SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

1996

22 MAY 1996

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator R Bell
Senator the Honourable I Campbell
Senator W Crane
Senator M Forshaw
Senator S Macdonald

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

FIRST REPORT OF 1996

The committee presents its First Report of 1996 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:

Student and Youth Assistance Amendment (Youth Training Allowance) Act (No. 3) 1995

Taxation Laws Amendment Act (No. 2) 1995)

Taxation Laws Amendment Act (No. 4) 1995

Student and Youth Assistance Amendment (Youth Training Allowance) Act (No. 3) 1995

The bill for this Act was introduced into the House of Representatives on 25 October 1995 by the Minister for Schools, Vocational Education and Training.

The Act amends 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 the bill in Alert Digest No. 17 of 1995, in which it made various comments. The then Minister for Schools, Vocational Education and Training responded to those comments in a letter dated 24 November 1995. In the committee's Nineteenth Report of 1995, the committee sought further clarification on whether a court would consider determinations made under subclause 185(1) to be administrative. The then Minister responded in a letter dated 29 January 1996. Although this bill has now been passed by both houses and received Royal Assent on 16 December 1995, the then 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 seemed to the committee that it might 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.

On 24 November 1995, the then Minister 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.

In its Nineteenth Report of 1995, the committee thanked the Minister for this response. The committee agreed 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 remained doubtful whether a court would consider determinations made under subclause 185(1) to be administrative.

The committee saw 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 appeared to the committee, in the light of Tooheys case, that a determination under this provision would change the content of the law.

In these circumstances, the committee continued 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.

In his further response of 29 January 1996, the then Minister, Mr Ross Free MP, advised the following:

> You have asked me to reconsider my position in relation to section 185 of the *Student and Youth Assistance Amendment (Youth Training Allowance) Act (No. 3) 1995.* I have done so and confirm my view as set out in my previous letter to you on this issue as follows.
>
> I am on the opinion that the Minister's power to make determinations under clause 185(1) (now subsection 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 (now section 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 Youth Training Allowance (YTA) Bill (now sections 178 and 179 of the YTA Act). 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 (now section 185 of the YTA Act) need not be made disallowable.

The Committee refers to the fact that the determinations under clause 185 (now section 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 (now section 185) will allow the Minister only to apply the law to particular cases. Thus, determinations made under this clause (now section) 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 (now section 185) is of a kind that should be subject to parliamentary disallowance.

The committee thanks the then Minister for this response.

Taxation Laws Amendment Act (No.2) 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 proposed, 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 was subsequently received from Mr Chang of Macquarie Investment Management Limited in relation to Item 31 of this bill. The committee dealt with this issue in its Seventeenth Report of 1995, in which it made various comments. The then Assistant Treasurer, Mr Gear MP responded to those comments in a letter dated 23 November 1995. Although this bill has now been passed by both houses (and received Royal Assent on 16 December 1995), the response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

The committee's terms of reference

In it's Seventeenth Report of 1995, the committee noted that due to the issues raised in Mr Chang's letter, it was 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 noted 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 was of the opinion that a trespass may have arisen otherwise 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 noted the remarks of Mr Douglas Chang of Macquarie Investment Management Limited with respect to the impact that the retrospective application of 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.

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[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).

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 noted 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 <u>amendment to their 1994/95 tax returns which have already been lodged in most cases, an additional payment of tax and possibly a penalty</u>. 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 noted 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 noted 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 sought the Treasurer's advice whether the solution suggested by Mr Chang is appropriate.

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.

The then Assistant Treasurer, Mr Gear MP, has responded to this issue as follows:

> The Government is proposing an amendment to TLAB(No 2) 1995 which addresses the issue of retrospectivity. The proposal, which is consistent with industry representations made to the Government, is to have the amendment apply where the period for which the annuity or pension first became payable is after 30 March 1995 rather than where the first payment is made after 30 March 1995.
>
> This change has been recommended because of the large number of individuals who first purchased an allocated pension or allocated annuity in April to June 1994 and who elected to defer receipt of the first pension or annuity payment until after 30 March 1995. Without the amendment, these people, together with others who purchased an allocated pension before 30 March 1995, will be subject to higher levels of taxation on their pension or annuity than anticipated at the date of purchase.
>
> The amendment proposed by Mr Douglas Chang of Macquarie Investment Management Limited to the Committee does not go this far. That is, his proposal does not protect taxpayers who entered into a contract before 1 April 1994 and did not receive their first pension or annuity payment until 1 July 1994 or later. However, unlike the Government's proposed amendment, Mr Chang's proposal may benefit a taxpayer who entered into a contract after 30 March 1995, received a pension or annuity before 1 July 1995, and had a birthday between the date of entering into the contract and the date of receiving the first payment. However, these circumstances are relatively unlikely.
>
> In this regard, it is relevant to note that the amendment in TLAB (No 2) 1995 is of a technical nature to ensure that the deductible amount is spread over the life of a pension or annuity and that pension and annuity providers are treated consistently. The only providers behaving differently from the manner proposed in the Bill were some allocated pension and annuity providers who were seeking to obtain a market advantage over their competitors. If a person takes out an allocated pension or annuity between 1 April and 30 June, the tendency is to delay taking a pension or annuity payment to the following year. Therefore, most allocated pension or annuity contracts entered into between 1 April 1995 and 30 June 1995 will not give rise to an assessable pension or annuity payment until the 1995/96 income year.

The committee thanks the then Assistant Treasurer for this response.

Taxation Laws Amendment Act (No.4) 1995

The bill for this Act was introduced into the House of Representatives on 28 September 1995 by the Minister for Human Services and Health.

The bill proposed 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 then Assistant Treasurer responded to those comments in a letter dated 15 November, 1995. In the committee's Eighteenth Report of 1995, the committee sought further clarification from the Treasurer on the reason for the proposed amendment. The then Assistant Treasurer, Mr Gear MP, responded in a letter dated 29 November 1995. Although this bill has now been passed by both houses (and received Royal Assent on 16 December 1995), the response may, nevertheless, be of interest to Senators. 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 then Assistant Treasurer, in his letter of 15 November 1995, 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.

In the Eighteenth Report of 1995, the committee thanked the then Assistant Treasurer for this response. The committee, however, regarded 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 pointed out that it had 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 noted 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 to the committee whether a court or other taxation review body had accepted that argument and, as a result, the retrospective amendment was proposed to preclude a court or other body from following that interpretation.

If, on the other hand, the amendment was 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 had no concern with the amendment.

The committee, therefore, sought clarification on this point from the Treasurer.

Pending that clarification, 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 then Assistant Treasurer, Mr Gear MP, has responded to this issue as follows:

> The assertion that certain taxable Australian assets are not subject to capital gains tax (CGT) is based on a technical argument that such assets are exempt from CGT because they are used to produce tax exempt income. This interpretation relies on a specific exemption in the CGT provisions for gains realised on disposals of assets used solely to produce eligible exempt income. For example, in past years assets

used to produce income from gold mining would have been exempt from CGT on disposal. Such income was also exempt from income tax. This can be contrasted with shares in Australian companies which are used to produce dividends. Such income is only excluded from the assessable income of a non resident taxpayer because tax is withheld at source on the dividend or the dividend is fully franked. The exemption is therefore an exemption from double taxation, rather than an exemption from income tax as such.

In my earlier response to the Committee I indicated that there were obstacles to the argument proposed by taxpayers that capital gains realised on the disposal of the affected taxable Australian assets are exempt from tax. In particular, such an interpretation would have the effect that CGT would never be payable on disposals by non residents of shares in Australian companies. This would be contrary to the clear intention of Parliament in enacting the provisions.

The operation of the relevant provisions in this regard has not been considered by a Court or tribunal, and there has been no universal agreement within the tax profession that such an exemption exists. The Bill contains a provision which protects those taxpayers who have received a favourable private binding ruling from the Commissioner on this point. However, it should be noted that not all binding rulings issued by the Commissioner on this issue were favourable to taxpayers.

There is nothing inherent in such assets, or the income produced by them, that would warrant such an exemption on policy grounds. In the absence of a generally accepted view that the legislation supports such an exemption, it is appropriate that those taxpayers who chose not to clarify their position by seeking a binding ruling from the Commissioner of Taxation (along with those taxpayers who have already paid the CGT properly payable on a purposive and fair interpretation of the law) should be generally taxable on capital gains from taxable Australian assets.

The committee thanks the then Assistant Treasurer for this clarification.

Barney Cooney
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SECOND REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator R Bell
Senator the Honourable I Campbell
Senator M Forshaw
Senator I Macdonald

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

SECOND REPORT OF 1996

The committee presents its Second Report of 1996 to the Senate.

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

Primary Industries and Energy Legislation Amendment Bill (No. 1) 1996

Primary Industries and Energy Legislation Amendment Bill (No. 1) 1996

This bill was introduced into the House of Representatives on 9 May 1996 by the Minister for Primary Industries and Energy.

The bill proposes to amend the:

- *Offshore Minerals Act 1994* to maintain the integrity of licences issued by both the Commonwealth and the States to ensure that mineral licences granted under the Act (the boundaries of which might be affected by changes in the location of the territorial sea baseline) remain wholly valid;
- *Laying Chicken Levy Act 1988* to:
  - acknowledge the Australian Egg Industry Association as the industry representative organisation to allow it to make recommendations on behalf of industry on levy related matters; and
  - authorise the Minister to facilitate future changes in industry representative organisation status by notice published in the *Gazette*;
- *Poultry Industry Assistance Act 1965* to facilitate the transfer of funds from the Poultry Industry Trust Fund to the Egg Industry Development Fund administered by the Rural Industries Research and Development Corporation for research and development on the egg industry;
- *Wool International Act 1993* to
  - remove the provision for eligible wool tax payers to make voluntary (additional) contributions of wool tax up to a further 5.5 per cent of the sale value of shorn wool, other than carpet wool;
  - provide that the amount payable to Wool International in respect of the debt component of wool tax, currently fixed at 4.5 per cent, be set by regulation;
  - facilitate Wool International undertaking a limited program of forward trading to assist in the development of a broader range of risk management options for the industry;
- *Australian Wool Research and Promotion Organisation Act 1993* to:
  - make a consequential amendment in relation to the setting of rates of wool tax; and
  - provide for interim wool industry funding for the Australian Animal Health Council by the Australian Wool Research and Promotion Organisation; and

- repeals the *Egg Industry Research (Hen Quota) Levy Act 1987*, the *Poultry Industry Assistance Act 1965* and *Poultry Industry Levy Act 1965* and makes consequent (upon these repeals) amendments to the *Primary Industries Levies and Charges Collection Act 1991* and the *Rural Industries Research Act 1985*.

The committee dealt with this bill in Alert Digest No. 1 of 1996, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in a letter dated 28 May 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Insufficient scrutiny by Parliament?
Schedule 6, Part 1

In Alert Digest No. 1 of 1996, the committee noted that by item 1 of Part 1 of Schedule 6, a new subsection 9(5) would be inserted in the *Wool International Act 1993*. That proposed subsection would limit to three sitting days the time within which a ministerial instrument under proposed subsection 9(4) could be disallowed by Parliament. The committee sought the advice of the Minister on the reasons for not allowing Parliament the usual 15 sitting days.

Pending the advice of the Minister, 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:

> In the Primary Industries and Energy Legislation Amendment Bill 1996, the amendments to the Wool International Act 1993 would involve a change to the standard period for disallowance from fifteen sitting days of Parliamentary scrutiny to three days. This is to ensure Wool International can take full advantage of any commercial opportunities as they arise.
>
> For example, if Wool International wanted to make a commercial decision or enter into a commercial venture within a tight commercial timeframe, and I was disposed to approve of the proposal, then waiting fifteen sitting days could prejudice achievement of the commercial objective. An extreme example could also be a mandatory fifteen day disallowance period might actually mean an even longer period if fifteen sitting days are not available before a parliamentary session concludes. The commercial opportunity might then be no longer available.

The committee thanks the Minister for his response. Although the committee acknowledges that commercial opportunities may be lost, the committee continues to be concerned at the dilution of the opportunity for Parliament to scrutinise effectively this exercise of legislative power. Whether the right balance between commercial advantage and adequate scrutiny is struck by restricting the opportunity for disallowance to three days is a matter for ultimate resolution by debate in the Chamber.

The committee therefore 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.

Barney Cooney
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

1996

19 June 1996

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator R Bell
Senator the Honourable I Campbell
Senator M Forshaw
Senator I Macdonald

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 1996

The committee presents its Third Report of 1996 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 1(a)(v) of Standing Order 24:

Crimes Amendment (Controlled Operations) Bill 1996

Crimes Amendment (Controlled Operations) Bill 1996

This bill was introduced into the Senate on 8 May 1996 by the Parliamentary Secretary to the Minister for Social Security.

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*, sections 10-14 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*, associated offences and States or Territory related 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 to Parliament on these matters to Parliament;
- provide that the protection of a certificate authorising an operation does not extend to conduct involving the inducement of a suspect to commit an offence;
- preserve judicial discretions to exclude evidence or stay proceedings, except to the extent that these discretions are expressly restricted by the bill;
- require the making of reports to the Minister and to Parliament, detailing the route which narcotic goods passed in the course of an authorised controlled operation, the persons or agencies who had control of the goods during and after the operations, and the current status and whereabouts of the narcotic goods;
- 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 Service for an exemption from detailed customs scrutiny; and
- include procedures which will contain the usage of controlled operations to instances involving the investigation or detection of, or the prosecution of persons for, serious criminal activity.

This bill is substantially the same as the one which the committee dealt with in Alert Digest No. 11 of 1995, in which it made various comments. The then Minister for

Justice responded to those comments in a letter dated 29 August 1995. The committee published the Minister's response in its Thirteenth Report of 1995. In Alert Digest No. 1 of 1996, the committee continued to express its concerns in relation to the issue of retrospective application. The Attorney-General has responded to those comments in a letter dated 3 June 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

The committee noted that the recommendations made by the Senate Legal and Constitutional Legislation Committee in its Report on the previous Bill in September 1995 appear to have been substantially accepted. The committee also noted that the Legal and Constitutional Committee reached the same conclusion as the Scrutiny of Bills Committee that the bill was constitutionally valid because it is within Parliament's power to decide the parameters of a statutory offence. Having re-examined the question, the committee was content to leave for ultimate resolution by the Senate whether the trespass on personal rights and liberties occasioned by the prospective operation of the bill was appropriately balanced by the need to ensure that crimes relating to narcotics are detected and the offenders punished.

For the reasons, however, contained in its Thirteenth Report, the committee continued to be concerned with the retrospective application of Division 3 of the Schedule because, in some circumstances, retrospective application may unduly trespass on personal rights and liberties. The committee acknowledged that this bill does not criminalise previously non-criminal conduct. Criminalising previously non-criminal conduct, however, is not the only way in which retrospectivity may unduly trespass on personal rights and liberties.

The committee was concerned that the effect of the bill was to take away the protection which some persons, presently accused, have from the inadmissibility, generally, of evidence where law enforcement officers broke the law by committing an element of the offence for which those accused are being prosecuted.

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.

On this issue the Attorney-General has responded as follows:

> The committee has drawn the Senate's attention to the "retrospective" application of Division 3 of the Schedule and has stated that the provisions "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 Committee has acknowledged that Division 3 of the Schedule is not retrospective in the sense of making illegal an act that at the time it was committed was lawful. The transitional provisions contained in Division 3 are only partly "retrospective" in that 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 a number of significant prosecutions for Commonwealth narcotics trafficking offences will be undermined. In four cases already the Director of Public Prosecutions has been forced to drop a proposed Commonwealth charge.
>
> I believe that the Bill strikes a careful balance between the need to protect personal rights and liberties and the need to protect the community through effective law enforcement.

The committee thanks the Attorney-General for this response.

The committee has distinguished between the application of this bill to future controlled operations and its application to prosecutions brought hereafter for offences committed before the High Court's judgement in *Ridgeway.* Making evidence obtained illegally before *Ridgeway* admissible in cases prosecuted after that decision has the flavour of some retrospectivity about it. Whether it, therefore, unduly trespasses on those rights is a matter which is appropriately settled by debate in the Chamber.

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.

(Barney Cooney)
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

OF

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26 JUNE 1996

SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 1996

The committee presents its Fourth Report of 1996 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 1(a)(v) of Standing Order 24:

ANL Sale Act 1995

Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996

Telstra (Dilution of Public Ownership) Bill 1996

ANL Sale Act 1995

The bill for this Act was introduced into the House of Representatives on 20 September 1995 by the Special Minister of State.

The bill proposed to make the necessary provisions to facilitate the sale of the Commonwealth's shares in ANL Limited.

The committee dealt with this bill in Alert Digest No. 14 of 1995, in which it made various comments. The Minister for Finance has responded to those comments in a letter dated 18 June 1996. Although this bill passed both Houses and received Royal Assent on 5 December 1995, by virtue of section 79 of the Act, it became automatically repealed with effect from 1 January 1996 because a sale agreement had not been entered by P&O by 31 December 1995. Nevertheless Senators may be interested in the Minister's response. A copy of his letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 37(1)

In Alert Digest No. 14 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 or other subordinate instruments made under other Acts where they are connected with the sale of ANL and take effect on the sale day.

The committee noted that the explanatory memorandum, in paragraph 71, states, as the reason for this provision, that it may not be possible or practicable to have the subordinate legislation or instruments made prior to the sale day and 'without this provision, such subordinate legislation may not be able to commence before the date of notification in the *Gazette*'.

Subsection 48(2) of the *Acts Interpretation Act 1901*, however, 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 ANL 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 37(1), therefore, would apply only if peoples' rights were retrospectively disadvantaged or if obligations were retrospectively imposed on them. The committee sought 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 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 for Finance has responded as follows:

> I should note at the outset that the ANL Sale Bill was enacted on 5 December 1995. However, by virtue of section 79, the *ANL Sale Act 1995* automatically repealed with effect from 1 January 1996 because a sale agreement had not been entered by P&O by 31 December 1995. Notwithstanding this and the fact that the Bill was developed by the former Government, I would note that clause 37(1) provides flexibility to make amendments to subordinate legislation as required to give effect to a sale and is a standard provision which has been included in legislation relating to previous asset sales. It is necessary because it is not possible to be completely sure that all required amendments to subordinate legislation have been identified. Further, as the sale day is often set at short notice, it is sometimes not practicable to have amendments made to subordinate legislation to coincide precisely with the sale day.

The committee thanks the Minister for these comments but continues to be concerned at the net effect of this provision which seems to be that, in order to ensure a possible sale, the Commonwealth was prepared to take away people's rights retrospectively or retrospectively impose obligations on them. The committee is, therefore, heartened by the concluding words of the Minister's letter:

> Nevertheless, the Government will keep the comments of the Committee in mind when developing future asset sale legislation.

Cessation of rights
Clause 38

In Alert Digest No. 14 of 1995, the committee noted that the purpose of this section was to avoid doubt about the application of Part IV of the *Public Service Act 1922* and the *Officers' Rights Declaration Act 1928*. The committee also noted that the explanatory memorandum, in paragraph 73, indicated that a small number of ANL staff may have acquired mobility rights which have been preserved.

The committee was concerned that preserved rights were being taken away merely because 'it would not be appropriate for mobility rights to be retained'. It may be that just compensation was being provided and so possible constitutional invalidity was

precluded. But the committee contrasted the treatment of these officers with the treatment, under clauses 24 and 25 of this bill, of former members of the Defence Force whose continued employment by ANL was to be deemed continued public employment or eligible employment for certain purposes of the *Defence Force Retirement Benefits Act 1973*.

Accordingly, 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 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:

> With respect to clause 38, certain ANL employees who joined the organisation prior to its conversion to a company in 1989 may have mobility rights under the *Public Service Act 1922* or the repealed *Officers' Rights Declaration Act 1928.* Clause 38 is simply a declaratory provision that makes it clear that these mobility rights will be extinguished upon a sale by the operation of the *Public Service Act.* This situation applied in the case of previous asset sales such as Qantas and CSL Limited.
>
> Nevertheless, the Government will keep the comments of the Committee in mind when developing future asset sale legislation.

The committee thanks the Minister for this response which clarifies that the extinguishment of mobility rights is effected by the operation of the *Public Service Act 1922* and not by the bill under consideration. The Minister's response, however, does not address why the bill did not override the relevant provisions of the *Public Service Act 1922* to protect the rights of those public servants in the same way as clauses 24 and 25 of the bill would have protected the rights of former defence personnel. Again, the committee is heartened by the Minister's assurance that the committee's comments will be kept in mind when developing future asset sale legislation.

Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996

This bill was introduced into the House of Representatives on 23 May 1996 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the:

- *Social Security Act 1991*, the *Student and Youth Assistance Act 1973* and the *Health Insurance Act 1973* to extend the waiting period (from 26 to 104 weeks) for certain migrants who arrived in Australia or were granted permanent residence on or after 1 April 1996 and who wish to claim certain social security payments or other benefits;
- *Social Security Act 1991* and *Student and Youth Assistance Act 1973* to allow additional information to be sought from persons (usually employers) about a class of persons with a view to reducing the need for supplementary requests for information;
- *Data-matching Program (Assistance and Tax) Act 1990* to put beyond doubt the lawfulness of using Australian Taxation Office income data for different financial years in a single data matching program cycle;
- *Social Security and Veterans' Affairs Legislation Amendment Act 1995* to amend a drafting error and make a consequential amendment; and
- *Social Security Act 1991* to make technical amendments.

The committee dealt with this bill in Alert Digest No. 2 of 1996, in which it made various comments. The Minister for Social Security has responded to those comments in a letter dated 19 June 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclauses 2 (5) - Items 6, 7 and 8 of Schedule 5

In Alert Digest No. 2 of 1996, the committee noted that by virtue of subclause 2 (5), some of the provisions of this bill would have retrospective effect. It seemed to the committee that, while the amendments proposed by those items appeared to be technical, it was unclear whether the retrospectivity would prejudicially affect any individual. It seemed to the committee that the retrospective amendment may have had the effect of imposing a two year waiting period on a person, for example, who entered Australia in November 1994 and who by force of the present subsection 921(3) would be exempted from the waiting period provisions or who by force of the

present subsection 922(2) would have been subject only to a six month waiting period. It also seemed to the committee that the proposed change may affect the outcome of decisions which may currently be under appeal.

The committee sought the Minister's advice on whether the amendment would prejudicially affect any person.

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:

> Items 6, 7 and 8 of Schedule 5 amend subsections 921(3) and 922(2) of the ***Social Security Act 1991*** (the Social Security Act). Whereas under the existing provisions, parenting allowance is not payable to a person who has entered Australia on or after 1 January 1993 and who holds a **permanent visa** until 26 weeks after the person has been granted that permanent visa, subsections 921(3) and 922(2) provide that the newly arrived resident's waiting period for a person who held a valid **"designated temporary entry permit"** ends 26 weeks after the day the "designated temporary entry permit" was granted to the person.
>
> The term "designated temporary entry permit" is defined in subsection 7(1) of the Social Security Act to mean as follows:
>
> (a) an old PRC (temporary) entry permit held by the partner or a dependent child (if any) of a citizen of the People's Republic of China if that citizen holds an old PRC (temporary) entry permit; or
>
> (b) a new PRC (temporary) entry permit held by the partner or a dependent child (if any) of a citizen of the People's Republic of China if that citizen holds:
>
> (i) an old PRC (temporary) entry permit; or
>
> (ii) a new PRC (temporary) entry permit.
>
> The terms "old PRC (temporary) entry permit" and "new PRC (temporary) entry permit" are also defined in subsection 7(1).
>
> "Old PRC (temporary) entry permit" means a PRC (temporary) entry permit within the meaning of the Migration (1989) Regulations as in force before 1 February 1993.
>
> "New PRC (temporary) entry permit" means an entry permit within class 437 of Division 2.6 - Group 2.6 in Part 2 of Schedule 1 to the Migration (1993) Regulations as in force before 1 September 1994.
>
> The net effect of these provisions, therefore, is that the special treatment afforded to holders of "designated temporary entry permits" in subsection 921(3) and 922(2) could only operate in respect of a person who held such permits before 1 September 1994. Class 437 entry permits were not issued from that date.

> As a result, the amendments made by items 6, 7 and 8 to subsection 921(3) and 922(2) will not disadvantage anyone. Rather, they merely ensure that the subsections relating to parenting allowance (parenting allowance having been introduced in July 1995) are identical to corresponding provisions relating to job search allowance, newstart allowance and sickness allowance that had been inserted into the Social Security Act in September 1994.

The committee thanks the Minister for this explanation, noting that the relevant amendments do not disadvantage anyone.

As the practical legal effect of the amendment appears to be nil, a statement indicating this in the explanatory memorandum would have been helpful. However, the committee is warmed by the thought that some public servant is probably sleeping more soundly in the knowledge that the starting date of this section relating to parenting allowance is identical with the starting date of the corresponding sections relating to the other allowances.

Retrospective application
Schedule 3

In Alert Digest No. 2 of 1996, the committee noted that the amendments proposed by Schedule 3 of this bill, if enacted, may be regarded as having retrospective application. They would allow a data-matching program to apply to information, not only from a current tax return but also from tax returns in respect of previous financial years. The committee noted that the explanatory memorandum claims that the effect of the amendment is to 'put beyond doubt' the lawfulness of using the earlier information because a doubt has arisen that the words 'available and current' tax data do not include the use of tax data available but not current.

The committee was concerned that the data matching program may have been unlawfully using the earlier data and that the effect of this amendment was to change the law to give wider powers to the program than those that presently exist. The committee sought from the Minister any legal advice that may have been given on these issues.

Pending the Minister's response, 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 second matter by the Committee related to Schedule 3 of the Bill.
>
> The Committee notes that "the amendments...may be regarded as having retrospective application. They would allow the data-matching program to apply information, not only from a current tax return but also from tax returns in respect of previous financial years... and that the effect of this amendment is to change the law to give wider powers to the program than currently exist." The Committee

was also concerned that the Data Matching Agency may have been unlawfully using earlier data.

The intention of the ***Data-matching Program (Assistance and Tax) Act 1990*** (the Data-matching Act) was to provide authority for strictly prescribed matching of data from specified agencies to detect incorrect payments of personal assistance or tax avoidance. To that end, the Data Matching Agency was given authority to seek relevant data from specified source agencies, one of which is the Australian Taxation Office (ATO).

At paragraph 7 of section 7 of the Data-matching Act, it was stated that the ATO should provide specified 'available and current' data. At paragraph 4.1(1) of the Schedule to the Data-matching Act, which provides guidelines to which agencies participating in the data-matching program are bound, the notion of the relevance of data is introduced, the Data Matching Agency being required to produce a technical standards report that addresses, among other things, the 'relevance, timeliness and completeness of data items'.

Although entitlement to most forms of personal assistance is dependent on current income, some personal assistance, most notably family payments paid by the Department of Social Security and Austudy and Abstudy, both paid by the Department of Employment, Education and Youth Affairs, are regularly paid on the basis of income in a previous tax year (known as the base year). For family payment, the base year is the tax year that ended in the previous calendar year.

Given the intention of the Data-matching Act and the need for data used by the Data Matching Agency to be relevant, it was understood by source agencies and the Privacy Commissioner that the Data-matching Act authorised the use of the tax data relevant to the payment of family payment, Austudy and Abstudy even if that tax data was not in respect of the most recently completed tax year. Matching has been conducted on that basis, and rather than seeking to widen the scope of the present matching, the amendment seeks to correct an element of drafting that casts doubt on the legitimacy of the matching that does take, place, although that matching is clearly consistent with the intent of the legislation.

Matching with family payment produced over half the total savings from the data-matching program in 1994-95 ($84.2m). If the proposed amendment to the Datamatching Act was not approved, this level of savings could not be sustained because:

. a potential fifteen percent of family payment cases identified each year for investigation under present arrangements would be lost to the program at a cost of approximately $12m in direct savings, plus an estimated $20m carry-over savings in subsequent years;

. there would be a smaller but still significant impact on matching for unemployment and pensions cases with a possible loss to the program of approximately $3m; and

. some loss of savings in Veterans' Affairs and Employment, Education and Youth Affairs payments could occur.

It should also be noted that income matching against the last tax year's data would not be worthwhile in the following July to October period as there is insufficient tax data available for any financial year until after the ATO's 31 October deadline for returns from wage and salary earners has passed.

> The Committee also sought a copy of any legal advice that may have been given on the data-matching issue.
>
> A copy of an advice issued by the Attorney-General's Department is attached.

The committee thanks the Minister for this response.

The committee notes the words of the Minister: 'The intention of the ***Data-matching Program (Assistance and Tax) Act 1990*** (the Data-matching Act) was to provide authority for strictly prescribed matching of data from specified agencies'. It seems clear, however, from the Minister's letter and from the legal advice provided from the Attorney-General's Department that the program exceeded its authority by using data outside that which was strictly prescribed. The committee has no problem with the reasons for expanding the data which can be matched but is conscious of the climate in which the legislation was first passed with so many assurances given that the program would be strictly controlled, that it would be oversighted by the Privacy Commissioner and that, in effect, the limits laid down by Parliament would be faithfully adhered to.

The committee is concerned that the Minister, in relying on the 'intention' of the legislation to justify conducting the program in this way, is confusing the intention of the Department and perhaps of the Minister in having the legislation passed with the intention of Parliament in passing the legislation. No Scrutiny of Bills Committee could be expected to accept that legislation should mean what the Minister or the Department wants it to mean rather than what Parliament has actually passed.

The committee, therefore, 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.

Telstra (Dilution of Public Ownership) Bill 1996

This bill was introduced into the House of Representatives on 2 May 1996 by the Minister representing the Minister for Communications and the Arts.

The bill proposes to amend the following Acts:

- *Telstra Corporation Act 1991* to:
  - enable and facilitate the sale of up to one-third of the Commonwealth's equity in Telstra, while requiring the Commonwealth to retain the remaining two-thirds;
  - require Telstra to keep the Minister and the Minister for Finance informed of its operations, to notify the Minister of significant proposals and to provide to the Minister a Corporate Plan;
  - set ownership limits in relation to the one-third equity in Telstra which can be held by other persons than the Commonwealth;
  - ensure Telstra's head office, base of operations and incorporation remain in Australia and that its chairperson and majority of directors are Australian citizens;
  - enable remedial action to be taken where there has been a contravention of the foreign ownership limits;
  - reaffirm that the transfer of part of the Commonwealth's equity in Telstra will not affect the "Universal Service Obligations"; and the
- *Telecommunications Act 1991* to:
  - extend the statutory obligation on general telecommunications carriers to provide the option of untimed local calls to all customers in local call areas;
  - introduce a new scheme for a customer service guarantee; and
  - extend AUSTEL's functions of developing indicative performance standards about quality of goods and services and reporting annually on carrier performance against those standards.

The committee dealt with this bill in Alert Digest No. 1 of 1996, in which it made various comments. The Minister for Communications and the Arts has responded to those comments in a letter dated 18 June 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

General Comment

In Alert Digest No. 1 of 1996, the committee noted that the proposed section 87F provides for a customer to recover damages from Telstra for a contravention of a performance standard prescribed by AUSTEL. Proposed subsections 87G(1) and (3), if enacted, would provide for AUSTEL and not a court to set a scale for the award of damages and to put an upper limit of $3 000 on such an award. The committee sought the advice of the Minister on whether it is more properly the function of a court to set such damages as it appears to the court proper in the circumstances of a particular case or whether, as in Tables of Maims scales in compensation legislation, it is more appropriate for Parliament rather than an instrumentality to set such a scale.

The committee noted that by proposed section 87K normal access to damages through the court process is preserved.

Pending the Minister's advice, the committee drew Senators' attention to the provisions, as they may inappropriately impinge on the judicial function or they 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 Bill proposes to give AUSTEL the power to specify a scale of damages, rather than having a court determine appropriate damages because, in many cases, the breaches concerned will not be of a kind which would give rise to an injury ordinarily compensable by a court (for example, the failure to keep an appointment with a customer may not result in any ordinarily compensable damage to the customer). Accordingly the specified damages represent a statutory penalty.
>
> The power to set the scale of damages is given to AUSTEL because of the dynamic nature of the telecommunications industry, where new kinds of telecommunications services are developed in response to competitive pressures, and some telecommunications services become superseded where they fail in the marketplace. AUSTEL will need to act quickly to impose an appropriate scale of damages when a new service is developed by a carrier and the Minister directs AUSTEL to develop a performance standard in relation to that kind of service. In my view, customers would be left without the benefit of the scheme for too long a period if the scale of damages was set out in the legislation and it was necessary to rely upon the passage of amending legislation to deal with the development of new services.
>
> In recognition that giving the power to set the scale of damages to AUSTEL does represent a delegation of legislative power, the Bill makes the exercise of the power disallowable by the Parliament and includes a maximum to ensure that any statutory damages are confined to less than $3000.

The committee thanks the Minister for this response.

Barney Cooney
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH REPORT

OF

1996

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SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator the Honourable I Campbell
Senator M Forshaw
Senator I Macdonald
Senator A Murray

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

FIFTH REPORT OF 1996

The committee presents its Fifth Report of 1996 to the Senate.

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

Airports Bill 1996

Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill (No. 1) 1996

Workplace Relations and Other Legislation Amendment Bill 1996

Airports Bill 1996

This bill was introduced into the House of Representatives on 23 May 1996 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to establish the regulatory arrangements to apply to the airports currently owned and operated on behalf of the Commonwealth by the Federal Airports Corporation, and Sydney West Airport, following the leasing of those airports and includes some provisions which can be applied to other airports.

The committee dealt with this bill in Alert Digest No. 2 of 1996, in which it made various comments. The Minister for Transport and Regional Development has responded to those comments in a letter dated 20 August 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Vicarious liability and reversal of the onus of proof
Subclause 217(2)

Subclause 217(2) provides:

> If
>
> (a) conduct is engaged in on behalf of a person other than a corporation by an employee or agent of the person; and
>
> (b) the conduct is within the employee's or agent's actual or apparent authority;
>
> the conduct is taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in by the person unless the person establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

In Alert Digest No. 2 of 1996, the committee noted that Clause 217, if enacted, would impose vicarious liability on a person for the criminal acts of his or her employee or agent. Subclause (2) would put the onus of disproving liability on the principal by requiring that person to establish that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

The committee was not aware of any previous occasion on which a law has imposed vicarious liability on a natural person. The committee sought the Minister's advice on the reason for doing so in this bill.

The committee has been prepared to accept the imposition of criminal liability on the manager/directors of a company for the acts of a company as that is necessary

for the effective operation of the criminal law. The committee, therefore, has no concerns with clause 216 which provides for the prosecution of corporations. Different considerations, however, apply where vicarious liability for the acts of other persons is imposed on an employer or principal who is a natural person.

The committee's approach to the imposition of vicarious criminal liability is similar to its approach to the imposition of strict liability. The primary issue is whether the consequences of the offence are so serious as to warrant the departure from the normal requirement that a person can be guilty of a crime only if they act intentionally or recklessly.

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 acknowledges that both specific and general defences assist the personal rights and liberties of the accused. The primary issue, therefore, is whether a strict liability ought to be imposed.

The committee can understand that an oil spill on the Great Barrier Reef or serving salmonella infected food would warrant offences of strict liability because of the serious consequences of such acts. Acts with less serious consequences may not justify imposing strict liability.

With respect to vicarious criminal liability, the committee is of the view that imposing such liability would be justified only by the seriousness of the consequences of the prohibited acts. An examination of the offences in the bill for which subclause 217(2) will impose vicarious criminal liability discloses a wide variety, not all of which would equate in seriousness with an oil spill on the Great Barrier Reef. For example, the committee remains to be convinced that failure to comply with every condition that may be attached to a certificate of fitness for use (under clause 99) warrants vicarious liability. The committee sought the Minister's advice whether any of the offences have such serious consequences that vicarious liability is warranted and, if so, which.

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:

> I am advised that while the common law has generally not accepted the proposition that a person might be vicariously liable for the misdeeds of another, it has been prepared to recognise exceptions in relation to corporations (which can only act through their employees and agents) and some regulatory types of offences (for example, licensing laws) where vicarious liability is required to give practical effect to the legislative intention.
>
> The Bill sets out the regulatory framework to apply to airports currently owned and operated on behalf of the Commonwealth by the Federal Airports Corporation following the leasing of those airports. The principal controls contained in the Bill are expressed to apply to airport lessees and airport managers which are required by the Bill to be corporations. I understand that the committee has no difficulty with the imposition of criminal liability on the managers/directors of a company for the acts of a company as that is necessary for the effective operation of the criminal law.
>
> However, the Bill also contains controls which would not, of themselves, be limited in their application to corporations. These include the following:
>
> - carrying out unapproved building activities on airports: clause 90(3);
> - occupation and use of buildings without, or in contravention of a condition of, a certificate of fitness: clauses 97(4) and 99;
> - failure to comply with regulations about pollution on airport sites: clause 124;
> - failure to provide an airport-operator company with an auditor's certificate: clause 134(6);
> - failure to comply with regulations requiring the retention of records or the provision of information in relation to the quality of airport services or facilities: clause 148;
> - failure to comply with regulations requiring the operator of an airport to act in a manner consistent with Australia's international obligations: clause 159;
> - failure to comply with regulations dealing with the sale of liquor, commercial trading and gambling at airports: clause 167;
> - offences in prescribed airspace: clauses 176, 177 and 178; and
> - failure to comply with a demand management scheme: clause 200.
>
> These regulatory offences involve vicarious criminal liability being imposed on an employer for the acts of an employee. The scheme would be rendered ineffective without the imposition of vicarious criminal liability upon an employer in this way.
>
> Without an express provision such as clause 217 the question of whether criminal liability can be imposed on an employer for the acts of an employee acting within the scope of his or her employment is one of statutory interpretation. The courts have held that, in relation to a regulatory offence aimed at the regulation of commerce, the employer is prima facie liable for the acts of an employee done by

the latter in the course of his or her employment. Insofar as the offences affected by clause 217 are of a commercially regulatory nature, clause 217 simply reflects the common law position. In any event, the clause is necessary for the effective operation of the regulatory scheme contained in the Bill.

Finally, I am advised that clause 217 conforms with the approach taken on a number of occasions in other Commonwealth legislation, in particular, subsection 85(4) of the *Proceeds of Crimes Act 1987*, subsection 34(4) of the *Financial Transaction Reports Act 1988*, subsection 1358B(2) of the *Social Security Act 1991*, subsection 181(2) of the *Employment Services Act 1994* and subsection 42(4) of the *Road Transport Reform (Dangerous Goods) Act 1995*.

I trust that this advice addresses your concerns satisfactorily.

The committee thanks the Minister for clarifying these issues.

Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill (No. 1) 1996

This bill was introduced into the Senate on 23 May 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* to extend the sunset clause from 1 January 1997 to 1 January 1999. The extended sunset clause is proposed to allow for the development of complementary State/Territory regulation of private education providers.

The committee dealt with this bill in Alert Digest No. 2 of 1996, it which it made various comments. The Minister for Employment, Education, Training and Youth Affairs responded to those comments in a letter dated 15 August 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inappropriate delegation of legislative power?

In Alert Digest No.2 of 1996, the committee noted that it understood that the effect of this legislation was being frustrated by the failure of the States/Territories to develop complementary regulation. The committee was of the opinion that arrangements, which require States/Territories to develop a complementary regulatory framework to give effect to the Commonwealth's legislation, constituted a *de facto* delegation of legislative power. The committee, therefore, was concerned at the appropriateness of such a delegation and sought the Minister's advice on whether alternative arrangements might be more effective.

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 relevant comments in the *Scrutiny of Bills Alert Digest* Mr Crawford attached to his letter seem to be based on a misunderstanding about the effect of the Bill. Let me explain.
>
> The *Alert* states, "The extended sunset clause is proposed to allow for the development of complementary State/Territory regulation of private education providers." This is not the case. Rather, as stated in the Bill's *Explanatory Memorandum*, "The extension will allow time to develop and implement simpler, but

still effective, regulation in this industry, based on continuing industry consultations." A similar statement was made in the Bill's second reading speech.

The second reading speech did refer to the fact that States and Territories have not implemented their own legislation in a way which would allow the complete withdrawal of the principal Act which the Bill seeks to amend. However, this should in no way be taken to imply that "the effect of this legislation is being frustrated by the failure of the States/Territories to develop complementary regulation." (to use the words of the *Alert Digest*).

In fact, the principal Act has taken effect since 1991. Recent national consultations with industry and government stakeholders have indicated that the Act is perceived as being both necessary and effective, although there were requests from some industry groups for simplifying some regulatory requirements. The two year extension to the Act's sunset clause has been sought in the Bill to allow time to develop details of such simplifications in consultation with stakeholders.

The current regulatory regime covering providers of education and training to international students in Australia is based on a cooperative model with the Commonwealth and State/Territory regulatory authorities each having responsibilities defined in terms of their own legislation. However, it is not the case that States/Territories are required "to develop a complementary regulatory framework to give effect to the Commonwealth's legislation" (to use the words of the *Alert Digest*). Nor is there any actual or *de facto* delegation of legislative power.

Against the above background, I do not believe that this Bill warrants the concern expressed in the *Alert Digest*.

The committee thanks the Minister for this response.

Workplace Relations and Other Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 23 May 1996 by the Minister for Industrial Relations. [Portfolio responsibility: Industrial Relations]

The bill proposes to amend the *Industrial Relations Act 1988,* to be retitled the *Workplace Relations Act 1996,* to give primary responsibility for industrial relations and agreement making to employers and employees at the enterprise and workplace levels. Consequential amendments are also made to numerous Acts and the *Trade Union Training Act 1975* is to be repealed.

The committee dealt with this bill in Alert Digest No. 2 of 1996, in which it made various comments. The Minister for Industrial Relations has responded to those comments in a letter dated 25 June 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

General comment

In Alert Digest No. 2 of 1996, the committee noted that it had some difficulty in determining whether any of the provisions of this bill came within the committee's terms of reference. Because the bill makes substantial amendments to the *Industrial Relations Act 1988*, it would be difficult for any person to discover the state of the law until the amended Act was reprinted. Given these difficulties, the committee asked the Minister whether any thought was given to drafting these clauses in the form of a replacement bill rather than an amending bill.

On this issue, the Minister has responded as follows:

> As was the case with the *Industrial Relations Reform Bill 1993*, the Government is proceeding with an amending bill rather than a replacement Act. This is for the following reasons.
>
> An amending bill has the advantage that the Parliament and the wider community can see exactly what changes are proposed to the existing Act rather than having to differentiate between the new provisions and the existing provisions (many of which would, were there to be a replacement Act, be likely to be rewritten).
>
> In this context, I point out that the bill facilitates the comparison of the proposed amendments with the policy which the government presented to the Australian people at the last election.
>
> I also consider that there is the further advantage that presenting the amendments in this form has meant that the legislation can be considered by the Parliament sooner than would have been the case with a replacement Act.

> Subject to the passage of the amendments, I will be seeking to have a consolidated Act prepared and made available as quickly as possible. This would undoubtedly assist all those who need to refer to or apply the *Workplace Relations Act 1996.*

The committee thanks the Minister for this response.

Delegation of power to a person
Proposed subsection 83BE(2)

In Alert Digest No. 2 of 1996, the committee noted that Item 2 of Schedule 3 of the bill, if enacted, would insert proposed subsection 83BE(2). This subsection would permit the Employment Advocate to delegate some functions to 'any person'. Generally the committee is concerned about an unfettered discretion to grant statutory functions to any person. The functions to be delegated under this provision appeared to the committee to be very general and the committee sought the Minister's advice on the reasons for the width of this delegation.

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 upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

On this issue, the Minister has responded as follows:

> The functions that the Employment Advocate can delegate to any person are the functions set out in paragraphs (a), (b) and (c) of proposed section 83BB, viz:
>
> "(a) providing assistance and advice to employees about their rights and obligations under this Act;
>
> (b) providing assistance and advice to employers (especially employers in small business) about their rights and obligations under this Act;
>
> (c) providing advice to employers and employees, in connection with AWAs [Australian Workplace Agreements], about the relevant award and statutory entitlements and about the relevant provisions of this Act."
>
> The Explanatory Memorandum for the bill explains (at paragraph 3.14): "The function of giving advice can be delegated to any person; this broad power of delegation is considered appropriate as the function of giving advice does not extend to altering anyone's entitlements or exercising any coercive powers. The Employment Advocate would of course be expected to choose only delegates suitably qualified to give the advice, but it is considered inappropriate that the Act limit the categories of persons who might be chosen for this purpose."
>
> I do not think it is possible to specify particular qualifications for receiving this delegation, except that the Employment Advocate should be satisfied that the delegate is an appropriate person to receive the delegation. I think it is

> reasonable to assume that the Employment Advocate would not choose a delegate whom the Employment Advocate considered not to be appropriately qualified to properly exercise the delegation.

The committee thanks the Minister for this response.

Retrospective application
Subitems 17(1) and (2) of Schedule 7

In Alert Digest No. 2 of 1996, the committee noted that Subitems 17(1) and (2) of Schedule 7, if enacted, would allow Part 1 of that Schedule to apply to terminations of employment occurring after 30 March 1994, unless an application under the current legislation in respect of that termination has been lodged before the commencement of this Schedule.

The explanatory memorandum does not indicate whether such a retrospective application would adversely affect any person. Accordingly the committee sought 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 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:

> Part 1 of Schedule 7 replaces the existing unfair dismissal provisions of the Act with new provisions based on the principle of a "fair go all round". The new provisions will apply only for the traditional federal area of coverage, that is, employees covered by federal awards or agreements, Federal Government employees, and all employees in the Territories.
>
> The Government considers it appropriate that employees not within this traditional federal area of coverage should have to rely on State law for any remedy. This is appropriate whether or not the dismissal occurred before the change to the federal law. However, the bill makes an exception for people who have already applied for a remedy under the current unfair dismissal provisions; their cases will proceed under the old system.
>
> Dismissed employees who have not lodged an application before the change of law will not have the benefit of this exception to the new legal regime. Even if this might be characterised as "retrospective" in a technical sense (which is debateable), I suggest that the important point is that these employees will not have acted in reliance on the old law. It is also important to note that, generally, these employees will have an adequate remedy under State law; where this is not so, it will be because the State Parliament has chosen to create a category of exclusion from the general unfair dismissal law. Whether such exclusions are appropriate, outside the traditional federal areas of coverage, is a matter that the Government believes should be left to State Parliaments to decide.

The committee thanks the Minister for this response.

Barney Cooney
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTH REPORT

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SENATE STANDING COMMITTEE

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator the Honourable I Campbell
Senator M Forshaw
Senator S Macdonald
Senator A Murray

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

SIXTH REPORT OF 1996

The committee presents its Sixth Report of 1996 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 1(a)(v) of Standing Order 24:

Migration Legislation Amendment Bill (No. 2) 1996

Migration Legislation Amendment Bill (No. 2) 1996

This bill was introduced into the Senate on 20 June 1996 by the Assistant Treasurer. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to:

- ensure that certain provisions of the *Human Rights and Equal Opportunity Commission Act 1986* and the *Ombudsman Act 1976* do not apply to persons who are in immigration detention, having arrived in Australia as unlawful non-citizens, unless persons themselves initiate a complaint in writing to HREOC or to the Ombudsman; and
- clarify the duties of the Minister and officials concerning advice relating to applications for visas and on access to legal and other advice.

It is proposed that the amendments would commence on 19 June 1996.

The committee dealt with this bill in Alert Digest No. 4 of 1996, in which it made various comments. The Minister for Immigration and Multicultural Affairs responded to those comments in a letter dated 21 August 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Clause 2

In Alert Digest No. 4 of 1996, the committee noted that by clause 2, this bill, if enacted, would have a limited retrospective effect in that it would be taken to have commenced on the day it was introduced into Parliament, rather than the day on which it receives Royal Assent.

The committee pointed out that it is opposed in principle to retrospective legislation by which vested rights are taken away. The announcement that a bill, if passed, would operate retrospectively to any extent puts departmental officers in an invidious position. The committee took the proposed legislation as an example. The Federal Court has ruled that the law in Australia at the present time requires the custodial officer to deliver any sealed envelope to the detainee that comes from the Human Rights and Equal Opportunities Commission or the Ombudsman. If such an envelope were to arrive on that day, 26 June 1996, the custodial officer would be breaking the law if he/she failed to deliver it. The committee noted that there is no guarantee that this legislation will be passed or, if passed, will be passed in the same terms as the proposed bill, specifically that the legislation will be given a commencement date of 19 June 1996. The committee wondered whether it was appropriate for the Minister or the Departmental Secretary to give him/her a direction not to deliver the envelope and whether it was within the Minister's power,

to promise an indemnity if he/she does not deliver the envelope and the legislation is not passed or not passed with retrospective effect?

The committee pointed out that the net effect is if the custodial officers act within the rule of law and obey the law as it stands the proposed retrospective effect will be nullified. In order to give the proposed law retrospective effect the officers concerned need to break the present law. There are some shades of *Ridgeway's* case in this.

On the other side of the coin is the detainee who has a right to have the envelope delivered. If the envelope is not delivered, that right is taken away, not by law, but by a presently unlawful act on the dubious grounds that perhaps Parliament will pass a proposed law that will have retrospective effect to make the unlawful act lawful. This is an instance of where retrospectivity could have a very serious effect on the rights of people.

As the committee had occasion to say in its Third Report of 1996 on another bill:

> Criminalising previously non-criminal conduct, however, is not the only way in which retrospectivity may unduly trespass on personal rights and liberties.

The committee stated that it would be interested to know what the Minister's view is on the present obligations of his departmental officers.

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 Committee has requested information on the 'present obligations of ...departmental officers' who, the Committee asserts, have been placed in an 'invidious position' before the legislation takes effect.
>
> On 25 July 1966 the Federal Court made orders by consent settling the appeal in this matter. The orders provided for the delivery of amended letters (the sealed envelopes contemplated by the *Human Rights and Equal Opportunity Commission Act 1986*) to the 'Teal' detainees, the amendment removing any reference to contact Mr Ross McDougall of the Refugee Advice and Casework Service. These letters were delivered when received on 7 August 1996.
>
> You will also be aware from the Legal and Constitutional Legislation Committee hearing on 26 June 1996 on the Bill, that both the Human Rights Commissioner and the Commonwealth Ombudsman have given undertakings that they will carry out the functions under their respective legislation as if the Bill had been passed.
>
> Departmental officers therefore will not be placed in any 'invidious position' in this matter.

The committee thanks the Minister for this response. The committee, however, would like to make the following points:

When the committee considered the bill, neither the second reading speech nor the explanatory memorandum indicated that an appeal against the court's order would be lodged. Indeed, Schedule 2 of the Bill gave a clear impression to the contrary - that the proposed amendments were not intended to alter the effect of any orders made by a court before 19 June 1996. The committee accepts that, once the appeal was lodged and the stay order continued, departmental officers could quite properly await the outcome of the appeal and so not be in the 'invidious position' discussed above.

The committee notes, however, that the appeal has been settled by consent. Accordingly, should another boat arrive before the legislation is passed, the invidious position could recur.

Denial of access to justice?

The implications of section 256

In Alert Digest No. 4 of 1996, the committee stated that the substantive amendments to the *Migration Act 1958* which are made by this bill appeared to the committee to be predicated on an inaccurate view of section 256 of that Act. Section 256 provides:

> Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

The committee pointed out that this section places a positive obligation on the person responsible for the immigration detention of a person to give access to obtaining legal advice if the detained person requests it. It does not say that this section is an exhaustive code of all the ways in which such a detainee may have access to legal advice. Yet paragraph 2 on page 2 of the explanatory memorandum asserts that section 256 establishes that a person in immigration detention has a right to access legal advice only when they request it. Equally the second reading speech speaks of an onus on unlawful non-citizens to advise officials if they wish to seek legal advice and speaks of section 256 as making provision for access to legal advice but only where the detainees request legal advice.

The committee continued that section 256 for the detainee is an enabling section ensuring a right to access legal advice if the detainee requests it. Section 256 for the custodian imposes a positive obligation to provide that access if it is requested. But section 256 is not restrictive in the sense that it denies all access to legal advice

except through section 256. It is an unwarranted conclusion that because the Migration Act 1958 is otherwise silent on the matter of legal access to this class of person, that no other right to access legal advice exists and that the *Migration Act 1958* exhibits an intention to exclude all other access.

Parliament's intention in passing an Act is to be found in the interpretation which a court puts on the meaning of the words. It is true that in cases of ambiguity a court may use other documentary material. But, absent an ambiguity, no one can say the intention of an Act is other than what a court finds to be the express or implied meaning of the words. In this instance, the Federal Court in *Human Rights and Equal Opportunity Commission and Another v Secretary of the Department of Immigration and Multicultural Affairs* (unreported, 7 June 1996, Lindgren J, NG 268 of 1996) has put the matter beyond doubt.

On this issue of the implications of section 256 as a denial of access to justice, the Minister has responded as follows:

- *The implications of section 256*

> The Committee asserts that the proposed amendments to the *Migration Act 1958* are 'predicated on an inaccurate view of section 256 of that Act'; i.e. that section 256 establishes that a person in immigration detention has a right to access legal advice only when they request it, denying access to legal advice obtainable by other legal avenues.
>
> The Committee seems to be suggesting that detainees have further rights of access to legal advice sourced elsewhere in the common law or in statute. But the Committee fails to specify where these rights are to be found. However, in recent litigation *Wu Yu Fang v Minister for Immigration and Ethnic Affairs (1996) 135 ALR 583)* an opportunity was provided to establish the existence of such rights. None were established. Furthermore, it is quite clear from that case that there is no obligation on departmental officers to inform unauthorised arrivals on entering Australia of any rights to legal advice, unless the persons have made a request for such advice.
>
> In this Bill the Government is seeking to make absolutely clear that unauthorised arrivals have no right of access to legal advice unless they specifically request.

The committee is all too conscious of this declared purpose of the bill but disagrees that the bill merely clarifies. If it were true that unauthorised arrivals have no right of access to legal advice unless they request it under section 256 of the *Migration Act 1958*, there would be no need for this bill. Why else does the bill provide that paragraph 20(6)(b) of the *Human Rights and Equal Opportunity Commission Act 1986* not apply to a person in immigration detention? In dealing with the implications of section 256, the committee may not have specified that paragraph 20(6)(b) of that Act and the corresponding provision in the *Ombudsman Act 1976* are sources in statute that enable access to legal advice outside the *Migration Act 1958*.

The committee believes that its reference to the result in the Federal court case (*Human Rights and Equal Opportunity Commission and Another v Secretary of the Department of Immigration and Multicultural Affairs*) should have been sufficient for the reader to understand that the alternative source to a right to legal advice lay in those Acts.

Hierarchy of Acts?

In Alert Digest No. 4 of 1996, the committee was of the opinion that the second reading speech could also be seen mistakenly to assume that there is some hierarchy in Acts of Parliament. It mentions that certain provisions of the *Ombudsman Act 1976* and the *Human Rights and Equal Opportunity Commission Act 1986* could be used:

> to undermine the intention of section 256 of the Migration Act.

As we have seen above, the section does not exhibit an intention to exclude the operation of the *Ombudsman Act 1976* and the *Human Rights and Equal Opportunity Commission Act 1986*. So the argument that the effect of those Acts should be legislated away cannot be based on an assumption that the *Migration Act 1958* is somehow more important than the other Acts and therefore should not be undermined.

The result of the Federal Court case that has prompted this legislation is clear proof that the intention of Parliament, as found by the only institution that can authoritatively say what that intention is, in passing the *Ombudsman Act 1976* and the *Human Rights and Equal Opportunity Commission Act 1986* was to provide a method of access to legal advice alternative to that provided in the *Migration Act 1958*. Any impression that somehow Parliament made a mistake that now has to be fixed is quite false.

The right to knowledge

In 1765, in his *Commentaries*, Sir William Blackstone said:

> ... 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.

The committee noted that the maxim of law that ignorance of the law is no excuse is based on the assumption that people are able to find out what the law is that affects them. It seemed to the committee that the provisions of this bill are clearly designed to make it as difficult as possible for the people subject to these laws to find out what rights they have in law. The committee rejected the notion that this is justified because it will cost money to enable them to exercise their rights if they find out about them. The protection of rights ought not to be governed by cost-benefit analysis.

The committee noted that it had previously had cause to comment that:

> 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 International Covenant on Civil and Political Rights

The committee pointed out that article 26 of the International Covenant on Civil and Political Rights provides that all persons are entitled without any discrimination to the equal protection of the law. The committee questioned whether the bill discriminates against unlawful non-citizens by precluding a present lawful means of obtaining access to legal advice.

The issue

In Alert Digest No. 4 of 1996 the committee pointed out that the issue for the committee, as always, was not whether the clauses of the bill trespass on personal rights but whether they do so unduly. The committee was not convinced by the reasons given in the explanatory memorandum and the second reading speech justifying the proposal.

For these reasons, 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 these further issues, the Minister's response continues:

> - *Hierarchy of Acts?*
>
> The Committee has suggested that the second reading speech mistakenly assumes that there is some hierarchy of Acts.
>
> It is not a question of 'hierarchy of Acts' but rather making the position on access to lawyers clear. In practice, there can be a conflict as is evidenced by the 'Teal' case *(Human Rights and Equal Opportunity Commission v Secretary of the*

> *Department of Immigration and Multicultural Affairs*). This Bill seeks to resolve this conflict.
>
> - *The right to knowledge*
>
> The Committee asserts that the Bill is an attempt to 'make it as difficult as possible for the people subject to these laws to find out what rights they have in law'.
>
> The Government, through this Bill, seeks to clarify the situation in relation to certain unauthorised arrivals and their access to legal advice. The Bill makes it clear that such persons have no right to legal advice unless they make a specific request.
>
> - *The International Covenant on Civil and Political Rights*
>
> The Committee has expressed concerns whether the Bill discriminates against unlawful non-citizens by 'precluding a present lawful means of obtaining access to legal advice' and therefore may be contrary to Article 26 of the ICCPR.
>
> Based on the best advice available to the Government, I am satisfied that the Bill, taken with Australia's long standing practices in this area, is not in breach of Australia's international obligations under the ICCPR.
>
> - *Conclusion*
>
> Parliament in passing this Bill would be clearly seen to be confirming its intention to ensure that certain unlawful arrivals have access to legal advice in accordance with provisions which have been in the Migration Act for almost 40- years.
>
> I trust I have assisted the Committee with these comments.

The committee thanks the Minister for this response. The committee does not agree, however, that it is a matter of resolving the conflict between the laws or clarifying that no access to legal advice outside the Migration Act presently exists or even that it is a matter of Australia not being in breach of international obligations. In the committee's view, the bill will take away rights under the *Human Rights and Equal Opportunity Commission Act 1986* and the *Ombudsman Act 1976* which presently exist and which presently provide the only means not controlled by immigration authorities of giving advice to unauthorised arrivals of other rights that they may have under this country's laws.

For the committee, the issue is whether taking away these rights trespasses unduly on their personal rights and liberties. In the Alert Digest the committee stated it was not convinced that the reasons given in the explanatory memorandum and in the second reading speech justified the proposal. It remains unconvinced by the Minister's response.

The committee notes a parallel with the Mabo case and finds the words of Mr Justice Brennan (as he then was) particularly apposite to the situation of the unauthorised arrivals:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian People. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights (7) brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

(Mabo v Queensland [No.2] 175 CLR at p 42)

In the committee's view, it is contrary both to international standards (as expressed in Article 26 of the ICCPR) and to the fundamental values of the common law to entrench a discriminatory rule which effectively precludes a person from finding out what rights they might have under the law.

For these reasons, 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.

Barney Cooney
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

1996

9 October 1996

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator the Honourable I Campbell
Senator M Forshaw
Senator S Macdonald
Senator A Murray

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

SEVENTH REPORT OF 1996

The committee presents its Seventh Report of 1996 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 1(a)(v) of Standing Order 24:

Primary Industries and Energy Legislation Amendment Bill (No. 2) 1996

Primary Industries and Energy Legislation Amendment Bill (No. 2) 1996

This bill was introduced into the House of Representatives on 27 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the:

- *Agricultural and Veterinary Chemicals (Administration) Act 1992* to:
  - ensure that the National Registration Authority for Agricultural and Veterinary Chemicals (NRA) must comply with any lawful policy direction of the governments involved in the National Registration Scheme for Agricultural and Veterinary Chemicals;
  - clarify procedures in relation to the Department's management of chemicals subject to import and export restrictions under international obligations; and
  - enable the charging of fees for certificates concerning the export of agricultural and veterinary chemicals;
- *Agricultural and Veterinary Chemicals Code Act 1994* to:
  - clarify the application of the compensation provisions under Part 3 of the Code; and
  - enable the NRA to issue one national notice under the Agvet codes rather than separate notices for each jurisdiction;
- *Fisheries Management Act 1991* to provide that where there is an acquisition of property within the meaning of paragraph 31 of section 51 of the Constitution, reasonable compensation or compensation as determined by the Federal Court, is payable;
- *Farm Household Support Act 1992* to ensure that the drought relief payment is payable to eligible farmers only within the period specified on the drought exceptional circumstances certificate;
- *Imported Food Control Act 1992* to allow persons other than officers of the Australian Quarantine and Inspection Service to be appointed as authorised officers;
- *Quarantine Act 1908* to allow for the issue of penalty notices (on-the-spot-fines) to be issued to persons alleged to have breached Australia's quarantine requirements when entering Australia; and
- repeals 15 inoperative Commonwealth Acts.

The committee dealt with this bill in Alert Digest No. 5 of 1996, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in letters dated 17 September 1996 and 8 October 1996. Copies of those letters are attached to this report and relevant parts of the responses are discussed below.

Retrospectivity
Subclause 2(3)

In Alert Digest No. 5 of 1996, the committee noted that subclause 2(3) of this bill, if enacted, would allow Schedule 3 to have effect retrospectively from 15 March 1995.

It was not clear to the committee, however, whether the retrospectivity of any of the amendments would adversely affect persons other than the Commonwealth. The committee, therefore, 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 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:

> I would firstly like to say that the retrospective commencement of the proposed amendments to the 15 March 1995 does not adversely affect any person, nor does it adversely affect the Commonwealth. In particular, the retrospectivity is intended to remove any doubt about the inter-relationship between paragraph 32(2)(b) and subsection 59(1) which was originally intended to operate from the commencement of the Agvet Code on the 15 March 1995.
>
> Early operational experience with the Agvet Code revealed the need to amend the cross referencing between the above two provisions so that the Part 3 compensation provisions of the Agvet Code would operate effectively. The proposed amendments were first listed for introduction to Parliament around June 1995, but because of Parliament's busy sitting schedule the Bill was not introduced until November 1995. The Bill subsequently lapsed with the proroguing of Parliament in early 1996. The amendment Bill was again introduced on the 27 June 1996.
>
> In essence, Part 3 provides that certain information provided under paragraph 32(2)(b) by an originator company to the National Registration Authority for Agricultural and Veterinary Chemicals (NRA), is protected under subsection 59(1). The protection provides that a secondary company cannot access the information unless compensation is paid by the secondary company to the originator company. The clear intention of Part 3 is to provide protection to certain information and the chemical industry has an expectation that protection would be provided as originally intended.

> Since the commencement of the Agvet Code originator companies have been providing information to the NRA for evaluation in regard to the existing chemicals review program. It is intended to remove any doubt that the information already provided under paragraph 32(2)(b) is protected as was originally intended. The situation where a secondary company may wish to purchase access to an originator company's information has not yet arisen, but would be expected to arise soon following the NRA's full evaluation of the review information.
>
> Furthermore, the proposed amendment to paragraph 32(2)(b) will provide the option for the NRA to request specific information of a kind identified in its notice, or to request all relevant information where applicable. Thus the proposed amendment will avoid the situation where a chemical company provides duplicate information to that already held by the NRA so as to avoid being in breach of the NRA's request for all information under section 32 of the Agvet Code.
>
> I trust this reply satisfactorily explains the reasons for the retrospectivity of the proposed amendments to the Agvet Code.

The committee thanks the Minister for this response, which clarifies the matter satisfactorily.

Delegation of power to a person
Schedule 6 - authorised officers - the *Imported Food Control Act 1992*

In Alert Digest No. 5 of 1995, the committee noted that Schedule 6, if enacted, would amend various provisions of the *Imported Food Control Act 1992* so that not only officers of AQIS but any other person may be appointed as authorised officers for the purpose of exercising certain powers under that Act. These powers could include powers of search and seizure and the power to require answers to questions (with imprisonment for 6 months for failing to comply without a reasonable excuse) and to request assistance (with $3 000 penalty for failing to comply without a reasonable excuse). There is no limitation as to the persons or classes of persons who may be so appointed.

The committee noted that the second reading speech refers to the possibility that quarantine officers of the various States and Territories, appointed as authorised officers, might be involved in food inspection with the laudable purpose of avoiding what would otherwise be a duplication of that task. The committee did not have a problem with such a purpose but noted that neither the bill nor the explanatory memorandum demonstrates the need for a power of appointment of such width.

Since its establishment, the committee has consistently drawn attention to provisions which allow for the delegation of significant and wide-ranging powers to 'a person'. Generally, the committee would prefer to see a limit on either the sorts of powers that can be delegated in this way or the persons to whom the powers can be

delegated. If the latter course is adopted, the committee would like to see the delegation limited to the holders of a nominated office, to members of the Senior Executive Service or by reference to the qualifications of the person to be delegated the powers.

In these circumstances the committee sought the Minister's advice as to whether the amendments could be altered to define more narrowly the intended class of appointees and to circumscribe more closely the powers that are to be delegated.

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 reason that the Australian Quarantine and Inspection Service (AQIS) sought such a broad ranging provision was to achieve a more effective and efficient service by providing a more flexible delivery component to its Imported Food Inspection Program (IFIP).
>
> While the Committee quite correctly identified that AQIS sought the amendment in order that quarantine officers of the various States and Territories could be appointed as authorised officers under the Act, and thus be involved in the inspection of imported food, there will be occasions when persons other than those mentioned need to be appointed as authorised officers. An example of such an occasion would be when samples need to be taken from a consignment of imported food in a remote location and there are no AQIS officers nearby, but the services of an Environmental Health Officer (employed by a local council) could be utilised. In such circumstances the proposed provision would provide considerable program flexibility and benefits to industry. To more narrowly define the intended class of appointees would restrict the intention of the amendment.
>
> In its endeavour to achieve greater service flexibility, AQIS in no way sought to make rights, liberties or obligations that were unduly dependent upon insufficiently defined administrative powers, as appears to be the concern of the Committee in its comments regarding enforcement powers under the Act. Indeed the committee's concerns are already acknowledged by AQIS in the administration of the Act. If during routine inspections or discussions with importers, authorised officers suspect a breach of the Act and enforcement activities are needed, they are performed by Compliance Officers of AQIS who are not only authorised officers of AQIS, but officers experienced in enforcement issues.
>
> In acknowledgment of the Committee's concerns on this issue AQIS has advised that it has now instructed the Office of Parliamentary Counsel to amend the provision in the Bill to limit those enforcement powers of concern to the Committee to AQIS authorised officers only. I trust that these amendments to the Bill will satisfy the Committee's concerns regarding the need to set a limit on the sorts of powers that can be delegated without unduly restricting AQIS's quest for a more efficient and effective program which benefits importers by its flexible delivery of inspection activity.

The committee notes with approval the proposed amendment of the bill to limit the class of people to whom the powers can be delegated and thanks the Minister for his helpful explanation.

Barney Cooney
(**Chairman)**

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTH REPORT

OF

1996

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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 B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator the Honourable I Campbell
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Senator S Macdonald
Senator A Murray

TERMS OF REFERENCE

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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

EIGHTH REPORT OF 1996

The committee presents its Eighth Report of 1996 to the Senate.

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

Bankruptcy Legislation Amendment Bill 1996

Cattle Export Charges Amendment (AAHC) Bill 1996

Cattle Transaction Levy Amendment (AAHC) Bill 1996

Bankruptcy Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 26 June 1996 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to:

- establish a "One Stop Service" for bankrupts and insolvent debtors and rationalise bankruptcy administration by abolishing the offices of Registrar and Deputy Registrar in Bankruptcy;
- revise antecedent transaction avoidance provisions;
- establish administrations as alternative regimes to bankruptcy and to make meeting procedures align with those in bankruptcy;
- create a new insolvency administration to be known as debt agreements for certain low income debtors;
- modernise the statement of the duties of bankruptcy trustees;
- establish new administrative arrangements for trustee registration;
- correct anomalies and improve the compulsory income contribution regime;
- replace statutory approved forms with administrative approved forms;
- give the Federal Court jurisdiction in bankruptcy exclusive of the jurisdiction of courts other than the High Court under the Constitution;
- empower the Governor-General to make regulations relating to matters other than court practice and procedure;
- create a new register of bankruptcies and personal insolvencies to be known as the National Personal Insolvency Index;
- make powers of trustees discretionary, but subject to review by the Court;
- improve the investigative powers of trustees;
- repeal spent transitional provisions;
- make consequential and transitional provisions; and
- effect gender neutral language.

The committee dealt with this bill in Alert Digest No. 5 of 1996 in which it made various comments. The Attorney-General has responded to those comments in a letter dated 9 October 1996. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Retrospective application
Items 213 and 214

In Alert Digest No. 5 of 1996, the committee noted that by item 213, sections 120 and 121 of the *Bankruptcy Act 1966* are repealed and new sections are substituted. Proposed new sections 120 and 121 increase the range of transactions by a bankrupt which are to be void as against the trustee in bankruptcy. The amendments would enable a trustee in bankruptcy to lay claim to more former assets of the bankrupt for distribution among the creditors. They deal with undervalued transactions (where the transferee gave no consideration or inadequate consideration) and transfers to defeat creditors.

By item 214, subsection 122(1) is repealed and a new subsection is substituted. This subsection deals with avoidance of preferences, that is, it prevents a debtor from giving a particular creditor a preference, priority or advantage over other creditors.

As some of the transactions referred to in the proposed new sections may have taken place up to five years before the bankruptcy commenced, the amendments may have considerable retrospective application.

The committee pointed out that the issue is whether the retrospective application of these clauses unduly trespasses on personal rights. People who are bankrupts when these provisions commence (item 214) or who become bankrupts after these provisions commence (item 213) may, at various times over the five years before the date of their bankruptcy, have entered into transactions which, according to the present law, would have had the effect of preventing the trustee in bankruptcy from claiming certain former assets of the bankrupt for distribution to creditors.

On the one hand, the purpose of the amendments is to seek to increase the amount available for distribution among creditors whose rights to be paid in full may be considered to have been trespassed against. On the other hand, the position of people who may have entered in good faith to some of these transactions may be adversely affected.

The committee, therefore, sought the advice of the Attorney-General on the relative positions of those two groups.

Pending the Attorney-General'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 Attorney-General has responded as follows:

> The Committee has sought my advice on the relative position of the two groups who may be party to a voidable transfer of property under the Bankruptcy Act 1966. In particular, the Committee is concerned at the possible retrospective effect of the application of Items 213 and 214 in the Bill.
>
> In considering the application of these provisions, three possible alternative approaches were considered:
>
> (a) No "retrospective" operation at all. It would have been necessary to provide that the amendments relate only to transfers of property effected after commencement of the amendments. This would mean that creditors may not see the benefit of these provisions for some considerable time and two different sets of provisions would be applicable to each estate for up to 5 years from the date of commencement of these provisions. This would require trustees (and ITSA) to have regard in some estates to two regimes affecting antecedent transactions.
>
> (b) Introduction of a half way measure that would amount to partial retrospective operation whereby the new provisions would apply only to new bankruptcies occurring after commencement of the amendments. This would allow for the strengthened claw back to become effective a lot sooner.
>
> (c) Full retrospectivity whereby the amendments would apply to existing bankruptcies.
>
> Under option (a) any person, whether the bankrupt, or a person to whom he or she has transferred property, who has organised his or her affairs under the current law would not have been disadvantaged as the law would not have changed in relation to those dealings. However, under this option creditors would have continued to be denied access to any property transferred prior to the amendments coming into effect where it was transferred for no monetary consideration or less than market value if the bankrupt was insolvent at the time of the transfer.
>
> Under option (b) there would still be some retrospective effect on transferees in relevant prior transactions that had already occurred but only in the case of new bankruptcies. Also, prospective voluntary bankrupts could contemplate how the new amendments would impact on their existing affairs.
>
> While (on its face,) retrospectivity is undesirable, in considering the options the interests of creditors need to be weighed against those of the bankrupt and persons who have received property that was transferred to them at less than market value. While a change to commencement would protect bona fide transferees it would also protect transfers that were entered into to defeat creditors in an impending bankruptcy.
>
> If the proposed provisions apply to all bankruptcies, then maximum protection of creditors' interests is achieved. If they apply only to transfers effected after commencement, then it seems that, transferees' interests are protected.
>
> Because of the nature of the transactions that are the subject of the amendments (ie. there must have been a transfer at less than market value) this is likely to be the bankrupt's family or associated entities in many cases and therefore, indirectly, the bankrupt. For this reason, retrospectivity in these circumstances, while it may

> seem to infringe one sector's rights, could also protect the rights of another, those of creditors.
>
> Having weighed the competing interests of the parties, I consider that the application of the provisions to new bankruptcies as proposed, provides the fairest balance between the interests of bankrupts, creditors and those of third party transferees.

The committee thanks the Minister for this response.

Cattle Export Charges Amendment (AAHC) Bill 1996
Cattle Transaction Levy Amendment (AAHC) Bill 1996

These bills were introduced into the House of Representatives on 26 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bills propose to amend the *Cattle Export Charges Act 1990* and the *Cattle Transaction Levy Act 1995* to:

- allow for amounts raised under the Act to be paid to the Australian Animal Health Council; and
- set an operative charge or levy rate of 5 cents and maximum charge rate of 50 cents per head of cattle exported.

The committee dealt with these bills in Alert Digest No. 5 of 1996, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in a letter dated 8 October 1996. A copy of the letter is attached to this report and relevant parts of the response are discussed below.

Imposing charge by regulation

In Alert Digest No. 5 of 1996, the committee noted that certain items of Schedule 1 of each of these bills, if enacted, would each allow a charge or levy to be set by regulation.

The committee has consistently drawn attention to provisions which allow the rate of a charge or levy to be set by regulation, largely on the basis that a rate of a charge or levy could be prescribed which would amount to a tax. Generally the committee has taken the view that setting taxes is more appropriately a matter for primary legislation, a prerogative of Parliament, not of the executive. If there is a need for flexibility, (that is, adjustments to the rate of a charge or levy need to be made so frequently and/or so quickly that it is impractical to amend primary legislation) the committee prefers that the primary legislation prescribe either a maximum rate of the charge or levy or a method of calculating such a maximum rate.

The committee noted that, with respect to the charges and levies set by these items, there is also set a maximum amount: '(not more than 50 cents)'. The committee also noted paragraph 4 of the explanatory memorandum of the Australian Animal Health Council (Live-stock Industries) Funding Bill 1996:

> The Australian Animal Health Council Limited has been established as a non-profit company and will be jointly owned and funded by the Commonwealth Government, State and Territory Governments and the peak national representative bodies of Australia's livestock based industries. Its mission will be to ensure that the Australian animal health service system is capable of maintaining acceptable national animal health standards which meet consumer needs and market requirements at home and overseas.

The committee can understand that, at this initial stage, the future extent of the Commonwealth's share of the funding of the Council may be uncertain.

The committee noted, however, a difference between these bills and the other charge and levy bills considered in this Digest in that there is a marked discrepancy between the set rate and the maximum rate. For example, the set rate of 5 cents is only one tenth of the maximum rate of fifty cents per head whereas the set rate of 0.21 cents in the Laying Chicken Levy Amendment (AAHC) Bill 1996 is two thirds of the maximum levy rate of 0.33 cents per head.

The committee sought the advice of the Minister on the reasons for such a discrepancy.

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 decision that the maximum rates be 50 cents and the set rates be 5 cents was made at the request of the cattle industry. The cattle industry has indicated that it envisages using the Australian Animal Health Council Limited (AAHC) over time as a mechanism for funding a number of cattle-specific programs, and that they need to position themselves at this time to make significant funding increases. On the other hand, the poultry and most other industry members of the AAHC do not foresee significant increases in AAHC funding to deal with their specific animal health concerns.
>
> The Committee's attention is also drawn to the provisions inserted by Items 5 and 6 of Schedule 1 of the Cattle Export Charges Amendment (AAHC) Bill 1996, and Items 4 and 5 of Schedule 1 of the Cattle Transaction Levy Amendment (AAHC) Bill 1996. These provisions will require the Governor-General, before making regulations to prescribe a set rate, to take into consideration any recommendations about the amount made to the Minister by the Meat industry Council, or if a body has been specified in a declaration for the purpose, the amount recommended to the Minister by that body. The recommendation of industry which will pay the charge, must therefore be taken into consideration by the Governor-General before the rate can be varied.

The committee thanks the Minister for this response.

Barney Cooney
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINTH REPORT

OF

1996

30 October 1996

SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

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

NINTH REPORT OF 1996

The committee presents its Ninth Report of 1996 to the Senate.

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

Family (Tax Initiative) Bill 1996

Legislative Instruments Bill 1996

Social Security Legislation Amendment (Budget and Other Measures) Bill 1996

Family (Tax Initiative) Bill 1996

This bill was introduced into the House of Representatives on 11 September 1996 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* and *Social Security Act 1991* to provide for a family tax payment to be payable fortnightly through the Department of Social Security; and
- *Income Tax Assessment Act 1936* and *Taxation Administration Act 1953* to make consequential amendments.

The committee dealt with this bill in Alert Digest No. 7 of 1996, in which it made various comments. The Minister for Social Security has responded to those comments in a letter dated 24 October 1996. A copy of that letter is attached and the relevant parts of the response are discussed below.

Tax File Numbers
Item 6 of Schedule 2

In Alert Digest No. 7 of 1996, the committee noted that proposed new sections 900AW and 900AX, to be inserted by item 6 of Schedule 2, would allow the Secretary of the Department of Social Security to require a claimant for, or a recipient of, family tax payments to provide the Department with their tax file number and that of their partner. The committee has been concerned with the use of tax file numbers as mere identifiers in relation to matters unconnected with taxation, as such a measure may be regarded as trespassing to some extent on an individual's privacy. The committee, nevertheless, has been prepared to accept those measures which allow for the provision of a tax file number, if it can be seen as necessary for the prevention of fraud.

In the present case, the family tax payment is the alternative to, and closely connected with, the family tax assistance program under the taxation system. As such, it appears that the requirement for the provision of tax file numbers is necessary to prevent fraud.

The committee, however, was concerned at the possibility of inappropriate and/or unintended intrusion on a person's privacy and sought the Minister's advice on the procedures in place for protecting personal privacy and on their effectiveness.

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 Alert Digest noted that your Committee has been prepared to condone measures that allow for the provision of a tax file number (TFN) if it can be seen as necessary for the prevention of fraud. The Digest further notes that your Committee considers that the requirement in the Family Tax Initiative Bill for the provision of TFNs is necessary to prevent fraud. Notwithstanding this acceptance, your Committee has sought further information about the procedures in place for protecting personal privacy and on their effectiveness.
>
> The importance of safeguarding individual privacy in the use of TFNs to ensure that the family tax payment is only paid to those who are entitled to it and so as to ensure that there is no double dipping with family tax assistance (available through the taxation system), is recognised by the Department, which operates in accordance with the Tax File Number Guidelines issued by the Privacy Commissioner under Section 17 of the *Privacy Act 1988.* These Guidelines are readily available for examination as part of the Federal Privacy Handbook published by the Privacy Commissioner.
>
> Measures applied by the Department to protect TFN information include:
>
> . when a claimant provides their TFN, it is recorded directly on the Department's computer system. No paper record of the TFN is made. The computer system does not allow enquiries to be made on the TFN and does not display the TFN to users;
>
> . when the Data-matching Program identifies a discrepancy in income details between the Department and the Australian Taxation Office, the case is issued for review by Regional Office review staff. The information provided in these cases includes the person's TFN. This information is held on a secure Departmental computer system with access available to only a small number of people in each Region;
>
> . information on the selected cases can be printed from the computer system but such printouts must be retained in secure storage. The information is only retained until the required action on the case in completed, up to a maximum of twelve months after the data was initially received. After this, the selection information, including the TFN, must be destroyed and any other document on the customer's paper file which shows the TFN must have the TFN blacked out.
>
> Individuals affected by the Program have the right to complain to the Privacy Commissioner about any act or practice relating to the use of tax file numbers. The Privacy Commissioner also has the right to carry out investigations of any act or practice on his own initiative.
>
> Finally, unauthorised use or disclosure of TFNs is an offence under the *Taxation Administration Act 1953* with a penalty of up to $10,000 fine, two years' imprisonment, or both.
>
> In 1993, the Australian National Audit Office confirmed that the Department has effectively fulfilled its privacy obligations and has responded appropriately to

> operational matters raised by the Privacy Commissioner. The Privacy Commissioner has also been satisfied with the Department's treatment of privacy concerns. This assessment was endorsed by the House of Representatives Legal and Constitutional Affairs Committee in its June 1995 inquiry into the protection of confidential personal and commercial third party information held by the Commonwealth.

The committee thanks the Minister for this response.

Legislative Instruments Bill 1996

This bill was introduced into the House of Representatives on 26 June 1996 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to establish a regime to govern drafting standards and procedures for the making, registration, publication, scrutiny and sunsetting of delegated legislation.

The Committee dealt with this bill in Alert Digest No. 5 of 1996, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 19 September 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Attorney-General's certificate - judicial review and Parliamentary scrutiny
Clause 8

In Alert Digest No. 5 of 1996, the committee noted that Clause 8 provides for the Attorney-General to give a certificate to clarify definitively whether an instrument is a legislative instrument for the purposes of this legislation. In its Alert Digest No. 12 of 1994, the committee commented on a similar provision in the Legislative Instruments Bill 1994 because that bill excluded review of the exercise of this power.

The committee noted, however, that the present bill provides that the Attorney-General's decision will be subject to judicial review.

The committee also noted that, in its Fifteenth Report of 1994, in respect of the Attorney-General's power to issue such a certificate the committee endorsed the recommendation of the Senate Standing Committee on Regulations and Ordinances that the clause be amended to ensure that these certificates be subject to disallowance by Parliament. The previous Government proposed to amend the previous bill to provide for disallowance explicitly. The current bill could be interpreted as also providing for the exercise of this power to be subject to disallowance. The certificate is to be registered in Part C of the Federal Register of Legislative Instruments, so presumably it is itself a legislative instrument. Part 5 of the bill provides for the scrutiny by Parliament of registered legislative instruments. Proposed subsection 61(8) lists instruments which are not subject to disallowance but does not include these certificates in the list. As the matter may not be without doubt the committee sought the advice of the Attorney-General on whether the certificate is subject to disallowance by Parliament.

Pending the Attorney-General'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 Attorney-General has responded as follows:

> The initial issue that the Committee raised is the removal of Parliamentary disallowance in respect of Attorney-General's certificates that instruments are, or are not, legislative instruments. The Digest sets out the Committee's view that disallowance should be available, because it had been recommended in reports on the earlier Bill. I considered and rejected this approach in the course of developing the Government's policy for the Bill. I considered that having the two review mechanisms would create too much uncertainty and that ADJR was the preferable approach to adopt. The certificate is in essence a legal opinion to which ADJR review is appropriate and disallowance is not. Further, adoption of the Committee's suggestion would result in more complex drafting which could be criticised by the users of the system.
>
> The Bills Committee raised a further issue namely, that the failure to include the certificates in clause 61(8) - exemptions from disallowance - means by implication that disallowance may occur. While there may be superficial attraction to that argument it fails to have regard to clause 58 which requires only instruments registered in Part A of the Register to be tabled, scrutinised and, if necessary, disallowed. Those instruments are confined to legislative instruments made on or after the commencement of the Bill. Certificates made under clause 8 do not fit that description and thus are outside the scope for disallowance.

The committee thanks the Attorney-General for this explanation.

Insufficient scrutiny by Parliament
Subclause 61(7) - national schemes of legislation

In Alert Digest No. 5 of 1996, the committee noted that Clause 61 provides the regulatory framework which enables Parliament to disallow legislative instruments. Subclause 61(7), however, exempts certain legislative instruments from disallowance by Parliament. These are instruments made to facilitate the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States where the legislation enabling the instrument to be made directs that the instruments may not be disallowed.

Such a provision in a bill would come within the terms of reference of this committee and would be drawn to the attention of the Senate. The committee was concerned that subclause 61(7), if enacted, could be considered to give a general approval for removing from Parliament's scrutiny subordinate legislation in respect of national schemes of legislation. Primary legislation establishing such schemes originates from the decisions of ministerial councils and may sometimes be considered to be itself not subject sufficiently to Parliamentary scrutiny.

The committee acknowledged the potential benefits to Australia of national schemes of legislation. On the other hand, the committee is of the view that the norm should be that all subordinate legislation should be subject to Parliamentary scrutiny. Precluding Parliamentary power should occur only where just and weighty reasons warrant such a provision on a case by case basis. The committee sought the advice of the Attorney-General on whether he agrees that subclause 61(7) puts the wrong emphasis on this issue.

Pending the Attorney-General's response, 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 Attorney-General has responded as follows:

> The second matter raised is a provision for exemption from disallowance for national scheme legislation that was in he 1994 Bill and which was not considered a concern in the past. Presumably the Committee's current views on this issue are founded on the pending Senate Standing Committee on Regulations and Ordinances report about Scrutiny of National Scheme Legislation. That Report follows the release by the Committee in July 1995 of an Issues Paper canvassing the desirability of Uniform Scrutiny Principles for national schemes upon which my Department made a substantial submission drawing attention to a range of difficulties that needed to be considered. I understand that the Committee is currently considering a draft of its Report. To remove the exemption for national scheme legislation at this time would be premature without knowing the rationale for the Committee's approach and whether implementation of the Committee's Report is desirable.
>
> Further, clause 72 of the Bill provides specifically for issues arising from national scheme legislation to be considered in the course of the review of the operation of the legislative instruments legislation.

The committee thanks the Attorney-General for this response. The Attorney-General may be aware that the Position Paper on *Scrutiny of National Schemes of Legislation* has now been tabled in the Senate. The committee would be interested in any further comments he would wish to make.

The committee, nevertheless, would continue to draw the attention of Senators to the provision.

The committee questions why this provision has been included in the bill. On its face it does no more than state the obvious: if any Commonwealth Act contains a provision that says that regulations made under the Act are not subject to tabling and disallowance, those regulations cannot be reviewed by Parliament and disallowed. Such a provision in a particular bill would of course attract a comment from this committee. What concerns this committee is that subclause 61(7) in the present bill appears to approve as a general rule that subordinate legislation relating to national schemes of legislation ought not be subject to Parliamentary review and disallowance. In the past, if a Commonwealth Bill relating to a national scheme of

legislation proposed that the subordinate legislation made under it was not disallowable, the committee would have sought what just and weighty reasons warranted such an exemption. In the future, when the same situation arises, the committee does not want to be told that the Legislative Instruments Act approves removing such subordinate legislation from the scrutiny of Parliament.

The response suggests that to 'remove the exemption for national scheme legislation at this time would be premature'. The committee, however, points out that no such general exemption exists and the reason that the committee objects to the subclause is that it will mislead people into thinking that a general exemption exists as it apparently has already done on this occasion.

The committee, therefore, 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.

Insufficient parliamentary scrutiny of legislative power
Paragraph 61(8)(c) - Proclamation not disallowable

In Alert Digest No. 5 of 1996, the committee noted that Clause 61 provides for the disallowance of legislative instruments by either House of Parliament. Subclause 61(8), however, provides that certain legislative instruments are to be exempted from disallowance. Among the exemptions, paragraph (c) provides that a Proclamation under section 5 of the *Flags Act 1953* is not to be disallowable.

The committee noted that the explanatory memorandum does not contain any reason for this exemption. The second reading speech, however, indicates that the bill represents a significant shift in control over delegated legislation back towards the Parliament and will ensure that Parliament will have a greater role in the scrutiny of delegated legislation.

The committee, therefore, sought the advice of the Attorney-General on why Parliament should not have the power of disallowance in this instance.

Pending the advice of the Attorney-General, 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 Attorney-General has responded as follows:

> The Committee is concerned that Proclamations made under section 5 of the *Flags Act 1953* are to be exempt from disallowance under paragraph 61(8)(c). The basis for that provision was that to provide for disallowance and sunsetting of Proclamations for flags could be seen as discriminatory as most authorised flags are not required to be authorised by Proclamation but by other methods. There are currently only four Proclamations under the section to deal with flags for the

> Defence Services and the others for the Indigenous Communities. I cannot agree to an amendment in respect of this matter.

The committee thanks the Attorney-General for this explanation.

Insufficient parliamentary scrutiny of legislative power
Item 14 of Schedule 1 - Instruments that are not legislative instruments

In Alert Digest No. 5 of 1996, the committee noted that Schedule 1 lists certain instruments and provides that they are not to be legislative instruments for the purpose of the legislation. Item 14 provides for certain instruments to be included in the list by being prescribed.

This provision was not included in the 1994 Bill. It appears that Item 14 instruments could include Determinations under the *Public Service Act 1922*, the *Defence Act 1903* and the *Remuneration Tribunal Act 1973*, which are at present subject to full scrutiny and disallowance by Parliament. The committee acknowledged that the regulation which prescribes such determinations as Item 14 instruments and therefore makes them exempt from disallowance would itself be subject to disallowance. In the committee's opinion, this was not a satisfactory safeguard as a period of some months could elapse between the coming into effect of the regulation and its disallowance. Any determinations made during this period would remain in force even if the regulation was disallowed.

The committee sought the advice of the Attorney-General on this issue.

Pending the advice of the Attorney-General, 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 Attorney-General has responded as follows:

> The exemption from the legislation in respect of instruments dealing with terms and conditions of persons employed by the Commonwealth was agreed only on the basis that the continued exemption should be specifically considered in the course of the review of the legislative instruments legislation. There is a strong argument that accountability in relation to the Government as an employer should be in the industrial relations arena. Given that the Government's current industrial relations reforms are in the process of being implemented, I believe that the exemption is appropriate at this time. It will be considered as part of the review. I am unable to agree that the exemption should be removed at this time.

The committee's basic concern with this clause is that it removes these instruments from Parliamentary scrutiny. It is not a question, as the last sentence in the quotation from the response suggests, that the exemption of these instruments from

Parliament's scrutiny should be removed at this time. At this time these instruments are not exempt from Parliament's scrutiny; it is the bill that proposes to exempt them. The response gives the impression that the committee is asking for the status quo to be changed. Rather the committee is alerting Senators that what is being removed by this bill is Parliament's ability to scrutinise how the Government exercises the subordinate legislative power that Parliament has delegated to it on these matters.

If these instruments were not legislative in character but individual decisions applying the law, the committee would agree that an industrial tribunal or court would be the appropriate forum for review. But as they are legislative instruments representing the exercise of the Parliament's legislative power which has been delegated to the executive why should not the Parliament oversee what is done in its name?

The committee, therefore, continues to draw Senators' attention to this 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.

Inappropriate delegation of legislative power?
Schedule 4 - Amendment of various Acts with respect to Rules of Court

In Alert Digest No. 5 of 1996, the committee noted that Schedule 4 regulates, inter alia, the interaction between the substantive provisions of the proposed bill and the Rules of Court of the Family Court, the Federal Court, the High Court and the Industrial Relations Court. Clause 7 of the bill provides generally that the rules of those courts are not legislative instruments for the purposes of the legislation.

Schedule 4, however, would provide that the proposed bill, with some exceptions, would apply to those rules as if they were legislative instruments. Schedule 4 also provides, however, that the provisions of the proposed bill which are to apply to the rules of court may be modified or adapted by regulations made under the Acts regulating those Courts.

The power of those regulations to modify the primary legislation is subject to two exceptions. One is that the Rules of Court of the Federal Court, Industrial Relations Court and the High Court must provide some procedure for consultation before a rule directly affecting business is made. The other is that they may not modify the provisions of Part V of the bill which regulate the Parliamentary scrutiny of legislative instruments.

The committee was of the view that it would be possible, by modifying proposed section 48, for example, to exclude the rules of court from having to be registered. This would have the effect of excluding the rules from Parliamentary scrutiny because Part V operates only on registered instruments.

The committee dealt with this issue in its Fifteenth Report of 1994 on the former bill. The committee noted that the present bill excludes Part V from itself being modified but the committee remained of the view that other modifications could be made that would prevent Parliamentary scrutiny.

The committee noted that any regulations which modified the provisions of the proposed legislation would themselves be subject to tabling and disallowance by Parliament. The committee, however, sought the advice of the Attorney-General whether, given the intention of making rules of court subject to Parliamentary scrutiny, the bill should be drafted so as to prevent modifications by regulation that would have the effect of ousting Parliamentary scrutiny.

Pending the Attorney-General's advice, the committee drew Senators' attention to the provisions, as they 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 Attorney-General has responded as follows:

> Finally the Committee is concerned that the modification allowed by Schedule 4 in respect of the application of the Bill to the federal courts may mean that Rules of Court do not need to be registered and therefore are not subject to Parliamentary scrutiny. While the proposed amendments to the enabling legislation of each of the federal courts is broadly stated it is also specifically provided that any modification made cannot affect the requirement to comply with Part 5 of the Bill ie the scrutiny of the legislative instrument. I note further that any modification is to be made by regulation and if the Parliament is not satisfied with the proposed modifications it can disallow the regulations.

The committee thanks the Attorney-General for this response. The committee, however, remains of the view that, while one part of the bill exhibits an intention that rules of court should be subject to Parliamentary scrutiny, the bill as it stands provides an avenue to prevent that scrutiny.

The committee, therefore, continues to draw Senators' attention to the provisions, as they 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.

Social Security Legislation Amendment (Budget and Other Measures) Bill 1996

This bill was introduced into the House of Representatives on 12 September 1996 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the following Acts:

- *Social Security Act 1991* to:
  - change the name of carer pension to carer payment;
  - change provisions relating to carers without affecting qualifications for payment;
  - change the sickness allowance qualification rules by removing the loss of income qualification;
  - abolish the employment entry payment and the education entry payment for all but certain pensioners;
  - extend the qualification for widow allowance to women aged at least 50 years and who were widowed, divorced or separated after turning 40 years;
  - align the conditions of payment of widow and partner allowances including common phase-out arrangements, a common definition of recent workforce experience and common access to ancillary payments;
  - extend the qualification for partner allowance to AUSTUDY, ABSTUDY and Student Financial Supplement Scheme partners;
  - facilitate the earlier phase-out of widow B pension so that there will be no new entrants to this payment and by automatically transferring widow B pensioners of age pension to age pension;
  - rationalise arrangements for recipients of age pension age by no longer granting widow and partner allowances to people of age pension age and by automatically transferring widow, partner and mature age allowance recipients attaining age pension to age pension;
  - revise impairment tables so that people whose impairments have only a relatively small impact on their overall ability to work will receive an income support payment rather than a disability support pension;
  - limit the payment of child disability allowance to 3 months before a claim is made;
  - include age pension as a compensation affected payment; and

- modify the advance payment scheme for recipients of social security entitlements;

- *Student and Youth Assistance Act 1973* to:
  - align compensation provisions with corresponding provisions in the Social Security Act;
  - ensure that two or more lump sum compensation payments made in respect of one compensable event are treated as one lump sum compensation payment for the purposes of recovery provisions; and
  - make changes to compensation recovery provisions;

- *Social Security Act 1991* and *Student and Youth Assistance Act 1973* to:
  - abolish the minimum rate of payment of sickness, newstart and youth training allowances to persons under 18 years of age;
  - allow increased voluntary work participation for unemployed people;
  - ensure that where a person is unemployed as a result of industrial action that person will remain disqualified for payment for 6 weeks after the industrial action has ceased;
  - abolish the unused annual leave waiting period and replace it with an income maintenance period;
  - extend the maximum length of the liquid assets test waiting period to 13 weeks (applicable to claimants of newstart, youth training and sickness allowances);
  - introduce a 14 day grace period to allow people to renew qualification for sickness allowance or to renew exemption from the newstart or youth training allowance activity tests, through provision of a new medical certificate;
  - amend the sickness allowance qualification rules and newstart and youth training allowances activity test exemption rules so that the sole criterion for continuing sickness allowance will be a continuing temporary incapacity for work;
  - allow the backdating of disability support pension, newstart, sickness and youth training allowances through the deemed earlier date of lodgement of a claim;
  - abolish the earnings credit scheme;
  - use a single pension cut-out point as the compensation lump sum preclusion period divisor;
  - remove the concessional treatment applied to deposit concession money;

- provide for the recovery of social security payments that have been paid to persons in excess of their correct entitlement but which are not currently recoverable as debts; and
- make amendments relating to the application, transitional and savings provisions made by the bill;

- *Social Security Act 1991*, *Student and Youth Assistance Act 1973* and *Employment Services Act 1994* to:
  - tighten activity test breach provisions relating to voluntary unemployment and refusal of a job offer;
  - reclassify certain breaches as activity test breaches;
  - extend the non-payment period for moving to an area of lower employment prospects from 12 to 26 weeks; and
  - clarify the operation of Employer Contact Certificate provisions;
- *Health Insurance Act 1973, National Health Act 1953* and *Hearing Services Act 1991* to abolish the health benefits card and issue health care cards to sickness allowees;
- *Health Insurance Act 1973* to abolish the savings provisions allowing the receipt of a health care card by people receiving family allowance supplement;
- *Social Security Act 1991* and *National Health Act 1953* to abolish the modified income test and savings provisions allowing pensioners to receive concession cards after cancellation of pension; and
- *Social Security Legislation (Carer Pension and Other Measures) Act 1995* to correct a technical error.

The committee dealt with this bill in Alert Digest No. 7 of 1996, in which it made various comments. The Minister for Social Security has responded to those comments in a letter dated 24 October 1996. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(7), Schedule 16

In Alert Digest No. 7 of 1996, the committee noted that subclause 2(7) of this bill, if enacted would provide that Schedule 16 would have retrospective effect from 1 July 1995.

The amendments to the *Student and Youth Assistance Act 1973* proposed by Schedule 16 mirror amendments made to the compensation recovery provisions of the *Social Security Act 1991* by two amending Acts in 1994 and 1995. The committee would not be concerned by the changes were they not being made retrospectively.

It appears that some amendments proposed by the Schedule will adversely affect some recipients (or their partners) of compensation for illness or injury since 1 July 1995.

As the explanatory memorandum indicates that the financial effect of the amendments is negligible, the committee sought the advice of the Minister on why the amendments need to be given retrospective effect.

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 Alert Digest also sought my advice as to why there is a need for the amendments made by Schedule 16 of the Social Security Legislation Amendment (Budget and Other Measures) Bill 1996 to be retrospective.
>
> In 1995 the then Minister for Employment, Education and Training introduced three Bills into the parliament relating to youth training allowance, namely:
>
> - the Student and Youth Assistance (Youth Training Allowance) Bill 1995;
> - the Student and Youth Assistance Amendment (Youth Training Allowance) Bill (No. 2) 1995; and
> - the Student and Youth Assistance Amendment (Youth Training Allowance) Bill (No. 3) 1995.
>
> Both the Student and Youth Assistance Amendment (Youth Training Allowance) Bill (No. 2) 1995 ("the No. 2 Bill") and the Student and Youth Assistance Amendment (Youth Training Allowance) Bill (No. 3) 1995 secured passage through the Parliament. However, the Student and Youth Assistance (Youth Training Allowance) Bill 1995 did not obtain passage and lapsed on the proroguing of the Parliament.
>
> One of the measures that had been proposed in the Student and Youth Assistance(Youth Training Allowance) Bill 1995 was to repeal and substitute section 231 (dealing with compensation recovery) of the *Student and Youth Assistance Act 1973* ("the SYA Act") with effect from 1 July 1995, mirroring amendments made to the equivalent provision in the *Social Security Act 1991*.
>
> It had also been proposed that items 10, 11, 12 and 13 of Schedule 1 of the No. 2 Bill would subsequently further amend section 231 of the SYA Act with effect from the day on which equivalent amendments made by the *Social Security Legislation Amendment (Carer Pension and Other Measures) Act 1995* received the Royal Assent. Clearly, the amendments that were proposed to be made by items 10, 11, 12 and 13 so as to extend the compensation provisions of the SYA Act to include partners who claim or receive a compensation affected pension under the *Veterans' Entitlements Act 1986*, anticipated the prior passage of the amendment proposed to section 231 by the Student and Youth Assistance (Youth Training Allowance) Bill 1995. However, as the Student and Youth Assistance (Youth Training Allowance) Bill 1995 did not obtain passage, the amendments made by items 10, 11, 12 and 13 are currently misdescribed.
>
> The amendments that are proposed to be made by Part 1 of Schedule 16 of the Social Security Legislation Amendment (Budget and other Measures) Bill 1996

will rectify this situation without adversely affecting anyone as it is understood that there is currently no person in receipt of youth training allowance who has a partner receiving a compensation affected payment under the *Veterans' Entitlements Act 1986*.

The remaining amendments that are proposed by Parts 2 and 3 of the Social Security Legislation Amendment (Budget and other Measures) Bill 1996 are of a minor nature and in any event, it is not intended that any decision made between 1 July 1995 and Royal Assent of the Bill will be revisited in the off chance that a decision might be affected by these amendments.

I trust that my comments will be of assistance to your Committee.

The committee thanks the Minister for this response, noting that the retrospectivity of the amendments will not adversely affect any present recipient of youth training allowance and that it is not intended to revisit any decision made between 1 July 1995 and Royal Assent that might be affected by these amendments.

Barney Cooney
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TENTH REPORT

OF

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SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

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

TENTH REPORT OF 1996

The committee presents its Tenth Report of 1996 to the Senate.

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

CFM Sale Bill 1996

Social Security Legislation Amendment Bill (No. 1) 1996

CFM Sale Bill 1996

This bill was introduced into the House of Representatives on 19 September 1996 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Finance]

The bill proposes to establish the framework to sell Commonwealth Funds Management Limited and its subsidiaries. It also makes amendments to various Acts and regulations resulting from the proposed sale.

The committee dealt with this bill is Alert Digest No. 8 of 1996, in which it made various comments. The Minister for Finance has responded to those comments in a letter dated 4 November 1996. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Retrospectivity
Clause 61

In Alert Digest No. 8 of 1996, the committee noted that clause 61, if enacted, would provide that subsection 48(2) of the *Acts Interpretation Act 1901* not apply to regulations made under any Act where they are connected with the sale of CFM and take effect on the sale day.

The committee noted that the explanatory memorandum, in paragraph 103, indicated as the reason for this provision that it may not be practicable to have the subordinate legislation made prior to the sale day.

Subsection 48(2) of the *Acts Interpretation Act 1901*, however, 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 CFM sale from commencing

retrospectively unless the rights of persons would be retrospectively affected so as to disadvantage them or unless liabilities would retrospectively be imposed on them. Clause 61, therefore, would apply only if peoples' rights were retrospectively disadvantaged or if obligations were retrospectively imposed on them.

The committee also noted that the Minister, in response to the concerns of the committee which it expressed with regard to a similar clause in the ANL Sale Bill 1995, wrote to the committee on 18 June 1996 as follows:

> I should note at the outset that the ANL Sale Bill was enacted on 5 December 1995. However, by virtue of section 79, the *ANL Sale Act 1995* automatically repealed with effect from 1 January 1996 because a sale agreement had not been entered by P&O by 31 December 1995. Notwithstanding this and the fact that the Bill was developed by the former Government, I would note that clause 37(1) provides flexibility to make amendments to subordinate legislation as required to give effect to a sale and is a standard provision which has been included in legislation relating to previous asset sales. It is necessary because it is not possible to be completely sure that all required amendments to subordinate legislation have been identified. Further, as the sale day is often set at short notice, it is sometimes not practicable to have amendments made to subordinate legislation to coincide precisely with the sale day.

In its Fourth Report of 1996 the committee thanked the Minister for these comments but continued to be concerned at the net effect of this provision which seems to be that, in order to ensure a possible sale, the Commonwealth was prepared to take away peoples' rights retrospectively or retrospectively impose obligations on them. The committee was, therefore, heartened by the concluding words of the Minister's letter:

> Nevertheless, the Government will keep the comments of the Committee in mind when developing future asset sale legislation.

The committee sought 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 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 main reason for the inclusion of this provision in the CFM Sale Bill, and for its inclusion in legislation relating to previous asset sales, is that it provides necessary flexibility to give effect to a sale. The Committee will appreciate that it may not be practicable to have amendments to subordinate legislation made to coincide precisely with the sale day, as the sale day is often set at short notice. It may also be the case that not all necessary amendments to subordinate legislation are identified before the sale day. However, it is not the Government's intention that any regulations in relation to the CFM sale will be made that retrospectively disadvantage any person, or impose retrospective liabilities other than matters arising from the sale arrangements that have been entered into.

> The Government will keep this matter under review on a case by case basis as it develops future asset sales legislation.

The committee thanks the Minister for this response, noting that it is not the Government's intention to disadvantage any person retrospectively other than in relation to matters arising from the sale arrangements that have been entered into.

Social Security Legislation Amendment Bill (No. 1) 1996

This bill was introduced into the House of Representatives on 9 October 1996 by the Minister for Health and Family Services. [Portfolio responsibility: Social Security]

The bill proposes to amend the *Social Security Act 1991* to:

- exclude from the value of a person's assets any amounts received from the Mark Fitzpatrick Trust;
- preserve the automatic transfer of a partner from mature age partner allowance to wife pension when the other partner is automatically transferred from mature age allowance to age pension;
- continue the effect of saving provisions by removing references to "additional family payment" and replacing those with references to the new family payment regime and to correct a technical fault; and
- correct an error in Pension Rate Calculator A.

The committee dealt with this bill in Alert Digest No. 9 of 1996, in which it made various comments. The Minister for Social Security has responded to those comments in a letter dated 31 October 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inconsistent application
Schedule 1

In Alert Digest No. 9 of 1996, the committee noted that Schedule 1 of this bill, if enacted, would give the amendments proposed by the Schedule inconsistent application from 28 September 1995, because it seemed that the relief proposed by the legislation would vary between individuals depending on the date they asked for review of their entitlement. The committee noted that the Mark Fitzpatrick Trust was established to provide financial assistance to persons with medically acquired HIV infection and AIDS and to the dependants and carers of such persons.

The committee also noted that the explanatory memorandum states:

> When the Trust was established, it was intended that payments from the Trust would not affect any income support payment being received by persons to whom payments were made........
>
> At the time, no amendment was made to the assets test provisions. A commitment to make an amendment to the assets test provisions was, however, subsequently given by the (then) Minister for Social

> Security, the Hon Dr Neal Blewett. The amendments contained in Schedule 1 honour that commitment.
>
> The previous Minister for Social Security, the Hon Peter Baldwin, wrote to the Chairman of the Trust on 28 September 1995, advising that payments from the Trust would be exempted in anticipation of this amendment being passed by the Parliament. This being so, the amendments have retrospective effect (ie to the date of Mr Baldwin's advice to the Chairman of the Trust). In particular, the social security payments of social security customers affected by the assets testing of their payments from the Trust will be able to be adjusted from the date that they apply for a review of their payment rate. Other than paying the higher rate of pensions, allowance or benefit from the date that a person applies for a review, however, no arrears will be payable.

This means that, although a class of people will be in the same situation, the time at which they will obtain relief will vary depending upon the date at which they lodge their application.

Accordingly, the earlier a person affected or to be affected by the proposed change in the law learns of it, the earlier he or she will be able to obtain the increase in payments. This means that people in similar circumstances will obtain dissimilar results for no other reason than the time they acquire knowledge of the proposal.

The committee also notes, however, that the outline and financial impact statement at the beginning of the explanatory memorandum describes the financial implications of these amendments as negligible. The committee, therefore, seeks the advice of the Minister on why the amendments should not apply uniformly from 28 September 1995 rather than impose a further burden of making applications for a rate of payment review on an already severely disadvantaged group.

The committee appreciates the view that no arrears ought to be payable where the circumstances of a social security client change, and the client, as the one best placed to know about the change, is expected to inform the Department and seek an increased rate of payment. In the committee's view, the change here is not a change in the circumstances of a client but a change, and a retrospective change, in the law.

The change appears to be applied inconsistently if there is an advantage for those social security clients who were in the know about the then Minister's intention to change the law.

In the committee's view, where the change is in the law, not in the circumstances of the client, the Department ought to implement uniformly the change for all the clients affected by the change in the law.

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:

> Schedule 1 of the Bill proposes to exclude from the value of a person's assets any amounts received from the Mark Fitzpatrick Trust (the Trust). The Alert Digest indicates that the Committee considers that Schedule 1 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 concerned that the time at which persons affected by the amendments obtain relief will vary depending upon the date on which they apply for a review of their payment rate.
>
> As you are aware, the previous Minister for Social Security (the Hon Peter Baldwin MP) wrote to the Chairman of the Trust on 28 September 1995 advising that, in anticipation of the amendments contained in Schedule 1 being passed, the value of payments made by the Trust would be exempted from the assets test. The letter advised that persons affected by the inclusion of Trust payments with other assessable assets would be able to have their social security entitlements adjusted from the date on which they apply for a review.
>
> The Trust undertook to advise recipients of the then Minister's decision and to advise them to seek a review of their rate of payment in the light that decision. On 1 November 1995, the Trust advised affected persons of the decision, enclosing a coy of the then Minister's letter of 28 September 1995. Any affected person who sought a review of their entitlements would have had their rate of payment adjusted in anticipation of the passage of the amendments in Schedule 1.
>
> Accordingly, I do not consider it reasonable for the Committee to assert that "[t]he change appears to be applied inconsistently if there is an advantage for those social security clients who were in the know about the then Minister's intention to change the law". In my view, the Department took all reasonable steps to ensure that relevant persons were (through the Trust) informed of the previous Minister's decision.
>
> Further, I do not believe that it would be appropriate for the amendments to apply uniformly from the date of the previous Minister's decision. It was not administratively feasible for my Department to identify social security customers in receipt of payments from the Trust and to adjust their payments automatically with effect from the date of the previous Minister's decision. Nor, for reasons of privacy and the sensitivities involved, did it wish to contact them directly. Rather, it relied on the Trust to advise recipients of the previous Minister's decision, and made appropriate adjustments as soon as a recipient sought review of their payment. In the circumstances, I consider that the Department has taken all reasonable steps to ensure that the previous Minister's decision has been properly carried out.
>
> I would add that it would be administratively complicated, to a degree unwarranted by the slight possibility of disadvantage to anyone who did not immediately apply for a review of their rate of payment, to calculate arrears in relation to periods prior to their application day.

I trust I have assisted the Committee with these comments.

The committee thanks the Minister for this response.

The committee, of course, considers it quite reasonable for it to seek a Minister's advice where there is an appearance of unfairness in the effect of proposed legislation. It is unfortunate that the explanatory memorandum did not contain the information that the Minister has now provided (in the third paragraph above) about the steps taken by the Trust to inform its beneficiaries. Where a clause of a bill may infringe the committee's terms of reference, sufficient information in the explanatory memorandum may enable the committee to decide that in the circumstances as explained the clause does not, for example, unduly trespass on personal rights and liberties and so merits no further comment.

Barney Cooney
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

1996

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SENATE STANDING COMMITTEE

FOR

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ELEVENTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
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Senator S Macdonald
Senator A Murray

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT OF 1996

The committee presents its Eleventh Report of 1996 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 1(a)(v) of Standing Order 24:

> Social Security Legislation Amendment (Further Budget and Other Measures) Bill 1996

Social Security Legislation Amendment (Further Budget and Other Measures) Bill 1996

This bill was introduced into the Senate on 16 October 1996 by the Parliamentary Secretary to the Minister for the Environment. [Portfolio responsibility: Social Security]

The bill proposes to amend the following Acts:

- *Social Security Act 1991* to remove the means test exemption that applies to superannuation assets in certain cases; and
- *Social Security Act 1991* and the *Student and Youth Assistance Act 1973* to:
  - set a new maximum rate of rent assistance for single people who share accommodation; and
  - ensure that overpayments of all social security benefits and youth training allowance due to public holidays are recoverable as a debt.

The committee dealt with this bill in Alert Digest No. 10 of 1996, in which it made various comments. The Acting Minister for Social Security responded to those comments in a letter received 19 November 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Jumping the gun?
Schedule 3, items 6 and 9

In Alert Digest No. 10 of 1996, the committee noted that the explanatory memorandum on page 16 states that the proposed new arrangements for prepayments of some social security entitlements and youth training allowance will come into effect in January 1997. The legislation, however, will not be considered by the Senate until some time after Parliament resumes in February 1997. This arises pursuant to the order of the Senate of 29 November 1994 the effect of which is to adjourn debate on the second reading of a bill until the next sittings.

The committee is opposed in principle to legislation commencing to operate in anticipation that the Parliament will pass the legislation in the exact form in which it has been presented as a bill, that is, that the relevant provisions will be passed and passed without amendments.

The circumstances in this case make the proposal similar to legislation by press release. The committee has made clear its consistent view that legislation by press release is unsatisfactory. Such legislation is retrospective and when it adversely affects personal rights is unfair. Where Government treats its provisions as operative

before they are enacted the question arises as to whether the Parliament will ultimately pass them into law or if it does so then whether in their original form. All this creates uncertainty.

Parliament comes to a consideration of the legislation knowing that the Executive has for some time been pursuing a course of conduct determined by the presumptions that it would be passed. This could become a factor in the considerations given to the matter.

Schedule 3 proposes amendments to give legislative authority to new arrangements for what is called holiday processing of social security benefits. The committee notes the Minister's second reading speech to the effect that at present certain social security entitlements are programmed in advance to be paid automatically on predetermined days that are earlier than usual if the recipients' normal payday falls on a holiday. The statutory bases for this are such provisions as section 660XGG for mature age allowance and section 652 for newstart allowance. The committee understands that, under the present system, the prepayment occurs prior to the Department processing the relevant statement of income and circumstances in relation to the period which the recipient lodges at the end of the period.

The new arrangements require statements, lodged prior to the normal lodgment dates, to be processed so that the prepayment is made in accordance with the estimate given. If statements are to be lodged before the end of the period to which they refer, the social security recipient is unable to make the usual statement that, as a matter of fact, a particular amount of income has been received during that period or that a change of circumstances has occurred or that the person has become aware that a change of circumstances is likely to occur.

The new arrangements will substitute a "statement" not of what a recipient knows to be a fact but a "statement" of an estimate of future income during the period or of anticipated changes of circumstances. It is not clear from the proposed legislation whether the "statement" of anticipated changes of circumstances is to be different from the present requirement to inform the Department if the person becomes aware that a specified event or change of circumstances is likely to occur. If there is no difference, the committee is not concerned about it, as it will be a statement only about what the person is presently aware of and will not require guesswork about what might happen.

The proposed amendments in item 6 of Schedule 3 refer to amounts received which are calculated 'having regard to estimated income or anticipated changes of circumstances set out in a statement made in response to a recipient statement notice in respect of the period'.

Proposed subsection 1223AA(1BA), if enacted, would provide that, where the amount received as a result of this estimation is greater than the correct amount that would have been paid if the person's actual income or circumstances had been used

to calculate the payment in respect of that period, the difference between the two amounts will be a debt due to the Commonwealth.

The committee understood from the explanatory memorandum that, apart from the Christmas/New year holidays, prepayments will now not occur unless the person lodges a statement of estimated earnings/changes of circumstances.

Several issues arose for the committee:

- Does the Social Security Act give the Secretary the power to require recipients to guess? The notices requiring these "statements" to be given are to be sent under sections of the Act that require a person to make a statement about what is known as a fact. The committee further notes that they have a penalty of 6 months imprisonment attached for failure to comply without reasonable excuse. The committee sought the advice of the Minister as to whether legal advice has been given on whether the power in those sections extends to requiring estimates and would be interested to receive a copy.
- Is it proposed to send a further notice at the end of the period so that the actual income/changes of circumstances can be obtained and used as the basis of calculations to determine whether the correct amount has been paid?
- If so, will adjustments to the recipients' payments be made automatically where, instead of a debt to the Commonwealth arising, the recipient has received less than the correct amount?
- If no such further notice is sent but the recipient has received less than the correct amount, will the recipient be required to initiate steps to obtain the correct amount within thirteen weeks of the "incorrect decision" or else lose entitlement to the amount?
- The proposed amendments state that the debt will arise whether the payment was received before or after the commencement of the section. Obviously a debt would not legally exist under this proposed subsection before the legislation is passed. Is the Minister able to give the committee an assurance that any 'debt' arising from using these procedures before the legislation is passed will not be recovered before Royal Assent?
- Finally, the committee noted that the explanatory memorandum (at p 16) indicated that the Department plans to commence using these estimates in January 1997 which will be at a time when in the normal course of events the bill will not yet have become an Act. As the explanatory memorandum makes the point that these new arrangements depend on a different type of notice being sent, why cannot the implementation of the scheme be delayed until after the legislation has received Royal Assent and avoid a situation equivalent to legislation by press release?

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

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 Acting Minister has responded to these issues as follows:

> Schedule 3 deals primarily with overpayments that arise as a result of holiday processing of social security benefits when the benefits are paid having regard to estimated income or anticipated changes in circumstances.
>
> Current holiday processing arrangements that apply where the normal application lodgement or payment cycle is interrupted by public holidays often results in overpayments, some of which are not recoverable. This is due to the fact that these arrangements enable payment of allowances in respect of a period to be processed before receipt of the usual 'recipient statement' relating to that period (eg a statement under section 658 of the ***Social Security Act 1991*** (the Act)), and therefore, before a recipient's correct rate of payment can be ascertained. Under the modified holiday processing arrangements, social security customers who would like to receive their payments before holidays will be required to lodge their recipient statement one or two days earlier than usual and estimate income and changes in circumstances for those days. The modified arrangement will result in a higher rate of correct payments, therefore reducing the number of overpayments and costs associated with their recovery. The amendments made by Schedule 3 ensure that all overpayments resulting from incorrect estimates will be recoverable.
>
> The Committee questions the power of the Secretary to the Department of Social Security to require a social security recipient to provide statements that 'require recipients to guess'. The Committee seeks advice on whether legal advice has been given regarding this issue or whether the power in the sections of the Act under which the Secretary may require a person to make a statement extends to requiring estimates.
>
> Under the recipient statement notice provisions of the Act, eg section 658 in relation to newstart allowance, the Secretary may give a recipient of an allowance a notice that requires the person to give the Department a statement "about a matter that might affect the payment of the allowance to the person". These provisions do not specify when such a statement may be required, nor do they specify a period of time to which a statement is to relate. It has always been considered that under these provisions, the Secretary may require a person to give a statement whenever it is needed for the proper administration of the Act as long as the information required relates to a matter that 'might affect the payment'. For example, earnings that a person expects to have in respect of a day, or days, that are included in a period for which a person is paid an allowance affect the person's payment as they may impact on the rate payable for the period. Consequently, the information about expected earnings (or about such circumstances as, for instance, commencing a full-time employment), being matters that may affect a payment, may be required by the Secretary under the recipient statement notice provisions. The interpretation of recipient statement notice provisions was considered, as a matter of course, in the process of drafting of this legislation by the Office of Parliamentary Counsel. The Office of Parliamentary Counsel concurred with the above interpretation.

I note in this context that recipients of allowances who are in casual employment are currently required to provide a fortnightly statement that, due to the nature of casual employment, often involves 'guessing' amounts of income in a particular fortnight.

The Committee asks whether it is proposed to send a further notice at the end of a period so that the actual income or changes in circumstances can be obtained and used as the basis of calculations to determine whether the correct amount has been paid and whether arrears, if appropriate, would be paid automatically.

As explained above, the new arrangement that requires income estimates for a part of the period for which a person is paid an allowance is aimed at reducing the number of incorrect payments that are made when an allowance is paid without any information being available to the Department. If a person provides estimates, it would allow the person to receive an early and a more correct payment.

To facilitate the above arrangement, allowees who may lodge a recipient statement earlier will receive the following message on their notification statement notice for a holiday period such as Easter:

"For the Easter period you may lodge this form early, on the date shown above. If you do so, you will need to include expected changes in circumstances and an estimate of earnings for the full period. You must tell us if there is any change in this information."

Allowees who lodge statement earlier will receive, on their next notification statement notice, the following message:

"If the last form you returned included an estimate of earnings, you mush tell us if there was a change."

Thus, all allowees who choose to lodge their recipient statements early will be advised twice of their obligations to inform the Department about inaccuracies in their estimates and will have opportunity to provide the correct information relating to the holiday period on their statement relating to a post-holiday period.

Reassessment of the payment for a holiday period would be triggered by the information provided by an allowee (usually on his or her post-holiday statement). If estimates are inaccurate, the difference between the amount paid having regard to estimates and the amount that should have been paid having regard to actual earnings/circumstances would be recoverable by the Department under the proposed subsection 1223AA(1B), or arrears would be paid to a recipient under the existing provisions.

The Committee points to page 16 of the explanatory memorandum that refers to January 19997 as the implementation date of policy changes relating to modified holiday processing arrangements. It concludes that, in view of the fact that the legislation will not be considered in the Senate until some time after Parliament resumes in February 1997, the implementation of policy changes in January 1997 makes the proposal similar to legislation by press release. The Committee then extensively comments on the inappropriateness of retrospective legislation when it adversely affects personal rights. The Committee is also concerned that new subsection 1223AA(1BA) may result in debts arising from using the new estimate procedures being recovered before the commencement of the subsection, that is, before the date of Royal Assent.

> In making these comments, the Committee appears to have overlooked the fact that the Bill was introduced into the Senate on 16 October 1996. That being the case, there would seem to be no procedural impediments to consideration of the Bill by the Senate in the current Sittings or, in fact, to its passage in this Sittings period.
>
> Having said that, and regardless of when the Bill will be passed, it cannot be seen as retrospective legislation since it is to commence on the date of Royal Assent.
>
> New subsection 1223AA(1BA) will allow the Department to raise a debt if the amount of a payment calculated having regard to estimated earnings/circumstances is higher than the amount that should have been paid taking into account circumstances/earnings that have actually occurred. As the Committee pointed out, such debts may only be raised after the commencement of this subsection (Royal Assent) and I can assure the Committee that the Department will not be using subsection 1223AA(1BA) before the date of Royal Assent to recover any difference between the amount that was paid and that should have been paid.
>
> Once the legislation commences, it will be possible to recover such a difference even in respect of a payment received before Royal Assent. The application of this provision is however limited to payments that are made on the basis of an estimate provided by the customer. As the Department does not plan to commence using the estimates earlier than Easter 1997 (estimates will not be required for the Christmas/New Year period nor for one day holidays, such as the Australia Day holiday on 27 January 1997 or the Canberra Day holiday on 17 March 1997), this provision, in a strict sense, would not apply to payments made earlier than Easter 1997.
>
> The reference in the explanatory memorandum to January 1997 as the implementation date of policy changes regarding estimates was made in anticipation of the application of those changes to the Australia Day holiday in January. As explained above, this is no longer the case.
>
> I hope this explanation is of assistance.

The committee thanks the Acting Minister for this response. The committee appreciates the extent of detailed information provided which has assisted it in understanding the processes to be used. The committee also thanks the Acting Minister for the assurance that no amounts will be recovered before the incorrect payment becomes a legal debt by the passage of the legislation.

The committee points out that, contrary to the view expressed in the response, the order of the Senate of 29 November 1994, to which the committee referred in its comments on this bill in Alert Digest No. 10 of 1966, was applied to this bill when it was introduced on 16 October 1996 (See *Journals of the Senate* 1996 p.724). The resumption of the second reading debate was made an order of the day for the first day of sitting in 1997. The application of the order therefore constituted a procedural impediment to 'consideration of the Bill by the Senate in the current Sittings or, in fact, to its passage in this Sittings period'.

The committee notes, however, that, after the Acting Minister's reply was received, the Senate has agreed to a motion to exempt this bill from the order of 29 November

1994. The bill, therefore, may be passed during these sittings and the retrospective aspects will not arise.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWELFTH REPORT

OF

1996

4 December 1996

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWELFTH REPORT

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4 December 1996

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
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Senator M Forshaw
Senator S Macdonald
Senator A Murray

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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

TWELFTH REPORT OF 1996

The committee presents its Twelfth Report of 1996 to the Senate.

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

Taxation Laws Amendment Bill (No. 3) 1996

Taxation Laws Amendment Bill (No. 3) 1996

This bill was introduced into the House of Representatives on 31 October 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
  - provide an income tax rebate for low income aged persons;
  - amend provisions to prevent the conversion of ordinary annuities to rebatable annuities and pensions;
  - raise the threshold above which the medical expenses rebate applies to $1 430 and $1 500 for subsequent years;
  - remove the exemption from tax on income derived from the sale, transfer or assignment of rights to mine for gold or for any prescribed metal or mineral;
  - change the taxation treatment of eligible investments from being on revenue account to being subject to capital gains tax;
  - remove the tax deduction for loan repayments in respect of certain loans made to co-operatives by governments;
  - provide for transitional tax issues which arise when a tax exempt entity becomes subject to tax on any part of its income;
- *Development Allowance Authority Act 1992* to require that:
  - new indirect infrastructure borrowings or refinancing infrastructure borrowings that succeed them are made only by Australian resident taxpayers; and
  - any transfer of rights by a direct infrastructure borrowing lender or repayment of a direct infrastructure borrowing is accompanied by repayment or parallel transfer of any associated indirect infrastructure borrowing or refinancing infrastructure borrowing that has succeeded the indirect infrastructure borrowing;
- *Income Tax Assessment Act 1936* to amend research and development tax concession provisions to:
  - reduce the rate of deduction for expenditure on plant, contracted expenditure and other R&D expenditure from 150 per cent to 125 per cent;
  - make companies in partnership ineligible to claim expenditure on R&D activities under section 73B;

- limit to four years the period in which tax assessments may be amended to reduce tax liability by reason of deductions allowable for expenditure on R&D activities claimed under section 73B;
- modify the deduction rules for interest, feedstock, core technology and pilot plant; and
- clarify the definition of research and development activities; and

- *Industry, Research and Development Act 1986* to amend research and development tax concession provisions to:
  - remove the Industry Research and Development Board's power to register syndicates under section 39P for the tax concession;
  - allow the Minister to provide formal advice to the Board and its committees; and
  - ensure that general administrative arrangements for research and development programs contained in the Act also apply to programs administered through delegated legislation authorised under sections 19 and 20.

The committee dealt with this bill in Alert Digest No. 11 of 1996, in which it made various comments. The Treasurer responded to those comments in a letter dated 3 December 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospective application
Schedule 1, Part 4

In Alert Digest No. 11 of 1996, the committee noted that Part 4 of Schedule 1, if enacted, would remove the exemption from tax in respect of income derived by bona fide prospectors when they sell, transfer or assign their mining rights under contracts entered into after 31 December 1996. Ordinarily, the committee would not be concerned by a budget measure, as this is, which altered the incidence of taxation on income derived during the current financial year.

Although the provisions apply only to transactions which occur after 31 December 1996, they may nevertheless be regarded as retrospective in operation. The committee acknowledged that the exemption was enacted as an incentive for prospectors to search for metals and minerals whose known resources were thought to be inadequate for Australia's needs. The amendments, however, affect the reasonable expectations, which the prospectors would have had while they were carrying out the prospecting, that the realisation of the fruits of their prospecting would be exempt from tax.

The committee noted that the amendments proposed by Schedule 2 of this bill in respect of tax exempt entities that become taxable lays down an equitable principle

that could apply in the case of the bona fide prospector. Proposed subdivision 57-C in 57-15(2) would provide that income is treated for the purposes of the Act as having been derived before a certain time if the income is in respect of services rendered, goods provided or the doing of any other thing before that time. The committee sought the Treasurer's advice on this issue.

The committee understood that some taxpayers may have been waiting for up to two years for a decision on whether they will be treated as coming within paragraph 23(pa). In the absence of that decision, their ability to sell, transfer or assign their mining rights may be adversely affected.

The committee, therefore, sought the Treasurer's advice on how the proposed legislation will affect this group of taxpayers.

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 Treasurer has responded as follows:

> I refer to the Scrutiny of Bills Alert Digest No.11 1996 and the request for advice in relation to Part 4 of Schedule 1. This provision removes the exemption from tax on income derived by 'bona fide prospectors' from the sale, transfer or assignment of certain mining rights under contracts entered into after 31 December 1996. The Committee seeks the Treasurer's advice on how the proposed legislation will affect certain bona fide prospectors, on the basis that the legislation might be regarded as retrospective in operation.
>
> The Government does not agree that the provision is retrospective in any sense.
>
> Paragraph 23(pa) only applies to prospectors when their gains from disposing of rights to mine would be income. If their gains would not be income, the paragraph can never apply (and the capital gains tax provisions have applied since 1985). The repeal of paragraph 23(pa) is similar in its effect to any other wholly prospective tax changes to the treatment of income. Like any other change to the treatment of income yet to be earned, it may impact on the after-tax returns on decisions already made. For example, companies which have already invested in an income-producing business could be favoured or disadvantaged by subsequent changes to the corporate tax rate. Individuals who have obtained employment could be favoured or disadvantaged by subsequent changes to personal tax rates, or to their deductions or rebates. This is why the Committee is correct to acknowledge that it would not ordinarily be concerned by a budget measure such as this which altered the incidence of taxation on income derived only after the measure was announced.
>
> The Government must retain the right to make changes to the taxation system in response to changing circumstances. Paragraph 23(pa) was originally introduced to encourage Australia to become self-sufficient in minerals in which domestic reserves were thought to be inadequate for domestic needs. Each metal and mineral added to the schedule was included for that reason, though none has been removed as its known reserves have increased. This purpose is no longer relevant today.

The Government originally announced that the exemption would be removed for income derived from contracts entered into from 7.30 pm 20 August 1996. The date of effect was later moved to 31 December 1996 in order to limit any adverse effect on those prospectors who were in the process of selling rights to mine when the Budget announcement was made.

The Committee is concerned that prospectors may have reasonable expectations before carrying out prospecting that the fruits of their prospecting would be exempt from tax.

- Prospectors often look for a variety of metals and minerals, only some of which are covered by paragraph 23(pa). The metal or mineral actually discovered may not be prescribed.
- If prospectors go on to mine themselves, rather than selling a right to mine, there is no benefit for the prospector under paragraph 23(pa). Prospectors are not usually precluded either practically or otherwise from developing a find themselves.
- The prospector may not have carried out most of the field work of prospecting for the metal or mineral of which the right to mine might be sold (because this depends on how much work others do or have already done); in most of the areas where prospecting for gold is carried out by small prospectors, there have been many decades of previous work by others. Prospectors do not normally investigate the *amount* of field work already done before deciding to prospect (though they may well base their decision to do further work on some of the results of earlier work in the area).
- Field work no longer covers much of the work done by a modern prospector. Most of the work is done elsewhere — for example, investigation of past surveys, carrying out and reading seismic or other remote surveys, or computer-based and other geologic modelling. It is not uncommon that little or “no field work of prospecting” is done at all.

The fact is that most prospectors would not in all probability be eligible for the paragraph 23(pa) income tax exemption when their mining rights are sold. I therefore find it difficult to accept any argument that the Budget measure combined with the post-Budget modification to extend the date of effect to 31 December 1996 to allow ‘bona fide prospectors’ to sell their rights free of tax is likely to result in a depressed market. Rather, the sale of these few tenements is unlikely to have a significant impact on the market. Moreover, because there is often considerable uncertainty as to whether proceeds from a sale would qualify for an exemption under paragraph 23(pa) until after the transaction is completed, there is further reason for supposing that the Government’s decisions will have a limited impact on the market.

The Committee mentions proposed new subsection 57-15(2), which is also contained in TLAB No.3, as laying down an equitable principle which could apply in this instance. However, because the value of the right crystallises suddenly, that particular provision would be unlikely to have the effect you suppose if applied fairly to bona fide prospectors. To use the language of that section there is no "thing" which is done before the actual discovery or other event which the derivation of income can be treated as "in respect of". The only such “thing” is the sale of the right to mine.

> Of the provisions in proposed new Division 57 proposed new section 57-25 would have been more relevant. That section effectively ensures that gains and losses on assets accrue only from the time the exempt entity becomes taxable.
>
> In order to provide similar treatment for prospectors, rights would have to be valued at an effective date and any later increase would be subject to taxation and any decrease allowable as a revenue loss. I have been advised by the Australian Taxation Office (ATO) that valuation of unsold rights to mine is a difficult and imprecise practice and would be likely not to provide accurate results.
>
> You also sought advice on how the proposed legislation will affect taxpayers who "may have been waiting for up to two years for a decision on whether they will be treated as coming within paragraph 23(pa)".
>
> I have been advised by the ATO that it is unaware of any requests which have taken more than a few months to respond to. The ATO further pointed out that it is not until a right is actually sold that they can rule with entire confidence that the income will be exempt in terms of paragraph 23(pa). This is largely due to the need to determine whether the taxpayer is a "bona fide prospector" within the meaning of the paragraph. It is not until sale that this issue is able to be finally determined. Consider the following not unusual scenario - A prospector has done the only field work so far in relation to a tenement and has discovered deposits of a prescribed metal. At this stage the prospector would probably be a 'bona fide prospector'. The prospector invites the interest of a large mining company. The mining company then does so much more field work that the original prospector has no longer done the major part of the field work. When the right is actually sold the prospector would not be a 'bona fide prospector' within paragraph 23(pa) and its income from the sale would be subject to tax.

The committee thanks the Treasurer for drawing the attention of the committee to the many facets of this complex problem. The information will be invaluable in the debate on this measure in the Chamber.

The committee has also received representations from Mr Noel Crichton-Browne, a copy of which is also attached to this report.

With respect to the Treasurer's response, while it is true that the income is derived at the point of sale or other disposal and perhaps it is true that the value of the right crystallises suddenly, the committee is not persuaded that the measure is the same as altering the current personal rates of tax on individuals in employment.

The income of an individual in employment is generally derived from labour carried out during that year. In the case of the prospector, it appears that the labour could be over many years, in each of which the prospector had the expectation that the fruits of his labour for that year would be exempt from tax.

The committee appreciates the assessment difficulties for the Australian Taxation Office. Nevertheless, the committee is not persuaded that there is not an element of unfairness and leaves the matter for ultimate resolution by the Senate.

The committee continues to draw the 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.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

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

THIRTEENTH REPORT OF 1996

The committee presents its Thirteenth Report of 1996 to the Senate.

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

Bankruptcy Amendment Bill 1996

Migration Legislation Amendment Bill (No. 3) 1996

Bankruptcy Amendment Bill 1996

This bill was introduced into the House of Representatives on 9 October 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Bankruptcy Act 1966* and the proposed *Bankruptcy Legislation Amendment Act 1996* to make amendments consequential upon the Bankruptcy (Estate Charges) Bill 1996 and the Bankruptcy (Registration Charges) Bill 1996. It proposes to effect the change from imposing fees by regulation to enacting separate legislation imposing charges.

The committee dealt with this bill in Alert Digest No. 9 of 1996, in which it made various comments. The Attorney-General responded to those comments in a letter received 19 November 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

General comment

In Alert Digest No. 9 of 1996, the committee noted that it would like to take the opportunity in dealing with this bill to seek the advice of the Attorney-General with regard to the drafting technique used in it.

The committee noted that the technique has become common, even general. The committee referred to the now almost universal practice of putting into schedules attached to a bill the amendments proposed to be made to an Act of Parliament. These amendments used to be made within the body of the bill.

This format has implications for Parliamentary procedure.

A clause in a bill may be opposed in the Committee of the Whole and, upon the question being put that the clause stand as printed, be negatived. An equality of votes will mean the question is resolved in the negative.

The issue arises as to whether a schedule must be regarded as though it were a single clause or whether each item of the schedule can be treated discretely.

If the schedule must be treated as one clause, then to defeat one or more items the whole must be opposed.

The committee understands that it is the practice of the Senate to treat, for these purposes, each item of a schedule as if it were a clause of a bill. This prevents the form in which the amendment is proposed from affecting the ability of the Senate to defeat that amendment.

Accordingly, the committee asked the Attorney-General to explain to the committee why this technique of drafting is used.

The committee had no other comment on this bill.

The Attorney-General has responded as follows:

> The Office of Parliamentary Counsel has been experimenting with the use of Schedules for amendments for some years now. Since the Office adopted new formats for Bills in April this year, all amendments are made in Schedules.
>
> There are a number of reasons for the Office's approach, some relating to drafting efficiencies and others to the new Bills production processes.
>
> Schedules were originally used only for various forms of minor technical amendments. However, during the 1980s, amending forms for use in Schedules were developed which were substantially shorter and simpler than the forms used in clauses of a Bill (examples of clause forms and Schedule forms are attached).
>
> From 1993, the Office made increasing use of Schedules in amending Bills. As well as the advantages to drafters and readers of shorter amending forms, there are other advantages in using Schedules for amendments.
>
> The principal one relates to the ability to number Schedules independently of each other. Combined with grouping related amendments into separate Schedules, this provides substantial efficiencies in cases in which amendments relating to a particular topic are abandoned or deferred late in the drafting of a Bill. The omission of clauses dealing with a particular topic from a Bill may require substantial renumbering and checking of cross-references. By contrast, the omission of a whole Schedule, even an early Schedule, requires only renumbering of the remaining Schedules, not of each item with the remaining Schedules.
>
> This approach also has efficiencies where different groups of amendments are drafted by different drafting teams. It is much easier (both as a drafting matter and electronically) to combine independently drafted Schedules into a single Bill than to combine independently drafted clauses into a Bill.
>
> The new Bills production processes introduced in April this year in conjunction with new Bills formats involve the production by the Office of Parliamentary Counsel of electronic camera-ready copy for AGPS.
>
> The production of electronic camera-ready copy requires the use of "styles" (electronic tags applied to each kind of text which provide automatic formatting). It is vital to this process, and to the subsequent use that can be made of the electronic version of a Bill, that the correct styles are used for each kind of provision in the Bill.
>
> In these circumstances, the Office of Parliamentary Counsel was keen to minimise the number of different styles that would have to be used by staff creating and editing Bills. It was therefore proposed that, in the future, all amendments would be handled in Schedules, and that no styles would be created for amending clauses in Bills. I understand that the Office of Parliamentary Counsel consulted the Clerks of the Senate and the House of Representatives over an extended period about the proposed new formats.

In summary, the schedule amendment technique provides substantial drafting efficiencies and benefits readers. Of course, neither of these outcomes would justify a real interference with the Senate's ability to deal appropriately with individual amendments. I understand, however, the Senate procedures are flexible enough to ensure that the use of Schedules does not cause such interference.

The First Parliamentary Counsel would be happy to provide you with further briefing on this drafting technique.

The committee thanks the Attorney-General for this response.

Migration Legislation Amendment Bill (No. 3) 1996

This bill was introduced into the House of Representatives on 16 October 1996 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the following Acts:

- *Migration Act 1958*, the *Immigration (Education) Act 1971* and the *Migration (Health Services) Charge Act 1991* to make amendments to facilitate the introduction of the proposed visa application charge;
- *Migration Act 1958* to:
  - enable the Minister to limit, if necessary, the numbers of people in every migration category able to enter Australia each year; and
  - enable a distinction to be made in regulations and decision-making between married people and those in de facto relationships, for the purposes of visa applications; and the
- *Migration Act 1958* and the *Australian Citizenship Act 1948* to remove Australian citizenship from naturalised citizens if their citizenship was obtained following fraudulent claims in their visa applications or application for Australian citizenship.

The committee dealt with this bill in Alert Digest No. 12 of 1996, in which it made various comments. The Minister for Immigration and Multicultural Affairs responded to those comments in a letter dated 4 December 1996. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Exclusion of application of *Sex Discrimination Act 1984*
Schedule 3

In Alert Digest No. 12 of 1996, the committee noted that schedule 3, if enacted, would exclude the operation of the *Sex Discrimination Act 1984* in relation to certain regulations dealing with visa applications. Its effect would be that de facto couples would be able to be treated differently from married couples, contrary to the current provisions of the *Sex Discrimination Act 1984.*

As the *Sex Discrimination Act 1984* is a major legislative bulwark of human rights in this country, its exclusion could be warranted only in the most serious circumstances. The issue for the committee is whether the circumstances in this instance justify the exclusion. The committee, therefore, sought the advice of the Minister on this issue.

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 in expressing concern that exclusion of the operation of the *Sex Discrimination Act 1984* should only be warranted in the "most serious circumstances", has queried whether the circumstances of this Bill justify the exclusion.
>
> In the Bill and through these particular amendments, the Government is seeking to ensure that the integrity of the migration program is not undermined. The Government is concerned at evidence that too many visas are being granted on the basis of relationships which are not genuine. Such abuse threatens the integrity of the program through the entry into Australia of persons who would otherwise be ineligible for migration.
>
> A key feature of migration entitlements based upon relationships must be that only those who have demonstrated they are committed to the relationship with their Australian partner should be eligible to liver permanently in Australia and enjoy the rights and benefits that ensue. It is a major flaw that there is currently no minimum period of relationship in legislation for people who apply to live in Australia on the grounds of being in a de facto relationship with an Australian. As a result, applications are being made where couples have only been together for short periods, in some instances only a matter of a few weeks. Such relationships can provide very little evidence of long-term commitment.
>
> An evaluation of onshore spouse provisions at the beginning of this year provided empirical evidence that this is an area of concern, with de facto relationships being twice as likely as de jure marriages to break down during visa processing alone. Almost two in five spouses applying for residence in Australia do so on the basis of a de facto relationship.
>
> The proposed amendment will enable the Migration Regulations in future amendments to specify the nature and incidents of the relationship for the purpose of establishing a de facto relationship. This is seen as the most flexible means of achieving the Government's commitment to the Australian people to reduce abuse of migration based on fabricated or non-bona fide relationships. I am mindful of the need to provide for flexibility to facilitate those situations which warrant an exception to that cohabitation period.
>
> I believe that the mischief of bogus and short term relationships is sufficiently serious to justify the exception to the *Sex Discrimination Act 1984.* The Coalition's Immigration Policy Statement of 9 February 1996 signalled the Government's intention to introduce this measure to restore the integrity and community confidence in the migration program.

The committee thanks the Minister for this careful response.

Time limits on prosecution for summary offences
Schedule 4, item 5

In Alert Digest No. 12 of 1996, the committee noted that Item 5 of Schedule 4, if enacted, would prospectively remove the ten year limitation period for commencing proceedings to prosecute an offence against subsection 50(1) of the *Australian Citizenship Act 1948.*

The offence consists of concealing a material circumstance or making a false or misleading statement in relation to, or for the purposes of, the Act. Conviction carries a penalty of up to $1 000 or imprisonment for six months or both.

The committee questioned whether there is an unfair difference in the treatment of summary offences by removing the ten year limitation on prosecution for this summary offence. Time limitations on prosecutions apply almost universally to other summary offences. The committee, therefore, sought the advice of the Minister on whether the difference in treatment is warranted.

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 has questioned whether there is an unfair difference in the treatment of summary offences by removing the ten year limitation for commencing a prosecution for an offence against sub-section 50(1) of the *Australian Citizenship Act 1948* when the limitations apply almost universally to other summary offences.
>
> I do not believe that removal of the time limit could be called "unfair" when viewed in the context of the intention of the overall amendment. The proposed amendment reflects the Government's commitment to ensuring that the value of Australian citizenship is not undermined by allowing the grant of Australian citizenship to stand where it was obtained on the basis of fraud.
>
> Of course, the mere conviction of one of the offences does not necessarily lead to a person being deprived of Australian citizenship. The conviction simply enlivens the Minister's discretion to deprive a person of citizenship if the Minister is satisfied that it would be contrary to the public interest for the person to continue to be an Australian citizen. Furthermore, there are safeguards in relation to dealing with children and a decision to deprive a person of citizenship is subject to full merits review by the Administrative Appeals Tribunal as well as judicial review by the Courts.
>
> The Government's commitment *could* be achieved without removing the time limit for prosecution, by instead removing the requirement for a conviction (as is the case in some other countries, such as New Zealand, Canada and the United Kingdom). However, I believe that option would be inappropriate: the requirement for a conviction ensures that a person will not be deprived of citizenship unless the person has been found, in accordance with *judicial process* to have knowingly committed fraud. Hence, the Bill proposes that the requirement

for a conviction be maintained. The measure is, therefore, designed to ensure "fairness".

In addition, it is worth noting that the general Commonwealth criminal law policy reflected in the *Crimes Act 1914* is that an offence punishable by imprisonment for more than 6 months, up to and including 12 months, is a summary offence (section 4H), yet will have no time limitation on commencing a prosecution (subsection 15B(1)). It is, therefore, not correct to say that time limitations apply almost universally to other summary offences.

Finally, these measures will only have a prospective effect, applying to applications for citizenship made after the commencement of the new provisions.

I am satisfied that the two matters contained in this Bill are needed to maintain the integrity of the migration program and to ensure that the national value attached to Australian citizenship is not undermined.

In passing this Bill, Parliament would be clearly seen as implementing further measures to ensure that only those persons who are bona fide in their claims to enter Australia or become Australian citizens may do so.

I trust I have assisted the Committee with these comments.

The committee thanks the Minister for this response.

Barney Cooney
Chairman