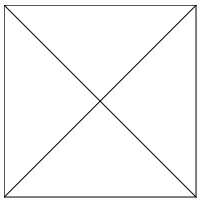

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

1997

5 February 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

1997

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ISSN 0729-6258

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

FIRST REPORT OF 1997

The committee presents its First Report of 1997 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:

Marine Personnel Legislation Amendment Bill 1996

Marine Personnel Legislation Amendment Bill 1996

This bill was introduced into the Senate on 27 November 1996 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the *Seafarers Rehabilitation and Compensation Act 1992* and the *Occupational Health and Safety (Maritime Industry) Act 1993* to address inconsistencies and anomalies in the current legislation. The amendments flow from recommendations by the tripartite Seafarers Safety, Rehabilitation and Compensation Authority to improve the administration of workers' compensation and occupational health and safety schemes.

The committee dealt with this bill in Alert Digest No. 14 of 1996, in which it made various comments. The Minister for Transport and Regional Development has responded to those comments in a letter dated 4 February 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(3)

In Alert Digest No. 14 of 1996, the committee noted that subclause 2(3) of this bill, if enacted, would give retrospective effect to item 9 of Schedule 2 from 18 July 1994.

The committee saw no reason for the need to insert the proposed provision. In its view, the general regulation making power in section 121 would include the power to impose penalties for contravention of regulations made under the Act.

The committee would be interested in the reasons for inserting a specific power.

The committee noted that the explanatory memorandum asserts that the retrospective commencement will not be to anyone's detriment 'because no penalties have been imposed under those regulations (and no prosecutions are pending).'

The committee, therefore, sought the Minister's advice on the need for retrospectivity as the amendment would be just as effective if it commenced on Royal Assent.

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 Attorney-General's Department has noted that the power to make regulations under section 121 of the *Occupational Health and Safety (Maritime Industry) Act 1933* "may be wide enough to support the inclusion of pecuniary penalties relating to the regulations that create offences, but it is at least arguable that it is not" and has recommended that the Act be amended as soon as possible to provide a specific power to make regulations that prescribe penalties not in excess of $1,000.
>
> As there is some doubt about whether the existing regulation making power is wide enough to support the making of regulations imposing penalties, the amendment to section 121 should proceed to remove this doubt. The proposed amendment will also serve to limit the maximum penalty that may be included in regulations.
>
> The amendment is proposed as a retrospective amendment to remove any doubt about the validity of the penalties in the regulations. If a court was to rule that section 121, as in force when the regulations were made, did not support the inclusion of pecuniary penalties in the regulations, then the existing penalties in the regulations would be *ultra vires*. The impact of the retrospectivity on people's rights and liberties will be negligible, as no penalties have been imposed under the regulations and no prosecutions are pending.
>
> The proposed amendment of section 121 and its retrospective application are both important to ensure the validity of the existing penalties in the Occupational Health and Safety (Maritime Industry) Regulations.

The committee thanks the Minister for this response. The committee notes that the reason for the amendment is to ensure the validity of the existing penalties because of the doubt raised by the Attorney-General's Department. The committee, however, continues to be concerned at the need for retrospectivity. The committee questions whether 'the impact of the retrospectivity on people's rights and liberties will be negligible because no penalties have been imposed and no prosecutions are pending'. In the committee's view, the impact of the retrospectivity will be far from negligible if, at some future time, a proÜ¥e_=À

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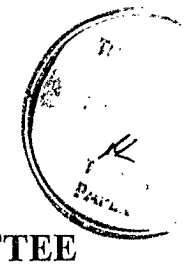
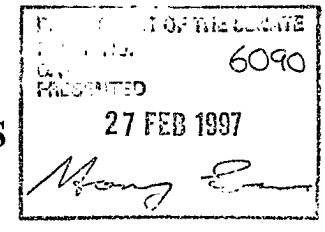


SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS



SECOND REPORT

OF

1997

26 February 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SECOND REPORT

OF

1997

26 February 1997

ISSN 0729-6258

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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(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 1997

The committee presents its Second Report of 1997 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:

Crimes and Other Legislation Amendment Bill 1996

Financial Laws Amendment Bill 1996

Telecommunications (Numbering Fees) Amendment Bill 1996

Crimes and Other Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the following Acts:

- *Australian Federal Police Act 1979* and the *Crimes (Superannuation Benefits) Act 1989* to correct anomalies in relation to the cancellation of employer funded superannuation benefits;
- *Crimes Act 1914* to increase the value of a penalty unit in all Commonwealth statutes from $100 to $110;
- *Customs Act 1901* to enable the Commonwealth to recover costs incurred in relation to the storage and maintenance of confiscated goods such as vehicles and vessels used in drug trafficking;
- *Extradition Act 1988* to:
  - modify restrictions on further applications for bail by persons who have been remanded in custody under the Act pending their extradition hearing; and
  - require that a person who has been arrested having escaped from custody under the Act is to be taken before a magistrate who may issue a warrant authorising return of the person to custody;
- *Proceeds of Crime Act 1987* to:
  - allow for extensions of time to be granted for the making of an application in relation to restrained property;
  - make provision for a defence of reasonable corporate precaution for offences committed by bodies corporate;
- *Witness Protection Act 1994* to enable a Program participant, a former participant or a person who has undergone assessment to make disclosure, without obtaining the consent of the Commissioner, when making certain complaints to the Ombudsman; and
- Commonwealth Acts to remove provisions requiring the consent of a Minister before a prosecution can be instituted against a person suspected of a Commonwealth offence.

The committee dealt with this bill in Alert Digest No. 1 of 1997, in which it made various comments. The Attorney-General responded to those comments in a letter

dated 11 February 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 1 of 1997, the committee noted that subclause 2(2) of this bill, if enacted, would allow various items in Schedule 1 to have retrospective effect. The committee noted from the explanatory memorandum that the retrospectivity is for the purpose of correcting earlier drafting errors.

The committee, however, was concerned at the possible adverse effect on individuals of the retrospective correction of the error. The committee sought clarification from the Attorney-General on whether there may be adverse effects on any individual because the error is corrected retrospectively rather than from Royal Assent.

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

The Attorney-General has responded as follows:

> The paragraphs in question are technical amendments to correct a misdescribed amendment to the *Proceeds of Crime Act 1987*. In each case section 46 of the *International War Crimes Tribunals Act 1995* was referred to whereas the correct reference should have been section 45.
>
> Legal advice was obtained following discovery of the errors to the effect that it is likely that a court would regard the incorrect reference as a patent mistake and interpret the amendment as referring to section 45 of the *International War Crimes Tribunals Act 1995* and not section 46.
>
> Section 45 of the *International War Crimes Tribunals Act 1995* enables the Director of Public Prosecutions to apply for registration in a specified court of a forfeiture order made in relation to property believed to be in Australia when so requested by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Former Yugoslavia Tribunal) or by the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (the Rwanda Tribunal).
>
> No applications for registration of Tribunal forfeiture orders have been received by my Department from either of the Tribunals and I am advised that there are none under consideration at this time.

In these circumstances I do not consider that any personal rights and liberties will be adversely affected by the amendments contined in items 21, 22, 23 and 27 of the Bill.

The committee thanks the Attorney-General for his assistance.

Financial Laws Amendment Bill 1996

This bill was introduced into the House of Representatives on 21 November 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend 13 Acts and to repeal the *Insurance (Deposits) Act 1932*. Principally, the bill proposes to:

- enable efficient sharing of information between the Reserve Bank and the Insurance and Superannuation Commission and between those organisations and other domestic and overseas financial regulators;
- to extend by two years the deadline by which foreign bank subsidiaries or money market corporations can apply for, and convert to, branch banking and qualify for the concessional taxation and other treatment provided by legislation;
- enable the prudential controls of the *Insurance Act 1973* to be extended to companies related to an insurer where the related company and the insurer seek the approval of the Insurance and Superannuation Commissioner for such an extension;
- prevent insolvent or near-insolvent insurance companies from using the AAT process to defer the application of regulatory directions designed to protect the interests of existing policyholders, such as orders to freeze assets or cease trading;
- make minor adjustments to the balance of the respective interests of consumers and insurers under insurance contracts, remove drafting errors and technical difficulties, and give legislative backing to the industry based Code of Practice for the general insurance industry, and an industry based Code of Practice for insurance brokers;
- make provisions gender inclusive;
- update provisions that create offences in line with the current Commonwealth criminal law policy;
- delete obsolete references to Papua New Guinea; and
- update definitions by reference to the *Corporations Law*.

The committee dealt with this bill in Alert Digest No. 13 of 1996, in which it made various comments and sought the advice of the Treasurer on a number of issues. Before any response had been received by the committee, the President of the Administrative Review Council wrote to the committee specifically on the issue of

removing the jurisdiction of the AAT to review certain decisions. In Alert Digest No. 1 of 1997 the committee quoted the letter of the ARC and reiterated its comments on the bill.

The committee has since received a letter from the Assistant Treasurer dated 4 February 1997. A copy of that letter is attached to this Report and the relevant parts are discussed below.

Non-reviewable decisions
Items 32 and 33, Schedule 12

In Alert Digest No. 13 of 1996 the committee noted that items 32 and 33 of Schedule 12 propose amendments that would remove various decisions of the Insurance and Superannuation Commissioner from review by the Administrative Appeals Tribunal.

The committee noted in the Minister's second reading speech that:

> ....the amendments will enhance the security of insurance policy holder interests by removing certain regulatory decisions from review by the Administrative Appeals Tribunal (AAT). This will prevent insolvent or near-insolvent companies from using the AAT appeal process to defer the application of regulatory directions designed to protect the interests of existing policy holders, such as orders to freeze assets or cease trading.
>
> This exemption from AAT review is consistent with similar exemptions contained in prudential legislation covering the superannuation sector. The Insurance and Superannuation Commission's regulatory powers in this regard will be checked by the need for the Commissioner to obtain Ministerial consent for decisions that are non-reviewable by the AAT. In addition, exemption from AAT review will be subject to a five year sunset clause.

In the committee's view, the matter was one of striking a balance between the interests of the policy holders and the interests of the insurance companies. The committee noted that the explanatory memorandum speaks of the appeal system's 'potential for ensuing time delays to jeopardise policy owners interests'. The committee sought the Treasurer's clarification on this point which is crucial to deciding where a proper balance lies.

Pending the Treasurer's advice, the committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

In Alert Digest No. 1 of 1997 the committee noted that on this issue, the President of the Administrative Review Council had written to the committee as follows:

I refer to the comments made by the Scrutiny of Bills Committee in Alert Digest No. 13 of 1996 concerning proposed amendments included in the Financial Laws Amendment Bill 1996 that will result in non-reviewable decisions in the *Life Insurance Act 1995*.

As the Committee is aware, the Council has a statutory function under the *Administrative Appeals Tribunal Act 1975* to ascertain and keep under review classes of administrative decisions that should be subject to review and to advise on the appropriate body to make that review. Therefore, it has an interest in amending legislation that removes existing review rights.

The Council notes that in addition to the provisions of the Financial Laws Amendment Bill that will remove jurisdiction of the Administrative Appeals Tribunal (AAT) specified by the Committee in Alert Digest 13 (Items 32 and 33 of Schedule 12 of the Bill) there are other provisions in that Bill that will also remove AAT review rights. These provisions are included in Schedule 5 of that Bill and concern amendments to the *Insurance Act 1973*. The types of decisions which will no longer be reviewable by the AAT are similar in both the Insurance Act and the Life Insurance Act.

The Council notes the intention of the amendments as indicated by the Minister in the Second Reading Speech is to protect the interests of policy holders. In doing so, the amendments negate the rights of insurance companies and life insurance companies to have decisions that affect them independently reviewed on their merits.

The Council considers that a strong case needs to be made out when existing rights are to be removed. The Council is not aware that the existence of AAT review for the decisions affected by these amendments has obstructed proper administration of the law to date but in any event, the fact that a right is capable of being misused does not negate the value of that right.

Provision is made in both the Insurance Act and the Life Insurance Act to ensure that Presidential members and members with special skills in the insurance field hear applications for review of these decisions. Moreover, the AAT has power to expedite hearings and uses this power in cases of real emergency. If there is a need to act quickly to protect the interests of policy holders the AAT would take this into account.

The Council acknowledges that these are prudential decisions and that there will be a need to act quickly in some cases. It also notes the Committee's comment at the bottom of page 6 of Alert Digest 13/96 that the matter is one of striking a balance between the interests of policy holders and the interests of the insurance companies. However, given that the Council is not aware that insurance companies and life insurance companies have misused the availability of AAT review rights to date and that the ability of the AAT to expedite proceedings means that the mere existence of a right of review by the AAT does not significantly delay matters to the detriment of policy holders, the Council does not consider that a case has been made out for removal of existing rights to AAT review of the decisions concerned.

The committee sought the Treasurer's advice on the views of the Administrative Review Council on this issue, which it supports.

In his letter of 4 February 1997 the Assistant Treasurer responded on the issue of AAT jurisdiction as follows:

> I am replying on the Treasurer's behalf as the administration of banking, insurance and superannuation legislation falls within my Ministerial responsibilities.
>
> I understand the Committee has concerns regarding proposals in FLAB to remove various decisions of the Insurance and Superannuation Commissioner (the Commissioner) from review by the Administrative Appeals Tribunal (AAT), and the extension of the range of persons or bodies to whom information may lawfully be passed. In response to the Committee's concerns, I draw your attention to the following.
>
> On the issue of non-reviewable decisions, Items 32 and 33 of Schedule 12 of FLAB amend the *Life Insurance Act 1995* to provide that certain decisions of the Commissioner will no longer be subject to AAT review. **Instead, these decisions by the Commissioner will be subject to approval by the Minister.**
>
> The decision making powers proposed to be amended by Items 32 and 33 are significant tools in the prudential supervision of life insurance companies. They are generally exercisable only when it is apparent that policyholders' funds may be put at risk if immediate action is not taken. The powers include the Commissioner's ability to make directions as to solvency and capital adequacy; to 'freeze' assets; and to prohibit a life company from issuing new policies.
>
> Recent ISC enforcement experience has demonstrated the potential for insurance companies to use the AAT processes to frustrate the Commissioner in his proper supervision of insurance companies. In this particular case it was a general insurance company but the observations apply equally to life companies. The company in this instance was able to continue trading while its application to stay directions of the Commissioner to either increase capital or cease trading was considered by the AAT.
>
> During the AAT review process, the Commissioner's decision can be reviewed on both its merits, and on the decision making process. The ability of the AAT to review the merits of a decision means that it is relatively simple for an insurer to obtain a stay of the Commissioner's decision while the review is under way. This process could potentially take weeks or months. **As a consequence, policyholders' financial interests and security can be put at risk.**
>
> Notwithstanding the proposed removal of the right to appeal to the AAT, limitations on the exercise of powers by the Insurance and Superannuation Commissioner will be retained. The Commissioner's relevant decisions must be made with the concurrence or agreement of the Treasurer (or his or her delegate, such as the Assistant Treasurer). In addition, a review of the decision making process may be made by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR). Unlike an appeal to the AAT, an appeal to the Federal Court can only be made on the legality of the decision making process itself and not on the merits of the decision. There is, therefore, reduced opportunity or ability to stay proceedings and delay the implementation of the Commissioner's decisions provided they are legally sound.
>
> Clearly, as the Alert Digest points out, the matter is one of striking a balance between the interests of the policyholders and the interests of insurance companies. Sometimes the AAT can deal with company appeals expeditiously,

> but there are occasions where, for one reason or another, proceedings become more drawn out. The risk of such delays impeding the swift and decisive action that the Commissioner must sometimes take in order to avert major losses to policyholders is significant; it would only take a single company collapse to seriously erode public confidence and stability in the insurance sector. Removing the scope for AAT review benefits policyholders by ensuring this risk (insofar as it is exacerbated through AAT processes) is eliminated, without depriving insurance companies of the right to challenge the legality of the Commissioner's decisions in courts of law.
>
> While the Government firmly believes in the appropriateness of these proposed new review arrangements, it recognises the significance of removal of AAT review. Therefore, it is also proposed that the new arrangements should be subject to a 'sunset' clause of five years. This will ensure that the workability and appropriateness of the arrangements can be review in the light of experience.

The committee thanks the Assistant Treasurer for this response and notes the sunset proposal. Nevertheless, the issue of whether the right balance between the competing interests has been struck is so important that, for ultimate resolution by the Senate itself, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

In Alert Digest No. 13 of 1996, the committee had also sought the advice of the Treasurer with respect to the appropriateness of a number of amendments which would delegate the legislative power of Parliament.

Inappropriate delegation of legislative power
Information sharing amendments

In Alert Digest No. 13 of 1996, the committee noted that a number of amendments proposed in this bill would extend the range of persons or bodies to whom information may lawfully be passed. The relevant amendments are contained in Schedule 5, item 108; Schedule 6, item 29; Schedule 7, item 60; Schedule 8, item 4; Schedule 12, items 38-51; Schedule 13, item 2; and Schedule 14, items 3-17. The committee noted that, in each case, there is a 5 year sunset clause which will bring about a review of the provisions. However, the committee observed that, in the meantime, disclosure under these provisions would be made to 'financial sector supervisory agencies', 'law enforcement agencies' and 'overseas financial sector agencies'. The particular agencies, however, are to be specified only in regulations.

The committee sought the advice of the Treasurer on whether, in relation to such a sensitive matter as the disclosure of private information, it might not be more appropriate that the agencies be specified in primary legislation.

Pending the advice of the Treasurer, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

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

> I note the Committee's concern that particular agencies to which information may be legally passed are to be specified only in regulations and that this may be considered an inappropriate delegation of legislative powers. In the Government's view, the delegation of the definition of specific 'financial sector supervisory agencies', 'law enforcement agencies' and 'overseas financial sector agencies' to regulation is necessary to enable flexibility to include newly constituted bodies and to ensure that the legislation is sufficiently responsive in times of crisis in both domestic and international financial markets. I note that the G7 Finance Ministers have encouraged financial regulators world-wide to cooperate and exchange information in a more flexible and responsive fashion, to better protect international financial stability.
>
> It is not possible at this time to set out all the specific agencies which would be included within the proposed information sharing arrangements. The structure of the international financial system is dynamic, and the range of organisations to be included in this list will vary over time, depending on the nature and extent of foreign participation in Australian insurance markets, and the names of organisations that change due to restructuring. Against this background, including the names of organisations in the Bill would appear to be unduly restrictive and inflexible.
>
> Further, there are a number of safeguards against abuse of this delegated power. In particular, agencies will be expected to put in place suitable administrative arrangements (such as bilateral agreements or Memoranda of Understanding) to ensure strict confidentiality standards are maintained before any information sharing would take place. The decision to include a particular agency under regulation would be subject to Parliamentary scrutiny via a disallowable instrument. In the Government's view this approach, and the associated safeguards, strikes an appropriate balance between considerations of administrative flexibility and international 'best practice', on the one hand, and the security of information exchanged and Parliamentary scrutiny, on the other.
>
> We note the Committee's understanding that information to be exchanged under the proposed arrangements would include private information. However, information collected as part of prudential supervision is, in general, aggregated prudential financial information concerning a company's financial position (eg. whether it is solvent). It is not personal and private information about citizens (ie, it is not about the company's customers).
>
> Information collected by the ISC and RBA that relates to individuals would only concern individuals in their capacity as directors or executives officers of companies or as a trustee of a superannuation fund. There are instances where exchanges of such information with other financial regulators and/or law enforcement officers would be highly beneficial. These include where a company executive misappropriates funds and leaves the country (eg, fraud involving corporate misuse of employees' superannuation assets); and where an act of fraud may result in a transnational financial conglomerate's failure/insolvency.

> I trust that the above information is useful in the Committee's deliberations regarding concerns over specific provisions of the FLAB. In the Government's view these provisions are necessary to ensure the reliability and integrity of the Australian financial system and the effectiveness and international consistency of its regulatory framework.

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

Telecommunications (Numbering Fees) Amendment Bill 1996

This bill was introduced into the House of Representatives on 30 October 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to amend the *Telecommunications (Numbering Fees) Act 1991* to require carriers and service providers to pay annual charges on numbers held by them for provision of telecommunications services. The charge will be set by AUSTEL in a written determination and limited to a maximum of $100 000 per number per annum.

The committee dealt with this bill in Alert Digest No. 11 of 1996, in which it made various comments. The Minister for Communications and the Arts has responded to those comments in a letter dated 12 December 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
Clauses 9 and 10

In Alert Digest No. 11 of 1996, the committee noted that Clause 9 of this bill, if enacted, would provide that the amount of a charge to be imposed on a telecommunications number would be determined by AUSTEL. Clause 10 would set a maximum charge on a number at $100 000.

The committee has consistently drawn attention to provisions which allow Ministers an unfettered power to make regulations to set the rate of a levy or a charge as such provisions may be considered to delegate legislative power inappropriately. The basis for this view is that, with such a power, a rate of charge could be set so high that it amounts to a tax. The committee is firmly of the view that taxation is a matter for primary legislation. Where it is impracticable to set the rate of the levy or charge in primary legislation, the committee has developed a policy of requesting that the primary legislation should prescribe either a maximum rate of charge or a method of calculating such a maximum rate.

The committee noted that, in this case, a maximum rate is established in the primary legislation but two issues concerned the committee. The first was that the power to determine the level of the actual charge is not given to a Minister but to a semi-autonomous body. The second was that the maximum amount is so high that it may be considered the grant of a power to levy a tax, which the committee believes should be a matter for Parliament.

The committee acknowledged that the determinations are disallowable instruments but pointed out that disallowance only takes effect from the date of the disallowance and that charges levied between the determination coming into effect and the disallowance would remain valid and payable.

The committee sought the Minister's views on these issues.

Pending the Minister's advice, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister has responded as follows:

> The proposed Bill would amend the *Telecommunications (Numbering Fees) Act 1991* to enable an annual charge to be imposed on numbers held by carriers and service providers for the provision of telecommunications services across public telecommunications networks.
>
> I note that the Committee is concerned that:
>
> - the power to determine the level of the actual charge is not given to a Minister but to a semi-autonomous body; and
> - the maximum amount of charge of $100,000 on a particular number is so high that the charge should be determined by the Parliament.
>
> In regard to the Committee's first concern it is important to note that AUSTEL was originally established as the telecommunications industry regulator under the *Telecommunications Act 1989*, with its current responsibilities set out under the *Telecommunications Act 1991* (the Act). Under s.39 of the Act AUSTEL has the legislative responsibility for managing the numbering of telecommunications services. In particular, Division 2 of Part 11 of the Act canvasses the management of numbering of telecommunications services, with s.239 requiring AUSTEL to prepare a written plan for the numbering of telecommunications services, and s.242 empowering AUSTEL to allocate numbers to carriers or service providers for the provision of telecommunications services.
>
> Through its implementation of these legislative responsibilities AUSTEL has acquired a level of knowledge and expertise in the use and allocation of telecommunications numbers that is not duplicated in any other Government body.
>
> Telecommunications numbers have an intrinsic value due to the length of the number and/or the particular sequence of digits. AUSTEL currently allocates numbers free of charge, and this intrinsic value is therefore received as a windfall gain to either the telecommunications company that receives the number, or the end user. The company that receives the number from AUSTEL sometimes recovers that intrinsic value from an end user through fees on the number. It is the Government's intention to recover some of that windfall gain by imposing a charge.

In order to ensure that the intrinsic value is assessed as accurately as possible it is important that the charges be determined by a regulatory authority with close knowledge of the industry. AUSTEL has been consulting with the industry through its Numbering Advisory Committee to enhance its knowledge in this area and guarantee an effective assessment of the value of different numbers.

I therefore consider that AUSTEL is best placed to assess the appropriate charge for a number as required by clause 9 of the Bill. An efficient and effective number allocation system is a prerequisite for the continued expansion of the rapidly growing and evolving telecommunications market. AUSTEL's involvement ensures there are no constraints imposed on this important sector of the economy by the imposition of inappropriate charges.

However, given that this power is legislative in nature, I consider it is appropriate that Parliament be able to disallow an exercise of the power and accordingly a determination is a disallowable instrument.

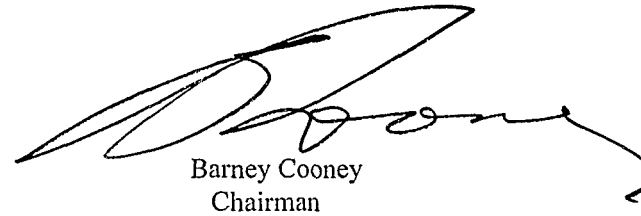
The Committee should also be aware that the Minister has the power under s.50 of the Act to direct AUSTEL in relation to the performance of its functions and the exercise of its powers. I will be using this power of direction to set certain parameters for AUSTEL, in particular requiring that charges not be set on geographic numbers and numbers with a high public value such as emergency and community service numbers.

With regard to the Committee's second concern relating to the level of the maximum per annum charge for a number, I must emphasise that this is the absolute maximum charge that could be set for any number, including those numbers with a large intrinsic value that are highly sought by the industry. I also wish to reiterate that all charges, including those close to the ceiling or maximum charge, are set by disallowable instrument and are therefore subject to the scrutiny of Parliament.

The Committee should also be aware that under s.5 and s.7 of the *Telecommunications (Numbering Fees) Act 1991* fees may be set by regulation on special numbers. Special numbers and maximum charges are not defined under the Act. By specifying a maximum charge the Bill therefore imposes a constraint lacking in the existing legislation.

I trust this response assists the Committee in its consideration of the Bill.

The committee thanks the Minister for this response.



Barney Cooney
Chairman

The Hon Daryl Williams AM QC MP

Attorney-General
and
Minister for Justice

11 FEB 1997

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

Dear Senator Cooney

I am writing in reference to the Committee's concerns referred to on page 17 of Alert Digest 1/97. I understand the Committee is concerned as to whether the retrospectivity which subclause 2(2) of the *Crimes and Other Legislation Amendment Bill 1996* (the Bill) would allow to items 21, 22, 23 and 27 in Schedule 1 of the Bill would trespass unduly on personal rights and liberties.

The paragraphs in question are technical amendments to correct a misdescribed amendment to the *Proceeds of Crime Act 1987*. In each case section 46 of the *International War Crimes Tribunals Act 1995* was referred to whereas the correct reference should have been section 45.

Legal advice was obtained following discovery of the errors to the effect that it is likely that a court would regard the incorrect reference as a patent mistake and interpret the amendment as referring to section 45 of the *International War Crimes Tribunals Act 1995* and not section 46.

Section 45 of the *International War Crimes Tribunals Act 1995* enables the Director of Public Prosecutions to apply for registration in a specified court of a forfeiture order made in relation to property believed to be in Australia when so requested by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Former Yugoslavia Tribunal) or by the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (the Rwanda Tribunal).

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No applications for registration of Tribunal forfeiture orders have been received by my Department from either of the Tribunals and I am advised that there are none under consideration at this time.

In these circumstances I do not consider that any personal rights and liberties will be adversely affected by the amendments contained in items 21, 22, 23 and 27 of the Bill.

Yours sincerely

DARYL WILLIAMS

ASSISTANT TREASURER
PARLIAMENT HOUSE
CANBERRA ACT 2600

Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Suite SG 49
Parliament House
CANBERRA ACT 2600

- 4 FEB 1997

Dear Senator Cooney

I refer to the letter of 28 November 1996 from Mr Peter Crawford, Secretary, Senate Standing Committee for the Scrutiny of Bills (the Committee), to the Treasurer's Senior Adviser, concerning comments contained in the Scrutiny of Bills Alert Digest No. 13 of 1996 regarding the *Financial Laws Amendment Bill 1996* (FLAB). I am replying on the Treasurer's behalf as the administration of banking, insurance and superannuation legislation falls within my Ministerial responsibilities.

I understand the Committee has concerns regarding proposals in FLAB to remove various decisions of the Insurance and Superannuation Commissioner (the Commissioner) from review by the Administrative Appeals Tribunal (AAT), and the extension of the range of persons or bodies to whom information may lawfully be passed. In response to the Committee's concerns, I draw your attention to the following.

Non-reviewable Decisions
Items 32 and 33, Schedule 12

Items 32 and 33 of Schedule 12 of FLAB amend the *Life Insurance Act 1995* to provide that certain decisions of the Commissioner will no longer be subject to AAT review. **Instead, these decisions by the Commissioner will be subject to approval by the Minister.**

The decision making powers proposed to be amended by Items 32 and 33 are significant tools in the prudential supervision of life insurance companies. They are generally exercisable only when it is apparent that policyholders' funds may be put at risk if immediate action is not taken. The powers include the Commissioner's ability to make directions as to solvency and capital adequacy; to 'freeze' assets; and to prohibit a life company from issuing new policies.

Recent ISC enforcement experience has demonstrated the potential for insurance companies to use the AAT processes to frustrate the Commissioner in his proper supervision of insurance companies. In this particular case it was a general insurance company but the observations apply equally to life companies. The company in this

instance was able to continue trading while its application to stay directions of the Commissioner to either increase capital or cease trading was considered by the AAT.

During the AAT review process, the Commissioner's decision can be reviewed on both its merits, and on the decision making process. The ability of the AAT to review the merits of a decision means that it is relatively simple for an insurer to obtain a stay of the Commissioner's decision while the review is under way. This process could potentially take weeks or months. **As a consequence, policyholders' financial interests and security can be put at risk.**

Notwithstanding the proposed removal of the right to appeal to the AAT, limitations on the exercise of powers by the Insurance and Superannuation Commissioner will be retained. The Commissioner's relevant decisions must be made with the concurrence or agreement of the Treasurer (or his or her delegate, such as the Assistant Treasurer). In addition, a review of the decision making process may be made by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR). Unlike an appeal to the AAT, an appeal to the Federal Court can only be made on the legality of the decision making process itself and not on the merits of the decision. There is, therefore, reduced opportunity or ability to stay proceedings and delay the implementation of the Commissioner's decisions provided they are legally sound.

Clearly, as the Alert Digest points out, the matter is one of striking a balance between the interests of the policyholders and the interests of insurance companies. Sometimes the AAT can deal with company appeals expeditiously, but there are occasions where, for one reason or another, proceedings become more drawn out. The risk of such delays impeding the swift and decisive action that the Commissioner must sometimes take in order to avert major losses to policyholders is significant; it would only take a single company collapse to seriously erode public confidence and stability in the insurance sector. Removing the scope for AAT review benefits policyholders by ensuring this risk (insofar as it is exacerbated through AAT processes) is eliminated, without depriving insurance companies of the right to challenge the legality of the Commissioner's decisions in courts of law.

While the Government firmly believes in the appropriateness of these proposed new review arrangements, it recognises the significance of removal of AAT review. Therefore, it is also proposed that the new arrangements should be subject to a 'sunset' clause of five years. This will ensure that the workability and appropriateness of the arrangements can be reviewed in the light of experience.

Information Sharing Amendments

I note the Committee's concern that particular agencies to which information may be legally passed are to be specified only in regulations and that this may be considered an inappropriate delegation of legislative powers. In the Government's view, the delegation of the definition of specific 'financial sector supervisory agencies', 'law enforcement agencies' and 'overseas financial sector agencies' to regulation is necessary to enable flexibility to include newly constituted bodies and to ensure that the legislation is sufficiently responsive in times of crisis in both domestic and international financial markets. I note that the G7 Finance Ministers have encouraged financial regulators world-

wide to cooperate and exchange information in a more flexible and responsive fashion, to better protect international financial stability.

It is not possible at this time to set out all the specific agencies which would be included within the proposed information sharing arrangements. The structure of the international financial system is dynamic, and the range of organisations to be included in this list will vary over time, depending on the nature and extent of foreign participation in Australian insurance markets, and the names of organisations that change due to restructuring. Against this background, including the names of organisations in the Bill would appear to be unduly restrictive and inflexible.

Further, there are a number of safeguards against abuse of this delegated power. In particular, agencies will be expected to put in place suitable administrative arrangements (such as bilateral agreements or Memoranda of Understanding) to ensure strict confidentiality standards are maintained before any information sharing would take place. The decision to include a particular agency under regulation would be subject to Parliamentary scrutiny via a disallowable instrument. In the Government's view this approach, and the associated safeguards, strikes an appropriate balance between considerations of administrative flexibility and international 'best practice', on the one hand, and the security of information exchanged and Parliamentary scrutiny, on the other.

We note the Committee's understanding that information to be exchanged under the proposed arrangements would include private information. However, information collected as part of prudential supervision is, in general, aggregated prudential financial information concerning a company's financial position (eg. whether it is solvent). It is not personal and private information about citizens (ie, it is not about the company's customers).

Information collected by the ISC and RBA that relates to individuals would only concern individuals in their capacity as directors or executives officers of companies or as a trustee of a superannuation fund. There are instances where exchanges of such information with other financial regulators and/or law enforcement officers would be highly beneficial. These include where a company executive misappropriates funds and leaves the country (eg, fraud involving corporate misuse of employees' superannuation assets); and where an act of fraud may result in a transnational financial conglomerate's failure/insolvency.

I trust that the above information is useful in the Committee's deliberations regarding concerns over specific provisions of the FLAB. In the Government's view these provisions are necessary to ensure the reliability and integrity of the Australian financial system and the effectiveness and international consistency of its regulatory framework.

Yours sincerely

ROD KEMP

SENATOR THE HON RICHARD ALSTON
Minister for Communications and the Arts
Deputy Leader of the Government in the Senate

12 DEC 1996

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

Dear Senator Cooney Barney.

I am writing with respect to matters raised by your Committee in the Scrutiny of Bills Alert Digest No 11 of 1996 on the **Telecommunications (Numbering Fees) Amendment Bill 1996**.

The proposed Bill would amend the *Telecommunications (Numbering Fees) Act 1991* to enable an annual charge to be imposed on numbers held by carriers and service providers for the provision of telecommunications services across public telecommunications networks.

I note that the Committee is concerned that:

- the power to determine the level of the actual charge is not given to a Minister but to a semi-autonomous body; and

- the maximum amount of charge of $100,000 on a particular number is so high that the charge should be determined by the Parliament.

In regard to the Committee's first concern it is important to note that AUSTEL was originally established as the telecommunications industry regulator under the *Telecommunications Act 1989*, with its current responsibilities set out under the *Telecommunications Act 1991* (the Act). Under s.39 of the Act AUSTEL has the legislative responsibility for managing the numbering of telecommunications services. In particular, Division 2 of Part 11 of the Act canvasses the management of numbering of telecommunications services, with s.239 requiring AUSTEL to prepare a written plan for the numbering of telecommunications services, and s.242 empowering AUSTEL to allocate numbers to carriers or service providers for the provision of telecommunications services.

Through its implementation of these legislative responsibilities AUSTEL has acquired a level of knowledge and expertise in the use and allocation of telecommunications numbers that is not duplicated in any other Government body.

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Telecommunications numbers have an intrinsic value due to the length of the number and/or the particular sequence of digits. AUSTEL currently allocates numbers free of charge, and this intrinsic value is therefore received as a windfall gain to either the telecommunications company that receives the number, or the end user. The company that receives the number from AUSTEL sometimes recovers that intrinsic value from an end user through fees on the number. It is the Government's intention to recover some of that windfall gain by imposing a charge.

In order to ensure that the intrinsic value is assessed as accurately as possible it is important that the charges be determined by a regulatory authority with close knowledge of the industry. AUSTEL has been consulting with the industry through its Numbering Advisory Committee to enhance its knowledge in this area and guarantee an effective assessment of the value of different numbers.

I therefore consider that AUSTEL is best placed to assess the appropriate charge for a number as required by clause 9 of the Bill. An efficient and effective number allocation system is a prerequisite for the continued expansion of the rapidly growing and evolving telecommunications market. AUSTEL's involvement ensures there are no constraints imposed on this important sector of the economy by the imposition of inappropriate charges.

However, given that this power is legislative in nature, I consider it is appropriate that Parliament be able to disallow an exercise of the power and accordingly a determination is a disallowable instrument.

The Committee should also be aware that the Minister has the power under s.50 of the Act to direct AUSTEL in relation to the performance of its functions and the exercise of its powers. I will be using this power of direction to set certain parameters for AUSTEL, in particular requiring that charges not be set on geographic numbers and numbers with a high public value such as emergency and community service numbers.

With regard to the Committee's second concern relating to the level of the maximum per annum charge for a number, I must emphasise that this is the absolute maximum charge that could be set for any number, including those numbers with a large intrinsic value that are highly sought by the industry. I also wish to reiterate that all charges, including those close to the ceiling or maximum charge, are set by disallowable instrument and are therefore subject to the scrutiny of Parliament.

The Committee should also be aware that under s.5 and s.7 of the *Telecommunications (Numbering Fees) Act 1991* fees may be set by regulation on special numbers. Special numbers and maximum charges are not defined under the Act. By specifying a maximum charge the Bill therefore imposes a constraint lacking in the existing legislation.

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I trust this response assists the Committee in its consideration of the Bill.

Yours sincerely

RICHARD ALSTON
Minister for Communications and the Arts

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SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

1997

5 March 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

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5 March 1997

ISSN 0729-6258

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

THIRD REPORT OF 1997

The committee presents its Third Report of 1997 to the Senate.

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

Health Insurance Amendment Act (No. 2) 1996

Health Insurance Amendment Act (No. 2) 1996

This bill for this Act was introduced into the House of Representatives on 17 October 1996 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the *Health Insurance Act 1973* to:

- set minimum proficiency requirements which new medical practitioners must meet before the services they provide attract Medicare benefits;
- introduce the multiple services rules for diagnostic imaging and general medical services;
- increase the maximum gap between the Medicare Benefits Schedule fee listed for any out of hospital service and the Medicare benefit payable for that service to $50; and
- remove the ability to seek an increase in fees for services claimed to be of unusual length or complexity.

The committee dealt with this bill in Alert Digest No. 10 of 1996, in which it made various comments. The Minister for Health and Family Services has responded to those comments in a letter dated 25 February 1997. A copy of that letter is attached to this Report. Although this bill has now been passed by both houses (and received Royal Assent on 17 December 1996), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Retrospective application?
Schedule 1, items 3, 10 and 14

In Alert Digest No. 10 of 1996, the committee noted that items 3, 10 and 14 of Schedule 1, if enacted, would provide the new mechanisms by which medicare benefits may not be able to be paid in respect of professional services rendered by persons who first become medical practitioners after 1 November 1996.

The committee was concerned that there may be an aspect of retrospectivity in this scheme. It may be argued that people who have studied medicine for a number of years have had a legitimate expectation that they would be able to practice their profession on the same basis as the colleagues who have graduated before them. The committee noted that they will still be able to be employed in public hospitals and that other avenues are provided through which they may be able to provide professional services that will attract a medicare rebate. The committee indicated that it would, nevertheless, appreciate the Minister's advice on this legitimate

expectation and whether there are any other alternative arrangements to accommodate the position the graduates will find themselves in.

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:

> On the issue of retrospectivity the Committee's Alert Digest says that "The committee is concerned that there may be an aspect of retrospectivity in this scheme. It may be argued that people who have studied medicine for a number of years have had a legitimate expectation that they would be able to practise their profession on the same basis as the colleagues who had graduated before them."
>
> With respect, I would argue that it is unreasonable to suggest that there can be no changes to medical career opportunities from the time a high school graduate decides to study medicine. This would imply that career opportunities for doctors should be unchanged over a seven year period. Clearly this is not possible. Medical practice and hence medical career opportunities change all the time. No-one would be suggesting, for example that surgeons who specialised in ulcer surgery still have a legitimate right to continue with their career even though surgery has been replaced by drugs as the treatment of choice for most stomach ulcers.
>
> Nor would other graduates have any right to expect that their career opportunities remained static throughout their training period. Why should doctors be any different. In fact, only one of the many career options available to doctors will be changed as a result of this legislation. That is, it will no longer be possible for doctors who enter private practice without appropriate training to attract a Medicare benefits for their services. As such, this measure is primarily about ensuring the highest possible standard of medical care for the Australian community.
>
> I would also like to emphasise that the measure was announced in the Budget, well in advance of the proposed changes. The publicity surrounding the measure has ensured that those to be affected by the changes have had considerable advance warning.
>
> The amending legislation takes effect from the date of Royal Assent. The reference in the Bill to 1 November, is used simply for the purpose of defining those medical practitioners whose future services will not be eligible for benefits.
>
> Although the need to undertake post graduate training is only now being made mandatory there have been very strong incentives in place for many years. In fact when first introducing vocational registration in 1989 the then Health Minister, Neal Blewett made the following joint statement with the President of the RACGP:
>
> > "It is inappropriate that entry into general practice currently requires nothing more than undertaking one year of hospital service after graduation" (March 2, 1989)
>
> The recent comments by Prof John Young, the Chair of the Committee of Deans, are relevant in this regard. He said (2 October, Australian) that "Medicare numbers

should only be given to those who have completed [postgraduate] training courses". Furthermore he went on to say "there is a lot of nonsense going around. Nobody could really argue that it is appropriate for people who have only done one year's internship to go out and be GPs".

The committee thanks the Minister for his response on this issue.

Discriminatory application? - inappropriate delegation of legislative power
Schedule 1, items 3, 10 and 14

In Alert Digest No. 10 of 1996, the committee noted that the second aspect of these items which concerns the committee is the part to be played by the regulations within the new scheme.

It appeared to the committee that a medical practitioner may become a Fellow of the Royal Australian College of General Practitioners but will not be able to be recognised as a general practitioner for the purposes of the medicare benefits system unless he/she is also eligible in accordance with some as yet unspecified regulations. Alternatively, qualifying for the purposes of the medicare benefits system through the Register of Approved Placements depends on eligibility in accordance with unspecified regulations or participating in courses or programs as yet unspecified in regulations made under proposed subsection 3GA(5).

The committee noted that the Minister's second reading speech and the explanatory memorandum both lay stress on the oversupply of medical practitioners.

The committee sought the Minister's advice on how the regulations would be worded so as to achieve lower numbers without discrimination.

The committee was of the opinion that the importance of this subject matter requires that more of the fundamentals of the scheme should be included in primary legislation. If a medical practitioner can qualify as a Fellow of the Royal College of General Practitioners but still not be able to render professional services which attract a medicare benefit, the committee believes that the further eligibility requirements should be in the Act and not left to regulations.

The committee indicated that it would be interested in the Minister's advice on both these issues.

Pending the Minister's advice, the committee drew Senators' attention to the provisions, as they may be considered both to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference and 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 second issue raised by the Committee was the possibility of inappropriate delegation of power. The Committee has raised two areas of concern - the use of regulations to specify which Fellows of the Royal Australian College of General Practitioners (RACGP) will gain full access to Medicare, and the use of regulations to establish a Register of Approved Placements. The Committee has asked how the regulations will be worded so as to achieve lower numbers without discrimination.

In both cases the proposed use of regulations reflects the need to be able to quickly respond to changes in the detailed arrangements involved in implementing the legislation. The need for regulations in each case is explained below.

Recognised Fellows of the RACGP

The Bill proposes that the professional services of recognised Fellows of the RACGP (amongst others) will continue to be eligible for Medicare benefits. The Bill provides for further details concerning who should be recognised to be contained in regulations. These arrangements mirror those already contained in the Act in respect of specialist recognition under Section 3D.

It is intended that the regulations will reflect the current arrangements by requiring that Fellows of the RACGP, wishing to retain full access to Medicare, should meet the requirements of the RACGP for taking part in continuing education and quality assurance. The use of regulations will enable any changes in terminology used by the RACGP to be reflected in a timely way.

Register of Approved Placements

The purpose of the register of approved placements is to ensure that full access to Medicare is continued for post graduate trainees of the various medical colleges as well as access for doctors working in areas of particular need. My recent announcement concerning full Medicare access for new doctors working as rural locums will be accommodated through this provision. Regulations are considered necessary due to the dynamic nature of these programs, and the possibility of regular changes (including additions) to the list of bodies administering the programs. For example;

. specialist colleges may be formed, disbanded or have a change of name;

. training programs may be expanded, reformed or renamed; and

. the bodies running other listed programs (eg rural locum service programs) could similarly change as roles of bodies are amended, names of organisations change etc.

With the Government's commitment to allow rural locum placements, the Government needs to maintain a flexibly approach to the day to day administration of programs and bodies that inform the Health Insurance Commission of the practitioners in these programs.

Again, any changes to the regulations would be made in response to or after consultation with the relevant bodies, and would be disallowable by Parliament.

The committee thanks the Minister for his response. Some aspects, however, remain unclear.

The committee acknowledges the convenience of using regulations to make timely additions or alterations to lists of prescribed programs or to respond quickly to changes in the detailed arrangements involved in implementing the legislation.

The committee, however, is concerned with the width of the legislative power proposed to be delegated. Proposed subsection 3EA(2), as presently worded, is so open-ended that the most discriminatory and restrictive eligibility criteria could be prescribed. The committee is of the opinion that the regulation making power should be more circumscribed by including in the bill some limitation or description of the general nature of the eligibility criteria.

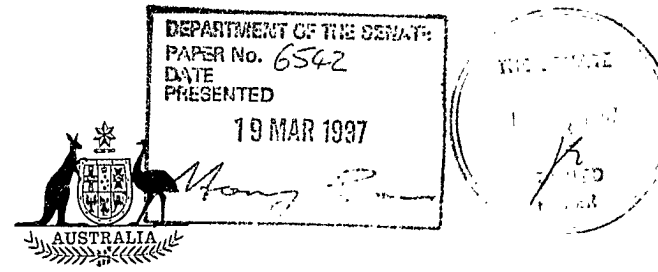
If, as the Minister states, it is intended that Fellows of the RACGP in order to retain access to Medicare should meet the requirements of the RACGP for taking part in continuing education and quality assurance, the bill could state that the regulation making power with respect to eligibility is restricted to such matters.

Further, the committee notes the Minister's intention that 'changes to the regulations would be made in response to or after consultation with the relevant bodies'. Perhaps such a practice could be put into the bill as a pre-condition for making regulations.

With respect to the Register of Approved Placements under proposed subsection 3GA (5), the committee notes that paragraph (a) sets out in the bill some details indicating the nature of the regulations to be made in providing one avenue for obtaining registration but that paragraph (b) gives complete carte blanche to the rule maker to determine criteria for eligibility.

In these circumstances the committee continues to draw Senators' attention to the provisions, as they may be considered both to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference and to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Barney Cooney
Chairman



SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

OF

1997

19 March 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

OF

1997

19 March 1997

ISSN 0729-6258

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**

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(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

FOURTH REPORT OF 1997

The committee presents its Fourth Report of 1997 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:

Auditor-General Bill 1996

Customs and Excise Legislation Amendment Bill (No. 2) 1996 (No. 2)

Euthanasia Laws Bill 1996

Legislative Instruments Bill 1996

Retirement Savings Accounts Bill 1997
(Previous citation: Retirement Savings Accounts Bill 1996)

Telecommunications Bill 1996

Auditor-General Bill 1996

This bill was introduced into the House of Representatives on 12 December 1996 by the Minister for Finance. [Portfolio responsibility: Finance]

One of four bills proposed to replace the *Audit Act 1901*, this bill proposes to:

- re-establish the office of Auditor-General for the Commonwealth, define the powers and functions and detail the processes of appointment and conditions of the office;
- expand the role of the Joint Committee of Public Accounts;
- establish the Australian National Audit Office as a statutory authority, with staff of that Office appointed or employed under the *Public Service Act 1922*; and
- re-establish the office of the Independent Auditor as the auditor of the Australian National Audit Office.

The committee dealt with this bill in Alert Digest No. 1 of 1997, in which it made various comments. The Minister for Finance has responded to those comments in a letter dated 3 March 1997. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Limitation on the powers of Parliament
Subclause 37(3)

In Alert Digest No. 1 of 1997, the committee noted that clause 37 of this bill, if enacted, would bring into effect section 49 of the Constitution which provides:

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

Clause 37 of this bill provides:

> (1) The Auditor-General must not include particular information in a public report if:
>
> (a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or

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

(2) The reasons are:

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

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

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

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

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

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

(3) The Auditor-General cannot be required, and is not permitted, to disclose to:

(a) a House of the Parliament; or

(b) a member of a House of the Parliament; or

(c) a committee of a House of the Parliament or a joint committee of both Houses of the Parliament;

information that subsection (1) prohibits being included in a public report.

(4) If the Auditor-General decides to omit particular information from a public report because the Attorney-General has issued a certificate under paragraph (1)(b) in relation to the information, the Auditor-General must state in the report:

(a) that information (which does not have to be identified) has been omitted from the report; and

(b) the reason or reasons (in terms of subsection (2)) why the Attorney-General issued the certificate.

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

(a) not to prepare a public report; or

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

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

(6) In this section:

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

State includes a self-governing Territory.

The committee was concerned with this issue when considering the corresponding clause in the earlier Auditor-General's Bill 1994. The committee dealt with the matter in its *Seventh, Eighth, Ninth, Tenth, Twelfth and Fourteenth Reports of 1995* although its efforts were mainly directed at whether that bill had the effect of significantly limiting the powers of Parliament and whether or not it was an intended effect or an oversight.

The committee noted that it seems clear that clause 37 of the present bill will have the effect of limiting the powers of Parliament.

In its *Seventh Report of 1995* the committee concluded:

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

It also seemed to the committee that, as the Auditor-General is described in subclause 8(1) as an independent officer of the Parliament, subclause 37(3) denies to the legislature, or any of its committees, the opportunity of satisfying itself that its agent is properly carrying out his or her functions and is refusing to reveal only those matters referred to in subclause 37(2).

The committee noted that subclause 37(4) provides that, where the Attorney-General issues a certificate preventing disclosure, the Auditor-General will note in the public report that information has been omitted and the reasons for doing so.

The committee further noted that the government understands the importance of the Auditor-General obtaining information as the bill by clause 35 takes away the right to silence. If obtaining the information is so important that people lose that right, why should Parliament not have access to it.

The committee sought the advice of the Minister on:

- whether subclause 37(4) ought also to require the Auditor-General to publish reasons where he or she decides not to include sensitive information under clause 37(1);
- why if members of the executive, under subclause 37(5), may be given the sensitive information, Parliament and its committees might not be entrusted with access (suitably safeguarded) to the same information.

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

On the first issue, the Minister has responded as follows:

> In relation to the first matter, Recommendation (c) of the Joint Committee of Public Accounts, in its *Report 346, Guarding the Independence of the Auditor-General,* also canvassed this issue. In considering its response to this recommendation, the Government was made aware that the Australian National Audit Office, in the process of preparing reports, regularly decides to exclude sensitive information (eg commercial-in-confidence matters). For the Auditor-General to be required, in each instance, to state in the report that material was excluded, would not only require the ANAO to depart from long-standing past practice (given that the equivalent of clause 37 has been in the *Audit Act 1901* - as subsection 48F(5) - for some time), but also, it could well translate into a very large number of reports. Given that the material may have no real bearing on the report, to highlight the fact could actually be detrimental to the effectiveness of the report if it diverted attention away from the report's recommendations and content. Thus, as a means of holding the Executive to account, the Bill proposes only requiring the Auditor-General to specify that sensitive information had been excluded where he had done so at the instigation of the Attorney-General.

The committee thanks the Minister for this explanation and agrees that requiring the Auditor-General to specify that sensitive information has been excluded need be restricted only to those occasions where it has been done at the instance of the Attorney-General.

In respect of the issues of (suitably guarded) access and the accountability of the Auditor-General to Parliament, the Minister has responded as follows:

> In relation to the second matter, it seems clear that, notwithstanding "suitable safeguards", such an approach would have the real potential to result in the very sort of inappropriate disclosures that the provisions of clause 37 are designed to prevent. Subclause 37(5) restricts the provision of reports containing sensitive information to only the Prime Minister, the Finance Minister and the responsible Minister (if any) - the information is not available even to the wider Executive at large. (An identical provision (subsection 48F(7)) has been in the Audit Act for some years and appears not to have lent itself to misuse.)

I also note the Committee's view that:

> "...as the Auditor-General is described in subclause 8(1) as an independent officer of the Parliament, subclause 37(3) denies to the legislature, or any of its committees, the opportunity of satisfying itself that **its agent** is properly carrying out his or her functions and is refusing to reveal only those matters referred to in subclause 37(2)." (emphasis added)

This is a selective view of the provisions covering the independence of the Auditor-General which ignores or overlooks subclause 8(3) which limits the powers of the Parliament to act in relation to the Auditor-General to those specified in law. Importantly, there are no implied powers arising from the Auditor-General being an independent officer of the Parliament.

The committee thanks the Minister for this response. The committee's suggestion of suitably safeguarded access was an attempt at compromise. The absolute nature of the prohibition on disclosure might also be appropriately lessened by allowing disclosure where the reasons outlined in subclause 37(2) no longer apply: for example, decisions of Cabinet or information passed between the Commonwealth and the States sensitive at one time are, at a later time, often the subject of announcements by the Prime Minister.

The committee, however, raised these matters in the light of the extremely serious consequence of this clause: by passing this clause unamended, Parliament will seriously erode the powers and privileges granted it under the Constitution. The committee remains of the view that for Parliament not to have access to some of the information which might be excluded by the clause impinges on the rights of Australians to have the administration of the country by the executive properly scrutinised by Parliament.

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

Customs and Excise Legislation Amendment Bill (No. 2) 1996 (No. 2)

This bill was introduced into the House of Representatives on 12 December 1996 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Act 1901* and the *Excise Act 1901* in relation to the diesel fuel rebate scheme. Broadly, the bill proposes to:

- restrict eligibility in the 'mining operations' category;
- address recent Federal Court and Administrative Appeals Tribunal decisions in the 'mining operations' category; and
- improve accountability under the scheme and assist in reducing expenditure under the scheme due to misuse.

The committee dealt with this bill in Alert Digest No. 1 of 1997, in which it made various comments. The Minister for Small Business and Consumer Affairs has responded to those comments in a letter dated 18 March 1997. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Taking away the right to silence
Item 25 of Schedule 1 and item 10 of Schedule 2

In Alert Digest No. 1 of 1997, the committee noted that these items would insert proposed subsection 164AC(15) into the *Customs Act 1901* and proposed subsection 78AD(15) into the *Excise Act 1901*. These sections refer to the powers of the Chief Executive Officer of Customs (CEO) to obtain information for the purposes of auditing a particular diesel fuel rebate application.

These subsections, if enacted, would take away the right of a person to remain silent where providing information or producing record with respect to the diesel fuel rebate that may result in the person incriminating himself or herself, thus exposing the person to prosecution for, and perhaps conviction of, a criminal offence.

The committee is opposed in principle to clauses which take away the right to silence in these circumstances because such a clause takes away a fundamental right in our common law system - one of the fundamental elements of a fair and effective justice system.

Taking away this right undoubtedly trespasses on personal rights and liberties. Whether it trespasses **unduly** on personal rights and liberties will depend on the

context in which it is done. The issue is whether the advantage to the common good outweighs the loss to the individual of taking away this right to silence.

Where Parliament has legislated in the past to take away this right, the law has often offered alternative protection in the form of making the information thus disclosed and other information derived from the disclosure inadmissible in certain types of criminal proceedings.

In this way, in theory, the need to obtain the information which the common good demands is accommodated without adverse results to the individual from taking away the right to silence.

In this case the common good calls for the Chief Executive Office of Customs to be able to obtain information to administer properly the rebate scheme.

The adverse effect of taking away the right to silence is partially mitigated by the protection included in the proposed subsections. The individual is protected because any direct or indirect use of the material disclosed is inadmissible in certain criminal proceedings. This inadmissibility is subject to exceptions in relation to proceedings for failing to comply with a requirement to give the information or produce the document and for making a false statement or knowingly providing a document that is false. It is the view of the committee that these exceptions do not unduly trespass on personal rights and liberties.

The protection, however, is quite inadequate because it does not grant immunity from prosecution under paragraphs 234(1)(c) or (d) of the *Customs Act 1901* or 120(1)(vc) or (vi) of the *Excise Act 1901* in relation to the diesel fuel rebate.

The committee noted that proposed new sections 164AA and 164AB provide avenues for avoiding prosecution. Section 164AB deals with the voluntary notification of an error or errors in the application which has led to a claim for an amount of diesel fuel rebate in excess of entitlement. Section 164AA enables the CEO, in lieu of instituting a prosecution, to serve a notice demanding repayment of diesel fuel rebate where entitlement did not exist or has ceased together with a 20% penalty.

The committee generally has no concern with forced disclosure provisions that lead to the refunding of government moneys where they have been paid in excess of entitlement. The committee, however, is opposed to forced disclosure where that disclosure is admissible in a prosecution for an offence thus disclosed.

The committee further noted that:

- the avenue of repayment through new sections 164AA and 164AB is available only at the discretion of the CEO;

- a decision by the CEO not to offer that avenue is not reviewable by the court or the AAT; and
- the reasons of the CEO under section 164AA for believing that the applicant lacked entitlement are also not subject to review.

The committee sought the advice of the Minister in respect of these issues.

Pending the advice of the Minister, 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 and they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

The Minister has responded as follows:

> Your Committee has noted its in principle objection to legislative provisions which take away one's "right to remain silent" via forced disclosure provisions, and the Government accepts the proposition that it is only in exceptional circumstances where the public interest might countenance the taking away of this fundamental individual right.
>
> It is the Government's view that the range of amendments contained in this Bill to improve accountability under the Diesel Fuel Rebate Scheme via new audit provisions and penalty sanctions rely on a claimant's right to silence in audits conducted under the Scheme being taken away.
>
> The reasons for this approach are as follows:
>
> The Diesel Fuel Rebate Scheme operates with a Budget of $1.4 Billion per annum. For the most part, it is an honour-based system relying upon the integrity of those who choose to use the Scheme that the information supplied by them to ground rebate claims is true and correct.
>
> The Australian National Audit Office's recent report on the Scheme criticised the structure of the Scheme from an audit point of view, citing the lack of audit-related powers, and ineffective sanctions. The proposed legislation addresses both of those criticisms, imposing record-keeping and audit obligations on those who choose to avail themselves of the benefits of the Scheme, and introducing a 3 tier penalty structure. In the proposed new penalty regime;
>
> - The most serious offences involve those situations where a claimant knowingly or recklessly obtains or retains rebate that is not payable (see proposed paragraph 234(1)(c), item 32 pg.23 of the Bill refers) or knowingly or recklessly makes a false or misleading statement (see paragraph 234(1)(d) of the existing Act). These are *mens rea* offences and contravention of paragraph 234(1)(c) results in a maximum penalty of 3 times the amount of rebate obtained or retained by the commission of the offence (see paragraph 234(2)(b), item 33 on pg.23 of the Bill refers), whilst contravention of paragraph 234(1)(d) results in a maximum penalty of $5,000 and twice the rebate to which there is no entitlement (see subsection 234((4), item 35 on pg.23 of the Bill refers).

- The next level of penalty is in relation to the new strict liability offences which apply in two circumstances

  - new section 164A, (item 25 on pgs. 12 and 13 of the Bill refer)

    This is the first of the two new strict liability offences, to replace Section 164A of the Act relating to a failure to notify Customs of any one of the 3 events which renders one ineligible for rebate (sale or other disposal, use in an otherwise indicated manner, or loss)

    The penalty is an amount not exceeding 100% of the "overclaim".

  - new subsection 164AC(8) (item 25 on pg. 19 of the Bill refers)

    This is the second of the new strict liability offences, to cover the sanction for a failure to substantiate an entitlement to rebate via the new audit powers of diesel fuel records.

    The penalty is again 100% of the "overclaim".

- The last level of penalty introduces a more flexible administrative penalty option than that currently existing in the Act, which gives Customs an option to apply an administrative penalty to both of the strict liability offences, at 20% of the "overclaim" (new paragraphs 164AA(2)(b) and (c), Item 25 on pgs. 13-14 of the Bill refers). The administrative penalty is akin to a traffic infringement notice, ie. if the person on whom the notice is served elects not to pay, then they might be proceeded against in Court for the strict liability offence. If the offence is proven though, a penalty of up to 5 times the amount of the administrative penalty they chose to forego is available to the Court.

It is in regard to the new audit power provision (the second of the new strict liability provisions above) that your Committee's commentary is directed; in particular, new subsection 164AC(15) on pgs. 19 and 20 of the Bill, where the "right to silence" is taken away via a forced disclosure provision. While the customary immunity from prosecution protection is acknowledged by the Committee, the Committee is concerned that the immunity does not extend to the criminal proceedings for offences against new paragraphs 234(1)(c) and (d) of the Customs Act; ie the first tier of the proposed new penalty regime above.

I consider it appropriate to include these "mens rea" offences in the group of offences for which the immunity from prosecution is excluded from the forced disclosure provision, because the offences are specific to the Diesel Fuel Rebate Scheme itself.

Audits under the Scheme are to be conducted on a risk-assessment basis. Given the huge number of claims received under the Scheme (220,000) the chances of any individual or claim being audited are low.

In a Scheme with such a huge call on the public purse, and where claimants are audited on a risk-assessment basis, it is not considered appropriate to only impose a sanction which in effect only returns to the Commonwealth amounts which should not have be claimed in the first place. Given the comparatively low risk of audit, such a sanction would simply encourage the unprincipled to "play the odds".

Thus, it is the Government's view that it is necessary in the public interest that applicants under the Scheme forgo the right to silence in relation to audits conducted under the Scheme, and in any subsequent proceedings under the Act, for the reasons summarised below:

- the provision is necessary to protect the public-purse investment of $1.4 billion per annum;

- the Scheme is optional - applicant's may choose not to participate, and therefore not become liable to the record-keeping and audit provisions.

- the information which will typically be sought under the audit provisions reposes almost exclusively in the hands of the applicant for rebate. In these circumstances, to allow an applicant to avail himself or herself of the right to silence on the occasion of an audit would be in effect to render the audit provisions optional, and in effect nugatory. The result would be an incentive to "play the odds" in a Scheme where only the honest players were subject to audit.

It is also noted that the Bill now proposes to codify the various obligations on claimants under this self assessment regime, and new subsection 164(1D) on page 5 of the Bill in particular provides that a person who applies for diesel fuel rebate represents by the making of the application that the information contained in the application is correct, and that the applicant is aware of his or her obligations in relation to the exercise of the audit powers under the Scheme, including the requirements to make available records that substantiate entitlements and to answer any questions concerning the fuel the subject of the application (paragraphs 164AC(2)(c) and (h) on pages. 16 and 17 of the Bill).

Given this, I think it is appropriate that no immunity from prosecution for an offence against this section is to be provided in the event of false or misleading information which might be uncovered in the exercise of the new audit powers.

I turn now to the other points noted by the Committee. These are:

- *the avenue of repayment through new sections 164AA and 164AB is available only at the discretion of the CEO;*

- *A decision by the CEO not to offer that avenue is not reviewable by the court of the AAT;*

- *the reasons of the CEO under section 164AA for believing that the applicant lacked entitlement are also not subject to review.*

The decision by the CEO to recover an amount of rebate with or without a 20% administrative penalty, and the reasons and circumstances underlying that decision, is intended to be unreviewable. To balance this, the CEO's decision is also unenforceable under the legislation.

Thus, where a person upon whom a penalty has been imposed is dissatisfied with the imposition of the penalty, or the fact-finding underpinning that decision, that person may simply do nothing if the person so chooses. In those circumstances it is not available to the CEO to seek to recover the rebate/penalty as a debt. The CEO's only option is to proceed against the person for a strict liability offence.

Under this system, a person who disputes the facts underpinning the imposition of the penalty (or the amount of penalty itself), and refuses to pay, is guaranteed that, without that person's consent, no penalty can be exacted other than by order of a Court.

In this respect, the administrative penalty operates very much like the "on-the-spot" traffic offences which govern our roads. As in that case, it is always the prerogative of the recipient of the administrative penalty notice to dispute the facts of the matter in Court. Under this proposed system, a recipient of an administrative penalty notice who refuses to pay need simply do nothing - it is the CEO who must then decide whether to launch a prosecution for the strict liability offence. However, where the CEO does so, and the offence is proven, the penalty which now might be imposed by the Court is up to 5 times the amount of the administrative penalty which the person chose to forego. Equally, a court may decide to impose a lesser penalty if that was appropriate in the court's view. Ultimately the independent review of the CEO's decision to proceed with a penalty, which your Committee commented on, is taken up by the Court in the sanction it might choose to impose when the matter is brought before it.

The Government considers that the rights of citizens are adequately guaranteed in these circumstances.

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

The committee thanks the Minister for this comprehensive response. The committee, however, is not persuaded that a decision to institute only a minimum audit system to protect the revenue justifies excluding immunity from prosecution for offences confessed under forced disclosure. In the committee's view, the balance needs to be struck between the amount of the revenue to be protected, in this case $1.4 billion, and the resources to be devoted to protecting it without resort to prosecution where the offence is disclosed under "duress". As to encouraging 'playing the odds', it can equally be argued that such a system would be an incentive to invent records to substantiate claims.

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

Euthanasia Laws Bill 1996

This bill was introduced into the House of Representatives on 9 September 1996 by Mr Kevin Andrews M.H.R., the Member for Menzies, as a Private Member's bill.

The bill proposes to amend the *Northern Territory (Self-Government) Act 1978,* the *Australian Capital Territory (Self-Government) Act 1988* and the *Norfolk Island Act 1979* to provide that the Northern Territory Legislative Assembly, the Australian Capital Territory Legislative Assembly and the Norfolk Island Legislative Assembly do not have the power to make laws which would permit intentional killing (euthanasia) or assisting a person to terminate their life.

The committee dealt with this bill in Alert Digest No. 7 of 1996, in which it made various comments. Mr Kevin Andrews MP has responded to those comments in a letter dated 14 March 1997. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Self-government rights
Schedules 1, 2 and 3

In Alert Digest No. 7 of 1996, the committee noted that the Legislative Assemblies of the Australian Capital Territory, Norfolk Island and the Northern Territory presently have power to legislate on a range of matters pursuant to the relevant provisions of the Acts identified above. This bill, if enacted, would diminish that range of matters.

The three Assemblies are all elected on a universal adult franchise. Accordingly, they operate within democracies. This bill seeks to take away from the people living within those democracies an ability they now have to elect an assembly with power to legislate about a matter of great moment.

By virtue of the Acts identified above, the Australian Capital Territory, Norfolk Island, and the Northern Territory are all jurisdictions akin to the States of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. All those States have the power to legislate on the matter with which this bill deals. If it is passed, the three relevant jurisdictions will lose that power. The States will continue to hold it.

Given this, the committee raised the following issues:

- The Commonwealth Parliament having given the Legislative Assembly of each Territory the power 'to make laws for the peace, order and good government' of each Territory, would, by this bill, negate the valid exercise of that legislative power by one of them.

- The Commonwealth Parliament, by this bill, proposes to intrude on the law-making function of the Territories not in accordance with a general principle but on an ad hoc basis. This threatens the certainty which ought exist for its citizens when any one or more of the Territories passes a valid law.
- The Commonwealth Parliament, while undoubtedly having the power to pass this bill, would, by so doing, create a situation where some Australians are treated in a way different from other citizens because it curtails their present right to self-government in circumstances where, were they to live in the States, it could not do so.
- *The Northern Territory (Self-Government) Act 1978* has now been in operation for a number of years and, up to the time this bill was introduced, people living there had the reasonable expectation that the statute would not be amended to deprive their Assembly of a power it had held for over a decade and a half. This bill now puts that reasonable expectation at risk.
- This bill, if passed, would override the decision of the democratically elected government of the Northern Territory when it appears that there would be no head of power or international convention by which it could override the same or similar legislation enacted by the States.

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.

Mr Andrews has responded as follows:

> Although many of the issues relating to the Bill have been canvassed in the report of the Senate Legal and Constitutional Legislation Committee, I will respond to the Committee's comments.
>
> The constitutional basis for the Euthanasia Laws Bill is clearly established in s. 122 of the Australian Constitution. The Bill was drafted by legal and constitutional experts to ensure that it validly met the requirements of the section.
>
> The Bill is consistent also with the limitation of powers given to the Legislative Assemblies. The Commonwealth specifically chose to limit the powers given to the Northern Territory. It also provided that it could review decisions taken by the Northern Territory Legislative Assembly. The notion that powers are limited in their exercise by any particular chamber of Parliament is entirely consistent with an, indeed, the basis of the federal constitutional structure of the nation. I note also that of the 992 submissions to the Legal and Constitutional Committee inquiry from the Northern Territory, 930 (including almost 200 submissions from aboriginal communities) supported the Commonwealth Bill.
>
> Far from being confined to the Northern Territory, the Rights of the Terminally Ill Act is available to any Australian who wishes to travel to the Territory. Indeed two of the four deaths under the Act have been of persons from other places.
>
> The Bill also reflects the state of the law throughout the nation, with the notable exception of the Northern Territory.

Any examination of the human rights ramifications of the Bill must also involve an examination of the Northern Territory Rights of the Terminally Ill Act.

Although human rights are not expressly referred to in the Constitution, there is a well-accepted view that they can be examined by reference to international instruments, notably the Universal Declaration on Human Rights [UDHR] and the International Covenant on Civil and Political Rights [ICCPR].

The first clause of the UDHR:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

asserts an intrinsic value (inherent dignity) and an absolute claim (inalienable rights) and claims that this recognition is the foundation for freedom, justice and peace.

The claim to inherent dignity and equal and inalienable rights is repeated in the preamble to the ICCPR.

Article 6(1) of the ICCPR provides:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

It is clear that the "inherent right to life" is the primary and most significant of all human rights. Indeed, article 4(2) precludes the right from being suspended notwithstanding a life-threatening national emergency.

The Northern Territory Act offends these principles. Even if the right is discretionary, rather than mandatory, the Northern Territory legislation fails to ensure that euthanasia will not be abused and the vulnerable exploited.

The Northern Territory Act has as its basis the concept of autonomy. The claim that autonomy is unlimited finds no support in western jurisprudence and has been explicitly denied in the western human rights tradition. The whole of the human rights tradition has held to inalienability which means that fundamental human rights can neither be given away nor taken away. To use John Stuart Mill's famous example, a person cannot sell him or herself into unfreedom in the name of freedom. Similarly, we do not permit the sale of body parts or organs. We do not allow a defence of consent to assault and battery. it has long been recognised that an unlimited claim to autonomy leads to the claim that those unable to exercise autonomy have no moral and legal rights. This is contrary to the whole development of international human rights since the second world war: the development of human rights is based on a concept of dignity founded on the equal worth of each member of the human family, not just of the autonomous. Fundamental human rights form a social contract which Parliament is committed to protect and defend. Moreover, Australia has freely bound itself to the United Nations Human Rights treaties, particularly through becoming a signatory to the ICCPR and the International Covenant on Economic, Social and Cultural Rights and subsequent human rights documents.

The Northern Territory legislation establishes a separate category for the terminally ill in which they no longer enjoy the same status as other human beings. Given that physical pain is controllable by adequate palliative care, under the legislation, their existence depends on their mental state. Whether a person lives or dies depends on

whether they feel so worthless or are made to feel such a burden that they relinquish their will to live. This undermines the human rights of all terminally ill persons.

The evidence of euthanasia without knowledge or consent in the Netherlands is a clear indication of the consequences of such legislation. Indeed, the monitoring requirements in the Northern Territory are less rigorous than the Netherlands.

The Northern Territory legislation offends the principles that the Scrutiny of Bills Committee is charged to examine in that it trespasses unduly on personal rights and liberties of terminally persons, makes the presence or removal of rights and liberties unduly dependent upon insufficiently defined administrative powers, and makes their presence or removal unduly dependent upon non-reviewable decisions by members of the medical profession.

The impact of the Northern Territory Act on aboriginal communities is significant. The evidence to the Senate of the person appointed by the Northern Territory Government to conduct an education campaign amongst aboriginal communities, Mr Chips Mackinolty (although personally in favour of euthanasia), about the impact of the Northern Territory legislation on aboriginal health raises significant human rights concerns. If personal rights and liberties extend to real access to adequate health care, then the fear generated amongst aboriginal people by the Northern Territory act clearly offends these principles.

On the other hand, the Euthanasia Laws Bill is consistent with the ICCPR. While it proscribes the intentional killing of another, it properly allows a person to refuse burdensome, futile or unwanted treatment. It also allows the provision of pain relief even if that relief may coincidentally hasten death. It allows the appointment of medical agents.

Accordingly, the Euthanasia Laws Bill does not trespass on personal rights and liberties. To the contrary, it seeks to protect them.

The committee thanks Mr Andrews for this comprehensive 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 responded to those comments in a letter dated 19 September 1996. The committee discussed this response in its Ninth Report of 1996 and made further comments. The Attorney-General has responded to those comments in a letter dated 17 March 1997. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

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.

In its Ninth Report of 1996, the committee thanked the Attorney-General for this response. The committee went on to say that the Attorney-General may have been aware that the Position Paper on *Scrutiny of National Schemes of Legislation* had since been tabled in the Senate. The committee indicated it 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 questioned 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 concerned the committee was that subclause 61(7) in the present bill appeared 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 did not want to be told that the Legislative Instruments Act approves removing such subordinate legislation from the scrutiny of Parliament.

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

The committee, therefore, 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.

On this issue, the Attorney-General has responded further:

> The Committee, commenting on the limited scrutiny of national schemes of legislation allowed under the Bill, drew attention to the tabling of a Position Paper on Scrutiny of National Schemes of Legislation and asked whether I wished to make any comments. I do not propose to comment on this matter as my Department is currently preparing a submission on the Position Paper.
>
> Clause 61(7) does not approve a general rule that subordinate legislation relating to national schemes of legislation should not be subject to Parliamentary review and disallowance. The clause recognises that any present or future scheme of legislation might require scrutiny and disallowance. However, if, in enacting the enabling legislation for the national scheme, the Parliament has considered and rejected the desirability of review and disallowance of subordinate legislation then it is not appropriate for that issue to be reconsidered when the subordinate legislation is actually made.
>
> The continued operation of clause will be considered in the review of the operation of the Bill under clause 72 when any concerns about over use of the provision, if any, can be examined. By the time of the review recommendations from the Working Part of Representatives on Scrutiny of National Schemes of Legislation should be available for consideration by the Government and provide a sound foundation for the consideration of the application of this Bill to those types of schemes.

The committee thanks the Attorney-General and looks forward to working with the Government to resolve this issue.

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.

In its Ninth Report of 1996, the committee pointed out that its 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 gave the impression that the committee was asking for the status quo to be changed. Rather the committee was 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.

The committee said in its Ninth Report of 1996 that 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 the committee asked why the Parliament should not oversee what is done in its name?

The committee, therefore, continued 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.

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

> The Committee's concern about exemption from the legislation in respect of instruments dealing with terms and conditions of persons employed by the Commonwealth has also been raised by the Senate Standing Committee on Regulations and Ordinances. In addition, The Chair of that Committee wrote to the Minister for Industrial Relations seeking his agreement to withdrawal of the exemption. I understand that the Minister will be writing shortly to that Committee on the issue.

The committee thanks the Attorney-General for this response and would be interested in the views of the Minister for Industrial Relations on the issues we have noted.

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

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.

In its Ninth Report of 1966, the committee thanked the Attorney-General for this response. The committee, however, remained 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, continued 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.

On this issue, the Attorney-General has responded further:

> Finally, the Committee is concerned that the modification by regulation allowed 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. In my earlier response I outlined the reasons why this would not occur. I note that the Committee is still troubled at that possibility. Given the Committee's concern I am currently considering an amendment to the Bill that would make it clear that a modification or adaptation could not operate to affect the operation of Part V of the Act.

The committee thanks the Attorney-General for this further response and awaits the outcome of his consideration of an amendment.

Retirement Savings Accounts Bill 1997

(Previous citation: Retirement Savings Accounts Bill 1996)

This bill was introduced into the House of Representatives on 4 December 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to allow banks, building societies, credit unions and life insurance companies to provide superannuation without a trust structure in the form of retirement savings accounts from 1 July 1997.

The committee dealt with this bill in Alert Digest No. 1 of 1997, it which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 6 March 1997. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Strict liability - Reversal of the onus of proof
Clauses 148 and 149

In Alert Digest No. 1 of 1997, the committee noted that these clauses provide that it is a criminal offence punishable on conviction by a fine not exceeding 40 penalty units (currently $4 000) for innocently making a statement that is not true or keeping a record that is incorrect with no onus on the prosecution to prove that the person knew it was false or knew there was an incorrect record. All that the prosecution is required to prove is that the statement objectively was false or misleading in a material particular. The onus is placed on the defendant to prove that he or she not only did not know but also that he or she could not reasonably be expected to have known that the statement was false or misleading or that the record was incorrect.

The committee acknowledged that serious reasons of public policy may dictate that strict liability offences should be created and that in these cases specific statutory defences assist the personal rights and liberties of the accused.

The committee noted that clauses 150 to 154 provide a comprehensive scheme of offences for recklessly or intentionally making false statements or keeping incorrect records. These offences require the prosecution to prove the intention or recklessness of the accused. The committee was concerned that prosecutions will be launched with alternative charges so that, where the prosecution fails to prove that the accused intentionally or recklessly made false statements or kept incorrect records, the accused will then be required to prove that he or she did not know and could not be reasonably expected to have known that the statement was false or the record incorrect to avoid a fine not exceeding $4 000.

The usual justification for reversing the onus of proof in criminal matters is that the prosecution will find it too difficult to prove intention. Without further material before it, the committee did not accept that this is the situation. In any event, the committee pointed out that the accused is, in these instances, put in the position of proving a negative. How does one prove that not only did one not know something at some point in the past but that at that time could not be reasonably have been expected to have known?

Given the availability of prosecutions for intentionally or recklessly making false statements, the committee sought the Treasurer's advice on the necessity for offences of strict liability and reversal of the onus of proof in these clauses.

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

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

> The regulation of RSAs will involve two distinct forms of supervision: prudential supervision oriented towards maximising the financial soundness and safety of the product provider, and functional supervision oriented towards ensuring compliance by RSA providers with certain retirement income and superannuation standards. Prudential supervision will be undertaken by the current institutional regulator of the relevant product provider (that is, the Reserve Bank of Australia in the case of banks; the Australian Financial Institutions Commission and State Supervisory Authorities for building societies and credit unions; and the Life Insurance Group of the Insurance and Superannuation Commission (ISC) for life offices). Functional supervision to ensure that concessionally taxed RSAs comply with the retirement income and superannuation standards will be undertaken by the ISC.
>
> The RSA Bill provides a framework for the functional supervision of RSAs by the ISC. Clauses 148 and 149 are located in Part 12 of the Bill. The object of Part 12 is to maintain the integrity of the supervisory framework by proscribing dishonest conduct in relation to the RSA institution's dealings with the ISC or its record keeping requirements.
>
> I acknowledge that there is a reversal of the normal onus of proof in clauses 148 and 149 which would not normally be regarded as acceptable. However, in the case of legislation with a 'revenue protection' purpose, a more robust approach has generally been taken to the question of onus of proof.
>
> Compliance with the RSA legislation allows institutions to accept superannuation contributions which attract substantial and generous taxation concessions. False or misleading statements by RSA providers to ISC officials, or falsification of records, could seriously undermine the capacity of the ISC to investigate breaches of the retirement income standards and institute appropriate remedial action, and the RSA provider may be able to continue to accept concessionally taxed superannuation contributions when they should not otherwise do so. In these circumstances, and given the serious nature of these offences, officers of RSA providers should have to satisfy the onus of proof which applies to any other taxpayer under taxation law generally.

> To this end, clauses 148 and 149 have been closely modelled on sections 8K and 8L of the *Taxation Administration Act 1953*. It should also be noted that the Government has announced that, for reasons of competitive neutrality, RSAs should be subject to superannuation standards consistent with those which apply to other superannuation entities. For this reason, various parts of the RSA Bill have been modelled closely on the *Superannuation Industry (Supervision) Act 1993* (the SIS Act). Clauses 148 and 149, in particular, closely mirror sections 302 and 303 of the SIS Act which provide for an identical reversal of the onus of proof for the same policy reasons outlined above.

The committee thanks the Assistant Treasurer for this response and notes his reasons for the renewal of the onus of proof insofar as they apply to clause 148. The committee, however, remains concerned with respect to clause 149 which appears to be able to apply to something as simple as a typing error in a statement to an account holder (see clause 63 "transactions related to RSAs"). As such an error could scarcely qualify as a serious offence, the committee would see an advantage in their being some distinction in clause 148 to quarantine less serious offences.

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

Modifiable provisions - appropriate delegation of legislative power? Part 15

In Alert Digest No. 1 of 1997, the committee noted that Part 15 would permit the Commissioner to modify the operation of, or the provisions of, various other measures in the bill.

The committee noted in the explanatory memorandum the reasons for giving this wide legislative power to the Commissioner - reasons similar to those put forward in respect of other bills regulating financial institutions and products: flexibility in dealing with specific industry problems; ensuring that the regulatory framework remains responsive to a diverse and rapidly expanding superannuation industry.

The committee also noted that the explanatory memorandum assures Parliament that the Commissioner would exercise these powers only where he or she is satisfied that the particular RSA provider or class of providers would still comply with the spirit of the provisions concerned, or where the exercise of these powers will advance the objects of this Act.

The committee was concerned at the proposed delegation of Parliament's power to amend this legislation as well as the power to exempt RSA providers from the application of these provisions. The committee could understand the convenience of the Commissioner being able, in appropriate circumstances, to exempt an RSA provider from one or more of the operating standards prescribed under clause 38 or even from the penalty for failing to comply with them under clause 39. But the

committee questions whether convenience is a sufficient warrant for including such wide powers as, by way of example, to enable the Commissioner to exempt a particular RSA from civil or criminal liability in respect of supplying false or misleading information to a prospective client (clauses 74 and 75).

For the Commissioner to intervene to declare that an act, otherwise criminal, is not to be criminal in a particular case, clause 74 raises the issue of the separation of powers. Likewise, where a person suffers loss or damage because an RSA provider has issued a regulated document that is false or misleading (clause 75), it is for a court to decide whether the circumstances warrant that no recovery of the loss be allowed.

The committee, therefore, asked the Treasurer whether the width of the powers delegated in Part 15 should be reviewed.

On this issue, the Assistant Treasurer has responded:

> The Insurance and Superannuation Commissioner's (the Commissioner) powers to exempt or modify the legislation in its application to an RSA provider or class of RSA providers corresponds to similar powers of the ISC under the SIS Act (Part 29) and the Australian Securities Commission (ASC) under the Corporations Law (section 1084). Both the Commissioner and the ASC have used their modification powers under the SIS Act and Corporations Law respectively in relation to a number of regulatory issues. In the ISC's case, these have been documented in the ISC's Annual Reports for 10994-95 and 1995-96.
>
> As noted by the Committee, the exemption and modification powers in the RSA Bill (Part 15) reflect the need for some flexibility under the proposed new RSA regime because of the complexity and diversity of the superannuation industry and because of the need to ensure that the regulatory framework remains responsive to the pace of change in the financial markets. In addition, the exemption and modification powers will help to smooth the transition of RSA institutions to the new regime.
>
> The modifiable provisions are a small part of the RSA Bill, only 29 out of 199 clauses. They relate to the operating standards for RSA providers, the payment of unclaimed money, the payment of benefits to eligible rollover funds and the procedures for offering RSAs. With regard to the Committee's general concerns about the width of the powers, it should be noted that they only extend to the provisions in the RSA Bill which are equivalent in operation to modifiable provisions in the SIS Act. The intention behind this is to maintain consistency between the RSA and SIS legislation, in order to maintain a level playing field throughout the superannuation industry.
>
> Although I acknowledge the Committee's specific concerns with the extension of these powers to clauses 74 and 75, the equivalent provisions in the SIS Act, sections 161 and 162, are modifiable. I should also point out that the Commissioner would not use these powers to exempt a person from criminal or civil liability under clauses 74 and 75 respectively. Rather, these provisions are only subject to the Commissioner's exemption and modification powers because of the possible need to clarify their wording and scope if the rapidly changing nature of the superannuation industry compel it. An example would be where the Commissioner considered it

necessary to clarify the meaning of the term 'false or misleading' to correct flagrant market abuses and enhance consumer protection.

The committee thanks the Assistant Treasurer for this response. The committee notes the Assistantant Treasurer's assurance that:

> I should also point out that the Commissioner would not use these powers to exempt a person from criminal or civil liability under clauses 74 and 75 respectively.

If this is the intention of the Executive and the Commissioner, the committee is of the view that Parliament should also express a similar intention by way of an amendment to the clauses that the powers not be used in this way.

Subject to such a solution, the committee continues to draw Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(iv) of the committee's terms of reference.

Parliamentary scrutiny

In Alert Digest No. a of 1997, the committee noted that in paragraph 364 of the explanatory memorandum reference is made to the annual report, pursuant to subclause 199(2), in respect of the exercise of the powers in Part 15. The explanatory memorandum seems to assume that this would be the avenue for Parliamentary scrutiny. The committee sought the Treasurer's advice on whether, on the enactment of the Legislative Instruments Bill 1996, the exemptions and declarations of the Commissioner, being legislative in character and made in the exercise of a power delegated by Parliament, would be subject to the provisions of that bill and thus directly subject to Parliamentary scrutiny.

Pending the Treasurer's advice, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

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

> Parliamentary scrutiny of the Commissioner's use of the exemption and modification powers is intended to occur in two ways. First, the ISC has to report annually on the working of the RSA Act - including on the details of the exercise during the year of the Commissioner's powers under Part 15 - and the Minister has to have the report tabled before each House of the Parliament within 15 sitting days after the day of receipt.
>
> Second, clause 179 of the RSA Bill requires the Commissioner to cause a copy of an exemption or modification under Part 15, or revocation of such an exemption or modification, to be published in the Gazette. Decisions made under clauses 173, 176 and 178 are reviewable by the Administrative Appeals Tribunal.

Third, once the Legislative Instruments Bill 1996 is enacted, the exemptions and modifications made by the Commissioner are expected to be subject to the provisions of that legislation and therefore directly subject to Parliamentary scrutiny. Under this Bill, the rules relating to the Parliamentary scrutiny of exemptions and modifications are generally the same as those that currently exist for regulations. That is, legislative instruments will have to be laid before each House of Parliament no later than 6 sitting days after the instrument is registered, and either House may disallow the instrument with 15 sitting days of the instrument being laid before the House.

I trust that the above information is useful in the Committee's deliberations regarding concerns over specific provisions of the RSA Bill. In the Government's view, these provisions are necessary to ensure the flexible and effective operation of the regime that will regulate RSAs and RSA providers.

The committee thanks the Assistant Treasurer for this response.

Telecommunications Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to:

- identify carriers and carriage service providers as the participants in the telecommunications industry who are to be subject to regulation and create the mechanisms to impose any necessary regulation upon them;
- create obligations on carriers and carriage service providers for the benefit of consumers (such as universal service, untimed local calls and the customer service guarantee);
- create obligations on carriers and carriage service providers for the benefit of the general community (such as provision of emergency call services, protection of the privacy of communications and requirements to co-operate with law enforcement agencies);
- create obligations on carriers and carriage service providers which will promote competition (such as provision of pre-selection and requirements for calling line identification);
- provide for technical regulation and management of numbering; and
- give benefits to carriers in the form of certain powers and immunities which assist them in carrying out the obligations which the legislation places on them.

The committee dealt with this bill in Alert Digest No. 1 of 1997, in which it made various comments. The Minister for Communications and the Arts has responded to those comments in a letter dated 17 March 1997. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Reversal of the onus of proof
Clause 280

In Alert Digest No. 1 of 1997, the committee noted that clause 280 of this bill, if enacted, would reverse the onus of proof in a criminal prosecution for an offence relating to disclosure of information under Division 2 of Part 13.

Subclause(1) provides, in effect, that the persuasive burden of proof lies on the defendant where the defendant relies on the exception in clause 272. Clause 272 provides that disclosure is not prohibited where the person believes on reasonable

grounds that the disclosure or use of the information is reasonably necessary to prevent or lessen a serious and imminent threat to someone's life or health. The committee noted that, in the past, it had been sometimes prepared to accept a reversal of the onus of proof where the matters to be raised by way of defence by the accused are peculiarly within the knowledge of the accused and it would be extremely difficult and costly for the prosecution to be required to negative the defence. On analysis, there are some aspects of the present case which may fall outside those guidelines and other aspects which are of concern to the committee.

It was the committee's view that there needs to be a deterrent against the reckless disclosure of information on too superficial an assessment of a threat to life or health without inhibiting the reasonable disclosure where a serious and imminent threat exists. The committee was concerned that requiring the accused to establish on reasonable grounds that the disclosure was reasonably necessary to prevent or lessen a serious or imminent threat to someone's life or health favours the deterrence and may unnecessarily introduce caution that inhibits necessary and timely action.

While one element - a state of belief - may be seen as peculiarly within the accused's knowledge, other elements which would need to be established are fairly objective: the seriousness of the threat, the imminence of the threat, how the health of the person would be affected. Further, there is a requirement to establish not only that there were reasonable grounds for the belief but that the disclosure was reasonably necessary. The committee considered that a person who makes an honest mistake in disclosing may have difficulty in later establishing the reasonable grounds.

Further, in a case of this nature the decision to prosecute ought to be made only after an objective assessment that the person could not have had reasonable grounds for forming such a belief. Given that objective assessment, the question arises whether requiring the prosecution to prove the lack of reasonable grounds would be extremely difficult and costly.

As the committee considered that, in an apparent emergency, it would better to err on the side of action and that placing the onus of proof on the accused may inhibit this, the committee sought the Minister's reconsideration of the necessity to reverse the onus of proof in this case.

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:

> Clause 280 provides for the burden of proof in proceedings for an offence against Division 2 of Part 13. That Division creates offences in relation to the disclosure of information or documents relating to the provision of carriage services.

Clause 280(1) provides that in proceedings for an offence against Division 2, the exceptions in Division 3 are taken to be part of the description of the offence. The consequence of this is that the prosecution would have the persuasive burden of disproving any of the exceptions applied at the time of the alleged offence.

However, this does not apply to the exception provided by clause 272 which relates to the disclosure or use of information or a document where the person believes on reasonable grounds that the disclosure or use is reasonably necessary to prevent or lessen a serious and imminent threat to the life or health on another person. The consequence of this is that a person accused of breaching Division 2, who wants to rely on the exception provided by clause 272 as a defence, would have to raise it in defence and would have the burden of proving that the exception applied at the time of the alleged offence.

The Committee has expressed the view that a person who makes an honest mistake in disclosing may have difficulty in later establishing the reasonable grounds for the disclosure. The Committee also considered that the decision to prosecute should only made after an objective assessment that the person could not have had reasonable grounds for forming the belief. Also, the Committee expressed the view that requiring an accused to establish on reasonable grounds that the disclosure was reasonably necessary favours the deterrence and may unnecessarily introduce caution that inhibits necessary and timely action.

I thank the Committee for drawing to my attention its concerns about this clause and I agree with the views expressed by the Committee. Accordingly, the Government will move an amendment to the clause so that the exception under clause 272 will be treated the same as the other exceptions in Division 3 of Part 13.

The committee thanks the Minister for this response, noting the terms of the amendment.

Delegation of powers to a person - rights unduly dependent on insufficiently defined administrative power
Subclause 451(1)

In Alert Digest No. 1 of 1997, the committee noted that subclause 451(1) of this bill, if enacted, would enable the ACA to delegate any or all of the powers conferred on the ACA by the numbering plan to a body corporate. Clause 429 provides that the ACA must make a numbering plan which will be a disallowable instrument and thus subject to Parliamentary scrutiny.

The committee generally has concerns with a provision which gives a body a wide-ranging discretion to choose any person at all as the recipient of a delegated administrative power as such a discretion may result in making rights, liberties or obligations unduly dependent upon insufficiently defined administrative power.

Generally, the committee has taken the view that it 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 has expressed

a preference that the limit should preferably be 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 this instance, as the numbering plan has yet to be made, the powers capable of being delegated are unknown and therefore without limit. Equally 'a body corporate' is an unknown quantity.

In these circumstances, the committee sought the advice of the Minister on whether the bill could be amended in some way to confine the open-ended discretion.

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:

> Clause 451 allows the ACA to delegate to a body corporate any or all of the powers conferred on the ACA by the numbering plan.
>
> The numbering plan is made under clause 439 and would include such matters as rules for the allocation, use, transfer, portability, surrender and withdrawal of numbers used in relation to the provision of carriage services to the public in Australia.
>
> Clause 439(7) provides that the numbering plan may make provision for or in relation to a matter by empowering the ACA to make decisions of an administrative character.
>
> The Committee has expressed the view that because the numbering plan is yet to be made, the powers capable of being delegated are unknown and therefore without limit. The Committee considers this may breach principle 1(a)(ii) of the Committee's terms of reference which aims to strike out provisions that may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. The Committee seeks my advice on whether the Bill could be amended in a way so as to confine the open-ended discretion.
>
> The numbering plan is a disallowable instrument (see clause 439(11)) and will therefore be subject to parliamentary scrutiny. This will allow each House of Parliament to consider whether the discretions provided for in the plan are appropriate. Clause 444 requires the ACA to engage in public consultation on a draft of the numbering plan and requires the ACA to have due regard to any comments made by interested persons during the consultation process.
>
> In preparing the numbering plan, the ACA will be restricted in what it may include in the plan to dealing with matters that relate to the numbering of carriage services in Australia, and the use of numbers in connection with the supply of such services. Any discretions provided by the plan would be similarly restricted.

> The Department of Communications and the Arts consulted with the Attorney-General's Department on the draft of clause 451. During those consultations it was agreed that the numbering plan should provide for review of any decisions of an administrative character allowed by the numbering plan. This expectation has been indicated at page 73 of Volume 2 of the Explanatory Memorandum for the Telecommunications Bill.
>
> A further safeguard in clause 451(2) provides that, in the exercise of a delegated power, the delegate is subject to the written directions of the ACA.
>
> This delegation power has been included as part of the general policy, expressed in various provisions of the Bill, that industry should as much as possible be able to regulate itself. Clause 4 of the Bill states that the regulatory policy for the legislation is that telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation. Indeed, industry was very keen for the inclusion of clause 451 during the consultation phase on the draft Bill. It is anticipated that the body corporate to which the ACA might delegate its powers under the numbering plan would be formed by industry and would be representative of the stakeholder interests attached to the management of the numbering plan.
>
> The inclusion of review rights and the ACA's power of direction are considered to be adequate safeguards against any possible problem that might arise from allowing delegation of yet-to-be-defined discretions under the numbering plan to a body corporate.

The committee thanks the Minister for this response. The ACA's power of direction is included in the bill in clause 451. Review rights, however, are merely an expectation. The committee, therefore, asks whether the Minister would consider including in subclause 451(2) that the written directions of the ACA must include a direction to establish the "expected" merits review indicated at page 73 of Volume 2 of the explanatory memorandum to which the Minister refers.

Subject to such a solution, the committee continues to draw 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.

Vicarious liability and reversal of the onus of proof
Subclause 560(3)

Subclause 560(3) 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. 1 of 1997, the committee noted that clause 560, if enacted, would impose vicarious liability on a person for the criminal acts of his or her employee or agent. Subclause (3) 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 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 559 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 560(3) 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. The committee noted that clause 560 specifically excludes vicarious liability from an offence against clause 42 of the bill and from certain offences under the *Crimes Act 1914*. Accordingly, the committee sought the Minister's advice whether any other offences having less serious consequences might also be excluded from the ambit of this provision.

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.

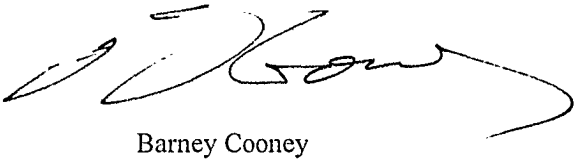
On this issue, the Minister has responded as follows:

> The Committee has sought my advice as to whether any offences other than the offence created by clause 42 might be excluded from the ambit of clause 560(3)d. I thank the Committee for directing my attention to this matter.
>
> Clause 560(3) provides that if an employee or agent of a person other than a corporation engages in conduct within his or her actual or apparent authority, the conduct will be taken, for the purposes of a proceeding under the 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.
>
> Clause 560(3) will not apply to proceedings for an offence under clause 42, which prohibits network units being used without a carrier licence or nominated carrier declaration. The maximum penalty applying to a contravention by an individual of clause 42 is 20,000 penalty units ie, $2 million. The amount of this penalty far exceeds any other penalty under the Bill for an offence for which an individual might be liable. The next highest penalty for an individual for an offence is 2,000 penalty units (or $200,000) for an intentional or reckless contravention of clause 436(1) dealing with the operation of prohibited customer equipment or customer cabling.
>
> The magnitude of the penalty under clause 42 means that it is appropriate that it be excluded from the ambit of clause 560(3). For the following reasons it is not, however, appropriate that any other offences be excluded from the ambit of clause 560(3).
>
> Part 21 of the Bill contains a number of offences relating to non-compliance with technical standards including the supply and connection of unauthorised customer equipment, unauthorised cabling work and non-compliance with cabling provider rules and cabling licence conditions. Because failure to comply with Part 21 obligations may seriously endanger public health and safety and/or may risk causing serious damage to a carrier's network, I consider that individuals subject to these obligations should be expected to establish rigorous monitoring mechanisms and/or comprehensive training programs to minimise the possibility of any contraventions of these obligations taking place.
>
> Other offences to which clause 560(3) would apply include those relating to the failure of a participating carrier to lodge returns of eligible revenue, the improper disclosure of protected information, failure to keep proper records, non-compliance with ACA and ACCC directions and orders, giving the ACA false or misleading

information and hindering ACA investigations. Once again, in my view it is not unreasonable to expect that an individual subject to these obligations will have appropriate reporting or monitoring mechanisms and/or training programs in place to minimise the possibility of any contraventions of these obligations taking place.

For these reasons, I do not propose that any offences other than the offence created by clause 42 should be excluded from the ambit of clause 560(3).

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



Barney Cooney
Chairman

RECEIVED
4 MAR 1997
Senate Standing C'tte
for the Scrutiny of Bills

MINISTER FOR FINANCE

Senator B. Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2601

- 3 MAR 1997

Dear Senator Cooney

Alert Digest No. 1 of 1997 contained your Committee's comments on the package of legislation which is to replace the *Audit Act 1901* - namely, the *Audit (Transitional and Miscellaneous) Amendment Bill 1996*, the *Auditor-General Bill 1996*, the *Commonwealth Authorities and Companies Bill 1996* and the *Financial Management and Accountability Bill 1996.*

The Committee has sought my advice in relation to Clause 37 of the Auditor-General Bill:

- "whether subclause 37(4) ought also to require the Auditor-General to publish reasons where he or she decides not to include sensitive information under clause 37(1);
- why, if members of the executive, under subclause 37(5), may be given the sensitive information, Parliament and its committees might not be entrusted with access (suitably safeguarded) to the same information."

I note the Committee's comments on the remainder of the Bills.

In relation to the first matter, Recommendation 9(c) of the Joint Committee of Public Accounts, in its *Report 346, Guarding the Independence of the Auditor-General*, also canvassed this issue. In considering its response to this recommendation, the Government was made aware that the Australian National Audit Office, in the process of preparing reports, regularly decides to exclude sensitive information (eg commercial-in-confidence matters). For the Auditor-General to be required, in each instance, to state in the report that material was excluded, would not only require the ANAO to depart from long-standing past practice (given that the equivalent of clause 37 has been in the *Audit Act 1901* - as subsection 48F(5) - for some time), but also, it could well translate into a very large number of reports. Given that the material may have no real bearing on the report, to highlight the fact could actually be detrimental to the effectiveness of the report if it diverted attention away from the report's

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recommendations and content. Thus, as a means of holding the Executive to account, the Bill proposes only requiring the Auditor-General to specify that sensitive information had been excluded where he had done so at the instigation of the Attorney-General.

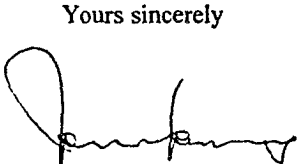
In relation to the second matter, it seems clear that, notwithstanding "suitable safeguards", such an approach would have the real potential to result in the very sort of inappropriate disclosures that the provisions of clause 37 are designed to prevent. Subclause 37(5) restricts the provision of reports containing sensitive information to only the Prime Minister, the Finance Minister and the responsible Minister (if any) - the information is not available even to the wider Executive at large. (An identical provision (subsection 48F(7)) has been in the Audit Act for some years and appears not to have lent itself to misuse.)

I also note the Committee's view that:

> "...as the Auditor-General is described in subclause 8(1) as an independent officer of the Parliament, subclause 37(3) denies to the legislature, or any of its committees, the opportunity of satisfying itself that **its agent** is properly carrying out his or her functions and is refusing to reveal only those matters referred to in subclause 37(2)." (emphasis added)

This is a selective view of the provisions covering the independence of the Auditor-General which ignores or overlooks subclause 8(3) which limits the powers of the Parliament to act in relation to the Auditor-General to those specified in law. Importantly, there are no implied powers arising from the Auditor-General being an independent officer of the Parliament.

Yours sincerely



JOHN FAHEY

COMMONWEALTH OF AUSTRALIA

RECEIVED
18 MAR 1997
Senate Standing ... for the Scrutiny of Bills

THE HON. GEOFF PROSSER, MP
MINISTER FOR SMALL BUSINESS AND CONSUMER AFFAIRS
MINISTER RESPONSIBLE FOR CUSTOMS

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

Dear Senator Cooney

I am writing in response to the Scrutiny of Bills Alert Digest No.1 of 1997, dated 5 February 1997, which contained comments by your Committee on the Customs and Excise Legislation Amendment Bill (No.2) 1996, and in particular, the proposed forced disclosure provision in the new audit amendments contained in the Bill.

Your Committee has noted its in principle objection to legislative provisions which take away one's "right to remain silent" via forced disclosure provisions, and the Government accepts the proposition that it is only in exceptional circumstances where the public interest might countenance the taking away of this fundamental individual right.

It is the Government's view that the range of amendments contained in this Bill to improve accountability under the Diesel Fuel Rebate Scheme via new audit provisions and penalty sanctions rely on a claimant's right to silence in audits conducted under the Scheme being taken away.

The reasons for this approach are as follows:

The Diesel Fuel Rebate Scheme operates with a Budget of $1.4 Billion per annum. For the most part, it is an honour-based system relying upon the integrity of those who choose to use the Scheme that the information supplied by them to ground rebate claims is true and correct.

The Australian National Audit Office's recent report on the Scheme criticised the structure of the Scheme from an audit point of view, citing the lack of audit-related powers, and ineffective sanctions. The proposed legislation addresses both of those criticisms, imposing record-keeping and audit obligations on those who choose to avail themselves of the benefits of the Scheme, and introducing a 3 tier penalty structure. In the proposed new penalty regime;

- The most serious offences involve those situations where a claimant knowingly or recklessly obtains or retains rebate that is not payable (see proposed paragraph 234(1)(c), item 32 pg.23 of the Bill refers) or knowingly or recklessly makes a false or misleading statement (see paragraph 234(1)(d) of the existing Act). These are *mens rea* offences and contravention of paragraph 234(1)(c) results in a maximum penalty of 3 times the amount of rebate obtained or retained by the commission of the offence (see paragraph 234(2)(b), item 33 on pg.23 of the Bill refers), whilst contravention of paragraph 234(1)(d) results in a maximum penalty of $5,000 and twice the rebate to which there is no entitlement (see subsection 234((4), item 35 on pg.23 of the Bill refers).

- The next level of penalty is in relation to the new strict liability offences which apply in two circumstances

  - new section 164A, (item 25 on pgs. 12 and 13 of the Bill refer)

    This is the first of the two new strict liability offences, to replace Section 164A of the Act relating to a failure to notify Customs of any one of the 3 events which renders one ineligible for rebate (sale or other disposal, use in an otherwise indicated manner, or loss)

    The penalty is an amount not exceeding 100% of the "overclaim".

  - new subsection 164AC(8) (item 25 on pg. 19 of the Bill refers)

    This is the second of the new strict liability offences, to cover the sanction for a failure to substantiate an entitlement to rebate via the new audit powers of diesel fuel records.

    The penalty is again 100% of the "overclaim".

- The last level of penalty introduces a more flexible administrative penalty option than that currently existing in the Act, which gives Customs an option to apply an administrative penalty to both of the strict liability offences, at 20% of the "overclaim" (new paragraphs 164AA(2)(b) and (c), Item 25 on pgs. 13-14 of the Bill refers). The administrative penalty is akin to a traffic infringement notice, ie. if the person on whom the notice is served elects not to pay, then they might be proceeded against in Court for the strict liability offence. If the offence is proven though, a penalty of up to 5 times the amount of the administrative penalty they chose to forego is available to the Court.

It is in regard to the new audit power provision (the second of the new strict liability provisions above) that your Committee's commentary is directed; in particular, new subsection 164AC(15) on pgs. 19 and 20 of the Bill, where the "right to silence" is taken away via a forced disclosure provision. While the customary immunity from prosecution protection is acknowledged by the Committee, the Committee is concerned that the immunity does not extend to the criminal proceedings for offences against new paragraphs 234(1)(c) and (d) of the Customs Act; ie the first tier of the proposed new penalty regime above.

I consider it appropriate to include these "mens rea" offences in the group of offences for which the immunity from prosecution is excluded from the forced disclosure provision, because the offences are specific to the Diesel Fuel Rebate Scheme itself.

Audits under the Scheme are to be conducted on a risk-assessment basis. Given the huge number of claims received under the Scheme (220,000) the chances of any individual or claim being audited are low.

In a Scheme with such a huge call on the public purse, and where claimants are audited on a risk-assessment basis, it is not considered appropriate to only impose a sanction which in effect only returns to the Commonwealth amounts which should not have be claimed in the first place. Given the comparatively low risk of audit, such a sanction would simply encourage the unprincipled to "play the odds".

Thus, it is the Government's view that it is necessary in the public interest that applicants under the Scheme forgo the right to silence in relation to audits conducted under the Scheme, and in any subsequent proceedings under the Act, for the reasons summarised below:

- the provision is necessary to protect the public-purse investment of $1.4 billion per annum;

- the Scheme is optional - applicant's may choose not to participate, and therefore not become liable to the record-keeping and audit provisions.

- the information which will typically be sought under the audit provisions reposes almost exclusively in the hands of the applicant for rebate. In these circumstances, to allow an applicant to avail himself or herself of the right to silence on the occasion of an audit would be in effect to render the audit provisions optional, and in effect nugatory. The result would be an incentive to "play the odds" in a Scheme where only the honest players were subject to audit.

It is also noted that the Bill now proposes to codify the various obligations on claimants under this self assessment regime, and new subsection 164(1D) on page 5 of the Bill in particular provides that a person who applies for diesel fuel rebate represents by the making of the application that the information contained in the application is correct, and that the applicant is aware of his or her obligations in relation to the exercise of the audit powers under the Scheme, including the requirements to make available records that substantiate entitlements and to answer any questions concerning the fuel the subject of the application (paragraphs 164AC(2)(c) and (h) on pages. 16 and 17 of the Bill).

Given this, I think it is appropriate that no immunity from prosecution for an offence against this section is to be provided in the event of false or misleading information which might be uncovered in the exercise of the new audit powers.

I turn now to the other points noted by the Committee. These are:

- *the avenue of repayment through new sections 164AA and 164AB is available only at the discretion of the CEO;*

- *A decision by the CEO not to offer that avenue is not reviewable by the court of the AAT;*

- *the reasons of the CEO under section 164AA for believing that the applicant lacked entitlement are also not subject to review.*

The decision by the CEO to recover an amount of rebate with or without a 20% administrative penalty, and the reasons and circumstances underlying that decision, is intended to be unreviewable. To balance this, the CEO's decision is also unenforceable under the legislation.

Thus, where a person upon whom a penalty has been imposed is dissatisfied with the imposition of the penalty, or the fact-finding underpinning that decision, that person may simply do nothing if the person so chooses. In those circumstances it is not available to the CEO to seek to recover the rebate/penalty as a debt. The CEO's only option is to proceed against the person for a strict liability offence.

Under this system, a person who disputes the facts underpinning the imposition of the penalty (or the amount of penalty itself), and refuses to pay, is guaranteed that, without that person's consent, no penalty can be exacted other than by order of a Court.

In this respect, the administrative penalty operates very much like the "on-the-spot" traffic offences which govern our roads. As in that case, it is always the prerogative of the recipient of the administrative penalty notice to dispute the facts of the matter in Court. Under this proposed system, a recipient of an administrative penalty notice who refuses to pay need simply do nothing - it is the CEO who must then decide whether to launch a prosecution for the strict liability offence. However, where the CEO does so, and the offence is proven, the penalty which now might be imposed by the Court is up to 5 times the amount of the administrative penalty which the person chose to forego. Equally, a court may decide to impose a lesser penalty if that was appropriate in the court's view. Ultimately the independent review of the CEO's decision to proceed with a penalty, which your Committee commented on, is taken up by the Court in the sanction it might choose to impose when the matter is brought before it.

The Government considers that the rights of citizens are adequately guaranteed in these circumstances.

I trust the above comments are of assistance to the Committee

Your sincerely

Geoff Prosser

GEOFF PROSSER 12/3/97

KEVIN ANDREWS, M.P.
FEDERAL MEMBER FOR MENZIES

14 March 1997

The Secretary
Senate Standing Committee for the Scrutiny of Bills
The Senate
Parliament House
CANBERRA 2600

Dear Secretary,

EUTHANASIA LAWS BILL

I am replying to the invitation by the Senate Standing Committee for the Scrutiny of Bills to respond to its comments about the Euthanasia Laws Bill.

Although many of the issues relating to the Bill have been canvassed in the report of the Senate Legal and Constitutional Legislation Committee. I will respond to the Committee's comments.

The constitutional basis for the Euthanasia Laws Bill is clearly established in s. 122 of the Australian Constitution. The Bill was drafted by legal and constitutional experts to ensure that it validly met the requirements of the section.

The Bill is consistent also with the limitation of powers given to the Legislative Assemblies. The Commonwealth specifically chose to limit the powers given to the Northern Territory. It also provided that it could review decisions taken by the Northern Territory Legislative Assembly. The notion that powers are limited in their exercise by any particular chamber of Parliament is entirely consistent with and, indeed, the basis of the federal constitutional structure of the nation. I note also that of the 992 submissions to the Legal and Constitutional Committee inquiry from the Northern Territory, 930 (including almost 200 submissions from aboriginal communities) supported the Commonwealth Bill.

Far from being confined to the Northern Territory, the Rights of the Terminally Ill Act is available to any Australian who wishes to travel to the Territory. Indeed two of the four deaths under the Act have been of persons from other places.

The Bill also reflects the state of the law throughout the nation, with the notable exception of the Northern Territory.

Any examination of the human rights ramifications of the Bill must also involve an examination of the Northern Territory Rights of the Terminally Ill Act.

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Although human rights are not expressly referred to in the Constitution, there is a well-accepted view that they can be examined by reference to international instruments, notably the Universal Declaration on Human Rights [UDHR] and the International Covenant on Civil and Political Rights [ICCPR].

The first clause of the UDHR:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .

asserts an intrinsic value (inherent dignity) and an absolute claim (inalienable rights) and claims that this recognition is the foundation for freedom, justice and peace.

The claim to inherent dignity and equal and inalienable rights is repeated in the preamble to the ICCPR.

Article 6(1) of the ICCPR provides:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

It is clear that the "inherent right to life" is the primary and most significant of all human rights. Indeed, article 4(2) precludes the right from being suspended notwithstanding a life-threatening national emergency.

The Northern Territory Act offends these principles. Even if the right is discretionary, rather than mandatory, the Northern Territory legislation fails to ensure that euthanasia will not be abused and the vulnerable exploited.

The Northern Territory Act has as its basis the concept of autonomy. The claim that autonomy is unlimited finds no support in western jurisprudence and has been explicitly denied in the western human rights tradition. The whole of the human rights tradition has held to inalienability which means that fundamental human rights can neither be given away nor taken away. To use John Stuart Mill's famous example, a person cannot sell him or herself into unfreedom in the name of freedom. Similarly, we do not permit the sale of body parts or organs. We do not allow a defence of consent to assault and battery. It has long been recognised that an unlimited claim to autonomy leads to the claim that those unable to exercise autonomy have no moral and legal rights. This is contrary to the whole development of international human rights since the second world war: the development of human rights is based on a concept of dignity founded on the equal worth of each member of the human family, not just of the autonomous. Fundamental human rights form a social contract which Parliament is committed to protect and defend. Moreover, Australia has freely bound itself to the United Nations Human Rights treaties, particularly through becoming a signatory to the ICCPR and the International Covenant on Economic, Social and Cultural Rights and subsequent human rights documents.

The Northern Territory legislation establishes a separate category for the terminally ill in which they no longer enjoy the same status as other human beings. Given that physical pain is controllable by adequate palliative care, under the legislation, their existence depends on their mental state. Whether a person lives or dies depends on whether they feel so worthless or are made to feel such a burden that they relinquish their will to live. This undermines the human rights of all terminally ill persons.

The evidence of euthanasia without knowledge or consent in the Netherlands is a clear indication of the consequences of such legislation. Indeed, the monitoring requirements in the Northern Territory are less rigorous than the Netherlands.

The Northern Territory legislation offends the principles that the Scrutiny of Bills Committee is charged to examine in that it trespasses unduly on personal rights and liberties of terminally ill persons, makes the presence or removal of rights and liberties unduly dependent upon insufficiently defined administrative powers, and makes their presence or removal unduly dependent upon non-reviewable decisions by members of the medical profession.

The impact of the Northern Territory Act on aboriginal communities is significant. The evidence to the Senate of the person appointed by the Northern Territory Government to conduct an education campaign amongst aboriginal communities, Mr Chips Mackinolty (although personally in favour of euthanasia), about the impact of the Northern Territory legislation on aboriginal health raises significant human rights concerns. If personal rights and liberties extend to real access to adequate health care, then the fear generated amongst aboriginal people by the Northern Territory Act clearly offends these principles.

On the other hand, the Euthanasia Laws Bill is consistent with the ICCPR. While it proscribes the intentional killing of another, it properly allows a person to refuse burdensome, futile or unwanted treatment. It also allows the provision of pain relief even if that relief may coincidentally hasten death. It allows the appointment of medical agents.

Accordingly, the Euthanasia Laws Bill does not trespass on personal rights and liberties. To the contrary, it seeks to protect them.

Yours sincerely,

KEVIN ANDREWS

The Hon Daryl Williams AM QC MP

Attorney-General
and
Minister for Justice

96028931

CONFIRMATION OF FAX

17 MAR 1997

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

Dear Senator ~~Cooney~~ Barney

I refer to the letter of 31 October 1996 from the Secretary of the Committee attaching a copy of the Committee's Ninth Report of 1996 and drawing attention to the Committee's comments on the Legislative Instruments Bill 1996. The Secretary requested that any comments that I had on the issues raised be sent to you.

I note that in its Report the Committee referred to my response of 19 September 1996 on the Committee's concerns on this Bill and has now raised three issues which require further comment by me.

The Committee, commenting on the limited scrutiny of national schemes of legislation allowed under the Bill, drew attention to the tabling of a Position Paper on Scrutiny of National Schemes of Legislation and asked whether I wished to make any comments. I do not propose to comment on this matter as my Department is currently preparing a submission on the Position Paper.

Clause 61(7) does not approve a general rule that subordinate legislation relating to national schemes of legislation should not be subject to Parliamentary review and disallowance. The clause recognises that any present or future scheme of legislation might require scrutiny and disallowance. However if, in enacting the enabling legislation for the national scheme, the Parliament has considered and rejected the desirability of review and disallowance of subordinate legislation then it is not appropriate for that issue to be reconsidered when the subordinate legislation is actually made.

The continued operation of clause will be considered in the review of the operation of the Bill under clause 72 when any concerns about over use of the provision, if any, can be examined. By the time of the review recommendations from the Working Party of Representatives on Scrutiny of National Schemes of Legislation should be available for consideration by the Government and provide a sound foundation for the consideration of the application of this Bill to those types of schemes.

The Committee's concern about exemption from the legislation in respect of instruments dealing with terms and conditions of persons employed by the Commonwealth has also been raised by the Senate Standing Committee on Regulations and Ordinances. In addition, the Chair of that Committee wrote to the Minister for Industrial Relations seeking his agreement to withdrawal of the exemption. I understand that the Minister will be writing shortly to that Committee on the issue.

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Finally, the Committee is concerned that the modification by regulation allowed 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. In my earlier response I outlined the reasons why this would not occur. I note that the Committee is still troubled at that possibility. Given the Committee's concern I am currently considering an amendment to the Bill that would make it clear that a modification or adaptation could not operate to affect the operation of Part V of the Act.

Yours sincerely

DARYL WILLIAMS

ASSISTANT TREASURER
PARLIAMENT HOUSE
CANBERRA ACT 2600

- 6 MAR 1997

Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Suite SG 49
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 6 February 1997 from Mr Peter Crawford, Secretary, Senate Standing Committee for the Scrutiny of Bills (the Committee) to the Treasurer's Senior Adviser, concerning comments contained in the Scrutiny of Bills Alert Digest No. 1 of 1997 regarding the Retirement Savings Accounts Bill 1996 (the RSA Bill). I am replying on the Treasurer's behalf as the administration of superannuation legislation falls within my Ministerial responsibilities.

I understand the Committee has concerns regarding proposals in the RSA Bill. In response to the Committee's concerns, I draw your attention to the following.

Strict liability - Reversal of the onus of proof
Clauses 148 and 149

The regulation of RSAs will involve two distinct forms of supervision: prudential supervision oriented towards maximising the financial soundness and safety of the product provider, and functional supervision oriented towards ensuring compliance by RSA providers with certain retirement income and superannuation standards. Prudential supervision will be undertaken by the current institutional regulator of the relevant product provider (that is, the Reserve Bank of Australia in the case of banks; the Australian Financial Institutions Commission and State Supervisory Authorities for building societies and credit unions; and the Life Insurance Group of the Insurance and Superannuation Commission (ISC) for life offices). Functional supervision to ensure that concessionally taxed RSAs comply with the retirement income and superannuation standards will be undertaken by the ISC.

The RSA Bill provides a framework for the functional supervision of RSAs by the ISC. Clauses 148 and 149 are located in Part 12 of the Bill. The object of Part 12 is to maintain the integrity of the supervisory framework by proscribing dishonest conduct in relation to the RSA institution's dealings with the ISC or its record keeping requirements.

I acknowledge that there is a reversal of the normal onus of proof in clauses 148 and 149 which would not normally be regarded as acceptable. However, in the case of legislation with a 'revenue protection' purpose, a more robust approach has generally been taken to the question of onus of proof.

Compliance with the RSA legislation allows institutions to accept superannuation contributions which attract substantial and generous taxation concessions. False or misleading statements by RSA providers to ISC officials, or falsification of records, could seriously undermine the capacity of the ISC to investigate breaches of the retirement income standards and institute appropriate remedial action, and the RSA provider may be able to continue to accept concessionally taxed superannuation contributions when they should not otherwise do so. In these circumstances, and given the serious nature of these offences, officers of RSA providers should have to satisfy the onus of proof which applies to any other taxpayer under taxation law generally.

To this end, clauses 148 and 149 have been closely modelled on sections 8K and 8L of the *Taxation Administration Act 1953*. It should also be noted that the Government has announced that, for reasons of competitive neutrality, RSAs should be subject to superannuation standards consistent with those which apply to other superannuation entities. For this reason, various parts of the RSA Bill have been modelled closely on the *Superannuation Industry (Supervision) Act 1993* (the SIS Act). Clauses 148 and 149, in particular, closely mirror sections 302 and 303 of the SIS Act which provide for an identical reversal of the onus of proof for the same policy reasons outlined above.

Modification provisions - appropriate delegation of legislative power
Part 15

The Insurance and Superannuation Commissioner's (the Commissioner) powers to exempt or modify the legislation in its application to an RSA provider or class of RSA providers corresponds to similar powers of the ISC under the SIS Act (Part 29) and the Australian Securities Commission (ASC) under the Corporations Law (section 1084). Both the Commissioner and the ASC have used their modification powers under the SIS Act and Corporations Law respectively in relation to a number of regulatory issues. In the ISC's case, these have been documented in the ISC's Annual Reports for 1994-95 and 1995-96.

As noted by the Committee, the exemption and modification powers in the RSA Bill (Part 15) reflect the need for some flexibility under the proposed new RSA regime because of the complexity and diversity of the superannuation industry and because of the need to ensure that the regulatory framework remains responsive to the pace of change in the financial markets. In addition, the exemption and modification powers will help to smooth the transition of RSA institutions to the new regime.

The modifiable provisions are a small part of the RSA Bill, only 29 out of 199 clauses. They relate to the operating standards for RSA providers, the payment of unclaimed money, the payment of benefits to eligible rollover funds and the procedures for offering RSAs. With regard to the Committee's general concerns about the width of the powers, it should be noted that they only extend to the provisions in the RSA Bill which are equivalent in operation to modifiable provisions in the SIS Act. The intention behind this is to maintain

consistency between the RSA and SIS legislation, in order to maintain a level playing field throughout the superannuation industry.

Although I acknowledge the Committee's specific concerns with the extension of these powers to clauses 74 and 75, the equivalent provisions in the SIS Act, sections 161 and 162, are modifiable. I should also point out that the Commissioner would not use these powers to exempt a person from criminal or civil liability under clauses 74 and 75 respectively. Rather, these provisions are only subject to the Commissioner's exemption and modification powers because of the possible need to clarify their wording and scope if the rapidly changing nature of the superannuation industry compel it. An example would be where the Commissioner considered it necessary to clarify the meaning of the term 'false or misleading' to correct flagrant market abuses and enhance consumer protection.

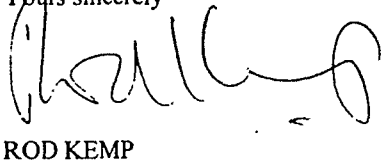
Parliamentary scrutiny of the Commissioner's use of the exemption and modification powers is intended to occur in two ways. First, the ISC has to report annually on the working of the RSA Act - including on the details of the exercise during the year of the Commissioner's powers under Part 15 - and the Minister has to have the report tabled before each House of the Parliament within 15 sitting days after the day of receipt.

Second, clause 179 of the RSA Bill requires the Commissioner to cause a copy of an exemption or modification under Part 15, or revocation of such an exemption or modification, to be published in the Gazette. Decisions made under clauses 173, 176 and 178 are reviewable by the Administrative Appeals Tribunal.

Third, once the Legislative Instruments Bill 1996 is enacted, the exemptions and modifications made by the Commissioner are expected to be subject to the provisions of that legislation and therefore directly subject to Parliamentary scrutiny. Under this Bill, the rules relating to the Parliamentary scrutiny of exemptions and modifications are generally the same as those that currently exist for regulations. That is, legislative instruments will have to be laid before each House of Parliament no later than 6 sitting days after the instrument is registered, and either House may disallow the instrument within 15 sitting days of the instrument being laid before the House.

I trust that the above information is useful in the Committee's deliberations regarding concerns over specific provisions of the RSA Bill. In the Government's view, these provisions are necessary to ensure the flexible and effective operation of the regime that will regulate RSAs and RSA providers.

Yours sincerely



ROD KEMP

SENATOR THE HON RICHARD ALSTON
Minister for Communications and the Arts
Deputy Leader of the Government in the Senate

17 MAR 1997

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

Dear Senator Cooney, Barney.

Thank you for providing me with a copy of your Committee's Scrutiny of Bills Alert Digest No. 1 of 1997.

In that Alert Digest, the Committee raised a number of issues regarding the Telecommunications Bill 1996. I thank the Committee for drawing to my attention its concerns.

Please find at the attachment my response to the Committee's comments I trust that this adequately addresses the concerns raised by the Committee.

Yours sincerely

Richard Alston

RICHARD ALSTON
Minister for Communications and the Arts

Parliament House, Canberra ACT 2600 • Telephone (06) 277 7480 • Facsimile (06) 273 4154

COMMUNICATIONS AND THE ARTS
RESPONSE TO ALERT DIGEST NO.1 OF 1997, 5 FEBRUARY 1997

Telecommunications Bill 1996

Clause 280 - Burden of proof

Clause 280 provides for the burden of proof in proceedings for an offence against Division 2 of Part 13. That Division creates offences in relation to the disclosure of information or documents relating to the provision of carriage services.

Clause 280(1) provides that in proceedings for an offence against Division 2, the exceptions in Division 3 are taken to be part of the description of the offence. The consequence of this is that the prosecution would have the persuasive burden of disproving any of the exceptions applied at the time of the alleged offence.

However, this does not apply to the exception provided by clause 272 which relates to the disclosure or use of information or a document where the person believes on reasonable grounds that the disclosure or use is reasonably necessary to prevent or lessen a serious and imminent threat to the life or health of another person. The consequence of this is that a person accused of breaching Division 2, who wants to rely on the exception provided by clause 272 as a defence, would have to raise it in defence and would have the burden of proving that the exception applied at the time of the alleged offence.

The Committee has expressed the view that a person who makes an honest mistake in disclosing may have difficulty in later establishing the reasonable grounds for the disclosure. The Committee also considered that the decision to prosecute should only be made after an objective assessment that the person could not have had reasonable grounds for forming the belief. Also, the Committee expressed the view that requiring an accused to establish on reasonable grounds that the disclosure was reasonably necessary favours the deterrence and may unnecessarily introduce caution that inhibits necessary and timely action.

I thank the Committee for drawing to my attention its concerns about this clause and I agree with the views expressed by the Committee. Accordingly, the Government will move an amendment to the clause so that the exception under clause 272 will be treated the same as the other exceptions in Division 3 of Part 13.

Clause 451 - Delegation (of powers under numbering plan)

Clause 451 allows the ACA to delegate to a body corporate any or all of the powers conferred on the ACA by the numbering plan.

The numbering plan is made under clause 439 and would include such matters as rules for the allocation, use, transfer, portability, surrender and withdrawal of numbers used in relation to the provision of carriage services to the public in Australia.

Clause 439(7) provides that the numbering plan may make provision for or in relation to a matter by empowering the ACA to make decisions of an administrative character

The Committee has expressed the view that because the numbering plan is yet to be made, the powers capable of being delegated are unknown and therefore without limit The Committee considers this may breach principle 1(a)(ii) of the Committee's terms of reference which aims to strike out provisions that may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. The Committee seeks my advice on whether the Bill could be amended in a way so as to confine the open-ended discretion.

The numbering plan is a disallowable instrument (see clause 439(11)) and will therefore be subject to parliamentary scrutiny. This will allow each House of Parliament to consider whether the discretions provided for in the plan are appropriate. Clause 444 requires the ACA to engage in public consultation on a draft of the numbering plan and requires the ACA to have due regard to any comments made by interested persons during the consultation process.

In preparing the numbering plan, the ACA will be restricted in what it may include in the plan to dealing with matters that relate to the numbering of carriage services in Australia, and the use of numbers in connection with the supply of such services Any discretions provided by the plan would be similarly restricted.

The Department of Communications and the Arts consulted with the Attorney-General's Department on the draft of clause 451. During those consultations it was agreed that the numbering plan should provide for review of any decisions of an administrative character allowed by the numbering plan. This expectation has been indicated at page 73 of Volume 2 of the Explanatory Memorandum for the Telecommunications Bill.

A further safeguard in clause 451(2) provides that, in the exercise of a delegated power, the delegate is subject to the written directions of the ACA.

This delegation power has been included as part of the general policy, expressed in various provisions of the Bill, that industry should as much as possible be able to regulate itself. Clause 4 of the Bill states that the regulatory policy for the legislation is that telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation. Indeed, industry was very keen for the inclusion of clause 451 during the consultation phase on the draft Bill. It is anticipated that the body corporate to which the ACA might delegate its powers under the numbering plan would be formed by industry and would be representative of the stakeholder interests attached to the management of the numbering plan.

The inclusion of review rights and the ACA's power of direction are considered to be adequate safeguards against any possible problem that might arise from allowing delegation of yet-to-be-defined discretions under the numbering plan to a body corporate.

Clause 560 - Vicarious liability and reversal of the onus of proof

The Committee has sought my advice as to whether any offences other than the offence created by clause 42 might be excluded from the ambit of clause 560(3) I thank the Committee for directing my attention to this matter.

Clause 560(3) provides that if an employee or agent of a person other than a corporation engages in conduct within his or her actual or apparent authority, the conduct will be taken, for the purposes of a proceeding under the 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.

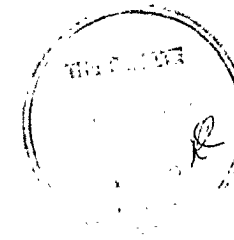
Clause 560(3) will not apply to proceedings for an offence under clause 42, which prohibits network units being used without a carrier licence or nominated carrier declaration. The maximum penalty applying to a contravention by an individual of clause 42 is 20,000 penalty units ie, $2 million. The amount of this penalty far exceeds any other penalty under the Bill for an offence for which an individual might be liable The next highest penalty for an individual for an offence is 2,000 penalty units (or $200,000) for an intentional or reckless contravention of clause 436(1) dealing with the operation of prohibited customer equipment or customer cabling.

The magnitude of the penalty under clause 42 means that it is appropriate that it be excluded from the ambit of clause 560(3). For the following reasons it is not, however, appropriate that any other offences be excluded from the ambit of clause 560(3).

Part 21 of the Bill contains a number of offences relating to non-compliance with technical standards including the supply and connection of unauthorised customer equipment, unauthorised cabling work and non-compliance with cabling provider rules and cabling licence conditions. Because failure to comply with Part 21 obligations may seriously endanger public health and safety and/or may risk causing serious damage to a carrier's network, I consider that individuals subject to these obligations should be expected to establish rigorous monitoring mechanisms and/or comprehensive training programs to minimise the possibility of any contraventions of these obligations taking place.

Other offences to which clause 560(3) would apply include those relating to the failure of a participating carrier to lodge returns of eligible revenue, the improper disclosure of protected information, failure to keep proper records, non-compliance with ACA and ACCC directions and orders, giving the ACA false or misleading information and hindering ACA investigations. Once again, in my view it is not unreasonable to expect that an individual subject to these obligations will have appropriate reporting or monitoring mechanisms and/or training programs in place to minimise the possibility of any contraventions of these obligations taking place.

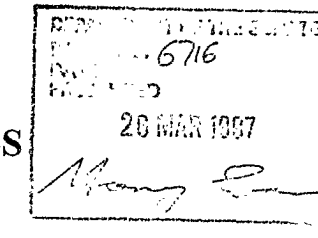
For these reasons, I do not propose that any offences other than the offence created by clause 42 should be excluded from the ambit of clause 560(3).



SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS



FIFTH REPORT

OF

1997

26 March 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH REPORT

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ISSN 0729-6258

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

FIFTH REPORT OF 1997

The committee presents its Fifth Report of 1997 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:

Environment, Sport and Territories Legislation Amendment Bill 1996

Excise Tariff Amendment Bill (No. 1) 1997

Hearing Services Administration Bill 1997

Environment, Sport and Territories Legislation Amendment Bill 1996

This bill was introduced into the Senate on 12 December 1996 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Environment]

The bill proposes to amend the following Acts:

- *Australian Capital Territory (Planning and Land Management) Act 1988* to change the name of the National Capital Planning Authority to the National Capital Authority;
- *Australian Sports Drug Agency Act 1990* to:
  - penalise competitors who wilfully interfere with samples taken for the purposes of testing for drugs; and
  - enable the Australian Sports Drug Agency to impose a fee with a profit component for the delivery of commercial services;
- *Christmas Island Act 1958* and *Cocos (Keeling) Islands Act 1955* to:
  - repeal obsolete provisions in relation to the acquisition of Australian citizenship; and
  - clarify the jurisdiction of the District Court of Western Australia in relation to the Territories of Christmas Island and Cocos (Keeling) Islands;
- *Cocos (Keeling) Islands Act 1955* to delete an incorrect reference to an Ordinance which has been repealed;
- *Coral Sea Islands Act 1969* to incorporate the land areas on Elizabeth and Middleton Reefs within the Coral Sea Islands Territory;
- *Customs Act 1901* to enable the Act in whole or part to be extended to the Territory of Ashmore and Cartier Islands by way of regulation;
- *Endangered Species Protection Act 1992* to:
  - increase the period for the Minister to make a decision from 30 to 90 days; and
  - to correct several drafting errors;
- *Environment Protection (Sea Dumping) Act 1981* to:
  - incorporate resolutions of the 16th Consultative Meeting of the Contracting Parties to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Material;

- allow the continued dumping of jarosite until the end of December 1997;
- allow for an extension of time where the Minister administering the *Environment Protection (Impact of Proposals) Act 1974* directs that a Public Environment Report be submitted on an application for a sea dumping permit; and
- delete reference to parts of the Annexes to the London Convention which have been deleted or incorporated elsewhere;

- *Great Barrier Reef Marine Park Act 1975* to:
  - enable the Minister to delegate the power to allow the Great Barrier Reef Marine Park Authority to provide assistance in relation to environmental management;
  - remove an offence of waste discharge by vessels and aircraft of the Australian Defence Force or the defence force of a foreign country;
  - clarify that the enforcement provisions in a plan of management for an area can prohibit or regulate the use of or entry into that area or parts thereof; and
  - correct three other minor drafting errors;
- *Migration Act 1958* to enable the Act to apply to the Territory of Ashmore and Cartier Islands;
- *Quarantine Act 1908* to enable to Act to be extended to the Territory of Ashmore and Cartier Islands by regulation;
- *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* to clarify that references to an agreement between the Commonwealth and Queensland include that agreement, as amended; and
- *Environment, Sport and Territories Legislation Amendment Act 1995*, *National Parks and Wildlife Conservation Act 1975*, and *Ozone Protection Act 1989* to correct minor drafting errors.

The committee dealt with this bill in Alert Digest No. 1 of 1997 in which it made various comments. The Minister for the Environment has responded to those comments in a letter dated 25 March 1997. A copy of that letter is attached to this Report and the relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Item 27 of Schedule 1

In Alert Digest of 1997 the committee noted that Item 27 of Schedule 1 of this bill, if enacted, would amend the definition of 'Convention' in the *Environment Protection (Sea Dumping) Act 1981*. The definition enables future changes to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other

Material to be given the force of law in Australia by setting out the changes in regulations rather than in a Schedule to the Act itself, as has been the practice hitherto.

The committee noted that the current definition, which has been unchanged since Royal Assent was given on 24 March 1981, contains the same power to incorporate changes by regulations.

As this committee was not in existence at that time, no comment was made on whether it is an appropriate delegation of legislative power to allow changes to the Convention to be given the force of law in Australia by being set out in subordinate legislation rather than in a Schedule to the Act itself.

The committee further noted that, although the current definition would have enabled changes to the Convention to be set out in regulations, Item 35 of Schedule 1 proposes to set out the 1993 changes to the Convention in Schedules 3A, 3B and 3C.

As the explanatory memorandum did not give a reason for using regulations rather than Schedules to the Act, the committee sought the advice of the Minister on this issue.

Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

On this issue, the Minister has responded as follows:

> The Schedules to the *Environment Protection (Sea Dumping) Act 1981* (the Sea Dumping Act) contain the text of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention), the amendments to that Convention agreed at the Third and Fifth Consultative Meetings (1978 and 1980 respectively), and the text of the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (SPREP Dumping Protocol).
>
> The amendments to the London Convention which flow from the 16th Meeting of Contracting Parties in November 1993 are important matters of policy and procedure, including a ban on dumping of industrial waste at sead, a ban on incineration of industrial waste and sewage sludge at sea, and a new definition of radioactive waste, to replace the existing definition.
>
> It is appropriate for important policy changes to the Convention to be incorporated as Schedules to the Act rather than given effect through the making of regulations. Accordingly the amendments flowing from the 16th Meeting of Contracting Parties are sought to be included as Schedules to the Act.
>
> Nevertheless, there may be instances where amendments to the London Convention of a minor or technical nature are made and accepted by Australia, in which case the incorporation of those changes is more appropriately effected by way of regulation.

The retention in the Sea Dumping Act of the power to incorporate such amendments by way of regulation is therefore necessary.

The committee thanks the Minister for this response noting his distinction between major and minor matters.

Excise Tariff Amendment Bill (No. 1) 1997

This bill was introduced into the House of Representatives on 5 March 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Excise Tariff Act 1921* to ensure the continuing excisability of all beverages which contain distilled alcohol, including spirits, regardless of their alcohol content.

The committee dealt with this Bill in Alert Digest No. 4 of 1997, in which it made various comments. The Minister for Small Business and Consumer Affairs has responded to those comments in a letter dated 25 March 1997. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(2) - Items 1 and 2 of Schedule 1

In Alert Digest No. 4 of 1997, the committee noted that subclause 2(2) of this bill, if enacted, would provide that the amendments proposed by items 1 and 2 of Schedule 1 would come into effect on 3 February 1996. Item 1 would repeal the definition of 'spirituous beverage' in the Schedule to the *Excise Tariff Act 1921*. Item 2 would substitute a new item 2 in the Schedule of that Act which deals with the excise to be paid on beverages containing distilled alcohol.

To change a law retrospectively with adverse effect may be considered to trespass unduly on personal rights and liberties. The rule of law requires that a person's actions be subject to the legal rights and the obligations prevailing at the time they are taken.

The meaning of a law is determined, not by what a department considers it should mean or by what the individual affected by it thinks it means, but by what Parliament has passed as finally interpreted by the courts.

Background

The amendments in this bill are proposed because of an interpretation by the Administrative Appeals Tribunal (AAT) in determining on 7 June 1996 an application by the Carlton and United Breweries for review of a decision, pursuant to the role given to the AAT in the *Excise Act 1901*. The AAT interpreted subitem 2(H) of the Schedule to the *Excise Tariff Act 1921* in a way different from the meaning which the Australian Customs Service (ACS) attributed to it when the ACS

decided that a product known as "Subzero Alcoholic Soda" was excisable under that subitem.

The ACS is appealing the AAT's decision in the Federal Court.

The *Excise Act 1901* provides under section 154 that in the event of a dispute over duty, a person may deposit the amount demanded and, if, by action commenced within six months of the deposit, it is determined that the proper duty is less than the amount deposited, the excess must be refunded. Under section 162C(2) of the Act, where a deposit under section 154 has been made, the AAT may be asked to review the matter and determine the proper duty with similar effect as to refund.

It appears from the explanatory memorandum that producers of other low alcohol beverages have been exercising their rights under sections 154 and 162C since at least 7 June 1996.

Effect of the amendments

The effect of the proposed amendments will be to nullify the exercise of these rights by retrospectively changing the law from 3 February 1996.

The committee was concerned

- with the misapprehension, exhibited in the explanatory memorandum, that the meaning of the law was somehow changed by the AAT decision: the law was not changed; the meaning that the ACS had attributed to that subitem was found to be incorrect;

- with the view exhibited in the explanatory memorandum, that moneys which excise payers were not by law required to pay should not be refunded by the Government.

The committee pointed out that it had no problem with changing the *Excise Tariff Act 1921* with respect to this subitem, whether it be done by an Excise Tariff alteration proposed in Parliament, by gazettal under section 160B of the *Excise Act 1901* or by formal amendment commencing with Royal Assent. However, the committee is concerned that retrospectively changing the law will deny people the right to be dealt with for their acts and omissions under the legal regime in operation at the time and not as it may later become.

In these circumstances, 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 for Small Business and Consumer Affairs has responded to those comments as follows:

Your Committee noted its concern that retrospectively changing the law will override the rights of people to have the law apply to their actions as it stands at the time of those actions. Your Committee also noted its concern at certain misapprehensions and views exhibited in the Explanatory Memorandum to this Bill.

The amendments contained in the Bill are intended to ensure the continuing excisability of all beverages containing distilled alcohol, regardless of their alcohol content. As set out in the Explanatory Memorandum, the term "spirituous beverage" was introduced into the *Excise Tariff Act 1921* (the Tariff Act) in 1985 with the intention of making any beverage which contained a spirit subject to excise. All such beverages have been treated as excisable regardless of their alcohol content since that time.

In November 1994, when Carlton and United Breweries (CUB) commenced the manufacture of the product known as "Subzero Alcoholic Soda", the Australian Customs Service (the ACS) considered, as a matter of law, that "Subzero" was excisable under the Tariff Act as a spirituous beverage. CUB appealed the decision of the ACS to the Administrative Appeals Tribunal (AAT). On 7 June 1996, the AAT determined that the production of "Subzero", with a low alcohol content by volume of only 5.5%, could not be described as spirituous and was therefore not excisable under the Tariff Act. The decision was based on what the AAT considered is commonly regarded as the definition of "spirit" in the community, which is a strong alcoholic liquor usually containing not less than 37% alcohol by volume.

The ACS is appealing this decision of the AAT to the Federal Court on the grounds that the ACS believes that the AAT erred in law in determining that "Subzero" was not a spirituous beverage under the Tariff Act. The appeal is based on the legal ground that the Tariff Act, together with the *Excise Act 1901* and the *Distillation Act 1901* should be read together as a code which makes excisable any alcoholic beverage deriving its alcohol by means of distillation.

The Explanatory Memorandum also indicates that, although CUB has ceased the manufacture of "Subzero" using alcohol derived from distillation, there are several other manufacturers of beverages of low alcohol content which are based on brandy, whisky etc. The ACS has continued to impose excise duty of these beverages as the ACS considers that, as a matter of law, these beverages are spirituous beverages.

Your Committee expressed concern that the Explanatory Memorandum exhibits the misapprehension that the meaning of the law was somehow changed by the AAT decision in the "Subzero" case. I do not share the Committee's concern in this instance. Rather, I consider that the Explanatory Memorandum clearly indicates that the ACS is continuing to treat all beverages containing distilled alcohol as excisable regardless of their alcohol content, despite the AAT decision. This action, in my view, clearly contradicts any perception that the law may have been changed by the AAT decision.

The AAT decision, however, has highlighted a technical shortcoming in the application of the Tariff Act to beverages containing distilled alcohol and the Bill proposes to address this by:

(i) deleting all references to "spirituous beverages" in the Schedule and item 2 to the Tariff Act; and

(ii) clarifying that excise liability is imposed upon *all* beverages which contain distilled alcohol, regardless of the alcohol content (except fortified wine)(emphasis added). The removal of the term "spirituous" from the Tariff Act will remove any connotation as to the strength that an alcoholic beverage must be fore it will be excisable.

It is also proposed that these amendments take effect on and from 3 February 1996. The Explanatory Memorandum clearly states that this commencement will extinguish all rights of appeal to the AAT in relation to the excisability of low alcohol beverages and all possible rights of refunds of excise duty in respect of such beverages. I do not believe that the provisions of the Bill unduly trespass on these rights for the following main reason.

Since the term "spirituous beverage" was introduced into the Tariff Act and up until the decision in the "Subzero" case, there was no dispute with the manufacturers of the low alcohol beverages using distilled alcohol as their excisability under the Tariff Act. The Parliament passed a law making all spirituous beverages subject to excise duty and ACS, in applying that law, considered all beverages containing distilled alcohol regardless of their alcohol content to be excisable. There was no dispute from manufacturers of such beverages as to the application of that law.

I note your Committee's concern that retrospectively changing the law will override the rights of people to have the law apply to their actions as it stands at the time of those actions. Based on the fact that there was no dispute as the excisability of beverages containing distilled alcohol, however, it is not considered that the provisions in the Bill involve a substantive change to the law in relation to alcoholic beverages but only amount to a clarification of the law as is stood at the time of the "Subzero" decision.

For this reason, I also do not agree with your Committee that the Explanatory Memorandum exhibits the view that moneys which excise payers were not by law required to pay should not be refunded by the Government. I believe that the Explanatory Memorandum clearly indicates that excise duty, as a matter of law, has always been, and continues to be, payable on all beverages based on distilled alcohol and that the provisions of the Bill are only clarifying the application of this law to such beverages. There are, therefore, no grounds upon which excise duty paid on such beverages can be legally refunded.

It is worth noting, however, that as a result of the decision of the AAT in the "Subzero case", the party to the proceeding (Carlton and United Breweries) was immediately given a refund of the excise duty that it paid under deposit in respect of "Subzero" (being $233,604). This amount will not be recovered from CUB as CUB has already received that money in pursuance of successful legal proceedings which are preserved by the Bill.

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

The committee thanks the Minister for this response but remains unconvinced. Where there is a dispute as to the meaning of the law, as there was, in the present instance, the courts have the constitutional duty to say what the law means and to apply it. Neither a department nor any of its officials has the ability to give a binding interpretation of legislation, nor has any individual affected by its terms.

The Australian Customs Service has appealed to the Federal Court. Were the Federal Court to reverse the decision of the AAT this bill, if enacted, would become superfluous. The effect of the bill being passed will be a net loss to the revenue of $233,604 which the Federal Court would have directed CUB to pay.

If the Federal Court were to confirm the AAT decision, it would mean (subject, of course, to a further appeal to the High Court) that the law has always been that excise is not payable in cases like the present one. This would mean that persons have paid excise under protest because of section 154 when they were never lawfully obliged to do so.

Therefore, the committee maintains its concerns about the retrospectivity of this bill. People are entitled to be dealt with for their actions and omissions in accordance with the law prevailing at the time of their occurrence and not with a legal regime instituted at a later date.

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.

Hearing Services Administration Bill 1997

This bill was introduced into the House of Representatives on 5 February 1997 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to provide for the establishment of a voucher system for the delivery of Government-funded hearing services from 1 July 1997. The office of Hearing Services, with responsibility for the new arrangements, is established by the bill.

The committee dealt with this bill in Alert Digest No. 2 of 1997 in which it made various comments. The Parliamentary Secretary to the Minister for Health and Family Services has responded to those comments in a letter dated 20 March 1997. A copy of that letter is attached to this Report and the relevant parts of the response are discussed below.

Retrospective application
Subclause 19(5)

Subclause 19(5) of this bill provides:

> For the purposes of this section, a person is a ***disqualified person*** at a particular time if:
>
> (a) the person has been convicted (whether before or after the commencement of this section) of a disqualifying offence (as defined by subsection (6)); and
>
> (b) if the person was sentenced to imprisonment—the time occurs during the period:
>
> (i) beginning when the person was convicted; and
>
> (ii) ending 5 years after the person's release from prison; and
>
> (c) if the person was not sentenced to imprisonment—the time occurs during the period:
>
> (i) beginning when the person was convicted; and
>
> (ii) ending 5 years after the conviction.

In Alert Digest No. 2 of 1997, the committee noted that subclause 19(5), if enacted, would set out the conditions under which a person would become a disqualified person for the purposes of the accreditation scheme for hearing services providers. One of those conditions would be that the person has been convicted of a disqualifying offence whether the conviction occurred before or after the

commencement of this clause of the bill. The person would become disqualified for a period of five years from the time of the conviction or, where a term of imprisonment was imposed, five years from the person's release.

Attaching a present legal effect to past events raises the issue whether there may be undue trespass on personal rights and liberties. Further, the committee observes the arbitrary nature of choosing five years as the relevant period. It observes the uneven treatment of natural persons as against corporations.

Both corporations and natural people may be disqualified persons. The Minister must not accredit or must cancel the accreditation of both corporations and natural persons if they are or become disqualified persons. The period of disbarment, however, may differ. Because a corporation cannot be jailed, the period from conviction will never be more than five years. A natural person, because of his or her imprisonment, may have a longer period of disbarment.

Accordingly, the committee sought the Minister's advice on these issues.

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

On this issue, the Parliamentary Secretary to the Minister for Health and Family Services has responded as follows:

> I begin by making the point that the government is serious about fraud prevention. These clauses are a necessary part of the government's strategy in that regard.
>
> In relation to the alleged retrospective application of Subclause 19(5) of the Bill and whether this might trespass on personnel rights and liberties, I note the following:
>
> The subclause is not retrospective as it does not provide that the law as at a past date is to be taken as different from what it was at that date. Where, as here, prior events (conviction for a disqualifying offence) would form the basis of future actions (disbarment from accreditation as a service provider) the legislation is not being given a retrospective effect.
>
> The Victorian Full Supreme Court accepted this distinction between legislation having a prior effect on past events and legislation basing future action on past events in *Robertson v City of Numawading* (1973) VR 819 at 824: '[the] principle [against retrospectivity] is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that.'
>
> The most frequently cited example of the courts applying this distinction is *Re a Solicitor's Clerk* (1957) 1WLR 1219. In that case when the clerk had been convicted on charges of larceny, no order prohibiting him from being employed as a solicitor's clerk could be made under the Solicitors Act as it then stood because he had not stolen from his employer or his employer's clients. The Act was subsequently amended to allow such an order in the case of conviction for larceny.

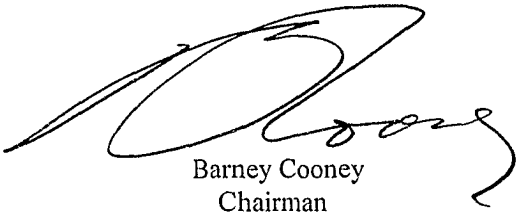
The clerk argued that to apply the amendment to him would be to give it retrospective operation. This argument was rejected by the court on the ground that no retrospectivity was involved. The Act had future operation only, even if the conduct on which it depended had taken place in the past. Although the prohibition was based on a conviction that had occurred before the commencement of the Act, it operated in the future.

There are other examples of the courts viewing this matter similarly *[La Macchia v Minister for Primary Industry* (1986) 72 ALR 23; *Geschke v Del-Monte Home Furnishers Pty Ltd* (1981) VR 856].

In relation to the Committee's note on the five-year period to apply in relation to disqualification on the basis of conviction or imprisonment and the different consequences of this clause has for natural persons and corporations, I observe that this provision has many precedents. A couple of recent precedents include the *Employment Services Reform Act* and the *Export Development Grants Act.* In many respects the committee's concern is an unavoidable consequence of the difference between a corporation and a natural person. But more importantly a provision which treated a natural person in the same way as a corporation by starting the period of disqualification from date of conviction could have the anomalous result, in the case where the person is gaoled, that the convicted natural person could be entitled to be a director of a service provider whilst still in gaol.

I am of the view that on the basis of legal precedent and in the circumstances of the bill currently before the Senate, where the proposed provision represents a form of protection against fraud by business entities to which public monies are to be paid, these provisions are reasonable, and do not constitute undue trespass on personal rights and liberties.

The committee thanks the Parliamentary Secretary for this response.



Barney Cooney
Chairman

RECEIVED
25 MAR 1997
Senate Standing Cttee for the Scrutiny of Bills

Senator the Hon Robert Hill

Leader of the Government in the Senate
Minister for the Environment

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

25 MAR 1997

Dear Senator Cooney

I refer to your Committee's Alert Digest No. 1 of 1997 in which my advice was sought in regard to Item 27 of Schedule 1 to the Environment, Sport and Territories Legislation Amendment Bill 1996. I provide the following response to the matters raised in the Digest:

The Schedules to the *Environment Protection (Sea Dumping) Act 1981* (the Sea Dumping Act) contain the text of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention), the amendments to that Convention agreed at the Third and Fifth Consultative Meetings (1978 and 1980 respectively), and the text of the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (SPREP Dumping Protocol).

The amendments to the London Convention which flow from the 16th Meeting of Contracting Parties in November 1993 are important matters of policy and procedure, including a ban on dumping of industrial waste at sea, a ban on incineration of industrial waste and sewage sludge at sea, and a new definition of radioactive waste, to replace the existing definition.

It is appropriate for important policy changes to the Convention to be incorporated as Schedules to the Act rather than given effect through the making of regulations, accordingly the amendments flowing from the 16th Meeting of Contracting Parties are sought to be included as Schedules to the Act.

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Nevertheless there may be instances where amendments to the London Convention of a minor or technical nature are made and accepted by Australia, in which case the incorporation of those changes is more appropriately effected by way of regulation. The retention in the Sea Dumping Act of the power to incorporate such amendments by way of regulation is therefore necessary.

Yours sincerely

Robert Hill

COMMONWEALTH OF AUSTRALIA

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25 MAR 1997
Senate Standing Committee for the Scrutiny of Bills

THE HON. GEOFF PROSSER, MP
MINISTER FOR SMALL BUSINESS AND CONSUMER AFFAIRS
MINISTER RESPONSIBLE FOR CUSTOMS

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

Dear Senator Cooney

I am writing in response to the Scrutiny of Bill Alert Digest No 4 of 1997, dated 19 March 1997, which contained comments by your Committee on the Excise Tariff Amendment Bill (No.1) 1997 (the Bill) and, in particular, the proposed retrospective commencement of amendments proposed in this Bill.

Your Committee noted its concern that retrospectively changing the law will override the rights of people to have the law apply to their actions as it stands at the time of those actions. Your Committee also noted its concern at certain misapprehensions and views exhibited in the Explanatory Memorandum to this Bill.

The amendments contained in the Bill are intended to ensure the continuing excisability of all beverages containing distilled alcohol, regardless of their alcohol content. As set out in the Explanatory Memorandum, the term "spirituous beverage" was introduced into the *Excise Tariff Act 1921* (the Tariff Act) in 1985 with the intention of making any beverage which contained a spirit subject to excise. All such beverages have been treated as excisable regardless of their alcohol content since that time.

In November 1994, when Carlton and United Breweries (CUB) commenced the manufacture of the product known as "Subzero Alcoholic Soda", the Australian Customs Service (the ACS) considered, as a matter of law, that "Subzero" was excisable under the Tariff Act as a spirituous beverage. CUB appealed the decision of the ACS to the Administrative Appeals Tribunal (AAT). On 7 June 1996, the AAT determined that the production of "Subzero", with a low alcohol content by volume of only 5.5%, could not be described as spirituous and was therefore not excisable under the Tariff Act. The decision was based on what the AAT considered is commonly regarded as the definition of "spirit" in the community, which is a strong alcoholic liquor usually containing not less than 37% alcohol by volume.

The ACS is appealing this decision of the AAT to the Federal Court on the grounds that the ACS believes that the AAT erred in law in determining that "Subzero" was not

a spirituous beverage under the Tariff Act. The appeal is based on the legal ground that the Tariff Act, together with the *Excise Act 1901* and the *Distillation Act 1901* should be read together as a code which makes excisable any alcoholic beverage deriving its alcohol by means of distillation

The Explanatory Memorandum also indicates that, although CUB has ceased the manufacture of "Subzero" using alcohol derived from distillation, there are several other manufacturers of beverages of low alcohol content which are based on brandy, whisky etc. The ACS has continued to impose excise duty on these beverages as the ACS considers that, as a matter of law, these beverages are spirituous beverages

Your Committee expressed concern that the Explanatory Memorandum exhibits the misapprehension that the meaning of the law was somehow changed by the AAT decision in the "Subzero"case. I do not share the Committee's concern in this instance. Rather, I consider that the Explanatory Memorandum clearly indicates that the ACS is continuing to treat all beverages containing distilled alcohol as excisable regardless of their alcohol content, despite the AAT decision. This action, in my view, clearly contradicts any perception that the law may have been changed by the AAT decision.

The AAT decision, however, has highlighted a technical shortcoming in the application of the Tariff Act to beverages containing distilled alcohol and the Bill proposes to address this by:

(i) deleting all references to "spirituous beverages" in the Schedule and item 2 to the Tariff Act; and

(ii) clarifying that excise liability is imposed upon *all* beverages which contain distilled alcohol, regardless of the alcohol content (except fortified wine)(emphasis added). The removal of the term "spirituous" from the Tariff Act will remove any connotation as to the strength that an alcoholic beverage must be before it will be excisable.

It is also proposed that these amendments take effect on and from 3 February 1996. The Explanatory Memorandum clearly states that this commencement will extinguish all rights of appeal to the AAT in relation to the excisability of low alcohol beverages and all possible rights of refunds of excise duty in respect of such beverages. I do not believe that the provisions of the Bill unduly trespass on these rights for the following main reason.

Since the term "spirituous beverage" was introduced into the Tariff Act and up until the decision in the "Subzero" case, there was no dispute with the manufacturers of the low alcohol beverages using distilled alcohol as their excisability under the Tariff Act. The Parliament passed a law making all spirituous beverages subject to excise duty and ACS, in applying that law, considered all beverages containing distilled alcohol regardless of their alcohol content to be excisable. There was no dispute from manufacturers of such beverages as to the application of that law.

I note your Committee's concern that retrospectively changing the law will override the rights of people to have the law apply to their actions as it stands at the time of those actions. Based on the fact that there was no dispute as the excisability of beverages

containing distilled alcohol, however, it is not considered that the provisions in the Bill involve a substantive change to the law in relation to alcoholic beverages but only amount to a clarification of the law as is stood at the time of the "Subzero"decision.

For this reason, I also do not agree with your Committee that the Explanatory Memorandum exhibits the view that moneys which excise payers were not by law required to pay should not be refunded by the Government. I believe that the Explanatory Memorandum clearly indicates that excise duty, as a matter of law, has always been, and continues to be, payable on all beverages based on distilled alcohol and that the provisions of the Bill are only clarifying the application of this law to such beverages. There are, therefore, no grounds upon which excise duty paid on such beverages can be legally refunded.

It is worth noting, however, that as a result of the decision of the AAT in the "Subzero case", the party to the proceeding (Carlton and United Breweries) was immediately given a refund of the excise duty that it paid under deposit in respect of "Subzero" (being $233,604). This amount will not be recovered from CUB as CUB has already received that money in pursuance of successful legal proceedings which are preserved by the Bill.

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

Yours sincerely

GEOFF PROSSER 24/3/97

SENATOR The Hon. CHRISTOPHER ELLISON
Parliamentary Secretary to the Minister for Health and Family Services
and Parliamentary Secretary to the Attorney-General
Senator for Western Australia

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

Dear Senator ~~Cooney~~ Barney,

The Scrutiny of Bills Alert Digest No.2 of 1997 draws attention to issues noted by the Senate Standing Committee for the Scrutiny of Bills on one of the provisions of the *Hearing Services Administration Bill 1997*. A letter of 27 February 1997 from the Secretary of Committee to the Senior Adviser to the Minister for Health and Family Services invites the Minister's response to the matters identified. As Parliamentary Secretary to the Minister I am responding on behalf of the government.

I begin by making the point that the government is serious about fraud prevention. These clauses are a necessary part of the government's strategy in that regard.

In relation to the alleged retrospective application of Subclause 19(5) of the Bill and whether this might trespass on personnel rights and liberties, I note the following.

The subclause is not retrospective as it does not provide that the law as at a past date is to be taken as different from what it was at that date. Where, as here, prior events (conviction for a disqualifying offence) would form the basis of future actions (disbarment from accreditation as a service provider) the legislation is not being given a retrospective effect.

The Victorian Full Supreme Court accepted this distinction between legislation having a prior effect on past events and legislation basing future action on past events in *Robertson v City of Nunawading* (1973) VR 819 at 824: '[the] principle [against retrospectivity] is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that.'

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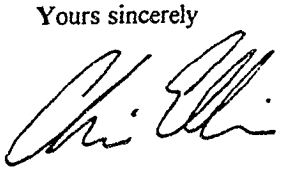
The most frequently cited example of the courts applying this distinction is *Re a Solicitor's Clerk* (1957) 1 WLR 1219. In that case when the clerk had been convicted on charges of larceny, no order prohibiting him from being employed as a solicitor's clerk could be made under the Solicitors Act as it then stood because he had not stolen from his employer or his employer's clients. The Act was subsequently amended to allow such an order in the case of conviction for larceny. The clerk argued that to apply the amendment to him would be to give it retrospective operation. This argument was rejected by the court on the ground that no retrospectivity was involved. The Act had future operation only, even if the conduct on which it depended had taken place in the past. Although the prohibition was based on a conviction that had occurred before the commencement of the Act, it operated in the future.

There are other examples of the courts viewing this matter similarly *[La Macchia v Minister for Primary Industry* (1986) 72 ALR 23; *Geschke v Del-Monte Home Furnishers Pty Ltd* (1981) VR 856].

In relation to the Committee's note on the five-year period to apply in relation to disqualification on the basis of conviction or imprisonment and the different consequences of this clause has for natural persons and corporations, I observe that this provision has many precedents. A couple of recent precedents include the *Employment Services Reform Act* and the *Export Development Grants Act*. In many respects the committee's concern is an unavoidable consequence of the difference between a corporation and a natural person. But more importantly a provision which treated a natural person in the same way as a corporation by starting the period of disqualification from date of conviction could have the anomalous result, in the case where the person is gaoled, that the convicted natural person could be entitled to be a director of a service provider whilst still in gaol.

I am of the view that on the basis of legal precedent and in the circumstances of the bill currently before the Senate, where the proposed provision represents a form of protection against fraud by business entities to which public monies are to be paid, these provisions are reasonable, and do not constitute undue trespass on personal rights and liberties.

Yours sincerely



Chris Ellison
Senator for Western Australia

20 MAR 1997

cc. Secretary
Senate Standing Committee
for the Scrutiny of Bills
SG 49, Parliament House

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTH REPORT

OF

1997

7 May 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

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ISSN 0729-6258

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

SIXTH REPORT OF 1997

The committee presents its Sixth Report of 1997 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:

Aviation Legislation Amendment Act (No. 1) 1997

Export Market Development Grants Act 1997

Legislative Instruments Bill 1996

Aviation Legislation Amendment Act (No. 1) 1997

The bill for this Act was introduced into the House of Representatives on 26 February 1997 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the following Acts:

- *Air Navigation Act 1920* to:
  - provide flexibility to deal with the increased range of programs of international non-scheduled flights for which approval is sought;
  - merge the approval processes for non-scheduled applications from both Australian and foreign charter operators;
  - remove the existing distinctions drawn between aircraft from contracting and non-contracting States to the Convention on Civil Aviation signed at Chicago; and
  - enable the establishment of a national register of encumbered aircraft to be maintained by Airservices Australia;
- *Airports Act 1996* to:
  - establish new offences dealing with the deliberate causing of harm to the environment at an airport site;
  - provide certain regulation-making powers;
  - require all persons who carry out activities at an airport site to comply with a final environment strategy in force for that airport;
  - require airport-lessee companies to seek public comment prior to submitting minor variations of master plans and major development plans to the Minister for approval;
  - provide that parties, other than the airport-lessee company, be consulted by the Minister before undertaking certain activities;
  - authorise the ACCC to publish accounts and reports provided to it; and
- *Airports (Transitional) Act 1986* to correct a minor typographical error.

The committee dealt with this bill in Alert Digest No. 3 of 1997, in which it made various comments. The Minister for Transport has responded to those comments in a letter dated 28 April 1997. A copy of that letter is attached to this Report. Although this bill has now been passed by both houses (and received Royal Assent on 17 April 1997), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Regulations insufficiently subject to Parliamentary scrutiny
Items 64 and 66 of Schedule 1

In Alert Digest No. 3 of 1997, the committee noted that items 64 and 66 of Schedule 1 would insert a new subsection 3A into sections 132 and 133 of the *Airports Act 1996* respectively. The wording proposed is:

> (3A) Regulations made for the purposes of subsection (1) may make provision for or in relation to a matter by applying, adopting or incorporating (with or without modification) any matter contained in a standard proposed or approved by the Standards Association of Australia, being a standard as in force or existing from time to time.

These items, if enacted, would allow the making of regulations which adopt material from other documents, as in force from time to time.

Section 49A of the *Acts Interpretation Act 1901* lays down a general rule that allows the adoption or incorporation of other material in a regulation. Where the material adopted is not itself an Act or a regulation, the general rule does not allow the material to be adopted "as in force from time to time" but only as it exists at the time of the adoption, that is, when the regulation is made. The general rule in Section 49A is subject to being ousted where a contrary intention is expressed, as is the case with proposed subsection (3A).

One of the reasons for section 49A of the *Acts Interpretation Act 1901* is that, without it, a person or body outside Parliament could change the obligation imposed by a regulation adopting such a document as in force from time to time without Parliament's knowledge or without the opportunity for Parliament to scrutinise, and if so minded, to disallow the variation. A further reason for section 49A, of course, is that one of the characteristics of good legislation is certainty. Another is the onus on the lawmaker to ensure that those obliged to obey the law have adequate access to its terms.

The committee noted that subsection 132(2) of the *Airports Act 1996* prescribes a penalty of up to 250 penalty units (currently $25 000) for offences contravening the regulations - regulations which could be changed without either Parliament or those obliged to comply with them being aware of the change.

The committee considered that the reasons for retaining the application of section 49A of the *Acts Interpretation Act 1901* far outweigh the administrative convenience of adopting the documents as in force from time to time. If the responsible rule-maker takes seriously the need to ensure adequate access to the change in the obligation, there seems little to be gained by not formally adopting by regulation the changes in the incorporated documents.

The committee, therefore, sought the Minister's advice on whether there should be reconsideration of the derogation from section 49A of the *Acts Interpretation Act 1901*.

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

The Minister has responded as follows:

> I note that the amendments in question were passed by the Senate on Wednesday, 26 March.
>
> I do not believe that our approach to applying current Standards Association of Australia (SAA) standards unreasonably derogates from Parliamentary scrutiny and is justified on a number of grounds.
>
> The adoption of standards made by the SAA as they exist from time to time rather than the standards that exist at the time of the initial adoption is a well accepted principle of regulation making.
>
> The approach proposed in sections 132 and 133 is consistent with that taken elsewhere in the Act. For example, while sections 100 and 107 provide the power to make regulations about the granting of building approvals (s. 100) and the provision of certificates of fitness (s. 107), they also make provision for applying, adopting or incorporating (with or without modification) any matter contained inter alia in a standard proposed or approved by the SAA, as in force from time to time.
>
> Other examples of adopting standards elsewhere in Commonwealth Statutes include the *Air Navigation Act 1920* (in relation to the investigation of transport accidents) and the *Motor Vehicle Standards Act 1989* (regarding the incorporation of documents setting out standards, in force from time to time, in determining vehicle standards).
>
> With the proposed amendments, we have confined the standards that we propose to draw on to only those proposed or approved by the SAA. The SAA is a reputable organisation, recognised by the Commonwealth Government under its Memorandum of Understanding with SAA as the peak standards body in Australia.
>
> The regulations will incorporate SAA standards on technical matters that are routine and uncontentious, including evidentiary matters such as testing methods, guidance to administrative decision makers and defining technical terms by reference. I am advised that the structure of the Airports (Environment Protection) Regulations is such that criminal liability does not depend on the content of the standards.
>
> Before SAA standards are introduced they undergo a considerable period of development and consultation, including a three-tiered approval process to ensure stakeholder equity in the completed standard.
>
> SAA standards are updated regularly to ensure that they meet national needs for contemporary, internationally aligned standards. Once a standard is amended or updated by SAA, the users seek to comply with the revised standard. Industry is used to operating in accordance with SAA standards.

> In view of the widespread acceptance of SAA standards, it would seem appropriate to incorporate the most recent version of a standard into the regulations rather than requiring persons to comply with an outdated version until such time that the standard in question is identified and remedied through an amending regulation. As the updated standards will be applied generally throughout the economy, this would have the practical effect of having two different SAA standards in force at the one time, undermining the rationale for the standards system itself.
>
> Finally, referring to relevant standards, as in force from time to time, in the environment regulations (which already contain considerable technical detail) enables us to keep the regulations relatively simple and to a reasonable length - both important drafting principles.
>
> Should you require further background on the above matters, I would be happy for Departmental officers to provide a briefing.

The committee thanks the Minister for this response, however, it continues to have several concerns. While acknowledging the good standing of the Standards Association of Australia (SAA), and the convenience of incorporating standards as they are in force from time to time, the committee points out that this mechanism takes away Parliament's ability to supervise how the executive is exercising the legislative power which Parliament has delegated to it. It also means that Parliament could not prevent the imposition on Australians of a standard of which it disapproves.

The committee agrees that keeping the law relatively simple and of reasonable length are important drafting principles. The purpose, however, of those principles is to ensure that those obliged to obey the law are able to access and understand it easily. The committee is concerned that not all those obliged to comply with a changed standard will know that it has been changed.

Finally, the committee is concerned that there has been some misunderstanding of what it was seeking. As the committee pointed out in Alert Digest No. 3 of 1997, Section 49A of the *Acts Interpretation Act 1901* allows the adoption of material as it exists at the time of the adoption. The committee was seeking no more than that, each time a relevant standard is altered, a regulation be made omitting the reference to that standard in the relevant regulation and substituting a reference to the new standard. Alternatively, the committee requests that a mechanism of tabling in both Houses of Parliament a notice that an incorporated document has been changed, together with a copy of the amended document, be implemented.

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, and 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.

Export Market Development Grants Act 1997

This bill for this Act was introduced into the House of Representatives on 27 February 1997 by the Minister for Trade. [Portfolio responsibility: Trade]

The bill proposes to create a revised Export Market Development Grants Act which simplifies the structure and readability of the current Act. It focuses on assistance to small to medium enterprise and places an upper limit on the cost of the scheme.

The committee dealt with this bill in Alert Digest No. 3 of 1997, it which it made various comments. The Minister for Trade has responded to those comments in a letter dated 25 March 1997. A copy of that letter is attached to this Report. Although this bill has now been passed by both houses (and received Royal Assent on 17 April 1997), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Retrospective application
Paragraph 7(1)(g) and clause 17

Paragraph 7(1)(g) of this bill provides:

> (1) A person referred to in subsection 6(1) (other than an approved joint venture or approved trading house) is eligible for a grant in respect of a grant year if the following conditions are satisfied:
>
> ...
>
> (g) there are no disqualifying convictions outstanding against the person under section 17 when the person applies for the grant

Clauses 16 and 17 provide:

> **16 Disqualifying convictions**
>
> (1) For the purposes of this Act, a ***disqualifying conviction*** is:
>
> (a) in relation to an individual—a conviction of the individual for a relevant offence; or
>
> (b) in relation to a body corporate—a conviction of the body corporate or of an associate of the body corporate for a relevant offence; or
>
> (c) in relation to a partnership or an approved joint venture—a conviction of an associate of the partnership or of the joint venture for a relevant offence.
>
> Note: For *associate* see section 107.
>
> (2) In this section:
>
> ***relevant offence*** means:

(a) an offence that under subsection 229(3) of the Corporations Law disqualifies a person from managing a corporation; or

(b) an offence against section 29A, 29B, 29C or 29D of the *Crimes Act 1914* that relates to an application for a grant; or

(c) an offence against section 39 of the repealed Act; or

(d) an offence under:

(i) section 5, 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*; or

(ii) a provision of a law of a State or Territory that corresponds to any of those provisions;

that relates to an offence referred to in paragraph (a, (b) or (c).

Note: For *repealed Act* see section 107.

17 When is a disqualifying conviction outstanding?

A disqualifying conviction in respect of a person remains ***outstanding*** against the person for the period starting on the day on which the conviction was recorded and ending:

(a) if the conviction was for a term of imprisonment—5 years after the individual convicted was released from prison; or

(b) in any other case—5 years after the day on which the conviction was recorded.

In Alert Digest No. 3 of 1997, the committee noted that these provisions, if enacted, would set out one of the conditions under which a person would be ineligible for a grant in a grant year. The person would be ineligible where there is an outstanding disqualifying conviction against the person. Where the person has been convicted of a relevant offence, the disqualifying conviction is outstanding during a time period of five years from the time of the conviction or, where a term of imprisonment was imposed, five years from the person's release.

The committee was not concerned that certain offences attract ineligibility for a period of time. The committee was concerned, however, with attaching a legal effect to past events which occurred before the commencement of this legislation. Retrospective application in this way raises the issue whether there may be undue trespass on personal rights and liberties.

Further, the committee noted the arbitrary nature of choosing five years as the period. It was concerned with the apparently uneven treatment of a natural person as against a body corporate. Both a body corporate and a natural person may be ineligible by reason of an outstanding disqualifying conviction. The periods of ineligibility, however, may differ. Because a body corporate cannot be jailed, the period from conviction will not be more than five years unless an associate of the body corporate is also convicted for a term of imprisonment. A natural person, subject to imprisonment, may have a longer period of ineligibility.

Accordingly, the committee sought the Minister's advice on these issues.

Pending the Minister's advice, the committee drew 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.

Retrospective application
Clause 78

In Alert Digest No. 3 of 1997, the committee noted that clause 78 of this bill, if enacted, provides that an individual, convicted of certain offences, is disqualified from preparing applications for a grant for a disqualification period of five years from the time of the conviction or, where a term of imprisonment was imposed, five years from the individual's release.

As with the outstanding disqualifying convictions dealt with above, the committee was concerned, not with the disqualification itself, but with the retrospective application of the provision to convictions occurring before the commencement of this legislation. 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 these issues, the Minister for Trade has responded as follows:

> With reference to paragraph 7(1)(g) and clause 17, and clause 78 of the bill, I would point out that these provisions are identical in effect to those in the current *Export Market Development Grants Act 1974*. These provisions were devised with the assistance of the Attorney-General's Department, who gave consideration to human rights issues before giving their approval for the provisions. The five year period, and the relative impact on jailed individuals versus corporations was also considered by Attorney-General's Department to be a consistent application of the law. Given the prior existence of these provisions, I do not see that there is any retrospectivity or that any applicant is disadvantaged by their inclusion in the bill.

The committee thanks the Minister for this response.

Vicarious liability and reversal of the onus of proof
Subclauses 102(4) and (5)

Subclauses 102(4)and (5) provide:

(4) If it is necessary to establish the state of mind of an individual in relation to particular conduct, it is enough to show:

> (a) that the conduct was engaged in by an employee or agent of the individual within the scope of his or her actual or apparent authority: and

(b) that the employee or agent had the state of mind.

(5) If

(a) conduct is engaged in on behalf of an individual by an employee or agent of the individual; and

(b) the conduct is within the scope of his or her actual or apparent authority;

the conduct is taken, for the purposes of a prosecution for an offence referred to in subsection (1), to have been engaged in by the individual unless the individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

In Alert Digest No. 3 of 1997, the committee noted that these subclauses, if enacted, would impose vicarious liability on a person for the criminal acts of his or her employee or agent. Subclause (5) 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 has been prepared to accept the imposition of criminal liability on a company through the acts and intentions of its manager/directors as that is necessary for the effective operation of the criminal law. The committee, therefore, has no concerns with subclauses (2) and (3) which relate to the prosecution of a body corporate. Different considerations, however, ought to apply where vicarious liability for the acts of other persons is imposed on an employer or principal who is a natural person.

The primary issue is whether imposing criminal liability vicariously on an employer who is a natural person unduly trespasses on that person's personal rights and liberties. 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 reference to subclauses 102(4) and (5) I would comment that I consider the obtaining of, or attempting to obtain, a grant by fraud of deception to be a serious offence. This is supported by the level of the penalty, five years, imposed under the current EMDG Act. I would suggest that it is reasonable that any person in a managerial position who knew that a person under their control was attempting to obtain for their employer a grant by fraud is equally guilty of an offence as the actual perpetrator. But in any case I feel that people should be specifically accountable for matters which fall within their area of responsibility.
>
> Under the current legislation, section 39 provides that persons are guilty of an offence if they "ought reasonably to have known" that an amount was not payable,

> or made reckless statements that were false or misleading. The proposed provision addresses the same situation in a different way. It provides that the criminal act of employee or agent is deemed to be the act of the employer or principal if it was carried out in the course of the employment or agency and the employer or agent did not take "reasonable precautions and exercise due diligence".
>
> Managers are not liable to penalty in a number of instances where they can show that they made a reasonable effort to avoid such conduct by their staff, and, of course, that they did not know of the actions of their staff. Again, the current legislation was assisted in its development and approved by the Attorney-General's Department. The bill would have received similar scrutiny by that department. Given that I consider the offences to be serious, I do not feel it appropriate to alter the provisions of subclauses 102(4) and (5).

The committee thanks the Minister for this response but remains unconvinced by the reasons put forward. It may be, as the Minister suggests,

> reasonable that any person in a managerial position who knew that a person under their control was attempting to obtain for their employer a grant by fraud is equally guilty of an offence as the actual perpetrator.

But subclauses 102(4) and (5) would operate even if the person in the managerial position did not know of the fraudulent intentions of the person under their control.

Further, with respect to the current section 39, the committee does not agree that the proposed provisions 'address the same situation in a different way'. Subclauses 102(4) and (5) impose vicarious liability on the employer for the actions and intentions of an employee and reverse the onus of proof by requiring the employer to establish that he or she took reasonable precautions and exercised due diligence to avoid the conduct. Section 39 of the current Act has no vicarious liability for an employee of an individual and imposes on the prosecution the onus of proving that the person who actually committed the offence 'ought reasonably to have known' that an amount was not payable or that the person acted recklessly.

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.

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 responded to those comments in a letter dated 19 September 1996. The committee discussed this response in its Ninth Report of 1996 and made further comments. The Attorney-General responded to those comments in a letter dated 17 March 1997. In its Fourth Report of 1997, the committee invited comments from the Minister for Industrial Relations regarding item 14 of Schedule 1. The Minister has forwarded a copy of a letter sent to the Regulations and Ordinances Committee dated 26 March 1997 regarding this item. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

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 19 September 1996 in relation to this issue, the Attorney-General 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.

In its Ninth Report of 1996, the committee pointed out that its 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 gave the impression that the committee was asking for the status quo to be changed. Rather the committee was 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.

The committee said in its Ninth Report of 1996 that 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 the committee asked why the Parliament should not oversee what is done in its name?

The committee, therefore, continued 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.

In a further reply on 17 March 1997, the Attorney-General wrote:

> The Committee's concern about exemption from the legislation in respect of instruments dealing with terms and conditions of persons employed by the

Commonwealth has also been raised by the Senate Standing Committee on Regulations and Ordinances. In addition, The Chair of that Committee wrote to the Minister for Industrial Relations seeking his agreement to withdrawal of the exemption. I understand that the Minister will be writing shortly to that Committee on the issue.

The committee thanked the Attorney-General for this response and sought the views of the Minister for Industrial Relations on these issues.

Pending the Minister's response 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.

On 26 March 1997 the Minister for Industrial Relations responded as follows:

I refer to your Committee's Fourth Report of 19 March 1997, and its consideration of the proposed exemption of public sector employment instruments from the Legislative Instruments Bill 1996.

I note that the Committee is particularly concerned at the idea that such instruments might no longer be subject to parliamentary scrutiny and disallowance.

I have addressed this issue in responding to similar concerns raised by the Senate Standing Committee on Regulations and Ordinances. Accordingly, I attach a copy of that reply for your Committee's information.

I have sent a copy of this letter to the Attorney-General for his information.

Extract from letter to Regulations and Ordinances Committee

Thank you for your letter of 4 November 1996 seeking my agreement to the deletion of Item 14 of Schedule 1 from the Legislative Instruments Bill 1996.

Until now, I have not been in a position to provide you with a substantive reply. Your letter raised issues of considerable significance for my portfolio, and they have been the subject of ongoing and detailed consultations between the Attorney-General and myself, and our officers, about the effect of the Bill.

As you know, the Schedule lists classes of instruments that are not legislative instruments for the purposes of the Bill. The effect of deleting Item 14 would be that instruments of the specified kinds (broadly, those dealing with terms and conditions of public sector employees) would become subject to the scheme established by the Bill. This would involve central registration, tabling within 6 sitting days, backcapturing, sunsetting and the future possibility (following the proposed review of the scheme after 3 years) of compulsory consultation.

Your letter implies that exemption of public sector employment instruments from the scheme would mean that they would no longer be subject to Parliamentary scrutiny. All these kinds of instruments are made under the authority of Principal Acts which at present provide, where appropriate, for Parliamentary scrutiny and disallowance of related subordinate legislation. It is not the Government's intention that the Bill should have the effect of changing the current position. Accordingly,

exemption from the legislative instruments scheme is not intended to result, for example, in determinations made under section 82D of the *Public Service Act 1922* or section 58B of the *Defence Act 1903* no longer being tabled, publicly notified, scrutinised and subject to disallowance.

The Government will therefore be introducing amendments to the Bill to ensure that these processes, as they currently operate, are not disturbed. I note that it is unnecessary to make similar amendments to the *Remuneration Tribunal Act 1973*, which will continue to provide for Tribunal determinations to be subject to Parliamentary scrutiny and disapproval even though Item 15 of Schedule 1 to the Bill provides that such determinations will not be legislative instruments for the purposes of the scheme.

In these circumstances, the effect of the proposed exemption is to remove certain public sector instruments from the requirements of the Bill, but to preserve the opportunity of disallowance in relation to instruments which are currently disallowable.

The Government believes that the Commonwealth's employment practices should operate, to the maximum extent consistent with its public responsibilities, under the same industrial relations and employment arrangements as apply to the rest of the workforce. The proper place for accountability in relation to these practices should be the industrial relations arena, consistent with the Government's industrial reform program.

Under the Government's approach to the Australian Public Service employment framework which I announced on 5 March 1997, pay and conditions for APS staff will be implemented mainly through agency-level agreements under the *Workplace Relations Act 1996*. Such agreements will not be subject to the legislative instruments scheme.

Privacy is also an important consideration. Many determinations are made to resolve specific issues affecting particular named individuals. The electronic register under the Bill could lead to the disclosure of the personal details of those individuals, contrary to the spirit of the *Privacy Act 1988* and contrary to normal employment practices.

The Government also regards the sunsetting requirement of the legislative instruments scheme as incompatible with the special features of the employer/employee relationship. Sensitive matters on which a compromise had been reached would automatically be reopened, and expectations encouraged that entitlements would not only be reviewed but also (potentially) enhanced. Other difficulties would involve conflict with planned changes to industrial arrangements; encouraging the parties to focus on individual conditions at the expense of a broader, more rational approach; and the risk of entitlements lapsing.

In the light of these fundamental policy concerns, you will appreciate why the Government's firm position is that the exemption should be retained in Schedule 1 to the Bill.

I am sending a copy of this letter to the Attorney-General for his information.

The committee thanks the Minister for this response, noting the government's intention to introduce amendments to ensure that these instruments continue to be tabled in Parliament and subject to disallowance.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

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28 May 1997

SENATE STANDING COMMITTEE

FOR

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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 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

SEVENTH REPORT OF 1997

The committee presents its Seventh Report of 1997 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:

Constitutional Convention (Election) Bill 1997

Constitutional Convention (Election) Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Prime Minister. [Portfolio responsibility: Administrative Services]

The bill proposes to establish a process for the election of half (76) the delegates to the proposed Constitutional Convention. The Convention is scheduled to meet in December 1997.

The committee dealt with this bill in Alert Digest No. 6 of 1997, in which it made various comments. The Minister for Administrative Services responded to those comments in a letter dated 21 May 1997. A copy of that letter is attached to this Report, and relevant parts of the response are discussed below.

Reversal of the onus of proof
Subsections 139(1), (2) and (3)

In Alert Digest No. 6 of 1997, the committee noted that subsections 139(1), (2) and (3) of this bill, if enacted, would reverse the onus of proof in prosecutions for the offences established by those subsections.

These subsections provide:

Protection of the official mark

(1) A person must not, without lawful authority, proof whereof is to lie upon the person:

(a) make any official mark on or in any paper; or

(b) be in possession of any paper bearing any official mark; or

(c) make use of or be in possession of any instrument capable of making on or in any paper an official mark.

Penalty: 10 penalty units.

(2) A person who, without lawful authority, proof whereof is to lie upon the person, makes on or in any ballot-paper, or on or in any paper purporting to be a ballot-paper, an official mark, is to be taken to have a forged ballot-paper.

(3) All paper bearing an official mark, and all instruments capable of making on or in paper an official mark, made, used, or in the possession of any person without lawful authority (proof whereof is to lie upon the person) are forfeited to the Commonwealth, and may without warrant, be seized by a member of the Australian Federal

Police or a member of the police force of a State or Territory and destroyed or dealt with as prescribed.

The committee acknowledged that the reversal of the onus of proof in these circumstances is also contained in section 346 of the *Commonwealth Electoral Act 1918*. That section, however, pre-existed this committee so that the committee had not previously had an opportunity to comment upon it. It seemed to the committee that the explanatory memorandum did not contain any justification of the need to reverse the onus of proof in these circumstances. The committee, therefore, sought the Minister's advice on the reasons for doing so.

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 words ("proof thereof is to lie upon the person") contained in clause 139 of the Bill were the subject of Government Amendments to the Bill introduced in the House of Representatives on 15 May 1997. The amendments omit those words thereby withdrawing the reversal of onus of proof.
>
> The inclusion of those words in the Bill was an editing oversight.

The committee thanks the Minister for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTH REPORT

OF

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18 June 1997

SENATE STANDING COMMITTEE

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 1997

The committee presents its Eighth Report of 1997 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:

National Residue Survey (Ratite Slaughter) Levy Bill 1997

Taxation Laws Amendment Bill (No. 2) 1997

Wine Export Charge Bill 1997

National Residue Survey (Ratite Slaughter) Levy Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to allow for a national residue survey levy of 75 cents per bird slaughtered to be imposed on the slaughter of ratite emu for human consumption.

The committee dealt with this bill in Alert Digest No. 6 of 1997, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in a letter dated 17 June 1997. A copy of that letter is attached to this report and the relevant parts of the response are discussed below.

Setting a levy by regulation
Clause 6

In Alert Digest No. 6 of 1997, the committee noted that clause 6 of this bill, if enacted, would provide that the rate of the levy imposed by this bill may be prescribed by regulation.

The committee has consistently drawn attention to legislation which provides for the level of a levy to be set by regulation. This creates a risk that the levy may in fact become a tax. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so.

The committee pointed out that where the level of a levy needs to be changed frequently and expeditiously, the question arises as to whether this can best be done by regulation rather than by primary legislation. If a compelling case can be made out for the level to be set by subordinate legislation, the committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the levy or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is taxation by non-primary legislation.

In this case, the committee noted that clause 6 provides an upper limit of $5 per head. However, the explanatory memorandum does not set out the reasons for allowing the levy to be set by regulation rather than by primary legislation. The committee sought the advice of the Minister on the reason for choosing this mechanism.

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 purpose of the legislation is to recover the cost of an ongoing chemical residue monitoring program from those sections of the ratite industry who have chosen to participate in a National Residue Survey program. The levy is designed to be a collection mechanism to recover the cost of the program on a least-cost basis, that is, as a fee for service rather than as a tax.
>
> I was petitioned by industry for this form of collection mechanism to be put in place by legislation after market failure occurred within industry with the collection of a voluntary levy.
>
> As the levy is meant to be applied on a least-cost basis, some amendment to the operative rate of levy may occur from time to time as the industry expands and contracts with seasonal and market fluctuations. The proposed legislation allows for the operative rate of levy to be amended by regulation only after full consultation has been carried out with industry, and the necessary policy approval sought from the Prime Minister and Treasurer.
>
> This process is part of the 'General Principles Applying to Proposals for new and changed Primary Industry Levies for R&D, Promotion, Marketing or Fees for Chemical Residue Testing and Animal Health Services' agreed to by the Government in December 1996.
>
> Under Parliamentary process regulations are also disallowable instruments that are subject to the scrutiny of the Standing Committee on Regulations and Ordinances and must sit in both houses for 15 working days where disallowance can occur.
>
> This system currently operates effectively in ensuring that the twenty-three agricultural commodities participating in the National Residue Survey who have levy collection mechanisms imposed by regulation are subject to the scrutiny of the Parliament and also get value for money on the service provided.
>
> The maximum rate of levy to which you refer cannot be amended by subordinate legislation, only by primary legislation.
>
> I trust that this information allays the concerns of your Committee and I am happy to provide any further information that the Committee may require.

The committee thanks the Minister for this response explaining the need for flexibility in setting the rate of the levy and thus justifying the use of regulations to do so.

Taxation Laws Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 13 February 1997 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*, the *Taxation Laws Amendment Act (No. 1) 1997* and *Income Tax (Consequential Amendments) Act 1997* to rectify defects in the capital gains tax provisions dealing with the carry forward and transfer of net capital losses;
- *Income Tax Assessment Act 1936* to:
  - counter withholding tax avoidance arrangements, address certain specific tax avoidance arrangements and clarify that withholding tax is payable where dividends are paid from capital reserves;
  - remove the ability for employers to elect to use the standard contribution limit in calculating the upper limit of deductions allowable in relation to superannuation contributions they make for the benefit of their employees;
  - extend the operation of the Act which denies an income tax deduction to non-residents for the non-payment of interest withholding tax to residents paying interest to overseas persons;
  - define the terms "interest" for the purposes as having the same meaning as in the IWT provisions of the income tax law; and
  - provide that lease arrangements involving cars whose cost is more than the depreciation cost limit applicable under section 57AF will be treated as sale and loan transactions;
- *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to change the tax treatment in respect of certain dual resident companies;
- *Income Tax Assessment Act 1936* and the *Income Tax (Bearer Debentures) Act 1971* to restrict the Act's operation to interest paid in Australia on bearer debentures and provide an exemption for bearer debentures issued by an Offshore Banking Unit; and
- *Income Tax Assessment Act 1936* and the *Financial Corporations (Transfer of Assets and Liabilities) Act 1993* to replace the requirement that debentures issued by an Australian company must be widely distributed on overseas capital markets with a public offer test.

The committee dealt with this bill in Alert Digest No. 2 of 1997 and also in Alert Digest No. 4 of 1997, in which it made various comments. In a letter dated 28 April

1997 the Treasurer has responded to the comments made in Alert Digest No. 2. A copy of that letter is attached to this Report, and relevant parts of the response are discussed below.

Retrospective application
Part 3 of Schedule 5

In Alert Digest No. 2 of 1997, the committee noted that item 18 in Part 3 of Schedule 5, if enacted, would apply the amendments proposed by Part 5 to interest paid on or after 1 January 1996. The effect of the amendments is to deny to Australian residents an income tax deduction in respect of a payment of interest overseas if those persons have neither deducted nor remitted interest withholding tax to the Australian Taxation Office.

The committee noted that the date of 1 January 1996 is the same as the date from which the amendments in Part 2 commence. The relevant interest in Part 2, however, is quarantined until the commencement of these provisions. Neither the explanatory memorandum nor the second reading speech give any reason for requiring the relevant interest in Part 3 to be affected retrospectively from 1 January 1996.

The committee further noted that the amendments give effect to an announcement by the Treasurer in June 1996. As the bill has been introduced more than 6 months after the announcement and as the committee is unaware of any draft bill being published in the interim, the resolution of the Senate of 8 November 1988 may apply. That resolution states that:

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

In these circumstances the committee sought the Treasurer's advice on the reasons for not quarantining these interest payments.

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

On this issue, the Treasurer has responded as follows:

> I refer to the Scrutiny of Bills Alert Digest No. 2 of 1997 in relation to Part 2 and Item 18 in Part 3 of Schedule 5 of TLAB (No. 2), relating to interest withholding tax measures.

The Committee has sought my advice on the reasons for applying the provisions under Item 18 from 1 January 1966, rather than from the date of Royal Assent, as is provided for in Part 2.

In general terms, interest withholding tax (IWT) applies to interest derived in Australia under a range of circumstances and paid to non-residents by either Australian residents or non-residents. A number of exceptions apply to this general rule. Interest withholding tax is required to be withheld by the person paying the interest and remitted to the Australian Taxation Office (ATO).

Part 2 of Schedule 5 modifies an existing exemption from interest withholding tax (IWT) under section 128F of the *Income Tax Assessment Act 1936* (ITAA). Under the existing law, section 128F provides an exemption from IWT on interest on certain borrowings raised outside Australia by Australian resident companies (or their wholly owned foreign borrowing subsidiaries) where certain conditions are met. The provisions in Part 2 modify the exemption in a number of respects, which are mostly beneficial to taxpayers.

Item 15 of Part 2 states that the amendments to section 128F apply in respect of a debenture issued after 1 January 1966. Under transitional arrangements, Item 16 of Part 2 allows taxpayers to elect whether to use the existing 128F exemption or the proposed amendments to the section, up to the time that the Bill receives Royal Assent. As the proposed amendments under Part 2 are broadly aimed at enhancing an existing tax exemption there is no policy issue which should deny taxpayers the choice of using either the existing or proposed exemption up to the date when the bill receives Royal Assent. Under both provisions, the clear policy intention is to provide an exemption from tax.

The amendment proposed by Item 18 will deny resident taxpayers and income tax deduction in respect of interest paid to a person overseas that is subject to IWT where the payer of the interest has neither deducted IWT nor remitted IWT to the ATO. This amendment is an anti-avoidance provision which properly denies a taxpayer a tax deduction for interest paid where IWT payable on that interest has neither been deducted nor remitted to the ATO.

This amendment seeks to mirror a similar anti-avoidance provision which applies to royalty withholding tax.

As the provision seeks to address avoidance of tax, it would be high inappropriate to enact the provision from some unspecified date in the future (Royal Assent). This would allow taxpayers who seek not to remit or deduct IWT to do so in the full knowledge that they would still be able to claim tax deductions on the same interest payments. This would be very unusual and set an unfortunate precedent for the application of similar anti-avoidance provisions in the future.

The Committee has also asked why there was a period of more than 6 months between the announcement by the previous Government of the measures in Item 18 on 6 December 1995 and the release of the Government's draft legislation on 31 July 1997. The amendment proposed by Item 18 was foreshadowed by the former Government by Press Release of 6 December 1995 titled 'Interest withholding tax exemption improved' as part of the *Innovate Australia Media Statements*. The Press Release made the following statement in relation to Item 18:

> 'An amendment will also be made to the operation of the IWT [interest withholding tax] collection procedures. To make the collection procedures

consistent with the existing royalty withholding tax procedures, an income tax deduction will be denied to borrowers who fail to deduct IWT from interest payments.

...

These changes will take effect on 1 January 1996.'

As the Committee notes, no draft legislation was released by the previous Government between its original announcement of these measures on 6 December 1995 and the calling of the 1996 election on 27 January 1996.

I announced the amendment proposed by Item 18 by Press Release No 36, titled 'Interest withholding tax measures' on 25 June 1996. The Press Release made the following statement in relation to Item 18:

'IWT collection procedures will be amended to ensure they are consistent with existing royalty withholding tax procedures. This change will result in an income tax deduction being denied to borrowers who do not take IWT from interest payments.

...

The amendment of section 126 will be effective from the date the amending legislation receives Royal Assent and other measures are effective from 1 January 1996.'

(The amendment of section 126 of the ITAA is not affected by Item 18.)

I announced on 31 July 1996 by Press Release No 53, titled 'Reform of the interest withholding tax: Release of draft legislation' that draft legislation was being released for public comment. The draft legislation was released by the Government within 5 months of the Government being sworn in on 11 March 1996. The 8 week period by which the release of the draft legislation exceeds the 6 month period noted by the Senate can be attributed to the 14 weeks between the announcement by the previous Government on 6 December 1995 and the swearing-in of the Government on 11 March 1996.

The Government undertook extensive consultations with interested parties on the draft legislation prior to its introduction into the Parliament. I have been advised by the ATO that none of the submissions received on the draft legislation suggested that the application date in relation to Item 18 should be altered.

I trust that the above information is useful in the Committee's deliberations in relation to its concerns regarding Item 18.

The committee thanks the Treasurer for this response.

The committee takes this opportunity to note that it had further concerns with this bill which it expressed in Alert Digest No. 4 of 1997. In that Alert Digest it sought further advice from the Treasurer but has, as yet, not had a response on those concerns.

The committee, however, has examined the Government amendments which were made in the House of Representatives. These amendments allay the committee's concern over the definition of interest in item 3 of Schedule 2.

The committee again seeks the advice of the Treasurer with respect to the other issues raised in Alert Digest No. 4 of 1997. For the information of Senators, the relevant parts of that Digest are reproduced below.

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

Extract from Alert Digest No. 4 of 1997

Retrospective application
item 16 - the application of Part IVA

The committee has received a letter dated 12 March 1997 from the Taxation Manager of Chartered Accountants in Australia, extracts from the letter and attachment are set out below:

> We refer to the review which your committee recently conducted of the retrospective application of a number of provisions contained in the above bill.
>
> We are unsure whether your committee is aware of the retrospective application of certain amendments made in the above Bill in relation to withholding tax avoidance schemes. Details of these amendments and the Institute's concerns in relation to their retrospective nature are shown on the attachment to this letter.
>
> We would request that, if possible, your committee consider and/or report on these retrospective amendments in the light of your Committee's charter.
>
> **Attachment**
>
> **Withholding Tax Avoidance**
> **Amendments to Part IVA**
>
> *Taxation Laws Amendment Bill (No. 2)* 1997 amends Part IVA in relation to so-called 'withholding tax avoidance schemes'. The amendments are expressed to apply to all **payments** made after 7.30 pm EST on 20 August 1996.
>
> By expressing the application date in this way, the amendments will have **retrospective effect** in relation to any payment of interest made **after** 20 August 1996 pursuant to contractual arrangements entered into **before** this date. This is contrary to the way in which Part IVA has previously operated, in that Part IVA has only applied to schemes entered into (or commenced to be carried out) **after** the date of commencement, namely, 27 May 1981.
>
> Thus, after the proposed amendments, Part IVA will apply to interest payments made pursuant to arrangements entered into before 20 August 1996, being arrangements which were quite legitimate at the time that they were entered into and which, at that time, did not give rise to any liability to withholding tax. Further, notwithstanding the amendments, such payments will continue to give rise to **no** substantive liability to withholding tax under Division 11A of the *Income Tax Assessment Act*.

It follows that the only liability which can arise in relation to such payments is when the Commissioner makes a determination under Part IVA. Short of terminating pre-existing commercial arrangements (a course of action which may not be open to all taxpayers), there is no way for an affected taxpayer to make a 'voluntary' payment of withholding tax to avoid the application of Part IVA. Not only will taxpayers be required to pay tax on arrangements which previously gave rise to no tax liability but, in addition, substantial penalties will be incurred as a result of the Commissioner's application of Part IVA.

The retrospective imposition of both tax and penalties to an arrangement which previously gave rise to no liability should be a matter of great concern. There can be no justification, in this case, for a departure from established conventions which reject retrospective legislation.

In conclusion, to avoid the consequences of retrospectivity, the amendments to Part IVA should apply only to payments made pursuant to schemes entered into or carried out after 7.30 pm EST on 20 August 1996.

The committee **seeks the Treasurer's advice** on this issue.

Retrospective application
items 6 and 7 - implications for royalties already being paid under contracts

A further consequence of item 19 of schedule 2 has been brought to the attention of the committee. Item 19 provides that the amendments proposed by Schedule 2 would apply to payments made after 7.30 pm EST on 20 August 1996.

Items 6 and 7 of Schedule 2 bring the payments of certain royalties made after that time within the ambit of the withholding tax provisions.

As the committee understands the effect of the provisions, withholding tax will become payable for the first time on royalties paid by an Australian resident to the foreign branch of an Australian resident.

The committee understands that the withholding tax on royalties under 128B(2B) was imposed to change the time of receipt of the payment of the tax already payable on royalties received by non-residents. Thus, before the 1993-94 year of income, royalties paid to non-residents were liable for tax but were paid after an assessment consequent upon the lodgement of a tax return after the end of the relevant financial year. The imposition of withholding tax on royalties paid to non-residents merely advanced the time at which the liability for the tax was to be met.

The committee understands further that when similar withholding tax was introduced on interest under section 128B(2A), its effect on Australian businesses was mitigated by the statutory exemptions from withholding tax provided in sections 128F and 128G. The committee understands that the proposed amendments imposing withholding tax on royalties will also have an effect on Australian businesses. There are, however, no similar statutory exemptions to protect them because contracts entered into before 20 August 1996 requiring royalties to be paid will need to be honoured and payments made after 20 August 1996 will be subject to withholding tax.

The committee further understands from Budget Paper No. 1 at page 4-14 that the imposition of withholding tax on these royalties does "not signal any change in the Government's policy on withholding taxes but are intended to give effect to existing policy by addressing tax avoidance. The committee finds it difficult to understand the claim of tax avoidance to justify extending the

withholding tax to royalties derived by a resident if subsection 128B(2B) clearly targets only non-residents in imposing the withholding tax on their royalties.

As the payments of royalties since Budget night are made subject to withholding tax, the measure is retrospective in itself. It also has retrospective application in that it affects contracts entered into before the Budget and not just those which have commenced since Budget night. Both these adverse effects may be considered to trespass unduly on personal rights and liberties.

Accordingly, the committee **seeks the Treasurer's advice** on this issue.

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

Wine Export Charge Bill 1997

This bill was introduced into the House of Representatives on 19 March 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to impose a charge on exports of Australian wine. The charge will be based on the value of wine exported and will be paid by wine exporters. The funds raised by the charge will be paid to the Australian Wine and Brandy Corporation through the Consolidated Revenue Fund.

The committee dealt with this bill in Alert Digest No. 5 of 1997, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 28 April 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Setting a charge by regulation
Subclause 7(1)

In Alert Digest No. 5 of 1997, the committee noted that subclause 7(1) of this bill, if enacted, would provide that the rate of the charge imposed by this bill is to be prescribed by regulation.

The committee has consistently drawn attention to legislation which provides for the level of a charge to be set by regulation. This creates a risk that the charge may in fact become a tax. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so.

The committee pointed out that where the level of a charge needs to be changed frequently and expeditiously the question arises as to whether this can best be done by regulation rather than by primary legislation. If a compelling case can be made out for the level to be set by subordinate legislation the committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the charge or alternatively a formula by which such an amount can be calculated. The vice to be avoided is taxation by non-primary legislation.

The committee acknowledged that, in this case, subclause 7(2) provides a formula by which an upper limit can be calculated. The upper limit must not exceed 0.5% of the free on board sales value of the wine. However, the explanatory memorandum does not set out the reasons for setting the charge by regulation rather than by primary legislation. The committee sought the advice of the Minister on the reason for choosing this mechanism.

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 Committee's comments in its *Alert Digest* (No 5 of 1997) request my advice on the reasons for choosing to have the rate of the wine export charge (the charge) prescribed by regulation.
>
> In order to better explain the reasons for this, I will provide some background to the wine industry's proposal. In developing the proposal for the charge, the industry decided it wished to raise an amount of around $1 million per annum to support the wine export promotion programme of the Australian Wine and Brandy Corporation (the Corporation). Following extensive consultation, the industry agreed to propose a 'stepped' rate of the charge, with the highest rate applied on exports of up to $10 million (per exporter) in free-on-board value, and lower rates for exports above that level. This was to reflect the fact that small winemakers gain proportionally greater benefits from the generic export promotion programme, and also to reflect the substantial financial commitment by larger exporters to export promotion of their own brands.
>
> The proposal was put to Annual General Meetings of levypayers of the Corporation in both 1995 and 1996. The proposal as agreed to by the industry was for a scale of charge rates as follows: 0.25% of the free-on-board value of exports, for the first $10 million in exports (per exporter); 0.15% for the exports between $10 million and $40 million; and 0.05% for remaining exports, above $40 million. The motion also incorporated a reduction in the rate of the charge from 1 July 1998, so that despite the expected increase in the value of exports, the export charge would continue to raise around $1 million in funds for export promotion (text of the motion put to the Corporation's 1995 Annual General Meeting is at Attachment A).
>
> Clearly the industry's wine export charge proposal is far from simple in respect to the rates of the charge: it incorporates six rates in all (three in the initial 'stepped' scale of rates, to be superseded by three more applying from 1 July 1998). Given the rates of growth in wine exports the industry expects to achieve over coming years, it is highly likely that further changes to the charge rates will be required, quite possibly as often as once a year. If every change in the rates of charge required amendment to the legislation, it would place an unreasonable burden on Parliament, and because of the delays that are often involved in amending legislation, could hamper the Corporation's and the industry's ability to finance generic wine export promotion appropriately.
>
> With regard to safeguards, it is noted in the *Alert Digest* that subclause 7(2) of the *Wine Export Charge Bill 1997* sets a maximum limit of 0.5% of the free-on-board value of wine exports. In addition, under subclause 10(3), any request to the Minister for a change to the rate of the charge must have been put to a vote of levy (and charge) payers at an Annual General Meeting of the Corporation.
>
> This Government has also put in place additional safeguards in relation to the imposition of statutory levies and charges, and changes to their operative rates. In response to a number of industry requests made in 1996 for new or increased levies and charges, the Government decided to develop a set of principles to assist it in the

assessment of such proposals. These draft Levies Principles were agreed to by the Government in December 1996 (Attachment B). The draft Principles apply a number of tests to proposals for new levies and charges, including a requirement for proposals to demonstrate the need for the levy or charge, and to provide evidence of broad industry support and extensive prior industry consultation. They also require accountability mechanisms for the expenditure of the funds raised and periodic review of levies and charges against the draft Principles. The Government used the draft Principles to assess the proposals it had before it, and is currently consulting widely with industries before finalising the Levies Principles.

The Government has assessed the wine export charge proposal against the Levies Principles, and has concluded it satisfies the Principles.

The Committee has also expressed concern about the potential in the Bill for taxation by non-primary legislation. In developing the Levies Principles, the Government was also concerned to ensure that industry proposals for levies and charges would not result in the imposition of new taxes. In this regard, I can assure the Committee that, consistent with the administrative arrangements for other primary industries levies and charges under the *Primary Industries Levies and Charges Collection Act 1991*, all funds raised by the wine export charge will be passed on to the Corporation from the Consolidated Revenue Fund. Funds raised by the charge will be used for the benefit of wine exporters, and there will be no impact on Government revenue as a result of the introduction of the charge. In respect of administrative costs, the Corporation will be invoiced periodically for costs incurred by the Department of Primary Industries and Energy in collecting the funds raised by the wine export charge.

In conclusion, I share the Committee's concerns about delegating legislative power inappropriately. I do not believe however that the Bill does so. I have agreed to the Bill's provision for the rate of the charge to be set by regulation in order to avoid imposing an unreasonable burden on the Parliament resulting from consideration of frequent changes to the legislation, and also to ensure that the funding and operation of the wine industry's generic export promotion activities are not impeded by the delays that Parliamentary consideration can entail.

I trust this response meets the Committee's concerns about the legislation. I am happy to provide any further information the Committee may require.

The committee thanks the Minister for his detailed response.

Barney Cooney
Chairman

THE HON JOHN ANDERSON MP
Minister for Primary Industries and Energy

Deputy Leader
National Party of Australia

17 JUN 1997

Senator B Cooney
Chairman
Standing Committee
for The Scrutiny Of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 8 May 1997 in which your Committee Secretary drew to the attention of my Senior Advisor the Scrutiny of Bills Alert Digest No. 6 of 1997.

In the Alert your Committee raised concerns that Clause 6 of the proposed **National Residue Survey (Ratite Slaughter) Levy Bill 1997**, if enacted, would provide for the rate of the levy imposed by this bill to be prescribed by regulation. Your committee also expressed concern that it created a risk that the levy may become a tax and that it was for Parliament to set a tax rate and not for the makers of subordinate legislation to do so.

The purpose of the legislation is to recover the cost of an ongoing chemical residue monitoring program from those sections of the ratite industry who have chosen to participate in a National Residue Survey program. The levy is designed to be a collection mechanism to recover the cost of the program on a least-cost basis, that is, as a fee for service rather than as a tax.

I was petitioned by industry for this form of collection mechanism to be put in place by legislation after market failure occurred within industry with the collection of a voluntary levy.

As the levy is meant to be applied on a least-cost basis, some amendment to the operative rate of levy may occur from time to time as the industry expands and contracts with seasonal and market fluctuations. The proposed legislation allows for the operative rate of levy to be amended by regulation only after full consultation has been carried out with industry, and the necessary policy approval sought from the Prime Minister and Treasurer.

This process is part of the 'General Principles Applying to Proposals for new and changed Primary Industry Levies for R&D, Promotion, Marketing or Fees for Chemical Residue Testing and Animal Health Services' agreed to by the Government in December 1996.

Parliament House, Canberra ACT 2600 Tel: (06) 277 7520 Fax: (06) 273 4120

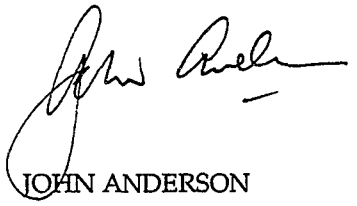
Under Parliamentary process regulations are also disallowable instruments that are subject to the scrutiny of the Standing Committee on Regulations and Ordinances and must sit in both houses for 15 working days where disallowance can occur.

This system currently operates effectively in ensuring that the twenty-three agricultural commodities participating in the National Residue Survey who have levy collection mechanisms imposed by regulation are subject to the scrutiny of the Parliament and also get value for money on the service provided.

The maximum rate of levy to which you refer cannot be amended by subordinate legislation, only by primary legislation.

I trust that this information allays the concerns of your Committee and I am happy to provide any further information that the Committee may require.

Yours sincerely



JOHN ANDERSON

TREASURER

PARLIAMENT HOUSE
CANBERRA ACT 2600

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28 APR 1997

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

Dear Senator Cooney Barney

Taxation Laws Amendment Bill (No. 2) 1997 (TLAB (No. 2))

I refer to the Scrutiny of Bills Alert Digest No. 2 of 1997 in relation to Part 2 and Item 18 in Part 3 of Schedule 5 of TLAB (No. 2), relating to interest withholding tax measures.

The Committee has sought my advice on the reasons for applying the provisions under Item 18 from 1 January 1996, rather than from the date of Royal Assent, as is provided for in Part 2.

In general terms, interest withholding tax (IWT) applies to interest derived in Australia under a range of circumstances and paid to non-residents by either Australian residents or non-residents. A number of exceptions apply to this general rule. Interest withholding tax is required to be withheld by the person paying the interest and remitted to the Australian Taxation Office (ATO).

Part 2 of Schedule 5 modifies an existing exemption from interest withholding tax (IWT) under section 128F of the *Income Tax Assessment Act 1936* (ITAA). Under the existing law, section 128F provides an exemption from IWT on interest on certain borrowings raised outside Australia by Australian resident companies (or their wholly owned foreign borrowing subsidiaries) where certain conditions are met. The provisions in Part 2 modify the exemption in a number of respects, which are mostly beneficial to taxpayers.

Item 15 of Part 2 states that the amendments to section 128F apply in respect of a debenture issued after 1 January 1996. Under transitional arrangements, Item 16 of Part 2 allows taxpayers to elect whether to use the existing 128F exemption or the proposed amendments to the section, up to the time that the Bill receives Royal Assent. As the proposed amendments under Part 2 are broadly aimed at enhancing an existing tax exemption there is no policy issue which should deny taxpayers the choice of using either the existing or proposed exemption up to the date when the bill receives Royal Assent. Under both provisions, the clear policy intention is to provide an exemption from tax.

The amendment proposed by Item 18 will deny resident taxpayers an income tax deduction in respect of interest paid to a person overseas that is subject to IWT where the payer of the interest has neither deducted IWT nor remitted IWT to the ATO. This amendment is an anti-avoidance provision which

properly denies a taxpayer a tax deduction for interest paid where IWT payable on that interest has neither been deducted nor remitted to the ATO.

This amendment seeks to mirror a similar anti-avoidance provision which applies to royalty withholding tax.

As the provision seeks to address avoidance of tax, it would be highly inappropriate to enact the provision from some unspecified date in the future (Royal Assent). This would allow taxpayers who seek not to remit or deduct IWT to do so in the full knowledge that they would still be able to claim tax deductions on the same interest payments. This would be very unusual and set an unfortunate precedent for the application of similar anti-avoidance provisions in the future.

The Committee has also asked why there was a period of more than 6 months between the announcement by the previous Government of the measures in Item 18 on 6 December 1995 and the release of the Government's draft legislation on 31 July 1997. The amendment proposed by Item 18 was foreshadowed by the former Government by Press Release of 6 December 1995 titled 'Interest withholding tax exemption improved' as part of the *Innovate Australia Media Statements*. The Press Release made the following statement in relation to Item 18:

> 'An amendment will also be made to the operation of the IWT [interest withholding tax] collection procedures. To make the collection procedures consistent with the existing royalty withholding tax procedures, an income tax deduction will be denied to borrowers who fail to deduct IWT from interest payments.
>
> . . .
>
> These changes will take effect on 1 January 1996.'

As the Committee notes, no draft legislation was released by the previous Government between its original announcement of these measures on 6 December 1995 and the calling of the 1996 election on 27 January 1996.

I announced the amendment proposed by Item 18 by Press Release No 36, titled 'Interest withholding tax measures' on 25 June 1996. The Press Release made the following statement in relation to Item 18:

> 'IWT collection procedures will be amended to ensure they are consistent with existing royalty withholding tax procedures. This change will result in an income tax deduction being denied to borrowers who do not take IWT from interest payments.
>
> . . .
>
> The amendment of section 126 will be effective from the date the amending legislation receives Royal Assent and other measures are effective from 1 January 1996.'

(The amendment of section 126 of the ITAA is not affected by Item 18.)

I announced on 31 July 1996 by Press Release No 53, titled 'Reform of the interest withholding tax: Release of draft legislation' that draft legislation was being released for public comment. The draft legislation was released by the Government within 5 months of the Government being sworn in on 11 March 1996. The 8 week period by which the release of the draft legislation exceeds the 6 month period noted by the Senate can be attributed to the 14 weeks between the announcement by the

previous Government on 6 December 1995 and the swearing-in of the Government on 11 March 1996.

The Government undertook extensive consultations with interested parties on the draft legislation prior to its introduction into the Parliament. I have been advised by the ATO that none of the submissions received on the draft legislation suggested that the application date in relation to Item 18 should be altered.

I trust that the above information is useful in the Committee's deliberations in relation to its concerns regarding Item 18.

Yours sincerely

PETER COSTELLO

THE HON JOHN ANDERSON MP
Minister for Primary Industries and Energy

Deputy Leader
National Party of Australia

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

Dear Senator Cooney

I refer to the letter of 27 March 1997 from the Secretary to the Senate Committee for the Scrutiny of Bills (the Committee), Mr Peter Crawford, to my Senior Adviser regarding the *Wine Export Charge Bill 1997* (the Bill). I am responding to the Committee's request for additional information on the Bill.

The Committee's comments in its *Alert Digest* (No 5 of 1997) request my advice on the reasons for choosing to have the rate of the wine export charge (the charge) prescribed by regulation.

In order to better explain the reasons for this, I will provide some background to the wine industry's proposal. In developing the proposal for the charge, the industry decided it wished to raise an amount of around $1 million per annum to support the wine export promotion programme of the Australian Wine and Brandy Corporation (the Corporation). Following extensive consultation, the industry agreed to propose a 'stepped' rate of the charge, with the highest rate applied on exports of up to $10 million (per exporter) in free-on-board value, and lower rates for exports above that level. This was to reflect the fact that small winemakers gain proportionally greater benefits from the generic export promotion programme, and also to reflect the substantial financial commitment by larger exporters to export promotion of their own brands.

The proposal was put to Annual General Meetings of levypayers of the Corporation in both 1995 and 1996. The proposal as agreed to by the industry was for a scale of charge rates as follows: 0.25% of the free-on-board value of exports, for the first $10 million in exports (per exporter); 0.15% for the exports between $10 million and $40 million; and 0.05% for remaining exports, above $40 million. The motion also incorporated a reduction in the rate of the charge from 1 July 1998, so that despite the expected increase in the value of exports, the export charge would continue to raise around $1 million in funds for export promotion (text of the motion put to the Corporation's 1995 Annual General Meeting is at Attachment A).

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Clearly the industry's wine export charge proposal is far from simple in respect to the rates of the charge: it incorporates six rates in all (three in the initial 'stepped' scale of rates, to be superseded by three more applying from 1 July 1998). Given the rates of growth in wine exports the industry expects to achieve over coming years, it is highly likely that further changes to the charge rates will be required, quite possibly as often as once a year. If every change in the rates of charge required amendment to the legislation, it would place an unreasonable burden on Parliament, and because of the delays that are often involved in amending legislation, could hamper the Corporation's and the industry's ability to finance generic wine export promotion appropriately.

With regard to safeguards, it is noted in the ***Alert Digest*** that subclause 7(2) of the ***Wine Export Charge Bill 1997*** sets a maximum limit of 0.5% of the free-on-board value of wine exports. In addition, under subclause 10(3), any request to the Minister for a change to the rate of the charge must have been put to a vote of levy (and charge) payers at an Annual General Meeting of the Corporation.

This Government has also put in place additional safeguards in relation to the imposition of statutory levies and charges, and changes to their operative rates. In response to a number of industry requests made in 1996 for new or increased levies and charges, the Government decided to develop a set of principles to assist it in the assessment of such proposals. These draft Levies Principles were agreed to by the Government in December 1996 (Attachment B). The draft Principles apply a number of tests to proposals for new levies and charges, including a requirement for proposals to demonstrate the need for the levy or charge, and to provide evidence of broad industry support and extensive prior industry consultation. They also require accountability mechanisms for the expenditure of the funds raised and periodic review of levies and charges against the draft Principles. The Government used the draft Principles to assess the proposals it had before it, and is currently consulting widely with industries before finalising the Levies Principles.

The Government has assessed the wine export charge proposal against the Levies Principles, and has concluded it satisfies the Principles.

The Committee has also expressed concern about the potential in the Bill for taxation by non-primary legislation. In developing the Levies Principles, the Government was also concerned to ensure that industry proposals for levies and charges would not result in the imposition of new taxes. In this regard, I can assure the Committee that, consistent with the administrative arrangements for other primary industries levies and charges under the ***Primary Industries Levies and Charges Collection Act 1991***, all funds raised by the wine export charge will be passed on to the Corporation from the Consolidated Revenue Fund. Funds raised by the charge will be used for the benefit of wine exporters, and there will be no impact on Government revenue as a result of the introduction of the charge. In respect of administrative costs, the Corporation will be invoiced periodically for costs incurred

by the Department of Primary Industries and Energy in collecting the funds raised by the wine export charge.

In conclusion, I share the Committee's concerns about delegating legislative power inappropriately. I do not believe however that the Bill does so. I have agreed to the Bill's provision for the rate of the charge to be set by regulation in order to avoid imposing an unreasonable burden on the Parliament resulting from consideration of frequent changes to the legislation, and also to ensure that the funding and operation of the wine industry's generic export promotion activities are not impeded by the delays that Parliamentary consideration can entail.

I trust this response meets the Committee's concerns about the legislation. I am happy to provide any further information the Committee may require.

Yours sincerely

JOHN ANDERSON

enc

cc Mr Peter Crawford

ATTACHMENT A

MOTION ON NOTICE PUT TO 1995 ANNUAL GENERAL MEETING OF THE AUSTRALIAN WINE AND BRANDY CORPORATION

that the Australian levypayers recommend to the Minister for Primary Industries and Energy that an ad valorem levy on wine exports be introduced at the following rates:

First $10M of FOB sales in export @	.25%
Next $40M of FOB sales in export @	.15%
Remaining sales @	.05%

effective from 1 January 1997, to be invoiced quarterly in arrears and that effective 1 July 1998 the rate be reduced to:

First $10M of FOB sales in export @	.20%
Next $40M of FOB sales in export @	.10%
Remaining sales @	.05%

ATTACHMENT B

General Principles Applying to Proposals for new and changed Primary Industry Levies for R&D, Promotion, Marketing or Fees for Chemical Residue Testing and Animal Health Services

1. The proposed levy must relate to a function for which there is a significant market failure.

2. A request for a levy must be supported by industry bodies representing wherever possible all levy payers, or by levy payers directly. Otherwise a levy may be initiated by the government in the public interest in consultation with the industries involved.

3. The initiator of a levy proposal shall provide an assessment of the extent, the nature and source of any opposition to the levy, and shall provide an analysis of the opposing arguments and reasons why the levy should be imposed despite the arguments raised against the levy. The initiator shall also demonstrate that all reasonable attempts have been made to inform levy payers of the proposal and that they have had the opportunity to comment on the proposed levy.

4. The initiator shall provide an estimate of the amount of levy to be raised to fulfill the function to be paid for by the levy, a clear plan of how the levy will be utilised, including an assessment of how the plan will benefit levy payers in an equitable manner, and demonstrated acceptance of the plan by levy payers in a manner consistent with principle 2.

5. The initiator must be able to demonstrate that there is agreement by a significant majority on the levy imposition/collection mechanism, or that, despite objections, the proposed mechanism is equitable in the circumstances.

6. The levy imposition must be equitable between levy payers.

7. The imposition of the levy must be related to the inputs, outputs or units or value of production of the industry or some other equitable arrangement linked to the function causing the market failure.

8. The levy collection system must be efficient and practical, and must impose the lowest possible "red tape" impact on business, subject to transparency and accountability requirements.

9. Unless new structures are proposed, the organisation or organisations which will manage expenditure of levy monies must be consulted prior to introduction of the levy.

10. The body managing expenditure of levy monies must be accountable to levy payers and to the Commonwealth.

11. Levies must be reviewed against these principles following a specified period and in a manner determined by the Government in consultation with industry at the time of the imposition of the levy.

Changes to existing levies

12. The proposed change must be supported by industry bodies or by levy payers, or by the Government in the public interest. The initiator of the change must establish the case for change and, where an increase is involved, estimate the additional amount which would be raised, indicate how the increase would be spent and demonstrate how this expenditure would benefit levy payers.

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SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINTH REPORT

OF

1997

Crimes Amendment (Forensic Procedures) Bill 1997

18 June 1997

SENATE STANDING COMMITTEE

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18 June 1997

ISSN 0729-6258

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 1997

The committee presents its Ninth Report of 1997 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 (Forensic Procedures) Bill 1997

Crimes Amendment (Forensic Procedures) Bill 1997

The Crimes Amendment (Forensic Procedures) Bill 1997 was introduced into the House of Representatives on 26 March 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Crimes Act 1914* to introduce a new regime for carrying out forensic procedures during the investigation of Commonwealth offences, and for the storage, use and destruction of material derived from those procedures.

The committee dealt with this bill in Alert Digest No. 6 of 1997. The committee observed that the bill raised a number of issues on which the committee intended to seek further information.

Hearing

The committee wrote to the Attorney-General to tell him that the committee would conduct a hearing and would be seeking the expert assistance of his officers to clarify a number of specified areas of interest. The Attorney-General's Department provided a briefing for the committee dealing with those matters and officers gave further explanations at the hearing on 28 May 1997. The committee thanks the Attorney-General and his officers for their expert guidance.

Terms of reference

The Scrutiny of Bills Committee is required to consider and report, in the light of its terms of reference, upon each bill introduced into the Senate. The subject matter of a bill such as the Crimes Amendment (Forensic Procedures) Bill 1997 invites consideration under those terms of reference which refer to whether a bill trespasses unduly on personal rights and liberties, makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers or makes rights, liberties or obligations unduly dependent upon non-reviewable decisions.

The concerns of the committee

In its letter to the Attorney-General the committee listed a number of issues with regard to aspects of the bill which the committee thought should be clarified. The meaning and the practical impact of the bill in relation to these matters was not clear to the committee so that it was not possible to tell the extent to which some of the matters listed may have come within the committee's terms of reference. The Attorney-General's Department provided the committee with a written briefing

discussing each of those topics. Relevant parts of the briefing are discussed below. For the information of Senators the full text of the briefing is at Appendix 1.

Compulsory testing without arrest

In Alert Digest No. 6 of 1997 the committee noted that the provisions of proposed Part 1D of the bill would allow various forensic procedures to be carried out on a suspect. These include intimate forensic procedures which the bill describes as:

> ***intimate forensic procedure*** means the following forensic procedures:
>
> (a) an external examination of the genital or anal area, the buttocks or, in the case of a female, the breasts;
>
> (b) the taking of a sample of blood;
>
> (c) the taking of a sample of saliva, or a sample by buccal swab;
>
> (d) the taking of a sample of pubic hair;
>
> (e) the taking of a sample by swab or washing from the external genital or anal area, the buttocks or, in the case of a female, the breasts;
>
> (f) the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks or, in the case of a female, the breasts;
>
> (g) the taking of a dental impression;
>
> (h) the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks or, in the case of a female, the breasts.

'Suspect' is defined in proposed section 23WA and includes a person whom a constable suspects on reasonable grounds has committed an indictable offence. It appeared to the committee that the bill would enable a number of personal and intrusive procedures on a person to be carried out compulsorily although the person had not been arrested.

The committee, therefore, listed this issue in seeking clarification from the Department of the Attorney-General. The Department's briefing dealt with the matter as follows:

> **A. The proposal for people to be compulsorily tested before being arrested**
>
> 2. The Bill does allow a suspect to be ordered to undergo a forensic procedure before the suspect has been arrested. However, the criteria which must be met before an order for compulsory testing is made are essentially the same as those which apply to arrest, ie the magistrate must be satisfied, amongst other things, that there are reasonable grounds to believe that the suspect has committed an indictable offence (proposed paragraph 23WT(1)(a). The magistrate must also be satisfied that the forensic procedure is likely to produce evidence that will tend to confirm or disprove the suspect's involvement in the commission of an offence

(proposed paragraph 23WT(1)(d) and that the carrying out of the forensic procedure is justified in all the circumstances (proposed paragraph 23WT(1)(d)).

3. Commonwealth policy is not to arrest a suspect in relation to a Commonwealth offence except as a last resort in order to ensure the person's appearance before the court, or to preserve the safety of others or prevent the destruction of evidence etc or interference with witnesses (see section 3W of *Crimes Act 1914* at Attachment A). To require the arrest of a person merely for the purpose of obtaining a forensic sample, when otherwise the police would proceed by way of summons, would be contrary to that policy.

4. Other advantages of not requiring arrest are:

- It avoids the stigma associated with arrest which can impact on a person's employment or business, and on their standing in the community; and
- Arrest, at the direction of a constable, is not nearly as strong a safeguard as requiring independent judicial consideration after a hearing at which the suspect can cross examine witnesses and address the magistrate.

This response clarifies for the committee that a suspect may be required, by this bill, to undergo compulsory testing only when criteria have been established which would have permitted an arrest in accordance with common law principles.

This information also helps to allay a concern of the committee which arises from the difference between 'custody' and 'arrest'. Clause 23WC contains a table which shows the circumstances in which a forensic procedure may be carried out on a suspect and the provisions which authorise the carrying out of the procedure. That part of the table which interested the committee is as follows:

Authority for forensic procedures

Suspect	Intimate forensic procedure	Non-intimate forensic procedure
1 adult not in custody	with informed consent under Division 3	with informed consent under Division 3
	by order of a magistrate under Division 5	by order of a magistrate under Division 5
2 adult in custody	with informed consent under Division 3	with informed consent under Division 3
	by order of a magistrate under Division 5	by order of a senior constable under Division 4
		by order of a magistrate under Division 5

It seemed to the committee that there was a grey area in which a person who had not been arrested could nevertheless be in custody and, therefore, subject to being

ordered to undergo a non-intimate forensic procedure by a senior constable under Division 4.

The committee sought advice on the difference between custody and arrest. The Department's briefing on this point is as follows:

> **The relationship between the concepts of 'custody', of 'arrest' and of 'detained'.**
>
> *Custody*
>
> 39. The Bill makes the distinction between suspects "in custody" and suspects not in custody. Proposed subsection 23WA(2) defines "in custody" to mean "in the lawful custody of a constable". This can be broken down into two categories:
>
> (i) where a person is under lawful arrest (the vast majority of cases); or
>
> (ii) where a person is in the custody of a constable pursuant to some other lawful authority, eg. voluntary attendance by a suspect after a magistrate's order for a forensic procedure.
>
> 40. The term "under arrest" is not used (for the purposes of deciding on whether a forensic procedure can be ordered) because it is narrower in scope than the term "in custody". Thus, a person arrested, charged, and remanded in custody may not be subject to the provisions of the Bill if "under arrest" was substituted for "in custody". Similarly, a prisoner serving a period of imprisonment will not come within the provisions of the Bill if it were confined to persons "under arrest". Such persons may be suspects for offences committed before being sentenced for another offence. Under the Bill as it currently stands, those persons may be ordered by a Magistrate to attend a police station for the purpose of undergoing a forensic procedure.
>
> *Arrest*
>
> 41. The term "arrest" does appear but only in the context of a Magistrate's order (see for example proposed section 23XGC). Arrest in those circumstances refers to lawful arrest. Generally speaking, a constable must have reasonable grounds to believe that a person has committed an offence before a lawful arrest can be made. That position is preserved in the Bill by requiring a magistrate (before ordering a forensic procedure) to be satisfied on the balance of probabilities, inter alia, that "on the evidence before him or her, there are reasonable grounds to believe that the suspect committed a relevant offence" (proposed paragraph 23WT(1)(b)).
>
> *Detention*
>
> 42. The term "detention period" appears in the Bill in proposed section 23XGD to refer to the period that a suspect in custody may be detained for the purpose of carrying out a forensic procedure.

The committee notes that the briefing points out that 'custody' not only encompasses 'arrest' but also:

> (ii) where a person is in the custody of a constable pursuant to some other lawful authority, eg. voluntary attendance by a suspect after a magistrate's order for a forensic procedure.

The committee also noted that other examples of being in the custody of a constable pursuant to some other lawful authority could arise from the present Part 1C of the *Crimes Act 1914*. Subsection 23B(2) in Part IC provides that a reference "in this Part" to a person who is arrested includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

- the official believes that there is sufficient evidence to establish that the person has committed a Commonwealth offence that is to be the subject of the questioning; or
- the official would not allow the person to leave if the person wished to do so; or
- the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

In the circumstances described in Subsection 23B(2), a person would not have been formally arrested but would be in the lawful custody of a constable and so subject to a non-intimate forensic procedure being ordered by a senior constable under Division 4.

However, the criteria which must be met before an order for compulsory testing is made are essentially the same as those which apply to arrest, ie the senior constable must be satisfied, amongst other things, that there are reasonable grounds to believe that the suspect has committed an indictable offence [proposed paragraph 23WO(1)(b)]. It is clear, therefore, that, in these circumstances a suspect, although not formally arrested, may be required, by this bill, to undergo compulsory testing only when criteria have been established which would have permitted an arrest in accordance with common law principles.

In these circumstances, the committee makes no further comment on this matter.

Custody without bail

One of the issues which concerned the committee was the apparent absence of any proposal to allow bail for a person taken into custody under the proposed legislation.

The Department's briefing dealt with the matter as follows:

> **The absence of any proposal to allow bail for a person taken into custody under the Bill**
>
> 9. Proposed Part 1D is designed to operate in tandem with Part 1C. The suspects dealt with under proposed Part 1D may, in some circumstances, not be under arrest.
>
> 10. At common law if a person has been lawfully arrested he or she must be brought to a Magistrate without delay for the purposes of determining whether he or she is to be released on bail or remanded in custody pending trial (*Williams v. R* (1986) 161 CLR 278). However, section 23C of Part 1C of the *Crimes Act 1914*

abrogates the common law rule in that it allows police to delay taking the suspect to a Magistrate for the purpose of investigating whether the suspect committed the offence. But this investigation period is limited to a reasonable time, to a maximum of 4 hours (or 2 in the case of vulnerable suspects, eg. Aboriginal persons, Torres Strait Islanders, children etc.)

11. Under the Bill a person is in custody "if he or she is in the lawful custody of a constable"(proposed subsection 23WA(2)). That is, a person who has been lawfully arrested by a constable or is otherwise in the lawful custody of a constable e.g. where a suspect voluntarily attends for a forensic procedure after being ordered to do so by a magistrate.

12. If the person is arrested he or she must be brought to a magistrate or bail officer for bail to be determined within the time periods prescribed by section 23C of the *Crimes Act 1914*.

13. Accordingly, a person "taken into custody" will have the right to bail, or to be brought before a magistrate at the latest on the expiration of the Part 1C investigation period. Bail for persons charged with Commonwealth offences (by virtue of the *Judiciary Act 1903)* has always been a matter determined in accordance with State and Territory bail laws.

This information clarifies the position and allays the concern of the committee.

Accordingly, the committee makes no further comment on this matter.

Admissibility of illegally obtained evidence

The committee raised concerns about the ability of the prosecution to lead evidence of the results of a forensic procedure, even though those results have been obtained in contravention of the terms of the proposed legislation.

The Department's briefing dealt with the matter as follows:

The ability of the prosecution to lead evidence even though it has been obtained in contravention of the Bill

14. Evidence obtained in breach of the requirements of the Bill may be rendered inadmissible unless the court can be satisfied that the admission of the evidence is justified in spite of non-compliance (proposed section 23XX). That is not a novel approach. At common law, *Bunning v. Cross* (1978) 141 CLR 34 governs the exercise of such a discretion (see generally Stephen and Aickin JJ at 78-80).

15. In deciding whether to justify admission, under this Bill the court will consider the reasons for and the gravity of the breach, whether the breach was deliberate, and the seriousness of the offence in question.

16. The standard that must be met for admissibility under this Bill is more onerous to discharge than the normal *Bunning v Cross* (supra) discretion concerning the admission of illegally obtained evidence. By allowing discretionary admission, the provision recognises that some breaches of the new Part may involve procedural provisions with little or no impact on fairness to the suspect. In such a case, admission of evidence might be justified in the public

interest. However, a court must consider the circumstances of each case to determine this.

This response meets the concerns of the committee. The admission of evidence gained in contravention of the bill is to be subject to the exercise of judicial discretion. The committee has always regarded the exercise of judicial discretion as a sufficient safeguard against an undue trespass on personal rights and liberties.

Accordingly, the committee makes no further comment on this matter.

The 1995 Bill

The Crimes Amendment (Forensic Procedures) Bill 1995 was the subject of a detailed inquiry by the Senate Legal and Constitutional Legislation Committee in October 1995. That committee made 20 recommendations. Many of those recommendations were adopted in the 1997 Bill. Some were not and some could be considered to be more appropriately dealt with administratively rather than by legislation. As the recommendations of that committee do not necessarily fall within the terms of reference of the Scrutiny of Bills Committee, Senators are referred to Appendix 4 which lists the recommendations.

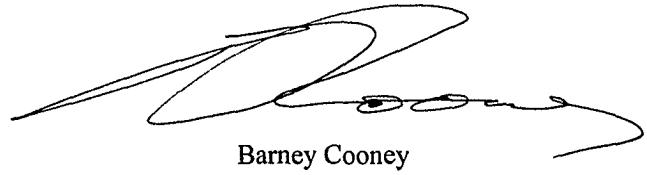
Documentation

Appendix 1 contains the committee's requests for information and the briefing of the Attorney-General's Department on those matters.

Appendix 2 contains the transcript of the hearing on 28 May 1997.

Appendix 3 contains the answers to the questions that were taken on notice during the hearing.

Appendix 4 contains the recommendations of the Senate Legal and Constitutional Legislation Committee when it considered the Crimes Amendment (Forensic Procedures) Bill 1995.



Barney Cooney
Chairman

APPENDIX I

Committee's Request for Information

Briefing of the Attorney-General's Department

Committee's Request for Information

List of areas of interest to the committee

1. The proposal for people to be compulsorily tested before being arrested.
2. The proposal for a suspect to be held for testing for a reasonable time instead of for a specified time.
3. The absence of any proposal to allow bail for a person taken into custody under the proposed act.
4. The ability of the prosecution to lead evidence even though it has been obtained in contravention of the proposed act.
5. The ability or otherwise of a person who has suffered from a contravention of the proposed act to take civil action for damages.
6. The cogency of D.N.A. tests
7. The cogency of dental impressions.
8. The propriety of compulsorily taking fingerprints.
9. The need or otherwise for greater latitude for the investigation of serious crimes such as murder than for lesser offences.
10. The relationship between the concept of 'custody', of 'arrest' and of 'detained'.
11. The proposal in relation to the time limits for forensic procedures which appears to differentiate between different classes of suspects on the basis of race (namely Aboriginal or Torres Strait Islander people) (see 23WCA in Schedule 1).
12. Why is this differentiation made only in relation to Aboriginal and Torres Strait Islander people, but not, for example, people of other races who may have language or cultural difficulties in such a situation?

    What measures are there under this legislation to provide protection to the rights of people of other races in relation to the taking of forensic samples?

BRIEFING OF THE ATTORNEY-GENERAL'S DEPARTMENT FOR THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS ON ISSUES RAISED BY CRIMES AMENDMENT (FORENSIC PROCEDURES) BILL 1997

23 MAY 1997

INTRODUCTION

1. The Senate Standing Committee for the Scrutiny of Bills ("the Senate Committee") has proposed to conduct a hearing on the issues arising out of the Crimes Amendment (Forensic Procedures) Bill 1997. The Senate Committee has stated that it will be seeking the expert advice of officers of the Department on the ramifications of the proposed legislation. The specific areas which the Senate Committee seeks information on (and the Department's response) are as follows:

A. The proposal for people to be compulsorily tested before being arrested

2. The Bill does allow a suspect to be ordered to undergo a forensic procedure before the suspect has been arrested. However, the criteria which must be met before an order for compulsory testing is made are essentially the same as those which apply to arrest, ie the magistrate must be satisfied, amongst other things, that there are reasonable grounds to believe that the suspect has committed an indictable offence (proposed paragraph 23WT(1)(a). The magistrate must also be satisfied that the forensic procedure is likely to produce evidence that will tend to confirm or disprove the suspect's involvement in the commission of an offence (proposed paragraph 23WT(1)(d) and that the carrying out of the forensic procedure is justified in all the circumstances (proposed paragraph 23WT(1)(d)).

3. Commonwealth policy is not to arrest a suspect in relation to a Commonwealth offence except as a last resort in order to ensure the person's appearance before the court, or to preserve the safety of others or prevent the destruction of evidence etc or interference with witnesses (see section 3W of *Crimes Act 1914* at Attachment A). To require the arrest of a person merely for the purpose of obtaining a forensic sample, when otherwise the police would proceed by way of summons, would be contrary to that policy.

4. Other advantages of not requiring arrest are:

- It avoids the stigma associated with arrest which can impact on a person's employment or business, and on their standing in the community; and

- Arrest, at the direction of a constable, is not nearly as strong a safeguard as requiring independent judicial consideration after a hearing at which the suspect can cross examine witnesses and address the magistrate.

B. The proposal for a suspect to be held for testing for a reasonable time instead of for a specified period

5. The Bill does not permit a suspect who is not under arrest to be held against his or her will for any period of time. A suspect undergoing a procedure by informed consent may terminate consent at any time before or during the procedure (proposed section 23WK). He or she is free to leave after the consent is withdrawn. Where consent is withdrawn, it is up to the police to seek an order from a magistrate under Division 5 if they wish to perform a forensic procedure on the suspect.

6. Where the suspect has been ordered to undergo a forensic procedure by a Magistrate or senior constable, the suspect may be detained in custody for such period as is reasonably necessary to carry out the forensic procedure but in any case for no longer than 4 hours (2 hours in the case of Aboriginal persons, Torres Strait Islanders, children or incapable persons), excluding dead time, such as time during which a suspect is consulting with a lawyer (see proposed sections 23WLA, 23XGB and 23XGD).

7. Thus, although the legislation provides for a procedure to be carried out within a reasonable time, this period is capped to a maximum of 4 and 2 hours. The specification of 'a reasonable time' is to ensure that the person is not held longer than is reasonable for the purposes of the procedure, if that is less than 4 (or 2) hours.

8. In the Government's view this achieves an appropriate compromise between the needs of law enforcement and individual civil liberties. This is consistent with Part 1C of the Crimes Act 1914 and was not disapproved of by the Senate Legal and Constitutional Legislation Committee ('the SLCLC') when it considered the Bill.

C. The absence of any proposal to allow bail for a person taken into custody under the Bill

9. Proposed Part 1D is designed to operate in tandem with Part 1C. The suspects dealt with under proposed Part 1D may, in some circumstances, not be under arrest.

10. At common law if a person has been lawfully arrested he or she must be brought to a Magistrate without delay for the purposes of determining whether he or she is to be released on bail or remanded in custody pending trial (*Williams v. R* (1986) 161 CLR 278). However, section 23C of Part 1C of the *Crimes Act 1914* abrogates the common law rule in that it allows police to delay taking the suspect to a Magistrate for the purpose of investigating whether the suspect committed the offence. But this investigation period is limited to a reasonable time, to a maximum of 4 hours (or 2 in the case of vulnerable suspects, eg. Aboriginal persons, Torres Strait Islanders, children etc.)

11. Under the Bill a person is in custody "if he or she is in the lawful custody of a constable"(proposed subsection 23WA(2)). That is, a person who has been lawfully arrested by a constable or is otherwise in the lawful custody of a constable e.g. where a suspect voluntarily attends for a forensic procedure after being ordered to do so by a magistrate.

12. If the person is arrested he or she must be brought to a magistrate or bail officer for bail to be determined within the time periods prescribed by section 23C of the *Crimes Act 1914*.

13. Accordingly, a person "taken into custody" will have the right to bail, or to be brought before a magistrate at the latest on the expiration of the Part 1C investigation period. Bail for persons charged with Commonwealth offences (by virtue of the *Judiciary Act 1903)* has always been a matter determined in accordance with State and Territory bail laws.

D. The ability of the prosecution to lead evidence even though it has been obtained in contravention of the Bill

14. Evidence obtained in breach of the requirements of the Bill may be rendered inadmissible unless the court can be satisfied that the admission of the evidence is justified in spite of non-compliance (proposed section 23XX). That is not a novel approach. At common law, *Bunning v. Cross* (1978) 141 CLR 34 governs the exercise of such a discretion (see generally Stephen and Aickin JJ at 78-80).

15. In deciding whether to justify admission, under this Bill the court will consider the reasons for and the gravity of the breach, whether the breach was deliberate, and the seriousness of the offence in question.

16. The standard that must be met for admissibility under this Bill is more onerous to discharge than the normal *Bunning v Cross* (supra) discretion concerning the admission of illegally obtained evidence. By allowing discretionary admission, the provision recognises that some breaches of the new Part may involve procedural provisions with little or no impact on fairness to the suspect. In such a case, admission of evidence might be justified in the public interest. However, a court must consider the circumstances of each case to determine this.

E. The ability or otherwise of a person who has suffered from a contravention of the Bill to take civil action for damages

17. A person authorised to carry out a forensic procedure is immune from civil or criminal liability in respect of actions that are done properly and in good faith with a reasonable belief that the suspect had consented to the procedure, or that the procedure was authorised (proposed section 23YL).

18. However, that proposed section does not provide any protection in respect of action taken maliciously or recklessly.

19. That safeguard was introduced in response to recommendation 19 of a report on the Bill in October 1995 by the SLCLC which considered submissions suggesting that the Bill should include "specific offences for exercising or threatening to exercise the powers contained in the Bill without following the proper procedures for obtaining informed consent, determining whether a mandatory procedure should be carried out or carrying out a mandatory procedure" (page 52).

F. The cogency of DNA tests

20. This Bill does not require a court to admit any forensic evidence, and does not require a jury to give forensic evidence any weight. It merely allows forensic evidence to be obtained, and leaves admissibility and weight to the judge and jury.

21. The recent criticisms of DNA evidence are an understandable reaction to the widely held, but inaccurate, view that DNA matching can always conclusively determine guilt or innocence. In truth, the value of DNA evidence varies from case to case, depending on the quality of the sample at the crime scene, the nature of the tests performed, and the distinctiveness of the DNA in question. In some cases, DNA evidence will be of little value. In others, it may show a high probability that DNA found at a crime scene is the suspect's DNA. The defence can conduct its own analysis of the defendant's DNA. If it is able to create real uncertainty as to the reliability of DNA evidence on which the prosecution case relies, a jury would be unable to find the defendant guilty beyond reasonable doubt on that evidence alone.

22. There is widespread international acceptance that DNA evidence has probative value. DNA databases are already established in the UK, USA and New Zealand. Canada is currently undertaking a wide ranging consultative process in relation to establishing a 'National DNA Data Bank'.

23. In Australia, a Working Party has been established and is currently examining the creation of a Convicted Offenders DNA Database. The Working Party has arisen out of the report received by the Australian Police Ministers' Conference (APMC) from Ms P Easteal entitled, *The Forensic Use of DNA Profiling in Australia: Need for a National Database*. Subsequently, in 1993 the APMC received a report from Mr A Ross entitled, *Considerations of the Easteal Report*. In 1993 the APMC resolved to note the Ross Report and endorse its recommendations. The technical aspects of DNA analysis were referred to other expert committees. In 1995, the Working Party was asked to report on the legislative framework, in particular:

(i) Whether existing legislation, including that applicable in New Zealand, to obtain body samples can be standardised;

(ii) To examine particularly the importance and need to create a properly accountable pre-arrest power to enable the taking of body samples in certain circumstances for the purposes of DNA profiling;

(iii) The impact of legislation relating to privacy including the legal implications of the exchange of information to, and between, States and Territories;

(iv) The level of database security, including control over access; and

(v) Medical and ethical considerations.

24. The Working Party released an interim report in August 1996 which was distributed to participating laboratories, and the Privacy and Human Rights Commissions for comment. A final report is due to be presented to the APMC in July 1997.

25. In Victoria, the Victoria Forensic Sciences Centre (VFSC) has established a Sexual Offence Intelligence Data System for the purpose of providing effective sexual offence intelligence (SOI) to the Victorian Justice System. The data system maintains profile information gathered from samples submitted to the VFSC.

G. The cogency of dental impressions

26. Recent developments in the area of forensic odontology have paved the way for dental impressions to provide reliable and probative evidence particularly in cases where bite marks are present on a victim.

27. A reliable technique has been developed which involves the use of the dental casts of the alleged offender's teeth being applied directly to the bite mark. However, given the propensity of bite marks on humans to fade over time, early collection of dental impressions from a suspect is essential for this technique to be effective.

28. Another development in this field is the use of scanning electron microscopy. This technique is now used to observe the striations on the surface of the teeth. These striations are individual characteristics and mean that identification of an individual is possible from a single tooth mark if sufficient detail of the striations can be located in the bitten material.

29. Bite mark evidence is particularly useful in child abuse cases. In most of these cases, there are only two suspects, being the custodial adults, and it is not uncommon for each to blame the other. In cases where children have been bitten, there is a real possibility of differentiating between the alleged assailants by eliminating one person. There is often no other adequate way to assess which custodial adult is the perpetrator.

30. Excluding dental impressions from the Bill would set a precedent in the Model Bill (developed by the Model Criminal Code Officers' Committee) that the States would find difficult to overcome, and would deny the use of this investigatory tool in many of these cases.

31. Finally, it should also be noted that proposed section 23XJ provides that any force used to enable a forensic procedure to be carried out must be reasonable. Force would not be reasonable if it caused harm to the suspect. Further, all procedures are to be carried out in a manner consistent with appropriate medical or other relevant professional standards: (proposed section 23XJ(2)). Therefore, if any effort to force a suspect to give a dental impression would harm the suspect, then under the terms of the Bill such force could not be used and an impression could not be obtained.

H. The propriety of compulsorily taking fingerprints

32. In relation to the taking of hand, finger, foot or toe prints the Bill will:

- regulate the taking of hand, finger, foot or toe prints, as well as other forensic material, from adult suspects who are not in custody (proposed paragraph 23YR(b));
- apply to incapable persons or child suspects who have not yet been both arrested and charged (proposed subsection 3ZJ(6A));
- not apply to the taking of hand, finger, foot or toe prints from an adult suspect in custody who is not an incapable person (proposed paragraph 23YR(b)); and
- not apply to the taking of these prints from children or incapable persons who have been both arrested and charged (proposed paragraph 23YR(a)).

33. Section 3ZJ of Part 1AA of the Crimes Act governs the taking of "identification material" from adults in lawful custody. "Identification material" is defined in section 3ZJ to include finger and other prints, and this section will continue to govern the taking of these prints after the enactment of the new Part 1D.

34. While this outcome may seem cumbersome, it recognises that the taking of prints from those in custody is not an intrusive procedure and is a long accepted feature of the criminal investigation system. Accordingly, the safeguards in this Bill are not required for the taking of prints in these circumstances and it is proposed to rely on the system already in place in this instance.

I. The need or otherwise for greater latitude for the investigation of serious crimes such as murder than for lesser offences.

35. As noted by the SLCLC, forensic procedures are likely to be used in relation to offences against the person. The vast majority of offences of that nature carry maximum penalties of 12 months or more imprisonment.

36. None of the Reports which have investigated the feasibility of, and justification for, forensic procedures have recommended restricting the availability of procedures to offences punishable by 5 years or more[1]. They have all settled on indictable offences as being an appropriate threshold test. The higher threshold would exclude its being used for many of the offences for which it is most applicable. Many offences against the person are punishable by less than 5 years imprisonment.

36. As stated in the Coldrey Report, whilst it may be argued that the choice of indictable offences as such is arbitrary, nonetheless, it is regarded as a practical and workable option for a threshold test for these criminal investigation procedures.

37. Concern that procedures may be used in cases of less serious indictable offences is addressed by requiring the police officer who is requesting consent, or the police officer or magistrate who is ordering the procedure, to decide whether the forensic procedure is justified in all the circumstances.

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1 The ALRC Report No 2 on *Criminal Investigation*;
The Review of Commonwealth Criminal Law, Fifth Interim Report, known as the Gibbs Committee Report;
Consultative Committee on Police Powers of Investigation report on *Body Samples and Examinations* 1989, chaired by Mr John Coldrey QC;
The Queensland Criminal Justice Commissions report *A review of Police Powers in Queensland.*

38. The threshold level of offences for which procedures can be carried out is one of the key features of the Bill. Any change to that threshold will adversely affect the Bill's use as a model for the States and Territories.

J. The relationship between the concepts of 'custody', of 'arrest' and of 'detained'.

Custody

39. The Bill makes the distinction between suspects "in custody" and suspects not in custody. Proposed subsection 23WA(2) defines "in custody" to mean "in the lawful custody of a constable". This can be broken down into two categories:

(i) where a person is under lawful arrest (the vast majority of cases); or

(ii) where a person is in the custody of a constable pursuant to some other lawful authority, eg. voluntary attendance by a suspect after a magistrate's order for a forensic procedure.

40. The term "under arrest" is not used (for the purposes of deciding on whether a forensic procedure can be ordered) because it is narrower in scope than the term "in custody". Thus, a person arrested, charged, and remanded in custody may not be subject to the provisions of the Bill if "under arrest" was substituted for "in custody". Similarly, a prisoner serving a period of imprisonment will not come within the provisions of the Bill if it were confined to persons "under arrest". Such persons may be suspects for offences committed before being sentenced for another offence. Under the Bill as it currently stands, those persons may be ordered by a Magistrate to attend a police station for the purpose of undergoing a forensic procedure.

Arrest

41. The term "arrest" does appear but only in the context of a Magistrate's order (see for example proposed section 23XGC). Arrest in those circumstances refers to lawful arrest. Generally speaking, a constable must have reasonable grounds to believe that a person has committed an offence before a lawful arrest can be made. That position is preserved in the Bill by requiring a magistrate (before ordering a forensic procedure) to be satisfied on the balance of probabilities, inter alia, that "on the evidence before him or her, there are reasonable grounds to believe that the suspect committed a relevant offence" (proposed paragraph 23WT(1)(b)).

Detention

42. The term "detention period" appears in the Bill in proposed section 23XGD to refer to the period that a suspect in custody may be detained for the purpose of carrying out a forensic procedure.

K. In relation to the time limits (within which a forensic procedure can be carried out) under the Bill why is there a differentiation between classes of suspects on the basis of race (namely Aboriginal or Torres Strait Islander people)?

43. A forensic procedure must be carried out:

(a) Where the suspect is not in custody "as quickly as reasonably possible" (proposed subsection 23XGB(1)); or

(b) Where the suspect is in custody, he or she may be detained for such period "as is reasonably necessary to carry out the forensic procedure" (proposed subsection 23XGD(1)).

44. Accordingly, there is no differentiation on the basis of race in relation to the time for which a forensic procedure must be carried out. Once the forensic procedure is completed, the suspect must be released if he/she is not under arrest.

45. There is however, a differentiation in the set time limits in which a suspect may be required to remain (if not in custody), or be detained (if in custody). The time limits will only be relevant where the carrying out of the forensic procedure is on-going at the expiration of the time limits. Once that point is reached, the carrying out of the forensic procedure must cease.

46. The Senate Legal and Constitutional Legislation Committee ('the Committee') unanimously recommended in its report (released in October 1995) that the maximum time limit for which an Aboriginal person or Torres Strait Islander suspect may be held for the purposes of a forensic procedure be two hours (see recommendation 5 at page 25). That is consistent with the period for which an Aboriginal person and Torres Strait Islander suspect can be detained under the "investigation period" in Part 1C of the *Crimes Act 1914*.

47. The Committee considered submissions from civil liberty groups and recommendations of the *Royal Commission into Aboriginal Deaths in Custody* ('the Royal Commission'). The two hour maximum period reflects the Interim Report of the Royal Commission which specifically referred to the risks associated with the initial period in custody. It is the view of the Government that the time limit is an appropriate response to those findings.

L. Why is the differentiation made only in relation to Aboriginal persons and Torres Strait Islander suspects, but not, for example, people of other races who may have language or cultural difficulties in such a situation? Why is the differentiation made only in relation to Aboriginal persons and Torres Strait Islander suspects, but not, for example, people of other races who may have language or cultural difficulties in such a situation?

48. Given the nature of some of the procedures involved it is important that constables and magistrates inform themselves of any cultural or linguistic difficulties which might be relevant to certain procedures. After having regard to those matters, the constable or magistrate must still be satisfied on the balance of probabilities that the carrying out of the forensic procedure is justified in all the circumstances.

49. In relation to language and cultural difficulties the Bill contains significant safeguards to people of all races. Before consent is requested, or an order is made for a forensic procedure, regard must be had (by a constable or magistrate) to, inter alia, the cultural background and (where appropriate) religious beliefs of the suspect, to the extent that they are known (to the constable or magistrate) or can reasonably be discovered by the constable (by asking the suspect or otherwise) (see proposed paragraphs 23WI(3)(c), 23WM(3)(c) and 23WT(3)(c)).

50. Where a suspect has language difficulties he/she must be informed of his/her rights by an interpreter in a language (including sign language or braille) in which the suspect is able to communicate with reasonable fluency (proposed section 23WA(4)).

51. As stated previously the focus of the time limits is on the maximum period in which a suspect may be required to remain with, or be detained by, an investigating official for the purposes of a forensic procedure. The Royal Commission specifically referred to the risks associated with the initial period in custody for Aboriginal persons and Torres Strait Islanders. Having regard to the findings of the Royal Commission, the Committee made its unanimous recommendation which the Government has accepted.

52. As part of the Review of Part 1C of the *Crimes Act 1914* submissions were received from ethnic groups on the issue of whether it was appropriate to accord persons with language and cultural difficulties the same safeguards as Aboriginal persons and Torres Strait Islanders. There was no evidence provided in those submissions that Part 1C had not provided adequate safeguards for the rights of non-English speaking persons. Accordingly, it was decided that there was no justification for amending Part 1C to provide further safeguards for persons with language and cultural difficulties. On the other hand, there is available evidence that Aboriginal persons and

Torres Strait Islanders are in need of the safeguards which they are currently entitled to under Part 1C.

ATTACHMENT A

1. Section 3W of the *Crimes Act 1914* provides:

(1) A constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that:

(a) the person has committed or is committing the offence; and

(b) proceedings by summons against the person would not achieve one or more of the following purposes:

(i) ensuring the appearance of the person before a court in respect of the offence;

(ii) preventing a repetition or continuation of the offence or the commission of another offence;

(iii) preventing the concealment, loss or destruction of evidence relating to the offence;

(iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;

(v) preventing the fabrication of evidence in respect of the offence;

(vi) preserving the safety or welfare of the person.

(2) If:

(a) a person has been arrested for an offence under subsection (1); and

(b) before the person is charged with the offence, the constable in charge of the investigation ceases to believe on reasonable grounds:

(i) that the person committed the offence; or

(ii) that holding the person in custody is necessary to achieve a purpose referred to in paragraph (1) (b);

the person must be released.

(3) A constable may, without warrant, arrest a person whom he or she believes on reasonable grounds has escaped from lawful custody to which the person is still liable in respect of an offence.

APPENDIX II

Transcript of Hearing 28 May 1997

COMMONWEALTH OF AUSTRALIA

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Crimes Amendment (Forensic Procedures) Bill 1997

CANBERRA

Wednesday, 28 May 1997

OFFICIAL HANSARD REPORT

CANBERRA

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Members

Senator Cooney (Chair)

Senator Crane
Senator Ferris
Senator Forshaw
Senator Sandy Macdonald
Senator Murray

Crimes Amendment (Forensic Procedures) Bill 1997.

WITNESSES

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Crimes Amendment (Forensic Procedures) Bill 1997

CANBERRA

Wednesday, 28 May 1997

Present

Senator Cooney (Chair)

Senator Crane	Senator Sandy Macdonald
Senator Ferris	Senator Murray
Senator Forshaw	

The committee met at 8.08 a.m.

Senator Cooney took the chair.

JOHNSON, Ms Laurel Eva, Assistant Secretary, Criminal Justice Branch, Attorney-General's Department, Robert Garran Offices, Barton, Australian Capital Territory 2600

MONZO, Mr Claude, Senior Government Lawyer, Criminal Justice Branch, Criminal Law Division, Attorney-General's Department, Robert Garran Offices, Barton, Australian Capital Territory 2600

CHAIR—Welcome. This private briefing is about the Crimes Amendment (Forensic Procedures Bill) 1997. Have you read this bill, Ms Johnson?

Ms Johnson—Yes—so many times that I hardly see it now when I read it!

CHAIR—You have put in this report, which I thought was a very good report. Thanks very much for that. Will you give us a bit of a run-down about it? Then people can ask questions. Did you write that?

Ms Johnson—It was a combined effort of three of us.

CHAIR—I thought it was good and that it covered it pretty well. What is the history of it? A lot of people would not know, because we have some new faces here.

Ms Johnson—This goes back to at least 1995, when we based our development of this bill on the draft provisions of the Coldrey report, the Victorian report that the Victorians built their bill on.

CHAIR—He was a great legal mind.

Ms Johnson—Yes.

CHAIR—He had done a lot of work in the Northern Territory for the Aboriginal Legal Service, and is now a judge of the Supreme Court there.

Ms Johnson—He is. We had got to the stage of introduction. The scrutiny of bills committee had looked at that bill and it had been examined, as you probably know, by the Senate committee on legal and constitutional affairs that held public inquiries on it. There had been massive consultation because it was developed as part of a proposed uniform scheme by the MCCOC, the Model Criminal Code Officers Committee. They had done a huge amount of consultation. They have a consulting list of about 600. We again consulted when we picked it up. We had about 60 submissions.

One way and another, it has been well and truly looked at by both the community and parliamentary committees. After we were introduced in the last administration, parliament was prorogued and the bill lapsed. So this is our second time around with it.

CHAIR—What issues were raised in those discussions?

Ms Johnson—I suppose the biggest issue is that, like the Victorian bill, our provisions apply to people who are not in custody. That has aroused a certain amount of opposition because people have had the misapprehension that the people could not have been arrested. The criteria that apply to the compulsory procedures in this bill will require a level of belief in the commission of the offence by the suspect that is equivalent to the level of belief that justifies arrest, so although the people are not arrested, they could have been arrested.

It is a little complicated by the fact that under the Commonwealth Crimes Act, the criteria for arrest include things like the belief that the person would not respond to a summons, or that they might destroy evidence if they were not arrested, or that they might intimidate witnesses, or things like that. But that is statutory. The common law criteria for an arrest are a belief on reasonable grounds that the person has committed the offence. That is the level of belief required for compulsory procedures under this bill. That was one of the contentious things.

Senator SANDY MACDONALD—Could you explain to me what informed consent means? Is informed consent where testing takes place and the person is given the choice?

Ms Johnson—Yes. There are circumstances where a person can be asked whether they will consent to the procedure. They have to be asked in a language that they understand, including sign language.

Senator SANDY MACDONALD—Could it be in circumstances below compulsory testing?

Ms Johnson—Yes.

Senator SANDY MACDONALD—In such a case, they could leave at any time.

Ms Johnson—That is right.

CHAIR—What other issues were raised? The Coldrey report had a bit to say about the dental stuff.

Ms Johnson—Yes. Was that back in 1988?

CHAIR—About then.

Ms Johnson—There has been criticism of the provision for dental samples, dental casts and things to be taken on the basis that their evidential value was not great enough to

justify the sort of uncomfortable procedure and the intrusion on the person. That was based on information available in the mid to late 1980s. Since then—and I have to look at this because it is scientific—there has been a reliable technique developed which allows casts to be taken that are useful for evidential reasons. They also have scanning electron microscopy which can be used to observe the striations on the surface of the teeth.

These striations are highly individual and a single tooth mark may be sufficient to identify a person if the striations can be located in the material. That is not so useful for bites on other people's bodies but, for example, in property offences, you will often read in the newspapers that burglars have had a good feed out of the fridge before they left the premises and, if they have left bite marks in food, often those marks are useful. Cheese is supposed to be very good.

In child abuse cases where children have been bitten and the custodial parents are accusing one another of having bitten the child, the question can often be resolved by dental impressions which are three dimensional and can be actually fitted onto the bite on the child. So, since the 1980s, we think that there is sufficient value in dental evidence for it to be included in the bill, particularly as this is proposed to be a model bill. Dental evidence is particularly relevant to state offences involving offences against a person and property.

CHAIR—Can you develop two things there? One thing that is said and you have answered it, but can you put it in this context: the Commonwealth does not investigate many offences where there is violence concerned where you might need this sort of testing.

Ms Johnson—Yes. Commonwealth offences are traditionally offences against the Commonwealth, rather than against a human victim. They are usually such things as fraud and drug offences and various other mainly property and financial offences. However, we do have some offences against the person. All the offences under the Defence Force Discipline Act pick up ACT offences against persons and property. We have offences against Commonwealth officers and police. So there are quite a number where it could be relevant and where, for public interest reasons, it be very useful to have these techniques available.

CHAIR—And it is a model act.

Ms Johnson—And it is a model act.

CHAIR—What has disturbed me a bit over the years is the fact of testing from intimate parts of the body. That seems a bit intrusive.

Ms Johnson—Yes. And again, as you probably would be aware, it is probably less relevant to Commonwealth offences than it is for state and territory ones, although the

ones that I have mentioned could well have involved those areas. It is because it is a model bill that it has to be comprehensive. There certainly are offences where forensic material could be located on intimate parts of the body, for instance, sexual offences and some offences involving violence where blood could be splashed on the offender on all sorts of parts of the body.

CHAIR—What about people who can take the tests? I think that police can take some intimate samples.

Ms Johnson—I am not so sure about that, mainly with the intimate ones. We have a table in the bill now, Senator.

CHAIR—This one here—

Ms Johnson—But he is not the one who actually performs the procedure. He may order it. It is a non-intimate procedure, isn't it? Yes, that is a non-intimate one. The constable cannot order a compulsory intimate procedure. If the person does not consent, he has to go to a magistrate to get permission for that.

Senator MURRAY—And where does this procedure take place?

Ms Johnson—We do not specify a particular place, but we do specify conditions that provide reasonable privacy for the person.

Senator MURRAY—Are there restrictions on who may observe the procedure?

Ms Johnson—Yes, there are. Where possible, persons of the same sex are involved in an intimate procedure. For children, only a person of the same sex may be present.

Senator MURRAY—If a male were having an sample taken by a medical practitioner, you still would not want a male constable observing the procedure.

Ms Johnson—How many people are allowed to observe? Some of these procedures would be videotaped. The videotaping provision is there for the protection both of the person being tested and the people who are performing the procedure. It is a guarantee that there will not be any rough or unfeeling conduct by the police or medical practitioners involved in the procedure, and it will be protection for them against any accusations that they have breached human rights in some way by physically abusing the person in the course of the procedure. The person can waive that right to have it videotaped if he or she prefers privacy to safe evidence of the procedure.

Senator MURRAY—Who activates the video camera?

Ms Johnson—They would have a qualified video operator.

Senator MURRAY—Is it activated remotely?

Ms Johnson—Since the bill is not yet in effect, those details are yet to be worked out. You are suggesting that it might be behind a one-way screen, or something, so that—

Senator MURRAY—What I am suggesting is that you might waive your right to have a video and somebody in another room just presses a button and records it anyway.

Ms Johnson—They would be clearly in breach of the act if they did that.

Senator MURRAY—That has not stopped people before.

Ms Johnson—All the warnings and rights that the person is entitled to under this act have got to be recorded. So if the person says, 'I don't want to be videoed,' it ought to be recorded. If the police then produce a video, how are they going to account for that?

Senator MURRAY—Maybe the video is not produced by the police. Maybe it just goes into circulation elsewhere.

Ms Johnson—That is a horrible thought.

Senator MURRAY—But that is a real danger—

Senator FERRIS—On page 39 of the bill, there is actually a chart that shows who may carry out the forensic procedures. I notice that the third party is an appropriately qualified person. Then when you go to page 4 of the bill—who is an appropriately qualified person—you discover that it is somebody qualified under the regulations, or somebody having suitable professional qualifications or experience to carry out the act. 'Qualified under the regulations' is pretty open to me. Does that mean police?

Ms Johnson—Regulations are disallowable instruments and because this field is a scientific field and it is changing even as we speak, we cannot foreshadow all the techniques and all the possible experts that are going to be necessary to perform—

Senator FERRIS—I am thinking of country police stations. It just seems to me that somebody qualified under the regulations could very easily become a male police constable and I wonder why it is there.

Senator MURRAY—In a country Victorian town.

Senator FERRIS—I do not mean country in relation to any slight to the country, I mean where other appropriately qualified people may not be readily available. It could be argued that somebody might be appropriately qualified by experience but not qualifications.

Ms Johnson—From my experience in making regulations, they do get a very good amount of scrutiny and I would be surprised if that got through the system.

Senator FERRIS—I am never surprised about that. I would be more interested in trying to get some of them passed.

Ms Johnson—And it will also have to get through us because we prepare the regulations and we do not want a piece of legislation that is going to bring the Commonwealth into disrepute. We really try to balance law enforcement against civil rights.

Senator CRANE—Can I raise an issue that I raised at the committee last time? It concerns the murders of those three girls in Perth and the voluntary testing of the taxi drivers where all but 31 of the taxi drivers have voluntarily come forward and had certain DNA testing done and fingerprinting, et cetera. Would this, in fact, give the powers to the police, without arresting the other 31, to have them tested?

Ms Johnson—They could ask them. The bill—I think it is 23YT—specifically does not apply to that situation where police, for reasons of wanting to exclude a large number of people so that they can narrow their investigation, ask people that they have no reasonable grounds to suspect to undergo the procedure.

Senator CRANE—But they have not got the power to actually say, 'There are 31 left to go, we must test them to eliminate that group of people.'

Ms Johnson—What do you mean, 'There are 31 left to go'?

Senator CRANE—They had the voluntary testing and I think the last figures I saw were that some 1,130 taxi drivers came forward voluntarily and had the testing done. There were about 30 that were left who did not come forward to have the testing.

Ms Johnson—Unless they had reasonable grounds to suspect that all of those 30 people had committed the offence, they would not meet our criteria for a compulsory test.

Senator CRANE—So the answer is no.

Ms Johnson—They could ask them and if the people said no—

Senator CRANE—They have already asked them and they have not come forward. They set up caravans and had them lined up.

Ms Johnson—They cannot compel them unless they have other evidence to link them to the offence and have a reasonable ground to suspect or believe actually that they—

Senator SANDY MACDONALD—What if, instead of 31, there had been six, three or one?

Ms Johnson—Exactly the same.

Senator FERRIS—That is easy because they might find evidence to suggest that they were suspects. Ms Johnson, I apologise, I have to go and there is just one other question I want to ask, if I may. On recommendation 9 of the legal and constitutional committee, given your earlier comment about the use of the word 'suspect', I am wondering why you did not pick up the legal and constitutional committee's recommendation that the word 'suspect' be changed to 'a person whom a constable believes [not suspects] on reasonable grounds has committed the indictable offence . . . '

Ms Johnson—There is a very good reason for that, because if you changed it to 'reasonable grounds to believe', you would deprive all those people that a constable may have reasonable grounds to suspect committed the offence from the protections under the act that are available to people who consent to procedures. They would fall then into the class of non-suspects that the act does not cover and, therefore, there are not protections and it would not affect the others who are capable of having compulsory tests ordered on them.

Senator FERRIS—In lay terms, the use of the word 'suspect' to me conveys a greater sense of belief that the person may have been involved with a crime than 'has reason to believe'. I suppose I had not thought about it from the protection of the individual position. Is that the reason?

Ms Johnson—That is the reason.

Senator CRANE—What about the testing of vehicles, such as taxis?

Ms Johnson—Not covered.

Senator CRANE—They were testing the cars as well.

CHAIR—How good are the DNA tests anyhow?

Ms Johnson—This is back into the scientific side of things. This act does not talk about what the value or the cogency of DNA evidence is because, as I mentioned before, these things change over time, as the dental impressions did, and evidence may be not so reliable five years ago yet next year developments might have made it highly reliable. But what we have done is lay down a set of rules about when and how the evidence can be used. It is then up to the jury to evaluate the evidence itself as a fact. I think that is the best way to put it.

Senator MURRAY—How far were you influenced by any groundbreaking acts elsewhere in the world and their experience? Was any research done on that?

Ms Johnson—I think the most groundbreaking act that we were influenced by was the Victorian one. I am not sure now of the extent to which the Coldrey committee looked at the legislation around the world.

Senator MURRAY—I would expect a model law to try and build on the best practices internationally because plainly these are problems that every society has to deal with.

Ms Johnson—Perhaps we can take that on notice and ask the MCCOC, who developed the basic bill, how much of other nations' legislation they looked at.

Senator MURRAY—It might just help in the summary of a parliamentarian's approach to the bill to know that.

Senator SANDY MACDONALD—You talk about the groundbreaking nature of this legislation. Is the groundbreaking nature of this legislation the fact that tests are applied without being arrested?

Ms Johnson—Perhaps that is, yes, because in New South Wales they had a far simpler piece of legislation that they used to rely on to do forensic testing, and that certainly was found not to be available pre-arrest.

Senator SANDY MACDONALD—This legislation is in Victoria, but is it in all the states now?

Ms Johnson—This legislation?

Senator SANDY MACDONALD—Yes, the model state legislation.

Ms Johnson—Most of the states, if not all, have some sort of legislation that they rely on to do these tests, but it is not a comprehensive code in most cases, except in Victoria. It is usually a provision that says doctors can examine people who are suspected—

Senator SANDY MACDONALD—You make a statement here that Commonwealth policy is not to arrest a suspect. What is Commonwealth policy? What does that mean?

Ms Johnson—In our Crimes Act, our arrest provision uses arrest as a last resort. If a person will respond to a summons—if they are settled, they have got a job, they have got an address and they have got every reason to stay in the jurisdiction—they normally

will not be arrested unless it is an extremely serious offence or there is some other reason to want them out of circulation, such as that they have threatened witnesses or something.

Senator SANDY MACDONALD—Does the Commonwealth have any gaols?

Ms Johnson—No, it does not.

Senator SANDY MACDONALD—It has police stations, police cells, I assume.

Ms Johnson—I really do not know, you would have to ask the AFP.

Senator SANDY MACDONALD—There is one here, of course.

Ms Johnson—In the ACT they have, but I am not sure that they would in other states.

Senator SANDY MACDONALD—The President of the Senate has one cell.

Senator MURRAY—It is downstairs.

Ms Johnson—Mostly they use state police facilities..

Senator SANDY MACDONALD—Where a suspect has been ordered to undergo forensic procedure, why are there different time limits—two hours in the case of Aboriginal people and four hours for everybody else?

Ms Johnson—That goes back to the Aboriginal Deaths in Custody Royal Commission, I think—recommendation 92. Certainly that is why people are particularly sensitive about holding Aboriginal people in custodial situations.

Senator SANDY MACDONALD—Isn't that struck down by the Racial Discrimination Act?

Ms Johnson—No, because it is positive discrimination allowed by the act to put people in a—

Senator SANDY MACDONALD—But it is negative discrimination to a large group of other people including non-English speaking people.

Ms Johnson—It was accepted in the course of consultation—I mentioned earlier there was a great deal for this bill. Also the same provision applies in our part 1C which applies to investigation—holding people pre-charge for investigation after they have been arrested. There is a similar discrepancy in the time limits for Aboriginal and Torres Strait Islander people. By and large, that is well accepted. Aboriginals are in favour of it for the

reasons canvassed in the royal commission. Other nationalities do not seem to feel as though they require that kind of special consideration. We have other safeguards for other ethnic groups, particularly people whose grasp of the English language is not adequate for them to cope with the police investigation situation. They can have an interpreter present.

Senator MURRAY—What about tourists? Lots of them do not have good English skills. We have got three million-odd wandering around the country apparently. I guess a percentage of those are involved in crime. Do they just fall naturally under this act?

Ms Johnson—Yes, if they are within jurisdiction and they are suspected on reasonable grounds of committing an offence in Australia they would be covered by the act.

Senator MURRAY—I am given to understand that Customs has special powers, particularly at international airports and sea ports and so on. Do these provisions exceed or match, or are they less than the powers they have?

Ms Johnson—I think Customs powers have now been brought into line with our search warrants and powers of arrest.

Senator MURRAY—I think they are entitled to do intimate body searches and take samples.

Ms Johnson—The Crimes Act also permits that, but it is in different circumstances.

Senator MURRAY—Would you take that on notice and advise us as to whether there are any other acts, from a federal point of view, which also allow these kinds of procedures. I am thinking particularly of Customs at international ports.

Ms Johnson—As far as I am aware, it is only the Customs Act and the Crimes Act that allow intimate searches.

Senator MURRAY—We would like to know if these provisions are common. The second part of my question on notice would be to identify any areas in which they would differ.

Ms Johnson—Do you mean differ from these forensic procedure provisions or differ from our Crimes Act searches?

Senator MURRAY—No, differ from those forensic procedures, because what I would not like to see as a legislator is two different kinds of legislation for the same problem or the same need.

Senator FORSHAW—This question may be more relevant to the general operation of the criminal law rather than this specific proposed legislation, but what is the position with objections on religious grounds? Earlier you mentioned ethnic considerations and then you said people had language difficulties, but what about religious customs such as those of Muslim women? Are there any protections, either here or in the criminal law generally, about what procedures have to be followed before they can be subjected to examination or testing? Obviously I am thinking about removal of clothing and things like that.

Ms Johnson—Section 23WO deals with the matters to be considered by a senior constable before ordering a forensic procedure. This is for a non-intimate procedure for a person in custody because constables cannot order intimate procedures.

Senator FORSHAW—The definition of intimacy there may be different, or the understanding of what is meant by intimacy may be broader in circumstances—

Senator MURRAY—Simply lifting a veil.

Ms Johnson—What they have to take into account includes the cultural background and religious beliefs of the suspect. For simple DNA testing you can take blood from a fingertip. Although it is an intimate procedure it does not involve undressing anybody. Providing saliva, I suppose, for a forensic procedure does not have to be an intrusive procedure.

Senator FORSHAW—It struck me when you mentioned the reference to ethnic considerations, because I can imagine circumstances just under the criminal law, or any other law operating generally, that do not even have to go to the question of disrobing but even to who could be present at the time. This is an issue that has arisen in the past in medicine where there are certain customs about who can be present at the birth of a child and things like that.

Ms Johnson—Both the constable and the magistrate have to take that into account. It is, again, a balancing procedure.

Senator FORSHAW—In any event, what you are saying is that other than the question of intimate examinations, where it would be protected anyway, the normal taking of DNA can be done without that sort of interference in many cases?

Ms Johnson—Yes, taking of DNA can. If it is the taking of evidence off a person's body, then you have to actually get to the part of the person's body where the evidence is.

Senator FORSHAW—The same concerns about privacy and intimacy can arise, not necessarily because of cultural background but for other reasons as well. I think that

answers it.

CHAIR—There is some reference to others as well in other jurisdictions but it probably needs to be brought up to date a bit.

Ms Johnson—Most of them are waiting to see how our legislation gets through the system. South Australia is champing at the bit. I think they may have already introduced—

Senator FORSHAW—Is there an agreement that this be introduced in similar terms in all states?

Ms Johnson—That is the proposal.

Senator FORSHAW—But is there an understanding of the alternatives—that this will be the model legislation?

Ms Johnson—We had negotiated right up until the bill lapsed. When it was introduced in the previous government all the states were still in agreement about all the provisions. They might have slipped a bit, but probably not because the variations that we have here are mainly ones that apply to the Commonwealth specifically. We always put in more safeguards than any other jurisdiction.

Senator FORSHAW—New South Wales might have a different view, I suppose.

Senator CRANE—If you get pulled over for driving and drinking too much, you can be marched off to have a blood test taken to get your alcohol content reading. It has never happened to me—I only know from what I have been told. What are the procedures? Are you formally arrested if the police require you to have a blood test—

Ms Johnson—That is state legislation. I would not describe it as an arrest situation. I would say it was a statutory power to detain and put a person through a procedure.

Senator CRANE—In a lot of ways, this is very similar, isn't it?

Ms Johnson—In a lot of ways it is dissimilar.

Senator FORSHAW—That is based upon a reasonable suspicion that an offence may have been committed.

Senator CRANE—But in some cases after the test it is found out that an offence has not been committed.

Senator FORSHAW—Then they let you go.

Ms Johnson—Yes, I think it is a statutory power.

Senator CRANE—They let you go anyhow. You are not locked in gaol or anything. You have your test and then you have to appear in the court to answer your case or you are automatically fined.

Senator FORSHAW—Yes, but it is based upon the principle that you cannot leave it for 24 hours or something. You cannot ask the person to come back in one or two days' time.

Senator CRANE—What do you mean, you cannot leave it?

Senator FORSHAW—If it is a drink-driving—

Senator CRANE—No, it happens immediately. But after the test is done, you are allowed to go home. There is some similarity to this.

Ms Johnson—Yes, there is to an extent, but this is a much more complex bill.

Senator CRANE—I am not saying it is not, but it is a simple example. Taking a blood test is fairly intimate.

Ms Johnson—We class it as an intimate procedure.

Senator CRANE—Particularly if you do not like needles.

Senator FORSHAW—In fact, I think I read in the report to the committee that it has been argued that, because of the power that now exists for compulsory blood testing, you do not need these other powers as extensive. If you can do blood tests, you can pretty well cover the field in terms of the evidence you want to take. I do not agree with that, but I think somewhere in there someone argued that—

Ms Johnson—If it is only DNA evidence you want.

Senator FORSHAW—Yes. Bev Schurr, I think, argued—

Ms Johnson—If it is scene of crime evidence attaching to the person it is different.

Senator FORSHAW—It was one of the objections that was put in by Bev Schurr.

CHAIR—Thank you, Laurel Johnson and Claude Monzo.

Committee adjourned at 8.48 a.m.

APPENDIX III

Answers to Questions taken on notice during Hearing

ATTORNEY-GENERAL'S DEPARTMENT

RECEIVED
29 MAY 1997
Senate Standing Cttee for the Scrutiny of Bills

Criminal Law Divisio

95002347

28 May 1997

Senator Barney Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Suite SG49
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

CRIMES AMENDMENT (FORENSIC PROCEDURES) BILL 1997

I refer to the attendance of officers of this Department before the Senate Standing Committee for the Scrutiny of Bills on 28 May 1997 to address issues arising out of the Crimes Amendment (Forensic Procedures) Bill 1997 ('the FP Bill'). At that meeting questions were taken on notice to which I now provide answers below.

(1) Did the Model Criminal Code Officers' Committee ('MCCOC') consider international legislation when drafting the Model Forensic Procedures Bill?

2. MCCOC did consider international legislation which authorised internal searches and/or the taking of body samples for the purpose of criminal investigation. In relation to the latter, the major piece of legislation considered was the *Police and Criminal Evidence Act 1984* (UK)('the PACE Act') which is in similar terms to the Model Forensic Procedures Bill (and thus the FP Bill).

3. The PACE Act makes the distinction between "intimate" and "non-intimate" sample Under the PACE Act, an intimate sample may be taken from a person in police detention consent is given, and if a police officer of at least the rank of Superintendent authorises it (subsection 62(1)). An officer may only give an authorisation if he or she has reasonable grounds for suspecting the involvement of the person from whom the sample is being tak in a serious arrestable offence and believing that the sample would tend to confirm or disprove that involvement (subsection 62(2)). The PACE Act does not require a judge's c magistrate's order before an intimate sample may be taken without the person's consent. I that respect, the FP Bill affords the suspect greater safeguards, in that an intimate forensic procedure can only be conducted pursuant to an order of a magistrate after proper judicial consideration has been given to the matter.

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4. Under the PACE Act, a non-intimate sample may be take from a person with consen or without consent if the person is in police detention or being held by the police on the authority of a court and if an officer of at least the rank of Superintendent authorises it (subsections 63(1)-(4)). The PACE Act also has similar provisions to the FP Bill in relation to destruction requirements and evidentiary matters.

5. MCCOC also considered New Zealand and Canadian developments which are discussed in detail in the *Review of Commonwealth Criminal Law*, Fifth Interim Report, June 1991 ('Gibbs Report) (copies of relevant extracts are attached).

(2)(i) What is the relationship between search powers under the *Customs Act 1901* and the FP Bill?

6. The *Customs Act 1901* makes detailed provision for the conduct of internal searches insofar as they may be necessary to ascertain whether a person is carrying a "suspicious substance" (defined in subsection 4(1)). An "internal search" is defined as "an examination (including an internal examination) of the person's body to determine wheth the person is internally concealing a substance or thing, and includes the recovery of any substance or thing suspected on reasonable grounds to be so concealed" (subsection 4(1)) This differs with the FP Bill in two important respects. First, the FP Bill does not permit any intrusion into a person's body cavities except the mouth (proposed subsection 23WA(1)). As noted by the Gibbs Report, in essence "the need to make an internal searc arises only in drug cases". Secondly, the *Customs Act 1901* is restricted to body searches whereas the FP Bill is directed to obtaining forensic samples.

7. Under the *Customs Act 1901* a person may be detained where a Customs officer or a police officer suspects on reasonable grounds that a person is internally concealing a suspicious substance. Under this Act, a person may be detained to allow Customs or police to apply for an order for the detention of the person either from a judge (where the person is under the age of 17 or an incapable person), or from a magistrate (in any other case, sections 219S and 219T). This differs from the FP Bill in that the latter contains no power to detain a person who is not already in custody, for the purposes of obtaining an order to conduct a forensic procedure.

8. Under the *Customs Act 1901*, detention may be ordered for up to 48 hours, which ca be extended for another 48 hours. The FP Bill provides that a forensic procedure must be carried out "as quickly as reasonably possible" but in any event within 2 or 4 hours, if the person is in custody, or "for such period ... as is reasonably necessary" but in any event within 2 or 4 hours, if the person is not in custody. If a forensic procedure is completed before the expiration of those time limits, the person must be released (if not in custody). If a person is in custody under Part 1C of the *Crimes Act 1914*, relevant Part 1C time limi and 'dead time' may also apply, as well as 'dead time' in proposed section 23XGD of the FP Bill.

9. Under the *Customs Act 1901*, an internal search may occur by consent, or if no consent is given, by order of a judge upon application by the Comptroller or a police officer (subsections 219V(2) and (3)) provided that the application is made before the expiration of the period of detention under section 219U (i.e., within the 96 hours). The Judge may order an internal search if satisfied that there are reasonable grounds for suspecting that the detainee is internally concealing a suspicious substance. That process similar to the FP Bill which requires an order from a Magistrate before an intimate forens procedure can be carried out on a non-consenting suspect.

(2)(ii) How many Commonwealth Acts contain intimate search powers?

10. Apart from the *Customs Act 1901*, intimate search powers are also contained in the *Crimes Act 1914* and the *International War Crimes Tribunal Act 1995*. Section 3Z of the former, and section 71 of the latter make provision for the conduct of a "strip search". A "strip search" is defined to mean "a search of a person or of articles in the possession of a person that may include:

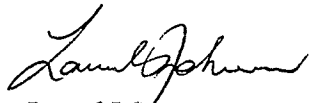
(a) requiring the person to remove all of his or her garments; and

(b) an examination of the person's body (but not of the person's body cavities) and of those garments." (Section 4 of *International War Crimes Tribunal Act 1995* and section 3C of *Crimes Act 1914*).

11. Similar to the FP Bill, there must be 'suspicion on reasonable grounds' in relation tc various matters before the search powers may be exercised.

12. If you have any queries on the above the contact officers for this matter are Claude Monzo (Tel: 260 6514) and Sam Ahlin (Tel: 250 6390).

Yours sincerely



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A non-intimate sample may be taken from a person with the "appropriate consent", as defined above, or without such consent if the person is in police detention or being held by the police on the authority of a court and by an officer of at least the rank of Superintendent authorises it to be taken without the appropriate consent. An officer may give an authorisation only if he or she has reasonable grounds for suspecting the involvement of the person in a serious arrestable offence and for believing that the sample will tend to confirm or disprove his or her involvement: sub-sections 63(1)-(4). Section 64 provides for the destruction of both intimate and non-intimate samples as soon as possible if the person is cleared of the offence, or it is decided not to prosecute the person (unless he or she has admitted the offence and has been cautioned by a constable), or, if the person is not suspected of the offence, as soon as the samples have fulfilled the purpose for which they were taken, the person concerned is entitled to witness the destruction: sub-section 64(6). The provisions of section 64 apply also to fingerprints.

5.15 Under New Zealand law an intimate or internal search of a person may be carried out only by a medical practitioner pursuant to sections 13A-13I or sub-section 18A(2) of the Misuse of Drugs Act 1975. That sub-section reads as follows:

> "Where any person (in this subsection referred to as the suspect) is arrested for any offence against section 6 or section 7 or section 11 of this Act, a commissioned officer or non-commissioned officer of the Police who has reasonable ground for believing that the suspect has secreted within his body any property that may be evidence of the offence with which the suspect is charged, or any property the possession of which by the suspect constitutes any other offence against any of the said provisions, may require the suspect to permit a medical practitioner nominated for the purpose by the officer, to conduct an internal examination of any part of the suspect's body by means of an X-ray machine or other similar device, or by means of a manual or visual examination (whether or not facilitated by any instrument or device) through any body orifice".

Sections 6, 7 and 11 of the Act relate to dealing (section 6), possession or use (section 7), and theft or receiving (section

11) of controlled drugs. An exception is made for a search of a person's mouth which may be carried out by a police officer with the person's consent. Under sub-section 18A(3) the medical practitioner is not permitted to conduct the examination if he or she considers it may be prejudicial to the suspect's health or is satisfied that the person will not consent to the examination. If the suspect fails to permit the examination and then applies for bail, the Court may decline to consider the bail application for two days following the day on which the police required the suspect to be examined, unless the person sooner permits the examination to be conducted and the Court may order that the suspect continue to be detained in police custody until the two day period expires or the suspect sooner complies, as the case may be: sub-section 18A(4).

5.16 Section 18A was found, however, to be of limited value as it did not provide for cases where an arrest could not be justified until the internally concealed items had been retrieved. Accordingly, sections 13A-13I of the Misuse of Drugs Act were inserted in 1985. These sections provide powers and a procedure of conduct to be followed when Police or Customs officers are without a sufficient basis to arrest the person for a drug-related offence, but still wish to have the person internally examined. Those powers, however, are only exercisable in relation to offences involving the importation or exportation of a Class A or B controlled drug: section 13J. These drugs are listed in Schedules to the Act. A Police or Customs officer who has reasonable cause to believe that any person has secreted within his or her body any such controlled drug for any "unlawful purpose", which means the commission of an offence against the Act or the concealment of the commission of any such offence, may cause that person to be detained: section 13A. A person detained under this section must be informed of the true reason for the detention, provided with a Statement of Rights, as set out in the Act, and, in the presence of a medical practitioner, nominated or approved by the Commissioner of Police or the Comptroller of Customs, asked if he or she wishes to undergo one or more of the specified kinds of internal examinations: section 13B.

The kinds of examination specified are a physical examination (whether or not facilitated by an instrument or device) by a designated medical practitioner, an X-ray examination with or without a contrast agent) and an ultrasound scan: section 13C. Upon detaining a person, the Police or Customs officer must as soon as possible apply to a District Court Judge for a warrant authorising the continuing detention of that person: paragraph 13B(b). Sub-section 13E(1) sets out a number of particulars which must be provided in the application for such a warrant. If satisfied that there is reasonable cause to believe that controlled drugs are internally concealed for an unlawful purpose and that section 13B has been complied with and that the premises in which the person is being, or is proposed to be, detained, are reasonably sufficient, the judge may issue a warrant authorising the continued detention of the person for a period of seven days from when the person was initially detained or for such shorter period as the judge specifies or until the detention is brought to an end in the circumstances described in section 13H: sub-sections 13E(4) and (5). The judge shall also appoint a barrister or a solicitor and a medical practitioner whose tasks stated broadly are to protect the legal and medical interests of the person detained and to report to the appointing judge if these interests are not being observed: section 13F. The detained person is also given rights of access to any lawyer, medical practitioner or other person whom he or she reasonably wishes to see, although only in the presence of a Police or Customs officer and on such reasonable conditions as may be necessary to ensure the safety of the detained person or to avoid frustration of the purpose of the detention: section 13G. An examination may only be done with the person's consent. The medical practitioner must explain what is involved and endorse on the written consent to the examination signed by the person to be examined a certificate to the effect that he or she has advised the detained person and that the detained person, when giving consent, understood what was involved in the examination: sub-section 13C(3). On concluding the examination, the medical practitioner must certify whether in his or her professional judgment the detained person has or has not anything secreted in the body which could be a Class A

or B controlled drug or whether the results of the examination are inconclusive: section 13D. The detention of the person under section 13A ceases in each of the following circumstances: if the person is arrested; if the medical practitioner certifies under section 13D that there is nothing secreted within that person's body which could be a Class A or B controlled drug; if the Customs or Police officer in charge of the case forms the view that there is no longer reasonable cause to believe that such a controlled drug is internally secreted for any unlawful purpose; if the District Court Judge declines to issue or renew a warrant for the person's detention; and if the warrant is cancelled on appeal: section 13H.

5.17 Section 13C of the New Zealand Act allows for an internal examination only with the person's consent and it is silent on the power to seize anything found. This is also so with regard to section 18A. The Act confers not a right to search, but a right of detention. A judge may renew the initial detention warrant for a period of up to a further seven days and may renew a renewed warrant provided a person may not be detained for longer than 21 days: section 13I. A person may consent to an examination at any time whilst detained. It has been held by the New Zealand Court of Appeal(8) that a serious disregard of the requirements of these provisions had the consequence that the evidence of the examination and its results should be excluded, even though there had been no prejudice to the accused.

5.18 There is no general power under New Zealand law to take samples of or from a person's body. In 1978 the New Zealand Criminal Law Reform Committee recommended that there be a procedure for compulsory bodily examination or taking of samples as a means of identification(9), but their recommendations were not given effect. Foreign material such as scrapings from under fingernails or from a person's feet or hair might be taken in exercise of the common law right to search an arrested person for evidence relating to the offence but, in general, there is no power either at common law or under statute to compel a person to provide a body sample. An

important exception exists under the Transport Act 1962 (N.Z.) which makes extensive provision for taking breath and blood samples, but only in the context of so-called "drink-driving" offences: sections 57, 58-58J and 63. Such provisions exist in many jurisdictions, but the Review Committee considers that taking blood samples in these circumstances involves matters which are unique to these offences which are beyond the scope of Commonwealth law.

5.19 The Law Reform Commission of Canada has said, in the course of introductory comments to Part Three of its proposed Code of Criminal Procedure (see paragraph 4.21), that very few of the procedures which include bodily examination and the taking of samples of hair or blood are the subject of clear statutory regulations in Canada, and the common law on the subject fails to be clear and comprehensive. Sections 10 and 11 of the Narcotics Control Act 1985 give a peace officer power to enter a place (but only under the authority of a warrant or writ of assistance if the place is a dwelling house) if he or she believes on reasonable grounds that there is, in that place, a narcotic in respect of which an offence has been committed, and to search any person found there, and rather surprisingly provisions in these terms have been held to authorise a peace officer to make an internal search of a suspect's rectum[10]. Power is given to take blood samples in cases involving the operation of a vehicle, vessel or aircraft by a person who has alcohol in his or her body: paragraph 254(3)(b) of the Canadian Criminal Code. Otherwise the matter is left to the common law, subject to the operation of the Charter. In these circumstances the Commission has proposed a legislative scheme to regulate investigative procedures which involve obtaining forensic evidence from a suspect. The scheme is set out in Part Three of the Commission's proposed Code of Criminal Procedure. Rather than drawing a distinction between "intimate" and "non-intimate" searches or samples, as in the U.K., the proposed Code divides investigative procedures into four broad categories:

(a) Procedures which may be done without either consent or a warrant.

(b) Procedures which may be conducted pursuant to a warrant, or without a warrant if there are "exigent circumstances" requiring the procedure to be carried out immediately.

(c) Procedures which may be done with consent.

(d) Procedures which are "absolutely prohibited".

5.20 A visual inspection of the surface of a person's body, excluding the genitals, buttocks and female breasts may be made by or for a peace officer who has arrested the person for a crime punishable by more than two years' imprisonment, as incident to the arrest and without a warrant if the officer believes on reasonable grounds that such inspection will provide probative evidence of the person's involvement in the crime and there is no practicable and less intrusive means for obtaining the evidence: proposed section 72.

5.21 The procedures which may be carried out pursuant to a warrant are listed in proposed section 56. These are: a visual inspection of the surface of a person's body; a visual inspection of a person's body cavities and the probing for, removal and seizure of, any "object of seizure" concealed in a body cavity; the taking of prints or impressions from any exterior part of a person's body; the taking of bites or dental impressions; the taking of hair samples; the taking of scrapings or clippings from fingernails or toenails; the removal of residues or substances from the surface of a person's body by means of washings, swabs or adhesive materials; the taking of saliva samples or swabs from a person's mouth for purposes other than the detection of intoxicating substances; a physical examination by a medical practitioner and lastly, an examination by means of X-rays or ultrasound. Provision is made for taking breath or blood samples without the person's consent, but only in Part Four of the Code dealing with the operation of vehicles. It seems therefore that a blood sample might only be taken either in accordance with Part Four or with the person's consent. The conditions and procedure for obtaining a warrant are regulated

by the proposed provisions. The warrant may be issued by a justice if the person to be subjected to the procedure has been arrested for, charged with or issued an appearance notice in relation to a crime punishable by more than two years' imprisonment and the justice is satisfied that there are reasonable grounds to believe that carrying out the procedure will provide probative evidence of the person's involvement in the crime, that there is no practicable and less intrusive method of obtaining the evidence and, if the application is for examination by X-rays or ultrasound, that the examination would not endanger life or health: proposed section 60. The proposed "exigent circumstances" exception, which allows any investigative procedure listed in section 56, except examination by X-rays or ultrasound to be carried out by or for a peace officer without a warrant, would apply when the person has been arrested for, charged with or issued an appearance notice in relation to an offence punishable by more than two years' imprisonment and the officer believes on reasonable grounds that the procedure will provide probative evidence of the person's involvement in the crime, that the delay involved in obtaining a warrant would result in the loss or destruction of the evidence and that there is no practicable and less intrusive means of obtaining the evidence: proposed section 71.

5.22 Where a person's consent is sought to an investigative procedure of these kinds, the person must be given a description of the procedure, an explanation of its nature and the reasons for its being carried out and told whether there are any (and if so what) significant health risks and must also be told of his or her right to consult with counsel before deciding whether to consent and that consent may be refused or withdrawn at any time. Consent may be given orally or in writing: see proposed section 73. A suspect may consent to "any investigative procedure" other than that which is "absolutely prohibited". Consent is not limited to the procedures listed in proposed section 56 and would appear to include, for example, procedures to remove stomach contents or take samples of blood, urine or semen. The Commission considered that if the subject gives a consent which is genuine and informed, his or her autonomy should be respected.

5.23 The only procedure which is "absolutely prohibited" is "the administration of a drug known or designed to affect mood, inhibitions, judgment or thinking": proposed sub-clause 73(1). The Commission considers that the administration of such drugs is "a repugnant, unreliable and intrusive method of obtaining evidence".

5.24 In respect of investigative procedures generally the proposed Code provides that the procedures shall be carried out by a person who, by training or experience, is competent to do so, that dental and bite impressions shall be taken by a person legally qualified and that a procedure which involves probing for or removing an object that is inside a person's body shall be carried out by a medical practitioner, except that a peace officer may probe for and remove an object from the mouth if the officer is carrying out the procedure in exigent circumstances: proposed section 74. The procedure is to be carried out in a manner which respects the dignity of the person and with as little discomfort and as much privacy as is reasonably practical: proposed section 76. A report of the procedure must be prepared and a copy given to the person: proposed sections 80 and 81.

5.25 In Australia the conduct of medical examinations and the taking of specimens was dealt with in clause 38 of the Criminal Investigation Bill 1981. Sub-clause 38(1) would have given a police officer power to arrange for a medical practitioner to examine a person in lawful custody in respect of an offence for the purpose of securing evidence of, or relating to, the offence if, and only if, the police officer believed on reasonable grounds that the examination would be likely to provide such evidence and the person had given his or her consent in writing or a magistrate had approved the examination in writing. Sub-clause 38(2), which was in similar terms, would have provided for the medical practitioner to take a specimen from the person, if the police officer who arranged for the specimen to be taken believed on reasonable grounds that analysis of the specimen would be likely to provide evidence of, or relating to, the offence and if the person had consented or a magistrate had approved. "Specimen"

APPENDIX IV

Recommendations of the

Senate Legal and Constitutional Legislation Committee

Recommendations of the Senate Legal and Constitutional Legislation Committee when it considered the Crimes Amendment (Forensic Procedures) Bill 1995

Recommendation No. 1

The Committee recommends that the power to take body samples and conduct examinations, other than 'non-intimate forensic procedures' defined in paragraphs 23WA(1)(b),(c) and (f), should be available only where a police officer has reasonable grounds to believe that a suspect has committed an indictable offence, that is serious, being punishable by imprisonment for five years or more. The police officer must have the same 'reasonable grounds to believe' as required to make a lawful arrest. See page 11.

Recommendation No. 2

The Committee recommends that, given the present state of forensic odontology (forensic dentistry), paragraph (g) 'the taking of a dental impression' be deleted from the definition of 'intimate forensic procedure' as contained in clause 23WA. See page 15.

Recommendation No. 3

The Committee recommends that the power to gather forensic evidence obtained by external examination of breasts; breast swabbing; taking a sample by vacuum suctioning, scraping or lifting by tape from the breast; or the taking of a photograph of the breasts should be restricted to circumstances where a police officer has 'reasonable grounds to believe' that a suspect has committed an indictable offence, that is serious, being punishable by imprisonment for five years or more. The police officer must have the same 'reasonable grounds to believe' as required to make a lawful arrest. See page 17.

Recommendation 3 is only necessary if Recommendation 1 is not adopted.

Recommendation No. 4

The Committee recommends that the responsibility for making a decision under paragraph 23WG(3)(c) to waive the special informed consent procedures for Aboriginal and Torres Strait Islander people, on the basis that the suspect 'is not at a disadvantage...in comparison with members of the Australian community generally', should be made by a police officer of the rank of sergeant or above. See page 21.

Recommendation No. 5

The Committee recommends that the maximum time for detention should follow the precedent of Part 1C of the *Crimes Act 1914* and limit detention for Aboriginal and Torres Strait Islander people to a maximum of two hours. Unless there are extraordinary circumstances, Aboriginal and Torres Strait Islander people should not be kept in custody solely for the purpose of undergoing forensic procedures. See page 25.

Recommendation No. 6

The Committee recommends that the Bill be amended to exempt children below the age of 10 years from being compelled to undergo forensic procedures. See page 28.

Recommendation No. 7

The Committee recommends that subparagraph 23WW(1)(b) be re-drafted to include a provision that children under the age of sixteen, from whom a forensic sample is sought, should be required to attend court only by means of a summons, and not by a warrant for arrest, unless they have failed to respond to the summons. See page 29.

Recommendation No. 8

The Committee recommends that proposed subparagraph 23WF(2)(c) be amended. A suspect should be given a reasonable opportunity to communicate with a legal practitioner of his or her choice.

A clear written statement of a suspect's rights should be given or read to a suspect (if they have difficulty reading), before consent to a forensic procedure is requested by the police officer. The written statement should be available in a variety of community languages. See page 30.

Recommendation No. 9

The Committee recommends that the **definition of 'suspect'** in subparagraph 23WA(a) be amended so that a suspect is:

> a person whom a constable **believes** [not suspects] on reasonable grounds has committed the indictable offence...

The Committee considers that such an amendment would better define the basis on which a police officer acts. In the Committee's view a police officer must have 'reasonable grounds to believe' that a suspect has committed an indictable offence, that is serious, being punishable by imprisonment for five years or more. The police officer must have the same 'reasonable grounds to believe' as required to make a lawful arrest. See page 32.

Recommendation No. 10

The Committee recommends that the Bill be amended to specify that the responsibility for ordering non-intimate procedures should rest with a police officer of the rank of sergeant or above. See page 34.

Recommendation No. 11

The Committee recommends that judges and magistrates be provided with more frequent opportunities for education about changes to the legislation and forensic procedures. To this end an appropriate sum should be given to the Australian Institute of Judicial Administration to enable this to happen. See page 37.

Recommendation No. 12

The Committee recommends that a systematic bi-annual audit on the taking of forensic samples be undertaken. An independent organisation, such as the Commonwealth Ombudsman, should undertake this review. The organisation must have full access to the relevant records. It must report to Parliament on its assessment of the scheme's operation. See page 38.

Recommendation No. 13

The Committee recommends that clause 23XS(2) be amended to provide that police officers of the opposite sex should not be present during the carrying out of an intimate forensic procedure on a child under the age of sixteen years. The words 'if practicable' should be deleted from this sub-clause insofar as it relates to a child under the age of sixteen years.

The Committee recommends that clause 23XS(2) should be re-drafted to require that a constable must be of the same sex as the suspect, unless it is not practicable to obtain one in a reasonable time. See page 46.

Recommendation No 14

The Committee recommends that clause 23XU be amended to provide that the suspect is entitled to a part of the material, suitable for testing, taken as a result of the forensic procedure. If it is technically feasible, the material should be provided to the suspect at the conclusion of the forensic procedure, or as soon as possible after the procedure. If it is not technically feasible to give a part of the material to the suspect, then an expert acting on behalf of the suspect should be entitled to attend the laboratory and verify the procedures conducted by the expert acting for the prosecution.

The suspect's part of the material should be protected and preserved, in accordance with proper storage procedures, until the suspect receives it. See page 47.

Recommendation No. 15

The Committee recommends that the Bill be amended to prevent a Court drawing any adverse inference to an accused person on the basis of his or her refusal to consent, or resistance to the taking of a forensic sample, where that sample is in fact taken. See page 48.

Recommendation No. 16

The Committee recommends evidence affected by a minor technical breach of the procedures should be admissible. However, where there is a breach of the key protective provisions of the Bill, the discretion to exclude evidence obtained in breach of the Bill should be exercised. See page 51.

Recommendation No. 17

The Committee recommends that incriminating statements made by the suspect while undergoing forensic procedures, or while in custody awaiting the performance

of a forensic procedure, should be treated as unlawfully obtained evidence, unless an appropriate warning is given to him or her before the statements are made. See page 51.

Recommendation No. 18

The Committee notes the provisions of subsection 23V(7) and recommends that a similar provision be inserted to clause 23XX. If a judge permits evidence to be given before a jury, which has been collected in breach of the provisions of the Bill, the judge must inform the jury of the non-compliance and give the jury such warning about the evidence as he or she thinks appropriate in the circumstances. See page 52.

Recommendation No. 19

The Committee recommends that clause 23YL of the Bill be amended to specify that nothing in the section excuses a person taking a forensic sample or assisting in the taking of a forensic sample from criminal liability for the malicious or reckless conduct of a forensic procedure. See page 52.

Recommendation No. 20

The Committee recommends that a Mandatory Code of Practice be implemented by regulation setting out appropriate procedures for the collection, storage and retention and analysis of genetic material. See page 55.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TENTH REPORT

OF

1997

25 June 1997

SENATE STANDING COMMITTEE

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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 1997

The committee presents its Tenth Report of 1997 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:

Australian National Railways Commission Sale Bill 1997

Telecommunications (Interception) and Listening Device Amendment Bill 1997

Australian National Railways Commission Sale Bill 1997

This bill was introduced into the House of Representatives on 14 May 1997 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to enable the sale of non-interstate mainline track rail assets of Australian National by amending the *Australian National Railways Commission Act 1983* to:

- provide arrangements for the transfer of assets, liabilities and contracts between the Commission, the Commonwealth and new rail operators;
- provides Ministerial authority to enter into agreements with relevant States to replace or amend specified rail agreements with the States to allow the sale to proceed;
- provides for the Minister for Finance to be authorised to sign agreements with purchasers of the Commission rail businesses;
- make provision to protect the Commonwealth from default by the Commission as a result of the loss of assets and revenue generating capacity;
- provide that liabilities of the Commission are met in order to protect parties which have contracted to the Commission in good faith;
- enable the Commission to assist the Commonwealth with the sale and to provide a Ministerial power of direction to facilitate disposal of the Commission's assets and liabilities;
- enable abolition of the Commission and the transfer of residual assets, liabilities and contracts to the Commonwealth after the sale has been completed and the Commission liabilities have been met.

Further, the bill allows for the eventual repeal of the *Australian National Railways Commission Act 1983*; repeals legislation covering agreements with South Australia and Tasmania after replacement agreements have been negotiated and taken effect; enables fixtures to be severed from railways land and to be sold to a rail operator; provides for access to railways for defence-related purposes and for emergency or disaster relief, and compensation for that access and amends 11 other Acts as a consequence of the abolition of the Commission.

The committee discussed this bill in Alert No. 7 of 1997, in particular its commencement clause and was satisfied with the reasons for commencing it by Proclamation. A letter dated 18 June 1997 has been received from the Acting Minister for Transport and Regional Development in relation to this bill. For the information of Senators the committee's discussion in Alert Digest No. 7 of 1997

and the relevant parts of the Acting Minister's letter are reproduced below. A copy of that letter is attached to this report.

Extract from Alert Digest No. 7 of 1997

Commencement by Proclamation
Subclauses 2(2), (3) and (5)

Subclause 2(2) of this bill provides:

> (2) Items 7 to 10 of Schedule 3 and items 8 and 9 of Schedule 4 commence on a day to be fixed by Proclamation. The day must not be earlier than the day on which the Minister gives the Governor-General a written certificate stating that the Minister is satisfied that the relevant Minister of South Australia has agreed to those items commencing.

Subclause 2(3) of this bill provides:

> (3) Item 11 of Schedule 3 commences on a day to be fixed by Proclamation. The day must not be earlier than the day on which the Minister gives the Governor-General a written certificate stating that the Minister is satisfied that the relevant Minister of Tasmania has agreed to that item commencing.

Subclause 2(5) of this bill provides:

> (5) The remaining items of Schedule 3 and Schedule 4 commence on a day to be fixed by Proclamation. The day must not be earlier than the later of the day proclaimed for the purposes of subsection (2) and the day proclaimed for the purposes of subsection (3).

The bill, therefore, does not specify a time within which the relevant provisions must either commence or be repealed.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Drafting Instruction provides:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

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

The committee notes that paragraph 6 is applicable here as the commencement of the provisions in question requires the agreement of Ministers of State in South Australia and Tasmania.

In the circumstances, the committee makes no further comment on the provisions.

Extract from the Acting Minister's letter

I note that the committee places importance on the Office of Parliamentary Counsel Drafting Instructions No. 2 of 1989 which provide that Bills should include limits within which time Acts should be proclaimed and that a number of items in Schedules 3 and 4 of the Sale Bill do not have limits of this type. The Committee recognises that in this case the commencement date requires the agreement of South Australian and Tasmanian Transport Ministers, and as such are an unusual circumstance provided for in the Instructions.

The Minister was keen to have the legislation proclaimed and the sale process completed at the earliest possible time and would have liked to have been more prescriptive about when different items in the legislation should take effect. For the reasons outlined by the Committee this was not possible.

In fact, the Sale Bill provides for a series of sequentially related events to occur in South Australia and/or Tasmania, in the lead up to the agreement of South Australian and Tasmanian Transport Ministers. These include the negotiation of an agreement between the Commonwealth and each State covering the sale (under section 67AZR(1) or (2)) and notification of the agreement to the Commonwealth Parliament (section 67AZR(3)) with subsequent period to provide the opportunity for Parliament to disallow it. In addition there may be a need for legislation in South Australia and/or Tasmania to authorise the State Transport Minister to agree to the repeal or replacement of the existing agreements prior to Commonwealth proclamation to repeal existing agreements (schedule 3 items 7 to 11).

The remaining items of Schedule 3 and the items of Schedule 4 give effect, or are consequential, to the abolition of the Australian National Railways Commission. The timing of the abolition must be after the above processes are completed, and will also be dependent on how long it takes to wind up residual activities of the Commission.

Given these circumstances and the very real possibility of delays at a number of stages of the process, for example as a result of an election in South Australia, the Minister was unable to include a reasonable time limit in the legislation and accordingly opted for the arrangements contained in the Bill.

However, it is worth noting that negotiations with both South Australia and Tasmania are well advanced and South Australia is expected to introduce related

legislation in July. Subject to passage of the Commonwealth legislation, the Minister is hopeful that any delay in proclamation will be minimal.

The committee thanks the Acting Minister for these comments.

Telecommunications (Interception) and Listening Devices Amendment Bill 1997

This bill was introduced into the House of Representatives on 14 May 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the following Acts:

- *Telecommunications (Interception) Act 1979* to:
  - enable the Police Integrity Commission to receive intercepted information where that information appears to relate to police conduct that the Commission may investigate;
  - permit the Commission to use intercepted information for investigating alleged police misconduct;
  - permit the Commission to obtain warrants to intercept telecommunications, provided certain authority has been given by the Attorney-General;
  - add to, and clarify, the categories of proceedings in which intercepted information can be given in evidence;
  - permit intercepted information to be used in making a decision whether to appoint, re-appoint, dismiss or retire a member or staff member of a police service;
- *Telecommunications (Interception) Act 1979, Australian Federal Police Act 1979* and *Customs Act 1901* to permit the Minister to nominate specified members of the Administrative Appeals Tribunal to issue interception warrants for law enforcement purposes; and
- *Financial Transaction Reports Act 1988* to give the Australian Bureau of Criminal Intelligence and the Police Integrity Commission access to FTR information held by AUSTRAC, provided certain Information Privacy Principles have been complied with.

The committee dealt with this bill in Alert Digest No. 7 of 1997, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 19 June 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Committee's view

The committee is satisfied by the explanation of the Attorney-General with respect to the suggestion of legislative creep. The committee, however, continues to differ

from the view of the Attorney-General as to the usefulness of a sunset clause. With respect to the appointment of non-judicial officers to issue warrants, the committee appreciates the necessity of the amendments to address the problem posed by the unwillingness of the federal court judges to continue to make themselves available and thanks the Attorney-General for this explanation.

General Comment

In Alert Digest No. 7 of 1997 the committee noted that this bill interferes with the privacy of a certain category of people. The committee was concerned at the extension of intrusive powers proposed by this bill. It allows a further body, namely the Police Integrity Commission, to make use of the interception of telecommunications. It is again an extension of an intrusive power and, as such, a fresh example of legislative creep. The committee respectfully sought the Attorney-General's comments on this matter.

The committee asked the Attorney-General whether the extension of power proposed by this bill should be subject to a sunset clause. The need to obtain Parliament's assent to renewing these powers would enable Parliament to review whether the granting of these powers has been appropriate and worthwhile.

The committee, therefore, sought the advice of the Attorney-General whether a sunset clause would be appropriate.

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

> The first concern raised by the Committee is that conferring interception powers on the recently established New South Wales Police Integrity Commission (PIC) might be an extension of an intrusive power by legislative creep. I do not believe this is the case.
>
> The proposed amendments to the *Telecommunications (Interception) Act 1979* dealing with the PIC will not permit any wider use of telecommunications interception than is currently possible. The Bill merely takes into account the decision of the NSW Parliament to transfer responsibilities for investigating police misconduct from the Independent Commission Against Corruption (ICAC) and NSW Police to a new statutory authority. This means that allegations of serious police misconduct involving NSW Police will be investigated in future by the PIC rather than the other agencies. In performing its statutory functions, the PIC will not have any interception powers which were not available to the ICAC and NSW Police for the same purpose.
>
> The establishment of the PIC implements one of the main recommendations of the Wood Royal Commission for ensuring that police corruption does not reappear in

> NSW. I believe the Commonwealth should be seen to support the NSW Government's efforts to deal with this insidious problem.
>
> I have noted the Committee's suggestion that the relevant provisions should be subject to a sunset clause. No sunset clause applies to other intercepting agencies and there seems to be no reason for imposing one on the PIC.

The committee thanks the Attorney-General for this response. The committee, however, continues to think that a sunset clause would enable Parliament to review whether the granting of these powers has been appropriate and worthwhile.

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

Powers to non-judicial officers
Schedule 1, Item 19, Schedule 2 and Schedule 3

In Alert Digest No. 7 of 1997, the committee noted that these provisions, if enacted, would enable the Minister to nominate certain members of the Administrative Appeals Tribunal to issue warrants in relation to telecommunication intercepts and the use of listening devices. The committee noted that only those members who, when appointed to the AAT, were enrolled as a legal practitioner for not less than 5 years, may be nominated.

The committee takes the view that the power to issue warrants should be confined to judicial officers. If the power is to be given to non-judicial officers, the reasons for doing so should be clearly set out in the explanatory memorandum. As the explanatory memorandum does not give any reasons for increasing the number of people who may issue warrants by including AAT members, the committee sought the advice of the Attorney-General on this issue.

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

> The second issue raised by the Committee concerns the provisions which will enable nominated members of the Administrative Appeals Tribunal to issue certain warrants. I appreciate the Committee's view that this power should be confined to judicial officers. However, the amendments are necessary because the Chief Justice of the Federal Court has advised both my predecessor and myself that the judges of his court who presently perform this function have decided to withdraw their consent. Under the Constitution, this function cannot be conferred on judges without their consent.
>
> Issuing warrants is an administrative function and the Constitution does not allow the Parliament to confer non-judicial powers on any Court established under the

Constitution (other than those ancillary to the exercise of judicial powers). It has only been possible for this function to be performed by judges of the Federal Court and the Family Court because individual judges have consented to perform it as designated persons. The Federal Court judges have decided to withdraw their consent because they have come to the view this is not a function they should perform. They have agreed, however, to continue to perform the function for an interim period so that new arrangements can be made. Departmental discussions with the Family Court indicate that the judges of that court also intend to cease issuing warrants.

I should point out that law enforcement agencies are already experiencing difficulties obtaining warrants in some areas. For example, the Australian Federal Police must apply to judges in Sydney for interception warrants to assist ACT investigations because there is no ACT resident judge who will agree to issue warrants.

Finally, I am confident that, once the amendments are enacted, the nominated members of the AAT will be as diligent as the eligible judges have been in discharging their obligations under the relevant Acts.

The committee thanks the Attorney-General for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

1997

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SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ELEVENTH 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 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

ELEVENTH REPORT OF 1997

The committee presents its Eleventh Report of 1997 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:

Administrative Decisions (Effect of International Instruments) Bill 1997

Carriage of Goods by Sea Amendment Bill 1997

Telecommunications (Interception) and Listening Device Amendment Bill 1997

Administrative Decisions (Effect of International Instruments) Bill 1997

This bill was introduced into the House of Representatives on 18 June 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to respond to the High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh* by providing a statutory indication that by entering into a treaty the Australian Government does not give rise to a "legitimate expectation" that could form the basis for challenge.

The committee dealt with this bill in Alert Digest No. 9 of 1997, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 20 August 1997. 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 1997, the committee noted that the High Court in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* held that the ratification of a treaty by Australia creates a legitimate expectation that administrative decision-makers will take into account treaty provisions, even if they have not become part of the domestic law of Australia by being passed by the Parliament. The High Court also held that procedural fairness requires that the person affected be given notice and an adequate opportunity to reply to a proposal to make a decision inconsistent with the legitimate expectation. The Court also held that the legitimate expectation would not arise if there is either a statutory or executive act amounting to a contrary indication.

In the committee's view, the fact that this bill is considered necessary demonstrates that, as things now stand, international instruments may have effect within Australia without being incorporated in legislation. The committee wondered whether this amounts to an exercise of power with insufficient parliamentary scrutiny or no Parliamentary scrutiny at all. The committee sought the advice of the Attorney-General on this issue and on the process that has been put in place to enable Parliament to examine international instruments.

The committee suggested that doubt had been expressed whether the joint statements of the Attorney-General and the Minister for Foreign Affairs were executive acts within the meaning of the High Court judgment.

The committee went on to say that, if the joint statements of the Attorney-General and the Minister for Foreign Affairs were executive acts amounting to a contrary indication within the meaning of *Teoh's* case, no legitimate expectation would have arisen since 10 May 1995. Accordingly, legislation to be passed now could not be said to trespass on personal rights and liberties and the issue whether the bill trespasses unduly, therefore, does not arise.

On the other hand, if those statements were not executive acts, then whether the bill trespasses unduly remained a live issue. Accordingly, 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 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:

> In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 the majority of the High Court held that the entry into a treaty by Australia creates 'a legitimate expectation' in administrative law that the Executive Government and its agencies will act in accordance with the terms of the treaty, even where those terms have not been incorporated into Australian law. The High Court held that, where a decision-maker proposes to make a decision which is inconsistent with such a legitimate expectation, procedural fairness requires that the person affected by the decision be given notice and an adequate opportunity to put arguments on the point. The High Court made clear that such an expectation cannot arise where there is either a statutory or executive indication to the contrary.
>
> It is a longstanding principle that the provisions of a treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into domestic law by statute. The High Court in the *Teoh* case affirmed that principle but at the same time gave treaties an effect in Australian law which they did not previously have. The Government is of the view that this development is not consistent with the proper role of Parliament in implementing treaties in Australian law. This view was expressed in the joint statement of 25 February 1997 by the Minister for Foreign and Affairs and myself and reiterated in the Second Reading Speech I delivered in the House of Representatives on 18 June 1997 following introduction of the Bill.
>
> As you would be aware, one of the first major reform initiatives the Minister for Foreign Affairs and I undertook on coming into office was to reform the treaty-making procedures. While in Opposition, the Coalition had long expressed its dissatisfaction with the treaty-making process and the lack of Parliamentary scrutiny of the Executive Government's actions on treaties. One of the principal aims of the treaty-making reforms undertaken by the Minister for Foreign Affairs and myself was to enhance the role of Parliament in scrutinising treaty action by the Executive Government. Those reforms included the tabling of treaties in Parliament at least 15 sitting days prior to the Government taking the action fully to become a party to a treaty, the preparation and tabling of national interest analyses for each treaty to which it is proposed Australia become a party and the establishment of the Joint Standing Committee on Treaties to examine treaties.

The new treaty-making procedures complement the Bill. However, these procedures do not obviate the need for the Bill. First, the reforms do not affect the position of most of the treaties to which Australia is already a party. Secondly, while greatly enhancing Parliamentary scrutiny of treaty action by the Executive, the process of inquiry and report on a treaty by the Joint Standing Committee would not, of itself, preclude a *Teoh*-type challenge to an administrative decision based upon that treaty. The Committee may identify the legislative and executive action which it believes necessary to implement the treaty. This will assist in ensuring that there is adequate implementation of a treaty. Nevertheless, it will not necessarily preclude a challenge to an administrative decision based upon *Teoh's* case. Of course, if legislation is to be introduced to implement all or part of a treaty to which Australia is a party, that legislation is subject to the usual Parliamentary procedures for the scrutiny and passage of legislation.

As I stated in my Second Reading Speech, 'the Bill will restore the situation which existed before the *Teoh* case. That is, if there are to be changes to procedural or substantive rights in Australian law resulting from adherence to a treaty, they will result from parliamentary and not executive action'.

Turning to the second issue on which you have sought my advice, both the Joint Statements of 10 May 1995 (made by the then Attorney-General and the then Minister for Foreign Affairs) and the Joint Statement of 25 February 1997 (made by the Minister for Foreign Affairs and myself) are, in the words of Mason CJ and Deane J 'executive indications to the contrary'. Accordingly, as noted in the Alert Digest, I am advised that no legitimate expectation has arisen since 10 May 1995.

I am aware that Hill J of the Federal court in *Department of Immigration and Ethnic Affairs v Ram* (1996) 41 ALD 517 at 522-523 expressed the view that Mason CJ and Deane J in *Teoh's* case may have been referring to 'executive indications to the contrary' made at the time of entering into a treaty, rather than statements made after the treaty entered into force for Australia. Consequently, he cast doubt on the efficacy of the Joint Statement of 10 May 1995 and, necessarily, that of 25 February 1997. However, it must be noted that Justice Hill's comments were *obiter*.

Passage of the Bill will, of course, resolve any uncertainty as to the position of treaties in Australian law arising from *Teoh's* case.

I trust this information is of assistance to your Committee.

The committee thanks the Attorney-General for this information clarifying the processes put in place enabling Parliamentary scrutiny of international treaties and explaining the position with respect to the 'executive indications to the contrary'.

Carriage of Goods by Sea Amendment Bill 1997

This bill was introduced into the House of Representatives on 18 June 1997 by the Parliamentary Secretary to the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the *Carriage of Goods by Sea Act 1991*.

The *Carriage of Goods by Sea Act 1991* ("the COGSA") gives effect in Australia to an international convention ("the amended Hague Rules") relating to carrier liability for loss or damage to marine cargoes. The Act contains an automatic trigger (at subsection 2(3)) which will bring an alternative international regime, commonly known as the Hamburg Rules, into force in Australia on 20 October 1997.

The amendments of COGSA will:

- remove the trigger for implementing the Hamburg Rules and replace it with a mechanism for regular review by the Minister for the desirability of bringing the Rules into force in Australia;
- clarify that arbitration in Australia does not offend section 11 of the Act; and
- include a regulation making power intended to be used to implement changes relating to:
    - coverage of a wider range of contracts of carriage, including electronic documents ;
    - coverage for importers in some circumstances;
    - coverage of cargo agreed to be carried on deck, in certain circumstances;
    - extending coverage from the current "hook-to-hook" coverage to "terminal-to-terminal coverage"; and
    - limited recompense for shippers' losses due to delays.

The committee dealt with this bill in Alert Digest No. 9 of 1997, in which it made various comments. The Minister for Transport and Regional Development has responded to those comments in a letter dated 28 July 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Henry VIII clauses
Item 7 - proposed subsections 7(2) and (3)

In Alert Digest No. 9 of 1997, the committee noted that proposed subsections 7(2) and (3) of this bill, if enacted, would enable both the Schedule to, and substantive provisions in, the Principal Act to be amended by regulation.

The committee noted that the explanatory memorandum put forward arguments in favour of allowing these Henry VIII type clauses. On page 6 the explanatory memorandum states:

> Item 7 repeals section 7 of the COGSA and replaces it with a new section which sets out the modified meaning of the term "amended Hague Rules" to reflect the changes to be made by regulations to implement elements of the industry-endorsed package concerned with the type of sea carriage documents to which the COGSA applies, deck cargo, importer coverage, duration of liability, and liability for losses due to delay.
>
> The concepts behind these changes can be simply expressed. However, given the nature of international conventions, the modifications to the amended Hague Rules to make these changes are technically complex and lengthy. Given the need not to overburden Parliament's business agenda and recognising that the resources of the Office of Parliamentary Counsel are under pressure, it is quite appropriate that such technical matters be handled by regulation.
>
> Accordingly, the Bill includes a very precise regulation making power which will enable the subsequent drafting and making of regulations to implement these changes. This might be regarded as an "Henry VIII clause", which is a clause that permits the making of regulations which have the effect of amending the operation of an Act.
>
> Such clauses are used in Commonwealth laws regularly, and enable the expeditious passage of legislation. The regulations are, of course, subject to disallowance, and will be required by the Act to be made only after consultation with relevant industry stakeholders.

The committee did not accept that a busy Parliamentary agenda or insufficient resources in the Office of Parliamentary Counsel are valid reasons for inappropriately delegating the legislative function of Parliament to the executive. Further, the committee noted that the subject matter of the proposed regulations amending the Act includes extending the liability of carriers.

In these circumstances the committee sought the advice of the Minister on these matters.

Pending the advice of the Minister, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference and 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 Bill and proposed regulations are intended to implement a comprehensive package of enhancements which was developed by industry. A working group comprised of industry experts under the chairmanship of an officer of my Department developed an industry compromise in which carriers agreed to support significant improvements to Australia's marine cargo liability regime in return for having the "Hamburg Rules trigger" removed from the *Carriage of Goods by Sea Act 1991* (the COGSA). I enclose a copy of the *Report of the Marine Cargo Liability Working Group*.
>
> Leading representatives of shippers, carriers, marine insurers and maritime law interests at a subsequent industry forum organised by my Department endorsed the package of changes which this Bill seeks to implement. These same interests were consulted during the development of the Bill, and will be further consulted during the making of the regulations.
>
> The Bill, in my view, proposes an appropriate delegation of legislative power. The issues to be covered in the regulations are technical matters well within the boundaries of the policy implemented by the Act and amending Bill. The proposed regulations must be tabled in, and may be disallowed by, the Parliament before coming into force.
>
> The regulation-making power in the Bill is very precisely defined to enable the complete implementation of a delicate industry compromise, before the next operation of the "Hamburg Rules trigger" in October 1997, as expected by industry. The regulation-making power has been tightly drafted to achieve this limited purpose. The compromise, one element of which is the replacement of the Hamburg Rules trigger by a review mechanism, settled what had been a very vigorous debate in the industry in the years leading up to the first action of the Hamburg Rules trigger in November 1994.
>
> Regulations are often used by the Commonwealth Parliament to enact detailed technical matters into law. In the Commonwealth arena, some examples provided by the Office of Parliamentary Counsel are:
>
> | | |
> |---|---|
> | . *Corporations Law* | Section 92A |
> | . *Agricultural And Veterinary Chemicals Act 1994* | Section 10 |
> | . *Airports (Transitional) Act 1996* | Section 55 |
> | . *Archives Act 1983* | Section 20 |
> | . *Health Insurance Commission Act 1973* | Section 41B |

The Bill (see subsection 7(4)) requires that the Minister must consult with representatives of shippers, ship owners, carriers, cargo owners, marine insurers and maritime law associations before regulations are made. I intend that my Department will circulate drafts of the proposed regulations to industry for comment as part of the process of making the regulations.

I trust that this advice will assist the Committee on these matters.

The committee thanks the Minister for this response which allays the concerns of the committee.

Telecommunications (Interception) and Listening Devices Amendment Bill 1997

This bill was introduced into the House of Representatives on 14 May 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the following Acts:

- *Telecommunications (Interception) Act 1979* to:
  - enable the Police Integrity Commission to receive intercepted information where that information appears to relate to police conduct that the Commission may investigate;
  - permit the Commission to use intercepted information for investigating alleged police misconduct;
  - permit the Commission to obtain warrants to intercept telecommunications, provided certain authority has been given by the Attorney-General;
  - add to, and clarify, the categories of proceedings in which intercepted information can be given in evidence;
  - permit intercepted information to be used in making a decision whether to appoint, re-appoint, dismiss or retire a member or staff member of a police service;
- *Telecommunications (Interception) Act 1979, Australian Federal Police Act 1979* and *Customs Act 1901* to permit the Minister to nominate specified members of the Administrative Appeals Tribunal to issue interception warrants for law enforcement purposes; and
- *Financial Transaction Reports Act 1988* to give the Australian Bureau of Criminal Intelligence and the Police Integrity Commission access to FTR information held by AUSTRAC, provided certain Information Privacy Principles have been complied with.

The committee dealt with this bill in Alert Digest No. 7 of 1997, in which it made various comments. The Attorney-General responded to those comments in a letter dated 19 June 1997. A further letter has been received from the Attorney-General in response to the committee's comments in its Tenth Report of 1997. 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. 7 of 1997, the committee asked the Attorney-General whether the extension of power proposed by this bill should be subject to a sunset clause. The need to obtain Parliament's assent to renewing these powers would enable Parliament to review whether the granting of these powers has been appropriate and worthwhile.

The committee, therefore, sought the advice of the Attorney-General whether a sunset clause would be appropriate.

Pending the Attorney-General's advice, the committee drew Senators' attention to this bill, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

In a letter of 19 June 1997, the Attorney-General responded as follows:

> I have noted the Committee's suggestion that the relevant provisions should be subject to a sunset clause. No sunset clause applies to other intercepting agencies and there seems to be no reason for imposing one on the PIC.

In its Tenth Report of 1997, the committee thanked the Attorney-General for this response. The committee, however, continued to think that a sunset clause would enable Parliament to review whether the granting of these powers has been appropriate and worthwhile.

The committee, therefore, continued to draw Senators' attention to this bill, 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 20 August 1997, the Attorney-General responded to the committee's concerns expressed in the Tenth Report:

> I have seen the Committee's response to my letter in its Tenth Report of 1997 dated 25 June 1997 which reaffirms its view that a sunset clause should be imposed on the granting of interception powers to the NSW Police Integrity Commission (PIC).
>
> I again suggest to the Committee that it is not necessary to single out the PIC in this way. The PIC is taking over a function that was previously performed by the Independent Commission Against Corruption (ICAC). I am not aware of any difference between the two agencies which would warrant the imposition of a sunset clause on the PIC where no such limitation has been placed on the ICAC, or any other agency.
>
> Also, I do not share the view that a sunset clause is necessary to enable Parliament to review the granting of these powers to the PIC. I would draw to the Committee's attention that, in accordance with section 104 of the *Telecommunications*

(Interception) Act 1979, Parliament is provided with an annual report which contains comprehensive statistics on the use of interception powers by individual Commonwealth and State agencies, as well as the outcomes achieved and the associated costs. The purpose of this reporting requirement is to allow Parliament, each year and in relation to all agencies, to check that interception powers are being properly and effectively used. I have enclosed a copy of the 1995-96 Annual Report for your information.

The Committee may not know that the NSW Parliament has provided for the PIC's legislation to be reviewed after 5 years of operation (see section 146 of the *Policy Integrity Commission Act 1996 (NSW)).*

I hope that this additional information demonstrates that a sunset clause is not necessary to achieve the Committee's objectives.

The committee thanks the Attorney-General for this response.

The committee, however, continues to be concerned whether reporting to Parliament is an adequate outcome. The Act gives intercept powers which are extremely intrusive. Whether these powers should continue indefinitely is a matter with which Parliament can legitimately be concerned. It is extremely difficult for a Private Member or a Private Senator to succeed in having a bill to end these powers properly debated, let alone passed.

On the other hand, a sunset clause forces the Government to sponsor a bill which gives the opportunity for a Parliamentary committee to examine the merits of granting a continuation of these powers.

Noting the Attorney-General's reluctance to include a sunset clause, the committee is strongly of the view that the bill should provide for a review by an appropriate Parliamentary Committee within 5 years.

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.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWELFTH REPORT

OF

1997

24 September 1997

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 S Macdonald
Senator A Murray
Senator J Quirke

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

TWELFTH REPORT OF 1997

The committee presents its Twelfth Report of 1997 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:

Radiocommunications (Spectrum Licence Tax) Bill 1997

Radiocommunications (Spectrum Licence Tax) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to impose an annual spectrum licence tax on spectrum licences issued under the *Radiocommunications Act 1992* to recover spectrum maintenance costs.

The committee dealt with this bill in Alert Digest No. 10 of 1997 in which it made various comments. The Minister for Communications and the Arts responded to those comments in a letter dated 22 September 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Clause 7

In Alert Digest No. 10 of 1997, the committee noted that clause 7 would allow the amount of the tax to be imposed by this bill to be set by the Australian Communications Authority, with no upper limit on that tax being specified in the primary legislation. This raises the issue of whether the clause inappropriately delegates the legislative power of the Parliament. An inappropriate delegation enables the Executive, by regulation, to make laws that ought be made by Parliament.

For this reason, the committee has consistently drawn attention to legislation which provides for a rate of tax to be set by regulation. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so.

The committee noted the paragraph on page 3 of the explanatory memorandum dealing with the reasons for not including a maximum limit on the amount of licence tax:

> The Spectrum Licence Tax bill does not include a maximum limit on the amount of licence tax that can be imposed on a holder of a licence under a determination. It is considered inappropriate to impose a limit on the licence tax that can be determined by the ACA because of the nature of spectrum licensing and the possibility of a single licensee holding a large proportion of the spectrum in a given band and therefore paying a proportionally larger amount of spectrum maintenance charge. However, the amount of tax payable by a single licensee is not calculated solely by reference to the amount of spectrum held by that licensee. The licence tax will be calculated as a sum divided by all

licensees in a given band having regard to the licensee's share on a "Megahertz/population" basis on a given date.

The committee was not convinced that these reasons warrant the delegation by Parliament of an unfettered power to tax.

The committee also pointed out that, although the determination of the amount of the tax may be disallowed by either House of Parliament, disallowance is an all-or-nothing mechanism which allows no scope for either house to make a positive input (by making an amendment) on the determination.

The committee further pointed out that disallowance is effective only from the date it occurs. The taxation liability would either accrue at the determined amount during the period from commencement to disallowance or those whose licence tax fell due during that period would be required to pay it at the rate determined without any alleviation by subsequent disallowance.

For these reasons the committee sought the Minister's reconsideration of this issue.

The committee has had to deal with a similar issue where a bill has proposed the setting of a levy or a charge, not purporting to be a tax, by regulation. If a compelling case can be made out for the level of a charge or a levy to be set by subordinate legislation the committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the levy or alternatively a formula by which such an amount can be calculated. The vice to be avoided is taxation by non-primary legislation.

The committee noted that it appears from the explanatory memorandum, on page 3, that the elements contributing to the amount of the tax are known. It may be that they are capable of being reduced to a formula which could be incorporated in the primary legislation.

The committee, accordingly, sought the consideration by the Minister of doing so.

The committee also sought the advice of the Minister on whether a review process of the operation of the tax might be included in the bill.

Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister has responded as follows:

> The proposed Bill would enable an annual charge to be imposed on the holder of a spectrum licence issued under the *Radiocommunications Act 1992* to recover spectrum maintenance costs.
>
> You expressed concern:

- that there is no upper limit on the tax to be imposed;

- whether it is possible to devise a formula for calculating the tax and if so could this be incorporated in the primary legislation; and

- whether a review process of the operation of the tax might be included in the Bill.

The Australian Communications Authority (ACA) operates on a full cost recovery basis. All costs recovered through licensing activities are paid to the Consolidated Revenue Fund daily, and are therefore not kept by the ACA itself.

Spectrum maintenance charges recover the ongoing costs of spectrum management once a licence has been issued e.g. international coordination, domestic planning, interference investigation and policy development. These costs are not attributable to any one radiocommunications user.

The amount recovered is related to the costs incurred by the ACA in providing these services. The charges are not used to raise revenue in excess of these costs.

Currently, spectrum maintenance costs are fully recovered from apparatus licence holders only. The Bill proposes to recover spectrum maintenance costs from holders of spectrum and apparatus licences on a proportionate basis, which is more equitable than the current situation.

The spectrum licence tax proposed in the Bill would be recovered from individual spectrum licensees based on their respective shares of spectrum (in terms of MHz). The spectrum maintenance charge would be the same amount that would apply if the spectrum used by a spectrum licensee had been allocated by issuing an apparatus licence. That is, the amount of tax payable by a spectrum licensee will be linked to the apparatus licence fee table, which is formula driven.

The formula has been published in the Apparatus Licence Fee Schedule produced by the Spectrum Management Agency (now ACA). The extract (Attachment A) sets out the framework. the Bill, if passed by Parliament, would apply the spectrum maintenance component to spectrum licence holders on the same basis as currently applies to apparatus licence holders.

The factors affecting each licensee's contribution will be reviewed annually (in consultation with industry through the Radiocommunications Consultative Council), in accordance with usual ACA practice in respect of radiocommunications licence fees. The annual amount paid by individual licensees will vary according to factors such as variations in the level of costs associated with providing these services and changes in the number of licensees. Specification of the formula and weighting factors in detail, in legislation, would constrain flexibility in this process.

Given all ACA Determinations are disallowable instruments, licensees can raise objections during the 60 day period between the notification of the tax amount and the due date for payment of the tax.

I would also like to draw the Committee's attention to the fact that there is currently under way a review of the Radiocommunications Act 1992 and related legislation. A copy of the Review's terms of reference is attached for your information (Attachment B).

I trust this information addresses the Committee's concerns.

The committee thanks the Minister for this detailed response.

The committee notes that a formula has been published in the Apparatus Licence Fee Schedule and that a Taskforce has been set up to review the *Radiocommunications Act 1992* and related legislation.

The committee, however, in accordance with its terms of reference, was addressing the issue of whether the bill inappropriately delegated the legislative power of the Parliament. This issue arises because the bill authorises the rate of a tax to be set by a statutory authority without some provision in the primary legislation which limits that authorisation in such a fashion that the delegation can be considered to be appropriate.

The committee notes in the response the reasons put forward for flexibility in the process of setting the tax. As the committee discussed in Alert Digest No. 10 of 1997 where a compelling case can be made out for setting the level of a charge by subordinate legislation, the committee seeks to have the enabling Act prescribe either a maximum figure or a formula by which such an amount can be calculated.

The committee also notes the Minister's statement that the charges are not used to raise revenue in excess of these costs. The committee, however, sees the danger of the nexus between the charges and the costs becoming obscure over time and prefers to see a legislative provision to that effect rather than a statement of intention.

For these reasons, the committee continues to draw 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.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

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SENATE STANDING COMMITTEE

FOR

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Senator J Quirke

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

(iv) inappropriately delegate legislative powers; or

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT OF 1997

The committee presents its Thirteenth Report of 1997 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. 4) 1997

Migration Legislation Amendment Bill (No. 4) 1997

This bill was introduced into the House of Representatives on 25 June 1997 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* to:
  - merge the Migration Internal Review Office and the Immigration Review Tribunal into a new body to be called the Migration Review Tribunal (MRT);
  - provide the principal members of the MRT and the Refugee Review Tribunal (RRT) with clear authority to apply efficient processing practices;
  - prevent MRT and RRT hearings from being unnecessarily delayed where a prescribed notice of a personal hearing has been provided;
  - provide that personal hearings are to be at the discretion of the president MRT or RRT member(s);
  - give the MRT and RRT authority to use telephone or other media to conduct personal hearings or for people to appear before them;
  - provide for the publication of tribunal decisions of interest at the discretion of principal members;
  - apply a code of procedure to the MRT and RRT in relation to decisions on entry and stay of non-citizens;
  - provide for the "no further stay" condition on temporary visas to be waived in prescribed circumstances;
  - enable more effective cancellation of visas which were granted on the basis of incorrect information; and
  - clarify existing provisions and make amendments of a technical nature;
- *Migration Act 1958* and *Administrative Decisions (Judicial Review) Act 1977* to:
  - introduce a new judicial review scheme;

- apply the new judicial review scheme to both the Federal Court and the High Court; and

- allow specified decisions to be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*;

- *Australian Citizenship Act 1948* to bring the penalty provision into line with similar offences under Commonwealth law; and

- *Immigration (Education) Act 1971*, the *Migration Reform Act 1992* and the *Migration Legislation Amendment Act (No. 5) 1995* to make minor technical amendments.

The committee dealt with this bill in Alert Digest No. 10 of 1997 in which it made various comments. The Minister for Immigration and Multicultural Affairs responded to those comments in a letter dated 22 September 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Non-reviewable decisions and insufficiently defined administrative powers
Item 10 of Schedule 1 - proposed section 339

In Alert Digest No. 10 of 1997, the committed noted that proposed section 339 to be inserted by item 10 of Schedule 1 of this bill, if enacted, would give the Minister a wide power to certify that some decisions not be reviewable by the Migration Review Tribunal.

Proposed section 339 provides:

> The Minister may issue a conclusive certificate in relation to the decision if the Minister thinks that:
>
> (a) it would be contrary to the public interest to change the decision, because any change in the decision would prejudice the security, defence or international relations of Australia; or
>
> (b) it would be contrary to the public interest for the decision to be reviewed because such review would require consideration by the Tribunal of deliberations or decisions of the Cabinet or of a committee of the Cabinet.

The committee noted that the proposed section appears to limit to some extent the type of decisions which may be so certified. The committee noted that several issues arise:

- Is the conclusiveness of the certificate amenable to challenge in the Federal Court? If so, upon what grounds? It appears that the Minister has only to 'think' that the prejudice would arise or 'think' that it would involve consideration by the Tribunal of Cabinet deliberations or decisions to found the issue of a conclusive certificate. (Does this mean that the Minister could prevent review of a decision by putting a submission to Cabinet on an issue related to it?).

- Does the unfettered nature of the Minister's power make rights liberties or obligations unduly dependent upon insufficiently defined administrative powers?

- Does the clause makes rights, liberties and obligations unduly dependent upon non-reviewable decisions?

The committee sought the advice of the Minister on these issues.

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 and as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

On these issues, the Minister has responded as follows:

> The Committee has raised two concerns on the proposed new section 339. This section provides the Minister with the power to issue a conclusive certificate where he/she thinks that it would be contrary to the public interest for reasons of either security, defence or international relations, or that any review would involve deliberations/decisions of Cabinet. Once a conclusive certificate has been issued in relation to a decision, the decision is not reviewable by the MRT.
>
> The specific concerns are addressed as follows:
>
> *Review of the certificate by the Federal Court*
>
> > The power vested in the Minister to issue conclusive certificates is currently in the Migration Act, in particular sections 338 for internal review and section 346 for review by the Immigration Review Tribunal. These powers were introduced in 1989. Section 339 merely carries over the Minister's power to issue conclusive certificates but in relation to the new review body, the MRT. The existing powers have been subject to review by the Federal Court and this will continue in relation to the new section 339.
> >
> > With the passage of the provisions in the Migration Legislation Amendment Bill (No. 5) 1997 dealing with judicial review of immigration decision-making, review of section 339 will continue through section 39B of the *Judiciary Act 1903* and also through section 75(v) of the Commonwealth Constitution.

Insufficiently defined administrative powers

Whilst the power in section 339 is discretionary, its exercise is limited in two broad areas. First, to the circumstances outlined in subsections 339(a) and (b) and secondly, by its susceptibility to judicial review.

The current power has been used infrequently and I expect this will continue to be the case. There have been no situations where submissions have been made to Cabinet in an attempt to justify use of the power.

Were a Minister to attempt to use this power by putting the matter to Cabinet, judicial review of the bona fides of such decision under section 339 would be available: privative clauses have been interpreted by the High Court as not excluding acting in bad faith as a ground of judicial review.

Committee's comments

The committee thanks the Minister for clarifying that the certificate is reviewable in the Federal Court and for explaining the limiting and inhibiting factors on the exercise of this administrative power.

No entitlement to be heard
Proposed new sections 360 and 425

In Alert Digest No. 10 of 1997, the committee noted that this bill proposes to repeal the present sections 360 and 425 of the *Migration Act 1958* and substitute new sections the effect of which is to take from applicants their present right to be heard by the Migration Review Tribunal and the Refugee Review Tribunal. In place of that right, each Tribunal may invite the applicant to appear to give evidence and present arguments. Unless so invited, the applicant is not entitled to appear before the Tribunal.

Other proposed new sections provide for the Tribunal to give relevant information to the applicant and to seek comments and/or further information from the applicant.

The committee noted that the *Migration Legislation Amendment Act (No. 1) 1995* made some changes to the procedures of the Tribunal the purpose of which was described in the relevant explanatory memorandum as 'to enhance the non-adversarial nature' of the Tribunal. The committee noted these and other changes which deprived the applicant of legal representation before these Tribunals together with the proposals in this bill not only to revoke the ability of an applicant to appear, as of right, but also to deprive the applicant of appealing to the Federal Court for review of the Tribunal decision. All these changes represent a major diminution of the rights of these applicants to ensure a fair hearing according to law. The Courts have held that the individual components that make up natural justice, such as the right to cross examination, to be represented, do not all have to be present. But

when so many are taken away the fabric of natural justice is left in tatters, and the question is rightly raised whether natural justice is being denied.

The committee, therefore, sought the Minister's reconsideration of these changes.

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

On this issue, the Minister has responded as follows:

> The Committee has expressed concern that the proposed sections 360 and 425 further erode the rules of natural justice by replacing the entitlement to appear before the respective Tribunal with appearance to be by invitation only. The Committee has suggested that these changes, together with other changes made by the *Migration Legislation Amendment Act (No. 1) 1995*, "represent a major diminution of the rights of these applicants to ensure a fair hearing according to law."
>
> The Bill contains a statutory code of procedure which will ensure that a person has the opportunity to present their case to the Tribunal and to comment on any material before the Tribunal can made a decision. These requirements ensure applicants receive a fair hearing and also reinforce in statutory form, the rules of natural justice.
>
> The Committee will be aware of certain amendments to this Bill moved by the Government during the course of debate in the House of Representatives on Wednesday, 3 September 1997. In particular, amendments were made to these provisions which will ensure that an applicant for review has the right to a personal appearance in all cases unless one of the following circumstances applies:
>
> . the appropriate Tribunal can decide the review in the applicant's favour; or
>
> . the applicant waives the right to a personal appearance; or
>
> . the applicant does not respond to a request from the appropriate Tribunal for information or comment within the prescribed time (including where an extension has been given); or
>
> . the applicant fails to appear before the appropriate Tribunal on the scheduled day and time (and where a request for a change has not been made).
>
> I am satisfied that the amendments the Government has moved meet the concerns put forward by the Committee.

Committee's comments

The committee thanks the Minister for this response, noting the amendments passed in the House of Representatives which allay the committee's concerns.

Ousting of judicial review
Item 7 of Schedule 4 - Proposed new Part 8 - Judicial Review

In Alert Digest No. 10 of 1997, the committee noted that proposed new Part 8 of the *Migration Act 1958* to be inserted by item 7 of Schedule 4 would impose severe limitations on the ability of those affected by various decisions to seek judicial review of those decisions.

Ousting of judicial review is not a matter to be undertaken lightly by the Parliament. It has the potential to upset the delicate arrangement of checks and balances upon which our constitutional democracy is based. We ignore the doctrine of separation of powers at our peril. It is the function of the courts within our society to ensure that executive action affecting those subject to Australian law is carried out in accordance with law. It is cause for the utmost caution when one arm of government (in this case the Executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the Judiciary) from its legitimate role whatever the alleged efficiency, expediency or integrity of programs is put forward in justification.

The committee sought the advice of the Minister on this issue.

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 this issue, the Minister has responded as follows:

> The Committee has expressed concern with the provisions dealing with the judicial review of immigration decision-making. In particular, that these provisions ignore the doctrine of the separation of powers by excluding the operation of the judiciary.
>
> While the provisions falling within Schedule 4 have been excised from this Bill and placed in the Migration Legislation Amendment Bill (No. 5) 1997, I believe that it remains appropriate for me to comment on the Committee's concerns.
>
> The current scheme at Part 8 of the Migration Act for Federal Court review of visa decisions was introduced by the previous Government on 1 September 1994. That scheme was clearly intended to reduce Federal Court litigation since it required merits review rights to be exhausted before Federal Court review was possible and it restricted the grounds of review available before that Court. For example, the natural justice ground was replaced by the ground of failing to follow statutory procedures and the grounds of unreasonableness, failure to take into account a relevant consideration and taking into account an irrelevant consideration, were excluded.
>
> That judicial review scheme has not reduced the volume of cases before the courts. There were nearly 400 applications to the Federal and High Courts in 1994-95, around 600 in 1995-96 and 749 in 1996-97. Based on litigation trends and the estimated output of the Immigration Review Tribunal and the Refugee Review Tribunal, applications to the courts could rise to 850 in 1997-98.

In migration cases, litigation can be an end in itself. There is a high incentive for refused applicants to delay removal from Australia. This may be done to give time for them to establish ties in Australia which they may hope will give them entitlement to a visa through another pathway. The incentive to delay removal is increased if the refused applicants are enjoying privileges such as work rights and access to Medicare.

The Coalition's election immigration policy stated:

> *"We believe that the established assessment and two tiered review mechanism contained in the MRA [Migration Reform Act 1992] is such that access to the courts for further review should be restricted in all but exceptional circumstances".*

My Department sought expert advice from the Attorney-General's Department and eminent legal counsel on the best way to implement that election commitment, bearing in mind that access to the High Court is guaranteed under section 75 of the Commonwealth Constitution. Those counsel are: Mr Tom Hughes AO QC; Mr Robert Ellicott QC; Mr David Bennett QC; Mr Dennis Rose AM QC; and Mr Richard Tracey QC.

The consensus of that expert legal advice was that because of the constitutional guarantee of access to the High Court, the only practical option open to the Government was the imposition of a privative clause. That advice was largely based on how the high Court itself had dealt with privative clauses in past cases (privative clauses exist elsewhere in Commonwealth legislation - in the Industrial Relations Act, the Commonwealth Electoral Act and the Income Tax Assessment Act.)

The option of a special leave provision (as a means of implementing the Government's election commitment) was also considered but not supported by those expert advisers. With one exception, they stated that the High Court's jurisdiction under section 75 of the Commonwealth Constitution could not be made subject to a leave requirement. While a leave provision could be imposed on the Federal Court, there was a widely held view that it would not be cost effective, would not reduce the volume of litigation and may actually increase delays.

As well as meeting the Government's policy objective, the new judicial review scheme would have the added advantage of turning the existing two judicial review schemes in relation to visa decisions into primarily one judicial review scheme. At present, the restrictions on the judicial review grounds in Part 8 of the Migration Act apply only to the Federal Court and the High Court's original jurisdiction under section 75 of the Commonwealth Constitution is unaffected. Under the new judicial review scheme, the same grounds of review would apply before both the Federal and High Courts.

The effect of a privative clause as interpreted by the High Court, is not to remove access to the courts, including the High Court, but is to limit the grounds of judicial review. The High Court has made it clear that privative clauses are not unconstitutional (and it is the Commonwealth Constitution which deals with the separation of powers between the Executive and the Judiciary).

This Government remains committed to preserving an open and credible migration program and a balance between the "rights" of the individual and the interests of the wider Australian community. The use of a privative clause is appropriate in the area

of immigration decision-making where there is an entitlement to the grant of a visa if an applicant meet the legal criteria (subject to capping controls) and extensive access to merits review by independent tribunals; and where unrestricted access to the courts is an incentive for certain individuals to delay resolution of their claims.

I am satisfied that the matters contained in this Bill and those transferred to the Migration Legislation Amendment Bill (No. 5) 1997 are needed to maintain the community's confidence in decision-making in the migration area.

I trust I have assisted the Committee with these comments.

Committee's comments

The committee thanks the Minister for this response.

The committee notes particularly the Minister's statement about 'preserving ... a balance between the "rights" of the individual and the interests of the wider Australian community'.

Whether the proposed use of the privative clause strikes the right balance, however, is a matter which the committee believes should be left for ultimate resolution by debate in the Chamber.

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.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

1997

22 October 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTEENTH 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 J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT OF 1997

The committee presents its Fourteenth Report of 1997 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:

Customs and Excise Legislation Amendment Bill (No. 2) 1997

Fuel (Penalty Surcharges) Administration Bill 1997

Customs and Excise Legislation Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of seven bills which relate to the minimisation of fuel substitution. This bill proposes to introduce offences and penalties that will apply to a person who enters marked fuel as unmarked fuel and to a person who enters unmarked fuel as marked fuel. Further, it makes amendments consequential upon the remainder of the bills in the package.

The committee dealt with this bill in Alert Digest No. 10 of 1997, in which it made various comments. The Minister for Customs and Consumer Affairs responded to those comments in a letter dated 8 October 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Strict liability
Schedule 1 items 2 and 15 - Proposed subsections 234(6) and (7) of the *Customs Act 1901* and proposed subsections 120(6) and (7) of the *Excise Act 1901*

In Alert Digest No. 10 of 1997, the committee noted that proposed subsections 234(6) and (7) of the *Customs Act 1901* and proposed subsections 120(6) and (7) of the *Excise Act 1901*, if enacted, would create offences of strict liability in relation to substituting clean fuel for designated fuel for home consumption and vice versa. Other proposed provisions create offences for intentionally or recklessly performing these actions.

A bill creates a strict liability offence when it provides that people are to be punished for doing something or alternatively for failing to do something whether they have a guilty intent to do so or not. They are held to be legally liable for their conduct no matter what their moral responsibility might be.

The committee noted that the penalties for these offences are considerably less than for the same acts being done intentionally or recklessly. The committee, however, questioned whether the imposition of criminal liability is warranted in the absence of any guilty knowledge, lack of care or intention to contravene the law.

Accordingly the committee sought the advice of the Minister on this matter.

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

On this issue, the Minister has responded as follows:

> Your Committee has sought my advice on the question of whether criminal liability is warranted in the absence of any guilty knowledge, lack of care or intention to contravene the law.
>
> The courts recognise 3 categories of offences according to degrees of culpability; ie ***mens rea* offences, strict liability offences**, and **absolute liability offences.** The offences contained in the Bills involve strict liability, which does not require the prosecution to show fault. It is, of course, open to the defendant to rely on a defence which shows an honest and reasonable mistake of fact. Also, strict liability does not make any other defence unavailable.
>
> In general, the reason that strict liability is imposed in legislation involves considerations of whether the offence is of a petty nature, or whether there is a public welfare or public interest reason for imposing that type of liability.
>
> In deciding to impose strict liability for some of the offences in the above Bills, the Government took the following factors into account:
>
> a) **the risk to the revenue**: The practice of fuel substitution which this legislation addresses is estimated to result in substantial revenue leakage. Initial estimates put this leakage at the level of $26 million per annum, although recent evidence (ie voluntary disclosures since the introduction of the legislation) would tend to indicate a figure vastly exceeding that amount.
>
> b) **consumer protection**: the practice of fuel substitution adversely affects the consumer in several ways. Examples are rife of engines being ruined after using blended fuel.
>
> c) **the opportunity for avoidance**: Under the present legislation, the process of entering fuel for home consumption for a particular use is largely an honour-based system. Once the fuel has entered into home consumption, the Australian Customs Service has little or no control or powers to address potential substitution practices, and reliance is placed on the honesty of the citizen not to divert concessional fuel to a non-concessional use.
>
> In the Government's view there is a lot to commend this approach as, for the most part, that faith is well-founded. Therefore, in drafting this legislation the Government has been careful not to intrude too greatly into the lives of the law-abiding, while ensuring that adequate measures exist in the proposed legislation to address the unreliable.
>
> To this end, in conferring audit powers etc on Customs officers for the purpose of enforcing the proposed legislation, the Government will ensure that those powers may only be exercised in relation to persons or places where the amount of fuel involved is at least 1000 litres. These limits will be imposed in the regulations, and I attach a very early draft of regulations drafted for this purpose. As a result,

members of the general public will continue to remain largely unaffected by these powers.

On the other hand, the Government believes that it is reasonable to expect that persons who are in the business of voluntarily dealing in amounts of fuel exceeding 1000 litres should bear both the obligation of taking steps to find out whether that fuel is marked fuel, and the responsibility of maintaining the integrity of that fuel while it is in their charge. Only those persons may be audited under that proposed legislation, and the strict liability offences upon which the Committee has commented are directed at them.

Having regard to the availability of the common law defence of honest and reasonable mistake of fact, and to the fact that the penalty for the proposed strict liability offence is considerably less than for the same acts when done intentionally or recklessly, the Government believes that strict liability is warranted in this instance. It is also important to note the public interest considerations referred to above, (that is to say, the risk to the revenue, consumer protection, and the opportunity for avoidance under the duty-paying arrangements), and the 1000-litre limitation on the proposed audit powers. Accordingly, the Government considers that some strict liability offences are justified, and that the rights of citizens are adequately guaranteed in these circumstances.

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

The committee thanks the Minister for this detailed response.

Fuel (Penalty Surcharges) Administration Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of seven bills which relate to the minimisation of fuel substitution. This bill proposes to:

- specify the times at which the penalty surcharges will become payable;
- impose record creation and record keeping obligations to persons dealing in petroleum products;
- set out the notification requirements in relation to the sale or disposal of marked fuel;
- set out the audit powers of authorised officers to ensure compliance with the requirements of the Act and to obtain evidential material concerning any breaches; and
- include a range of offences and appropriate penalties related to failure to comply with the requirements of the Act, including penalties for failing to pay the penalty surcharge when required and failing to comply with the record creation and keeping obligations.

The committee dealt with this bill in Alert Digest No. 10 of 1997, in which it made various comments. The Minister for Customs and Consumer Affairs responded to those comments in a letter dated 8 October 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Strict liability
Subclauses 9(2), (5) and (9) and 48(2)

In Alert Digest No. 10 of 1997 the committee noted that subclauses 9(2), (5) and (9) and 48(2), if enacted, would create offences which by reason of subclauses 9(3), 9(6) and 9(10) and 48(3) are offences of strict liability. These offences relate to failing to pay in advance the penalty surcharge imposed by the various Penalty Surcharge Bills included in this package of legislation. Other proposed provisions create offences for intentionally or recklessly failing to pay the surcharge in advance.

A bill creates a strict liability offence when it provides that people are to be punished for doing something or alternatively for failing to do something whether they have a guilty intent to do so or not. They are held to be legally liable for their conduct no matter what their moral responsibility might be.

The committee noted that the penalties for these offences are considerably less than for the same acts being done intentionally or recklessly. The committee, however, questioned whether the imposition of criminal liability is warranted in the absence of any guilty knowledge, lack of care or intention to contravene the law.

Accordingly the committee sought the advice of the Minister on this matter.

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

On this issue, the Minister has responded as follows:

> Your Committee has sought my advice on the question of whether criminal liability is warranted in the absence of any guilty knowledge, lack of care or intention to contravene the law.
>
> The courts recognise 3 categories of offences according to degrees of culpability; ie ***mens rea* offences, strict liability offences**, and **absolute liability offences.** The offences contained in the Bills involve strict liability, which does not require the prosecution to show fault. It is, of course, open to the defendant to rely on a defence which shows an honest and reasonable mistake of fact. Also, strict liability does not make any other defence unavailable.
>
> In general, the reason that strict liability is imposed in legislation involves considerations of whether the offence is of a petty nature, or whether there is a public welfare or public interest reason for imposing that type of liability.
>
> In deciding to impose strict liability for some of the offences in the above Bills, the Government took the following factors into account:
>
> a) **the risk to the revenue**: The practice of fuel substitution which this legislation addresses is estimated to result in substantial revenue leakage. Initial estimates put this leakage at the level of $26 million per annum, although recent evidence (ie voluntary disclosures since the introduction of the legislation) would tend to indicate a figure vastly exceeding that amount.
>
> b) **consumer protection**: the practice of fuel substitution adversely affects the consumer in several ways. Examples are rife of engines being ruined after using blended fuel.
>
> c) **the opportunity for avoidance**: Under the present legislation, the process of entering fuel for home consumption for a particular use is largely an honour-based system. Once the fuel has entered into home consumption, the Australian Customs Service has little or no control or powers to address potential

substitution practices, and reliance is placed on the honesty of the citizen not to divert concessional fuel to a non-concessional use.

In the Government's view there is a lot to commend this approach as, for the most part, that faith is well-founded. Therefore, in drafting this legislation the Government has been careful not to intrude too greatly into the lives of the law-abiding, while ensuring that adequate measures exist in the proposed legislation to address the unreliable.

To this end, in conferring audit powers etc on Customs officers for the purpose of enforcing the proposed legislation, the Government will ensure that those powers may only be exercised in relation to persons or places where the amount of fuel involved is at least 1000 litres. These limits will be imposed in the regulations, and I attach a very early draft of regulations drafted for this purpose. As a result, members of the general public will continue to remain largely unaffected by these powers.

On the other hand, the Government believes that it is reasonable to expect that persons who are in the business of voluntarily dealing in amounts of fuel exceeding 1000 litres should bear both the obligation of taking steps to find out whether that fuel is marked fuel, and the responsibility of maintaining the integrity of that fuel while it is in their charge. Only those persons may be audited under that proposed legislation, and the strict liability offences upon which the Committee has commented are directed at them.

Having regard to the availability of the common law defence of honest and reasonable mistake of fact, and to the fact that the penalty for the proposed strict liability offence is considerably less than for the same acts when done intentionally or recklessly, the Government believes that strict liability is warranted in this instance. It is also important to note the public interest considerations referred to above, (that is to say, the risk to the revenue, consumer protection, and the opportunity for avoidance under the duty-paying arrangements), and the 1000-litre limitation on the proposed audit powers. Accordingly, the Government considers that some strict liability offences are justified, and that the rights of citizens are adequately guaranteed in these circumstances.

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

The committee thanks the Minister for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF

1997

29 October 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTEENTH REPORT

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29 October 1997

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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 S Macdonald
Senator A Murray
Senator J Quirke

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:

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 1997

The committee presents its Fifteenth Report of 1997 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:

Snowy Hydro Corporatisation Bill 1997

Snowy Hydro Corporatisation Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to reform the Snowy Mountains Hydro-electric Authority and establish Snowy Hydro Limited to replace the Authority as the corporate body to operate and maintain the Snowy Mountains Scheme. Specifically, the bill:

- creates the Snowy Hydro Company;
- replaces existing rights of the Commonwealth, New South Wales and Victoria in the Scheme with an initial issue of equity in Snowy Hydro Company;
- enables the environmental, planning and other laws of New South Wales to be applied to the operations of the Scheme;
- facilitates the refinancing and repayment of the debt to the Commonwealth under the Scheme; and
- provides for the establishment of a public water inquiry with respect to environmental issues arising from current water flows in the Scheme and implementation of the outcomes of that inquiry agreed by New South Wales and Victoria.

The committee dealt with this bill in Alert Digest No. 10 of 1997, in which it made various comments. The Minister for Resources and Energy has responded to those comments in a letter dated 27 October 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Cessation of rights
Clause 46

In Alert Digest No. 10 of 1997, the committee noted that clause 46 of this bill, if enacted, would provide for the cessation of mobility rights to which certain employees of the Snowy Mountains Authority may currently be entitled under either the *Public Service Act 1922* or *the Officers' Rights Declaration Act 1928*.

The committee noted that the explanatory memorandum at paragraph 63 says that this clause 'restates the current position of the Public Service Act 1922 under which mobility rights of those employees are extinguished when those employees cease to be employed by a statutory authority.'

The committee understands, however, that employees would be in the same position of losing entitlements to rights upon ceasing to be employed by a relevant statutory authority under the *Maternity Leave (Commonwealth Employees) Act 1973* and the *Defence Force Retirement and Death Benefits Act 1973*. The committee noted, however, that this bill (by clauses 37 to 41) preserves rights accruing under those Acts from extinguishment.

The committee, accordingly, sought the advice of the Minister on the different treatment of the rights of various groups of employees.

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:

> As part of corporatisation the Commonwealth, New South Wales and Victorian governments agreed that, to the extent possible, all SMHEA employees transferring to Snowy Hydro Limited (SHL) would be entitled to retain terms and conditions of employment, pending the negotiation of a new Award to cover the corporatised workforce. The commitment was made in consultation with the three workforces on the Scheme - the SMHEA employees, Victorian Power Exchange employees and Pacific Power (New South Wales) employees - and the unions.
>
> This commitment is in line with the policy currently adhered to in relation to the corporatisation and privatisation of Commonwealth organisations - namely to ensure that agencies operate, or are encouraged to operate, in the commercial and competitive environment into which they are placed. In this context, a smooth transition to the new environment is assisted by providing for a period of stability in post-corporatisation employment, where possible providing broadly equivalent terms and conditions.
>
> As the Committee has noted, Clause 46 of the Bill provides for the cessation of mobility rights to which certain SMHEA employees may have been entitled under Part IV of the *Public Service Act 1922* or under the *Officers' Rights Declaration Act 1928* (ORD).
>
> The reason why the policy of maintaining existing terms and conditions has not been applied in relation to mobility rights is that these rights are defined in the relevant legislation as applying to continuing public sector employment. Section 87TA of the Public Service Act expressly defines the conditions under which the ORD will continue to apply to eligible officers. Likewise, Divisions 2 and 3 of Part IV expressly prescribe the conditions in which mobility rights will cease to apply to an employee on departure from eligible public employment. SHL will not satisfy the definitions of eligible Commonwealth employment or eligible public employment contained in the Public Service Act.
>
> SMHEA staff are therefore being treated in the same way as other staff who have been transferred out of Commonwealth employment by legislation. Clause 46 of the Snowy Bill simply makes transparent the cessation of rights which would otherwise be effected by the operation of the Public Service Act and ORD and also, by

implication, by clause 8(1)(d) of the Snowy Bill, which states that a Snowy Hydro-group company "is not a public authority for any purpose". Employees will not "lose" an entitlement through the enactment of Clause 46 because the entitlement to mobility within Commonwealth employment by definition does not apply to employment outside the public sector.

By way of contrast, maternity leave is a condition of employment common to both public and private sector employment. The Committee correctly notes that entitlements under the *Maternity Leave (Commonwealth Employees) Act 1973* would normally cease to apply to an employee at the time that employee ceased to be employed by a Commonwealth authority.

The Snowy Bill preserves these rights for a limited period of twelve months. This limited preservation of rights has been introduced in order to avoid trespassing unduly on personal rights and liberties in the period prior to the negotiation of an agreement covering terms and conditions of employment in SHL.

Stability of employment would not be promoted if staff who are currently on maternity leave or who have anticipated taking advantage of entitlements under the Maternity Leave Act in the near future were to be stripped of their entitlements under that Act at an arbitrarily determined date, by enactment of the Snowy Bill. The limited preservation of these rights avoids the inequity which would arise if a transitional provision, applicable only to those already entitled under the Maternity Leave Act, was enacted. This would be at the expense of those who, although currently anticipating the birth of a child, would not be eligible for maternity leave under the Maternity Leave Act until after the transfer of their employment under the Bill.

Similarly, entitlements under the *Defence Force Retirement and Death Benefits Act 1973* would normally cease to apply to an employee when employment with a Commonwealth authority ceased.

Clauses 40 and 41 preserve the deferred superannuation benefits of ex-members of the Defence Force who are, or were, in SMHEA employment. Unlike other public sector employees, these persons are generally required to complete 20 years of Defence Force or public sector employment before the benefits can be paid. In the absence of the savings provisions, persons who had not served the required period prior to the SMHEA corporatisation would lose their entitlement to the deferred superannuation benefit.

The committee thanks the Minister for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF

1997

Interim Report on the
Penalty Provisions of the Productivity Commission Bill 1996

13 November 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT OF 1997

The committee presents its Sixteenth Report of 1997 to the Senate.

Penalty Provisions of the Productivity Commission Bill 1996

Introduction

On 4 December 1996, the Productivity Commission Bill was introduced into the House of Representatives. The Bill proposes to establish the Productivity Commission by merging the functions of the Industry Commission, the Economic Planning Advisory Committee and the Bureau of Industry Economics.

Reference

The Productivity Commission Bill was negatived at the third reading stage on 3 September 1997. Before doing so, the Senate agreed that the penalty provisions contained in the Productivity Commission Bill 1996 be referred to the Scrutiny of Bills Committee for inquiry and report by 29 October 1997. On 28 October 1997 the Senate agreed to extend the reporting date to 20 November 1997.

Inquiry

The committee sought a briefing paper from the Attorney-General's Department. The committee also asked the Parliamentary Library to research the passage through the Commonwealth Parliament of laws containing similar provisions.

The committee held a public hearing on Tuesday, 30 September 1997 at which it took evidence from Dr Russell Smith of the Australian Institute of Criminology and from Mr Chris Meaney and Mr Sam Ahlin of the Criminal Law Division of the Attorney-General's Department. The committee requested that further information be provided on penalties for offences of the kind occurring in the Bill. Dr Smith and the officers of the Attorney-General's Department agreed to collaborate on a paper which would address the concerns expressed by the committee as well as give general background on the philosophy of judicial punishment. To enable time for this to be completed, the committee sought and was granted the extension of time to report.

Restoration of the Productivity Commission Bill to the Notice Paper

The Productivity Commission Bill was restored to the Notice Paper on Thursday 30 October 1997 and listed for debate on Monday 10 November 1997. Given the likelihood of debate taking place on the Bill before the committee has had time to report the committee has decided, for the information of Senators, to attach to this interim report the paper which it has recently received from Dr Smith and the

officers of the Attorney-General's Department, Mr Chris Meaney and Mr Sam Ahlin.

In the light of the issues raised by the paper, the committee finds that determining the appropriate penalties for these kinds of offences requires a longer and more thorough inquiry and will be seeking the approval of the Senate to do so.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF

1997

19 November 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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Senator B Cooney (Chairman)
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Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT OF 1997

The committee presents its Seventeenth Report of 1997 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 (Parenting and Other Measures) Bill 1997

Social Security Legislation Amendment (Parenting and Other Measures) Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 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:
  - introduce, from 20 March 1998, a new income support payment, parenting payment, that will replace the sole parent pension and the parenting allowance;
  - change the qualification provisions for child disability allowance; and
  - apply consistent hardship rules to ordinary waiting periods, the liquid assets waiting periods and the income maintenance periods;
- *Health Insurance Act 1973* to:
  - maintain eligibility for a health care card for children whose parent or guardian will no longer qualify for child disability allowance; and
  - extend the period over which a person's income is assessed for the purpose of determining whether they are a low income, disadvantaged person who is eligible for a health care card; and
- *Data-matching Program (Assistance and Tax) Act 1990* to:
  - make reference changes;
  - provide that a matching agency may return tax file number data to an assistance agency; and
  - allow data to be transferred between agencies by secure on-line computer connections.

The committee dealt with this bill in Alert Digest No. 14 of 1997, in which it made various comments. The Minister for Social Security has responded to those comments in a letter dated 11 November 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Tax file numbers
Item 86 of Schedule 1 - proposed sections 500N and 500P

Item 86 of Schedule 1 inserts Part 2.10 in the *Social Security Act 1991*. Part 2.10 contains proposed sections 500N and 500P. These sections, if enacted, would provide that the parenting payment would not be payable if the applicant has not provided the tax file number of the applicant and (where relevant) his or her partner. The committee recognises that these clauses may be included in the bill in order to prevent overpayments and fraud against the Commonwealth. The committee, however, notes that this is one more example of tax file numbers being used more as a means of identification and as an aid to income testing rather than as a part of the tax laws.

In these circumstances, 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 comments relate to the requirement to provide tax file numbers (TFNs) as part of the initiatives to introduce parenting payment, from 20 March 1998 .... Your Committee noted that new Part 2.10 (Parenting payment) ... of the ***Social Security Act 1991*** would oblige people to provide their TFNs, and the TFNs of their partners, as a condition of payment of parenting payment. Your Committee was concerned that, while TFNs may be considered necessary to prevent people from defrauding the social security system, they may also '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 rate at which ... parenting payment ... is payable to a person is determined by the income received by a person.
>
> Under a data-matching program introduced by the ***Data-matching Program (Assistance and Tax) Act 1990***, income disclosed by people to Centrelink for social security purposes is checked automatically against income disclosed to the Australian Taxation Office (ATO) and other paying agencies.
>
> In relation to the proposed parenting payment ..., many people likely to receive these allowances are receiving some form of current social security payment or AUSTUDY, and, therefore, are already subject to TFN provisions.
>
> In addition, some customers will be exempted (temporarily or indefinitely) from being requested to provide a TFN (for example, a person with no income, where a person is in a natural disaster zone or a remote area, or when the partner is not contactable or is violent).
>
> Those customers who do not have a TFN can be assisted by Centrelink, as the TFN provisions enable Centrelink to accept TFN applications on behalf of the ATO and conduct necessary proof of identity checks. This approach provides an opportunity for Centrelink to assist those customers who may have problems with obtaining a TFN because of proof of identity requirements. As Centrelink conducts its own

proof of identity checks, this practice would not constitute any increased intrusiveness from the customer's point of view. Centrelink's involvement in the TFN application process should be beneficial to disabled people, people with language difficulties or new entrants to the workforce.

The use of TFNs actually decreases the chance that a person will be identified during the process of data-matching. If Centrelink was unable to use TFNs, data-matching would require Centrelink to obtain a list of all taxpayers from the ATO and then conduct a data-matching exercise against the list of all the taxpayers. By using TFNs, Centrelink compares ATO income details only in respect of social security customers rather than all taxpayers.

The requests to provide TFNs as a condition of payment of ... parenting payment ... are consistent with the requirements that apply to existing payments administered by Centrelink on behalf of the Department of Social Security.

The committee thanks the Minister for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF

1997

26 November 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF

1997

26 November 1997

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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 S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT OF 1997

The committee presents its Eighteenth Report of 1997 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:

Australian Meat and Live-stock Industry Bill 1997

Taxation Laws Amendment Bill (No. 5) 1997

Australian Meat and Live-stock Industry Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to effect a restructuring in the red meat industry so that the provision of industry policy, planning, marketing and promotion, and research and development services in both domestic and export markets are provided by a producer owned service delivery company. The new service company will be funded by statutory levies contributed by beef, wool, sheepmeat and goat producers. Supplementary funding will be provided from non-statutory contributions made by the processing and live-stock export sectors. The bill further proposes for the continuation of export licensing, export quota management and related enforcement provisions under the control of the Department of Primary Industries and Energy.

The committee dealt with this bill in Alert Digest No. 14 of 1997, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 20 November 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Commencement by Proclamation
Subclause 2(3)

In Alert Digest No. 14 of 1997, the committee noted that subclause 2(3) of this bill provides that the substantive provisions of the bill may commence at any time up to nine months after Royal Assent.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the

> Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

With respect to subclause (3), the committee noted that paragraph 4 of the Drafting Instruction is applicable. The explanatory memorandum did not appear to give a reason for using a nine month period rather than a six month period for automatic commencement.

The committee, therefore, sought the advice of the Minister on the reasons for choosing a nine month period.

Pending the Minister's advice, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister has responded as follows:

> This subclause provides for an automatic commencement date nine months after Royal Assent, if commencement of the Act is not proclaimed at an earlier date.
>
> The Alert Digest points out that the Office of Parliamentary Counsel Drafting Instruction 2/89 provides *inter alia* in paragraph 4 that "Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months."
>
> I am aware that subclause 2(3) exceeds this preferred period, but in view of the complex nature of the new arrangements I would appreciate it if your committee would consider the following matters when preparing your report or any recommendations to the Senate.
>
> Implementation of these industry reforms presents some unusual challenges for both government and industry. Because of the significant transfer of responsibility from government statutory corporations to private companies, a degree of flexibility for full implementation is clearly required.
>
> The reforms constitute a major change and industry leaders must come to grips not only with the complexity of corporate operations and obligations, but also with the new industry dynamics placing greater responsibility and reliance on industry peak councils to demonstrate leadership. The new corporations are being formed, but the (designate) board members are also on a steep learning curve, and need time to digest the reforms and appreciate their Corporations Law responsibilities. They also need to review and agree on detailed funding requirements and responsibilities for

undertaking agreed functions, and these need to be cleared, documented and signed off to my satisfaction. This is an essential, difficult and time consuming process.

Government must ensure that accountability, transparency and equity issues are fully covered. Accountability matters in particular are clearly of interest to the Parliament, and while reliance on Corporations Law is sufficient guarantee, it is not likely to secure information for Parliament in appropriate timeframes, formats or levels of detail. This must and will be negotiated and agreed.

Additionally, finalisation of these reforms requires that there be sufficient notice for all wind up and transfer activities covering contacts, assets and liabilities. Sufficient notice is also relevant to staff that are not offered positions in the new service delivery company, and also to those staff who aspire for a position in that company. At the (industry) Transition Team meeting of 17 September it was acknowledged that a commencement date close to 1 July 1998 was realistic. Participants are now working to that date.

Taking into account the above and the complexities of staffing issues, assets transfers, contract/deed negotiations, and the requirements for the wind up of the Meat Industry Council, the Australian Meat and Live-stock Corporation and the Meat Research Corporation, acceptable commencement arrangements could be jeopardised unless the automatic commencement provision extends beyond the preferred six months.

Negotiation and agreement are a guiding principal underlying these reforms. The provision for nine months anticipated all these complexities, and as it stands provides reasonable and sufficient time for full implementation. This period also provides a degree of comfort in case implementation of any of these unique negotiated requirements, in particular accountability and zero levy undertakings, extends beyond expectations.

For these reasons, and because the future of the red meat industry is at stake and we must implement this properly, I believe that the full nine month period is a necessary contingency and would be reluctant to impose an earlier deadline on industry. I therefore believe that subclause 2(3) should remain unchanged, and ask for a supportive ruling from your committee.

The committee thanks the Minister for this detailed response which allays the concern of the committee.

Taxation Laws Amendment Bill (No. 5) 1997

This bill was introduced into the House of Representatives on 23 October 1997 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 extend the capital gains tax small business roll-over relief to the disposal of certain shares in companies and units in unit trusts;

- *Sales Tax Assessment Act 1992* to require suppliers of personal computers and related goods to be accredited and dealings to be authorised if goods are to be obtained free of sales tax;

- *Income Tax Assessment Act 1997* to:

  - provide a rebate of tax on interest derived by a lender to an approved road or rail infrastructure project; and

  - remove the income tax exemption of the rebates payable to employers under the Commonwealth rebate for apprentice full-time training (CRAFT) scheme; and

- *Income Tax Assessment Act 1997*, *Income Tax Assessment Act 1936*, *Airports (Transitional) Act 1996*, *Civil Aviation Legislation Amendment Act 1995* and *Federal Airports Corporation Act 1986* to ensure that the rewrite of the income tax law reflects recent legislation and that recent legislation reflects the tax law improvement rewrites.

The committee dealt with this bill in Alert Digest No. 15 of 1997, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter received 20 November 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Commencement by regulations
Item 25 of Schedule 2

In Alert Digest No. 15 of 1997, the committee noted that item 25 of Schedule 2 of this bill provides that Divisions 3 and 4 of Part 7A, to be inserted by this bill, apply to dealings on or after a date to be prescribed by regulation. It seemed to the committee that such a process is akin to commencing legislation by proclamation.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

Item 25 of Schedule 2 leaves a completely open ended commencement date for these provisions. In view of paragraphs 3 and 4 of the Drafting Instruction the committee sought the advice of the Treasurer whether the provisions referred to should come into effect 6 months after Royal Assent, or after a longer period if there is some good reason for choosing a longer period.

Pending the Treasurer's advice, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Assistant Treasurer has responded as follows:

> As you will be aware, Item 25 provides that Divisions 3 and 4 of the proposed Part 7A of the *Sales Tax Assessment Act 1992* will apply from a date prescribed by regulation.
>
> The legislation was deliberately designed to allow flexibility with regard to the application date. The operation of Divisions 3 and 4 depends on a system of accreditation of people who buy or sell personal computers and some other goods. To be accredited, a person will have to apply to the Commissioner of Taxation, and the Commissioner will have to approve the application. It is thought that there will

be several thousand applications at least. Before people apply for accreditation, the Commissioner will need to undertake a public education campaign and distribute applications forms. Most of this work can only be done after Royal Assent.

In addition, the computer systems necessary to support the new law will need to be in place before it begins.

It is estimated that it will take approximately three months from the date of Royal Assent to determine the applications for accreditation and get the computer system up and running, and the intention is that the commencement date will be prescribed shortly after the necessary systems are established. However, there is no guarantee that these things will not take longer than three months to complete, and the start date may have to be delayed. Consequently, it is not desirable to put a limitation on the time-frame for the application date.

Proposed subsection 91X(2) in Division 4 institutes a system of withholding requirements for retailers of personal computers and related goods, with effect from a prescribed day. The retailer withholding rules will only come into effect if other anti-avoidance measures prove to be ineffective, and for this reason it is impossible to pre-determine an application date. Nevertheless, the presence of these rules in the law is considered important as a deterrent, and to facilitate a quick response if new forms of evasion are discovered.

Because it might be some time before the retailer withholding rules are activated, it is considered that a provision which allows the new law to lapse if the application date is not prescribed within a particular time will be inappropriate. Such a provision is also unnecessary in relation to the rest of Divisions 3 and 4.

Finally, it should be noted that members of the personal computer industry were consulted during the development of this legislation and agreed to the use of a prescribed starting date.

I trust this information is of assistance to the Committee.

The committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINETEENTH REPORT

OF

1997

3 December 1997

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINETEENTH 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 J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

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(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINETEENTH REPORT OF 1997

The committee presents its Nineteenth Report of 1997 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:

Customs Legislation (Anti-Dumping) Amendment Bill 1997

Customs Tariff (Anti-Dumping) Amendment Bill 1997

Social Security Legislation Amendment (Youth Allowance) Bill 1997

Customs Legislation (Anti-Dumping) Amendment Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the following Acts:

- *Anti-Dumping Authority Act 1988* to make a minor technical amendment; and
- *Customs Act 1901* to:
  - provide for a case by case approach for determining normal values of allegedly dumped goods from countries that are in the process of transition to a market economy; and
  - clarify provisions which relate to the manner in which interim dumping and countervailing duties are collected.

The committee dealt with this bill in Alert Digest No. 10 of 1997, in which it made various comments. The Minister for Customs and Consumer Affairs has responded to those comments in a letter dated 24 October 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(3)

In Alert Digest No. 10 of 1997, the committee noted that subclause 2(3) of this bill, if enacted, would provide that various provisions of the bill would commence retrospectively on 1 January 1993.

The committee noted that the explanatory memorandum states:

> The Bill also contains amendments which, in combination with those in the Customs Tariff (Anti-Dumping) Amendment Bill 1997, clarify the operation of the provisions of the Customs Act and the *Customs Tariff (Anti-Dumping) Amendment Act 1975* which relate to the manner in which interim dumping and countervailing duties are collected. The amendments make it clear that such interim duties can be imposed, pending final assessment of any dumping or countervailing duties, notwithstanding that the actual export price and normal value, or the fact that a countervailable subsidy has been received, have not yet been ascertained.

> Although these amendments are to be taken to have commenced on 1 January 1993, the date on which the interim dumping and countervailing duties were introduced, they will not require importers to pay an amount of dumping duty beyond that which has previously been demanded. The amendments merely seek to ensure that approximately $12 million in interim duties collected since 1 January 1993 is not subject to legal challenge.

It appeared to the committee that no judicial interpretation of the meaning of the 1992 amendments has been made and that the changes proposed in this bill would not therefore take away any rights that have been declared by a Court.

As there may have been cases pending, however, which have prompted the decision to seek these amendments, the committee sought the advice of the Minister on these matters.

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:

> In particular, the Committee sought my advice on whether there has been a judicial interpretation of the meaning of the 1992 amendments that introduced the interim dumping duty regime and whether there are any cases pending which had prompted the decision to seek the current amendments.
>
> The amendments are intended to remove the possibility that the relevant provisions of the *Customs Act 1901* and the *Customs Tariff (Anti-Dumping) Act 1975* might be interpreted so as to require actual values to be ascertained before interim dumping and countervailing duties can be imposed. The possibility of such an interpretation was discovered in the general process of ongoing review of the terms of the legislation by officers of the Australian Customs Service and the Anti-Dumping Authority. The relevant provisions have not been the subject of judicial interpretation and there are no cases currently pending which would be affected by the passage of the proposed amendments.
>
> As stated in the Explanatory Memorandum to the Bill, the amendments will not require importers to pay an amount of dumping or countervailing duty beyond that which has already been paid. The amendments simply clarify the relevant provisions of the Acts to ensure that they in fact operate in the way in which they were always intended, and in the way in which both the Government and importers have always understood that they operated. I consider therefore, that the proposed amendments do not trespass unduly on personal rights and liberties and would not be in breach of principle 1(a)(i) of the Committee's terms of reference.
>
> I trust this meets the concerns of the Committee.

The committee thanks the Minister for this response.

Customs Tariff (Anti-Dumping) Amendment Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Tariff (Anti-Dumping) Act 1975* to clarify provisions which relate to the manner in which interim dumping and countervailing duties are collected.

The committee dealt with this bill in Alert Digest No. 10 of 1997, in which it made various comments. The Minister for Customs and Consumer Affairs has responded to those comments in a letter dated 24 October 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(1)

In Alert Digest No. 10 of 1997. the committee noted that subclause 2(1) of this bill, if enacted, would provide that various provisions of the bill would commence retrospectively on 1 January 1993.

The committee noted that these amendments relate to those discussed earlier in that Alert Digest with respect to the Customs Legislation (Anti-Dumping) Amendment Bill 1997.

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

On this issue, the Minister has responded as follows:

> In particular, the Committee sought my advice on whether there has been a judicial interpretation of the meaning of the 1992 amendments that introduced the interim dumping duty regime and whether there are any cases pending which had prompted the decision to seek the current amendments.
>
> The amendments are intended to remove the possibility that the relevant provisions of the *Customs Act 1901* and the *Customs Tariff (Anti-Dumping) Act 1975* might be interpreted so as to require actual values to be ascertained before interim dumping and countervailing duties can be imposed. The possibility of such an interpretation was discovered in the general process of ongoing review of the terms of the legislation by officers of the Australian Customs Service and the Anti-Dumping Authority. The relevant provisions have not been the subject of judicial

interpretation and there are no cases currently pending which would be affected by the passage of the proposed amendments.

As stated in the Explanatory Memorandum to the Bill, the amendments will not require importers to pay an amount of dumping or countervailing duty beyond that which has already been paid. The amendments simply clarify the relevant provisions of the Acts to ensure that they in fact operate in the way in which they were always intended, and in the way in which both the Government and importers have always understood that they operated. I consider therefore, that the proposed amendments do not trespass unduly on personal rights and liberties and would not be in breach of principle 1(a)(i) of the Committee's terms of reference.

I trust this meets the concerns of the Committee.

The committee thanks the Minister for this response.

Social Security Legislation Amendment (Youth Allowance) Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the *Social Security Act 1991* to give effect to the new social security payment to be known as youth allowance. Youth allowance will commence on 1 July 1998.

The committee dealt with this bill in Alert Digest No. 14 of 1997, in which it made various comments. The Minister for Social Security has responded to those comments in a letter dated 11 November 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Tax file numbers
Item 6 of Schedule 1 - proposed sections 551A and 551B

Item 6 of Schedule 1 inserts Part 2.11 in the Act. Part 2.11 contains proposed sections 551A and 551B. These sections, if enacted, would provide that the youth allowance would not be payable if the applicant has not provided the tax file number of the applicant and (where relevant) his or her partner. The committee recognises that these clauses may be included in the bill in order to prevent overpayments and fraud against the Commonwealth. The committee, however, notes that this is one more example of tax file numbers being used more as a means of identification and as an aid to income testing rather than as a part of the tax laws.

In these circumstances, 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 comments relate to the requirement to provide tax file numbers (TFNs) as part of the initiatives to introduce ... youth allowance, from 1 July 1998... Your Committee noted that new ... Part 2.11 (youth allowance) of the ***Social Security Act 1991*** would oblige people to provide their TFNs, and the TFNs of their partners, as a condition of payment of parenting payment. Your Committee was concerned that, while TFNs may be considered necessary to prevent people from defrauding the social security system, they may also '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 rate at which ... youth allowance is payable to a person is determined by the income received by a person.

Under a data-matching program introduced by the ***Data-matching Program (Assistance and Tax) Act 1990***, income disclosed by people to Centrelink for social security purposes is checked automatically against income disclosed to the Australian Taxation Office (ATO) and other paying agencies.

In relation to the proposed ... youth allowance, many people likely to receive these allowances are receiving some form of current social security payment or AUSTUDY, and, therefore, are already subject to TFN provisions.

In addition, some customers will be exempted (temporarily or indefinitely) from being requested to provide a TFN (for example, a person with no income, where a person is in a natural disaster zone or a remote area, or when the partner is not contactable or is violent).

Those customers who do not have a TFN can be assisted by Centrelink, as the TFN provisions enable Centrelink to accept TFN applications on behalf of the ATO and conduct necessary proof of identity checks. This approach provides an opportunity for Centrelink to assist those customers who may have problems with obtaining a TFN because of proof of identity requirements. As Centrelink conducts its own proof of identity checks, this practice would not constitute any increased intrusiveness from the customer's point of view. Centrelink's involvement in the TFN application process should be beneficial to disabled people, people with language difficulties or new entrants to the workforce.

The use of TFNs actually decreases the chance that a person will be identified during the process of data-matching. If Centrelink was unable to use TFNs, data-matching would require Centrelink to obtain a list of all taxpayers from the ATO and then conduct a data-matching exercise against the list of all the taxpayers. By using TFNs, Centrelink compares ATO income details only in respect of social security customers rather than all taxpayers.

The requests to provide TFNs as a condition of payment of ... youth allowance ... are consistent with the requirements that apply to existing payments administered by Centrelink on behalf of the Department of Social Security.

The committee thanks the Minister for this response.

Barney Cooney
Chairman