency commenced operations on 1 July 1993;

- *Special Broadcasting Service Act 1991* to remove the requirement for the SBS to obtain Ministerial approval prior to entering into certain contracts; and

- *Telecommunications Act 1991* to express maximum financial penalties in terms of 'penalty units'.

The committee dealt with this bill in Alert Digest No. 1 of 1995, in which it made various comments. The Minister for Communications and the Arts responded to those comments in a letter dated 2 March 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Item 119 of the Schedule

In Alert Digest No. 1 of 1995, the committee noted that this item inserts a new section 314A into the *Radiocommunications Act 1992* to enable instruments under the Act to adopt by reference any matter in other instruments or documents as in force at a particular time or as in force from time to time.

Proposed new subsection 314A(2) provides that '[s]ection 49A of the *Acts Interpretation Act 1901* does not apply in relation to instruments made under this Act'. Section 49A allows material to be adopted by reference into an instrument but only as in force at the time when the instrument takes effect not as in force from time to time. The effect of proposed section 314A, therefore, is to enable the adoption by reference of material not only in the form the material has at the time the instrument is made but in any form that the material subsequently takes.

The committee was concerned that this may be regarded as inappropriately delegating legislative power as it would allow a determination to be made to adopt any matter contained in an instrument that is made by any person or body in Australia or elsewhere, and the law in force in Australia will change every time that person or body alters that instrument.

The committee noted that the *Radiocommunications Act 1992* (with the exception of three provisions) appears in Schedule 2 of the Legislative Instruments Bill. Acts listed in Schedule 2 of the Bill become subject to Part 3 which requires a process of consultation so as to ensure that persons likely to be affected by a legislative instrument made under such an Act have an opportunity to make submissions concerning the policy or content of the instrument. This means that, when the Legislative Instruments Bill becomes law, the Minister or other rule-maker must consult before a rule can be made or changed under the *Radiocommunications Act 1992*. The committee is concerned at the lack of consultation if a rule adopted some radiocommunications standards of a body in another country as in force from time to time. That body could not be required to consult with persons in Australia before it changed its standards. The width of the power in proposed section 314A appears to be at odds with the policy enshrined in the Legislative Instruments Bill.

The committee, therefore, sought the advice of the Minister whether it would be more appropriate for a less wide power to be delegated.

Pending the Minister's advice, 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.

On this issue, the Minister has responded as follows:

> The Committee's concerns appear to relate to the possibility of the SMA

adopting a radiocommunications standard of a body in another country as in force from time to time and that that body could not be required to consult with persons in Australia before it changed its standard.

I can assure you that the standards making process followed by the SMA will continue to include an extensive process of consultation, consistent with the policy of consultation enshrined in the Legislative Instruments Bill which is currently before Parliament.

Section 162 of the Act outlines the SMA's standards making power. This power is specific to matters about minimising electromagnetic interference. Section 163 of the Act outlines the procedure the SMA must follow in making such standards. This includes that the SMA must, so far as is practicable, try to ensure an adequate consultative process.

The SMA has entered into a Memorandum of Understanding (MoU) with the Standards Association of Australia (SAA) whereby the SAA is responsible for preparing draft radiocommunications standards, including those that are based on international standards. An integral part of this responsibility is a comprehensive process of the public consultation. SAA radiocommunications standards are published as voluntary Australian standards and recommended to the SMA for adoption.

The process for developing standards under the Act will also ensure that standards continue to be disallowable instruments under subsection 165(1) of the Act, thereby enabling the ongoing scrutiny of Parliament.

I trust this advice allays the Committee's concerns about the proposed amendment.

The committee thanks the Minister for this response which satisfactorily addresses the issue of consultation. The process which the Minister has outlined seems to fall within the exception, contained in subparagraph 19(1)(a)(vi) of the Legislative Instruments Bill, of "compliance with comparable consultation requirements". The issue of whether it is appropriate to allow a body outside Australia to change the law as it applies in Australia is not directly addressed, but the committee is prepared to accept that the technical nature of the standards involved in this process suggests that it may be appropriate.

Employment Services Act 1994

The bill for this Act was introduced into the House of Representatives on 30 June 1994 by the Minister for Employment, Education and Training.

The Act established:

- the Commonwealth Employment Service within the Department of Employment, Education and Training (DEET);

- Employment Services Regulatory Authority as an independent statutory authority responsible for regulating the case management system;

- Employment Assistance Australia as a separate organisation, within DEET, to provide case management services.

The committee dealt with this bill in Alert Digest No. 12 of 1994, in which it made various comments. The Minister for Employment, Education and Training responded to those comments in a letter dated 10 November 1994. The committee considered this response in its Seventeenth Report and made various comments. The Minister for Employment, Education and Training has now responded to those further comments in a letter dated 6 March 1995. A copy of that letter is attached to this report. Although this Bill has now been passed by both houses (and received Royal Assent on 19.12.94), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Double penalty and retrospective application
Clause 45

In Alert Digest No. 12 of 1994, the committee noted that clause 45, if enacted, would restrict the Employment Services Regulatory Authority (ESRA) from accrediting persons who have been found guilty of various offences relating to fraud and dishonesty. In particular, paragraph 45(6)(b) prohibits accreditation for a period of five years after the person has paid the penalty imposed by reason of his or her conviction.

The committee was concerned that the provision, if enacted, may be considered to trespass unduly on personal rights by imposing a double penalty on a person in that even after a convicted person has paid his or her debt to society, the fact of the conviction will operate for a further five years to discriminate against the person.

The committee considered that it is inappropriate for the proposed section to have retrospective application in that the offence and the conviction could have occurred before the commencement of the section. Hence, the committee was concerned that the retrospective application may be considered to trespass unduly on personal rights

in that a statutory penalty is being imposed retrospectively on a convicted person in addition to the penalty imposed by the court. It may be that, in future cases, courts may take into account the statutory penalties imposed by this bill in considering an appropriate sentence. Such an adjustment of sentence is not possible for those already sentenced on whom these statutory penalties are retrospectively imposed.

The committee found no explanation in the explanatory memorandum for the apparent lack of correspondence between the purpose of the accreditation scheme and the definition of a person disqualified from being accredited. The committee sought the Minister's advice on why it is thought that a person who up to ten years previously committed an act of fraud or dishonesty is now an inappropriate person to be accredited for the purpose of assisting the unemployed to obtain employment.

Pending the Minister's advice on these matters, 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.

On 10 November, 1994 the Minister responded as follows:

> The Committee has commented upon clause 45 of the Employment Services Bill which would disqualify certain persons (individuals or bodies corporate) convicted of offences under the proposed Act or involving fraud or dishonesty from being accredited as a case manager. The Committee commented upon what it sees as an apparent lack of correspondence between the definition of a person disqualified from being accredited and the purpose of the accreditation scheme.
>
> The accreditation scheme to be established by the legislation is a foundation of the case management system and an essential part of the Employment Services Regulatory Authority's (ESRA's) regulatory powers. The case management system will involve the expenditure of Government moneys in the provision of important services to one of the most vulnerable sections in our community, the unemployed. It is therefore essential that only suitable persons are accredited to provide such services.
>
> Clause 45 has been based upon section 11YA of the *Export Market Development Grants Act 1974*. This provision, which was added in 1993, implemented Government policy in relation to persons eligible to claim grants under that Act. As the case management system proposed under the Employment Services Bill would involve significant Government funding of businesses in the provision of services, it is appropriate that similar qualification provisions should be adopted. Specifically, the clause would prevent ESRA from accrediting:
>
> ! individuals who, and corporations which have been convicted of offences involving fraud or dishonesty; and
>
> ! other entities with whom such individuals or corporations are closely

associated.

The clause would also require ESRA to cancel an accreditation where such a conviction occurs after the accreditation.

The clause would provide that an individual or corporation is disqualified if they have been convicted of the following.

- an offence under clause 48 which deals with false or misleading statements in connection with claims for payments to contracted case managers;

- an offence involving fraud or dishonesty, punishable by imprisonment for life or for a period or a maximum period of at least two years imprisonment;

- an indictable offence committed in connection with the promotion, formation or management of a body corporate; or

- certain specified offences under the Corporations Law relating to breaches of duty and dishonest dealings (individual provisions are described in the notes to the clause).

A person would be disqualified for a period of 5 years following the conviction or, where a custodial sentence has been imposed, for a period of 5 years following release. This would mean that relatively recent offenders remain disqualified for an appropriate period of time. In establishing a competitive environment for the provision of case management services, the Government is concerned that there are adequate standards maintained in the provision of services and there is proper protection of both vulnerable clients and the public revenue.

The legislation would set other major standards for accreditation, eg

- a case manager may not charge participants fees for the provision of case management services (clause 41);
- a case manager must provide copies of Case Management Activity Agreements entered into with participants and must provide reports on compliance with those agreements (clause 42); and
- security deposits may be required to ensure compliance with financial obligations (clause 43).

ESRA, by way of a disallowable instrument, will stipulate other requirements of the accreditation scheme. There is also to be provision for the formulation of rules of conduct, again by way of disallowable instrument.

Provisions similar to clause 45 are often used in the establishment of

occupational licensing schemes such as the accreditation scheme under this Bill. For example, under the *Income Tax Assessment Act 1936* the Tax Agents Board is required to cancel or suspend the registration of a Tax Agent convicted of certain offences. The period of any suspension may be for such time as the Board thinks fit (section 251K). The *Broadcasting Services Act 1992* provides that the Australian Broadcasting Authority must take into account the suitability of a person to hold a broadcasting licence (section 41). Matters to be taken into account include whether a person has been convicted of an offence against the Act or regulations or whether there is a risk of such offence being committed. Such provisions are particularly appropriate where Government funded services are to be offered to sections of the general public.

The Committee has made the comment that it considers it inappropriate for the proposed section to have retrospective application in that the offence and conviction could have occurred before the commencement of the section. The Committee has also made the comment that clause 45 amounts to imposition of a statutory penalty in addition to a penalty imposed by a court. With respect, I believe these comments to be based on an incorrect analysis of the provision.

As I have stated above, the accreditation scheme is a form of occupational licensing. Disqualification is a failure to satisfy a requirement of suitability rather than the imposition of a penalty. Perhaps the clearest authority that such measures are not regarded as resulting in a double penalty appears in the judgement of the High Court in the case of *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186; a case dealing with the disbarment of a barrister. The five member bench of the High Court stated (at pp201-202):

> "Although it is sometimes referred to as the "penalty of disbarment", it must be emphasized that a disbarring order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection....."

The purpose of clause 45 is to protect the public, especially vulnerable unemployed clients, and the public revenue in that only suitably qualified persons may be accredited as case managers within the case management system established by this Bill. It does not provide an additional penalty for past offences and accordingly it would be unnecessary for a court, in imposing a penalty on a convicted person, to take into account the possibility of disqualification from accreditation under the Employment Services legislation.

I also draw the Committee's attention to the report on the Employment Services Bill by the House of Representatives Standing Committee on Legal and Constitutional Affairs. The Committee did not see fit to make comment on clause 45.

In its Seventeenth Report of 1994, the committee thanked the Minister for this response but remained unconvinced by the reasons put forward. The committee indicated that it did not have a problem with cancelling accreditation for an offence under clause 48 in relation to false claims under the scheme nor, as a matter of principle, with an appropriate disqualification, whether it was rightly called a double penalty or not. The committee, however, continued to disagree with the retrospective application to crimes committed before the commencement of the legislation.

The committee indicated that its main concern was with the lack of logical correspondence between the occupation and the reason for disqualification for that occupational licence.

The committee noted that the protection of the unemployed is a worthy cause but if that were the purpose the committee would have expected that subclause 45(2) would have included as disqualified not only the directors, company secretary and board of management of a body corporate accredited to provide case management services but also any employee who provides those services. It would perhaps also have been logical to protect the vulnerable unemployed by disqualifying ex-burglars who might pass on break-and-enter techniques or ex-purse snatchers who might inspire a spot of mugging to complement government benefits. Basically, the question remained unanswered: why should someone who cannot expect to be re-employed in the finance industry not have the right to assist unemployed people to find a job ? The answer may be that such a person may be able to assist as an employee but not as a principal. If that is the case, the underlying reason for the provisions is not that such a person is unfit to assist the unemployed but is not fit to be employed directly or financed by the Government.

This left the reason of protecting public revenue, which the committee also found unconvincing. It seemed to be based on a lack of confidence in the administration of the scheme. There appeared to be some apprehension that the administrators would be unable successfully to supervise the operation of a contract for the provision of services where the provider has previously committed a serious fraud.

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.

On this issue, the Minister has made a further response as follows:

> The Committee has again commented on the previous clause 45 of the Bill (this clause was renumbered to clause 57 in the Bill as passed by the House of Representatives). The Committee had previously provided comments on this provision in a letter to me dated 25 August 1994. I provided a response to those comments on 7 November 1994.
>
> I believe that my response of 7 November 1994 adequately explained both the purpose and effect of the provision and directly addressed the concerns that

have been expressed by the Committee, both then and now. Nevertheless, I had my Department obtain advice on the matter from the Attorney-General's Department. I have attached a copy of that advice which I consider substantially supports the position I have put to the Committee.

Given the provision has now passed the Parliament without further comment or amendment, I do not think that I can usefully add anything to my previous comments at this stage.

The committee thanks the Minister for this response. The committee also agrees that nothing further could be usefully added at this stage. The advice from the Attorney-General's Department is attached to this report for the information of Senators.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH REPORT

OF

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SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1995

The committee presents its Fifth Report of 1995 to the Senate.

The committee reports to the Senate on the following bills which the committee has examined in the light of principles 1(a)(i) to (v) of Standing Order 24:

Taxation Laws Amendment Bill (No. 5) 1994

Transport Legislation Amendment Bill 1994

Taxation Laws Amendment Bill (No. 5) 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Minister for Justice.

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 to:

- avoid an element of double taxation in relation to the cost of certain bonus shares received as assessable dividends and subsequently sold from the insurance funds of a life company;

- allow life companies to use the average rate of tax payable on their non-fund component of taxable income;

- ensure payments of disability wage supplement are given similar tax treatment to other comparable social security payments;

- ensure that natural increase of a class of live stock for which no minimum value is prescribed is valued at the actual cost of production when the producer chooses to value at cost;

- amend the depreciation, capital gains and related miscellaneous 'rollover' provisions in relation to panel vans and utility trucks that carry one tonne or more;

- allow income tax deductions for gifts made to certain funds and organisations;

- include in assessable income of a friendly society or other registered organisation income derived from certain assets of the organisation;

- deal with the tax treatment in respect of certain transitional matters arising from the privatisation of the State Bank of New South Wales;

- amend capital gains tax (CGT) provisions to ensure certain transactions involving the creation of assets will be subject to CGT;

- repeal the existing anti-avoidance provision of the new company tax instalment arrangements, and make technical and consequential amendments;

- amend provisions setting out when the Commissioner of Taxation is deemed to have made an assessment under the existing and new company tax instalment regimes; and

- to replace the definitions of 'tainted calculated liabilities' and 'calculated liabilities';

Taxation Administration Act 1953 to:

- streamline the circumstances when administrative penalty becomes payable;

- amend provisions so that a public ruling is made when it is published and notice of the ruling is published in the Commonwealth Gazette; and

- amend provisions providing for a tax liability to be rounded down to the nearest multiple of five cents;

Superannuation Guarantee (Administration) Act 1992 to defer the requirement that employers meet their superannuation guarantee obligations on a quarterly basis until the regime is more established; and

Ombudsman Act 1976 to allow the Commonwealth Ombudsman, when performing investigative functions in relation to the Australian Taxation Office, to be known as the Taxation Ombudsman.

The committee dealt with this bill in Alert Digest No. 1 of 1995, in which it made various comments. The Assistant Treasurer responded to those comments in a letter received by the Committee on 21 March 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Schedule 1, item 71

In Alert Digest No. 1 of 1995, the committee noted that Item 71 of Schedule 1 of this bill provides for the amendments to the *Income Tax Assessment Act 1936* to be made by Part 9 of this bill to apply retrospectively from 12 January 1994.

The committee noted that the amendments, which concern the capital gains tax in relation to the assignment of non-corporeal interests, were announced by a press release of the Assistant Treasurer on 12 January 1994. This is an example of legislation by press release to which the resolution of the Senate of 8 November 1988 may apply.

That resolution states:

> where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill.

The committee noted that, as more than 6 calendar months had elapsed before the introduction of the bill and as the committee was not aware of any publication of a draft bill within that period, the committee drew the amendments to the attention of Senators for action in accordance with that resolution or any further resolution.

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.

On this issue, the Assistant Treasurer has responded as follows:

> The Committee noted in the Digest that provisions dealing with capital gains tax and pre-admission Everett assignments were introduced in the House of Representatives more than six months after the measures were announced on 12 January 1994. Further, the Committee stated that it was not aware of the publication of a draft bill in the six month period after that date. In that case, the amendments would be in breach of the resolution of the Senate of 8 November 1988.
>
> The amendments do not breach the relevant resolution, however, because draft legislation and explanatory notes relating to these measures were circulated for public comment on 12 July 1994. Copies of the press release and associated documents are attached. Interested parties were given until 12 August to comment on the draft provisions and, in the event, no comments were received. The press release indicated that the provisions were expected to be included in a Bill to be introduced into the Parliament later in 1994.

I trust that this satisfies your concerns in this matter.

The committee thanks the Assistant Treasurer for this response.

Transport Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to amend the following Acts:

Air Navigation Act 1920 to ensure articles of association of an Australian international airline (other than Qantas) conform with the Corporations Laws so they might be eligible to participate in the Clearing House Electronic Subregister System;

Australian Maritime Safety Authority Act 1990 to:

- enable the Minister to notify the Authority of his or her views on the appropriate strategic direction for the Authority and the performance of its functions;
- provide grounds for termination of appointment of members of the Authority when failure to provide information to the Minister occurs;
- provide for the payment of interim dividends;
- empower the Authority to appoint the Chief Executive Officer and Acting Chief Executive Officer; and
- transfer the employment of staff from the *Public Service Act 1922* to the Authority;

Australian National Railways Commission Act 1983 to:

- enable the Minister to notify the Commission of his or her views on the appropriate strategic direction for the Commission and the performance of its functions;
- provide grounds for termination of appointment of members of the Commission when failure to provide information to the Minister occurs;
- provide for the payment of interim dividends;
- empower the Commission to appoint the Managing Director and Acting Managing Director; and
- allow financial targets to be set as a specified rate of return on

assets;

Civil Aviation (Carriers' Liability) Act 1959 to increase the liability limits in respect of passenger death or injury for Australian international carriers;

Federal Airports Corporation Act 1986 to:

- enable the Minister to notify the Corporation of his or her views on the appropriate strategic direction for the Corporation and the performance of its functions;
- provide grounds for termination of appointment of members of the Board of the Corporation when failure to provide information to the Minister occurs;
- provide for the payment of interim dividends; and
- empower the Board to appoint the Chief Executive Officer;

Motor Vehicle Standards Act 1989 to:

- introduce categories of identification plates and specify administrative procedures; and
- allow the Minister to incorporate standards produced by recognised international standards organisations into the national standards, including subsequent amendments to those international standards;

Navigation Act 1912 to:

- revise the system of ship survey and certification, giving effect to a resolution of the International Maritime Organisation;
- remove a seaman's entitlement to wages when there is entitlement to compensation under the *Seafarers Rehabilitation and Compensation Act 1992*;
- revise salvage operations;
- provide an objective standard and prescribed forms of testing for alcohol and drug impairment; and
- remove sexist language;

Protection of the Sea (Civil Liability) Act 1981 to remove sexist language;

Protection of the Sea Legislation Amendment Act 1986 to ensure compensation is available to persons who suffer oil pollution damage as a result of maritime casualties involving oil carrying ships; and

Ships (Capital Grants) Act 1987 to define the procedure for demanding the repayment of an overpayment of a grant.

The committee dealt with this bill in Alert Digest No. 1 of 1995, in which it made various comments. The Minister for Transport responded to those comments in a letter dated 9 February 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Item 11 of Schedule 1

In Alert Digest No. 1 of 1995, the committee noted that this item inserts a new section 7A into the *Motor Vehicles Standards Act 1989* to enable the Minister to incorporate by reference documents that set out vehicle standards produced by various bodies as in force from time to time.

It seemed to the Committee that proposed new section 7A exhibits the contrary intention which would exclude the application of section 49A of the *Acts Interpretation Act 1901* in relation to instruments made under section 7A. Section 49A allows material to be adopted by reference into an instrument but only as in force at the time when the instrument takes effect not as in force from time to time. The effect of proposed section 7A, therefore, is to enable the adoption by reference of material not only in the form the material has at the time the instrument is made but in any form that the material subsequently takes.

The committee was concerned that this may be regarded as inappropriately delegating legislative power as it would allow a determination to be made to adopt documents containing vehicle standards that is made by a body in Australia or elsewhere, and the law in force in Australia will change every time that body alters those standards.

The committee noted that the *Motor Vehicles Standards Act 1989* appears in Schedule 2 of the Legislative Instruments Bill. Acts listed in Schedule 2 of the Bill become subject to Part 3 which requires a process of consultation so as to ensure that persons likely to be affected by a legislative instrument made under such an Act have an opportunity to make submissions concerning the policy or content of the instrument. This means that, when the Legislative Instruments Bill becomes law, the Minister or other rule-maker must consult before a rule can be made or changed under the *Motor Vehicles Standards Act 1989*. The committee was

concerned at the lack of consultation if a rule adopted some vehicle standards of a

body in another country as in force from time to time. That body could not be required to consult with persons in Australia before it changed its standards. The width of the power in proposed section 7A appears to be at odds with the policy enshrined in the Legislative Instruments Bill.

The committee, therefore, sought the advice of the Minister whether it would be more appropriate for a less wide power to be delegated.

Pending the Minister's advice, 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:

> The proposed amendments reflect the pursuit of international harmonisation of standards in this, and other industries. Such standards harmonisation is consistent with Australia's obligations under the GATT Standards Code (to which Australia is a contracting state), and our continuing involvement through APEC and similar forums in pursuing harmonisation and trade facilitation.
>
> With respect to vehicles, it is a long standing policy to adopt international standards wherever possible. The national standards determined under the MVS Act (known as the "Australian Design Rules" - ADRs) already incorporate many standards developed by organisations such as the Standards Association of Australia, and international standard making bodies. The existing practice of incorporating technical standards produced by such organisations acknowledges the role of specialist technical bodies in the development of industry standards, as well as the advantages to industry and consumers in the rapid application of new standards.
>
> Where such standards are incorporated into the ADRs they represent a conscious decision that the Australian market will accept the international standard as its own. Such decisions are made during the determination process, which involves consultation with State and Territory governments and industry and consumer groups. While the national standards currently incorporate many technical standards produced by these organisations, unless Australia amends its standards when the standards of international bodies which are already incorporated into the ADRs are changed, the ADRs becomes out of step with international practice. Vehicle manufacturers, which largely operate multinationally, are thereby disadvantaged by having to produce vehicles to satisfy differing standards in differing countries. Historically, as working to outdated standards imposes additional costs on manufacturers, industry has pressed strongly for the prompt adoption of changed standards by Australian authorities and favours the approach proposed in the Bill.

> While I agree that the subsequent amendments to ADRs having such "ambulatory effect" would not of themselves be subject to the consultation requirements of the Legislative Instruments Bill 1994, I note that industry, both manufacturers and consumers and their representative bodies, are active participants in both the international and national forums which develop and endorse technical standards. Therefore, manufacturers and users have a high degree of awareness and detailed knowledge of proposed changes to technical standards which may be incorporated into the ADRs, as they would usually have been involved in the development process.
>
> In conclusion, I would add that this amendment will not surrender responsibility for the maintenance of standards relevant to Australian conditions, nor would it lead to the diminution of standards in areas where Australia requires a higher level of protection or safety for road users, for example, seat belts on buses and side intrusion bars.

The committee thanks the Minister for this response which satisfactorily addresses the issue of consultation. The process which the Minister has outlined seems to fall within the exception, contained in subparagraph 19(1)(a)(vi) of the Legislative Instruments Bill, of "compliance with comparable consultation requirements". On the issue of whether it is appropriate to allow a body outside Australia to change the law as it applies in Australia, the committee is prepared to accept that the technical nature of the standards involved in this process suggests that it may be appropriate.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1995

The committee presents its Sixth Report of 1995 to the Senate.

The committee reports to the Senate on the following which the committee has examined in the light of principles 1(a)(i) to (v) of Standing Order 24:

Commonwealth Electoral Amendment Bill 1995

Migration Legislation Amendment Act (No. 2) 1995

Migration Legislation Amendment Bill (No. 3) 1995

Social Security (Non-Budget Measures) Legislation Amendment Bill 1994

Commonwealth Electoral Amendment Bill 1995

This bill was introduced into the House of Representatives on 9 November 1994 by the Minister for Administrative Services as the Commonwealth Electoral Amendment Bill (No. 2) 1994.

The bill proposes to amend the *Commonwealth Electoral Act 1918* to provide that:

- registered political parties will not have to report minute details of financial transactions in annual returns;

- donors to registered political parties will report annually to the Australian Electoral Commission (AEC);

- the agent of a registered political party will have a right to attend compliance investigations into local party units;

- organisations closely related to registered political parties will be required to furnish annual returns to the AEC and to detail the source of capital where income derived has been used wholly or mainly for the benefit of a political party;

- an anomaly will be removed to enable the current party agent to make a request for amendment to a claim or return;

- the rate for election funding reimbursement will be amended so that a Senate vote will be funded at the same rate as a House of Representatives vote and the rate will be increased to $1.50 per vote; and

- payments of election funding entitlements will also be made to the National Secretariat of a registered political party.

The bill has been amended in the House of Representatives and has been renamed Commonwealth Electoral Amendment Bill 1995.

The attention of the committee has been drawn to an aspect of the bill which may be said to have retrospective application.

Retrospective application
Item 34 - Proposed subsection 314EAE(3)

Proposed new subsection 314AEA(3) (to be inserted by item 34 of the Schedule) requires, in some circumstances, an "associated entity" to set out details about persons who have contributed to the capital of the associated entity, even though the

contributions may have been made before (and even long before) the commencement of this bill. This might be regarded as having retrospective application, as the provision relates to matters which occurred prior to the commencement of the legislation. On the other hand, the subsection requires no more than the provision of information about past events, and does not prejudicially affect the liability of any person. However, as the law currently stands, the privilege of anonymity which some donors enjoy will have been removed. The issue for the committee is whether the retrospective abrogation of a donor's privilege to remain anonymous can be regarded as an undue trespass on that individual's rights.

On this issue, the committee notes the Minister's remarks in the House of Representatives on 9 March 1995:

> "I wish to table the supplementary explanatory memorandum and make one comment on this alleged retrospectivity argument. It has been put to me at a fairly late stage in these proceedings--too late to effectively prepare amendments--that there is an element of retrospectivity in that, prior to 1992, donors to these funds would have had no possible knowledge of parliament's intention to force this form of disclosure. I must say that I find that argument quite persuasive. But I think it is a matter that deserves further consideration. It will have further consideration as this bill proceeds through the parliament."

The committee also finds the argument persuasive and so draws the matter to the attention of Senators for the further consideration mentioned by the Minister 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.

Migration Legislation Amendment Act (No. 2) 1995

The bill for this Act was introduced into the Senate on 31 January 1995 by the Minister for Defence.

The Act enables the recently enacted safe third country provisions of the *Migration Act 1958* to cover Vietnamese refugees who had already been successfully resettled in the People's Republic of China but who lodged claims for a protection visa in Australia after 30 December 1994. Further, the Act enables the safe third country provisions of the Act to have effect from a specified date preceding the date of commencement of any future agreements and relevant regulations.

The committee dealt with this bill in Alert Digest No. 2 of 1995, in which it made various comments. The Minister for Immigration and Ethnic Affairs responded to those comments in a letter received 22 March 1995. A copy of that letter is attached to this report. Although this bill has now been passed by both houses (and received Royal Assent on 17 February 1995), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Retrospective application - legislation by press release
Subclause 4(1)

In Alert Digest No. 2 of 1995, the committee noted that subclause 4(1), if enacted, would bring the substantive provisions of the bill into effect from 30 December 1994, the date on which the Minister announced the proposal for these amendments. It provides that applications from certain asylum seekers made, but not granted, during the transitional period (from that date until 27 January 1995) would cease to be valid on the commencement of the bill and would be treated as having been made after commencement.

The committee has consistently taken the view that, in principle, legislating in this way is unsatisfactory. It shares the unfairness that attaches to any form of retrospective legislation which adversely affects personal rights. But it also suffers the drawback of uncertainty. Legislation by press release assumes that Parliament will not only pass the bill but also pass it in the same terms as the press release. This detracts from Parliament's ability, capacity and inclination to amend legislation.

In this instance the introduction of the bill shortly after the Minister's announcement lessens the uncertainty about the details of the proposed legislation but does not lessen the uncertainty on whether the bill will be passed unamended. The committee noted that, for practical reasons, the Senate has been prepared to accept a degree of retrospectivity in relation to taxation legislation which had been announced by press release, as is evident from the resolution of 8 November 1988 (see *Journals* of the

Senate, No. 109, 8 November 1988, pp. 1104-5).

On the other hand, the retrospective application of the proposed bill takes away the present rights of this class of asylum seekers under the current law of Australia.

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.

On this issue, the Minister has responded as follows:

> The Committee commented on the retrospective nature of subsection 4(1) which has had the effect of bringing that subsection into effect from 30 December 1994, the date of which I announced the proposal for these amendments. The Committee noted that this would have the effect of providing that applications from asylum seekers covered by the proposed Bill that were made, but not granted, during the transitional period (from that date until 27 January 1995) would cease to be valid on the commencement of the Act and would be treated as having been made after commencement.
>
> The Committee commented that "legislation by press release" detracts from Parliament's ability, capacity and inclination to amend legislation and concluded that the retrospective commencement of the bill would take away rights of asylum seekers under the then current law of Australia.
>
> While noting the Committee's concerns, the Government does not consider that the legislation detracts in any way from Parliament's ability, capacity and inclination to amend legislation. The Government considers it is always open for the Parliament to enact legislation it considers appropriate in the circumstances, including commencement date of any such legislation. Further, the Government notes it is the Parliament which has legislative power under the Constitution and that the Parliament is neither obliged nor required to directly translate the intentions of the Cabinet or Executive into law.
>
> In this instance, the Government considers the retrospective nature of subsection 4(1) is more than a matter of convenience. The Government's view is that the proposed amendments are necessary to maintain the integrity and efficiency of Australia's migration, entry and humanitarian programs.
>
> Prompt action was required on the part of the government because of the recent arrival of persons who have been resettled and given protection in the People's Republic of China. As noted above, a Memorandum of Understanding was signed between Australia and the PRC on 25 January 1995. The critical aspect of the agreement is that, upon identification of the people concerned, the PRC has agreed to continue to provide protection to those persons.

The committee thanks the Minister for this response.

Non-reviewable decision
Schedule, item 1 - Proposed subsection 91F(1)

In Alert Digest No. 2 of 1995, the committee noted that Item 1 of the Schedule proposed to omit subsection 91F(1) and substitute a new subsection in the same terms as the previous subsection but with the addition of a further non-reviewable

discretion of the Minister.

In Alert Digest No 15 of 1994 the committee dealt with the insertion of section 91F into the Act. The committee noted that proposed section 91F of the *Migration Act 1958*, if enacted, would give to the Minister, if the Minister thinks it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The decision not to exercise this discretion is apparently not reviewable in any way, as subsection 91F(6) provides that the Minister does not have a duty to consider whether to exercise the power to exempt a particular person from the scheme.

The committee sought the Minister's advice on this matter, as it appeared inappropriate that, where it might be in the public interest to exercise a power, the bill should provide that the Minister does not have a duty even to consider exercising that power.

The committee also noted that the then proposed subsection 96F(3) required the Minister to lay before Parliament a favourable determination and the reasons for making it but the committee was of the opinion that scrutiny ought to be directed at the reasons for not considering to make a determination or, having considered, the reasons for refusing the determination. Accordingly, the committee sought the Minister's advice on an appropriate method of review.

The committee, therefore, 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.

On this issue, the Minister responded on 10 November 1994 as follows:

> Your Committee expressed concerns about section 91F of the Bill. This section would give me, if I think it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The Committee noted that subsection 91F(6) would provide that I do not have a duty consider whether to exercise this power.
>
> The Committee queried, since the power may be exercised in the public interest, whether it was appropriate that I am not subject to a duty to consider the exercise of the power.
>
> There are currently five sections of the *Migration Act 1958* (the Act) which provide the Minister with a non-compellable discretion to act in a certain manner where it is in the public interest to do so. These provisions are:
>
> (i) Subsections 345(1) and 345(7) - following review by the Migration Internal Review Office (MIRO).
>
> (ii) Subsections 351(1) and 351(7) - following review by the Immigration Review Tribunal (IRT).
>
> (iii) Subsections 391(1) and 391(7) - following review by the Administrative Appeals Tribunal (AAT) of an IRT reviewable decision.
>
> (iv) Subsections 417(1) and 417(7) - following review by the Refugee Review Tribunal (RRT).

(v) Subsections 454(1) and 454(7) - following review by the AAT of an RRT - reviewable decision.

These non-compellable discretions provide me with the power to act where the circumstances of a particular case are such as to merit my intervention in the "public interest". Thus, the powers involved provide for a "safety-net".

The various discretions are non-compellable to ensure that persons whose circumstances are such that they do not require my intervention cannot require that I exercise these powers. This will ensure that the powers are used sparingly and the integrity of the statutory scheme is maintained.

The Committee also noted that proposed subsection 91F(3) requires that the Minister lay before Parliament a favourable determination and the reasons for the making of the determination. However, the Committee formed the opinion that scrutiny ought to be directed at the reasons for not considering to make a determination, or at the reasons for refusing the determination and requested advice on an appropriate method of review of such matters.

Notwithstanding the Committee's comments, the Government does not consider it is appropriate to provide for the review of a non-compellable discretion that may only be exercised personally by the Minister when it is the "public interest" to do so.

In its Seventeenth Report, the committee thanked the Minister for this response but continued to draw 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.

As this bill also repeats the features of the earlier bill which were of concern, the committee drew Senators' attention to the repeated 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.

On this issue, the Minister has responded as follows:

The Committee also expressed concerns about subsection 91(F)(1). In Alert Digest No 15 of 1994 similar concerns were expressed about that section. The Committee noted that I responded to those concerns on 10 November 1994. The Committee in its Seventeenth Report thanked me for my response but continued to draw Senators' attention to the provision. With respect to the Committee, I reiterate again my response of the 10 November 1994 on this point, and state that it remains the position of the Government.

The committee thanks the Minister for this response, but the opinion of the committee remains the same.

Insufficient parliamentary scrutiny
Proposed section 91G

In Alert Digest No. 2 of 1995, the committee noted that proposed section 91G, if enacted, would authorise the Minister to legislate by notice in the *Gazette* (at least during the transition period referred to in the section) without the opportunity for

review by the Parliament. The proposed section envisages that at various times in the future regulations will be made which, while not coming into force retrospectively, will have retrospective application. The amendment enables the Minister to issue a notice in the *Gazette* in respect of a country that is not a safe third country for the purposes of the *Migration Act 1988*. A Regulation prescribing that country to be a safe third country would be made later (but within 6 months). The Regulation will make void any application for refugee status in relation to the safe third country made during the period between the notice in the Gazette and the coming into effect of the Regulation. Any subsequent application will also be void. It appears that the Minister could delay making the regulation for up to six months. In the absence of any regulation laid before Parliament, parliamentary scrutiny and possible disallowance is frustrated. The committee seeks the Minister's advice on this issue.

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

On this issue, the Minister has responded as follows:

> The Committee also expressed concerns that section 91G enables the Minister to issue a notice in the Gazette in respect of a country that at that time was not a safe third country for the purposes of the Migration Act. A regulation prescribing that country to be a safe third country would be made later (but within 6 months). The Regulations would make void any application for refugee status in relation to the safe third country made during the period between the notice in the Gazette and the coming into effect of the regulation. Any subsequent application would be void.
>
> The Committee should be aware that the notice in the Gazette has no operative effect independent of a Regulation being made, that is it has no independent operation. In fact, the provision for the Gazette Notice was inserted into the Bill as an additional safeguard and to provide transparency. The proposed subsection 91G(4) in effect means that the retrospective operation of any regulation will only extend back to the date of a Gazette Notice and this must be no more than 6 months before the regulation commences.
>
> The Committee suggests that Parliamentary scrutiny and possible disallowance is frustrated. However, this criticism is also misconceived as it is only the regulation that can bring this scheme into effect and the regulation can be disallowed in the normal way.
>
> The amendments enable the safe third country provisions of the Act, generally, to have effect from a specified date preceding the date of the commencement of any future agreements and relevant regulations. This is because, by definition, a safe third country is a country that has afforded effective protection to an individual before that person's arrival in Australia. An agreement between Australia and the safe third country recognises this situation.
>
> The legislation will not, and cannot, result in people being returned to a country that is not a safe third country. No-one will be returned unless they are covered by a safe third country agreement or there has been a proper examination of their claim for protection. The legislation does not apply to anyone who has been granted a substantive visa or to whom it has been determined Australia owes protection obligations before the safe third country regulation takes effect.

The committee thanks the Minister for this response, but remains unconvinced. The committee's view is that under the mechanism provided in section 91G, the eventual

effect is as if the regulation was made on the day the notice was gazetted but parliamentary action to disallow cannot commence until after the actual day the regulation is made. But the real concern about section 91G is that it nullifies paragraph 48(2)(a) of the *Acts Interpretation Act 1901.*

Paragraph 48(2)(a) provides:

> A regulation, or a provision of regulations, has no effect if, apart from this subsection, it would take effect before the date of notification and as a result:
>
> (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of notification would be affected so as to disadvantage that person.

The legislative policy, expressed by Parliament in the Acts Interpretation Act, is that Parliament itself should make the laws that operate retrospectively to take away people's rights. Under section 91G, Parliament has delegated that power to the executive.

Further, the committee notes that disallowance of a regulation has effect only from the day the disallowance motion is passed or deemed to be passed. This, given the vagaries of sitting periods, can sometimes be several months after the regulation is made. Once the regulation is made, action to deport applicants, whose applications the regulation has made void, can lawfully be taken, even though Parliament later disallows the regulation.

Migration Legislation Amendment Bill (No. 3) 1995

This bill was introduced into the Senate on 31 January 1995 by the Minister for Defence.

The bill proposes to:

- ensure that fertility control policies of the government of a foreign country are disregarded in making certain determinations for the purposes of considering an application for a protection visa; and

- prevent a non-citizen from making further applications for a protection visa when they have already made an application, whether or not the prior application has been finally determined.

The committee dealt with this bill in Alert Digest No. 2 of 1995, in which it made various comments. The Minister for Immigration and Ethnic Affairs responded to those comments in a letter received 22 March 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Non reviewable decision
Schedule, item 4 - Proposed section 48B

In Alert Digest No. 2 of 1995, the committee noted that Item 4 of the Schedule proposes a new section in the same terms as Section 91F about which the committee expressed its concerns in Alert Digest No. 15 of 1994.

In Alert Digest No 15 of 1994 the committee dealt with the insertion of section 91F into the Act. The committee noted that proposed section 91F of the *Migration Act 1958*, if enacted, would give to the Minister, if the Minister thinks it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The decision not to exercise this discretion is apparently not reviewable in any way, as subsection 91F(6) provides that the Minister does not have a duty to consider whether to exercise the power to exempt a particular person from the scheme.

The committee sought the Minister's advice on this matter, as it appeared inappropriate that, where it might be in the public interest to exercise a power, the bill should provide that the Minister does not have a duty even to consider exercising that power.

The committee also noted that the then proposed subsection 91F(3) required the Minister to lay before Parliament a favourable determination and the reasons for making it but the committee was of the opinion that scrutiny ought to be directed at

the reasons for not considering to make a determination or, having considered, the reasons for refusing the determination. Accordingly, the committee sought the Minister's advice on an appropriate method of review.

As proposed section 48B of this bill repeats features of that earlier bill which were of concern, 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.

On this issue, the Minister has responded as follows:

> The Committee also commented about proposed subsection 48B - a non-reviewable Ministerial decision-making power. Similar concerns were expressed about section 91F in Alert Digest No. 15 of 1994. I responded to those concerns on 10 November 1984. I reiterate the points made in my letter of 10 November 1994, and advise that the position of the Government remains the same.

The committee thanks the Minister for this response, but the opinion of the committee also remains the same.

Social Security (Non-Budget Measures) Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:

Social Security Act 1991 to:

- modify carer pension provisions in relation to accompanying the carer overseas;
- extend employment entry payments to carer pensioners;
- provide education entry payment to carer pensioners;
- extend suspension provisions to disability support pensioners (DSP) when DSP is cancelled because of earnings;
- allow certain DSP recipients to retain eligibility for fringe benefits;
- allow recipients of job search allowance, newstart allowance and youth training allowance to receive mobility allowance;
- ensure partner allowance is payable from the same date as other allowances under certain circumstances;
- ensure the sole parent pension is available only if the separation is permanent or indefinite;
- require that claimants for sole parent pension or bereavement allowance attend an interview relating to that claim;
- increase the additional family payment benchmark effective from 1 January 1996;
- allow retrospective family payment arrears and increases to be paid in certain circumstances;
- remove the need to determine whether particular loans are exempt or not;
- remove the requirement for a waiting period before sickness allowance

can be paid in certain circumstances;

- allow the Secretary to require job search or newstart allowance recipients to attend a particular place for a specified purpose;

- provide that training supplement is payable only if the training course undertaken has the approval of the Employment Secretary;

- expand the circumstances in which a notice of decision is taken to be 'given' to a person;

- ensure that a person is taken to have failed to negotiate an activity agreement if the Secretary is satisfied that the person is unreasonably delaying the agreement;

- reduce rates of payments of certain allowances from a certain date when a customer with an earnings credit balance fails to notify receipt of income that could result in a decreased allowance payment;

- allow customer information to be disclosed to other Commonwealth agencies in certain cases;

- allow the Secretary to collect information relating to claims for Seniors Health Cards;

- clarify that Ministerial decisions under sections 1099E and 1099L are not subject to internal or Social Security Appeals Tribunal review;

- exempt specified exchange trading systems from the income test provisions;

- simplify the continuation, variation and termination of determinations;

- clarify the concept of payability; and

- make minor and technical amendments;

National Health Act 1953 to:

- enable certain persons who receive mature age allowances to retain eligibility for Commonwealth fringe benefits; and

- preserve health care card entitlement for certain mobility allowees;

Data-matching Program (Assistance and Tax) Act 1990 to effect the Department of Housing and Regional Development's withdrawal from the data-matching program; and

Social Security (Budget and Other Measures) Legislation Amendment Act 1993 to remove amendments relating to telephone allowance and their commencement on 1 July 1991.

The committee dealt with this bill in Alert Digest No. 1 of 1995, in which it made various comments. The Minister for Social Security responded to those comments in a letter received 21 March 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Unnecessary powers?
Part 2, Division 7

In Alert Digest No. 1 of 1995, the committee noted that Division 7 of Part 2 of this bill, if enacted, would provide additional power to the Department to require claimants for sole parent pension and bereavement allowance to attend an interview to give information relating to the person's claim and would also provide an additional ground to reject the claim - the ground of not taking reasonable steps to comply with the requirement to attend the interview. At first blush, these seemed to be not unreasonable, but the committee was concerned on several counts.

By way of background the committee noted:

- The Department already has the power to compel attendance at an interview - subsection 1304(5) - although subsection 1304(6) provides that the time specified for a compulsory interview must be at least 14 days after the notice is given.

- The explanatory memorandum indicates that the 14 day period is considered impractical for new claims because such persons are generally in hardship and need to have their claims determined as quickly as possible. Section 1304 is considered to prevent the department from arranging an interview in less than fourteen days.

- The explanatory memorandum also indicates that section 1304 also prevents the Department from rejecting a claim within that 14 day period.

- The explanatory memorandum also states that in order to ensure that claims do not remain undetermined for 'lengthy periods of time simply because the claimants has failed to attend an interview' the amendments allow the Department to reject a claim if the person has failed to attend an interview within the (reduced) notice period.

It seemed to the committee that the proposed amendments raise several questions:

- Why is there a problem only with sole parents and widowed persons and not with other claimants for income support?

- Surely if claimants are in hardship, they would be willing voluntarily to attend an interview - is there a legal impediment to such an interview?

- Why give officials an extra power to reject a claim on a ground that has nothing to do with whether the claimant is qualified but solely for disobeying a departmental instruction to come and be interviewed?

- Why force a claimant who has perhaps been traumatised by bereavement and therefore forgets or is unable to face an interview to justify themselves to a bureaucrat under pain of losing their first or perhaps first and second instalment of pension?

The committee was of the opinion that, if claimants for special benefit, who by definition are in hardship, can be satisfactorily dealt with on a voluntary basis without being dragooned by special powers to require attendance, a change in approach to sole parent and widowed claimants would be of more benefit than changes to the Act. The committee was interested to know whether the Minister agreed and sought his advice on the questions above.

Pending the Minister's advice, 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.

On this issue, the Minister has responded as follows:

> Division 7 was reviewed in the light of the unfavourable reaction that it attracted and it was decided that it should be omitted from the bill. A Government amendment to this was moved and passed in the House of Representatives. As a result, I do not believe it is necessary to address the substance of the Committee's concerns about Division 7.

The committee thanks the Minister for this response, noting the withdrawal of Division 7.

Non-reviewable decision
Clause 28

In Alert Digest No. 1 of 1995, the committee noted that Clause 28, if enacted, would include in the list of non-reviewable decisions in section 1250 of the *Social Security Act 1991* a decision by the Employment Secretary not to approve a person's participation in a specified vocational training course for the purpose of payment of the jobsearch/newstart training supplement.

The committee noted that the explanatory memorandum seemed to give as the reason for the amendments in Division 11 the need to restrict the payment of training supplement to those undertaking a training course of labour market program only where the course would assist the particular person to find full-time paid work or acquire the skills necessary to do so.

The Act already requires the Employment Secretary to approve the particular course as suitable for a vocational training course or labour market program. The Act also makes non-reviewable the decision of the Employment Secretary not to approve a particular course as suitable.

The committee was of the opinion that there was a vast difference between the approval in general of a course as suitable for vocational training or labour market program and the decision that a particular course will not assist a particular person to find work or obtain the skills to do so. It may be appropriate that there be no review of the decision to approve a course as suitable in general for the job training program. A decision, however, that a particular course, already approved as a course suitable for job training, will or will not assist a particular person requires the Ministerial guidelines, referred to in proposed subsections 560(8) and 644(8), to be applied to the circumstances of a particular person. Such a decision is apt for review on the merits. Whether or not review is available should not rest merely on whether other decisions of the decision-maker are subject to review but on the nature of the decision to be made.

It seemed that the proposed mechanism could result in Billy Bloggs and Mary Brown both undertaking the same vocational training course, with one receiving payment of training supplement and the other not. The decision to exclude one of them ought to be subject to review on the merits. The clause therefore could be considered to make personal rights unduly dependent on a non-reviewable decision.

The committee sought the Minister's advice on this matter. Pending the Minister's advice, 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.

On this matter, the Minister has responded as follows:

> Section 1250 does not prevent the SSAT from reviewing a decision to approve a customer's participation in a course of labour market program. Clause 28 of the Bill seeks to prevent such decision from being reviewable by the SSAT.
>
> The job search and newstart training supplements are income support arrangements and are paid to participants in Department of Employment, Education and Training (DEET) and approved labour market program training courses known as Formal Training Assistant (FTA). These payments are budget limited in that they are made from DEET's Labour Market Program budget appropriation. Management of the programs/courses that are approved for the purposes of payment of the training supplement requires that DEET officers assess the relative needs of job seekers to establish funding priorities with the objective of assisting the most disadvantaged and utilising available resources in the most cost effective manner.

The decision on whether or not to approve a person's participation in an approved program/course would be guided by Labour Market Program guidelines issued by the DEET Minister rather than criteria established by the Act. The guidelines (continued in the CES Manual) are the basis for the administration of the non-statutory labour market programs which are conducted within DEET. Under the guidelines, eligibility conditions for payment of the training supplement vary according to the nature of the labour market program in which the customer is participating. Since each of these programs are established as a matter of administration, it is not considered appropriate that statutory rights of review apply.

The Act provides a mechanism under which the payment of the training supplement may be included with payment of 'regular' job search allowance or newstart allowance payments.

This measure was triggered by a recent SSAT decision. The applicant in the relevant case was a student in a TAFE course also attended by JOBTRAIN participants. After becoming aware of the existence of newstart training supplement from fellow students, the applicant applied for the supplement but was rejected in accordance with the JOBTRAIN guidelines. After consideration of the matter, the SSAT decided that the applicant satisfied the requirements of subsection 644(1) of the Act and therefore should be paid the newstart training supplement.

This decision has major ramifications for DEET, who administer the training supplement provisions.

The interpretation of the Act adopted by the SSAT has the potential to set up a statutory entitlement to a budget limited DEET Labour Market Program and may set a precedent which may see a possible escalation in the payment of FTA to customers previously determined by DEET as ineligible for the payment under program guidelines.

The SSAT decision may be interpreted as meaning that any job search or newstart allowee could claim FTA if he or she participates in a course that is also attended by a person who receives FTA. This would bypass the CES selection of the allowee's training needs and the ability of DEET program managers to control FTA funds and would result in FTA becoming a demand driven appropriation. This would also mean that future customers would not be able to receive FTA because of lack of available FTA funds.

The committee thanks the Minister for these comments which greatly elucidate the nature of the problem. Although unable to agree that merits review is inappropriate merely because criteria are not set out in the Act, the committee is persuaded by the fuller explanation of the limits of the program.

It is perhaps unfortunate that the explanatory memorandum left the committee with the impression that eligibility for this training supplement depended on a decision that a particular course, already approved as suitable for vocational training or labour market program, would or would not assist a particular person to find work or obtain the skills to do so. The Minister makes clear that the eligibility criteria require:

"that DEET officers assess the relative needs of job seekers to establish funding priorities with the objective of assisting the most disadvantaged and utilising available resources in the most cost effective manner."

On the basis that the funds available are limited and need to be directed to the most disadvantaged, the committee accepts that merits review would not be appropriate. In this respect, the committee notes paragraph 7.32 of the Seventeenth Annual Report 1992-93 of the Administrative Review Council:

"Decisions that relate to the allocation of a finite fund or resource, against which all potential claims for a share of that fund or resource could not be met, are generally considered inappropriate for merits review. This is because a decision to make an allocation affects the amount available for distribution to other claimants; if that decision is altered, then so is the basis of all other decisions. Decisions of this nature are referred to as polycentric decisions."

Issuing of guidelines by the Minister for Employment Education and Training

On this matter, the committee noted that there did not appear to be any requirement for the ministerial guidelines, in accordance with which the decision will be made, to be gazetted or subject to tabling or disallowance by Parliament. Such a lack of publication may be considered to make personal rights unduly dependent upon insufficiently defined administrative powers. If, however, the view is taken that the ministerial guidelines are an exercise of legislative power, that exercise may be considered to be insufficiently subject to parliamentary scrutiny.

The committee sought the Minister's advice on these matters.

The committee also 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 or, in the alternative, to make the exercise of legislative power insufficiently subject to Parliamentary scrutiny in breach of principle 1(a)(v) of the committee's terms of reference.

On this issue the Minister has responded as follows:

The guidelines are issued by the Minister for Employment, Education and Training in relation to the eligibility for payment of FTA. They are incorporated in the CES Manual. As noted above, this labour market program is established as a matter of administration and the issue of the guidelines is not an exercise of legislative power. As such, it is not appropriate for them to be subject to parliamentary scrutiny by way of disallowance.

The CES Manual is reviewed regularly and is available for public inspection and purchase as is required under the ***Freedom of Information Act 1982*** in relation to documentation relating to schemes administered by DEET. I do not consider that any additional requirements for gazettal or tabling are appropriate.

The committee thanks the minister for this response.

Disclosure of information
Clauses 37 and 38

In Alert Digest No. 1 of 1995, the committee noted that these clauses would widen the range of people by whom and to whom information about Social Security clients may be disclosed. This may be considered as trespassing unduly on personal rights and liberties.

Clause 37 repeals the provision that prevented the delegation of the power of the Secretary to disclose information to the Secretary of a Commonwealth Department or the head of a Commonwealth authority. Clause 38 enables the disclosed information to be received not only by the relevant Secretary or head but also by staff of their agencies.

In respect of the receipt of information, (clause 38), the committee was uncertain whether to regard this as a real widening or a mere clarification of the law. Subsection 1314(4) of the *Social Security Act 1991* obviously contemplates that the staff of the various agencies to whom disclosure is made, as the Act stands at present, will have access to the information as it binds them to some of the same confidentiality obligations as staff of the Social Security Department.

In respect of disclosing the information, (clause 37), the committee noted that the explanatory memorandum indicated that it was unworkable for the Social Security Secretary to consider and disclose information personally in all relevant cases. While accepting this consideration, the committee sought the Minister's advice on whether it would be more appropriate for the law expressly to place some limit on the delegation of this power. If Parliament thought it appropriate to prevent the delegation of this power even to the Deputy Secretary of the Department, it seems a major reversal to remove all restrictions.

Pending the Minister's advice, 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.

On this issue, the Minister has responded as follows:

> There is already in place a scheme along these lines which is well known and accepted. the Scheme has been based on the Secretary *authorising* the disclosure of information under paragraph 1314(1)(b) in specific circumstances, by specific staff of the Department and to specific staff of other agencies. This is to be distinguished from *delegation* of the power. Delegation means that an individual "owns" the power to disclose information delegated to him or her by the principal decision maker. Authorisation, however, means that the person disclosing the information does not own the power which he or she exercises. Instead, he or she is, for reasons of convenience, the *alter ego* or an extension of the principal decision maker - authorised to exercise the power in the name of the principal decision maker as prescribed by the principal decision maker. It is based on a principal/agent relationship.
>
> Authorisation is a recognised technique by which an administrator who is required by law to take a particular action in relation to a matter, but cannot possibly be expected to focus his or her personal attention on the matter in all relevant cases, may authorise another person who is responsible to the principal decision maker to exercise the power on his or her behalf. This is commonly known as the *Carltona* principle (as it has its origins in the decision of the English Court of Appeal in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.) It generally

applies by implication, for example, when there is no express power of delegation and the power is not required to be exercised personally by the principal decision maker.

The current scheme operates on the basis of a detailed instrument of authorisation by the Secretary - see the attached current instrument. In some situations, disclosure of information by staff at operational levels is authorised. In other situations, more senior staff are authorised to make the disclosure. It should be noted that the instrument is widely known and accepted. The Privacy Commissioner has been consulted about it and no objections have been lodged by other groups or individuals in relation to the levels of staff at which these disclosure functions are carried out. The intention is that the same levels of staff as are currently *authorised* to disclose information will be *delegated* the power and in the same very specific circumstances.

The omission by clause 37 of the provision that currently prevents the delegation of the disclosure power in question will allow the current scheme to operate more formally. The omission was recommended by the Attorney-General's Department so that the scheme is based clearly on legislation rather than on the common law *Carltona* principle.

The Committee has sought advice on whether it would be appropriate for the law expressly to place some limit on the delegation of this power. I would not favour this as the levels at which it is practical to conduct this disclosure function are sometimes relatively junior, as indicated in the attached instrument. Furthermore, it would be unwieldy to be restricted under the legislation when it becomes necessary to address the disclosure requirements for new categories of information not already covered or anticipated.

If delegation of this disclosure power were limited in this way, it could be seen as inconsistent with the arrangements for delegation of any number of other powers under the Act, particularly those of a more sensitive nature, that have no such restriction.

Lastly (and importantly), it should be noted that the scheme for disclosure of information under this particular power is already subject to Parliamentary scrutiny in a related sense as a result of amendments made by the ***Social Security Legislation Amendment Act 1994***. Those amendments provided that the exercise of this disclosure power is subject to Ministerial guidelines under paragraph 1315(1)(aa) and that those guidelines constitute a disallowable instrument. Therefore, the whole scheme has become increasingly accountable, these current amendments being a further step.

It is intended that guidelines would be made under paragraph 1315(1)(aa) if the clauses are enacted. Currently, the only person who would legally be subject to the guidelines is the Secretary to the Department.

I trust that this information addresses the Committee's concerns in relation to the various provisions discussed.

The committee thanks the Minister for this response.

Non-reviewable decisions
Clauses 40 and 41

In Alert Digest No. 1 of 1995, the committee pointed out that these clauses, if enacted, would ensure that certain decisions of the Minister exercising a power or function under the Act would not be reviewable whether internally or through the Social Security Appeals Tribunal and thereafter by the Administrative Appeals Tribunal. The explanatory memorandum suggests that it had always been assumed that decisions of

the Minister under the relevant sections were not reviewable but that recent legal advice had brought this assumption into question.
It seems clear that the decisions of officers are reviewable and from the definition of officer in the Act - a person performing duties or exercising powers or functions under the Act - that the Minister's decisions would be reviewable when he or she exercises powers or functions under the Act.

The question for the committee was whether exempting the Minister's decision from the review process makes personal rights and liberties unduly dependent on non-reviewable decisions. The committee was not convinced that a decision should not be reviewable just because it is made by a Minister. Otherwise administrative review might be avoided by giving to the Minister all the discretionary and contentious decisions. The committee readily acknowledged that general policy decisions are not apt for administrative review, nor is a range of other decisions. But it is the nature of the decision not the status of the decision-maker that is relevant to the issue of whether a decision should be reviewable on the merits.

The committee noted that the decisions in question are decisions under sections 1099E and 1099L of the Act. The Act provides that income for the purposes of the income test on social security payments includes amounts deemed to be earned by moneys deposited in accounts which bear little or no interest or by moneys loaned with little or no interest. Sections 1099E and 1099L enable the Minister to decide that specified money of a person, or of a class of persons and specified loans or a specified class of loans may be disregarded and so no deemed amount is included in the income test. Where the Minister decides with respect to a class of persons or a class of loans, it may be characterised as a general policy decision that would be inappropriate for review. But fairness demands, where an individual seeks the favourable exercise of what is so obviously a discretion, that review on the merits be available.

The committee suggested that it may be felt that there is some difficulty in review of ministerial decisions by departmental officers or by a tribunal whose members are appointed by the Minister. The Administrative Appeals Tribunal, therefore, may be the appropriate forum along the lines of the former jurisdiction with respect to certain Migration Appeals.

The committee sought the Minister's advice on this matter.

Pending the Minister's advice, 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 committee thanks the Minister for his detailed assistance with this bill. Unfortunately, his response did not refer to this final matter concerning clauses 40 and 41. The committee remains interested in any comment the Minister might care to make on this issue.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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

SEVENTH REPORT OF 1995

The committee presents its Seventh Report of 1995 to the Senate.

The committee reports to the Senate on the following which the committee has examined in the light of principles 1(a)(i) to (v) of Standing Order 24:

Archives Amendment Act 1995

Auditor-General Bill 1994

Migration Legislation Amendment Bill (No. 5) 1994

Social Security (Non-Budget Measures) Legislation Amendment Bill 1994

Archives Amendment Act 1995

The bill for this Act was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The Act provides that:

- bodies either established for a public purpose or subject to Commonwealth control remain subject to the Archives Act unless specifically excluded from its operation;

- the prior records of bodies which are subsequently removed from the application of the Archives Act remain subject to the Act unless specifically excluded from its operation;

- the Australian Federal Police retain custody of certain sensitive documents relating to the National Witness Protection Program (NWPP) rather than requiring their transfer to the Australian Archives;

- highly sensitive documents relating to the NWPP are exempted from public disclosure under the Archives Act; and

- the Commissioner of the Australian Federal Police or certain staff members may provide documents and/or evidence to a private hearing of the Administrative Appeals Tribunal.

The committee dealt with this bill in Alert Digest No. 1 of 1995, in which it made various comments. The Minister for Communications and the Arts responded to those comments in a letter dated 7 May 1995. A copy of that letter is attached to this report. Although this bill has now been passed by both houses (and received Royal Assent on 15 March 1995), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Proposed section 3A

In Alert Digest No. 1 of 1995, the committee noted that proposed section 3A, if enacted, would allow regulations as well as primary legislation to deem a particular body not to have been established for a public purpose for the purposes of the *Archives Act 1983*. Where Parliament legislates to establish an authority, body, tribunal or organisation for a public purpose, Parliament automatically places the agency within the purview of the *Archives Act 1983*. The proposed subsection would enable such an agency to be taken outside the Act by regulation. This may be regarded

as an inappropriate delegation of legislative power. The committee, therefore, sought the Minister's advice on whether it might be more appropriate to achieve this purpose by an amendment of primary legislation.

Pending the Minister's advice, 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:

> The essential purpose of the amending legislation in relation to Government Business Enterprises is to halt the erosion of coverage by the *Archives Act 1983* (the Act) that has resulted from the inadvertent removal by legislation of Commonwealth Government agencies from the Act's jurisdiction.
>
> Section 3A provides that an authority of the Commonwealth will only be able to be removed from the Act's jurisdiction if there is a specific legislative provision or a specific regulation under the Act. It certainly is not the Archives' wish or intention to have the power to change the public purpose role of an organisation. The reason for including the option of a regulation is to cover those organisations whose public purpose role is not provided for in legislation and whose change in role and structure is not covered by legislation. The Archives would never be in a position to initiate the change in the public purpose role of such an organisation but would only be reflecting a decision of the Government in such a case. The intention of a regulation under the Act would be for the purpose of clarifying the Status of an organisation under the Act only.
>
> I accept the Committee's contention that it would be better, as a matter of principle, to achieve the purpose of section 3A by primary legislation rather than by regulation. It may well be that a situation will never arise in which the use of a regulation would be the only practical option. If this proves to be the case, consideration will be given to removing the power of regulation in section 3A when the Act is next amended.

The committee thanks the Minister for this response, noting his in-principle agreement and his remarks concerning consideration being given to future amendment.

Auditor-General Bill 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Minister for Finance.

The bill is one of a package of three to replace the *Audit Act 1901*. Particularly, this bill:

- creates the office of Auditor-General for the Commonwealth and defines powers and functions of that office to support its functional independence;

- establishes the Australian National Audit Office (ANAO); and

- provides for the appointment of the Independent Auditor to audit the ANAO.

The committee dealt with this bill in Alert Digest No. 4 of 1995, in which it made various comments. The Minister for Finance responded to those comments in a letter received on 30 March 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Sensitive information not to be included in public reports. Clause 34

In Alert Digest No. 4 of 1995, the committee noted that this clause had been discussed at a public hearing of the Finance and Public Administration Legislation Committee (*Hansard* p.27ff), from which the committee made the following observations.

Clause 34, as amended, provides:

(1) The Auditor-General must not include particular information in a public report if:

(a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or

(b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).

(2) The reasons are:

(a) it would prejudice the security, defence or international relations of the Commonwealth;

(b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;

(c) it would prejudice relations between the Commonwealth and a State;

(d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the commonwealth;

(e) it would unfairly prejudice the commercial interests of any body or person;

(f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

(3) If, because of subsection (1), the Auditor-General decides:

(a) not to prepare a public report; or

(b) to omit particular information from a public report;

the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a copy of each report under this subsection to the Prime Minister, the Finance Minister and the responsible Minister or Ministers (if any).

(4) In this section:

"public report" means a report that is to be tabled in either House of the Parliament;

"State" includes a self-governing Territory.

It seemed only common sense that some legislative mechanism be put in place to prevent disclosure of information that would prejudice national security and at the same time enable the Auditor-General to carry out his or her functions. To the extent that the clause achieves that purpose, the committee had no problem with it.

What has been raised is whether clause 34 would prevent the Auditor-General from disclosing to a parliamentary committee or to Parliament itself, other than by way of tabling a report in either House, information coming within paragraph 34(1)(a) or (b).

The committee was of the opinion that clause 34, as it stands, would not operate as a declaration under section 49 of the Constitution to prohibit disclosure to Parliament or its committees.

In case the contrary was correct, however, the committee sought advice of the Minister as to whether the clause could be so drafted that it is clear that Parliament and its committees has right of access (suitably safeguarded) to the information.

For Parliament not to have access to some of the information which might be excluded by the clause impinges on the rights of Australians to have the administration of the country by the executive properly scrutinised by Parliament.

The committee, therefore, 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:

> The Committee has raised the question whether the terms of that clause would also operate to prevent the Auditor-General from disclosing such sensitive information to Parliament, or a committee of the Parliament other than by way of tabling a public report.
>
> I note that your Committee is of the opinion that clause 34, as it stands, would not operate as a declaration under section 49 of the Constitution to prohibit disclosure to Parliament or its committees. In case the contrary is correct, however, the Committee seeks my advice as to whether the clause could be so drafted to make it clear that Parliament and its committees have a right of access (suitably safeguarded) to the information. On that score, I note the Committee's view, as expressed in the Alert Digest, that for Parliament not to have access to some of the information which might be excluded by the clause impinges on the rights of Australians to have the administration of the country by the executive properly scrutinised by Parliament.
>
> I am advised that, in the opinion of the Attorney-General's Department, clause 34 does, in fact, operate as a declaration for the purposes of section 49 of the Constitution to prohibit disclosures of sensitive information to Parliament and its committees.
>
> In considering your Committee's views and its request as to whether the clause might be re-cast to permit such access, I have taken two other relevant factors into account: first, the considered judgement in this matter by Parliament in 1978, in agreeing to insert subsection 48F(5) into the *Audit Act 1901* - clause 34 of the Auditor-General Bill, as you would be aware, is a continuation of the scope and effect of that subsection; and secondly, over the last 17 years, there has never been any indication that subsection 48F(5) of the Audit Act has worked other than sensibly and sensitively - that is, without trespassing unduly on the personal rights and liberties of Australians, as the Committee seems to fear it would.
>
> Accordingly, I do not share the Committee's concerns and I do not accept that clause 34 of the Auditor-General Bill 1994 warrants redrafting.

The committee thanks the Minister for this response.

The committee, however, remains to be convinced that section 49 of the Constitution applies. The committee is of the opinion that an exchange of views between the committee and the Attorney-General would be profitable and an invitation to meet with him is being extended.

The committee's view is that there is nothing in the present section 48F which would enable the conclusion to be drawn that it would operate as a declaration for the purposes of section 49 of the Constitution. If the opinion of the Attorney-General's Department is correct, clause 34 is much wider in effect and scope than the present section 48F which it replaces. According to that opinion, clause 34 will operate as a section 49 declaration and so preclude disclosure to Parliament. The committee is of the opinion that where it is intended that a clause of a bill should operate as a section 49 declaration, that intention should be clearly expressed in the bill.

Pending discussion with the Attorney-General, the committee continues to draw the 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.

Migration Legislation Amendment Bill (No. 5) 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:

Migration Act 1958 to:

- 9 effect some recommendations of the Committee for the Review of the System for Review of Migration Decisions, particularly in relation to the Immigration Review Tribunal (IRT);

- 9 create the positions of Deputy Principal Member and Senior Members of the Refugee Review Tribunal (RRT);

- 9 provide for the Remuneration Tribunal to determine the remuneration of members of the IRT and RRT; and

- 9 amend procedures relating to the cancellation of business skills visas; and

Immigration (Education) Act 1971 to provide for the indexation of fees.

The committee dealt with this bill in Alert Digest No. 1 of 1995 in which it had no comment. The Law Institute of Victoria has forwarded a submission dated 29 March 1995 in relation to this bill. A copy of that submission is attached to this report and relevant parts of the submission are discussed below.

In the light of this submission, it could well be argued that new section 363A, when read with new section 366A, trespasses unduly on individual rights, in that they prevent an applicant before the Immigration Review Tribunal from having effective legal representation.

The committee is informed that the Legal and Constitutional Legislation Committee is to report on this bill on 31 May 1995. In the interim, the committee seeks the advice of the Minister on this issue and draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Social Security (Non-Budget Measures) Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:

Social Security Act 1991 to:

- modify carer pension provisions in relation to accompanying the carer overseas;
- extend employment entry payments to carer pensioners;
- provide education entry payment to carer pensioners;
- extend suspension provisions to disability support pensioners (DSP) when DSP is cancelled because of earnings;
- allow certain DSP recipients to retain eligibility for fringe benefits;
- allow recipients of job search allowance, newstart allowance and youth training allowance to receive mobility allowance;
- ensure partner allowance is payable from the same date as other allowances under certain circumstances;
- ensure the sole parent pension is available only if the separation is permanent or indefinite;
- require that claimants for sole parent pension or bereavement allowance attend an interview relating to that claim;
- increase the additional family payment benchmark effective from 1 January 1996;
- allow retrospective family payment arrears and increases to be paid in certain circumstances;
- remove the need to determine whether particular loans are exempt or not;

- remove the requirement for a waiting period before sickness allowance can be paid in certain circumstances;

- allow the Secretary to require job search or newstart allowance recipients to attend a particular place for a specified purpose;

- provide that training supplement is payable only if the training course undertaken has the approval of the Employment Secretary;

- expand the circumstances in which a notice of decision is taken to be 'given' to a person;

- ensure that a person is taken to have failed to negotiate an activity agreement if the Secretary is satisfied that the person is unreasonably delaying the agreement;

- reduce rates of payments of certain allowances from a certain date when a customer with an earnings credit balance fails to notify receipt of income that could result in a decreased allowance payment;

- allow customer information to be disclosed to other Commonwealth agencies in certain cases;

- allow the Secretary to collect information relating to claims for Seniors Health Cards;

- clarify that Ministerial decisions under sections 1099E and 1099L are not subject to internal or Social Security Appeals Tribunal review;

- exempt specified exchange trading systems from the income test provisions;

- simplify the continuation, variation and termination of determinations;

- clarify the concept of payability; and

- make minor and technical amendments;

National Health Act 1953 to:

- enable certain persons who receive mature age allowances to retain eligibility for Commonwealth fringe benefits; and

- preserve health care card entitlement for certain mobility allowees;

Data-matching Program (Assistance and Tax) Act 1990 to effect the Department of Housing and Regional Development's withdrawal from the data-matching

program; and

Social Security (Budget and Other Measures) Legislation Amendment Act 1993 to remove amendments relating to telephone allowance and their commencement on 1 July 1991.

The committee dealt with this bill in Alert Digest No. 1 of 1995, in which it made various comments. The Minister for Social Security responded to those comments in a letter received 21 March, 1995. That response, however, inadvertently omitted comments on Clauses 40 and 41. The Minister has now responded to comments in relation to these two clauses in a letter dated 28 April 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Non-reviewable decisions
Clauses 40 and 41

In Alert Digest No. 1 of 1995, the committee noted that these clauses, if enacted, would ensure that certain decisions of the Minister exercising a power or function under the Act would not be reviewable whether internally or through the Social Security Appeals Tribunal and thereafter by the Administrative Appeals Tribunal. The explanatory memorandum suggested that it had always been assumed that decisions of the Minister under the relevant sections were not reviewable but that recent legal advice had brought this assumption into question.

It seemed clear that the decisions of officers were reviewable and from the definition of officer in the Act - a person performing duties or exercising powers or functions under the Act - that the Minister's decisions would be reviewable when he or she exercised powers or functions under the Act.

The question for the committee was whether exempting the Minister's decision from the review process made personal rights and liberties unduly dependent on non-reviewable decisions. The committee was not convinced that a decision should not be reviewable just because it was made by a Minister. Otherwise administrative review might be avoided by giving to the Minister all the discretionary and contentious decisions. The committee readily acknowledged that general policy decisions were not apt for administrative review, nor was a range of other decisions. But it was the nature of the decision not the status of the decision-maker that was relevant to the issue of whether a decision should be reviewable on the merits.

The decisions in question are decisions under sections 1099E and 1099L of the Act. The Act provides that income for the purposes of the income test on social security payments includes amounts deemed to be earned by moneys deposited in accounts which bear little or no interest or by moneys loaned with little or no interest. Sections 1099E and 1099L enable the Minister to decide that specified money of a person, or

of a class of persons and specified loans or a specified class of loans may be disregarded and so no deemed amount is included in the income test. Where the Minister decides with respect to a class of persons or a class of loans, it may be characterised as a general policy decision that would be inappropriate for review. But fairness demands, where an individual seeks the favourable exercise of what is so obviously a discretion, that review on the merits be available.

It may be felt that there is some difficulty in review of ministerial decisions by departmental officers or by a tribunal whose members are appointed by the Minister. The Administrative Appeals Tribunal, therefore, may be the appropriate forum along the lines of the former jurisdiction with respect to certain Migration Appeals.

The committee sought the Minister's advice on this matter.

Pending the Minister's advice, 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.

In the letter dated 28 April, 1995, the Minister has responded as follows:

> Clauses 40 and 41 of the Bill contain provisions which, if enacted, are intended to put beyond doubt the position that decisions by the Minister under section 1099E and 1099L of the *Social Security Act 1991* are exempt from review.
>
> Recent legal advice has raised a question about the basis for that position. The amendments seek to put the issue beyond doubt.
>
> Your Committee has recognised that it would be inappropriate for decisions of the Minister to be reviewed by the Department and by the SSAT. I agree. However, the Committee has suggested that such decisions might be reviewable by the Administrative Appeals Tribunal. I do not accept that such a review would be appropriate.
>
> When the Minister makes a decision under the relevant provisions in relation to an individual, and there would be very few of them, that decision would be informed by policy considerations of a similar nature to those applying to a decision in relation to a class of persons. The Committee has already acknowledged that it is inappropriate for those class decisions to be reviewed. I consider it is inappropriate for the AAT to review decisions of the Minister in relation to individuals, as they are effectively the same in nature as class decisions. I believe this view is supported by the fact that section 1099L gives the Minister the power to make determinations in relation to "specified loans", permitting a determination to be made on policy grounds in relation to a number of loans (possibly made by several individuals) that have some common feature.
>
> There is of course nothing that would prevent an individual, or indeed any member of a class of persons, from seeking the Minister's reconsideration of any decision.

The committee thanks the Minister for this response.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTH REPORT

OF

1995

31 MAY 1995

SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1995

The committee presents its Eighth Report of 1995 to the Senate.

The committee reports to the Senate on the following bill which the committee has examined in the light of principles 1(a)(i) to (v) of Standing Order 24:

Auditor-General Bill 1994

Health and Other Services (Compensation) Amendment Bill 1994

Auditor-General Bill 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Minister for Finance.

The bill is one of a package of three to replace the *Audit Act 1901*. Particularly, this bill:

- creates the office of Auditor-General for the Commonwealth and defines powers and functions of that office to support its functional independence;

- establishes the Australian National Audit Office (ANAO); and

- provides for the appointment of the Independent Auditor to audit the ANAO.

In its Seventh Report of 1995, the committee discussed the response of the Minister for Finance to the committee's comments in Alert Digest No. 4 of 1995. In that Report, the committee indicated that it proposed to meet with the Attorney-General to discuss the issue that Clause 34 of the bill might impinge on the power of Parliament to obtain information.

In view of difficulties in arranging a meeting with the Attorney-General which may not take place before debate in the Senate on this bill, the committee reiterates its views:

- where it is intended that a clause of a bill should operate as a section 49 declaration, that intention should be clearly expressed in the bill.

- if it is correct that clause 34 will operate as a section 49 declaration to preclude disclosure to Parliament, the clause is drawn to the attention of Senators as it may be considered to trespass unduly on personal rights and liberties in breach of principal 1(a)(i) of the committee's terms of reference.

For the convenience of Senators, the relevant part of the Seventh Report is reproduced:

Sensitive information not to be included in public reports
Clause 34

In Alert Digest No. 4 of 1995, the committee noted that this clause had been discussed at a public hearing of the Finance and Public Administration Legislation Committee (*Hansard* p.27ff), from which the committee made the following observations.

Clause 34, as amended, provides:

(1) The Auditor-General must not include particular information in a public report if:

(a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or

(b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).

(2) The reasons are:

(a) it would prejudice the security, defence or international relations of the Commonwealth;

(b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;

(c) it would prejudice relations between the Commonwealth and a State;

(d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the commonwealth;

(e) it would unfairly prejudice the commercial interests of any body or person;

(f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

(3) If, because of subsection (1), the Auditor-General decides:

(a) not to prepare a public report; or

(b) to omit particular information from a public report;

the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a copy of each report under this subsection to the Prime Minister, the Finance Minister and the responsible Minister or Ministers (if any).

(4) In this section:

"public report" means a report that is to be tabled in either House of the Parliament;

"State" includes a self-governing Territory.

It seemed only common sense that some legislative mechanism be put in place to prevent disclosure of information that would prejudice national security and at the same time enable the Auditor-General to carry out his or her functions. To the extent that the clause achieves that purpose, the committee had no problem with it.

What has been raised is whether clause 34 would prevent the Auditor-General from disclosing to a parliamentary committee or to Parliament itself, other than by way of tabling a report in either House, information coming within paragraph 34(1)(a) or (b).

The committee was of the opinion that clause 34, as it stands, would not operate as a declaration under

section 49 of the Constitution to prohibit disclosure to Parliament or its committees.

In case the contrary was correct, however, the committee sought advice of the Minister as to whether the clause could be so drafted that it is clear that Parliament and its committees has right of access (suitably safeguarded) to the information.

For Parliament not to have access to some of the information which might be excluded by the clause impinges on the rights of Australians to have the administration of the country by the executive properly scrutinised by Parliament.

The committee, therefore, 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:

> The Committee has raised the question whether the terms of that clause would also operate to prevent the Auditor-General from disclosing such sensitive information to Parliament, or a committee of the Parliament other than by way of tabling a public report.
>
> I note that your Committee is of the opinion that clause 34, as it stands, would not operate as a declaration under section 49 of the Constitution to prohibit disclosure to Parliament or its committees. In case the contrary is correct, however, the Committee seeks my advice as to whether the clause could be so drafted to make it clear that Parliament and its committees have a right of access (suitably safeguarded) to the information. On that score, I note the Committee's view, as expressed in the Alert Digest, that for Parliament not to have access to some of the information which might be excluded by the clause impinges on the rights of Australians to have the administration of the country by the executive properly scrutinised by Parliament.
>
> I am advised that, in the opinion of the Attorney-General's Department, clause 34 does, in fact, operate as a declaration for the purposes of section 49 of the Constitution to prohibit disclosures of sensitive information to Parliament and its committees.
>
> In considering your Committee's views and its request as to whether the clause might be re-cast to permit such access, I have taken two other relevant factors into account: first, the considered judgement in this matter by Parliament in 1978, in agreeing to insert subsection 48F(5) into the *Audit Act 1901* - clause 34 of the Auditor-General Bill, as you would be aware, is a continuation of the scope and effect of that subsection; and secondly, over the last 17 years, there has never been any indication that subsection 48F(5) of the Audit Act has worked other than sensibly and sensitively - that is, without trespassing unduly on the personal rights and liberties of Australians, as the Committee seems to fear it would.
>
> Accordingly, I do not share the Committee's concerns and I do not accept that clause 34 of the Auditor-General Bill 1994 warrants redrafting.

The committee thanks the Minister for this response.

The committee, however, remains to be convinced that section 49 of the Constitution applies. The committee is of the opinion that an exchange of views between the committee and the Attorney-General would be profitable and an invitation to meet with him is being extended.

The committee's view is that there is nothing in the present section 48F which would enable the conclusion to be drawn that it would operate as a declaration for the purposes of section 49 of the Constitution. If the opinion of the Attorney-General's Department is correct, clause 34 is much wider in effect and scope than the present section 48F which it replaces. According to that opinion, clause 34 will operate as a section 49

declaration and so preclude disclosure to Parliament. The committee is of the opinion that where it is intended that a clause of a bill should operate as a section 49 declaration, that intention should be clearly expressed in the bill.

Pending discussion with the Attorney-General, the committee continues to draw the 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.

Health and Other Services (Compensation) Amendment Bill 1994

This bill was introduced into the House of Representatives on 16 November 1994 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill is one of a package to address double dipping in health and community service programs by compensable people. The bill provides for:

- the recovery of medicare and nursing home benefits paid for services in respect of a compensable injury prior to compensation becoming payable;

- the Health Insurance Commission to act as the Commonwealth's agent for the recovery of benefits; and

- a requirement that all insurers and other compensation payers notify the Health Insurance Commission of all claims lodged for compensation where liability is not accepted within six months of the date of claim.

The committee dealt with this bill in Alert Digest No. 18 of 1994, in which it made various comments. The Minister for Human Services and Health responded to those comments in a letter dated 25 January 1995. The committee further dealt with this bill in its Second Report of 1995, in which it expressed that further consideration of the bill may be profitable. The Minister for Human Services and Health has responded to that report in a letter dated 8 May 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Abrogation of legal professional privilege
Proposed new paragraph 38(3)(a)

In Alert Digest No. 18 of 1994, the committee noted that proposed new paragraph 38(3)(a), if enacted, would preclude a person from relying on a claim of legal professional privilege as a reason for not complying with a notice under section 36 to give information or produce a document.

Paragraph 38(3)(a) provides :

> **(3)** For the purposes of subsection (1), a person is not taken to have reasonable excuse for refusing or failing to comply with a notice under section 36 only because:
>
> (a) the information or document is, or could be, subject to a claim of privilege that would prevent

> the information being given in evidence, or the document being produced as evidence, in proceedings before a court of tribunal;

The committee noted the reasons for the provision given on page 28 of the explanatory memorandum which states:

> Subclause 38(3) provides that the fact that the information or document which is sought is or could be subject to legal professional privilege does not, of itself, constitute a reasonable excuse for failing to comply with a notice issued under clause 36. Similarly, a contractual obligation not to relay the information or document to any third party is not a "reasonable excuse" for failing to comply with a requirement to provide information under clause 36. These provisions are an important feature of this Bill because they will improve the transparency of settlements and judgements in compensation cases.

The committee questioned whether the advantages to be gained from this provision outweigh the trespass on the right to maintain confidentiality in client-solicitor relationships.

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.

On this issue, the Minister responded as follows:

> In relation to the abrogation of legal professional privilege, one problem with administering the existing provisions contained in the *Health Insurance Act 1973* and the *National Health Act 1953* which are aimed at preventing double dipping by compensable people has been the difficulty in accessing information about the terms of compensation awards. The existing provisions can be and are circumvented because of recourse to the protection afforded by legal privilege.
>
> The provisions of the *Health and Other Services (Compensation) Bill 1994* have been framed to address this existing problem.

In the committee's Second Report of 1995, the committee thanked the Minister for this explanation but was of the opinion that further consideration may be profitable.

The Explanatory Memorandum indicated that the bill was designed to address the problem of double dipping in health and community services programs by compensable people.

The committee, however, was concerned that the proposed legislation to address that mischief did not seem to take sufficiently into account the complexities of common law damages awards, the adequacy of those statutory schemes that in some

jurisdictions had replaced common law damages and, ultimately, the ongoing philosophical debate on how the cost of injury was best borne by the community. A further complicating factor was the perception by Commonwealth and State governments that attempts continued to be made to shift the burden from one to the other.

The committee acknowledged the reasoning behind abrogating legal professional privilege, but continued to question whether what was to be gained was worth the loss of that privilege. There was always a healthy tension between the attractiveness of a convenient solution to a problem and the experience that resulted in the establishment of this committee: experience that attractive solutions sometimes have a downside of trespassing unduly on personal rights and liberties.

The committee suggested that there were reasons for not abrogating the privilege.

First, the rationale that the Commonwealth must always be paid back in full could be questioned. Indeed, there are indications in the bill itself that it is inappropriate always to recover in full. For example, clause 27, subclauses 8(2) and (3) provide that the amount recoverable may be reduced to less than the amount paid by way of medicare benefits.

Secondly, the information obtained by abrogating legal professional privilege may give rise to further problems in deciding under section 18(1) of the *Health Insurance Act 1973* what conclusions to draw from the documents obtained as a result of the abrogation.

Thirdly, there is already an alternative mechanism in the bill for obtaining some of the required information and the committee suggested that a similar mechanism could be inserted to obtain other information without the need to abrogate the privilege.

First reason: priority of the Commonwealth: Subclauses 8(2) and (3) and Clause 27

Where a judgment specifies an amount for past medical care and the amount of medicare benefits paid exceed the specified amount, subclause 8(3) provides that the excess is not recoverable.

Where compensation is reduced for contributory negligence, subclause 8(2) would reduce accordingly the amount to be recovered for medicare benefits already paid.

Both these provisions acknowledge what is widely held that the common law damages system does not always deliver adequate compensation. Where a person is not adequately compensated the question arises whether the Commonwealth ought always to be fully compensated for amounts which the Commonwealth has expended on the injured person. Subclauses 8(2) and (3) indicate a willingness to accept less

than the full amount - a position equating with the changes to bankruptcy law that saw the Commonwealth relinquish its privileged position of primacy of priority among creditors.

Clause 27 is another provision recognising the possible inadequacy of a compensation payment. It provides that where the amount to be repaid under the *Social Security Act 1991* together with the amount to be repaid in relation to medicare benefits under this bill exceeds the amount obtained by the injured person in a judgment or settlement, the amount to be repaid under this bill will be reduced by the excess.

Under clause 27, the total amount awarded to the injured person goes to the Commonwealth, even if the judge has awarded specific amounts for pain and suffering, future economic loss and future medical expenses. This means that a person, who is already being inadequately compensated, does not retain the amounts awarded specifically for heads of damage other than past medical expenses and past economic loss.

Clause 27, therefore, while not pursuing a debtor for an amount higher than the lump sum awarded, also raises the question whether the Commonwealth ought to be compensated for amounts which the Commonwealth has expended on the injured person, if recovery of such amounts ignores the issue of whether the injured person has been adequately compensated.

Second reason: problems arising from the information obtained

Under proposed section 36, the Managing Director of the Health Insurance Commission could obtain the relevant files relating to a compensation claim from both the compensable person's solicitor and the insurance company's solicitor. Little difficulty will arise where the files agree on the amount of damages to be paid in respect of the various heads of damage and a settlement is reached reflecting that amount.

It is, however, in the nature of adversarial litigation that documents in the respective solicitors' files relating to the assessment of damages to be paid will vary greatly. A not unknown scenario would be that the insurer's solicitor estimates a payment of $90 000, the claimant's solicitor is asking for $150 000 and, after two days in court which go badly for the claimant, an out-of-court settlement is reached for $50 000. In such a case, on what document will the decision maker rely in order to deem an amount to relate to medical expenses for which medicare benefits have been paid or may become payable and on which the prevention of double dipping is to be based? If the claimant's solicitor, for example, had assessed past and future medical expenses at $30 000 (20% of his total assessment) should the amount to be deemed be reduced to 20% of
$50 000?

In these circumstances, documents obtained as a result of abrogating legal profession

privilege add to the difficulty of deciding what amount should be deemed to have been awarded in respect of medical expenses.

Third reason: alternative mechanisms

Paragraph 38(3)(a), if enacted, would preclude a person from relying on a claim of legal professional privilege as a reason for not complying with a notice under section 36 to give information or produce a document.

Clauses 17 and 18 of this bill provide a mechanism for the Health Insurance Commission to ascertain what benefits have been paid by the Commission in respect of the injury the subject of the compensation claim. Under clause 17 the claimant is given a notice specifying all medicare benefits paid to the claimant since the date of the injury and the claimant is required to specify which of those benefits were in respect of the injury. If the claimant fails to do so clause 18 provides that all the benefits will be deemed to have been in respect of the injury.

This mechanism gives the Commission a reasonable avenue for obtaining relevant information without the need to impugn professional legal privilege under paragraph 38(3)(a).

It does not, however, necessarily give easy access to the details of what the bill describes as a 'reimbursement arrangement'. This is defined in the bill and covers the arrangement which may be entered into by agreement that the compensation payer will foot all future medical expenses relating to the compensable injury. An alternative to abolishing legal professional privilege might be to follow a similar mechanism to section 18, and presume that such an arrangement exists unless the compensated person supplies different details. In other words, no future medicare payments in respect of treatment for the injury unless it is shown that no reimbursement arrangement exists.

In the committee's Second Report of 1995, the committee sought the Minister's further consideration of this issue.

Pending the Minister's response, the committee continued to draw 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 to this issue as follows:

> The Community Affairs Legislative Committee asked that my Department undertake consultations on the Bills and report back to the Senate on these consultations. I forwarded a copy of my Department's Report to the Committee on 27 March 1995. I enclose a copy for your information. The Report proposes a number of amendments which I am currently considering. Two of these have a significant impact on the main concern of your last report - the potential infringement of the common law principle of legal professional privilege by

clause 38(3)(a).

It is proposed that a certificate of details signed by both parties be used to satisfy the details required for the operation of the legislation. Firstly, if such an amendment were introduced, it would replace the earlier provisions that required a copy of the settlement document to be lodged with the Health Insurance Commission (HIC). Secondly, it would replace the original proposal to allow an investigation of any claims of contributory negligence by the HIC.

If such an amendment is accepted therefore, the certificate of details would remove the need to impinge on legal professional privilege. While this alternative does open up the possibility of collusion by parties to avoid or minimise repayment to the Commonwealth, the HIC would monitor this. If there are problems of these kinds, either with particular insurers or legal representatives, or more broadly with this area of the legislation, other options would need to be considered.

The existence of clause 38(3)(b) overcomes the problem of parties seeking to contractually avoid providing this information eg by relying on a non-disclosure clause in a settlement. However, we are also seeking to ensure that, in the case of a non-disclosure provision which becomes an order of a Court, that disclosure of these details for the purposes of this legislation is not an offence.

Similarly, under some State legislation, revealing even the factual details proposed by this possible amendment could be an offence. Statutory privilege covers such details in some cases eg the legislation covering the Victorian Health Services Commission prohibits revealing such details from cases "conciliated" by the Commission. Such conciliations can involve significant monetary settlements in cases of personal injury. The Victorian Health Services Commissioner has indicated that she does not see a problem with the revelation of these details for the purposes of our legislation. We will therefore be exploring the best way of achieving this end through amendment of the legislation.

The committee thanks the Minister for this response, noting the proposals that will preclude the necessity to impinge on legal professional privilege.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINTH REPORT

OF

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SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT OF 1995

The committee presents its Ninth Report of 1995 to the Senate.

The committee draws the attention of the Senate to a clause of the following bill which contains a provision that the committee considers may fall within principles 1(a)(i) to (v) of Standing Order 24:

Auditor-General Bill 1994

Auditor-General Bill 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Minister for Finance.

The bill is one of a package of three to replace the *Audit Act 1901*. Particularly, this bill:

- creates the office of Auditor-General for the Commonwealth and defines powers and functions of that office to support its functional independence;

- establishes the Australian National Audit Office (ANAO); and

- provides for the appointment of the Independent Auditor to audit the ANAO.

In its Seventh Report of 1995, the committee discussed the response of the Minister for Finance to the committee's comments in Alert Digest No. 4 of 1995. In that Report, the committee indicated that it would seek to meet with the Attorney-General to discuss the issue that Clause 34 of the bill might impinge on the power of Parliament to obtain information.

The Attorney-General considered it more appropriate to provide, with the consent of the Minister for Finance, a copy of the legal opinion of the Attorney-General's Department, and a senior officer of that Department to discuss the issues.

The Legal Adviser to the committee, Professor J L R Davis, has put in writing his reasons for his view that clause 34 of the bill does not operate as a declaration for the purposes of section 49 of the Constitution.

Copies of the opinion of the Attorney-General's Department and of Professor Davis' reasons are attached to this Report.

At a public hearing held on 7 June, 1995, evidence was given by Mr Robert Orr, Deputy General Counsel, Office of General Counsel of the Attorney-General's Department, Professor J Davis, Legal Adviser to the committee and Mr Harry Evans, Clerk of the Senate in relation to clause 34 of the bill.

From the evidence given at the public hearing, two issues arose which require further clarification:

- whether there was an intention in drafting section 34 to exclude completely the power of Parliament to obtain information which is the subject of an Attorney-General's certificate.

- whether it would be more appropriate for a clause of a bill that operates as a section 49 declaration expressly to advert to that effect or for the *Acts Interpretation Act 1901* (or the *Parliamentary Privileges Act 1987*) to be amended so that no section of an Act could be interpreted as a section 49 declaration unless it expressly provides that it is such a declaration.

Accordingly, the committee seeks the advice of the Minister and of the Attorney-General respectively on these issues.

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

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TENTH REPORT

OF

1995

21 JUNE 1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1995

The committee presents its Tenth Report of 1995 to the Senate.

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

Air Services Bill 1995

Auditor-General Bill 1994

Customs Tariff Amendment Bill (No. 2) 1995

Migration Legislation Amendment Bill (No. 5) 1994

Trade Marks Act 1994

Air Services Bill 1995

This bill was introduced into the House of Representatives on 30 March 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to establish Airservices Australia to provide Australia's national airways system. This organisation, together with the Civil Aviation Safety Authority, replaces the Civil Aviation Authority.

The committee dealt with this bill in Alert Digest No. 6 of 1995, in which it made various comments. The Acting Minister for Transport responded to those comments in a letter received 8 June 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inappropriate delegation of legislative power: Setting of late payment penalty by determination Clause 55

In Alert Digest No. 6 of 1995, the committee noted that subclause 55(2) provides that the penalty for late payment, determined under subclause 52(1):

> must not exceed a penalty equivalent to 1.5%, **or such other percentage as is prescribed by the regulations**, of the unpaid amount of the charge for each month or part of a month during which it is unpaid, calculated from the date for payment, and compounded. (emphasis added)

The effect of this subclause, if enacted, would be to provide an unfettered power to prescribe any percentage as the basis to determine the late payment penalty.

Although regulations are disallowable by either House of Parliament, it should be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the amount of the penalty.

Further disallowance is effective only from the date it occurs. Late payment would have automatically attracted the penalty set out in the determination from the date the determination was made. Disallowance would not have the retrospective effect of cancelling an obligation already incurred during the period (if any) from when the determination was made until the regulation was disallowed. The committee sought the Minister's advice on whether an appropriate upper limit either of the penalty itself or on the method of calculating it can be specified in the bill.

Pending the Minister's advice, 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:

> The Government has accepted the Committee's concerns in relation to subclause 55(2) and will move an amendment to omit the words "or such other percentage as is prescribed by the regulations" from subclause 55(2).

The committee thanks the Minister for this response, noting that an amendment will be moved to omit an unfettered power to prescribe any percentage as the basis for determining the penalty.

Subclauses 69(2) and 70(2)
Negligence and the test for criminal liability

In Alert Digest No. 6 of 1995, the committee noted that clauses 69 and 70 of this bill provide:

Removal from Australian territory of aircraft under statutory lien

69.(1) A person who knows that a statutory lien is in effect in respect of an aircraft must not remove the aircraft from Australian territory without the prior approval of an authorised employee.
Penalty: Imprisonment for 3 years.

(2) For the purposes of establishing a contravention of subsection (1), a person is taken to have known that a statutory lien was in effect in respect of an aircraft if the person ought reasonably to have known that fact, having regard to:

(a) the person's abilities, experience, qualifications and other attributes; and

(b) all the circumstances surrounding the alleged contravention.

Dismantling etc. aircraft under statutory lien

70.(1) A person who knows that a statutory lien is in effect in respect of an aircraft must not detach any part or equipment from the aircraft unless the person has:

(a) lawful authority; or

(b) the prior approval of an authorised employee.

Penalty: Imprisonment for 2 years.

(2) For the purposes of establishing a contravention of subsection (1), a person is taken to have known that a statutory lien was in effect in respect of an aircraft if the person ought reasonably to have known that fact, having regard to:

(a) the person's abilities, experience, qualifications and other attributes; and

(b) all the circumstances surrounding the alleged contravention.

The committee has consistently drawn attention to offence provisions in this form since subsection 852KA(3) and 852KB(3) were inserted in the *Crimes Act 1914* in 1989.

The issues were canvassed in the committee's Twelfth Report of 1989 in respect of the Law and Justice Legislation Amendment Bill 1989 and Sixth Report of 1993 in respect of the Australian Wine and Brandy Corporation Amendment Bill 1993.

The crux of the matter appears to the committee to be whether mere negligence should attract criminal liability for a serious offence. The committee noted the response of the Deputy Prime Minister to the committee of 11 July 1989.

That response stated in part:

> What may be of concern to your Committee is the test of "ought reasonably to know". The legislative intention behind the provision is to cover both actual knowledge and recklessness. In certain circumstances "wilful blindness" may be construed as actual knowledge (see the facts of He Kaw Teh), but it may be that not all circumstances of wilful blindness will be taken as actual knowledge. It is theoretically better to treat "wilful blindness" as a type of recklessness rather than elevate it to actual knowledge. Thus the provisions have been formulated to cover both actual knowledge and recklessness (ie in other words where the defendant knew, or ought reasonably to have known).

The committee did not have any difficulty with a legislative intent to eliminate wilful blindness as a defence; but the committee was concerned that the formula proposed, in attempting to include wilful blindness, would cover not only actual knowledge and recklessness, which is the apparent legislative intent, but also mere negligence.

For mere negligence, no liability would attach under the present law.

The committee sought the Minister's advice whether he agreed that the test of liability under these proposed provisions was less stringent than one requiring actual knowledge or a reckless disregard of the facts. The committee considered such a test to be the appropriate standard to be applied before a person is found guilty of a serious offence.

Pending the Minister's advice, the committee drew Senators' attention to the provisions, 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 Acting Minister has responded as follows:

> Subclauses 69(1) and 70(1) contain offences in relation to the removal from Australia and dismantling of aircraft under a statutory lien. Subclauses 69(2) and 70(2) provide that a person is taken to have known that a statutory lien was in effect if the person ought reasonably to have known that fact, having regard to the person's abilities etc. and all the other circumstances surrounding the alleged contravention.
>
> The Committee is concerned that the test of liability under the proposed provisions is less stringent than one requiring actual knowledge or a reckless disregard of the facts in that it purports to attach criminal liability to negligent behaviour. The Committee considers that these provisions may trespass unduly on personal rights and individual liberties in principle 1(a)(1) of the Committee's terms of reference.

Clauses 69 and 70 will replace substantially similar offences contained in sections 78 and 78A of the *Civil Aviation Act 1988.* The existing provisions provide that a person is guilty of an offence when they have "reasonable grounds to believe that a statutory lien was in effect", and clearly attach criminal liability to negligent acts. The new provisions were drafted with the express intention of removing mere negligence from the scope of these offences. Advice from the Attorney-General's Department suggested that the new provisions be modelled on subsections 852KA(3) and 852KB(3) of the *Crimes Act 1914.*

The Attorney-General's Department has advised that although the test may be objective in part (ought reasonably to have known) it is subjectively based (whether the person having regard to his or her individual traits, etc. should have known). Thus the formulation is directed at creating an offence, the mens rea of which covers both actual knowledge and recklessness and takes into account the characteristics of the defendant and all the surrounding circumstances.

I also draw the Committee's attention to clause 62 of the Bill under which Airservices Australia will be required to take reasonable steps to notify those people who would be reasonably contemplated as possibly contravening subclauses 69(1) and 70(1) of the existence of a statutory lien.

I believe that subclauses 69(2) and 70(2) are consistent with current Commonwealth criminal law policy, and require proof of more than mere negligence on the part of the defendant in any prosecution. As a result, the government does not propose any amendments to clauses 69 and 70 in their current form.

I trust that this advice addresses your concerns satisfactorily.

The committee thanks the Minister for this response, noting the Acting Minister's assurance that 'the new provisions were drafted with the express intention of removing mere negligence from the scope of these offences' and on Attorney-General's Department's advice, were modelled on subsections 852KA(3) and 852KB(3) of the *Crimes Act 1914*. The committee would be pleased if the Minister would confirm that the advice from the Attorney-General's Department was to the effect that the new provisions would achieve the express intention of removing mere negligence.

Auditor-General Bill 1994

The committee's considerations

The committee dealt with this bill in Alert Digest No. 4 of 1995, in which it made various comments. The Minister for Finance responded to those comments in a letter received on 30 March 1995, referring to advice from Attorney-General's Department that clause 34 operated as a declaration under section 49 of the Constitution to limit Parliament's powers.

In its Seventh Report of 1995, the committee discussed the response of the Minister for Finance to the committee's comments in Alert Digest No. 4 of 1995. In that Report, the committee indicated that it would seek to meet with the Attorney-General to discuss the issue that clause 34 of the bill might impinge on the power of Parliament to obtain information.

The Attorney-General considered it more appropriate to provide, with the consent of the Minister for Finance, a copy of the legal opinion of the Attorney-General's Department, and a senior officer of that Department to discuss the issues.

The Legal Adviser to the committee, Professor J L R Davis, put in writing his reasons for his view that clause 34 of the bill does not operate as a declaration for the purposes of section 49 of the Constitution.

Copies of correspondence and of the opinion of the Attorney-General's Department and of Professor Davis' reasons are attached to this Report.

The committee also took evidence at a public hearing held on 7 June, 1995. Evidence was given by Mr Robert Orr, Deputy General Counsel, Office of General Counsel of the Attorney-General's Department, Professor J Davis, Legal Adviser to the committee and Mr Harry Evans, Clerk of the Senate.

After the public hearing, the committee sought the advice of the Minister and of the Attorney-General respectively on two issues which required further clarification.

The Minister for Finance responded in a letter dated 16 June 1995.

Key Issues

Significant issues have been raised in the committee's consideration of the bill. These issues are:

- whether clause 34, if enacted, will diminish the power of Parliament and/or its committees to obtain information

- whether section 48F of the present Audit Act has the same effect
- whether either section 48F or clause 34 was drafted with that intention or was that effect an unintended consequence
- if it was unintended, should the clause be re-drafted to avoid that effect
- if it was intended, should it be enacted in that form or in a more express form so that Parliament would know that it was passing a law that would diminish its powers.

Relevant legislation

Clause 34, as passed by the House of Representatives, provides:

(1) The Auditor-General must not include particular information in a public report if:

(a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or

(b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).

(2) The reasons are:

(a) it would prejudice the security, defence or international relations of the Commonwealth;

(b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;

(c) it would prejudice relations between the Commonwealth and a State;

(d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the commonwealth;

(e) it would unfairly prejudice the commercial interests of any body or person;

(f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

(3) If, because of subsection (1), the Auditor-General decides:

(a) not to prepare a public report; or

(b) to omit particular information from a public report;

the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a copy of each report under this subsection to the Prime Minister, the Finance Minister and the responsible Minister or Ministers (if any).

(4) In this section:

"public report" means a report that is to be tabled in either House of the Parliament;

"State" includes a self-governing Territory.

Section 49 of the Constitution provides:

> "The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth."

Summary of issues

The committee did not think that clause 34 operated as a declaration for the purposes of section 49 of the Constitution so as to prevent Parliament or its committees from obtaining information for the Auditor-General in a context other than his formal reports to Parliament under clauses 13, 14, 15, 16 and 22 of the bill.

The Minister for Finance and the opinion he received from Attorney-General's Department thinks that it does so operate.

In summary, the questions the committee has sought to answer are:

Does it?

If it does, should it?

If it should, should it not explicitly say so?

In summary, the committee's approach has been:

> Clause 34 does not bring Section 49 of the Constitution into effect. If the committee's opinion is correct, the committee has no further concern with the bill.
>
> If the Minister for Finance and Attorney-General's Department are correct in saying that it does limit Parliament's powers in the way described, the committee is of the opinion that it should not do so and should be redrafted.
>
> If the Minister insists that it should so operate, the committee is of the opinion that a bill with this effect should expressly state that it has this effect. Otherwise, Parliament could be limiting its powers without being aware of doing so.

Opinions and Evidence on whether Section 49 is brought into effect

The opinion of the Attorney-General's Department says:

> *Advice*
>
> 5. In my view, cl. 34 probably does operate as a declaration under s.49 of the Constitution.
>
> *Reasons*
>
> 6. Section 49 of the Constitution provides:
>
> > 'The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.'
>
> In an opinion dated 12 August 1990 (actually 1991), the Solicitor-General stated:
>
> > 'Although express words are not required, a sufficiently clear intention that (a) provision is a declaration under s.49 must be discernible. Accordingly, a general and almost unqualified prohibition upon disclosure is, in my view, insufficient to embrace disclosure to Committees. The nature of section 49 requires something more specific.
> >
> > Absent express provision, an intention to diminish parliamentary privilege cannot readily be inferred. Whether legislation constitutes a declaration for these purposes is very much a matter of degree....'
>
> 7. In my view, cl. 34 is specific enough in its terms to be interpreted as diminishing parliamentary privilege. It clearly provides that where the Auditor-General or the Attorney-General is of the opinion that disclosure of information in a report that is to be tabled in either

House of Parliament would be contrary to the public interest (as defined in subcl. 34(2)), that information *must not* be included in the report. That is, the information must not be disclosed to Parliament by way of a report prepared in accordance with the Bill.

8. The Standing Committee's view is sustainable only if it can be argued that cl. 34 is aimed solely at preventing disclosure to Parliament by way of report. However, I think that is too narrow a view of cl. 34 and fails to give effect to the manifest intention of cl. 34. It would seem to me to be anomalous and futile for the Parliament to provide that certain information not be disclosed to Parliament in a report by the Auditor-General, if a House of the Parliament (including its committees) were nevertheless to retain the power to require officers of the Executive Government to produce the same information, although not by way of a report prepared in accordance with the Bill. Information so obtained by Parliament or a committee could be made public, even if received in camera. That would clearly defeat the purpose of cl. 34. This view is supported by the terms of subcl. 34(4), which display an intention that the relevant information should only be disclosed to the members of the Executive Government mentioned therein (the Prime Minister, the Finance Minister and the 'responsible Minister or Ministers').

Professor Davis's view is

Section 49 of the Constitution is one source of the powers of each of the Houses of Parliament. In stating, as it does, that these powers are, in the absence of action by Parliament, to be the same as those of the House of Commons in the United Kingdom Parliament, section 49 gives the Senate and its committees virtually unlimited power to do such things as obtain information from any source it chooses. However, the section also states that those powers may be extended or abridged by a declaration of the Parliament.

In an Opinion to the Senate of 12 August 1991, the Solicitor-General stated that a declaration for the purposes of section 49 did not need to be in express words, but could arise by necessary implication. I assume that the Attorney-General and his advisers consider that such an implication is to be made from the words of clause 34, because the clause allows for some information to be excluded from a report that is to be tabled in the Senate, the Attorney may argue that such information cannot be divulged to the Senate or a committee of that House, and hence it is, by implication, a restriction on the powers of the Senate.

However, there are at least three reasons for disputing such a view.

First, the Solicitor-General's opinion appears to place very considerable limits on the circumstances in which a legislative provision could, by implication, be taken to be a declaration for the purposes of section 49 of the Constitution. The Solicitor-General states that

> "a general and almost unqualified prohibition on disclosure is, in my view, insufficient to embrace disclosure to (Parliamentary) Committees. The nature of section 49 requires something more specific."

The Solicitor-General also expresses the view that "an intention to diminish parliamentary privilege (and power) cannot readily be inferred." It may be doubted whether clause 34 of the Auditor-General Bill 1994 is so clear in its purpose as to raise the necessary implication.

Secondly, one may question whether the Solicitor-General is necessarily correct in his view that section 49 permits the powers of a House to be limited by implication. It should be noted that sections 46, 47 and 48 of the Constitution, concerned with various matters to do with both Houses of the Parliament, use the phrase "Until the Parliament otherwise provides" to make allowance for the terms of the sections to be departed from. It is suggested that such a form of words might more readily accommodate the notion of an implication than the more formal words of section 49 - "The powers...of the Senate...shall be such as are declared by the Parliament..."

Thirdly, clause 34 of the Auditor-General Bill 1994 does not make any general and unqualified prohibition on disclosure. Sub-clause 34(3) permits the Auditor-General to divulge part or all of the sensitive (and otherwise excluded) information to the Prime Minister, the Finance Minister and the Minister responsible for the Department the subject of the report. If disclosure to the holders of those offices is permitted, one may question the basis on which disclosure to (say) a Senate Committee is

prohibited. To put this point in a different way, one may observe that disclosure of sensitive information by the Auditor-General is:

- prohibited if the information is to form part of a report to be tabled in either House of Parliament;

- permitted if the information is to be divulged to (and only to) the Prime Minister, Finance Minister and responsible Minister.

The clause is silent with regard to (say) information that is requested by a Senate Committee, sitting in camera, but such a situation appears to be closer to the case where disclosure is permitted than to that where it is prohibited.

At the public hearing, Mr Orr, having read Professor Davis' reasons, commented:

I thank you for the opportunity to read that. In essence, it becomes a matter of judgment or balance with regard to these matters. The first point that Professor Davis makes relates to the advice of the Solicitor-General dated 12 August 1991. There is no doubt that the Solicitor-General is looking at the matter as one of a continuum, as it were, of a spectrum of possibilities. At one end of the spectrum is clearly the case where the Parliament specifically declares what its powers, privileges and immunities are. At the other end of the spectrum, there are general prohibitions on departments or persons doing things by way of disclosure. The view of the Solicitor-General is that, clearly, a specific declaration under section 49 would limit the privileges of the Parliament. A general and almost unqualified prohibition on disclosure by various people is at the other end of the spectrum and would not amount to a declaration of the privileges of the parliament.

The Solicitor-General then addresses a specific instance and says that, where there is more than just a general and unqualified prohibition, it is possible that this amounts to an implied declaration. I agree that it is a matter of assessing whether that view is correct, and where clause 34 falls. In my view, I think there are bases for saying that clause 34 is clearly not a general prohibition on disclosure. It is a specific prohibition on disclosure to the Parliament and that is why the view is taken that it impliedly declares the rights.

The second point is a more general questioning of the whole basis of the Solicitor-General's opinion that there can be, in any case, an implied declaration. It is a matter in which I disagree and the department has traditionally disagreed. In my view, there can be implied declarations. A law which has the effect of limiting or restricting, or indeed increasing, the powers, privileges and immunities of the Senate—provided it has that effect—would be a declaration of those powers, privileges and immunities. I think it would be to provide for form to be more important than substance for the view to be taken that that could only be done if it was specifically stated that that was what was being done.

The third point goes to the actual operation of clause 34. In essence, it is a matter of construing what it is that clause 34 is doing. As is often the case with these sorts of arguments, both sides are using the same facts to support their views. Our response to clause 34(3), that the Auditor-General must give a copy of the report to the Prime Minister, the finance minister and responsible ministers, if any, is used to support the view that this is restricting what the Auditor-General can do with this information. It is saying that this is all he or she can do and that he or she cannot otherwise be obliged to provide that information to the Parliament or a committee of the Parliament.

Professor Davis has taken the opposite view, based on the same section, by saying that disclosure to Parliament is more analogous to that type of disclosure than to the public report disclosure. I suppose it is a matter of simply disagreeing with that view. Our assessment of the clause is that it is, in fact, prohibiting disclosure. It is specifically prohibiting disclosure to the Parliament and that, by implication, is restricting the powers or privileges of the parliament to require that disclosure. There is a specific exemption from that prohibition in relation to specific ministers which supports the view that, otherwise, there is a prohibition, even in relation to the powers of parliament.

Detailed analysis

Clause 34 needs to be analysed in its context and according to its own wording. When it is summarised, it is too easy to put a gloss on it which favours one opinion or the other. The function of the Auditor-General is to audit Commonwealth institutions. The bill rightly provides that the results of those audits be available to the general public through being tabled in Parliament.

Clause 34 is in Division 2—Confidentiality of information in Part 5—Information-Gathering Powers and Secrecy. Part 5 provides the Auditor-General with very wide powers to gather information "not limited by any other law (whether made before or after the commencement of this Act), except to the extent that the other law expressly excludes the operation of sections 29 or 30". (Clause 27.)

These powers may be used to obtain information for the purpose of, or in connection with, any Auditor-General function (with some exceptions). These functions include Statement Audits under clauses 9, 10 and 11 of the bill and performance audits of Agencies, Authorities and Companies of the Commonwealth or of the Commonwealth public sector under clauses 13, 14, 15 and 16 of the bill.

All of these clauses require the Auditor-General to furnish a report which either he/she or the relevant Minister must table in Parliament.

If the Auditor-General conducts an audit, he must write a report and that report must be tabled in Parliament. It is in this context that clause 34 operates.

Clause 34 is directed to the Auditor-General. It provides that the Auditor-General must not include particular information in a public report. Public report is defined in clause 34 as a report that is to be tabled in Parliament.

Clause 34 is limited by its context to reports which the Auditor-General writes as a result of carrying out his functions. It is not concerned with reports that others might ultimately write. The mischief which it avoids is to prevent the disclosure of sensitive information in Auditor-General's reports which are tabled in Parliament.

If subclause 34(3) is examined in detail it is seen to provide the following:

- as a result of his/her own decision or the Attorney-General's certificate with respect to not putting particular information in a public report, the Auditor-General may decide not to prepare a public report at all or he may omit the particular information from a public report.

- If he/she chooses to do either of these options, he/she may decide to prepare a special report under this sub-clause including the particular information.

- If, and only if, he/she prepares such a report, does the sub-clause require the Auditor-General to give a copy to the Prime Minister, the Finance Minister and the responsible Minister, if any.

This is not a clause which provides that, where an Attorney-General's Certificate has been issued, the Auditor-General must prepare a special report which must only go to those three members of the executive.

The Attorney-General's Department's opinion states that information obtained from the Auditor-General by Parliament other than by way of statutory obligation to report could be made public, even if received in camera. It draws the conclusion that that would clearly defeat the purpose of clause 34.

This might have some merit, if the opinion also contended that the clause also prevents the Prime Minister, the Minister for Finance and other responsible Ministers from ever making public the particular information.

The Attorney-General's Department's opinion does not take sufficiently into account the circumstances surrounding clause 34. It is limited by time to a specific occasion: the occasion of the report being tabled as required by statute. What is contrary to the public interest to disclose at the time the Auditor-General makes his/her statutory report may change to being in the public interest to disclose even 24 hours later. For example, it may be necessary not to reveal a cabinet decision only until certain negotiations are completed.

The purpose of clause 34 is far less wide than the Departmental opinion states. This is seen if clause 34 is contrasted with clause 33. Clause 33 is a general secrecy provision of the type which the Solicitor-General's opinion clearly states is not a declaration for the purposes of section 49 of the Constitution. Clause 33 is not limited by time or to specific occasions. The Auditor-General could not rely on clause 33 to refuse to answer questions asked by a Parliamentary committee. Clause 34, in contrast, is restricted to not disclosing on a specific occasion.

Conclusion

The committee is not yet persuaded that clause 34 operates as a declaration under section 49. The Attorney-General's opinion says it probably does, the evidence from Mr Orr appears to concede that it is a matter of opinion. The committee, therefore, reports to the Senate that clause 34 may impinge on the powers of Parliament.

Should the powers of Parliament be diminished in this way?

The committee, in considering this issue, has taken the view that, when the present section 48F was inserted in the Audit Act 1901 debate in Parliament did not touch on the issue of whether section 49 of the Constitution was involved. Accordingly, the committee sought the advice of the Minister for Finance on whether in redrafting section 48F into clause 34 there was an intention to make it operate as a section 49 declaration.

The Minister has responded in a letter of 16 June 1995 that the intention was only to continue the scope and effect of section 48F. As he put it:

> In my previous letter of 22 March 1995 to you in respect of Clause 34, I pointed out that the terms of the proposed provision were included in the Auditor-General Bill as a continuation of the scope and effect of an existing provision of the *Audit Act 1901* - subsection 48F(5) - and that, as far as I was aware, the existing provision had operated appropriately and unremarkably in the handling of specific categories of sensitive information that the Auditor-General had access to.
>
> Thus, the *intention* in drafting the clause was to continue that position.

The issue remains, then, whether the section 49 implication was an unintended effect. If it was unintended, should it be redrafted either to make the intention explicit or to take away the unintended consequence? The committee prefers the latter. The argument is that a committee of the Parliament is as capable of exercising discretion in sensitive matters as the members of the executive.

Conclusion

Whether the consequence was intended or unintended, it is a matter for the Senate to decide whether to pass the clause in its present form.

Should the intent be made explicit?

Whether Parliament should be warned that a bill contains a clause that will operate as a section 49 declaration is a matter of legal policy. It could be achieved by the relevant clause expressly adverting to the Section 49 of the Constitution or for the *Acts Interpretation Act 1901* (or the *Parliamentary Privileges Act 1987*) to be amended so that no section of an Act could be interpreted as a section 49 declaration unless it expressly provides that it is such a declaration.

The committee sought the advice of the Attorney-General on this issue but has not yet received a response.

General conclusions

The committee has tried to establish whether clause 34 operated as a declaration under section 49. If it did not, the committee would have no further concern with the bill. As the matter is not without doubt, the attention of Senators is drawn to the provision.

The committee also tried to establish whether this effect was intentional. It seems that it was not specifically adverted to. That such an effect on the powers, privileges and immunities of Parliament could be brought about without specific advertence is a matter of concern which is also drawn to the attention of Senators.

Customs Tariff Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 27 March 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to amend the *Customs Tariff Act 1987* to:

- allow certified reference materials to be used in a broader range of industrial and scientific processes;
- reinstate the level of assistance for goods of mixed fibre content;
- free all imports of unmanufactured and manufactured tobacco and tobacco products from customs duty; and
- maintain the intended rate of duty for parts of regulating and controlling instruments and burglar alarms, consequent upon the World Trade Agreement coming into effect.

The committee dealt with this bill in Alert Digest No. 6 of 1995, in which it made various comments. The Minister for Small Business, Customs and Construction responded to those comments in a letter dated 6 June 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclauses 2(2) to (5)

In Alert Digest No. 6 of 1995, the committee noted that by virtue of these subclauses most of the substantive provisions of this bill would have retrospective effect.

Retrospectivity is normally seen as potentially breaching principle 1(a)(i) of the committee's terms of reference in that it may unduly trespass on personal rights and liberties. The amendments made by proposed sections 3 and 4 and Schedule 2, however, are beneficial to importers. Where a provision is beneficial to persons other than the Commonwealth, the committee has been prepared to accept retrospectivity. Accordingly, the committee made no further comment on those provisions.

Schedule 1, however, if enacted, would retrospectively impose customs duty on certain items that the Administrative Appeals Tribunal has declared to be free of duty under the Act as it stands at present. Where a change in duty has been announced by a Customs Tariff Proposal tabled in Parliament, the committee has been prepared to accept the retrospectivity of the subsequent ratifying legislation. It was not clear to the committee from the explanatory memorandum whether the change in this instance had been made by way of a Custom Tariff Proposal. The committee sought the advice of the Minister on whether this was so.

On the other hand, the explanatory memorandum seemed to suggest that the change had been made to restore what the law was intended to mean. The committee has no objection to amendments which change the law from what the law has been found to mean to what the law was intended to mean, provided that it is not changed retrospectively to anyone's disadvantage. People have the right to have the law applied as it stands at the time of application if that is to their advantage. Serious revenue implications might be considered to justify retrospectivity in some circumstances. The committee noted, however, that this amendment is among those which the explanatory memorandum in its Financial Impact Statement indicates 'have little or no revenue implications'. Accordingly, the committee also sought the Minister's advice on any other reason which might justify retrospectivity.

Pending the Minister's advice, 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.

On the issue of Schedule 1 of the bill which subclause 2(4) makes retrospective and on which the committee sought the Minister's advice, the Minister has responded as follows:

> The *Customs Act 1901* allows the alteration of Customs rates of duty by Customs Gazette Notice or Customs Tariff Proposal provided parameters contained in the *Industry Commission Act 1989* are met. It is administrative practice to postdate increases in duty; decreases do not have the same financial effect on business and are implemented on the most appropriate date, whether being backdated or postdated.
>
> The amendments contained in subclause 2(4) of the Bill were tabled in the House of Representatives on 17 November 1994 as Customs Tariff Proposal No. 6 (1994). The changes became operative on 18 November.
>
> ...
>
> I thank the Committee for its comments and trust the above answers their reservations concerning this Bill.

The committee thanks the Minister for this response.

Migration Legislation Amendment Bill (No. 5) 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:

- *Migration Act 1958* to:
  - effect some recommendations of the Committee for the Review of the System for Review of Migration Decisions, particularly in relation to the Immigration Review Tribunal (IRT);
  - create the positions of Deputy Principal Member and Senior Members of the Refugee Review Tribunal (RRT);
  - provide for the Remuneration Tribunal to determine the remuneration of members of the IRT and RRT; and
  - amend procedures relating to the cancellation of business skills visas; and
- *Immigration (Education) Act 1971* to provide for the indexation of fees.

The committee dealt with this bill in Alert Digest No. 1 of 1995 in which it had no comment. The Law Institute of Victoria forwarded a submission dated 29 March 1995 in relation to this bill. Relevant parts of the submission are discussed below. The committee also dealt with this bill in its Seventh Report of 1995, in which it made various comments. The Minister for Immigration and Ethnic Affairs has responded to those comments in a letter dated 6 June 1995. A copy of that letter is attached to this report and relevant parts of the response are also discussed below.

Legal Representation

In its Seventh Report of 1995, the committee noted that in the light of the submission from the Law Institute of Victoria, it could well be argued that new section 363A, when read with new section 366A, trespasses unduly on individual rights, in that they prevent an applicant before the Immigration Review Tribunal from having effective legal representation.

The committee was informed that the Legal and Constitutional Legislation Committee was to report on this bill on 31 May 1995. In the interim, the committee sought the advice of the Minister on this issue and 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:

I note that when the Committee considered the Bill in the Alert Digest No 1 of 1995, no such concern was raised. The Committee's comments follow concerns raised in a submission to the Committee by the Law Society of Victoria. I have received similar concerns from the Law Society of New South Wales and am awaiting the report from the Legal and Constitutional Legislation Committee due at the end of this month, before I respond to the Law Society.

Without the benefit of that report, the Government continues to consider that the provisions in the Bill are warranted. The provisions give statutory effect to recommendation 26(2) of the December 1992 Report of the Committee for the Review of the System for Review of Migration Decisions (CROSROMD). Recommendation 26(2) states that an assistant who accompanies the applicant to a Tribunal hearing may with leave of the Tribunal make oral submissions in exceptional circumstances, but may not examine or cross-examine witnesses. In making this recommendation, CROSROMD commented at paragraph 7.3 of its Report that:

> *"it does not believe that it is appropriate for a person other than the applicant to have a right to address the Tribunal, although it may be appropriate for the Tribunal to ask an applicant's adviser to add to the evidence or information presented by the applicant in exceptional circumstances. The exceptional circumstances in which advisers may make oral submissions to a tribunal should be detailed in directions issued by the Principal Member".*
>
> *"...the Committee considers that advisers should be limited principally to advising applicants rather than themselves addressing the Tribunal or questioning witnesses. The Committee notes that if an applicant's adviser were entitled to examine or cross-examine witnesses then the Department, as a party to the review, would wish to attend and be represented in the proceedings to ensure that its interests are protected. This would gravely undermine the benefits of a non-adversarial approach. However, it may often be desirable for the Tribunal to give applicants (or their advisers) an opportunity to indicate issues which they believe should be pursued by the Tribunal when questioning witnesses. Similar disadvantages could arise if lawyers or other advisers were entitled to make oral submissions to the Tribunal as hearings, save in very exceptional circumstances".*

During the Second Reading debate on the Bill in the House of Representatives on 9 February 1995, the Parliamentary Secretary representing the Minister for Immigration and Ethnic Affairs in that House said that the new sub-section 366A(2)

> *"is not intended to prevent assistants from commenting on minor and routine matters which could assist the Tribunal, such as providing it with guidance or referring to relevant parts of the documentation. Communication of this kind should obviously occur. As this is a matter which goes to the operational procedures of the Tribunal, I would expect the Principal Member to develop and promulgate specific rules relating to the conduct of those appearing before the Tribunal".*

In reflecting the concerns of the Law Society of Victoria, I do not consider that your Committee placed sufficient weight on the non-adversarial role of the Immigration Review Tribunal and its inquisitorial nature without any representation from the Department. In practical terms, to allow for unrestricted representation by the assistant could transform the Tribunal into an adversarial body and will require consideration as to whether the Department should also appear. The cost implications are obvious and such transformation of the nature of the Tribunal's operations would inhibit its ability to meet its statutory objective to provide a service which is fair, just, economical, informal and quick.

> The Government awaits with interest the report of the Legal and Constitutional Legislation Committee and will give careful consideration to any recommendations or view of that committee.

The committee thanks the Minister for this response and assumes that some misunderstanding led to the signing of the reply on 6 June, a week after the Legal and Constitutional Legislation Committee tabled its report. The committee also awaits with interest the 'careful consideration' of the views of that committee.

Trade Marks Act 1994

The bill for this Act was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to provide for the registration of trade marks, collective trade marks, certification trade marks and defensive trade marks and sets out and protects the rights deriving from registration. The bill conforms with the standards and principles prescribed for trade marks in the Agreement Establishing the World Trade Organization. The bill repeals the *Trade Marks Act 1955*.

The committee dealt with this bill in Alert Digest No. 15 of 1994, in which it made various comments. On 8 June 1995 the committee received a copy of a letter dated 28 November 1994 from The Minister for Small Business, Customs and Construction responding to those comments. The original of that letter appears never to have been received by the committee. A copy of the letter is now attached to this report and relevant parts of the response are discussed below.

Offences of strict liability
Subclauses 154(4) and 157(4)

In Alert Digest No. 15 of 1994, the committee noted that proposed subsection 154(1) would create an offence where a person falsifies or unlawfully removes a representation of a trade mark, knowing that the trade mark is registered. Proposed subsection 157(1) creates an offence with respect to selling or importing goods for trade or manufacture if the person knows that the goods have false marks.

Offences against these subsections would normally require the prosecution to prove that the defendant knew that the trade mark was registered or that the marks were false.

Proposed subsections 154(4) and 157(4), however, if enacted, would deem the offence to have occurred and the defendant liable to imprisonment if the defendant ought reasonably to have known these matters, **even if** they did not, in fact, have such knowledge.

The committee questioned the legitimacy of enabling the prosecution to have a fall back position: where the prosecution fails to prove that the person knew that he/she was contravening the law, the defendant is to be guilty because he/she should have known.

The committee raised similar concerns when sections 99 and 100 were inserted in the present *Trade Marks Act 1955* in 1989. In the committee's Twelfth Report of 1989, the committee said:

> The Committee notes the response of the Minister but considers that where legislation creates a serious offence, an element of that offence ought to be a guilty intention or a reckless disregard of the consequences of that act. Mere negligence should not be enough to make a person guilty of a serious crime.
>
> The test provided in the proposed subsections to visit criminality on a person is that he or she 'ought reasonably to have known of the existence of a set of facts'. This test is less stringent than one requiring actual knowledge or a reckless disregard of the facts which the Committee considers the appropriate standard to be applied before a person is found guilty of a serious offence.

The committee did not have any difficulty with the intention of the legislation: 'to eliminate wilful blindness' as a defence. But the committee was concerned with the width of the provisions and wondered whether mere negligence should attract criminal liability.

Offences are categorised as of strict liability where it is immaterial whether the person had the 'guilty knowledge' which at common law is an integral part of any statutory offence, unless the statute itself or its subject matter rebuts that presumption. At common law offences of strict liability are subject to the defence of honest and reasonable mistake of fact. In such cases the accused must raise the defence, though the prosecution has the ultimate onus of proving the elements which constitute the offence. In a statute, a strict liability offence may also be made subject to a specific defence or defences.

Where public policy dictates that strict liability offences should be created, the committee acknowledged that both specific and general defences assist the personal rights and liberties of the accused. The primary issue, therefore, is whether grounds exist which would justify the imposition of strict liability.

The committee noted that, although strict liability is imposed by the present Act for sale and importation, the offence in proposed section 154 did not appear to be one of strict liability in the present Act. It cannot be said therefore to be merely continuing the policy of the present Act. The committee also noted that the explanatory memorandum contained no justification for imposing strict liability for either offence and sought the Minister's advice on the matter.

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:

> The Committee is concerned that proposed sections 154 and 157, if enacted, may trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. The Committee is also concerned with the width of the provisions and wonders whether mere negligence should attract criminal liability. Finally, the Committee notes that the offences provisions cannot be said to be merely continuing the policy of the present Act, especially in relation to proposed section 154.
>
> The Trade Marks Bill which was introduced into the House of Representatives on 21 September 1994 is essentially the same Bill which had previously been released as an exposure draft, except for some changes consistent with the minimum standards

required under the Agreement Establishing the World Trade Organisation (WTO Agreement). The public consultation process, which ended on 31 August 1994, enabled the Government to attract comments from traders, trade mark owners, practitioners and attorneys in the trade marks profession and relevant government departments on the exposure draft. Due to the strict deadlines we have to meet under the WTO Agreement, results of the consultation process have not been incorporated in the Bill. Amending legislation picking up the results of the public consultation is expected to be introduced early in the next sittings of Parliament.

Proposed section 154 of the Bill carries over the mental elements required under section 106 of the *Trade Marks Act 1955* and, therefore, is continuing the policy of the present Act. As a consequence of advice received from the Attorney-General's Department during the consultation process, I have proposed changes to the offences provisions (ie proposed sections 154 to 157 of the Bill), to form part of the amending legislation, such that the mental element of knowledge or recklessness is to apply to these offences, rather than strict liability or the test of "ought reasonably to have known". These changes would be consistent with the requirements under the Code Bill 1994 which is being considered by Parliament, and would also, I believe, meet your Committee's concern.

The committee thanks the Minister for this response, noting that the Trade Marks Bill 1995 contains the amendments referred to by the Minister which meet the committee's concerns.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

1995

28 JUNE 1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1995

The committee presents its Eleventh Report of 1995 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:

Customs and Excise Legislation Amendment Bill 1995

Customs and Excise Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 11 May 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to amend the

Customs Act 1901 to:

- remove the eligibility for the payment of rebate of customs duty in respect of the use of diesel fuel at residential premises;
- remove from the definition of 'minerals' materials that are more valuable for use in their own right rather than for their inherent mineral worth;
- ensure that rebate of customs and excise duty is payable only where the diesel fuel is for use in an activity included in the definition of 'agriculture; and
- remove the clause conferring rebate on activities 'connected with' mining operations and primary production and insert a clear list of eligible activities; and the

Excise Act 1901 to remove the eligibility for the payment of rebate of excise duty in respect of the use of diesel fuel at residential premises.

The committee dealt with this bill in Alert Digest No. 7 of 1994, in which it made various comments. The Minister for Small Business, Customs and Construction responded to those comments in a letter dated 27 June 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 7 the committee noted that by subclause 2(2) of this bill, if enacted, items 4, 7, 8 and 10 of Schedule 1 would have effect retrospectively from 1 August 1986.

The committee noted the comments of the explanatory memorandum with respect to these items:

> These items propose amendments to the definitions of "agriculture", "minerals" and "mining operations" in subsection 164(7) of the *Customs Act 1901* (the Customs Act), which set out some of the uses

of diesel fuel in respect of which rebate of customs duty and excise duty is payable.

The amendments are proposed to clarify the ambit of the Diesel Fuel Rebate Scheme (DFRS) as being a targeted scheme intended to provide rebate of duty paid on diesel fuel used by those who are genuinely involved in the business of mining or farming, or those who undertake activities that are intimately bound up with mining or farming. This intention is implicit in paragraphs 164(1)(a) and (aa) of the Customs Act, which provides that rebate is payable in respect of diesel fuel purchased for use in mining operations and in primary production.

Rebate was originally intended to be payable to those who the ordinary person would have considered to be 'farmers' and 'miners'. However, as the years have progressed, various decisions of courts and tribunals have expanded the ambit of the DFRS to the extent that many activities that should never have been regarded as being eligible to receive rebate have received, and continue to receive, rebate.

The committee had no difficulty with amending the law when interpretation by the courts over time had shown that the law was not drafted narrowly enough to implement a particular policy.

But the committee was concerned with the proposal to do so retrospectively. This clearly trespasses on the basic right that those subject to the law are entitled to be treated according to what the law says at the relevant time and according to what the law means at that time as declared by the courts. The committee is not persuaded by the argument that 'an ordinary person' would not have interpreted the law in the way in which the courts have interpreted it.

The committee pointed out that, when the Diesel Fuel Rebate Scheme was passed into law, all parties knew that the courts would interpret what its terms meant. Just as all parties knew that if the courts' interpretation was too narrow or too wide, the legislative scheme could be altered by parliamentary amendment.
The committee noted that the Financial Impact Statement in the explanatory memorandum indicated that the one-off retrospective savings amounting to $86 million are three times the $27 million savings for 1995-96 for the same categories. It would be a matter of grave concern if this position has been reached because for up to three years the executive has refrained from administering the rebate according to the law as declared by the courts, forcing applicants for the rebate into court action to obtain their rights. The committee was of the view that this could be a factor in the Senate's consideration of whether to take away those rights retrospectively amounts to trespassing unduly on those rights.

The committee sought the Minister's advice on this issue.

Pending the Minister's advice, 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:

> The Government accepts the principle that was highlighted in the Committee's comments, which quite properly presumes against the retrospective operation of legislation on the ground that those that are subject to the law are entitled to be treated according to what the law says at the relevant time and according to what the law means at that time as declared by the courts.
>
> That leads at first instance to a proposition that the 3 amendments involved here should only commence prospectively. These 3 amendments are:
>
> (i) the exclusion from rebate eligibility of "amenity agriculture" activities (items 4 and 10 of Schedule 1 to the Bill refer);
>
> (ii) the narrowing of the definition of "minerals" so as to exclude operations which involve the simple extraction of sand, sandstone etc (item 7 of Schedule 1 to the Bill refers); and
>
> (iii) the amendment of the definitions of "agriculture" and "mining operations" to replace the current "sweeper clauses" with a clear list of activities in which the use of diesel fuel is to be eligible for the payment of rebate.
>
> In introducing these amendments, the Government has maintained that they are intended to clarify the ambit of the Scheme as it was introduced in 1982. The Government is firmly of the view that the Scheme was never intended to pay rebate on diesel fuel used in activities that might only loosely be described as encouraging mining operations or primary production in a general sense. Rather, in the Government's view, the Scheme was designed to pay rebate to primary producers who use diesel fuel in the act of growing and gathering in of crops, or the rearing of livestock, and in other activities that are sufficiently connected with agriculture or, in relation to mining operations, to pay rebate for fuel used in the act of exploring or prospecting for minerals, and their subsequent mining and beneficiation, or in the liquefaction of natural gas or the production of common salt.
>
> The 3 amendments proceed on that basis. Is there a case, however, for retrospectivity to accommodate that?
>
> I believe there is in this particular instance, for the following reason. The Scheme permits claims for rebate in respect of fuel purchased up to 3 years prior to the receipt of an application for rebate, and, in the particular circumstances where a notice of intention to lodge a claim was made prior to 1 July 1994, there is an entitlement to make claims in respect of fuel purchases all the way back to 1 August 1986. This generous ability to back-claim can lead to a possibility of a windfall gains situation in circumstances where a test case claim might in fact be successful because of an unexpected result in a Court or Tribunal challenge.
>
> I think it is equally appropriate to outline the background to each of the 3 proposed retrospective amendments and their introduction at this point in time, as opposed to an earlier point in time, to counter suggestions in some quarters that this legislation is a tardy reaction to some ambiguity in the legislative provisions. Even where it is agreed this has allowed the expansion of activities which are now receiving rebate, and which go well beyond the ambit of the Scheme, the concern appears to be that if there has been an inordinate delay in addressing the legislative inadequacies, retrospectivity should not be resorted to now to fix the problem.
>
> 1. "Amenity agriculture" changes

The term "amenity agriculture" relates to activities such as the mowing of lawns, sporting ovals and golf courses, and the tending of parks and gardens. It is considered that such activities were never intended to be eligible for rebate as "agriculture" within the "primary production" category.

This proposed amendment is a direct response by the Government to the Administrative Appeals Tribunal (AAT) case of the City of Nunawading (the City) and the Collector of Customs. In this case, the City applied for rebate in respect of diesel fuel used in maintaining its parks and gardens, nature reserves and road strips and golf courses on the basis that these activities constituted "horticulture" under the definition of "agriculture". In September 1994, the AAT held that the City's activities were not "horticulture", thereby affirming the decision of the Australian Customs Service to refuse rebate in this circumstance. The City has appealed against this AAT decision to the Federal Court and the matter is not expected to be heard until later this year.

Since the City's application for rebate was lodged, the Australian Customs Service has received numerous other applications and notices of intention to claim from other city councils, golf courses, sporting clubs and caravan parks based on grounds similar to the City of Nunawading. The purpose of the proposed amendments to the definition of "agriculture", and its proposed retrospective commencement of 1 August 1986, is to eliminate any doubt that diesel fuel for use in any of these activities is not eligible for rebate and to indicate that such uses were never intended by the Government to be eligible. Without the retrospective commencement, the Government may be liable to pay up to $40 million in rebates, which is the estimated value of the claims that have been lodged or for which a notice of intention to claim has been lodged. Details of the monetary value of the City of Nunawading's claim and the number and estimated value of claims, or notices of intention to claim, which are awaiting the outcome in the City of Nunawading's Federal Court appeal are in the Attachment to this letter.

It is important to note, in respect of the Attachment, the essence of the test case nature of Nunawading, in which the value of that particular claim is small indeed ($7,085.12). The outcome of a successful challenge, however, would quite literally open the door for comprehensive claims not only by that Council but also by a host of other parties with similar past usage entitlements. These parties, however, have invariably had no involvement with the Scheme to date in respect of "amenity agriculture" activities and their only claim on the Scheme to date has been a notice of intention to claim, which is pending the outcome of the Nunawading challenge.

2. Narrowing of the definition of "minerals"

Until recently, it was generally accepted that to be eligible for rebate in respect of "mining for minerals" under the "mining operations" category of rebate, a claimant had to demonstrate that its operation was for the purpose of obtaining a mineral or minerals embedded in the material that was to be extracted. This meant that sand extracted so that minerals such as rutile and zircon could be obtained was eligible for rebate but sand to be used as sand for building purposes was not.

Under subsection 164(1) of the *Customs Act*, rebate is payable on diesel fuel purchased for use in mining operations, which includes "mining for minerals". It is proposed to amend the definition of minerals to exclude sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel, limestone and water.

This proposed amendment is a direct response by the Government to the AAT case of Neumann Sands and the Collector of Customs. In this case, Neumann Sands applied for rebate for diesel fuel used in the dredging of sand for use in the manufacture of concrete and as bedding sand. The Australian Customs Services decided to reject this claim on the basis of previous case law in which both the AAT and the Federal Court had consistently held the view that the words "mining for minerals" contained a purposive test under which it must be demonstrated that the purpose of the activity was to obtain a mineral or minerals imbedded in the extracted material. The extraction of materials *per se*, which may contain minerals, had not been regarded as mining for minerals. For example, in the 1987 case of Neumann Dredging, the full Federal Court held that the dredging of sand from a harbour for use as landfill and in construction was not mining for minerals.

In the Neumann Sands decision of February 1995, the AAT overturned the decision of the Australian Customs Service and held that diesel fuel used in that company's operation was eligible for rebate. The AAT's reasoning appears contrary to the earlier Neumann Dredging decision and appears to say that the extraction of any material from the crust of the earth which may contain materials constitutes mining for minerals and is eligible for rebate. Indeed, claims by water authorities which use diesel fuel to pump water trapped in underground aquafers to provide drinking water for townships, on the basis that water is a mineral and that pumping water from underground constitutes mining, have adopted the same argument. On 30 May 1995, in the first of the Water Board cases heard in the AAT, the Water Authority of Western Australia was successful in overturning the decision of the Australian Customs Service that mining for water is not rebatable.

While the Australian Customs Service has appealed the Neumann Sands AAT decision to the Federal Court, the proposed amendments in the Bill to the definition of "minerals" (item 7 on page 7 of the Bill) will put it beyond doubt that the extraction *per se* of the excluded materials will not be eligible for rebate. The extraction of these materials will continue to be eligible where they are extracted for the purpose of removing any minerals contained therein.

Details of the monetary value of the test cases, together with the estimated value of claims which are pending the outcome of the test cases are in the Attachment to this letter. In this regard, it is noted the retrospective savings of $16 million set out in the Financial Impact Statement to the Bill, and to which your Committee has made reference in the Alert Digest commentary the subject of this reply, for the outstanding claims awaiting the outcome of the Neumann Sands appeal, was calculated on the basis of sand mining claims which were on hand prior to the introduction of the Budget. These figures are now understated because of subsequent events. Due to speculation about possible changes to the mining rebate and the actual Budget announcement, there has been an influx of claims for rebate in this category. As well as further sand mining claims, there have been many seeking rebate for quarrying type activities, for example the extraction of aggregate for road building. The retrospective savings for claims relating to sand mining and quarrying now exceed $91 million. It is still too early to calculate the value of claims which might follow the Water Board case.

It is important in this regard to note the effect of the proposed retrospectivity on claims which have in fact been paid, or for which one has judgment in a Court or Tribunal hearing, and, in particular, the effect of the Bill's retrospectivity on the $84,631.20 claim which has been paid in the Neumann Sands decision, or the $134,757.23 claim which has been paid in the Western Australian Water Authority decision. In short, the Bill will have **no** effect on claims that have been paid at the time of Royal Assent. The Government will have no ability to recover rebates that have already been paid. This savings provisions is contained in subclause 5(5) of the Bill and was specifically provided to ensure that the proposed extinguishment of pending claims is not to be taken to countenance recovery in circumstances where a person may have been paid rebate under a provision of the Scheme which is now proposed to be changed with retrospective effect.

3. Replacement of the "sweeper clauses" in the definitions of "agriculture" and "mining operations"

The clauses dealing with activities "connected with" agriculture and mining operations have been the source of most litigation in the Diesel Fuel Rebate Scheme since its 1982 commencement. The Government has decided to replace these subjective clauses with specific provisions listing eligible activities.

The proposed amendments are the direct response by the Government to the decision in January 1995 in the Cowell Electric Supply Company case, in which the full Federal Court held that diesel fuel used in the generation of electricity that is supplied to towns, some of which may be used by persons involved in agriculture on agricultural properties, is partly eligible for rebate. The Australian Customs Service is currently seeking leave to appeal against this decision to the High Court .

In previous cases dealing with the "sweeper clauses", the Federal Court has said that for an activity to be connected with agriculture or mining operations, the connection must be sufficient and more than tenuous or that a connection must be real and substantial. Previous cases that have perhaps resulted in broadening the "sweeper clauses" are also able to be confined to their particular facts and/or have not involved the payment of substantial amounts of rebate. In the Cowell Electric case, however, the Federal Court appears to have abandoned these tests. The outcome of that case may be that rebate is payable on an apportionment basis, in respect of diesel fuel used in the provision of any utility or service, to agriculture or mining operations.

The proposed amendments will, therefore, specifically list those activities that are sufficiently connected with "agriculture" and "mining operations" to be considered eligible for rebate. These will remove any possibility of rebate being payable in respect of activities that may only go towards encouraging agriculture or mining. Without the retrospective commencement, however, the Government may be liable to pay up to $30 million in rebates, which is the estimated value of the similar claims that have been lodged and are awaiting the outcome of the Cowell Electric test case.

Once again, in the Attachment hereto, the monetary value of the Cowell Electric test case is shown, together with the estimated value of the 6 claims awaiting the outcome of that test case. As with the two successful minerals cases dealt with in paragraph 2 above, the Cowell claim which was the subject of the Federal Court judgment in favour of that company has been paid, and that payment is preserved under the provisions of clause 5 of the Bill in spite of the proposed retrospective commencement of this amendment.

In the 3 proposed areas for amendment, I am of the view the Government has acted as expeditiously as possible to contain the effect of the recent Court and Tribunal decisions which are arguably removing the boundaries of the Scheme. I also am of the view the containment measures, if introduced retrospectively as proposed, would not trespass on the legitimate expectations or rights of diesel fuel claimants. They will, however, maintain ineligibility for activities which only recently have been brought within the Scheme as a result of test case judgments and which stand to advantage, in a windfall scenario, claimants for fuel purchases well before it was even contemplated there may be grounds for any challenge to rebate eligibility.

I trust that the above comments are of assistance to the Committee.

The committee thanks the Minister for this response, the detail of which has been of great assistance to the committee.

Whether the retrospective aspects of the bill unduly trespass on personal rights is ultimately a matter for the Senate.

Accordingly, the committee draws the attention of Senators' to these 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.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWELFTH REPORT

OF

1995

23 AUGUST 1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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

TWELFTH REPORT OF 1995

The committee presents its Twelfth Report of 1995 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:

Auditor-General Bill 1994
Student and Youth Assistance Amendment (Youth Training Allowance) Bill 1995

Auditor-General Bill 1994

The committee's considerations

The committee dealt with this bill in Alert Digest No. 4 of 1995, in which it made various comments. The Minister for Finance responded to those comments in a letter received on 30 March 1995, referring to advice from Attorney-General's Department that clause 34 operated as a declaration under section 49 of the Constitution to limit Parliament's powers.

In its Seventh Report of 1995, the committee discussed the response of the Minister for Finance to the committee's comments in Alert Digest No. 4 of 1995. In that Report, the committee indicated that it would seek to meet with the Attorney-General to discuss the issue that clause 34 of the bill might impinge on the power of Parliament to obtain information.

The Attorney-General considered it more appropriate to provide, with the consent of the Minister for Finance, a copy of the legal opinion of the Attorney-General's Department, and a senior officer of that Department to discuss the issues.

The Legal Adviser to the committee, Professor J L R Davis, put in writing his reasons for his view that clause 34 of the bill does not operate as a declaration for the purposes of section 49 of the Constitution.

Copies of correspondence and of the opinion of the Attorney-General's Department and of Professor Davis' reasons were attached to that Report.

The committee also took evidence at a public hearing held on 7 June, 1995. Evidence was given by Mr Robert Orr, Deputy General Counsel, Office of General Counsel of the Attorney-General's Department, Professor J Davis, Legal Adviser to the committee and Mr Harry Evans, Clerk of the Senate.

After the public hearing, the committee sought the advice of the Minister and of the Attorney-General respectively on two issues which required further clarification.

The Minister for Finance responded in a letter dated 16 June 1995. The committee included a copy of that letter in its Tenth Report of 1995.

A letter dated 7 July 1995 has been received from the Attorney-General in response to the committee's comments in its Ninth Report of 1995. A copy of that letter is attached to this report.

The Attorney-General has responded as follows:

> The specific issues raised by the Committee are:

- whether there was any intention in drafting clause 34 to exclude completely the power of Parliament to obtain information which is the subject of an Attorney-General's certificate; and
- whether it would be more appropriate for a clause of a Bill that operates as a section 49 declaration expressly to advert to that effect or for the *Acts Interpretation Act 1901* (or the *Parliamentary Privileges Act 1987*) to be amended so that no section of an Act could be interpreted as a section 49 declaration unless it expressly provides that it is such a declaration.

I understand that the Minister for Finance has, by letter dated 16 June 1995, responded to the first of these two issues by indicating to the Committee that it was the Government's intention, in drafting clause 34, to exclude completely the power of Parliament to obtain the relevant information. I will therefore confine my comments to the second issue.

Parliament may include in an Act a provision which states expressly Parliament's intention that the provision operate as a declaration of Parliament's powers, privileges and immunities for the purposes of s.49 of the Constitution. Whether that is an appropriate course to follow will depend on the proposed legislative provisions in question. In relation to cl.34 of the Auditor-General Bill 1994, an express legislative statement to that effect would remove any doubt which may presently exist about the way in which cl.34 is intended to operate, once enacted.

I do not think it would be appropriate for either the Acts Interpretation Act or the Parliamentary Privileges Act to be amended to provide that a provision of an Act may only be interpreted as a s.49 declaration if it expressly provides that it is such a declaration.

First, I consider that there is some risk such an amendment may be beyond the Parliament's legislative competence. That is because such an amendment might be characterised as an attempt to alter the effect of the Constitution. If the effect of s.49 is that the Parliament can declare its powers, privileges and immunities either expressly or by necessary implication, a legislative provision which said that Parliament could only declare those powers, privileges and immunities expressly could be characterised as an attempt to alter s.49. An ordinary Act of Parliament cannot validly have that effect. The Constitution may only be altered in accordance with the process established by s.128 of the Constitution.

Secondly, if such a provision could validly be enacted, it would be incapable of having the effect desired by the Committee. It is a well established principle of statutory interpretation that a provision of an Act which is expressed to operate in the absence of express provision to the contrary does not protect the provision from implied repeal by later inconsistent legislation. Accordingly, it would be possible for a provision such as cl.34 of the Auditor-General Bill, if enacted later in time, to effect an implied repeal of a provision such as that proposed by the Committee.

The committee thanks the Attorney-General for this response.

For the convenience of Senators, the relevant part of the committee's Tenth Report is reproduced below:

Key Issues

Significant issues have been raised in the committee's consideration of the bill. These issues are:

- whether clause 34, if enacted, will diminish the power of Parliament and/or its committees to obtain information
- whether section 48F of the present Audit Act has the same effect
- whether either section 48F or clause 34 was drafted with that intention or was that effect an unintended consequence
- if it was unintended, should the clause be re-drafted to avoid that effect
- if it was intended, should it be enacted in that form or in a more express form so that Parliament would know that it was passing a law that would diminish its powers.

Relevant legislation

Clause 34, as passed by the House of Representatives, provides:

(1) The Auditor-General must not include particular information in a public report if:

(a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or

(b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).

(2) The reasons are:

(a) it would prejudice the security, defence or international relations of the Commonwealth;

(b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;

(c) it would prejudice relations between the Commonwealth and a State;

(d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the commonwealth;

(e) it would unfairly prejudice the commercial interests of any body or person;

(f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

(3) If, because of subsection (1), the Auditor-General decides:
(a) not to prepare a public report; or
(b) to omit particular information from a public report;
the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a copy of each report under this subsection to the Prime Minister, the Finance Minister and the responsible Minister or Ministers (if any).

(4) In this section:
"public report" means a report that is to be tabled in either House of the Parliament;
"State" includes a self-governing Territory.

Section 49 of the Constitution provides:

"The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth."

Summary of issues

The committee did not think that clause 34 operated as a declaration for the purposes of section 49 of the Constitution so as to prevent Parliament or its committees from obtaining information for the Auditor-General in a context other than his formal reports to Parliament under clauses 13, 14, 15, 16 and 22 of the bill.

The Minister for Finance and the opinion he received from Attorney-General's Department thinks that it does so operate.

In summary, the questions the committee has sought to answer are:
Does it?
If it does, should it?
If it should, should it not explicitly say so?

In summary, the committee's approach has been:

Clause 34 does not bring Section 49 of the Constitution into effect. If the committee's opinion is correct, the committee has no further concern with the bill.

If the Minister for Finance and Attorney-General's Department are correct in saying that it does limit Parliament's powers in the way described, the committee is of the opinion that it should not do so and should be redrafted.

If the Minister insists that it should so operate, the committee is of the opinion that a bill with this effect should expressly state that it has this effect. Otherwise, Parliament could be limiting its powers without being aware of doing so.

Opinions and Evidence on whether Section 49 is brought into effect

The opinion of the Attorney-General's Department says:

Advice

5. In my view, cl. 34 probably does operate as a declaration under s.49 of the Constitution.

Reasons

6. Section 49 of the Constitution provides:

> 'The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.'

In an opinion dated 12 August 1990 (actually 1991), the Solicitor-General stated:

> 'Although express words are not required, a sufficiently clear intention that (a) provision is a declaration under s.49 must be discernible. Accordingly, a general and almost unqualified prohibition upon disclosure is, in my view, insufficient to embrace disclosure to Committees. The nature of section 49 requires something more specific.
>
> Absent express provision, an intention to diminish parliamentary privilege cannot readily be inferred. Whether legislation constitutes a declaration for these purposes is very much a matter of degree....'

7. In my view, cl. 34 is specific enough in its terms to be interpreted as diminishing parliamentary privilege. It clearly provides that where the Auditor-General or the Attorney-General is of the opinion that disclosure of information in a report that is to be tabled in either House of Parliament would be contrary to the public interest (as defined in subcl. 34(2)), that information *must not* be included in the report. That is, the information must not be disclosed to Parliament by way of a report prepared in accordance with the Bill.

8. The Standing Committee's view is sustainable only if it can be argued that cl. 34 is aimed solely at preventing disclosure to Parliament by way of report. However, I think that is too narrow a view of cl. 34 and fails to give effect to the manifest intention of cl. 34. It would seem to me to be anomalous and futile for the Parliament to provide that certain information not be disclosed to Parliament in a report by the Auditor-General, if a House of the Parliament (including its committees) were nevertheless to retain the power to require officers of the Executive Government to produce the same information, although not by way of a report prepared in accordance with the Bill. Information so obtained by Parliament or a committee could be made public, even if received in camera. That would clearly defeat the purpose of cl. 34. This view is supported by the terms of subcl. 34(4), which display an intention that the relevant information should only be disclosed to the members of the Executive Government mentioned therein (the Prime Minister, the Finance Minister and the 'responsible Minister or Ministers').

Professor Davis's view is

Section 49 of the Constitution is one source of the powers of each of the Houses of Parliament. In stating, as it does, that these powers are, in the absence of action by Parliament, to be the same as those of the House of Commons in the United Kingdom Parliament, section 49 gives the Senate and its committees virtually unlimited power to do such things as obtain information from any source it chooses. However, the section also states that those powers may be extended or abridged by a declaration of the Parliament.

In an Opinion to the Senate of 12 August 1991, the Solicitor-General stated that a declaration for the purposes of section 49 did not need to be in express words, but could arise by necessary implication. I assume that the Attorney-General and his advisers consider that such an implication is to be made from the words of clause 34, because the clause allows for some information to be excluded from a report that is to be tabled in the Senate, the Attorney may argue that such information cannot be divulged to the Senate or a committee of that House, and hence it is, by implication, a restriction on the powers of the Senate.

However, there are at least three reasons for disputing such a view.

First, the Solicitor-General's opinion appears to place very considerable limits on the circumstances in which a legislative provision could, by implication, be taken to be a declaration for the purposes of section 49 of the Constitution. The Solicitor-General states that

> "a general and almost unqualified prohibition on disclosure is, in my view, insufficient to embrace disclosure to (Parliamentary) Committees. The nature of section 49 requires something more specific."

The Solicitor-General also expresses the view that "an intention to diminish parliamentary privilege (and power) cannot readily be inferred." It may be doubted whether clause 34 of the Auditor-General Bill 1994 is so clear in its purpose as to raise the necessary implication.

Secondly, one may question whether the Solicitor-General is necessarily correct in his view that section 49 permits the powers of a House to be limited by implication. It should be noted that sections 46, 47 and 48 of the Constitution, concerned with various matters to do with both Houses of the Parliament, use the phrase "Until the Parliament otherwise provides" to make allowance for the terms of the sections to be departed from. It is suggested that such a form of words might more readily accommodate the notion of an implication than the more formal words of section 49 - "The powers...of the Senate...shall be such as are declared by the Parliament..."

Thirdly, clause 34 of the Auditor-General Bill 1994 does not make any general and unqualified prohibition on disclosure. Sub-clause 34(3) permits the Auditor-General to divulge part or all of the sensitive (and otherwise excluded) information to the Prime Minister, the Finance Minister and the Minister responsible for the Department the subject of the report. If disclosure to the holders of those offices is permitted, one may question the basis on which disclosure to (say) a Senate Committee is prohibited. To put this point in a different way, one may observe that disclosure of sensitive information by the Auditor-General is:

- <u>prohibited</u> if the information is to form part of a report to be tabled in either House of Parliament;
- <u>permitted</u> if the information is to be divulged to (and only to) the Prime Minister, Finance Minister and responsible Minister.

The clause is silent with regard to (say) information that is requested by a Senate Committee, sitting <u>in camera</u>, but such a situation appears to be closer to the case where disclosure is permitted than to that where it is prohibited.

At the public hearing, Mr Orr, having read Professor Davis' reasons, commented:

I thank you for the opportunity to read that. In essence, it becomes a matter of judgment or balance with regard to these matters. The first point that Professor Davis makes relates to the advice of the Solicitor-General dated 12 August 1991. There is no doubt that the Solicitor-General is looking at the matter as one of a continuum, as it were, of a spectrum of possibilities. At one end of the spectrum is clearly the case where the Parliament specifically declares what its powers, privileges and immunities are. At the other end of the spectrum, there are general prohibitions on departments or persons doing things by way of disclosure. The view of the Solicitor-General is that, clearly, a specific declaration under section 49 would limit the privileges of the Parliament. A general and almost unqualified prohibition on disclosure by various people is at the other end of the spectrum and would not amount to a declaration of the privileges of the parliament.

The Solicitor-General then addresses a specific instance and says that, where there is more than just a general and unqualified prohibition, it is possible that this amounts to an implied declaration. I agree that it is a matter of assessing whether that view is correct, and where clause 34 falls. In my view, I think there are bases for saying that clause 34 is clearly not a general prohibition on disclosure. It is a specific prohibition on disclosure to the Parliament and that is why the view is taken that it impliedly declares the rights.

The second point is a more general questioning of the whole basis of the Solicitor-General's opinion that there can be, in any case, an implied declaration. It is a matter in which I disagree and the department has traditionally disagreed. In my view, there can be implied declarations. A law which has the effect of limiting or restricting, or indeed increasing, the powers, privileges and immunities of the Senate—provided it has that effect—would be a declaration of those powers, privileges and immunities. I think it would be to provide for form to be more important than substance for the view to be taken that that could only be done if it was specifically stated that that was what was being done.

The third point goes to the actual operation of clause 34. In essence, it is a matter of construing what it is that clause 34 is doing. As is often the case with these sorts of arguments, both sides are using the same facts to support their views. Our response to clause 34(3), that the Auditor-General must give a copy of the report to the Prime Minister, the finance minister and responsible ministers, if any, is used to support the view that this is restricting what the Auditor-General can do with this information. It is saying that this is all he or she can do and that he or she cannot otherwise be obliged to provide that information to the Parliament or a committee of the Parliament.

Professor Davis has taken the opposite view, based on the same section, by saying that disclosure to Parliament is more analogous to that type of disclosure than to the public report disclosure. I suppose it is a matter of simply disagreeing with that view. Our assessment of the clause is that it is, in fact, prohibiting disclosure. It is specifically prohibiting disclosure to the Parliament and that, by implication, is restricting the powers or privileges of the parliament to require that disclosure. There is a specific exemption from that prohibition in relation to specific ministers which supports the view that, otherwise, there is a prohibition, even in relation to the powers of parliament.

Detailed analysis

Clause 34 needs to be analysed in its context and according to its own wording. When it is summarised, it is too easy to put a gloss on it which favours one opinion or the other. The function of the Auditor-General is to audit Commonwealth institutions. The bill rightly provides that the results of those audits be available to the general public through being tabled in Parliament.

Clause 34 is in Division 2—Confidentiality of information in Part 5—Information-Gathering Powers and Secrecy. Part 5 provides the Auditor-General with very wide powers to gather information "not limited by any other law (whether made before or after the commencement of this Act), except to the extent that the other law expressly excludes the operation of sections 29 or 30". (Clause 27.)

These powers may be used to obtain information for the purpose of, or in connection with, any Auditor-General function (with some exceptions). These functions include Statement Audits under clauses 9, 10 and 11 of the bill and performance audits of Agencies, Authorities and Companies of the Commonwealth or of the Commonwealth public sector under clauses 13, 14, 15 and 16 of the bill.

All of these clauses require the Auditor-General to furnish a report which either he/she or the relevant Minister must table in Parliament.

If the Auditor-General conducts an audit, he must write a report and that report must be tabled in Parliament. It is in this context that clause 34 operates.

Clause 34 is directed to the Auditor-General. It provides that the Auditor-General must not include particular information in a public report. Public report is defined in clause 34 as a report that is to be tabled in Parliament.

Clause 34 is limited by its context to reports which the Auditor-General writes as a result of carrying out his functions. It is not concerned with reports that others might ultimately write. The mischief which it avoids is to prevent the disclosure of sensitive information in Auditor-General's reports which are tabled in Parliament.

If subclause 34(3) is examined in detail it is seen to provide the following:

- as a result of his/her own decision or the Attorney-General's certificate with respect to not putting particular information in a public report, the Auditor-General may decide not to prepare a public report at all or he may omit the particular information from a public report.
- If he/she chooses to do either of these options, he/she may decide to prepare a special report under this sub-clause including the particular information.
- If, and only if, he/she prepares such a report, does the sub-clause require the Auditor-General to give a copy to the Prime Minister, the Finance Minister and the responsible Minister, if any.

This is not a clause which provides that, where an Attorney-General's Certificate has been issued, the Auditor-General must prepare a special report which must only go to those three members of the executive.

The Attorney-General's Department's opinion states that information obtained from the Auditor-General by Parliament other than by way of statutory obligation to report could be made public, even if received in camera. It draws the conclusion that that would clearly defeat the purpose of clause 34.

This might have some merit, if the opinion also contended that the clause also prevents the Prime Minister, the Minister for Finance and other responsible Ministers from ever making public the particular information.

The Attorney-General's Department's opinion does not take sufficiently into account the circumstances surrounding clause 34. It is limited by time to a specific occasion: the occasion of the report being tabled as required by statute. What is contrary to the public interest to disclose at the time the Auditor-General makes his/her statutory report may change to being in the public interest to disclose even 24 hours later. For example, it

may be necessary not to reveal a cabinet decision only until certain negotiations are completed.

The purpose of clause 34 is far less wide than the Departmental opinion states. This is seen if clause 34 is contrasted with clause 33. Clause 33 is a general secrecy provision of the type which the Solicitor-General's opinion clearly states is not a declaration for the purposes of section 49 of the Constitution. Clause 33 is not limited by time or to specific occasions. The Auditor-General could not rely on clause 33 to refuse to answer questions asked by a Parliamentary committee. Clause 34, in contrast, is restricted to not disclosing on a specific occasion.

Conclusion

The committee is not yet persuaded that clause 34 operates as a declaration under section 49. The Attorney-General's opinion says it probably does, the evidence from Mr Orr appears to concede that it is a matter of opinion. The committee, therefore, reports to the Senate that clause 34 may impinge on the powers of Parliament.

Should the powers of Parliament be diminished in this way?

The committee, in considering this issue, has taken the view that, when the present section 48F was inserted in the Audit Act 1901 debate in Parliament did not touch on the issue of whether section 49 of the Constitution was involved. Accordingly, the committee sought the advice of the Minister for Finance on whether in redrafting section 48F into clause 34 there was an intention to make it operate as a section 49 declaration.

The Minister has responded in a letter of 16 June 1995 that the intention was only to continue the scope and effect of section 48F. As he put it:

> In my previous letter of 22 March 1995 to you in respect of Clause 34, I pointed out that the terms of the proposed provision were included in the Auditor-General Bill as a continuation of the scope and effect of an existing provision of the *Audit Act 1901* - subsection 48F(5) - and that, as far as I was aware, the existing provision had operated appropriately and unremarkably in the handling of specific categories of sensitive information that the Auditor-General had access to.
> Thus, the *intention* in drafting the clause was to continue that position.

The issue remains, then, whether the section 49 implication was an unintended effect. If it was unintended, should it be redrafted either to make the intention explicit or to take away the unintended consequence? The committee prefers the latter. The argument is that a committee of the Parliament is as capable of exercising discretion in sensitive matters as the members of the executive.

Conclusion

Whether the consequence was intended or unintended, it is a matter for the Senate to decide whether to pass the clause in its present form.

Should the intent be made explicit?

Whether Parliament should be warned that a bill contains a clause that will operate as a section 49 declaration is a matter of legal policy. It could be achieved by the relevant clause expressly adverting to the section 49 of the Constitution or for the *Acts Interpretation Act 1901* (or the *Parliamentary Privileges Act 1987*) to be amended so that no section of an Act could be interpreted as a section 49 declaration unless it expressly provides that it is such a declaration.

The committee sought the advice of the Attorney-General on this issue but has not yet received a response.

General conclusions

The committee has tried to establish whether clause 34 operated as a declaration under section 49. If it did not, the committee would have no further concern with the bill. As the matter is not without doubt, the attention of Senators is drawn to the provision.

The committee also tried to establish whether this effect was intentional. It seems that it was not specifically adverted to. That such an effect on the powers, privileges and immunities of Parliament could be brought about without specific advertence is a matter of concern which is also drawn to the attention of Senators.

Student and Youth Assistance Amendment (Youth Training Allowance) Bill 1995

This bill was introduced into the House of Representatives on 11 May 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Student and Youth Assistance Act 1973* to make the following changes to the Youth Training Allowance provisions:

- amend the liquid assets waiting period applicable to youth training allowance clients;
- ensure that people receiving payments under predecessors of the current payment types under the *Social Security Act 1991* and who receive compensation are caught by the compensation recovery provisions;
- remove tables listing compensation affected payments and replace them with text descriptions;
- ensure that two or more lump sum compensation payments made in respect of a disease, injury or condition sustained in one compensable event are treated as one lump sum compensation payment for the purposes of the compensation recovery provisions;
- allow qualification assessment to be bypassed if the person's prospective payment will be precluded anyway following the application of the compensation recovery provisions;
- simplify the debt creation provisions, principally by removing the concept of payability;
- clarify that if a person loses qualification for youth training allowance it is not then necessary to make a determination that the allowance is not payable and loss of payability is automatic;
- ensure that customers who notify the department of an event or change in circumstances that affects their maximum payment rate will incur a debt from the end of the notification period only;
- amend the date of effect of rate reduction for clients with an earnings credit balance who fail to notify income from employment;
- allow the Secretary to disclose client information to certain agencies and to be able to delegate this disclosure power to departmental staff;

- clarify that certain Ministerial decisions are not subject to internal review or review by the Social Security Appeals Tribunal;
- ensure that the Secretary may waive only so much of a waiting/deferment period that overlaps with vocational training being undertaken by a client and to modify the rules relating to reduction of an education leaver's waiting period;
- extend the three week rule to clients who undertake full-time courses of education or training regardless of the duration of the course;

- introduce an automatic mechanism for setting interest rates based on current market rates (with an effect of loan fringe benefit provisions);
- provide that where a person complies with a recipient statement notice and the payment is varied, cancelled or suspended as a result of the information provided, the date of effect of the determination to vary, cancel or suspend payment is the day of the event or change in circumstances;
- clarify the Youth Training Activity Agreement provisions relating to unreasonable delay;
- allow the Secretary to require a YTA recipient to attend a particular place for a particular purpose;
- modify eligibility conditions for payment of the youth training supplement and to include participation in labour market programs as eligible for the supplement; and
- allow notices of decisions to be sent to post office boxes as well as residential addresses.

The committee dealt with this bill in Alert Digest No. 7 of 1995, in which it made various comments. The Acting Minister for Employment, Education and Training has responded to those comments in a letter received 28 July 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospective application Schedule 11

In Alert Digest No. 7 of 1995, the committee noted that schedule 11 of this bill, if enacted, would provide that proposed subsections 16(2) and (2A) of Schedule 3 of the *Student and Youth Assistance Act 1973* would have retrospective application, inserting notional rates of interests for the fringe benefit years ending on 31 March 1994 and 31 March 1995.

It was not clear to the committee whether the rates of interest so specified were declaratory of the present position or represented a retrospective change of interest. The committee, therefore, sought the Minister's advice on this matter and also on whether, if they did represent a retrospective change, that change was beneficial to clients or not.

Pending the Minister's advice, 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.

On this issue the Minister has responded as follows:

> The Committee noted in the Alert Digest that Schedule 11 would have the effect of inserting notional rates for the fringe benefit years ending on 31 March 1994 and 1995, and raised the question whether the rates of interest specified in Item 1 are declaratory of the present position or represent a retrospective change of interest. The Committee also asked whether, if they do represent a retrospective change, that change is beneficial to clients or not.
>
> On 11 May 1995, I introduced the Student and Youth Assistance Amendment (Youth Training Allowance) Bill 1995 into the House of Representatives. Schedule 11 of the Bill makes changes to the Youth Training Allowance (YTA) provisions of the Student and Youth Assistance Act 1973 (SYAA).

Under the YTA arrangements a student who satisfies certain criteria is entitled to a youth training allowance. Existing subsection 135(1) provides that the amount of a student's allowance is to be worked out in accordance with Schedule 1. In calculating the amount, if the recipient is not independent, the "parental income test" is applicable. To determine what is "parental income" for the relevant accounting period, one adds the recipient's "combined parental income" and "combined parental fringe benefits value" together.

If a parent has received a loan from an employer, it may be that that can be considered to be a fringe benefit. Whether there has been a "loan benefit" is worked out using a step by step formula set out in Division 3 of Part 5 of Schedule 3. The formula includes reference for comparison to "notional rates" of interest. The Act allows (existing subclause 16(2)(1) and (b) of Part 5 of Schedule 3) "notional rates" of interest to be prescribed, from time to time, by regulations.

No "notional rates" of interest have been prescribed since the introduction of YTA on 1 January 1995. It is this provision that is to be removed and replaced by the provision of Schedule 11 in the Bill.

Schedule 11 provides for a method of setting interest rates in future years based on current market rates, without the need to prescribe them by regulation. Schedule 11 also removes the ability to prescribe a notional rate of interest. Therefore it has also been necessary to make provision for the periods during which no rates were prescribed.

If a regulation had been made, the rates would have been the same as the rates inserted by Schedule 11. These are notional rates used under AUSTUDY and the future method for determining the rates is the same as that for AUSTUDY. This ensures that the parental income test for AUSTUDY and YTA are similar as the SYAA intended.

There are very few young people affected by the loan fringe benefit provisions of the parental income test. If any of them received youth training allowance at a higher rate than is provided for by these amendments, no repayments will be required. If any of them would have been entitled to a higher rate, but did not receive it, the amendments permit any shortfall to be paid.

It is for that reason that a further amendment in Schedule 11 allows, if necessary, for recalculation at the correct rate and for additional payment. This further Government amendment was made in the House of Representatives and involved adding an additional item to Schedule 11 - item 2 - which was not before the House when the Committee commented on the Bill.

The committee thanks the Minister for this response.

Non-reviewable ministerial determinations
Schedules 7 and 8

The committee has received a copy of a letter from the Administrative Review Council to the Minister for Justice, the Hon Duncan Kerr MP, dealing with non-reviewable ministerial determinations which will result from the amendments proposed in Schedules 7 and 8 of this bill, and similar amendments contained in the Social Security (Non-Budget Measures) Legislation Amendment Bill 1995. A copy of the letter is attached to this report and relevant parts are discussed below.

The committee dealt with these proposed amendments in Alert Digest No. 1 of 95

and the Seventh Report of 1995 in respect of the Social Security bill and in Alert Digest No. 7 of 95 in respect of this bill.

The committee welcomes and endorses the views and recommendations of the Council that ministerial determinations with respect to individual persons or loans should be subject to merits review by the SSAT and that class determinations should either be reviewable by the SSAT or be dealt with as disallowable instruments.

The committee would like to take the opportunity to clarify its remarks on the appropriate forum for review which the Council refers to in paragraph 8 of its letter, which states:

> Finally, the council notes that the committee had suggested that the AAT, not the SSAT, may be the appropriate review forum as "It may be felt there is some difficulty in review of ministerial decisions by departmental officers or by a tribunal whose members are appointed by the Minister." The Council considers that all tribunal members are independent of the relevant portfolio Minister and does not understand the Committee's comments to suggest that there is any difficulty in such a system of merits review.

In saying, 'It may be felt there is some difficulty' the committee, far from suggesting any lack of independence on the part of tribunal members was rather alluding to:

- a possible perception on the part of the Minister and the Department that internal review was not appropriate: this was confirmed by the Parliamentary Secretary to the Minister in her response to the committee;
- a possible apprehension on the part of an applicant for review of such a decision that an appeal from Caesar's decision to Caesar's "employees" gives the appearance of a lack of procedural fairness which is the very basis of external review; and
- the precedent which the committee believed had been set by the procedures for review by the AAT of certain decisions of the Minister for Immigration.

In suggesting the AAT as an appropriate forum, the committee was seeking a solution to what might have been seen as a problem and, perhaps, as the reason for removing the Minister's decisions from the jurisdiction of authorised review officers and the SSAT.

As the AAT is the forum for appeals from SSAT decisions, the committee is happy to endorse the Administrative Review Council's opinion that ministerial determinations with respect to individual persons or loans should be subject to merits review by the SSAT and that class determinations should either be reviewable by the SSAT or be dealt with as disallowable instruments.

The Committee draws 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.

For the information of Senators an extract of the relevant part of the committee's Seventh Report dealing with the Social Security Bill is reproduced as follows:

Non-reviewable decisions
Clauses 40 and 41

In Alert Digest No. 1 of 1995, the committee noted that these clauses, if enacted, would ensure that certain decisions of the Minister exercising a power or function under the Act would not be reviewable whether internally or through the Social Security Appeals Tribunal and thereafter by the Administrative Appeals Tribunal. The explanatory memorandum suggested that it had always been assumed that decisions of the Minister under the relevant sections were not reviewable but that recent legal advice had brought this assumption into question.

It seemed clear that the decisions of officers were reviewable and from the definition of officer in the Act - a person performing duties or exercising powers or functions under the Act - that the Minister's decisions would be reviewable when he or she exercised powers or functions under the Act.

The question for the committee was whether exempting the Minister's decision from the review process made personal rights and liberties unduly dependent on non-reviewable decisions. The committee was not convinced that a decision should not be reviewable just because it was made by a Minister. Otherwise administrative review might be avoided by giving to the Minister all the discretionary and contentious decisions. The committee readily acknowledged that general policy decisions were not apt for administrative review, nor was a range of other decisions. But it was the nature of the decision not the status of the decision-maker that was relevant to the issue of whether a decision should be reviewable on the merits.

The decisions in question are decisions under sections 1099E and 1099L of the Act. The Act provides that income for the purposes of the income test on social security payments includes amounts deemed to be earned by moneys deposited in accounts which bear little or no interest or by moneys loaned with little or no interest. Sections 1099E and 1099L enable the Minister to decide that specified money of a person, or of a class of persons and specified loans or a specified class of loans may be disregarded and so no deemed amount is included in the income test. Where the Minister decides with respect to a class of persons or a class of loans, it may be characterised as a general policy decision that would be inappropriate for review. But fairness demands, where an individual seeks the favourable exercise of what is so obviously a discretion, that review on the merits be available.

It may be felt that there is some difficulty in review of ministerial decisions by departmental officers or by a tribunal whose members are appointed by the Minister. The Administrative Appeals Tribunal, therefore, may be the appropriate forum along the lines of the former jurisdiction with respect to certain Migration Appeals.

The committee sought the Minister's advice on this matter.

Pending the Minister's advice, 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.

In the letter dated 28 April, 1995, the Minister has responded as follows:

> Clauses 40 and 41 of the Bill contain provisions which, if enacted, are intended to put beyond doubt the position that decisions by the Minister under section 1099E and 1099L of the *Social Security Act 1991* are exempt from review.
>
> Recent legal advice has raised a question about the basis for that position. The amendments seek to put the issue beyond doubt.
>
> Your Committee has recognised that it would be inappropriate for decisions of the Minister to be reviewed by the Department and by the SSAT. I agree. However, the Committee has suggested that such decisions might be reviewable by the Administrative Appeals Tribunal. I do not accept that such a review would be appropriate.
>
> When the Minister makes a decision under the relevant provisions in relation to an individual, and there would be very few of them, that decision would be informed by policy considerations of a similar nature to those applying to a decision in relation to a class of persons. The Committee has already acknowledged that it is inappropriate for those class decisions to be reviewed. I consider it is inappropriate for the AAT to review decisions of the Minister in relation to individuals, as they are effectively the same in nature as class decisions. I believe this view is supported by the fact that section 1099L gives the Minister the power to make determinations in relation to "specified loans", permitting a determination to be made on policy grounds in relation to a number of loans (possibly made by several individuals) that have some common feature.
>
> There is of course nothing that would prevent an individual, or indeed any member of a class of persons, from seeking the Minister's reconsideration of any decision.

The committee thanks the Minister for this response.

(End of Extract)

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

1995

30 AUGUST 1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1995

The committee presents its Thirteenth Report of 1995 to the Senate.

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

Air Services Act 1995

Crimes Amendment (Controlled Operations) Bill 1995

Ozone Protection Amendment Bill 1995

Ozone Protection (Licence Fees+Imports) Bill 1995

Ozone Protection (Licence Fees+Manufacture) Bill 1995

Air Services Act 1995

The bill for this Act was introduced into the House of Representatives on 30 March 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to establish Airservices Australia to provide Australia's national airways system. This organisation, together with the Civil Aviation Safety Authority, replaces the Civil Aviation Authority.

The committee dealt with this bill in Alert Digest No. 6 of 1995, in which it made various comments. The Acting Minister for Transport responded to those comments in a letter received 8 June 1995. In the Tenth Report of 1995, the committee discussed the Minister's response and requested confirmation from the Minister that the advice from the Attorney-General's Department was to the effect that the new provisions would achieve the express intention of removing mere negligence. The Parliamentary Secretary to the Minister for Transport has responded to that request in a letter dated 21 August 1995. A copy of that letter, together with a copy of the advice from the Attorney-General's Department, is attached to this report. Although this bill has now been passed by both houses (and received Royal Assent on 30 June 1995), the Parliamentary Secretary's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Subclauses 69(2) and 70(2)
Negligence and the test for criminal liability

In Alert Digest No. 6 of 1995, the committee noted that clauses 69 and 70 of this bill provide:

> **Removal from Australian territory of aircraft under statutory lien**
>
> **69.(1)** A person who knows that a statutory lien is in effect in respect of an aircraft must not remove the aircraft from Australian territory without the prior approval of an authorised employee.
> Penalty: Imprisonment for 3 years.
>
> **(2)** For the purposes of establishing a contravention of subsection (1), a person is taken to have known that a statutory lien was in effect in respect of an aircraft if the person ought reasonably to have known that fact, having regard to:
> (a) the person's abilities, experience, qualifications and other attributes; and

(b) all the circumstances surrounding the alleged contravention.

Dismantling etc. aircraft under statutory lien

70.(1) A person who knows that a statutory lien is in effect in respect of an aircraft must not detach any part or equipment from the aircraft unless the person has:

(a) lawful authority; or

(b) the prior approval of an authorised employee.

Penalty: Imprisonment for 2 years.

(2) For the purposes of establishing a contravention of subsection (1), a person is taken to have known that a statutory lien was in effect in respect of an aircraft if the person ought reasonably to have known that fact, having regard to:

(a) the person's abilities, experience, qualifications and other attributes; and

(b) all the circumstances surrounding the alleged contravention.

The committee has consistently drawn attention to offence provisions in this form since subsection 85ZKA(3) and 85ZKB(3) were inserted in the *Crimes Act 1914* in 1989.

The issues were canvassed in the committee's Twelfth Report of 1989 in respect of the Law and Justice Legislation Amendment Bill 1989 and Sixth Report of 1993 in respect of the Australian Wine and Brandy Corporation Amendment Bill 1993.

The crux of the matter appears to the committee to be whether mere negligence should attract criminal liability for a serious offence. The committee noted the response of the Deputy Prime Minister to the committee of 11 July 1989.

That response stated in part:

> What may be of concern to your Committee is the test of "ought reasonably to know". The legislative intention behind the provision is to cover both actual knowledge and recklessness. In certain circumstances "wilful blindness" may be construed as actual knowledge (see the facts of He Kaw Teh), but it may be that not all circumstances of wilful blindness will be taken as actual knowledge. It is theoretically better to treat "wilful blindness" as a type of recklessness rather than elevate it to actual knowledge. Thus the provisions have been formulated to cover both actual knowledge and recklessness (ie in other words where the defendant knew, or ought reasonably to have known).

The committee did not have any difficulty with a legislative intent to eliminate wilful blindness as a defence; but the committee was concerned that the formula proposed, in attempting to include wilful blindness, would cover not only actual knowledge and recklessness, which is the apparent legislative intent, but also mere negligence.

For mere negligence, no liability would attach under the present law.

The committee sought the Minister's advice whether he agreed that the test of liability under these proposed provisions was less stringent than one requiring actual knowledge or a reckless disregard of the facts. The committee considered such a test to be the appropriate standard to be applied before a person is found guilty of a serious offence.

Pending the Minister's advice, the committee drew Senators' attention to the provisions, 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.

In a letter received on 8 June 1995, the Acting Minister responded as follows:

> Subclauses 69(1) and 70(1) contain offences in relation to the removal from Australia and dismantling of aircraft under a statutory lien. Subclauses 69(2) and 70(2) provide that a person is taken to have known that a statutory lien was in effect if the person ought reasonably to have known that fact, having regard to the person's abilities etc. and all the other circumstances surrounding the alleged contravention.
>
> The Committee is concerned that the test of liability under the proposed provisions is less stringent than one requiring actual knowledge or a reckless disregard of the facts in that it purports to attach criminal liability to negligent behaviour. The Committee considers that these provisions may trespass unduly on personal rights and individual liberties in principle 1(a)(1) of the Committee's terms of reference.
>
> Clauses 69 and 70 will replace substantially similar offences contained in sections 78 and 78A of the *Civil Aviation Act 1988.* The existing provisions provide that a person is guilty of an offence when they have "reasonable grounds to believe that a statutory lien was in effect", and clearly attach criminal liability to negligent acts. The new provisions were drafted with the express intention of removing mere negligence from the scope of these offences. Advice from the Attorney-General's Department suggested that the new provisions be modelled on subsections 852KA(3) and 852KB(3) of the *Crimes Act 1914.*
>
> The Attorney-General's Department has advised that although the test may be objective in part (ought reasonably to have known) it is subjectively based (whether the person having regard to his or her individual traits, etc. should have known). Thus the formulation is directed at creating an offence, the mens rea of which covers both actual knowledge and recklessness and takes into account the characteristics of the defendant and all the surrounding circumstances.
>
> I also draw the Committee's attention to clause 62 of the Bill under which Airservices Australia will be required to take reasonable steps to notify those people who would be reasonably contemplated as possibly contravening subclauses 69(1) and 70(1) of the existence of a statutory lien.
>
> I believe that subclauses 69(2) and 70(2) are consistent with current Commonwealth criminal law policy, and require proof of more than mere negligence on the part of the defendant in any prosecution. As a result, the government does not propose any amendments to clauses 69 and 70 in their current form.
>
> I trust that this advice addresses your concerns satisfactorily.

In the Tenth Report of 1995, the committee thanked the Minister for this response, noting the Acting Minister's assurance that 'the new provisions were drafted with the express intention of removing mere negligence from the scope of these offences' and

on Attorney-General's Department's advice, were modelled on subsections 852KA(3) and 852KB(3) of the *Crimes Act 1914*. The committee indicated that it would be pleased if the Minister would confirm that the advice from the Attorney-General's Department had been to the effect that the new provisions would achieve the express intention of removing mere negligence.

The Parliamentary Secretary to the Minister for Transport has responded as follows:

> The committee had previously raised concerns that the test of liability under these provisions is less stringent than one requiring actual knowledge or a reckless disregard of the facts in that it purports to attach criminal liability to negligent behaviour. These concerns were addressed in a letter of 7 June 1995 from the Acting Minister.
>
> The Acting Minister advised that the new provisions were drafted with the express intention of removing mere negligence from the scope of these offences and that advice from the Attorney-General's Department suggested that the new provisions be modelled on subsections 85ZKA(3) and 85ZKB(3) of the *Crimes Act 1914*. The committee has sought confirmation that the advice from the Attorney-General's Department was to the effect that these provisions would achieve the express intention of removing mere negligence from the scope of these offences.
>
> The Attorney-General's Department advice referred to in the Acting Minister's letter of 7 June 1995 was provided to the Office of Parliamentary Counsel in relation to an early draft of the Bill which purported to remake sections 78 and 78A of the *Civil Aviation Act 1988*. Those provisions provided that a person is guilty of an offence when they have "reasonable grounds to believe that a statutory lien was in effect", and clearly attached criminal liability to negligent acts.
>
> The Attorney-General's Department advised that such provisions would cause concern to the committee and suggested that they be modified along the lines of the *Crimes Act 1914* provisions referred to above.
>
> A copy of the Attorney-General's Department advice is attached for the committee's information.

The relevant part of the advice from the Attorney-General's Department is as follows:

> <u>Proposed sections 73 and 74</u>
>
> 3. Proposed section 73 provides that it is an offence to remove an aircraft from Australia without the consent of an authorised officer if the person knows or has reasonable grounds to believe that a statutory lien is in effect in respect of the aircraft. The provision provides for a penalty of 2 years imprisonment.
>
> 4. Proposed section 74 prohibits a person from detaching any part or equipment from the aircraft without the consent of an authorised officer if the person knows or has reasonable grounds to believe that a statutory lien is in effect in respect of the aircraft. The provision provides for a penalty of 2 years imprisonment.
>
> 5. Both these proposed provisions include the phrase"ought reasonably to have known". Such a provision will undoubtedly cause concern to the Senate Standing committee for the Scrutiny of Bills as it has expressed concern about that formulation on previous occasions. Modified alternatives of such a provision are subsections 85ZKA(3) and 85ZKB(3) of the *Crimes Act 1914*. The test, then, is not whether a reasonable person in similar

circumstances should have known, rather the defendant, having regard to his or her abilities, experiences, qualifications and other attributes and all the relevant circumstances should have known.

6. While the test may be objective in part (ought reasonably to have known) it is subjectively based (whether the person, having regard to his or her individual traits, etc. should have known). Thus the formulation is directed at creating an offence, the mens rea of which covers both actual knowledge and recklessness and takes into account the characteristics of the defendant and all the surrounding circumstances.

The committee thanks the Parliamentary Secretary for his advice which allays the committee's concerns.

Crimes Amendment (Controlled Operations) Bill 1995

This bill was introduced into the House of Representatives on 29 June 1995 by the Minister for Justice.

The bill proposes to amend the *Crimes Act 1914* to:

- allow the Commissioner, Deputy Commissioners and Assistant Commissioners of the Australian Federal Police (AFP) and members of the National Crime Authority (NCA) to issue certificates authorising a controlled law enforcement operation involving the import, export and/or possession of narcotic drugs;
- provide that certain law enforcement officers involved in an authorised controlled operation are not criminally liable for offences against section 233B of the *Customs Act 1901*, and associated offences;
- require the AFP and NCA to report to the Minister on results of applications for certificates authorising controlled operations and the reasons for the decision in each case, and require the Minister to report on these matters to Parliament;
- provide that the fact that law enforcement officials took part in or facilitated, the importation of narcotics prior to the commencement of this legislation, is not to render evidence of that importation inadmissible where the importation was made pursuant to a request from the AFP to the Australian Customs Services for an exemption from detailed customs scrutiny.

The committee dealt with this bill in Alert Digest No. 11 of 1995, in which it made various comments. The Minister for Justice has responded to those comments in a letter dated 29 August 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Abrogation of the effect of a High Court decision
General Comment

In Alert Digest No. 11 of 1995, the committee noted that this bill sought to abrogate the effect of the decision of the High Court in *Ridgeway v R.* In that case the High Court held that evidence should generally not be admitted where law enforcement officers break the law by committing an element of the offence for which an accused person is being prosecuted. This decision was based on public policy grounds and in defence of the civil liberties of an accused person.

The committee pointed that to the extent that the bill abrogates the rights of an accused person, it may be considered to trespass on personal rights and liberties. The committee noted that the abrogation was limited to prosecutions in respect of certain offences relating to narcotics. The committee also noted, however, that the Victorian Council for Civil Liberties, among others, opposed these measures. Whether the trespass on personal rights and liberties, therefore, is appropriately balanced by the need to ensure that crimes relating to narcotics are detected and the offenders punished, in the committee's view, was a matter for ultimate resolution by the Senate.

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.

On this issue, the Minister has responded:

> The Committee's first comment is that the Bill may trespass on individual rights and liberties, in abrogating the effect of the decision in *Ridgeway v R* (1995) 129 ALR 41, to the detriment of accused persons.
>
> This is arguably the case in relation to the transitional provisions of the Bill (ss 15T to 15V) which I will discuss below. It is unquestionably not the case in relation to the remainder of the Bill. The provisions of the Bill dealing with future operations in no way alter the exclusionary rule of evidence laid down in *Ridgeway*. The discretion of the court to exclude unlawfully procured evidence remains intact.
>
> Rather, the provisions dealing with future operations take up the express invitation of the High Court for Parliament to legislatively authorise controlled operations, if Parliament wished police to use this technique. For example, Chief Justice Mason and Justices Deane and Dawson held that:
>
> > if it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements (*Ridgeway* at 58).

The committee thanks the Minister for this response. The committee, however, is not concerned with the validity of the bill. The committee, as much as the High Court, is aware that it is within the power of Parliament to pass a law that makes lawful that which was previously unlawful, if Parliament so wishes. The function of the committee is to make the Senate aware that such a bill may infringe current personal rights and liberties.

The committee is concerned that the effect of the bill is to take away the protection which an accused currently has from the inadmissibility, generally, of evidence where law enforcement officers break the law by committing an element of the offence for which the accused is being prosecuted.

The committee therefore continues to draw 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.

Retrospective application
Proposed subsection 15T(1)

Proposed section 15T provides:

(1) In this Division, a reference to a controlled operation is a reference to a controlled operation started before the commencement of this Part.

(2) In this Division:

Collector of Customs for a State or Territory has the same meaning as in the *Customs Act 1901*.

Ministerial Agreement means the agreement:

a) concerning the relationship between the Australian Customs Service on the one hand, and the National Crime Authority and the Australian Federal Police on the other, with respect to narcotic drug law enforcement; and

b) made by the Minister for Industry Technology and Commerce and the Special Minister of State on 3 June 1987.

In Alert Digest No. 11 of 1995, the committee noted that proposed subsection 15T(1), if enacted, would allow the retrospective application of the other provisions of the bill relating to the admissibility of evidence where law enforcement officers break the law by committing an element of the offence for which an accused person is being prosecuted. The effect is not only to abrogate the rights of the accused person, but to do so retrospectively. The committee sought the Minister's advice whether retrospectivity, which could extend as far as June 1987, was necessary.

Pending the Minister's advice, 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.

On this issue, the Minister has responded as follows:

> The second comment made by the Committee is that pending my advice, Senators should note that proposed section 15T possibly unduly trespasses on personal rights and liberties, in that it will retrospectively abrogate the rights of accused persons.

I would draw the Committee's attention to the comments of the Member for Tangney, the Honourable Daryl Williams QC, MP, former Shadow Attorney-General, in the second reading debate on the Bill in the House of Representatives:

> For my part, I regard the so-called retrospective section of the Bill as not retrospective in any real sense... The retrospective effect of this part of the Bill is to make evidence that would, under the decision in Ridgeway, almost certainly be excluded from evidence against an accused in a narcotics case because of the illegality of the police conduct. On the face of it, it does not affect the elements of the substantive criminal offence with which the accused is charged.
>
> This therefore appears not to be a case where the Parliament is by legislation retrospectively making illegal an act that at the time it was committed was lawful (*Hansard*, House of Representatives, 22 August 1995 at 16-17).

The transitional provisions (ss 15T to 15V) are only partly retrospective - they lay down a rule of evidence in future cases, by reference to law enforcement conduct that has taken place in the past. The Bill will not, therefore, unsettle the result in any case in which the admissibility of evidence is determined before the Bill's commencement.

Without the transitional provisions, the evidence available to prosecute a number of pending cases relating to serious Commonwealth narcotics trafficking offences, punishable by 25 years to life imprisonment, will be in serious jeopardy. In at least two cases, there is no alternative State charge, and in most others, the evidence available to support State charges is greatly inferior to that available to support the Commonwealth charges in jeopardy because of *Ridgeway*.

Furthermore, the sentences likely to be imposed on up to ten alleged narcotics traffickers, if convicted, are likely to be less than would otherwise have been the case, because of the need to avoid charges reliant on *Ridgeway* type evidence.

While the transitional provisions have been incorporated in the Bill to preserve necessary evidence of these serious offences, they have been given as narrow scope as possible, mindful of the importance of minimising retrospectivity.

The provisions only apply to evidence relating to a Commonwealth narcotics trafficking offence, obtained in the course of an investigation relating to such an offence. Such evidence is only preserved in relation to a limited range of unlawful conduct by police, directly relating to a controlled importation in accordance with then accepted procedures.

In particular, the prosecution must show that the unlawful importation was carried out with the knowledge and approval of the Australian Federal Police and Australian Customs Service, in accordance with a 1987 Ministerial Agreement.

Thank you for this opportunity to address the issues raised by the Committee.

The committee thanks the Minister for the response to this issue.

On the matter of retrospectivity, the committee is of the opinion that the effect of certain provisions may amount to trespass on personal liberties just as much where unlawful activity is retrospectively made lawful as where lawful activity is made

unlawful after the activity has taken place. The committee notes that the Minister does acknowledge the retrospectivity and has given the transitional provisions as narrow a scope as possible for that reason.

The committee also notes that the bill has been referred to the Legal and Constitutional Legislation Committee where it will receive further consideration.

The committee, therefore, continues to draw Senators' attention to these 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.

Ozone Protection Amendment Bill 1995
Ozone Protection (Licence Fees+Imports) Bill 1995
Ozone Protection (Licence Fees+Manufacture) Bill 1995

These bills were introduced into the House of Representatives on 21 June 1995 by the Parliamentary Secretary to the Minister for Environment, Sport and Territories as a package.

The bills propose, among other things, to:

- impose a two-yearly administration fee for each licence issued;
- provide that a licensee who holds a controlled substances licence must pay to the Commonwealth a quarterly licence fee for HCFCs or methyl bromide imported during that quarter; and
- provide that a licensee who holds a controlled substances licence must pay to the Commonwealth a quarterly licence fee for HCFCs or methyl bromide manufactured during that quarter.

The committee dealt with these bills in Alert Digest No. 10 of 1995, in which it made various comments. The Minister for the Environment, Sport and Territories has responded to those comments in a letter dated 14 August 1995. A copy of that letter is attached to this report and the relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Relevant provisions

The relevant provisions of the three bills are:

> Ozone Protection Amendment Bill 1995: Subclause 4(1) and item 19 of Schedule 1
>
> Ozone Protection (Licence Fees+Imports) Bill 1995: Subclause 4(1)
>
> Ozone Protection (Licence Fees+Manufacture) Bill 1995: Subclause 4(1)

In Alert Digest No. 10 of 1995, the committee drew attention to these provisions because they enabled the fees in respect of certain licences to be set by regulation without any provision in the primary legislation either for a maximum amount for the fee or a method of calculating the maximum amount.

The committee noted that it had consistently drawn attention to provisions which allow Ministers unfettered power to make regulations to set the rate of a fee as such provisions may be considered to delegate legislative power inappropriately in that a fee may be set so high that it amounts to a tax. Creating a tax is a matter for primary legislation in the view of the committee.

The committee noted, however, in respect of the Ozone Protection Amendment Bill 1995, that the explanatory memorandum indicated on page 3 the intention to impose a two-yearly administration fee for each licence, which would be set by regulation at $10 000 until the year 2000, except for essential uses licences, for which the fee would be $2 000 and that these amounts were to be based on cost recovery.

In the light of this explanation the committee sought the Minister's advice on whether those fees could be included in the primary legislation as the committee was of the opinion that it should not be too difficult to make a small amendment in five years time to alter the fee if that should prove necessary.

In respect of the other two bills, the committee noted that the explanatory memorandum of each bill indicated on page 4 that the purpose of the activity fee was to fund the furthering of the phase out programs for HCFCs and methyl bromide and related public awareness programs. The committee also noted that the explanatory memorandum of each bill indicated on page 3 that industry representatives had been consulted on the level of fees.

In the light of these statements, the committee sought the Minister's advice on whether some maximum amount or a means of calculating it could not be provided in the primary legislation while allowing the regulations to adjust the actual amount each quarter. This would avoid an open-ended power to set fees.

Pending the Minister's advice, the committee drew Senators' attention to the relevant provisions in each bill, as they 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:

> The content of these Bills reflects a long period of consultation with industry both on the types of controls proposed and on the level of fees. The level of fees proposed is designed to ensure full cost recovery of administration of the program to control Australia's consumption of ozone depleting substances and to finance information programs. The level of fees is based on conservative estimates of the number of licensees and their level of activity in importing or manufacturing ozone depleting substances from 1996 to 2000. While they represent a best estimate of the total fees that may be recouped, substantially less may be collected if information programs to encourage industry to move to more environmentally

benign substances take effect earlier than expected. The fees and the establishment of a Trust Fund also take into account the need to reserve funds from the early stages of the program, for the later stages when activity levels will have decreased but the cost of further action and the need for information programs remain high.

The consultative process in place between industry and government will resolve discrepancies between the conservative fee level compared with variable costs of the program. To illustrate with the HCFC licensing scheme, in the event that the level of application fees (initially set at $10,000 for controlled substances and used substances licenses, $2000 for essential substances licences and with activity fees at $2000 per ODP tonne for HCFC) is insufficient to meet the costs of the program, the level of fees can be increased within one year on informing licensees. Determining an accurate upper level fee at this early stage of the program would be most difficult.

The level of fees is not contained in the primary legislation because the primary legislation is difficult and time consuming to amend. It is quite conceivable that the process of regularly amending primary legislation in order to amend the level of fees would add considerably to the administrative costs which the fees are designed to recover. The figures initially set for licence and activity fees are based on estimated cost recovery. As more precise figures for costs incurred in administration of the amended Act will not be known until it has been operational, the EPA has already agreed to review the fees for the used substances licences after one year.

Industry is not confident that the Parliamentary legislative timetable could guarantee that minor amendments to principal legislation to amend fee levels could be achieved within one year and there is particular concern that reserves in the Trust Fund may be depleted in the meantime. They believe, and I agree, that the power of disallowance of regulations is sufficient safeguard to ensure that the responsible Minister does not raise fees without sufficient justification or industry consultation. The current ozone protection legislation has been operating successfully since 1989 without any cause for Parliamentary or industry concern on the powers to set fees under the legislation operating on the same basis without a specified upper fee level.

The committee thanks the Minister for this response but is not convinced that an unfettered power to set fees that could amount to a tax is an appropriate delegation of the legislative power of Parliament.

In contrast to the doubts and uncertainties expressed in the response, the committee notes the regime set out in the explanatory memorandum.

In the explanatory memorandum, the scenario on page 3 is that the application fees will be set at $10 000 and $2 000 respectively for the period 1996-2000. Also on page 3, the committee notes that the Ozone Protection Trust Fund is to be established to allow revenue from the licensing schemes to be directed into

ozone protection programs. The setting up of the Fund is put forward as the means to ensure that revenue collected from licensees at the time of peak activity (1996-2000) can be expended at the times of low activity (2000-2030), when the need for information programs will be most critical.

The response to the committee's comments, however, exhibits uncertainty about whether the scheme put forward in the explanatory memorandum is sufficient.

The committee notes also that the issue of setting fees by regulation without a maximum limit or a means of calculating it in the primary legislation was canvassed with the then Minister for the Arts, Sport, the Environment, Tourism and Territories when the current Licence Fees Acts were introduced in 1988. The Minister, at that time, argued that a similar uncertainty about future costs indicated a need not to have an upper limit expressed in primary legislation.

The committee notes, however, that the uncertainty was unfounded. The regulations were first made in 1989 but in the ensuing 6 years the fees set by those regulations have been altered only once (in 1990).

The committee seeks the Minister's further consideration, pointing out that the committee is not asking that an 'accurate upper level fee' be determined 'at this early stage of the program', nor is the committee asking that minor amendments to fee levels be made in primary legislation. What is being suggested is that a maximum amount, or a means of calculating it, be set with sufficient leeway to enable the program to increase, by regulation, the actual fee levels below that limit with the flexibility and responsiveness that the cost structures demand.

Given the intention to collect more in the early years than is needed to run the program, there ought to be more than sufficient time to amend the relevant Act if it appears that the maximum amount, or the formula for calculating it, is likely to be insufficient.

The committee also notes that in the response to the committee's comments in 1988, the then Minister said:

> Because the intent of the principal legislation is to reduce the quantities of substances manufactured or imported over time, the amount of the fees charged per kilogram of product must increase to recover the same cost.

Commonwealth legislation abounds in formulae that enables fees and other amounts to be increased on a sliding scale commensurate with such a variable.

The committee, therefore, conscious that the provisions grant an unfettered power to impose fees, continues to draw the provisions to the attention of Senators as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

1995

20 SEPTEMBER 1995

SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT OF 1995

The committee presents its Fourteenth Report of 1995 to the Senate.

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

Auditor-General Bill 1994

Taxation Laws Amendment (Budget Measures) Act 1995

Veterans' Affairs Legislation Amendment and Repeal Bill 1995

Auditor-General Bill 1994

The committee's considerations

The committee dealt with this bill in Alert Digest No. 4 of 1995, in which it made various comments. The Minister for Finance responded to those comments in a letter received on 30 March 1995, referring to advice from Attorney-General's Department that clause 34 operated as a declaration under section 49 of the Constitution to limit Parliament's powers.

In its Seventh Report of 1995, the committee discussed the response of the Minister for Finance to the committee's comments in Alert Digest No. 4 of 1995. In that Report, the committee indicated that it would seek to meet with the Attorney-General to discuss the issue that clause 34 of the bill might impinge on the power of Parliament to obtain information.

The Attorney-General considered it more appropriate to provide, with the consent of the Minister for Finance, a copy of the legal opinion of the Attorney-General's Department, and a senior officer of that Department to discuss the issues.

The Legal Adviser to the committee, Professor J L R Davis, put in writing his reasons for his view that clause 34 of the bill does not operate as a declaration for the purposes of section 49 of the Constitution.

Copies of correspondence and of the opinion of the Attorney-General's Department and of Professor Davis' reasons were attached to that Report.

The committee also took evidence at a public hearing held on 7 June, 1995. Evidence was given by Mr Robert Orr, Deputy General Counsel, Office of General Counsel of the Attorney-General's Department, Professor J Davis, Legal Adviser to the committee and Mr Harry Evans, Clerk of the Senate.

After the public hearing, the committee sought the advice of the Minister and of the Attorney-General respectively on two issues which required further clarification.

The Minister for Finance responded in a letter dated 16 June 1995. The committee included a copy of that letter in its Tenth Report of 1995.

The Attorney-General responded in a letter dated 7 July 1995. The committee included a copy of that letter in its Twelfth Report of 1995.

Advice has been received from the Clerk of the Senate in a letter dated 7 September 1995.

The advice is reproduced for the interest and information of Senators:

> This letter is by way of a follow-up to the advice which I provided at the hearing of the Scrutiny of Bills Committee on 7 June 1995 in relation to clause 34 of the Auditor-General Bill 1994.
>
> The reports of the committee on its inquiry into this provision reveal that something of an impasse has developed. The government has indicated that the clause would be an implied restriction on the powers of the Houses of the Parliament to obtain information from the Auditor-General, and that it was intended to have this effect. The government also suggests that a general provision to the effect that the powers and immunities of the Houses are not affected by a statutory provision except by express words may be unconstitutional. It is not entirely clear whether the government's advisers are of the view that a particular non-derogation provision in relation to parliamentary powers and immunities, such as that in section 15E of the Crimes Act, is also unconstitutional. It is difficult to see how the first type of provision could fail without the second type failing also. It is clear that, on the view taken by the government, the Senate's amendment to clause 34, subclause (4), would not be effective in avoiding the claimed implied restriction of parliamentary powers.
>
> While I do not accept these views, and do not for one moment suppose that they would be accepted by the courts, I wish to suggest a possible solution to the difficulty of clause 34. This is that the Senate's amendment to subclause (4) be replaced by an amendment to add to the clause a new subclause as follows:
>
> > (3A) This section does not prevent the provision by the Auditor-General of a report to a House of the Parliament in accordance with a resolution of that House.
>
> It appears that such a provision would not be subject to the alleged constitutional difficulty raised by the government's advisers and would overcome the problem with the clause.
>
> I do not think that it would be necessary to change the Senate's amendment to clause 27, as this is not a non-derogation provision but an application or definition provision not different in principle from what I have proposed for clause 34.
>
> While overcoming the immediate problem of clause 34, the proposed amendment would not deal with the implied declaration doctrine propounded by the government's advisers. It is highly desirable that that doctrine be defeated in the future. Probably the only way of doing that is to have a superior court reject it, which is how other such opinions have been dealt with in the past.
>
> I have written in similar terms to Senators Short and Gibson, who also sought advice on clause 34.

The committee thanks the Clerk for this advice.

Taxation Laws Amendment (Budget Measures) Act 1995

The bill for this Act was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to amend the following Acts:

Taxation (Deficit Reduction) Act (No. 1) 1993 to make consequential amendments in relation to the increased company tax rate as the increase will not apply to the concessional rates of tax applicable to recognised medium credit unions and recognised large credit unions for the 1995-96 and 1996-97 years of income;

Taxation (Deficit Reduction) Act (No. 2) 1993 to:

- freeze the rate of tax imposed on the eligible insurance business of friendly societies and other registered organisations at 33 per cent of the 1995-96 and 1996-97 years of income; and
- increase the rebate applying to taxable bonuses paid on life insurance policies issued by friendly societies to 33 per cent from 1 July 1995 and maintaining that level for the year beginning 1 July 1996;

Sales Tax Assessment Act 1992 and five Sales Tax (Deficit Reduction) Acts to make consequential amendments upon the increase of sales tax payable on passenger motor vehicles;

Sales Tax Assessment Act 1992 to:

- ensure that the Commonwealth is not liable to pay refunds if the liability to the refund does not arise under the provisions of the Assessment Act; and
- remove the concessional treatment afforded goods which contain computer programs embodied in non-permanent microchips; and

Sales Tax Amendment (Transitional) Act 1992 to ensure that the Commonwealth is not liable to refund sales tax that was paid or overpaid under the old law, if the liability to the refund does not arise under the provisions of the old sales tax law.

The committee dealt with this bill in Alert Digest No. 7 of 1995, in which it made various comments. The Assistant Treasurer responded to those comments in a letter dated 29 June 1995. A copy of that letter is attached to this report. Although this bill has now been passed by both houses (and received Royal Assent on 27 July 1995), the Assistant Treasurer's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Retrospective application

Schedule 9, item 3 in Part 3

In Alert Digest No. 7 of 1995, the committee noted that Item 3 in Part 3 of Schedule 9, if enacted, would allow the amendments proposed by the Schedule to apply to liabilities that arose prior not only to Royal Assent but also to Budget night, where legal proceedings to enforce the liabilities had not commenced before that night.

It should be kept in mind that, although the bill speaks of the liability of the Commonwealth, the words are referring to the right of a taxpayer to recover moneys which the common law or statutory law other than the sales tax legislation would deny that the Commonwealth had any right to keep.

The committee pointed out that the effect of item 3, therefore, is to take away a right of recovery that was in existence on Budget night. The explanatory memorandum did not appear to give any reason for taking away this right and the committee sought the Treasurer's advice on this matter.

Pending the Treasurer's advice, 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.

On this issue, the Assistant Treasurer has responded on behalf of the Treasurer as follows:

> The Government's view is that refunds of sales tax should only be obtained where the person applying for the refund has actually borne the tax. We consider that this condition, referred to as the "passing on" rule, is necessary to prevent windfall gains in the hands of taxpayers (wholesalers and manufacturers) at the expense of their customers (retailers). If a taxpayer has passed the tax on to another person, by including an amount to recoup the tax paid in the price of goods sold to that person, then the Government is of the view that a refund is not appropriate.
>
> The possible need for the proposed amendment has arisen because several actions have been commenced seeking refunds of sales tax under the common law. The litigants who have commenced these actions have done so because they are unable to satisfy the normal conditions for obtaining a refund under the sales tax law (see below), especially the "passing on" rule. A major reason for proposing these amendments was to prevent the possibility of windfall gains that could arise by litigants avoiding the "passing on" rules. In situations where a taxpayer would otherwise benefit at the expense of his or her customers, the Government considers it preferable that the gain should be retained by the Government to be applied for public purposes.
>
> It is the Government's view that the sales tax law contains comprehensive provisions for the payment of sales tax refunds, which are intended to be the only basis on which refunds can and should be paid.
>
> The refund provisions provide for a full "on the merits' review of amounts of sales tax paid, subject to certain conditions. One condition is that the "passing on" rule has been satisfied, that is, that the cost of the tax has been borne by the taxpayer or claimant, or if it was recovered from the taxpayer's customers, it has been refunded to them. Another condition is that applications for refunds must be made within

three years of the overpayment. This condition corresponds to a provision in the law which restricts the Commissioner's ability to collect sales tax properly payable more than three years after it was due. The only exceptions are where the Commissioner has, during that three year period, required payment of the tax in writing or is satisfied that payment of the tax has been avoided by fraud or evasion. These rules were put in the law to provide certainty to taxpayers that their past taxation obligations have been settled and certainty for the ATO in administration of potential refund cases.

It should be noted that the proposed amendment is being moved to make the sales tax refund position absolutely clear. There is no guarantee that the common law rights described in the amendment actually exist. The legal actions that have been commenced have not yet been decided, and the Commonwealth is not convinced that they will be successful. If the litigants were successful, this amendment would, of course, have no effect on their consequential entitlement to refunds. It would, however, prevent further actions being taken. Even though this would amount to taking away rights that were in existence on Budget night, I believe this is justified given our view that refunds of sales tax should only be available to people who have actually borne the tax, and subject to reasonable time constraints. Such action would also prevent difficulties arising in administration, as the integrity of the present "streamlined" system of sales tax refunds would be broken down and it would also prevent a potentially grave, but unquantifiable, threat to the revenue.

General comment
Schedule 9, Part 1

In Alert Digest No. 7 of 1995, the committee noted that it was not conversant with all the express provisions of the sales tax legislation. The committee, however, sought the Treasurer's advice whether an express provision covers the situation where through administrative error sales tax on a batch of goods was paid twice. A mistake of fact would give rise to a liability to refund under common law but, absent common law through this amendment, is there an avenue of redress?

Pending the Treasurer's advice, 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.

On this issue, the Assistant Treasurer has responded on behalf of the Treasurer as follows:

I am able to inform the Committee that the taxpayer would be able to recover the overpaid tax under credit ground 1 in Table 3 of Schedule 1 to the *Sales Tax Assessment Act 1992*, which provides for the refund of tax which was not legally payable. However, this credit ground is only available if the taxpayer has not passed the tax on to his or her customers, and lodges a claim for the refund within three years of the overpayment occurring.

I trust that this information will be of assistance.

The committee thanks the Assistant Treasurer for this response.

Veterans' Affairs Legislation Amendment and Repeal Bill 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Minister for Veterans' Affairs.

The bill proposes to amend the following Acts:

Veterans' Entitlements Act 1986 to:

- implement a rate calculation methodology for blind service pensioners with children;
- ensure the beneficial tax treatment intended by the 1987 poverty traps legislation is achieved without changing the total amount of pension payable;
- exempt credit entries in certain exchange trading systems from the income test provisions in the Act;
- exclude maintenance income provided in relation to expenses arising from a disability or learning difficulty that is likely to be permanent;
- provide further consequential amendments as a result of the removal of the waiting period for service pensions for refugees;
- provide the cessation date for Somalia as an operational area; and
- make minor, technical and consequential amendments;

Veterans' Affairs Legislation Amendment Act 1990, *Veterans' Entitlements (Re-write) Transition Act 1991*, *Veterans' Affairs Legislation Amendment Act (No. 2) 1992* and *Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act (No. 2) 1994* to correct misdescribed amendments;

Military Compensation Act 1994 to remove references to the *Veterans' Affairs Legislation Amendment Act (No. 3) 1993* which was disagreed to by the Senate and lapsed; and to repeal the *War Services Homes Agreement Act 1932* and *War Service Homes (South Australia) Agreement Act 1934*.

The committee dealt with this bill in Alert Digest No. 11 of 1995, in which it made various comments. The Minister for Veterans' Affairs responded to those comments in a letter dated 11 September 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(9)

In Alert Digest No. 11 of 1995, the committee noted that the amendments proposed to be made by items 1 and 2 of Schedule 1 would, if enacted, reduce the rate by half of their first instalment of service pension for blind pensioners who transfer from a social security pension to a service pension. The committee understood that such a transfer would under the present law entail a fortnightly instalment of pension being paid in successive weeks because service pension and social security pensions are paid in alternate weeks.

The committee had no objection to the change proposed but is concerned that, by virtue of subclause 2(9), the amendments are intended to have retrospective effect from 20 March 1995. The committee is unable to find any indication in the explanatory memorandum justifying the need for retrospectivity. Each of the legion(?) of blind pensioners who have transferred from social security to service pension in the period since 20 March 1995 was entitled under the law to the full rate of that instalment of pension. The committee sought the Minister's advice on the reasons warranting the raising of an overpayment against those pensioners by having their entitlement retrospectively taken away.

Pending the Minister's advice, 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:

> The proposed provisions will, in effect, halve the first instalment of service pension paid to a blind service pensioner who received a Social Security pension the previous week. The committee sought my advice on the reasons warranting the raising of an overpayment against those pensioners by having their entitlement retrospectively taken away.
>
> The proposed operative date of 20 March 1995 will bring the proposed legislation for blind service pensioners into line with similar provisions, applying to all other service pensioners, enacted from that date through the *Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act 1994.*
>
> A very small number of blind pensioners have transferred from a Social Security pension to a service pension since 20 March 1995. The debt that will arise from the reduced first instalment payable as a result of the proposed amendments will fall into a class of debt for general waiver under section 206(1)(b)(ii) of the *Veterans' Entitlements Act 1986* and published in the Commonwealth of Australia Gazette No. GN41 of 14 October 1992.

I want to assure the committee that no blind pensioner will have an overpayment of service pension raised as a result of the changes proposed in this Bill.

The committee thanks the Minister for this response.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTEENTH REPORT

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Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 1995

The committee presents its Fifteenth Report of 1995 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:

Ozone Protection Amendment Bill 1995

Ozone Protection (Licence Fees–Imports) Bill 1995

Ozone Protection (Licence Fees–Manufacture) Bill 1995

Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995

Ozone Protection Amendment Bill 1995
Ozone Protection (Licence Fees+Imports) Bill 1995
Ozone Protection (Licence Fees+Manufacture) Bill 1995

These bills were introduced into the House of Representatives on 21 June 1995 by the Parliamentary Secretary to the Minister for Environment, Sport and Territories as a package.

The bills propose, among other things, to:

- impose a two-yearly administration fee for each licence issued;
- provide that a licensee who holds a controlled substances licence must pay to the Commonwealth a quarterly licence fee for HCFCs or methyl bromide imported during that quarter; and
- provide that a licensee who holds a controlled substances licence must pay to the Commonwealth a quarterly licence fee for HCFCs or methyl bromide manufactured during that quarter.

The committee dealt with these bills in Alert Digest No. 10 of 1995, in which it made various comments. The Minister for the Environment, Sport and Territories responded to those comments in a letter dated 14 August 1995. In its Thirteenth Report of 1995, the committee sought the Minister's further consideration. The Minister has responded in a letter dated 25 September 1995. A copy of that letter is attached to this report and the relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Relevant provisions

The relevant provisions of the three bills are:

> Ozone Protection Amendment Bill 1995: Subclause 4(1) and item 19 of Schedule 1
>
> Ozone Protection (Licence Fees+Imports) Bill 1995: Subclause 4(1)
>
> Ozone Protection (Licence Fees+Manufacture) Bill 1995: Subclause 4(1)

In Alert Digest No. 10 of 1995, the committee drew attention to these provisions because they enabled the fees in respect of certain licences to be set by regulation

without any provision in the primary legislation either for a maximum amount for the fee or a method of calculating the maximum amount.

The committee noted that it had consistently drawn attention to provisions which allow Ministers unfettered power to make regulations to set the rate of a fee as such provisions may be considered to delegate legislative power inappropriately in that a fee may be set so high that it amounts to a tax. Creating a tax is a matter for primary legislation in the view of the committee.

The committee noted, however, in respect of the Ozone Protection Amendment Bill 1995, that the explanatory memorandum indicated on page 3 the intention to impose a two-yearly administration fee for each licence, which would be set by regulation at $10 000 until the year 2000, except for essential uses licences, for which the fee would be $2 000 and that these amounts were to be based on cost recovery.

In the light of this explanation the committee sought the Minister's advice on whether those fees could be included in the primary legislation as the committee was of the opinion that it should not be too difficult to make a small amendment in five years time to alter the fee if that should prove necessary.

In respect of the other two bills, the committee noted that the explanatory memorandum of each bill indicated on page 4 that the purpose of the activity fee was to fund the furthering of the phase out programs for HCFCs and methyl bromide and related public awareness programs. The committee also noted that the explanatory memorandum of each bill indicated on page 3 that industry representatives had been consulted on the level of fees.

In the light of these statements, the committee sought the Minister's advice on whether some maximum amount or a means of calculating it could not be provided in the primary legislation while allowing the regulations to adjust the actual amount each quarter. This would avoid an open-ended power to set fees.

Pending the Minister's advice, the committee drew Senators' attention to the relevant provisions in each bill, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

In a letter dated 14 August 1995, the Minister responded as follows:

> The content of these Bills reflects a long period of consultation with industry both on the types of controls proposed and on the level of fees. The level of fees proposed is designed to ensure full cost recovery of administration of the program to control Australia's consumption of ozone depleting substances and to finance

information programs. The level of fees is based on conservative estimates of the number of licensees and their level of activity in importing or manufacturing ozone depleting substances from 1996 to 2000. While they represent a best estimate of the total fees that may be recouped, substantially less may be collected if information programs to encourage industry to move to more environmentally benign substances take effect earlier than expected. The fees and the establishment of a Trust Fund also take into account the need to reserve funds from the early stages of the program, for the later stages when activity levels will have decreased but the cost of further action and the need for information programs remain high.

The consultative process in place between industry and government will resolve discrepancies between the conservative fee level compared with variable costs of the program. To illustrate with the HCFC licensing scheme, in the event that the level of application fees (initially set at $10,000 for controlled substances and used substances licenses, $2000 for essential substances licences and with activity fees at $2000 per ODP tonne for HCFC) is insufficient to meet the costs of the program, the level of fees can be increased within one year on informing licensees. Determining an accurate upper level fee at this early stage of the program would be most difficult.

The level of fees is not contained in the primary legislation because the primary legislation is difficult and time consuming to amend. It is quite conceivable that the process of regularly amending primary legislation in order to amend the level of fees would add considerably to the administrative costs which the fees are designed to recover. The figures initially set for licence and activity fees are based on estimated cost recovery. As more precise figures for costs incurred in administration of the amended Act will not be known until it has been operational, the EPA has already agreed to review the fees for the used substances licences after one year.

Industry is not confident that the Parliamentary legislative timetable could guarantee that minor amendments to principal legislation to amend fee levels could be achieved within one year and there is particular concern that reserves in the Trust Fund may be depleted in the meantime. They believe, and I agree, that the power of disallowance of regulations is sufficient safeguard to ensure that the responsible Minister does not raise fees without sufficient justification or industry consultation. The current ozone protection legislation has been operating successfully since 1989 without any cause for Parliamentary or industry concern on the powers to set fees under the legislation operating on the same basis without a specified upper fee level.

The committee thanked the Minister for this response but was not convinced that an unfettered power to set fees that could amount to a tax was an appropriate delegation of the legislative power of Parliament.

In contrast to the doubts and uncertainties expressed in the response, the committee noted the regime set out in the explanatory memorandum.

In the explanatory memorandum, the scenario on page 3 is that the application fees will be set at $10 000 and $2 000 respectively for the period 1996-2000. Also on page 3, the committee notes that the Ozone Protection Trust Fund is to be established to allow revenue from the licensing schemes to be directed into ozone protection programs. The setting up of the Fund is put forward as the means to ensure that revenue collected from licensees at the time of peak activity (1996-2000) can be expended at the times of low activity (2000-2030), when the need for information programs will be most critical.

The response to the committee's comments, however, exhibits uncertainty about whether the scheme put forward in the explanatory memorandum is sufficient.

The committee noted also that the issue of setting fees by regulation without a maximum limit or a means of calculating it in the primary legislation was canvassed with the then Minister for the Arts, Sport, the Environment, Tourism and Territories when the current Licence Fees Acts were introduced in 1988. The Minister, at that time, argued that a similar uncertainty about future costs indicated a need not to have an upper limit expressed in primary legislation.

The committee noted, however, that the uncertainty was unfounded. The regulations were first made in 1989 but in the ensuing 6 years the fees set by those regulations have been altered only once (in 1990).

The committee sought the Minister's further consideration, pointing out that the committee is not asking that an 'accurate upper level fee' be determined 'at this early stage of the program', nor is the committee asking that minor amendments to fee levels be made in primary legislation. What is being suggested is that a maximum amount, or a means of calculating it, be set with sufficient leeway to enable the program to increase, by regulation, the actual fee levels below that limit with the flexibility and responsiveness that the cost structures demand.

Given the intention to collect more in the early years than is needed to run the program, the committee took the view that there ought to be more than sufficient time to amend the relevant Act if it appears that the maximum amount, or the formula for calculating it, is likely to be insufficient.

The committee also noted that in the response to the committee's comments in 1988, the then Minister said:

> Because the intent of the principal legislation is to reduce the quantities of

substances manufactured or imported over time, the amount of the fees charged per kilogram of product must increase to recover the same cost.

The committee pointed out that Commonwealth legislation abounds in formulae that enables fees and other amounts to be increased on a sliding scale commensurate with such a variable.

The committee, therefore, conscious that the provisions grant an unfettered power to impose fees, continued to draw the provisions to the attention of Senators as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister's further response of 25 September 1995 is as follows:

> After careful consideration of the Committee's response to my letter of 14 August 1995 and legal advice from the Attorney-General's Department, I have decided to introduce the Bills into the Senate as passed by the House of Representatives on 30 August 1995.
>
> I note the Committee's comments on the imposition of administration fees and activity fees, and its concern that the fees could be set at such a level as to amount to a tax.
>
> The *Ozone Protection (Licence Fees–Imports) Bill 1995 and the Ozone Protection (Licence Fees–Manufacture) Bill 1995* are regarded as 'taxing bills' even though they refer to the term 'fees'. There are precedents in other legislation (eg fisheries legislation) and, I consider, sufficient justification in this particular case not to set a maximum amount.
>
> As the Principal Act is not taxing legislation, I appreciate that the validity of regulations made under the principal Act would be jeopardised if fees were set that amounted to a tax. These fees must and will relate directly to the administration costs of the licence and quota systems and will therefore not be a tax. The published annual reports for the legislation will require reports on the previous year's expenditures, the fees collected and whether the fees charged met the full cost-recovery objective. As explained in the Explanatory Notes and the Second Reading Speech on introduction, it is the Government's intention not to change the fees for HCFC and methyl bromide licences before a review in the year 2000.
>
> The proposed legislation ensures that an amount equal to all fees paid must be transferred from the Consolidated Revenue Fund into the specific Trust Fund (or a Reserve if the Financial Management and Accountability Act is passed). The purposes of the Trust Fund are clearly set out under proposed section 65D of the principal legislation. These purposes are to reimburse the Commonwealth for costs associated with furthering the HCFC and methyl bromide phase-out programs, providing information about those programs, and administering the licensing and quota systems under the Principal Act.
>
> For the reasons outlined, and due to the need to have the legislation passed in time to issue licences to commence at least two months prior to the commencement of the

> scheme on 1 January 1996, I do not propose to recommend amendments to the legislation at this late stage.

The committee thanks the Minister for this response. The reasons advanced, however, serve to confirm the committee's concern that the issue should be drawn to Senators' attention for ultimate resolution.

The Minister acknowledges that the regulations would be invalid if under the Principal Act fees were set that amounted to a tax. To preclude invalidity is the purpose of the committee's concern that a maximum rate or a means of calculating is included in the primary legislation.

With respect to the other "taxing bills", that other legislation does not contain maximum amounts is not persuasive for the committee. The principle remains: should Parliament set taxes or should the executive?

The committee continues to draw Senators' attention to the provisions as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to amend a number of Acts within the portfolio.

The committee dealt with this bill in Alert Digest No. 6 of 1995 and had no comment.

The committee, however, notes that certain amendments have been circulated by the Minister for Aboriginal Affairs. He has advised the committee that:

> certain provisions which appeared in the *Aboriginal Councils and Associations Legislation Amendment Bill 1994* have been inserted into the *Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995* and will shortly be introduced as amendments. The only such provision which has attracted the attention of your Committee is clause 44 of the *Aboriginal Councils and Associations Legislation Amendment Bill 1994*, which would have inserted a new section 79AA into the *Aboriginal Councils and Associations Act 1976*. This clause has been redrafted as Item 1L of the *Prime Minister and Cabinet(Miscellaneous Provisions) Bill 1995* and would insert a new section 79B into the *Aboriginal Councils and Associations Act 1976*.

As the Minister mentions, the committee dealt with the Aboriginal Councils and Associations Legislation Amendment Bill 1994 in Alert Digest No. 12 of 1994 in which it made various comments. The Minister responded to those comments in a letter dated 20 October 1994. The Minister has made a further response on 22 September 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Abrogation of the privilege against self-incrimination
Proposed new section 79B (Clause 44 of previous bill, now item 1L)

In Alert Digest No. 12 of 1994, the committee noted that this proposed provision, if enacted, would abrogate the privilege against self-incrimination for a person required:

- to answer questions or produce documents under section 39, 60 or 68.

The committee noted that this provision would preclude the act of self-incrimination

from being admissible in evidence 'in any criminal proceedings or proceeding for the imposition of a penalty'. The committee was concerned, however, that the form of the preclusion was less protective than the form which the committee has previously been prepared to accept, as it does not contain a limit on the indirect use to which any information can be put. The committee noted in particular that sections 39, 60 and 68 of the *Aboriginal Councils and Associations Act 1976,* in their present form, all contain a prohibition on the **indirect** as well as the direct use of self-incriminating acts. Subclauses 10(f), 32(f) and 38(b) of the Aboriginal Councils and Associations Legislation Amendment Bill 1994 would have repealed the relevant subsections that provide for the prohibition on **indirect** use. (These subsections are again proposed to be repealed by items 1C, 1E and 1G of the circulated amendments.) In Alert Digest No. 12 of 1994, the committee sought the Minister's advice on this matter.

Pending the Minister's advice, 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.

On 20th October 1994, the Minister responded as follows:

> I have informed the Prime Minister of the decision made on 22 September 1994 by the Commissioners of the Aboriginal and Torres Strait Islander Commission that debate on the Bill should be postponed indefinitely to enable a complete review of the Aboriginal Corporations Law to take place. Consequently debate on the Bill will not take place during the present sittings.
>
> Thank you for bringing to my attention the matters raised in the Alert Digest. The comments raised in the letter from the Secretary of your Committee will be taken into account during the course of this review.

In its Sixteenth Report of 1994, the committee thanked the Minister for this response, noting his assurance that the committee's concerns would be taken into account in the review.

In a letter dated 22 September 1995, the Minister informed the committee of the results of the review and of the circulated amendments:

> As you are aware, I am concerned about achieving a proper balance between, on the one hand, the increased levels of accountability on the part of Aboriginal organisations, and the need to protect personal rights and liberties on the other.
>
> I note your concern that the proposed new section 79AA (now 79B) would remove the derivative use immunity presently contained in sections 39, 60 and 68 of the *Aboriginal Councils and Associations Act 1976.* As those sections presently stand, anything obtained as a direct or indirect consequence of the answer or the production of a document is not admissible against the person examined or investigated in any proceeding other than proceedings for an offence against subsections 60(4) or 69(2).

> Your concern is that the proposed new sections do not contain a limit on the indirect use to which any information can be put.
>
> This proposed amendment is a result of legal advice from the Attorney-General's Department which confirms that any information received in the course of examination or investigation under section 60 or 68 of the Act may be referred to law enforcement agencies only for the purpose of investigation of criminal acts by persons other than the person examined or investigated. A copy of this advice is at Attachment A. In other words, the current provisions make it more difficult for law enforcement agencies to successfully prosecute a person since they are unable to rely on statements made or documents provided under the obligation to respond to questions or produce documents.
>
> This problem was acknowledged and rectified during the course of the 1992 amendments of the *Australian Securities Commission Act 1989*, when the derivative use immunity was removed from that Act. The new section 79B as proposed in Item 1J of the Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995 would reflect and be consistent with the present section 68 of the *Australian Securities Commission Act 1989.* Both these sections require privilege to be claimed before answering a question or producing a document.
>
> As you are aware, the Registrar of Aboriginal Corporations performs functions in relation to Aboriginal Corporations which are similar to those carried out by the Australian Securities Commission in relation to Corporations under the Corporations Law. In particular, the Registrar has powers of investigation and information gathering as well as examination of persons and inspection of bodies which are parallel to those exercised by the Australian Securities Commission. It therefore seems appropriate that the model provided by the Australian Securities Commission legislation be utilised in this amendment.
>
> I trust that these comments have satisfactorily answered your query.

The committee thanks the Minister for this response but retains its concerns which it expressed with respect to these amendments in the earlier bill. The committee is not persuaded by the reference to the *Australian Securities Commission Act 1989.* The committee raised concerns when that Act was amended by the *Corporations Legislation (Evidence) Amendment Act 1992* to achieve exactly the same effect as the current proposed amendments to the *Aboriginal Councils and Association Act 1976*, that is, to remove the derivative use immunity.

In Alert Digest No. 2 of 1992 and in its Fourth Report of 1992, the committee dealt with the amendment to the *Australian Securities Commission Act 1989*. The committee acknowledged the arguments as to the difficulty of securing convictions put forward by the proponents of the amendments 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.

The committee, of course, acknowledges that it is within Parliament's power to legislate to take away the common law right against self-incrimination and in compensation for that loss to substitute such immunity as is appropriate. The issue with this bill is whether the appropriate immunity should include both the use and **indirect** use of the material.

The Minister rightly is concerned about achieving a proper balance between increased levels of accountability and the need to protect personal rights and liberties. Whether the proper balance extends to include immunity from the derivative or **indirect** use of material which a person is obliged to provide is a matter on which opinions can vary and have varied.

In 1992, some months after the enactment of the amendments to the *Australian Securities Commission Act 1989* which took away the immunity with respect to the derivative or **indirect** use for that Act, and on which the Minister now relies, the Minister introduced amendments to the *Aboriginal Councils and Associations Act 1976* to include the derivative or **indirect** use which was not in the Act as passed 1976 - some years before the Scrutiny of Bills committee was formed.

The committee notes that Mr Tickner, the Minister for Aboriginal and Torres Strait Islander Affairs, wrote to the committee on 14 December 1992 on this very point:

> 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.

The committee continues to draw Senator's 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.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF

1995

18 OCTOBER 1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT OF 1995

The committee presents its Sixteenth Report of 1995 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:

Primary Industries Levies Bill 1995

Primary Industries Charges Bill 1995

Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995

Primary Industries Charges Bill 1995
Primary Industries Levies Bill 1995

These bills were introduced into the House of Representatives on 29 June 1995 by the Minister for Consumer Affairs.

The bills propose to allow regulations to be made for the purpose of imposing charges and levies on products of primary industry. The charges collected will allow industry to undertake marketing and research and development.

The committee dealt with these bills in Alert Digest No. 11 of 1995, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 29 September 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Clauses 9, 12 and 13

In Alert Digest No. 11 of 1995, the committee noted that Clause 9 of each bill provides:

> The rate of a charge (levy) is ascertained in accordance with the regulations.

General principles

The committee has consistently drawn attention to provisions which allow Ministers an unfettered power to make regulations to set the rate of a levy or a charge as such provisions may be considered to delegate legislative power inappropriately. The basis for this view is that, with such a power, a rate of charge or levy could be set so high that it amounts to a tax. The committee is firmly of the view that taxation is a matter for primary legislation. Where it is impracticable to set the rate of the levy or charge in primary legislation the committee has developed a policy of requesting that the primary legislation should prescribe either a maximum rate of charge or a method of calculating such a maximum rate.

The bills' alternative mechanism

In this respect, however, the committee noted that the bills do not provide for such a mechanism in the primary legislation but clauses 12 and 13 provide for a similar mechanism to be established by regulation.

One concern allayed

The committee noted especially that clause 13 provides that the regulations specifying, or specifying a method of ascertaining, the maximum total rate of a charge or levy will not come into force until the time for passing a resolution of disallowance in either House of the Parliament has expired. Thus, one of the concerns of the committee in respect of these clauses is allayed: the committee has had occasion to point out that where regulations come into effect when they are made, the effect of disallowance does not cancel any charges that may have become payable in the interim period.

Primary concern not allayed

The committee noted that clause 7 of each bill made it clear that the charges and levies set by these bills are valid only to the extent that the charge or levy is a duty of customs or excise within the meaning of section 55 of the Constitution. So the question of deciding whether the charge or levy is so high as to amount to a tax does not arise. Section 55 of the Constitution clearly implies that a law imposing a customs or excise duty is a law imposing taxation.

It seemed to the committee, therefore, that there remained the question whether the arrangements put in place by these bills obviate the committee's concern that taxation should be in primary legislation. Authorising taxation has been regarded as a matter for Parliament not the executive - tax laws being passed by an affirmative vote of both Houses.

Which course to follow

It seemed to the committee that there are three options:

1. to maintain the status quo by which Parliament enacts primary legislation to set or alter the rate of a tax;
2. to accept the mechanism proposed by these bills to enable the executive to set the rate of the tax by regulation subject to disallowance but with the tax only coming into force after the disallowance period; and
3. to alter the mechanism proposed by these bills to substitute a requirement for an affirmative resolution of both Houses of Parliament to adopt the regulation within a similar time frame.

The committee was of the view that option 1 has the advantage of retaining within Parliament the right to set taxes - a right which the history of our Parliamentary tradition shows was won with hardship and difficulty and has been jealously guarded.

The committee noted that option 2, while having the merit of doing away with multiple Acts and amending Acts setting, or amending the rates of, such taxes, passes the initiative to the executive in these matters of taxation. It downgrades, however, the importance of the measure and the degree of attention that the imposition may attract. Further, because the charge (levy) is a duty of customs (excise), the rate of the charge or levy cannot be subject to limitation in the way in which a charge or levy to raise money to cover costs for a specific purpose can be subject to scrutiny as to the fairness of the amount. A corollary of this might be that the amount of the tax, considered as an expression of government policy, might not attract comment from the Senate Standing Committee on Regulations and Ordinances.

The committee further noted that option 3 is marginally more attractive than option 2 in that it would require deliberation by Parliament to resolve to adopt the taxing measure. The issue, however, of adopting some but not others of the charges would need to be examined.

In these circumstances, the committee sought the views of the Minister on the pros and cons of these three options.

Pending the Minister's advice, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Less time for scrutiny
Clause 14

The committee noted that the effect of section 14 of each bill is to oust inconsistent provisions in the *Acts Interpretation Act 1901* and the as yet not enacted Legislative Instruments Bill 1994.

The committee noted also that the mechanism set up by clause 13 for disallowance substantially lessens the period within which the Senate would normally be able to consider the regulation.

The mechanism established by the *Acts Interpretation Act 1901* allows a period of 15 sitting days from the date of tabling for a motion for disallowance to be moved and a further period of 15 sitting days for the motion to be dealt with.

The committee noted also that the outcome under clause 13 is vastly different from the outcomes in the *Acts Interpretation Act* 1901. Failure to deal with the motion of disallowance brings the regulation into permanent effect whereas under the *Acts*

Interpretation Act 1901 failure to deal with the motion would result in automatic disallowance.

The committee therefore sought the Minister's advice why more of the mechanism in the *Acts Interpretation Act 1901* could not apply to this disallowance scheme.

Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered insufficiently to 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:

> I understand the Committee's concern for the principle that authorising taxation is a matter for the Parliament, not the Executive. At the same time there is a balance to be struck between the principle that levels of taxation should be set by primary legislation and the need to ensure that industry's needs are met as expeditiously as possible and to make effective use of Parliamentary time. When issuing the drafting instructions for this legislation, much consideration was given to the question of how to ensure that the Parliament would retain sufficient control to satisfy the Committee's concerns.
>
> I would like to draw the Committee's attention to the fact that the primary industries levies and charges are very special and unusual taxes in that they are not designed to raise Commonwealth revenue but rather to raise funds on behalf of, and at the request of, various primary industries and are to be used solely for the benefit of those industries. Special appropriations ensure that the funds raised through the levies and charges are directed to the purposes for which they were raised.
>
> Many of these primary industries are small and emerging industries with limited capability to undertake marketing and research activities without the assistance of Government in imposing and collecting levies for this purpose. The speed with which levy imposition and collection can be implemented can make a big difference to the financial flexibility of their marketing and research bodies. The important factor for all primary industries in relation to levies and charges is timeliness and the delays involved in amending primary legislation when there is a need to increase maximum levy rates or to levy additional products.
>
> You asked for my view on three options for addressing the problem. My response is set out below:
>
> ***Option 1***
>
> The status quo, whereby Parliament would enact primary legislation to set the maximum rates of levies, was the original starting point for the drafting of these Bills. However, this would not have improved timeliness for industry if the arrangements had involved the continued need to amend primary legislation.
>
> Because these Bills will cover all rural levies, there was a difficulty in finding a single suitable mechanism for setting the maximum rate for levies. The most obvious mechanism, a formula covering all leviable products, turned out not to be possible because the range of products and levy setting mechanisms was too great for a comprehensive mechanism to be established. To provide a list of all maximum rates in

the primary legislation would have involved limiting the products covered to those currently levied and would again have required the primary legislation to be amended every time industry decided it needed to impose a levy on a new product.

Option 2

Option 2 describes the procedure we have proposed in these Bills after considering a range of alternatives. We finally concluded that the most suitable method for setting maximum rates would be to have a set of special regulations that would not come into effect until after the Parliament had been given an opportunity to disallow them. In this way the Parliament would have the final say over the maximum rate set.

As a further safeguard (to ensure all industry members would be aware of the maximum rates being proposed), the draft Bills also provide for these rates to be published in major newspapers. The initial maximum levy rates will be set at the same level as the current maximum rates, unless industry bodies specifically seek a new maximum rate.

Peak primary industry bodies have been consulted on the contents of the draft Bills, and the use of special regulations to set maximum rates was specifically explained to them. These peak bodies have all approved the proposed arrangements in principle, subject to viewing the draft regulations, and are keen to see the proposals implemented because they will speed up the levy-making process. We propose to consult further with industry bodies, on the draft regulations for both the maximum rates and the operative rates of levies and on the declaration of designated bodies, before the Bills are debated in the Senate. the rates to be included in the regulations will be those approved by industry and recommended by the designated bodies.

Option 3

The arrangements currently proposed (Option 2) provide a definite time period within which disallowance can occur and this provides a degree of certainty in the framework. Industry can be sure that the matter will be resolved one way or the other within 15 sitting days. If a positive motion of both Houses were required the timing would depend upon the ability of both Houses to find a place on the program for debate. This could sometimes be difficult, given the likelihood of higher priority issues arising to take up scarce Parliamentary debating time. The uncertainty of this timing would make it very difficult for industry to program its activities.

On the question of Clause 14 and the Committee's objection to the non-inclusion of an additional 15 sitting days for consideration of a disallowance motion, again the length of time taken and the delay this causes for industry is the difficulty we were trying to overcome. The minimum delay involved in a 15 sitting day period is usually about 6 weeks. To add an additional 15 sitting days can extend this period to between 12 and 24 weeks, depending on the stage of the Parliamentary sittings. This is a considerable period for industry marketing and research activity to be delayed.

As indicated above, I appreciate the Committee's concerns, but because these taxes are a special case and the purpose of the amalgamation of these levies and charges was a dual one - to speed up processes for industry and to save Parliamentary time - I considered that the balance on this occasion should be weighed in favour of practicality, with due consideration still being given to the prerogative of the Parliament to be the final decision-maker on maximum rates before any other action could be taken.

> I trust the Committee recognises that this legislation was designed in good faith, with the Committee's concerns regarding taxation principles fully in mind when the proposed arrangements were chosen as the most appropriate means of balancing competing objectives.

The committee thanks the Minister for this response and for his assistance with this bill. The committee assures the Minister that it recognises the good intentions with which the legislation was proposed and the efforts made to accommodate the committee's concerns with respect to setting fees and other charges by regulation.

The committee, however, bases its approach to this issue on the view that fees and other charges are not taxes but are measures to recoup costs associated with such matters as administering a national industry body or a specific program of research and development. In such cases, the committee has opposed setting fees by regulation on the basis that a fee might be imposed at so high a rate as to amount to a tax. As the committee pointed out in Alert Digest No. 11 of 1995, the normal approach of the committee is immaterial in the case of these bills because they set out to impose taxation. There remains only the question of principle: retaining within Parliament the right to set taxes.

The committee, therefore, remains unpersuaded by the reasons adduced: a need for flexibility and saving Parliamentary time.

In the committee's view, Parliament should spend whatever time is necessary to consider and, if it thinks fit, pass legislation that imposes taxation. As imposing taxation is an important legislative function of Parliament the question of whether it is appropriate to delegate that function is a matter for ultimate resolution by the Senate itself. Whether the need for flexibility outweighs the principle of retaining the power to impose taxes in Parliament itself is a matter for debate in the chamber.

For this reason, the committee continues to draw the attention of Senators to these provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Further, reflecting on Section 53 of the Constitution, the committee wonders whether the proposed mechanism by which the bills authorise the regulations to impose taxation may involve a constitutional problem. If section 53 gives exclusive power to the House of Representatives to propose laws imposing taxation, preventing such laws from originating in the Senate, does this not, by implication, prevent proposed laws imposing taxation from originating from the Governor-General. It would seriously derogate from the elaborate process set up by sections 53 to 56 of the Constitution, if that process could be avoided by passing a bill to enable taxes to be imposed or moneys to be appropriated by regulations. The committee considers that advice from the Attorney-General's Department on this issue would be useful.

Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to amend a number of Acts within the portfolio.

The committee dealt with this bill in Alert Digest No. 6 of 1995 and had no comment.

In its 15th Report of 1995, the committee, however, noted that certain amendments had been circulated by the Minister for Aboriginal Affairs. He advised the committee that:

> certain provisions which appeared in the *Aboriginal Councils and Associations Legislation Amendment Bill 1994* have been inserted into the *Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995* and will shortly be introduced as amendments. The only such provision which has attracted the attention of your Committee is clause 44 of the *Aboriginal Councils and Associations Legislation Amendment Bill 1994*, which would have inserted a new section 79AA into the *Aboriginal Councils and Associations Act 1976.* This clause has been redrafted as Item 1L of the *Prime Minister and Cabinet(Miscellaneous Provisions) Bill 1995* and would insert a new section 79B into the *Aboriginal Councils and Associations Act 1976.*

As the Minister mentioned, the committee had dealt with the Aboriginal Councils and Associations Legislation Amendment Bill 1994 in Alert Digest No. 12 of 1994 in which it made various comments. The Minister responded to those comments in a letter dated 20 October 1994. The Minister made a further response on 22 September 1995. A copy of that letter was attached to the 15th Report and relevant parts of the response were discussed.

In response to the committee's 15th Report, the Minister for Aboriginal Affairs asked the Registrar of Aboriginal Corporations, Mr Bouhafs, to brief the committee further on the issue of the removal of the derivative or indirect use immunity.

This issue has recently been considered by the Legal and Constitutional References Committee which concluded in para 8.16 of its Report *The Investigatory Powers of the Australian Securities Commission*:

> The Committee is concerned at the extensive abridgment of the usual protection which are available to a person being questioned by an investigative authority. The transcripts of compulsory hearings examined by the Committee indicate that the privilege against self-incrimination is claimed almost as a matter of form by

> many examinees. The Committee feels that the evidence of Mr Scott of Coudert Brothers about the law and practice in the United States was compelling and persuasive. The Committee believes that some redress of the balance of rights is needed to protect examinees at compulsory hearings. However, the Committee believes that the law in relation to the privilege against self-incrimination should not be changed in relation to notices to produce documents nor in relation to corporations.

Despite, therefore, the arguments put forward by the Registrar, there remains the issue of principle: the need to achieve an appropriate balance between accountability and the need to protect personal rights and liberties. In the committee's view whether the provisions achieve that balance is a matter for ultimate resolution in the Senate.

For that reason, the committee continues to draw the attention of Senators 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.

EXTRACT FROM FIFTEENTH REPORT

For the convenience of Senators, an extract from the Fifteenth Report in which this matter was fully canvassed, is reproduced as follows:

Abrogation of the privilege against self-incrimination
Proposed new section 79B (Clause 44 of previous bill, now item 1L)

In Alert Digest No. 12 of 1994, the committee noted that this proposed provision, if enacted, would abrogate the privilege against self-incrimination for a person required:

- to answer questions or produce documents under section 39, 60 or 68.

The committee noted that this provision would preclude the act of self-incrimination from being admissible in evidence 'in any criminal proceedings or proceeding for the imposition of a penalty'. The committee was concerned, however, that the form of the preclusion was less protective than the form which the committee has previously been prepared to accept, as it does not contain a limit on the indirect use to which any information can be put. The committee noted in particular that sections 39, 60 and 68 of the *Aboriginal Councils and Associations Act 1976*, in their present form, all contain a prohibition on the **indirect** as well as the direct use of self-incriminating acts. Subclauses 10(f), 32(f) and 38(b) of the Aboriginal Councils and Associations Legislation Amendment Bill 1994 would have repealed the relevant subsections that provide for the prohibition on **indirect** use. (These subsections are again proposed to be repealed by items 1C, 1E and 1G of the circulated amendments.) In Alert Digest No. 12 of 1994, the committee sought the Minister's advice on this matter.

Pending the Minister's advice, 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.

On 20th October 1994, the Minister responded as follows:

> I have informed the Prime Minister of the decision made on 22 September 1994 by the Commissioners of the Aboriginal and Torres Strait Islander Commission that debate on the Bill should be postponed indefinitely to enable a complete review of the Aboriginal Corporations Law to take place. Consequently debate on the Bill will not take place during the present sittings.
>
> Thank you for bringing to my attention the matters raised in the Alert Digest. The comments raised in the letter from the Secretary of your Committee will be taken into account during the course of this review.

In its Sixteenth Report of 1994, the committee thanked the Minister for this response, noting his assurance that the committee's concerns would be taken into account in the review.

In a letter dated 22 September 1995, the Minister informed the committee of the results of the review and of the circulated amendments:

> As you are aware, I am concerned about achieving a proper balance between, on the one hand, the increased levels of accountability on the part of Aboriginal organisations, and the need to protect personal rights and liberties on the other.
>
> I note your concern that the proposed new section 79AA (now 79B) would remove the derivative use immunity presently contained in sections 39, 60 and 68 of the *Aboriginal Councils and Associations Act 1976*. As those sections presently stand, anything obtained as a direct or indirect consequence of the answer or the production of a document is not admissible against the person examined or investigated in any proceeding other than proceedings for an offence against subsections 60(4) or 69(2).
>
> Your concern is that the proposed new sections do not contain a limit on the indirect use to which any information can be put.
>
> This proposed amendment is a result of legal advice from the Attorney-General's Department which confirms that any information received in the course of examination or investigation under section 60 or 68 of the Act may be referred to law enforcement agencies only for the purpose of investigation of criminal acts by persons other than the person examined or investigated. A copy of this advice is at Attachment A. In other words, the current provisions make it more difficult for law enforcement agencies to successfully prosecute a person since they are unable to rely on statements made or documents provided under the obligation to respond to questions or produce documents.
>
> This problem was acknowledged and rectified during the course of the 1992 amendments of the *Australian Securities Commission Act 1989*, when the derivative use immunity was removed from that Act. The new section 79B as proposed in Item 1J of the Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995 would reflect and be consistent with the present section 68 of the *Australian Securities Commission Act 1989*. Both these sections require privilege to be claimed before answering a question or producing a document.
>
> As you are aware, the Registrar of Aboriginal Corporations performs functions in relation to Aboriginal Corporations which are similar to those carried out by the Australian Securities Commission in relation to Corporations under the Corporations Law. In particular, the Registrar has powers of investigation and

> information gathering as well as examination of persons and inspection of bodies which are parallel to those exercised by the Australian Securities Commission. It therefore seems appropriate that the model provided by the Australian Securities Commission legislation be utilised in this amendment.
>
> I trust that these comments have satisfactorily answered your query.

The committee thanks the Minister for this response but retains its concerns which it expressed with respect to these amendments in the earlier bill. The committee is not persuaded by the reference to the *Australian Securities Commission Act 1989*. The committee raised concerns when that Act was amended by the *Corporations Legislation (Evidence) Amendment Act 1992* to achieve exactly the same effect as the current proposed amendments to the *Aboriginal Councils and Association Act 1976*, that is, to remove the derivative use immunity.

In Alert Digest No. 2 of 1992 and in its Fourth Report of 1992, the committee dealt with the amendment to the *Australian Securities Commission Act 1989*. The committee acknowledged the arguments as to the difficulty of securing convictions put forward by the proponents of the amendments 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.

The committee, of course, acknowledges that it is within Parliament's power to legislate to take away the common law right against self-incrimination and in compensation for that loss to substitute such immunity as is appropriate. The issue with this bill is whether the appropriate immunity should include both the use and **indirect** use of the material.

The Minister rightly is concerned about achieving a proper balance between increased levels of accountability and the need to protect personal rights and liberties. Whether the proper balance extends to include immunity from the derivative or **indirect** use of material which a person is obliged to provide is a matter on which opinions can vary and have varied.

In 1992, some months after the enactment of the amendments to the *Australian Securities Commission Act 1989* which took away the immunity with respect to the derivative or **indirect** use for that Act, and on which the Minister now relies, the Minister introduced amendments to the *Aboriginal Councils and Associations Act 1976* to include the derivative or **indirect** use which was not in the Act as passed 1976 - some years before the Scrutiny of Bills committee was formed.

The committee notes that Mr Tickner, the Minister for Aboriginal and Torres Strait Islander Affairs, wrote to the committee on 14 December 1992 on this very point:

> 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.

The committee continues to draw 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.

Michael Forshaw
(Deputy Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF

1995

15 NOVEMBER 1995

SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT OF 1995

The committee presents its Seventeenth Report of 1995 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:

Human Services and Health Legislation Amendment Bill (No. 3) 1995

Taxation Laws Amendment Bill (No. 2) 1995

Human Services and Health Legislation Amendment Bill (No. 3) 1995

This bill was introduced into the House of Representatives on 20 September 1995 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to amend the following Acts:

- *Childcare Rebate Act 1993* to:
  - provide hardship provisions to assist certain groups of persons currently excluded from the rebate scheme;
  - allow the suspension of family and carer registrations if cancellation of registrations is being considered;
  - allow the Health Insurance Commission (HIC) to backdate carer registrations;
  - vary a family's registration;
  - cancel certain family and carer registrations;
  - ensure the rebate is not paid for child care costs already reimbursed by another agent;
  - clarify that the rebate is payable for child care costs incurred for certain specified absences from care;
  - clarify the backdating of family registrations;
  - clarify the eligibility of overseas students to claim the rebate; and
  - make administrative and technical amendments;
- *Health Insurance Act 1973* to:
  - correct drafting errors; and
  - allow for the appointment as Presidents of the Professional Services Review Tribunals persons who hold or have held judicial office in State and Territory jurisdictions;
- *Health Insurance Commission Act 1973* to:

- confer upon the HIC the function of providing consultancy and management services and of providing information technology services to the Commonwealth;
- empower the HIC to operate outside Australia and to enter into hedging arrangements; and
- retain evidential material seized pursuant to the execution of a search warrant for a certain period of time

- *National Health Act 1953* to:
  - remove redundant provisions;
  - include a "merits review" right for decisions on the amount of Commonwealth benefit that may be advanced to nursing home proprietors; and
  - to amend provisions relating to "exempt bed status",

- *National Health and Medical Research Council Act 1992* to provide that appointing certain senior officers the Minister is to consult with each State and Territory Health Minister;

and to repeal the *Handicapped Persons Assistance Act 1974*.

The committee dealt with this bill in Alert Digest No. 14 of 1995, in which it made various comments. The Minister for Family Services has responded to those comments in a letter dated 23 October 1995. A copy of that letter with its attached summary of items is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 14 of 1995, the committee noted that subclause 2(2), if enacted, would allow a considerable number of provisions of this bill to have retrospective effect from 1 July 1994. The committee noted from the general outline in the explanatory memorandum that several amendments would provide eligibility for the rebate scheme to certain groups, including children over the age of 13 who have a disability, who are currently excluded from the scheme. The explanatory memorandum, however, did not indicate why the provisions were to have effect from 1 July 1994 nor did it indicate whether any of the amendments would adversely affect any person other than the Commonwealth. Accordingly, the committee sought the Minister's advice on these issues.

Pending the Minister's advice, 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.

On these issues, the Minister has responded as follows:

> The Committee raised concerns about subclause 2(2), which provides that certain items in Schedule 1 will be taken to have commenced on 1 July 1994. 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."
>
> Although the Committee noted that several amendments will assist certain groups to gain eligibility for the Commonwealth Childcare Cash Rebate, it sought advice on two issues not explicitly addressed in the explanatory memorandum:
>
> . why the provisions are to have effect from 1 July 1994; and
>
> . whether any of the amendments would adversely affect any person other than the Commonwealth.
>
> Most of the items to which the retrospectivity provision applies will enhance the eligibility of families to claim the Childcare Cash Rebate. These amendments will be retrospective back to the introduction of the Rebate on 1 July 1994, since it was not intended to exclude these families' entitlement to the Rebate. The remaining items which will be taken to have commenced from 1 July 1994 will have a neutral effect on persons other than the Commonwealth, as they simply address administrative or technical aspects of the Act.
>
> I have attached a summary of the items which will have effect from 1 July 1994, showing the context for each item, for your information.
>
> I can therefore confirm that the retrospectivity in subclause 2(2) of the Bill does not adversely affect any person other than the Commonwealth, since each of the provisions which would have effect from 1 July 1994 will allow more families to benefit from the Childcare Cash Rebate, or will not impact on their entitlements.

The committee thanks the Minister for this response.

Taxation Laws Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 30 March 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes, among other things, to amend the *Income Tax Assessment Act 1936* to clarify the taxation arrangements for superannuation pensions and roll-over annuities so that the deductible amount of a life time superannuation pension or annuity is calculated based on life expectancy at the beginning of the period in respect of which the pension or annuity is payable.

The committee dealt with this bill in Alert Digest No. 6 of 1995, in which it made no comment. A letter dated 20 October 1995 has now been received from Mr Chang of Macquarie Investment Management Limited in relation to Item 31 of this bill. A copy of that letter is attached to this report and the relevant parts of the letter are discussed below.

The committee's terms of reference

From the issues raised in Mr Chang's letter, the committee is of the opinion that it should consider the bill again in the light of a different aspect of its terms of reference. Standing Order 24 1 (a) commences:

> 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.

The committee notes that its function is not only to report where a clause of a bill trespasses unduly on personal rights and liberties by express words of the clause but also where the trespass is caused 'otherwise'. Having initially not had cause to comment on the bill because of any of its express words, the committee is of the opinion that a trespass may have arisen other wise than by express words.

The committee's principles on retrospectivity

Retrospectivity is one of the principal reasons for the committee to report on clauses of bills which may trespass unduly on personal rights and liberties. Accordingly, the committee, since its establishment has drawn attention to provisions in legislation

that have a retrospective operation. Retrospective legislation has many facets and the committee's policy on the subject varies accordingly.

It is the right of the person subject to a law to know what the law is so that the person may act accordingly. This is obviously impossible if the law is changed after the event. One of the attributes of law is certainty of obligation.

The right to certainty about the law is affected where a change in the law has been announced but the law has not yet been changed in accordance with that announcement. The subjects of the law are left in a quandary as to how to arrange their conduct and their affairs.

Rights are also affected if the person announcing the law cannot be certain that the law, when it is passed, will be exactly as announced.

It is still more objectionable if the law is to be given a retrospective effect from the time of the announcement or some other time prior to it being passed.

The committee, in its *Report on the Operation of the Senate Standing Committee for the Scrutiny of Bills during the 36th Parliament*, quoted Sir William Blackstone in his *Commentaries* of 1765 with respect to the need to know what the law is and the mischief of retrospectivity:

> ... a base resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it.
>
> ...
>
> It may be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.

Blackstone went on to say:

> There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee than an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment

> for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed"*. But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.[1]

In the same Report the committee went on to say:

> This fundamental opposition to retrospective legislation is also reflected in the work of the Committee which, since its establishment, has drawn attention to provisions in legislation with a retrospective operation.
>
> Even so, the Committee will make 'no further comment' about a provision with retrospective action if:
>
> - the provision is beneficial to persons other than the Commonwealth;
> - the provision merely effects a 'technical' amendment or corrects a 'drafting error'
> - the provision gives effect to 'a Budget measure'; or
> - (in certain circumstances) the provision relates to a customs tariff proposal.
>
> It is helpful to the Committee (and, of course, the Parliament) if the Explanatory Memorandum to a bill makes explicit reference to the fact that one of the above factors is the justification for the retrospectivity.

Retrospective application
Schedule 3, Part 4, items 31 and 32

The committee notes the remarks of Mr Douglas Chang of Macquarie Investment Management Limited with respect to the impact that the retrospective application of

[1] Blackstone, W, *Commentaries on the laws of England* (Book 1) (1765, Clarendon Press, Oxford), pp. 45-6. These passages from Blackstone were referred to in *Polyukhovich v The Commonwealth (*1991) 85 ALJR 593 by Mason CJ (at p. 527), Deane (at p. 560), Dawson (at p. 574) and McHugh JJ (at p. 607).

the amendment of the definition of the life expectation factor will have on certain taxpayers in receipt of allocated pensions.

When the committee first considered these provisions of Taxation Laws Amendment Bill (No. 2) 1995, it did not seem to the committee that the express words of Schedule 3, Part 4, items 31 and 32 trespassed unduly on personal rights and liberties by reason of the proposed retrospective application. Subsequent events, however, have led the committee to examine whether such a trespass may have arisen otherwise than by the express words.

Trespass on personal rights and liberties may arise 'otherwise' because of a lack of certainty about the law or because of the quandary imposed on those subject to the law where there is a delay in passing laws, previously announced, especially when those laws are to have retrospective effect.

The committee did not comment on items 31 and 32 when the bill was introduced. The amendments were to apply from the date of that introduction and it appeared to the committee that taxpayers would be sufficiently aware of the proposed changes so as not to have their financial arrangements exposed to retrospective changes.

The submission from Mr Chang, however, draws attention to the quandary of a particular class of taxpayers who are required to submit a tax return by 31 October 1995 where the law as it currently stands would require a different self-assessment from that which will be required once the law is changed retrospectively. The committee notes on page 2 of Mr Chang's submission, the second and third dot points which state:

- in preparing their tax returns these taxpayers have calculated their deductible amount based on current law and could rightfully assume that using a life expectancy calculated at the date of first payment was permissible, particularly as Taxation Office confirmation had been obtained by the pension provider. It is worth noting that this amendment unlike the proposed changes in Part 7 of the Bill, was not brought to the Attention of taxpayers in the 1994/95 Tax Pack.

- However once this Bill has been passed and received Royal Assent, these taxpayers will now be required to have the deductible amount re-calculated for their allocated pension. This will necessitate an amendment to their 1994/95 tax returns which have already been lodged in most cases, an additional payment of tax and possibly a penalty. We believe this retrospective result to be manifestly unfair and unnecessary notwithstanding the very small number of taxpayers that would be affected.

The committee also notes that the bill was introduced into the House of Representatives on 30 March 1995, passed with amendments on 22 June 1995 and introduced into the Senate on 29 June 1995. It may be that when the bill was introduced it was not envisaged that the bill would not be passed until after 31 October 1995. On the other hand, the Resolution of the Senate of 29 November 1994 made it clear, in the absence of a further resolution of the Senate, that a bill such

as this, received from the House of Representatives during the Budget sittings, would not be considered by the Senate until the Spring sittings.

The committee notes Mr Chang's observation that the difficulties caused by the application of these amendments from 30 March 1995 would be obviated entirely if the amendments were to apply from 1 July 1995.

In these circumstances, the committee **seeks the Treasurer's advice** whether the solution suggested by Mr Chang is appropriate.

Pending the Treasurer's advice, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF

1995

22 NOVEMBER 1995

SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT OF 1995

The committee presents its Eighteenth Report of 1995 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:

Commonwealth Bank Sale Bill 1995

Primary Industries Charges Bill 1995

Primary Industries Levies Bill 1995

Taxation Laws Amendment Bill (No. 4) 1995

Commonwealth Bank Sale Bill 1995

This bill was introduced into the House of Representatives on 19 October 1995 by the Assistant Treasurer.

The bill enables the sale of the Commonwealth Government's remaining 50.39 per cent shareholding in the Commonwealth Bank and for the conversion of the Commonwealth Development Bank and the Commonwealth Bank Officers Superannuation Corporation into companies under the Corporations Law.

The committee dealt with this bill in Alert Digest No. 16 of 1995, in which it made various comments. The Treasurer has responded to those comments in a letter dated 15 November, 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Commencement
Subclause 2(3), item 12 of the Schedule

In Alert Digest No. 16 of 1995, the committee noted that by virtue of subclause 2(3), item 12 of the Schedule would commence on a date to be fixed by Proclamation, with no further provision in the bill limiting the discretion to proclaim commencement.

The committee had placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Drafting Instruction 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 the explanatory memorandum states that the proclamation would be made after the Commonwealth's shareholding falls to below ten per cent. While the timing of such a state of affairs is uncertain at present, there is nothing in the bill to compel the proclamation of the commencement once the shareholding falls below that threshold. This contrasts with the automatic commencement of those provisions of the bill which will come into effect at the 'transfer time' by virtue of subclauses 2(2), (4), (5) and (6), discussed above. The committee sought the Treasurer's advice on whether a similar compulsion might be appropriate with respect to this item.

Pending the Treasurer's advice, 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.

Retrospectivity
Subclause 19 (3)

In Alert Digest No. 16 of 1995, the committee noted that this subclause, if enacted, would provide that subsection 48(2) of the *Acts Interpretation Act 1901* not apply to regulations that take effect at or after the transfer time.

The committee noted that the explanatory memorandum, in paragraph 36, stated as the reason for this provision that regulations relating to savings and transitional matters related to the sale may not be able to commence before the date of notification in the *Gazette*, thereby potentially frustrating the sale.

Subsection 48(2) of the *Acts Interpretation Act 1901* provides:

> A regulation, or a provision of regulations, has no effect if, apart from this subsection, it would take effect before the date of notification and as a result:
>
> (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of notification would be affected so as to disadvantage that person; or
>
> (b) liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification.

The committee noted that this subsection of the *Acts Interpretation Act 1901* would not prevent subordinate legislation with respect to the sale from commencing retrospectively unless the rights of persons would be retrospectively affected so as to disadvantage them or liabilities would retrospectively be imposed on them. Subclause 19(3), therefore, would apply only if peoples' rights were retrospectively disadvantaged or if obligations were retrospectively imposed on them. The committee sought the Treasurer's advice on this issue.

Pending the Treasurer's advice, 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 Treasurer has responded as follows:

> The Government considers that these two sub-clauses have no adverse effects and is firmly of the view that the retention of the sub-clauses, in their current form, is necessary to facilitate the smooth implementation of the CBA sale process.
>
> **Commencement - Sub-clause 2(3), Item 12 of the Schedule**
>
> The *Commonwealth Bank Sale Bill 1995* seeks to amend the *Banks (Shareholdings) Act 1972, (BSA),* so that the CBA is treated in the same way as its competitors for the purposes of that Act (ie, after the amendment the BSA will generally limit an individual shareholding, or group of associated shareholdings, to 10 per cent of the CBA's total shares, rather than to 5 per cent as at present). Against the possibility that the sale of the Commonwealth's shares in the CBA will be effected in two tranches, it has been necessary to include a provision in the *Commonwealth Bank Sale Bill* (ie Item 11 of the Schedule) which will ensure that the Commonwealth is not in breach of the *BSA* while ever it holds more than 10 per cent of the CBA's shares. Item 12 of the Schedule will repeal this provision, by proclamation, as soon as the Commonwealth's CBA shareholding falls below 10 per cent.
>
> The Government considers that it is necessary for Item 12 of the Schedule to commence by proclamation as it is simply not possible to accurately identify when the Commonwealth's CBA shareholding will fall below 10 per cent. The proposed legislative approach, therefore, overcomes the need to speculate as to when the Commonwealth's CBA shareholding will actually fall below 10 per cent.
>
> In addition, commencement by proclamation imposes an obligation on the Commonwealth to publicly notify the commencement of this provision. The Government will not hesitate in providing the appropriate notification as soon as the Commonwealth's CBA shareholding falls to below 10 per cent.
>
> **Retrospectivity - Sub-clause 19(3)**
>
> Sub-clause 19(3) of the *Commonwealth Bank Sale Bill 1995* is a standard provision which has been used in legislation relating to previous asset sales and which provides the necessary flexibility to respond to any savings or transitional

issues affecting the sale process. This includes the flexibility to make amendments to relevant subordinate legislation. Such flexibility is potentially very important in facilitating the smooth implementation of the sale process which is in the interests of all existing and prospective CBA shareholders. For example, were it later to emerge that the sale had unintentionally deprived CBA employees of benefits under particular Commonwealth legislation, a retrospective regulation would be necessary to avoid any detriment.

It will not be possible to utilise the powers under clause 19 unless the Governor-General is satisfied that any prospective regulations are related to the sale process. In addition, the Government's intentions on the sale of its remaining CBA shareholding have been public knowledge since 9 May 1995 and, therefore, there is little likelihood of a person's rights being unduly affected by any retrospective regulations relating to the sale process.

It is also important to note that any regulations made under clause 19 of the *Commonwealth Bank Sale Bill* will continue to be disallowable instruments in accordance with the relevant provisions of the *Acts Interpretation Act 1901*. Therefore, the Parliament has the power to disallow any prospective regulation that it considers would 'unduly trespass on personal rights and liberties'.

I thank you for the opportunity to comment on these matters and I trust that your Committee will agree that the sub-clauses in question are not matters of concern and should be permitted to proceed as drafted.

The committee thanks the Treasurer for this response.

Primary Industries Charges Bill 1995
Primary Industries Levies Bill 1995

These bills were introduced into the House of Representatives on 29 June 1995 by the Minister for Consumer Affairs.

The bills propose to allow regulations to be made for the purpose of imposing charges and levies on products of primary industry. The charges collected will allow industry to undertake marketing and research and development.

The committee dealt with these bills in Alert Digest No. 11 of 1995, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 29 September 1995. A copy of that letter was attached to the committee's Sixteenth Report. In that Report, the committee considered that advice from the Attorney-General's Department on the issue of constitutional validity would be useful. The Minister for Primary Industries and Energy sought advice from the Attorney-General's Department. In a letter dated 14 November 1995, the Minister for Primary Industries and Energy has enclosed copies of two separate advices from the Attorney-General's Department regarding this issue and relevant parts of these advices are discussed below.

Inappropriate delegation of legislative power
Clauses 9, 12 and 13

In Alert Digest No. 11 of 1995, the committee noted that Clause 9 of each bill provides:

> The rate of a charge (levy) is ascertained in accordance with the regulations.

General principles

The committee has consistently drawn attention to provisions which allow Ministers an unfettered power to make regulations to set the rate of a levy or a charge as such provisions may be considered to delegate legislative power inappropriately. The basis for this view is that, with such a power, a rate of charge or levy could be set so high that it amounts to a tax. The committee is firmly of the view that taxation is a matter for primary legislation. Where it is impracticable to set the rate of the levy or charge in primary legislation the committee has developed a policy of requesting that the primary legislation should prescribe either a maximum rate of charge or a method of calculating such a maximum rate.

The bills' alternative mechanism

In this respect, however, the committee noted that the bills do not provide for such a mechanism in the primary legislation but clauses 12 and 13 provide for a similar mechanism to be established by regulation.

One concern allayed

The committee noted especially that clause 13 provides that the regulations specifying, or specifying a method of ascertaining, the maximum total rate of a charge or levy will not come into force until the time for passing a resolution of disallowance in either House of the Parliament has expired. Thus, one of the concerns of the committee in respect of these clauses is allayed: the committee has had occasion to point out that where regulations come into effect when they are made, the effect of disallowance does not cancel any charges that may have become payable in the interim period.

Primary concern not allayed

The committee noted that clause 7 of each bill made it clear that the charges and levies set by these bills are valid only to the extent that the charge or levy is a duty of customs or excise within the meaning of section 55 of the Constitution. So the question of deciding whether the charge or levy is so high as to amount to a tax does not arise. Section 55 of the Constitution clearly implies that a law imposing a customs or excise duty is a law imposing taxation.

It seemed to the committee, therefore, that there remained the question whether the arrangements put in place by these bills obviate the committee's concern that taxation should be in primary legislation. Authorising taxation has been regarded as a matter for Parliament not the executive - tax laws being passed by an affirmative vote of both Houses.

Which course to follow

It seemed to the committee that there are three options:

1. to maintain the status quo by which Parliament enacts primary legislation to set or alter the rate of a tax;
2. to accept the mechanism proposed by these bills to enable the executive to set the rate of the tax by regulation subject to disallowance but with the tax only coming into force after the disallowance period; and
3. to alter the mechanism proposed by these bills to substitute a requirement for an affirmative resolution of both Houses of Parliament to adopt the regulation within a similar time frame.

The committee was of the view that option 1 has the advantage of retaining within Parliament the right to set taxes - a right which the history of our Parliamentary

tradition shows was won with hardship and difficulty and has been jealously guarded.

The committee noted that option 2, while having the merit of doing away with multiple Acts and amending Acts setting, or amending the rates of, such taxes, passes the initiative to the executive in these matters of taxation. It downgrades, however, the importance of the measure and the degree of attention that the imposition may attract. Further, because the charge (levy) is a duty of customs (excise), the rate of the charge or levy cannot be subject to limitation in the way in which a charge or levy to raise money to cover costs for a specific purpose can be subject to scrutiny as to the fairness of the amount. A corollary of this might be that the amount of the tax, considered as an expression of government policy, might not attract comment from the Senate Standing Committee on Regulations and Ordinances.

The committee further noted that option 3 is marginally more attractive than option 2 in that it would require deliberation by Parliament to resolve to adopt the taxing measure. The issue, however, of adopting some but not others of the charges would need to be examined.

In these circumstances, the committee sought the views of the Minister on the pros and cons of these three options.

Pending the Minister's advice, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Less time for scrutiny
Clause 14

The committee noted that the effect of section 14 of each bill is to oust inconsistent provisions in the *Acts Interpretation Act 1901* and the as yet not enacted Legislative Instruments Bill 1994.

The committee noted also that the mechanism set up by clause 13 for disallowance substantially lessens the period within which the Senate would normally be able to consider the regulation.

The mechanism established by the *Acts Interpretation Act 1901* allows a period of 15 sitting days from the date of tabling for a motion for disallowance to be moved and a further period of 15 sitting days for the motion to be dealt with.

The committee noted also that the outcome under clause 13 is vastly different from the outcomes in the *Acts Interpretation Act* 1901. Failure to deal with the motion of disallowance brings the regulation into permanent effect whereas under the *Acts Interpretation Act 1901* failure to deal with the motion would result in automatic disallowance.

The committee therefore sought the Minister's advice why more of the mechanism in the *Acts Interpretation Act 1901* could not apply to this disallowance scheme.

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

On 29 September 1995, the Minister responded as follows:

> I understand the Committee's concern for the principle that authorising taxation is a matter for the Parliament, not the Executive. At the same time there is a balance to be struck between the principle that levels of taxation should be set by primary legislation and the need to ensure that industry's needs are met as expeditiously as possible and to make effective use of Parliamentary time. When issuing the drafting instructions for this legislation, much consideration was given to the question of how to ensure that the Parliament would retain sufficient control to satisfy the Committee's concerns.
>
> I would like to draw the Committee's attention to the fact that the primary industries levies and charges are very special and unusual taxes in that they are not designed to raise Commonwealth revenue but rather to raise funds on behalf of, and at the request of, various primary industries and are to be used solely for the benefit of those industries. Special appropriations ensure that the funds raised through the levies and charges are directed to the purposes for which they were raised.
>
> Many of these primary industries are small and emerging industries with limited capability to undertake marketing and research activities without the assistance of Government in imposing and collecting levies for this purpose. The speed with which levy imposition and collection can be implemented can make a big difference to the financial flexibility of their marketing and research bodies. The important factor for all primary industries in relation to levies and charges is timeliness and the delays involved in amending primary legislation when there is a need to increase maximum levy rates or to levy additional products.
>
> You asked for my view on three options for addressing the problem. My response is set out below:
>
> ***Option 1***
>
> The status quo, whereby Parliament would enact primary legislation to set the maximum rates of levies, was the original starting point for the drafting of these Bills.

However, this would not have improved timeliness for industry if the arrangements had involved the continued need to amend primary legislation.

Because these Bills will cover all rural levies, there was a difficulty in finding a single suitable mechanism for setting the maximum rate for levies. The most obvious mechanism, a formula covering all leviable products, turned out not to be possible because the range of products and levy setting mechanisms was too great for a comprehensive mechanism to be established. To provide a list of all maximum rates in the primary legislation would have involved limiting the products covered to those currently levied and would again have required the primary legislation to be amended every time industry decided it needed to impose a levy on a new product.

Option 2

Option 2 describes the procedure we have proposed in these Bills after considering a range of alternatives. We finally concluded that the most suitable method for setting maximum rates would be to have a set of special regulations that would not come into effect until after the Parliament had been given an opportunity to disallow them. In this way the Parliament would have the final say over the maximum rate set.

As a further safeguard (to ensure all industry members would be aware of the maximum rates being proposed), the draft Bills also provide for these rates to be published in major newspapers. The initial maximum levy rates will be set at the same level as the current maximum rates, unless industry bodies specifically seek a new maximum rate.

Peak primary industry bodies have been consulted on the contents of the draft Bills, and the use of special regulations to set maximum rates was specifically explained to them. These peak bodies have all approved the proposed arrangements in principle, subject to viewing the draft regulations, and are keen to see the proposals implemented because they will speed up the levy-making process. We propose to consult further with industry bodies, on the draft regulations for both the maximum rates and the operative rates of levies and on the declaration of designated bodies, before the Bills are debated in the Senate. the rates to be included in the regulations will be those approved by industry and recommended by the designated bodies.

Option 3

The arrangements currently proposed (Option 2) provide a definite time period within which disallowance can occur and this provides a degree of certainty in the framework. Industry can be sure that the matter will be resolved one way or the other within 15 sitting days. If a positive motion of both Houses were required the timing would depend upon the ability of both Houses to find a place on the program for debate. This could sometimes be difficult, given the likelihood of higher priority issues arising to take up scarce Parliamentary debating time. The uncertainty of this timing would make it very difficult for industry to program its activities.

On the question of Clause 14 and the Committee's objection to the non-inclusion of an additional 15 sitting days for consideration of a disallowance motion, again the length of time taken and the delay this causes for industry is the difficulty we were trying to overcome. The minimum delay involved in a 15 sitting day period is usually about 6 weeks. To add an additional 15 sitting days can extend this period to between 12 and 24 weeks, depending on the stage of the Parliamentary sittings. This is a considerable period for industry marketing and research activity to be delayed.

> As indicated above, I appreciate the Committee's concerns, but because these taxes are a special case and the purpose of the amalgamation of these levies and charges was a dual one - to speed up processes for industry and to save Parliamentary time - I considered that the balance on this occasion should be weighed in favour of practicality, with due consideration still being given to the prerogative of the Parliament to be the final decision-maker on maximum rates before any other action could be taken.
>
> I trust the Committee recognises that this legislation was designed in good faith, with the Committee's concerns regarding taxation principles fully in mind when the proposed arrangements were chosen as the most appropriate means of balancing competing objectives.

In its Sixteenth Report, the committee thanked the Minister for this response and for his assistance with this bill. The committee assured the Minister that it recognised the good intentions with which the legislation was proposed and the efforts made to accommodate the committee's concerns with respect to setting fees and other charges by regulation.

The committee, however, indicated that it based its approach to this issue on the view that fees and other charges are not taxes but are measures to recoup costs associated with such matters as administering a national industry body or a specific program of research and development. In such cases, the committee has opposed setting fees by regulation on the basis that a fee might be imposed at so high a rate as to amount to a tax. As the committee pointed out in Alert Digest No. 11 of 1995, the normal approach of the committee is immaterial in the case of these bills because they set out to impose taxation. In the committee's view, there remained only the question of principle: retaining within Parliament the right to set taxes.

The committee, therefore, remained unpersuaded by the reasons adduced: a need for flexibility and saving Parliamentary time.

In the committee's view, Parliament should spend whatever time is necessary to consider and, if it thinks fit, pass legislation that imposes taxation. The committee pointed out that as imposing taxation is an important legislative function of Parliament the question of whether it is appropriate to delegate that function is a matter for ultimate resolution by the Senate itself. Whether the need for flexibility outweighs the principle of retaining the power to impose taxes in Parliament itself is a matter for debate in the chamber.

For this reason, the committee continued to draw the attention of Senators to these provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Further, reflecting on Section 53 of the Constitution, the committee wondered whether the proposed mechanism by which the bills authorise the regulations to

impose taxation may involve a constitutional problem. If section 53 gives exclusive power to the House of Representatives to propose laws imposing taxation, preventing such laws from originating in the Senate, does this not, by implication, prevent proposed laws imposing taxation from originating from the Governor-General. It would seriously derogate from the elaborate process set up by sections 53 to 56 of the Constitution, if that process could be avoided by passing a bill to enable taxes to be imposed or moneys to be appropriated by regulations. The committee considered that advice from the Attorney-General's Department on this issue would be useful.

On the issue of constitutional validity, the Minister has responded as follows:

> I refer to the sixteenth report of the Senate Standing Committee for the Scrutiny of Bills of 18 October 1995. At page 344-5 of the report the Committee poses the question as to whether there is a constitutional problem with the mechanism proposed for setting maximum rates of levy and suggests that the Attorney-General's Department's advice be sought on this issue.
>
> Attached for your information is the advice of the Attorney-General's Department on this question indicating that the mechanism is considered constitutionally valid.

Extract of advice from Attorney-General's Department to Office of Parliamentary Counsel dated 15 May 1995:

> 4. You ask whether the draft Bills may validly be enacted. In my view, they may.
>
> 5. Two issues require consideration in relation to the draft Bills; namely, whether the Parliament has power to authorise the imposition of taxation by regulation, and whether it is possible for two taxing Acts to impose the variety of levies currently imposed by the existing taxing Acts. I deal with these issues below.
>
> **Imposition of taxation by regulation**
>
> 6. The power of the Parliament to delegate law-making power is well established, and there is no need to cite authority for its existence. In my view, there is no basis for distinguishing, for constitutional purposes, between the power to impose taxation and other powers. A law authorising the imposition of taxation is clearly a law 'with respect to... Taxation' and is therefore supported by s.51(ii) of the Constitution. It is no different in substance to a law providing that a tax 'is imposed' in the circumstances and at the rates specified in the regulations, which would clearly be valid. I note that Parliament has enacted legislation on the basis of this view (see the Life Insurance Policy Holders' Protection Levies Act 1991, the Superannuation (Financial Assistance Funding) Levy Act 1993 and the Superannuation (Rolled-Over Benefits) Levy Act 1993).
>
> 7. I mention that clear statutory authority is required for the imposition of a tax (*Attorney-General v Wilts United Dairies Ltd* (1922) 38 TLR 781; *Commonwealth v Colonial Combing, Spinning and Weaving Co. Ltd* (1922) 31

CLR 421). A regulation-making power intended to authorise the imposition of a tax should therefore do so in the clearest terms. In my view, cl.6(1) of the Levy Bill and cl.6(1) of the Charges Bill are sufficiently explicit for this purpose.

8. I mention also that, in my view, a court would regard a law authorising the imposition of taxation by regulations as a law 'imposing' taxation for the purposes of s.55 of the Constitution (since the purposes of that provision would be easily frustrated if its requirements could be avoided by framing taxing laws so as to delegate the power of imposition). It is therefore necessary to consider whether the draft Bills satisfy the requirements of s.55.

Section 55

9. The provisions of the Levy Bill and the Charges Bill deal only with the power to impose taxation and to define the circumstances in which, and the rates at which, it is payable. In my view, therefore, the Bills comply with the first paragraph of s.55 of the Constitution.

10. The second paragraph of s.55 provides as follows:

> 'Laws imposing taxation, except laws imposing duties of customs or excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.'

11. The duties imposed by the Levies Act are expressly limited to duties of excise, and those imposed by the Charges Act are likewise limited to duties of customs. They therefore comply with the second part of the paragraph. Duties of customs and of excise are clearly excepted from the general requirement in the first part of the paragraph that laws imposing taxation deal with 'one subject of taxation only'. In my view, therefore, there is no basis for an argument that the Levies Bill and the Charges bill contravene the second paragraph of s.55.

12. I note that one consequence of the way in which the draft Bills are structured is that they would not authorise the imposition of a levy or charge that was not a duty of customs or excise. The package of draft Bills therefore proceeds on the footing that all of the levies imposed by the existing taxing Acts are either duties of customs or duties of excise within the meaning of s.55, and that all of those levies will therefore be able to be re-imposed by regulations under the new legislation. The categorisation of existing levies for these purposes has been the subject of earlier advice from this Office and I have not revisited the issue. In any event, these considerations are not relevant to the validity of the draft Bills.

Extract of advice from Attorney-General's Department to Department of Primary Industries and Energy dated 30 October 1995.

4. In accordance with the last sentence of the passage quoted above, you seek advice as to whether a law providing for tax to be imposed by the Executive, by means of regulations, might contravene s.53 of the Constitution. In my view, it would not.

5. The fact that s.53 refers only to restrictions on the powers of the Senate, and that is headed 'Powers of the Houses in respect of legislation', indicate that s.53 is concerned with the powers of the Houses of Parliament *inter se* and not with the relationship between Parliament and the Executive. This is also borne out by the history of s.53, and ss.54-55 which prevent the limits on the Senate's power being abused (see the passages in the Convention Debates referred to in Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901), p.663). The 'proposed laws' with which s.53 deals are proposed laws which are, by their nature, capable of 'originating' in a House of the Parliament; that is, Bills for Acts of the Parliament (Quick and Garran, p.664).

6. In the present case, therefore, s.53 applies to the Bills themselves: they are 'proposed laws' which, if enacted, will 'impose taxation', in the sense that they will supply legislative authority for the levying of taxes. The Bills therefore cannot originate in, or be amended by, the Senate. Section 53 does not apply to anything which is done under the authority of the Bills once they are enacted, even though the bills will 'impose' taxation only through the medium of regulations.

7. I add, with respect, that I do not agree that this result 'derogates' from the 'process' set up by ss 53-56 of the Constitution. Section 53, as I have outlined above, is concerned only with the powers of the Houses *inter se* and not with the authority which the Executive requires in order to levy taxes (as to which see *Commonwealth v Colonial Combing, Spinning and Weaving Co. Ltd* (1922) 31 CLR 421). Section 54 (which, in any case, deals with appropriation Bills) and s.55 merely prevent the restrictions which s.53 imposes on Senate power being abused by the 'tacking' of extraneous provisions on to proposed laws which the Senate is unable to amend. Section 56 gives the Executive control over proposals to appropriate moneys by requiring a message from the Governor-General as a prerequisite for the passage of such a proposal.

The committee thanks the Minister for this response, which clarifies the constitutional issue. There remains, however, the Parliamentary issue enshrined in the committee's terms of reference: whether, in these circumstances, it is appropriate to delegate the legislative function of Parliament. In this regard, the committee notes that the three Acts referred to in paragraph 6 of the advice of the Attorney-General's Department of 15 May 1995, are Acts enabling levies to be set by regulation with a maximum amount, or the means of calculating that maximum amount, prescribed in the Act itself. These three Acts were seen as unexceptionable because the mechanism provided was seen as precluding the imposition of a tax.

As the committee pointed out in its Sixteenth Report, it has based its approach to this issue on the view that fees and other charges are not taxes but are measures to recoup specific costs. It is apparent that this is a narrower view of a 'tax' than that used by the Attorney-General's Department in the advices.

Nevertheless, the issue remains whether the delegation of the legislative function of Parliament, proposed by these bills, is appropriate.

The committee retains the view it expressed in its Sixteenth Report:

> As imposing taxation is an important legislative function of Parliament the question of whether it is appropriate to delegate that function is a matter for ultimate resolution by the Senate itself. Whether the need for flexibility outweighs the principle of retaining the power to impose taxes in Parliament itself is a matter for debate in the chamber.

For this reason, the committee continues to draw the attention of Senators to these provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Taxation Laws Amendment Bill (No. 4) 1995

This bill was introduced into the House of Representatives on 28 September 1995 by the Minister for Human Services and Health.

The bill proposes to amend the:

Income Tax Assessment Act 1936 to:

- amend capital gains tax provisions to:
  - allow for the transfer of depreciable assets between commonly owned companies;
  - allow for grouping of assets for the purpose of determining whether adjustments to the cost bases of shares and loans in a transferor company are required; make technical amendments;
  - increase the thresholds applying to personal-use assets;
  - ensure that the listed personal-use assets threshold applies appropriately to sets of articles;
  - ensure the threshold is apportioned appropriately where an asset is jointly owned;
  - ensure the tax applies to disposals of taxable Australian assets used to produce franked dividends or income subject to withholding tax;
  - extend relief for disposals of shares in foreign companies which give rise to dividends, to shares created prior to 26 June 1992;
  - limit the relief available for disposals of shares giving rise to dividends to amounts which are not paid out of capital, or share premium or revaluation reserves and limit the operation to eligible termination payments;
  - require that, where a company disposes of an asset to a related company and the disposal gives rise to a capital loss, there will be a compulsory rollover of the asset;
  - provide that the tax will not apply where a complying approved deposit fund coverts to a complying superannuation fund in certain circumstances; and
- require companies to establish a class C franking account and to convert existing class A and class B franking account balances into that account, as a result of the increase in the company tax rate from 33 to 36 per cent;
- deny franking credits under the imputation system for tax paid by companies as a result of a transfer pricing;

- deal with the taxation treatment of certain transactions likely to take place in the course of a demutualisation of a life or general insurance company;
- allow capital expenditure incurred in establishing plants for horticulture to be written off for taxation purposes;
- ensure tax is only levied on the net proceeds of the sale of standing timber, where taxpayers who conduct timber operations purchased the timber as an existing forest or plantation;
- ensure companies receive the same taxation treatment for expenditure incurred to private tax exempt entities as presently applies for expenditure incurred to public tax exempt entities under section 73CB;
- transfer responsibility for the maintenance of the Register of Approved Occupational Clothing;

Taxation Laws Amendment Act 1993 to set out the rules that have to be satisfied by trusts before a deduction is allowed for prior year and current year losses; deny deductions; and

Sales Tax (Exemptions and Classifications) Act 1992 to provide for an exemption for beverages consisting principally of rice milk.

The committee dealt with this bill in Alert Digest No. 15 of 1995, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 15 November, 1995. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospective application
Item 34 of Schedule 1

In Alert Digest No. 15 of 1995, the committee noted that the amendment referred to in this item would have retrospective effect from 20 September 1985.

The committee noted that the explanatory memorandum, at paragraph 2.23, stated:

> Generally, the amendments will apply to disposals of taxable Australian assets taking place after 19 September 1985, which is the date on which the introduction of the CGT provisions was announced. However, the amendments will not apply in relation to transactions which had been commenced to be carried out prior to 7.30pm AEST on 9 May 1995, where the transaction was covered by a private binding ruling issued by the Commissioner of Taxation under Part IVAA of the *Taxation Administration Act 1953*. ***[Subitems 34(1) and (2)].***

The committee sought the Treasurer's advice whether the amendments ought not to apply to a taxpayer who, prior to Budget night, had relied on the present wording of the legislation although not obtaining a ruling from the Commissioner.

Pending the Treasurer's advice, 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 Assistant Treasurer has responded to this issue as follows:

> **Capital Gains Tax (CGT) and Taxable Australian Assets**
>
> Item 34 of Taxation Laws Amendment Bill (No. 4) 1995 is the application provision for Item 22 of Schedule 1 of the Bill, which provides that disposals of taxable Australian assets used to produce franked dividends or income subject to withholding tax are subject to capital gains tax (CGT) on disposal. By Item 34, the amendment applies to disposals of taxable Australian assets occurring on or after 20 September 1985. An exception to this general application date is provided in relation to transactions commenced prior to 9 May 1995 in relation to which the Commissioner of Taxation had issued a private binding ruling.
>
> The Committee seeks advice on whether the amendments ought not to apply to a taxpayer who, prior to Budget night, had relied on the present wording of the legislation although not obtaining a ruling from the Commissioner.
>
> The amendments ought to apply to these taxpayers. As noted in the explanatory memorandum which accompanied Taxation Laws Amendment Bill (No. 4) 1995, any interpretation of the law which would have the effect of exempting disposals of taxable Australian assets from CGT would be contrary to the clear intention of Parliament as reflected in paragraphs (b), (c) and (d) of subsection 160T(1) of the Income Tax Assessment Act 1936.
>
> The private binding ruling system is intended to afford certainty to taxpayers in conducting their taxation affairs. Where a taxpayer has received a private binding ruling (PBR) in relation to a particular transaction, the Commissioner is bound to apply the law as stated in the ruling even in circumstances where the operation of the law conflicts with the terms of the ruling.
>
> As in any other case where a taxpayer purports to rely on an incorrect interpretation of the law without the support of a private binding ruling, those taxpayers who assumed that CGT would not be payable in relation to disposals of taxable Australian assets affected by the amendment prior to Budget night did so at their own risk.
>
> As noted above, I do not consider that it is open to taxpayers to argue that there was no indication that such disposals would be subject to CGT. The consequence of such an interpretation would be that shares in Australian companies held by non-residents could never be subject to CGT on disposal and that therefore section 160T would be meaningless in this regard. This would be contrary to the general rule of statutory interpretation that all words in a statute have meaning and effect.
>
> Further, it would be inequitable to concede that a non-resident taxpayer who did not obtain a PBR from the Commissioner of Taxation could escape paying tax on

> the disposal of taxable Australian assets. This is because resident taxpayers would have been subject to CGT on disposal of the same assets.

The committee thanks the Assistant Treasurer for this response. The committee, however, regards the private binding ruling as irrelevant to the main issue which is whether the true interpretation in law of the relevant provisions is being overturned retrospectively by this amendment.

The committee sought the Treasurer's advice on the basis that the present wording of the legislation supported the interpretation which the amendment is designed to preclude.

The committee notes that, in para 2.27, the explanatory memorandum states: 'It has been argued that the CGT exemption' applies in certain circumstances. It is not clear whether a court or other taxation review body has accepted that argument and, as a result, the retrospective amendment is proposed to preclude a court or other body from following that interpretation.

If, on the other hand, the amendment is proposed merely to clarify the interpretation which courts and other review bodies have always held and so is proposed 'ad cautelam' (out of caution), the committee has no concern with the amendment.

The committee, therefore, seeks clarification on this point from the Treasurer.

Pending that clarification, the committee continues to draw 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.

Retrospectivity: transfer pricing
Subitem 160(1) of Schedule 2

In Alert Digest No. 15 of 1995, the committee noted that it had received a submission on this matter from Mr Michael Wachtel, a tax partner at Arthur Andersen. A copy of the submission is attached to this Report. Mr Wachtel was concerned that the retrospective operation of this provision would be unfair and suggests that amendments should be confined to transactions entered into after the time of the budget announcement.

The committee sought the Treasurer's advice on the issue raised by Mr Wachtel.

Pending the Treasurer's advice, 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.

On this issue, the Assistant Treasurer has responded as follows:

Subitem 160(1) deals with the commencement of Item 15 of Schedule 2 which will deny a franking credit under the imputation system for company tax paid as a result of a non arm's length arrangement which has the effect of shifting profits offshore.

The Committee seeks advice on issues raised by Mr Wachtel, a tax partner at Arthur Andersen, in a submission to the Committee dated 19 July 1995. Mr Wachtel is concerned that the proposed amendment may operate retrospectively because it may affect transactions entered into prior to the Budget announcement and recommends that it be confined to transactions entered into after that time. Alternatively, if this change is not accepted, Mr Wachtel submits that the amendment should not apply in cases where a transfer pricing adjustment settlement was reached or substantially reached between the Australian Taxation Office and the taxpayer prior to the announcement of the amendment.

The proposal to confine the amendment to transactions entered into after the announcement of the amendment is not supported. The earliest possible commencement has been sought to protect the revenue from inappropriate relief currently provided under the imputation system.

The Government's policy for introducing the imputation system was to eliminate double taxation of company dividends. This was achieved by a system of franking dividends paid by Australian resident companies for income tax paid at the company level. Resident individual shareholders receive a tax rebate to the extent dividends are franked and non-resident shareholders are exempt from withholding tax on franked dividends.

The current interaction between the non arm's length dealing adjustment provisions for international transactions and the imputation system is inappropriate because, instead of relieving the double taxation of dividends, the provision of a franking credit may permit profits to escape tax at both the company level and the shareholder level. In other words, the provision of a franking credit largely negates the additional company tax payable as a result of the adjustment. This occurs because the profits which have been taxed as a result of the adjustment are not actually in Australia. These profits have been shifted offshore are not available for distribution by the Australian resident company. It is therefore unnecessary to provide relief under the imputation system for company tax paid on those profits because there are no actual profits from which to make a dividend distribution.

The result under the current rules - whereby a franking credit referable to profits shifted out of a company may be used to permit other profits to escape tax at both the company level and the shareholder level - is inconsistent with the policy underlying the imputation system that profits should be taxed at either the company or the shareholder level. The amendment will have the effect that tax payable at the shareholder level on dividends paid from untaxed company profits will not be reduced for tax paid on profits which have been shifted out of a company. This treatment will apply only for dividends paid to shareholders after the date of the Budget announcement and is therefore not considered retrospective. Even if the amendment were to be considered to involve an element of retrospectivity, such retrospectivity would be justified to ensure than an unintended benefit inconsistent with the basic policy of imputation is not conferred.

Mr Wachtel's alternate proposal is also not supported, namely, that the amendment not apply in cases where an assessment issued as a result of a transfer pricing adjustment settlement reached or substantially reached between the Australian Taxation Office and the taxpayer prior to the announcement of the amendment. A

transfer pricing settlement is an agreement on the calculation of an arm's length or profit for the purpose of assessing the proper amount of income tax. The agreement does not extend in any way to the benefit a taxpayer may obtain through the distribution in a tax free form of unrelated profits which would otherwise be subject to tax. The proposed amendment therefore has no bearing on the making of settlements reached or substantially reached before the Budget announcement and thus there is no need to exclude them from the operation of the new rules.

The committee thanks the Assistant Treasurer for this reponse.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINETEENTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINETEENTH REPORT OF 1995

The committee presents its Nineteenth Report of 1995 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:

> Student and Youth Assistance Amendment (Youth Training Allowance) Bill (No. 3) 1995

Student and Youth Assistance Amendment (Youth Training Allowance) Bill (No. 3) 1995

This bill was introduced into the House of Representatives on 25 October 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend youth training allowance provisions of the *Student and Youth Assistance Act 1973* to:

- extend the deeming rules which apply to investments held by recipients of youth training allowance;
- eliminate the need for recipients of youth training allowance to transfer to sickness allowance in certain circumstances;
- amend earnings credit scheme provisions to allow a person to access earnings credit notwithstanding that the person's ordinary income amount would, if the income test were applied, reduce the rate of the assistance to nil; and
- make consequential amendments resulting from the amalgamation of job search allowance and newstart allowance (into newstart allowance).

The committee dealt with this bill in Alert Digest No. 17 of 1995, in which it made various comments. The Minister for Schools, Vocational Education and Training has responded to those comments in a letter dated 24 November 1995. A copy of that letter is attached to this report. Although this bill has now been passed by both houses (but has not yet received Royal Assent), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Insufficient scrutiny
Proposed subsection 185(1)

In Alert Digest No. 17 of 1995, the committee noted that subsection 185(1), if enacted, would provide for the Minister to determine that certain financial investments are to be disregarded for the purposes of the deeming test in proposed sections 178 and 179. It seemed to the committee that the determinations would be at least quasi-legislative in character but there is no provision for them to be disallowable instruments. This contrasts with the determinations made by the Ministers in proposed section 183 as to the below threshold rate and the above threshold rate which, by force of that section, are to be disallowable instruments.

It may be that, when the Legislative Instruments Bill 1994 is enacted, the determinations will come within its purview as instruments legislative in character and thus become disallowable instruments. The committee, therefore, sought the Minister's advice whether, pending the enactment of the Legislative Instruments Bill, the determinations should be made disallowable.

Pending the Minister's advice the committee drew Senators' attention to the provision, as it may be considered insufficiently to 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:

> The Committee raised the question whether determinations under clause 185(1) should be made disallowable.
>
> The Committee found that the determinations would be at least quasi-legislative in character. I do not agree with this view. I am of the opinion that the Minister's power to make determinations under clause 185(1) is an administrative power and therefore does not need to be subjected to parliamentary scrutiny.
>
> There are a number of authorities on the distinction between actions of an administrative nature and those of a legislative character. The general distinction was stated by Chief Justice Latham in the High Court in *Commonwealth of Australia v Grunseit* (1943) 67 CLR 58, as being that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty whereas executive authority applies the law in particular cases.
>
> In *Tooheys Ltd v Minister for Business and consumer Affairs* (1981) 45 FLR 421, the Federal Court was considering the Minister's power under section 273 of the *Customs Act 1901* to make determinations specifying that certain goods will have the Customs Tariff applied to them. The Court considered this power to be of an administrative character as the law was not altered by the determination of the Minister, it was neither extended nor limited. The court found that the making of a determination merely applied the law in certain cases while not changing its content.
>
> The proposed power under clause 185 will allow the Minister to determine that particular investments are not to be regarded as financial assets for the purpose of clauses 178 and 179 of the YTA Bill. In making such determinations the Minister will merely be applying the law to particular factual situations rather than making new rules of law and thus the proposed power is correctly categorised as an administrative one. The administrative nature of the power means that it does not need to be subjected to parliamentary scrutiny and therefore determinations under clause 185 of the YTA Bill need not be made disallowable.
>
> The Committee refers to the fact that the determinations under clause 185 may come within the purview of the Legislative Instruments Bill 1994 as instruments legislative in character and thus become disallowable instruments. Clause 4(1) of the Legislative Instruments Bill defines a legislative instrument as one that

> determines the law or alters the content of the law, rather than stating how the law applies in a particular case. As I have said previously I believe that the proposed power under clause 185 will allow the Minister only to apply the law to particular cases. Thus, determinations made under this clause will not be legislative instruments for the purposes of the Legislative Instruments Bill, when it is enacted.
>
> Therefore, on balance, I do not consider that the determination contained in clause 185 is of a kind that should be subject to parliamentary disallowance.

The committee thanks the Minister for this response. The committee agrees completely with the Minister as to the law on this matter: the difficulty, as always, is in applying the law to a particular provision in legislation. The committee remains doubtful whether a court would consider determinations made under subclause 185(1) to be administrative.

The committee sees the problem as that, apart from this determination, there is no provision in the legislation that states that certain investments are to be disregarded for the purposes of the deeming test. If there were a provision which stated that financial investments with characteristics x, y or z were to be disregarded, it could also be provided that the Minister could determine that a particular investment possessed those characteristics. Thus, it could more easily be seen that such a determination was administrative. But, under the present bill, no financial investment is to be disregarded unless the Minister makes a determination exempting that investment: in other words there is no law to apply unless the Minister makes the determination. It appears, in the light of Tooheys case, that a determination under this provision would change the content of the law.

In these circumstances, the committee continues to draw Senators' attention to the provision, as it may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Judith Troeth
(Chairman)