SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

1999

15 February 1999

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
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 1999

The Committee presents its First Report of 1999 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:

Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998

Superannuation Legislation Amendment (Resolution of Complaints) Act 1998

Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 1998

Taxation Laws Amendment Bill (No. 2) 1998

Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No 10 of 1998*, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 13 January 1999. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses (and received Royal Assent on 11 December 1998) the Minister's response may, nevertheless, be of interest to Senators. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No 10 of 1998

This bill was introduced into the Senate on 11 November 1998 by the Assistant Treasurer. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to increase control over the entry into, and presence in, Australia of non-citizens who have a criminal background or have criminal associations and to strengthen the procedures used in dealing with such people.

Commencement
Clause 2

By virtue of clause 2 of this bill, all but two items in the Schedule are to commence on proclamation, with no further time specified within which the provisions either must come into force or be repealed.

The Committee notes that paragraph 6 of Office of Parliamentary Counsel *Drafting Instruction No 2 of 1989* suggests that such an approach should be used only in unusual circumstances, where commencement depends on an event whose timing is uncertain.

Committee consideration of the provision in its Fourth Report of 1998

In its *Fourth Report of 1998*, the Committee sought advice from the Minister in relation to a similar commencement provision in a bill of the same name introduced into the House of Representatives on 30 October 1997. In relation to that bill, the Minister advised that the approach of commencement on Proclamation had been adopted because:

. it was desirable for reasons of administrative efficiency and public convenience that the bill should commence at the same time as amendments made by other related bills, however the measures contained in this bill were sufficiently important to justify an earlier commencement should it be passed first; and

. the new administrative procedures which are required by the bill would significantly affect the operations of the Department and the Administrative Appeals Tribunal – these procedures should be fully developed and in place when the legislation commences.

It is unclear whether these reasons remain relevant and the Explanatory Memorandum does not clarify the issue. Accordingly, the Committee **seeks the advice of the Minister** on the reason for departing from Drafting Instruction No 2 of 1989, issued by the Office of Parliamentary Counsel.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

> The Committee has noted that the Act does not contain a specified date or time limit within which the Act must be proclaimed. The Committee believes that this may be considered to delegate legislative power inappropriately.
>
> As a general rule, legislation in the Immigration and Multicultural Affairs portfolio is designed to commence either on Royal Assent or by proclamation. It is also usual to include a clause providing that commencement will take place whichever is the earlier of 6 months after Royal Assent or by proclamation.
>
> The Act does not contain any such provision because the new administrative procedures required by the Act will significantly affect the operations of the relevant areas of my Department and of the Administrative Appeals Tribunal. The best possible level of service to the public will not be possible unless these new procedures are fully developed and in place when the legislation commences.

I assure the Committee that the provisions in the Act will commence as soon as possible once these procedures are in place. I note that the Act gained passage through the Senate on 25 November 1998 and through the House of Representatives on 2 December 1998, and was given the Royal Assent on the 11 December 1998.

I trust that these comments will be of assistance to the Committee.

The Committee thanks the Minister for this advice, which indicates that the reasons for departing from the usual procedure for commencement have not changed with the re-introduction of the legislation. The Minister has advised that open-ended commencement is necessary in the case of this legislation because of its relationship with other migration legislation, and to enable the development of new administrative procedures.

This legislation has been under active consideration by the Parliament since 30 October 1997. In the ordinary course, twelve months would seem ample time to have fully developed new administrative procedures both within the Department and for the Administrative Appeals Tribunal. Most Departments seem able to have their delegated legislation or cognate legislation drafted and in place within the six months referred to in the relevant *Drafting Instruction*.

The Committee notes that the Act received Royal Assent on 11 December 1998. Even after this, in January 1999, the only indication that was given as to its commencement was "as soon as possible once these [new] procedures are in place". It is unclear from this whether the Act will commence within months, or not for some years.

Notwithstanding that the bill has been passed, the Committee remains concerned at the precedent that this open-ended approach to commencement may have set.

Superannuation Legislation Amendment (Resolution of Complaints) Act 1998

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No 11 of 1998*, in which it made various comments. The Minister for Financial Services and Regulation has responded to those comments in a letter dated 19 January 1999. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses (and received Royal Assent on 11 December 1998) the Minister's response may, nevertheless, be of interest to Senators. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No 11 of 1998

This bill was introduced into the House of Representatives on 26 November 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Superannuation (Resolution of Complaints) Act 1993* to enable the Superannuation Complaints Tribunal to arbitrate superannuation complaints with the consent of the parties to the complaints.

Termination by Proclamation
Schedule 1, item 10

Item 10 of Schedule 1 proposes to insert a new section 48F in the Principal Act. This section will allow the operation of the amendments proposed in the bill to terminate on a date to be fixed by Proclamation, with no further limit specified within which such a Proclamation might be made.

The Explanatory Memorandum notes that the bill is a response to two recent Federal Court decisions. These decisions prevent the Superannuation Complaints Tribunal (the Tribunal) from using its review powers, leaving it with only an inquiry and conciliation role. As an interim solution to the growing backlog of cases awaiting review before the Tribunal, the bill proposes to allow the Tribunal to arbitrate disputes by consent.

With specific reference to proposed new section 48F, the Explanatory Memorandum simply notes that "in the light of the interim nature of the Tribunal's arbitration function, Part 7A will cease to have effect on a day to be fixed by Proclamation".

The Committee has consistently drawn attention to provisions which permit legislation to **commence** by Proclamation. Such provisions remove from Parliament, as the elected holder of federal legislative power, the responsibility of determining when its laws are to come into force. Provisions which remove from Parliament the responsibility of determining when its laws should **cease** to have effect raise similar concerns.

The Committee notes that the bill represents an interim solution. However, it does not refer to any timeframe within which a long term solution is to be developed, nor does it provide that the interim solution should cease to have effect on the adoption of the long term solution. Accordingly, the Committee **seeks the advice of the Minister** on the reason for providing the Executive with an unfettered discretion to determine when the amendments made by this bill will cease to have effect.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

The Bill amends the *Superannuation (Resolution of Complaints) Act 1993* to enable the Superannuation Complaints Tribunal to arbitrate complaints with the consent of the parties. The bill is a response to two Federal court decisions, in February 1998, which significantly impaired the ability of the Tribunal to meet its objective of providing superannuation fund members with a low cost and informal alternative to the courts for the resolution of complaints.

I note that the Attorney-General has appealed to the High Court against the Federal Court decisions. The High Court heard the appeal on 8 December 1998 and a decision is expected to be handed down early to mid this year.

The Committee has drawn attention to section 48F of the Bill which will allow the amendments proposed by the Bill to terminate on a date to be fixed by Proclamation. The Government considers that it was appropriate to include a provision such as section 48F given the interim nature of the amendments made by the Bill. This is because the Bill is designed to facilitate the continuing effective operation of the tribunal pending the High Court appeal.

If the High Court overturns the Federal Court decisions, and upholds the validity of the Tribunal's powers under the Superannuation (Resolution of Complaints) Act, the arbitration function conferred on the Tribunal by the Bill will be unnecessary.

Section 48F will allow the amendments made by the Bill to be terminated without further legislative amendment.

However, if the High Court upholds the Federal Court decisions, the Government will need to consider possible options for achieving a permanent solution to the findings of the Federal Court. These options include replacing the Tribunal with one or more approved industry-based schemes. Alternatively, it may be feasible to restore, as far as possible, the Tribunal's powers through legislative amendments to the *Superannuation (Resolution of Complaints) Act*. This may include an ongoing arbitration function for the Tribunal. Implementing a permanent solution will necessitate extensive consultation with industry.

In these circumstances, the Government believed that the insertion of a fixed date into the Bill would introduce an element of inflexibility which may hamper future efforts to find a permanent solution. Section 48F will allow the amendments made by the Bill to be terminated when a permanent solution is put in place.

Given the interim nature of the amendments made by the Bill and the difficulty in placing a definitive time on when the amendments should cease to have effect, the Government considered that a termination provision such as section 48F was appropriate.

The Committee thanks the Minister for this response.

Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No 10 of 1998*, in which it made various comments. The Minister for Finance and Administration has responded to those comments in a letter dated 27 January 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No 10 of 1998

This bill was introduced into the House of Representatives on 12 November 1998 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to change superannuation arrangements for Commonwealth employees by amending the following Acts:

- *Superannuation Act 1990* to close the Public Sector Superannuation Scheme (PSS) to new members from 1 July 1999;
- *Superannuation Act 1976* and *Superannuation Act 1990* to allow Commonwealth Superannuation Scheme (CSS) and PSS members to choose to leave those schemes for another scheme offered by, or arranged with, their employer;
- *Superannuation Act 1976* to:
- improve access to superannuation spouse benefits in certain circumstances where the retirement pensioner commenced a marital relationship after age 60 years;
- provide an option for age and early age retirees to reduce their pension entitlements and increase reversionary benefits payable to their spouse or to any children of the retiree;
- enable certain payments payable from other superannuation funds or schemes to be paid into the CSS Fund; and

- restore the original intention in relation to late elections to preserve benefits;
- *Superannuation Benefits (Supervisory Mechanisms) Act 1990* to provide that a determination made under the Act in relation to agencies meeting certain requirements in setting up superannuation arrangements for their employees will be a disallowable instrument;
- *Parliamentary Contributory Superannuation Act 1948* to:
- improve access to superannuation spouse benefits in certain circumstances where the retirement pensioner commenced a marital relationship after age 60 years;
- rectify anomalies and technical errors in relation to orphan benefits;
- rectify anomalies and technical errors in relation to the maximum reversionary benefit payable where there is more than one beneficiary;
- amend the arrangements relating to transfer values; and
- cease the application of the inwards transfer value arrangements to persons who become Members of Parliament after the date Royal Assent is given to this bill;
- *Administrative Appeals Tribunal Act 1975*, *Law Officers Act 1964* and *Workplace Relations Act 1996* in relation to people who leave the CSS or PSS to join the Judges' Pension Scheme to assist the schemes to comply with the national regulatory system for superannuation schemes;

and repeals the *Superannuation Act 1922*, *Superannuation Act 1976, Superannuation Act 1990*, *Superannuation (Productivity Benefit) Act 1988* and the superannuation and retirement income provisions of the *Papua New Guinea (Staffing Assistance) Act 1973*. However, in most circumstances, the repealed legislation will continue to operate through the application of the *Superannuation Legislation (Commonwealth Employment–Savings and Transitional Provisions) Act 1998*.

Retrospective application
Subclauses 2(3) to 2(5)

By virtue of subclause 2(3) of this bill, the amendments proposed in items 248, 251 and 263 of Schedule 1 will be taken to have commenced on 27 June 1997. The Explanatory Memorandum comments that this date was "the date of announcement of the new scheme".

The Committee consistently disapproves of legislation by press release. For example, *The Work of the Committee during the 37th Parliament (May 1993 – March 1996)* contains the following comments:

The Committee draws attention to legislation by press release. The fact that it is to have effect only after the intention to introduce it is made public is no justification for it being given force prior to its enactment. The expectations of its proposer that parliament will subsequently pass the legislation and that the people it is aimed at will comply with its provisions in the meantime are presumptuous.

By virtue of subclauses 2(4) and (5), other provisions will also commence retrospectively. Paragraphs 2(d) and (c) indicate that the amendments referred to here seek to do no more than clarify provisions in existing legislation, and make no substantive changes to the law. It is difficult to confirm this from the provisions in the bill.

Accordingly, the Committee **seeks the Minister's advice** as to why the provisions referred to in subclauses 2(3) to 2(5) need to commence retrospectively.

Pending the Minister'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.

Relevant extract from the response from the Minister

Subclause 2(3) provides for the commencement date of items 248, 251 and 263 of Schedule 1. Items 248 and 263 remove existing restrictions on the payment of certain benefits from the Commonwealth Superannuation Scheme (the CSS) provided for by the *Superannuation Act 1976* (the 1976 Act) to persons who involuntarily retired as a result of a sale of an asset or the transfer of a function. Item 251 provides an additional benefit option to persons who cease their CSS membership in those circumstances but who are not involuntarily retired, that is, they resign from Commonwealth employment in some cases to work for the new owner of the asset or provider of the function.

Subclause 2(4) provides for the commencement date of item 262 of Schedule 1. This item clarifies the original intention of section 155B of the 1976 Act in relation to its application to all CSS members who cease membership through the sale of an asset or the transfer of a function. I have been advised that the section as currently drafted would only apply to a person whose position ceases to exist in those circumstances. However, some persons may continue in their position but cease their CSS membership because an organisation is sold as a going concern to the private sector.

Regulations made under section 155B allow me to make declarations which provide for the early payment of benefits where a person is made redundant within three years of the sale or transfer. The amendment made by item 262 of Schedule 1 is necessary to allow this benefit to apply where a person ceases CSS membership because a body by which they are employed is sold as a going concern.

Because the amendments given retrospective effect by subclauses 2(3) and (4) are beneficial to the individuals concerned and do not trespass on their personal rights and liberties, I consider that the amendments should be made with retrospective effect.

Subclause 2(5) provides for the retrospective effect of items 247, 252, 255 and 256 of Schedule 1. All these items clarify or correct provisions of the 1976 Act that were inserted into the Act or amended with effect from 1 July 1995 by the *Superannuation Legislation Amendment Act 1995*. Item 247 ensures that the CSS Board can only be indemnified in circumstances permitted by the *Superannuation Industry (Supervision) Act 1993* and its regulations (SIS). Items 252 and 256 correct provisions relating to the release of benefits as permitted by SIS. These provisions have already been amended by regulations made under section 155C of the Act. When section 155C was inserted into the Act the then Minister for Finance assured the Committee that the Act itself would be amended in line with any regulations made under that provision on the first possible occasion. The date of effect of item 247 is the same as the date of effect of the regulations under section 155C.

Item 255 corrects an error of drafting relating to the date on which deferred benefits become payable. The error occurred when section 138 was redrafted in 1995 and instead of providing, as had been done by the provision since 1976, that benefits become payable after a particular event, eg, death, it inadvertently provided that the benefit should be payable from the day before the event. This creates a situation where a benefit appears to become payable from a day before the person was eligible for the benefit. As it was not intended that the provision be changed in this way, it has been administered since 1995 as if the error had not been made.

As the amendments given retrospective effect by subclause 2(5) clarify and correct provisions amended or inserted with effect from 1 July 1995 and the Act has been administered as if these amendments were in place from that date I do not consider they trespass unduly on personal rights and liberties.

Retrospective application
Subclause 2(6) and Schedule 1, Part 5

Subclause 2(6) will permit Part 5 of Schedule 1 to this bill to commence retrospectively on 5 December 1997. The Explanatory Memorandum indicates that these amendments will "restore the original intention of the 1976 Act".

It is unclear whether this retrospectivity will advantage or disadvantage members of the superannuation scheme established by the 1976 Act. Accordingly, the Committee **seeks the Minister's advice** as to the effect of the amendments referred to in subclause 2(6).

Pending the Minister'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.

Relevant extract from the response from the Minister

> Subclause 2(6) provides for the retrospective effect of Part 5 of Schedule 1 which restores the original intention of the 1976 Act in relation to late elections for preservation. The Courts have, over time, extended the application of the late election provision beyond its original intention. I announced the intention to make the amendments to restore the original intention of those provisions during the second reading speech when this Bill was originally introduced into the House on 3 December 1997. In order to ensure that a large number of late elections was not received prior to the date of effect (if it were to be Royal Assent), I announced that it would take effect at the end of the week in which the Bill was introduced.
>
> Because of the delays in the legislative process, including because of the recent Federal election, and the possibility that the CSS Board may have made some decisions in the intervening period, the Bill has been amended to provide that, if a person asks the CSS Board to accept a late election after 5 December 1997 and the Board accepts that election prior to Royal Assent to this Bill, the 1976 Act will apply as if it had not been amended.
>
> I consider, both because the amendments restore the original intention and because of the savings provision, that the retrospectivity of the amendments does not trespass unduly on personal rights and liberties.

Inappropriate delegation of legislative power
Schedule 1, item 18 and Schedule 3, item 10

Item 18 of Schedule 1 to the bill proposes to insert new subsections 3D(8) and (9) in the *Superannuation Act 1976*. Item 10 of Schedule 3 to the bill proposes to insert new subsections 3AAA(8) and (9) in the *Superannuation Act 1990*. Each of these proposed new subsections will permit the Minister to make a declaration as to the status of a Commonwealth authority or body, which declaration may be made "despite the previous provisions of" the relevant legislation.

Apparently, such declarations are not disallowable instruments. Accordingly, the Committee **seeks the Minister's advice** as to why these provisions are appropriate delegations of legislative power and why they are not subject to Parliamentary scrutiny.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to inappropriately delegate legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference, and insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> You have also requested advice concerning a possible inappropriate delegation of legislative power contained in the amendments proposed by item 18 of Schedule 1 and item 10 of Schedule 3 to the Bill. In this regard, item 20 of Schedule 1 and item 26 of Schedule 3 ensure that any declarations made under the amending provisions are disallowable instruments and are therefore subject to Parliamentary Scrutiny.

The Committee thanks the Minister for these responses which address its concerns.

Taxation Laws Amendment Bill (No. 2) 1998

Introduction

The Committee dealt with this bill in *Alert Digest No 10 of 1998*, in which it made various comments. The Assistant Treasurer responded to those comments in a series of letters dated 3 December 1998. In its *Eleventh Report of 1998*, the Committee sought further advice regarding retrospective application in relation to subclause 2(2) and Schedule 7, Part 3 of the bill. The Assistant Treasurer has responded to those comments in a letter dated 27 January 1999. A copy of that letter is attached to this report. An extract from the *Eleventh Report of 1998* and relevant parts of the Assistant Treasurer's further response are discussed below.

Extract from Eleventh Report of 1998

This bill was introduced into the House of Representatives on 12 November 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
- deny the ability to offset against capital gains certain capital losses created by an arrangement entered into before 3pm on 29 April 1997 and to prevent companies using capital losses artificially created through an arrangement entered into after that time;
- allow instalment taxpayers classified as small to pay their likely tax on 15 December following their income year and the balance, if any, of their tax liability on the following 15 March, and make consequential amendments;
- prevent franking credits or debits arising from the payment or refund of tax where those amounts are attributable to the retirement savings account business of a life assurance company;
- replace the formulae used to determine the passive income of the controlled foreign companies of life and general insurance companies;
- require life companies to use average calculated liabilities, rather than calculated liabilities at the end of the year of income, as the basis for determining income that relates to immediate annuity policies and apportioning income and capital gains;

- clarify the operation of the depreciation provisions in circumstances when an entity the income of which is exempt becomes, for any reason, subject to tax on any part of its income under the provisions of the Act; and

- exclude superannuation funds, approved deposit funds, and pooled superannuation trusts from the grouping provisions contained in the company tax instalment system; and

- *Fringe Benefits Tax Assessment Act 1986* to:

- exempt certain benefits relating to approved student exchange programs from FBT; and

- introduce new record keeping exemption arrangements; and

- *Fringe Benefits Tax Assessment Act* 1986, *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to:

- extend the existing exemption for taxi travel beginning or ending at an employee's place of work;

- introduce a new exemption from FBT for car parking benefits for certain small business owners; and

- simplify "arranger" provisions; and

- *Income Tax Assessment Act 1936*, *Income Tax Assessment Act 1997* and *Taxation Laws Amendment (Landcare and Water Facility Tax Offset) Act 1998* to ensure that taxpayers must reduce the cost base or indexed cost base of an asset to the extent of any net deductions allowable for expenditures included in the cost base; and

- *Income Tax Assessment Act 1997* to prevent a taxpayer who has become bankrupt from using a carried forward landcare and water facility tax offset in certain circumstances.

Retrospective application
Subclause 2(2) and Schedule 7, Part 3

By virtue of subclause 2(2) of this bill, the amendments proposed in Part 3 of Schedule 7 are to commence retrospectively on 14 July 1998. This is the commencement date of the *Taxation Laws Amendment (Landcare and Water Facility Tax Offset) Act 1998*.

The Explanatory Memorandum appears to provide no reason for this retrospectivity. Reference to the associated Act does not clarify matters. Accordingly the Committee **seeks the Minister's advice** as to the reasons for the retrospective application of the amendments proposed in Part 3 of Schedule 7.

Pending the Minister'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.

Relevant extract from the response from the Assistant Treasurer

Taxation Laws Amendment (Landcare and Water Facility Tax Offset) Act 1998 (Tax Rebate Act), which is being amended by Part 3 of Schedule 7 of TLAB2, contained provisions which adjusted the cost base and indexed cost base of an asset for capital gains tax purposes (cost base adjustment provisions) where a taxpayer had taken the landcare or water facilities rebate. However, these provisions were not to come into effect until just after the commencement of the cost base adjustment provisions in Taxation Laws Amendment Bill (No. 2) 1998 (TLAB2). These provisions have not commenced.

TLAB2 was introduced into the Senate on 30 November 1998. Part 3 of Schedule 7 of TLAB2 contained provisions which repealed the Tax Rebate Act's cost base adjustment provisions and their commencement provision with effect from 14 July 1998.

I understand that your Committee considers that these provisions may trespass unduly on personal rights and liberties.

TLAB2 does repeal the commencement provision of the cost base adjustment provisions in the Tax Rebate Act but it also goes on to repeal the cost base adjustment provisions too. Additionally, there is a commencement provision for the repeal which is to take effect immediately after the Royal Assent of the Tax Rebate Act - 14 July 1998. Taken together, these provisions prevent taxpayers' rights being adversely affected as the cost base adjustment provisions in the Tax Rebate Act are prevented from coming into operation retrospectively.

TLAB2 contains some replacement cost base adjustment provisions which will commence their operation on Royal Assent and affect expenditure which is eligible for the rebate where the expenditure is incurred on the date of TLAB2's introduction - 12 November 1998.

I trust the above has been of assistance.

The Committee thanks the Assistant Treasurer for this response. The response seems to indicate that the cost base adjustment provisions in the Tax Rebate Act, which were to come into effect after the commencement of the cost base adjustment provisions in the Taxation Laws Amendment Bill (No 2) 1998, are now to be repealed by that bill. This repeal is to take effect retrospectively from 14 July 1998, notwithstanding that the provisions have not yet come into effect. Substitute cost base adjustment provisions are to apply to expenditure incurred after 12 November 1998. The Committee would appreciate the Minister’s advice regarding any possible disadvantage to those who may have incurred expenditure prior to 12 November 1998.

Relevant extract from the further response from the Assistant Treasurer

I refer to your letter of 10 December 1998 as it relates to the CGT cost base adjustment provisions and the landcare and water facility tax offset. Your letter has been referred to me for reply.

As I understand the attachment to your letter, the Senate Committee is concerned that taxpayers who incur expenditure before 12 November 1998 could be disadvantaged by the operation of TLAB2.

The cost base adjustment provisions which are contained in TLAB2 operate to prevent a double deduction where expenditure for which a taxpayer can claim a deduction can also be included in the CGT cost base or indexed cost base of an asset. This adjustment also applies where a landcare and water facility tax offset is obtained, for the expenditure, as an alternative to claiming a deduction. However, the CGT cost base or indexed cost base will only be reduced where the relevant landcare and water facility expenditure is incurred on or after TLAB2's introduction - 12 November 1998.

In effect, a taxpayer who incurs landcare and water facility expenditure before 12 November 1998 gets the benefit of the expenditure as a tax offset and as an inclusion in the CGT cost base or indexed cost base of the relevant asset.

I hope this information reassures your Committee that the taxpayers who incur the relevant expenditure before 12 November 1998 are not disadvantaged.

The Committee thanks the Assistant Treasurer for this further response which clarifies the matter.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SECOND REPORT

OF

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17 February 1999

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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 H Coonan
Senator T Crossin
Senator J Ferris
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

SECOND REPORT OF 1999

The Committee presents its Second Report of 1999 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:

Workplace Relations Legislation Amendment (Youth Employment) Bill 1998

Workplace Relations Legislation Amendment (Youth Employment) Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No 10 of 1998*, in which it made various comments. The Minister for Employment, Workplace Relations and Small Business has responded to those comments in a letter dated 19 January 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 11 of 1998

This bill was introduced into the House of Representatives on 26 November 1998 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business]

The bill proposes to amend the following Acts:

- *Workplace Relations Act 1996* to:
- include in the principal object of the Act and the objects of Part VI of the Act the protection of the competitive position of young people in the labour market, the promotion of youth employment and the reduction of youth unemployment;
- permanently exempt junior rates of pay from the provisions of the Act intended to prevent and eliminate age discrimination in awards and agreements; and
- promote the inclusion of junior rates of pay in awards and agreements; and
- *Workplace Relations and Other Legislation Amendment Act 1996* to:
- permanently exempt junior rates of pay from the provisions of the Act intended to prevent and eliminate age discrimination in awards; and
- promote the inclusion of junior rates of pay in awards.

General comment
Schedule 1, item 4

Item 4 of Schedule 1 to the bill provides, in part, that "junior wage provisions are not to be treated as constituting discrimination by reason of age". In general terms, this amendment simply recognises a state of affairs that has continued for a considerable period of time, and it may have been included in the bill to avoid conflict with the provisions of other legislation. Nevertheless, the Committee recognises that there are some who may regard such a provision as trespassing on personal rights and liberties, and the reason for its inclusion in the bill is not clear to the Committee.

Accordingly, the Committee **seeks the advice of the Minister** on the reason for including this provision in the bill.

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

Relevant extract from the response from the Minister

> This item amends section 88B of the *Workplace Relations Act 1996* (the Act) to provide that, for the purposes of paragraph 88B(3)(e) of the Act, junior wage provisions are not to be treated as constituting discrimination by reason of age.
>
> Paragraph 88B(3)(e) states that the Australian Industrial Relations commission, in performing its award-making functions, must have regard to '…the need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'
>
> The proposed amendment is to make clear that, in the context of the requirement on the Commission to have regard to the need to prevent and eliminate discrimination on the basis of the matters set out in subsection 88B(3)(e), junior rates of pay do not constitute discrimination on the basis of age.
>
> The Bill does not seek to exempt junior wage provisions in awards from anti-discrimination law generally, or to prevent a party from seeking a remedy under such laws. It seeks only to ensure that junior wage provisions in awards do not constitute discrimination for the purposes of the *Workplace Relations Act 1996*. The Bill reflects the importance of junior rates of pay in creating employment opportunities for young people. The removal of junior rates would severely damage the youth labour market, and would be likely to result in many young people experiencing protracted unemployment, with potentially permanently damaged prospects for labour force integration.

In the context of Australia's international obligations, it is relevant to note that the achievement of full employment is an important principle underpinning the work of the International Labour Organisation.

Thank you for bringing the Committee's concerns to my attention.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

1999

10 March 1999

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

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10 March 1999

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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 H Coonan
Senator T Crossin
Senator J Ferris
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 1999

The Committee presents its Third Report of 1999 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:

Electoral and Referendum Amendment Bill (No. 2) 1998

Judiciary Amendment Bill 1998

Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998

Electoral and Referendum Amendment Bill (No. 2) 1998

Introduction

The Committee dealt with this bill in *Alert Digest No 11 of 1998*, in which it made various comments. The Special Minister of State has responded to those comments in a letter dated 17 February 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 11 of 1998

This bill was introduced into the House of Representatives on 26 November 1998 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to amend the *Commonwealth Electoral Act 1918* and *Referendum (Machinery Provisions) Act 1984* to:

- require new electors to produce one original form of identification at time of enrolment;
- provide that a person witnessing an enrolment application must be an elector in a prescribed class of persons;
- provide that all electors must notify the Australian Electoral Commission of a change of address within one month of moving;
- reduce the time period between the issue of the writ and the close of the rolls;
- allow for the provision of date of birth and salutation details of electors to Members, Senators and registered political parties;
- provide that any person sentenced to imprisonment is not entitled to enrol or to vote;
- provide that only the Presiding Officer at a polling place may assist electors in marking their ballot papers;
- provide that the preliminary scrutiny of declaration votes may commence on the Monday prior to polling day;

- raise from $500 to $1,500 the threshold for counting individual amounts received in regard to donations to political parties;

- provide that political parties are required to disclose a total amount of $5,000 or more (currently $1,500) received from a person or organisation during a financial year; and

- increase from $1,500 to $10,000 the amount above which a donor to a registered political party must furnish a return for a financial year.

Committee consideration of the bill in the 38th Parliament

This bill is, in all relevant respects, the same as a bill of the same name introduced into the Senate on 14 May 1998. The Committee commented on that bill in *Alert Digest 7/98,* and reported on it in the Committee's *Seventh Report of 1998*.

In that *Report*, the Committee referred to two matters: the debate concerning the proposed abolition of the voting rights of prisoners (Item 10 of Schedule 1), and the commencement provisions of the bill (subclause 2(3).

Commencement

Under subclause 2(3) of the bill, many of the items in Schedule 1 are to commence on Proclamation, with no further provision made for automatic commencement or repeal at a particular time. *In Alert Digest 7/98*, the Committee sought the advice of the Minister as to the reason for departing from *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel.

On this issue, the Minister stated that:

- the provisions listed in subclause 2(3) related to the upgrading of witnessing requirements for electoral enrolment; the requirement for new electors to produce proof of identity before lodging an enrolment form; and the removal of the one month qualifying period for enrolment;

- the delay in commencement would enable consultation and discussion with State and Territory governments, giving them the opportunity to enact necessary complementary legislation; and

- the Australian Electoral Commission had advised that it would require a minimum of 6 months to make the necessary administrative arrangements to implement the amendments.

The Committee thanked the Minister for this response, which addressed its concerns. However, this explanation properly belongs in the Explanatory Memorandum accompanying the bill. No reference to these matters appears in the Explanatory Memorandum accompanying the bill as reintroduced. Accordingly, the Committee **seeks the Minister's advice** as to why this necessary explanation does not appear in the Explanatory Memorandum accompanying the current bill.

In the circumstances, the Committee makes no further comment on this provision.

Relevant extract from the response from the Minister

I refer to the letter seeking advice as to why certain information relating to the commencement dates of a number of provisions contained in the Electoral and Referendum Amendment Bill (No. 2) 1998 was not included in the Explanatory Memorandum for the Bill.

The Australian Electoral Commission has advised that the omission of this information from the Explanatory Memorandum was an oversight, which occurred as a result of the reintroduction of the legislation at short notice late in the 1998 Spring Sittings.

I understand this has now been rectified. Thank you for bringing this matter to my attention.

The Committee thanks the Minister for this response.

Judiciary Amendment Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No 1 of 1999*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 5 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Judiciary Act 1903* to establish the Australian Government Solicitor as a separate statutory authority to provide legal and related services for government purposes, and makes transitional provisions and consequential amendments to 10 Acts.

Insufficient Parliamentary scrutiny
Proposed new Part VIIIC

This bill is, in all material respects, identical to a bill of the same name which was introduced into the House of Representatives on 20 November 1997 and on which the Committee commented in *Alert Digest No 17 of 1997* and in its *First Report of 1998*.

As the Committee previously noted, the bill proposes to insert a new Part VIIIC in the Judiciary Act. This new Part enables the Attorney-General to issue Legal Services Directions which must be complied with by a variety of persons or bodies, not all of whom are otherwise under the control of the Commonwealth.

It appeared to the Committee that, while these Directions might be legislative in character, the bill made no provision for them to be disallowable instruments for the purposes of the *Acts Interpretation Act 1901*.

The Attorney-General advised the Committee that Legal Services Directions would be capable of applying either generally to Commonwealth legal work, or to specific legal work being performed in relation to a particular matter. The Government

considered it appropriate for Legal Services Directions that were legislative in character (these are most likely to be Directions of general application) to be subject to Parliamentary scrutiny. The most effective process for subjecting such Directions to such scrutiny was under the Legislative Instruments Bill.

In response, the Committee expressed the view that, as an interim measure, until the Legislative Instruments Bill became law, alternative provision should be made for Parliamentary scrutiny of such Directions.

The Committee notes that the Legislative Instruments Bill still has not been passed, and reaffirms its view as to the desirability of Parliamentary scrutiny under the *Acts Interpretation Act 1901* as an interim measure. The Committee, therefore, **seeks the Attorney's advice** on how Legal Services Directions that are legislative in character are to be scrutinised by the Parliament if issued prior to the passage of the Legislative Instruments Bill.

Pending the Attorney's advice, the Committee draws Senators' attention to these 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.

Relevant extract from the response from the Attorney-General

I would like to thank the Committee for its consideration of the Bill.

The Committee reiterates previous comments that Legal Services Directions which may be made by the Attorney-General under the Bill, may be of a legislative character and, if so, should be subject to Parliamentary scrutiny.

I remain of the view that Parliamentary scrutiny of Legal Services Directions of a legislative character is appropriate and that the most effective process for subjecting such Directions to this scrutiny is under the Legislative Instruments Bill. I do not favour an ad hoc approach through the introduction of an amendment to the Judiciary Amendment Bill dealing specifically with Legal Services Directions. The Government remains determined to achieve the enactment of a suitable Legislative Instruments Bill which will provide a comprehensive regime for effective Parliamentary scrutiny of instruments of a legislative nature.

The Committee thanks the Attorney-General for this response, and notes that he remains of the view that Parliamentary scrutiny of Legal Services Directions that are legislative in nature is appropriate.

The Legislative Instruments Bill undoubtedly represents the most effective and comprehensive regime for Parliamentary scrutiny of such instruments. However, that bill, which was first introduced in 1994, was not passed during the 37th Parliament, or the 38th Parliament, and is not currently on the Senate Notice Paper. It may be some years yet before the Parliament agrees to its passage.

In these circumstances, the extent to which Legal Services Directions that are legislative in nature should be scrutinised before the passage of the Legislative Instruments Bill is a matter to be determined by the Senate.

Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No 10 of 1998*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter received on 22 December 1998. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No 10 of 1998

This bill was introduced into the House of Representatives on 12 November 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Superannuation Guarantee (Administration) Act 1992 to:

- require employers to make compulsory superannuation contributions to a complying superannuation fund or retirement savings account in compliance with the choice of fund requirements; and
- increase the amount of Superannuation Guarantee Charge payable by the employer where these contributions do not comply with the choice of fund requirements; and

Retirement Savings Accounts Act 1997 and the *Superannuation Industry (Supervision) Act 1993* to make consequential amendments.

Inappropriate delegation of legislative power
Schedule 1, item 2

Item 2 of Schedule 1 to the bill proposes to insert new subsections 5(2) and (2A) in the *Superannuation Guarantee (Administration) Act 1992*. These new subsections would make that Act subject to "such modifications as are prescribed". This would seem to permit the amendment of the Act by regulation – an example of a 'Henry VIII' clause – and so may be regarded as an inappropriate delegation of legislative power.

In addition, proposed new subsection 5(2C) will permit the Minister for Finance to issue directions which "must be complied with, notwithstanding any other law of the Commonwealth". This would seem to permit the Minister to override any other Commonwealth law – another example of a 'Henry VIII' clause in that it will permit the amendment of primary legislation without reference to the Parliament.

In referring to these provisions, the Explanatory Memorandum (at paragraph 1.99) simply notes that the Bill "contains amendments which have the effect of treating individual Commonwealth Departments as separate employers".

The provisions are in the same form as in a bill of the same name which was introduced into the House of Representatives on 28 May 1998, and on which the Committee commented in *Alert Digest No 8 of 98*.

The Committee reiterates its comments as made in that Digest, and **seeks the Minister's advice** on whether it might be more appropriate to achieve the required purposes by amendments to primary legislation.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Assistant Treasurer

The provisions of concern to the Committee form part of amendments that shift the responsibilities for meeting Superannuation Guarantee obligations from the Commonwealth as a whole to individual Commonwealth Departments and certain authorities.

I understand that the Committee is concerned that some of the provisions in Item 2 of Schedule 1 to the Bill may involve an inappropriate delegation of power. The relevant provisions either make the Act subject to prescribed modifications or provide that Ministerial directions must be complied with notwithstanding any other law of the Commonwealth.

My advice to the Committee is that these provisions involve an appropriate delegation of legislative power. As was recognised by the Committee in the Alert Digest, the relevant provisions are part of amendments which have the effect of treating individual Commonwealth Departments as separate employers for Superannuation Guarantee purposes.

Accordingly, the provisions only apply to Commonwealth Government entities and are exclusively a matter of Commonwealth internal financial management. The provisions will not affect the rights of individuals, businesses or corporations.

Each of the provisions highlighted by the Committee involve technical matters contemplated by the policy implemented by the *Superannuation Guarantee*

(Administration) Act 1992. That Act applies to encourage individual employers to make certain levels of superannuation contributions on behalf of their employees. While Commonwealth public servants are technically employees of the Commonwealth as a whole, personnel issues, such as superannuation, are dealt with on a Department by Department basis. Therefore, it is appropriate that Superannuation Guarantee responsibilities are shifted from the Commonwealth as a whole to individual Departments and authorities. The use of the Minister of Finance directions in particular will provide Departments and authorities with valuable guidance on how to satisfy their obligations.

The use of regulations and Ministerial directions in these matters is also justified on the grounds of flexibility. The regulations and directions will efficiently allow for the provision of rules in what is a technical and potentially complex area of Commonwealth administration. Amendments to primary legislation to implement highly technical rules would be a burden on the Parliament's time. However, you should also note that any rules made by regulation are disallowable by the Parliament.

In this context, I draw your attention to the following legislation, which have identical or very similar provisions to those inserted by Item 2 of Schedule 1 to the Bill:

- sections 4, 5 and 7 of the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* ensure that individual Commonwealth Departments are each responsible for fulfilling fringe benefits tax obligations. The rationale for having these provisions in that Act are similar to those outlined above for the rules in the Bill that are to apply for Superannuation Guarantee purposes.

- section 126A of the *Superannuation Act 1976* allows for regulations to override that Act in certain situations. Like the provisions in this Bill, section 126A of that Act applies to Commonwealth superannuation. It therefore also applies to a highly technical area.

I trust this information is of assistance.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

OF

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24 March 1999

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
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

FOURTH REPORT OF 1999

The Committee presents its Fourth Report of 1999 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:

A New Tax System (Australian Business Number) Bill 1998

Migration Legislation Amendment Bill (No. 2) 1998

Sales Tax Legislation Amendment Bill (No. 1) 1998

Therapeutic Goods Legislation Amendment Bill 1999

A New Tax System (Australian Business Number) Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999,* in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 10 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to introduce the Australian Business Number (ABN) as a single business identifier. An ABN will be available to all companies registered under the Corporations Law, government and business entities and entities which require to be registered for the Goods and Services Tax, such as charitable and religious institutions.

Reversal of the onus of proof
Subclause 16(3)

Proposed clauses 14 and 15 of this bill impose an obligation to notify the Registrar of the Australian Business Register of relevant information and of changes in that information. Proposed subclause 16(1) imposes this obligation on each member of a partnership, but states that it may be discharged by any of the partners. Similarly, proposed subclause 16(2) imposes this obligation on each member of the management committee of an unincorporated association, but states that it may be discharged by any of those members.

Proposed subclause 16(3) goes on to provide a defence for persons prosecuted for such offences under section 8C of the *Taxation Administration Act 1953* as members of partnerships or unincorporated associations. In general terms, subclause 16(3) reverses the onus of proof, requiring those prosecuted to prove that they were not involved or knowingly concerned in the conduct which led to the commission of the offence.

This provision has been included because section 8C of the *Taxation Administration Act 1953* would otherwise impose strict criminal liability on such persons. However, a number of other matters are not clear from the structure of the legislation. For example, the bill does not canvass liability or the availability of defences where such offences are committed by other legal entities such as trusts, incorporated associations or corporations. Similarly, it is not clear whether this approach to liability and defences is characteristic of the approach taken elsewhere in the taxation legislation, or has been developed with specific reference to these offences.

In general terms, it is not clear whether those who might seek to use the proposed subsection 16(3) defences are being treated more or less favourably than, or the same as, others who commit these offences on behalf of other legal entities, or others who commit similar offences under other parts of the taxation legislation. The Committee, therefore, **seeks the Treasurer's advice** on these matters.

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.

Relevant extract from the response from the Assistant Treasurer

Clauses 14 and 15 of the Bill impose obligations on Australian Business Number (ABN) registered entities to notify the Australian Business Registrar of relevant information and changes to that information. Subclauses 16(1) and 16(2) extend those obligations to cover each member of a partnership or each member of a management committee of an unincorporated association. That is, the subclauses extend the obligations to legal entities who can be prosecuted for an offence (partnerships and unincorporated associations cannot be prosecuted for an offence). Any one of those members can discharge the obligation.

As the Bill will be an Act which is taxation law, the provisions of the *Taxation Administration Act 1953* ("TAA") will apply. Where the obligations under clauses 14, 15 and 16 are not met, there will be an offence under section 8C of the TAA.

However, the Bill does not, of itself, create any offence. Nor does it reverse the onus of proof set out under section 8C, ie, that it is incumbent upon the Commissioner of Taxation to prove that the person was capable of providing the required information.

Because of the need to extend the information obligations to cover each member of a partnership or each member of a management committee of an unincorporated association, the Bill provides an additional safeguard to those members. Essentially, the proposed defence provided by subclause 16(3) of the Bill ensures that no offence will have occurred where the person proves that they did not knowingly fail to give the information. Of course, this defence will not be necessary if the Commissioner of

Taxation cannot prove that the person was capable of providing the required information.

Your Committee has indicated that they are concerned that the provisions may trespass unduly on personal rights and liberties. Four concerns which lead to this belief were advanced.

The first concern is that subclause 16(3) of the Bill "reverses the onus of proof". That is, that it is up to the person, not the Commissioner to prove that an offence has occurred. This concern is unfounded as it remains the Commissioner who must prove that an offence has been committed, that is, that the person was capable of providing the information and did not do so. The Bill merely provides an additional defence. That defence requires a knowledge of the person's mind. Such knowledge is not provable by the Commissioner.

The second concern is that the Bill does not deal with the liability for offences (and any defence) for entities other than partnerships and unincorporated associations. This concern is also unfounded. The Bill clearly notes at the end of clause 15 that section 8C of the TAA will apply to any entity registered for the ABN if it does not comply. As noted above, the Commissioner of Taxation continues to have the onus of proving the offence.

The third concern is whether the Bill's approach to liability and defences is the approach taken elsewhere in the taxation legislation, or is this a new approach. Clearly, the use of section 8C of the TAA is the normal approach throughout the taxation legislation. In regard to the defences for members of partnerships and unincorporated associations, the approach taken in the Bill is also common in the taxation legislation. For example, sections 220AZF and 220AZG of the *Income Tax Assessment Act 1936* or sections 165 and 166 of the *Fringe Benefits Tax Assessment Act 1986* provide virtually identical defences for members of partnerships and unincorporated associations to the defences provided under subclause 16(3) of the Bill.

The fourth concern is that the Committee is unsure whether subclause 16(3) of the Bill treats members of partnerships or unincorporated associations in a more or less favourable way in comparison to others, wither within this Bill or within taxation legislation generally. It is clear from the above that members of partnerships or unincorporated associations have an advantage over most other persons, as they have an additional defence open to them when being prosecuted under section 8C of the TAA which is not open to most other persons being prosecuted under that section.

In summary, I do not consider that the Bill's provisions unduly trespass on personal rights and liberties.

The Committee thanks the Assistant Treasurer for this detailed response.

Migration Legislation Amendment Bill (No. 2) 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 23 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the Senate on 3 December 1998 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Immigration and Multicultural Affairs]

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

- ensure that provisions of the *Human Rights and Equal Opportunity Commission Act 1986* and the *Ombudsman Act 1976* do not apply to persons who are in immigration detention, having arrived in Australia as unlawful citizens, unless such persons themselves initiate a written complaint to HREOC or orally or in writing to the Ombudsman; and

- clarify the duties of the Minister and officials concerning advice relating to applications for visas and on access to legal and other advice.

Introduction

In general terms, this bill is similar in form to the Migration Legislation Amendment Bill (No 2) 1996 ("the 1996 bill"), which was introduced into the Senate on 20 June 1996, and on which the Committee reported in its *Sixth Report of 1996*.

Retrospective effect and the current bill
Clause 2

Clause 2 of the 1998 bill provides that the proposed amendments are to commence on the date the bill was introduced into the Senate (ie 3 December 1998). In commenting on this provision, the Committee notes that, for more than 2 years between 1996 and 1998, the law was apparently administered on the basis of legislation which was said to operate retrospectively and yet was never passed by the Parliament. It is conceivable that such a situation might again arise in the case of the present bill.

It is also conceivable that the bill may ultimately be passed in an amended form. Again, this may have implications for the way the law will be administered in the period between the introduction of the bill, and its final passage through the Parliament.

The Committee reiterates that it is opposed in principle to retrospective legislation which detrimentally affects rights. The Committee considers that, in principle, legislation which changes the nature of people's access to justice should commence from the date it is passed by the Parliament rather than the date it is introduced into the Parliament. Given the experience of the 1996 bill, the Committee **seeks the Minister's advice** on the reasons for making this bill operative from its introduction rather than its passage, and on the implications of this for Departmental officers and administration should the bill again not be passed, or be passed in an amended form.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

> The Committee has noted that the Bill commences on the date of its introduction into Parliament, rather than its passage. The Committee believes that this 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.
>
> This Bill is largely the same as the Migration Legislation Amendment Bill (No. 2) 1996, which was before the last Parliament. That Bill was introduced on 20 June 1996 and had a commencement date linked to my public announcement on the issue on 19 June 1996.
>
> The present Bill has a commencement date of 3 December 1998, being the date of the Bill's re-introduction into the Senate. This date was chosen to take into account the two-year delay associated with the previous Bill and because there had been no

events between 20 June 1996 and 3 December 1998 that could have required retrospective validation.

I assure the Committee that making the Bill operative from the date of introduction rather than its passage does not have implications for Departmental officers or administration as both the Human Rights Commissioner and the Commonwealth Ombudsman have given undertakings that they will carry out the functions under their respective legislation as if the Bill has been passed.

I trust that these comments will be of assistance to the Committee.

The Committee thanks the Minister for this response, and accepts his assurance that "there were no events between 20 June 1996 and 3 December 1998 that could have required retrospective validation". The Committee also notes the Minister's assurance that making the bill operative from the date of its introduction rather than its passage has no implications for Departmental officers or administration "as both the Human Rights Commissioner and the Commonwealth Ombudsman have given undertakings that they will carry out the functions under their respective legislation as if the Bill has been passed". However, the Committee continues to be concerned at the potential implications of the bill's approach to its commencement.

For example, the Committee notes recent media reports that 95 illegal immigrants had entered Australia or been found in Australian waters at Cairns, Gove, Christmas Island and off the coast of Darwin in February and March of this year. The Committee **would appreciate the Minister's further advice** as to whether this bill is currently being applied to these people, and to the functions of the Human Rights Commissioner and the Commonwealth Ombudsman under their respective legislation in relation to these people.

Pending the Minister's advice, the Committee continues to draw Senators' attention to this 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.

Sales Tax Legislation Amendment Bill (No. 1) 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999,* in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 10 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following acts:

Sales Tax Assessment Act 1992 and ***Sales Tax (Exemptions and Classifications) Act 1992*** to provide exemptions from sales tax for:

- satellites, space launch vehicles and other commercial space equipment; and
- certain goods imported by, or on behalf of, non-Australian Sydney 2000 Olympic and Paralympic Family Members and delegations and participants in the Sydney 2000 Olympics, Paralympic and associated events; and

Sales Tax Assessment Act 1992 to:

- change the sales tax rules for the computer industry; and
- provide that goods imported into Australia under a temporary importation exemption, used in Australia, exported and then re-imported are subject to sales tax at the time of the later importation.

Indeterminate commencement
Subclause 2(2)

Subclause 2(2) provides that a number of items in Schedule 2 are to commence on a day to be fixed by Proclamation, with no further time fixed for automatic commencement or repeal.

The Committee has frequently commented on such provisions in the context of *Drafting Instruction No 2 of 1989* issued by the Office of Parliamentary Counsel. This *Drafting Instruction* states that, as a general rule, a restriction should be placed on the time within which an Act should be proclaimed. The commencement clause should fix either a period or a date after Royal Assent, together with a provision stating that, if no proclamation has been made, the Act either commences at the fixed time, or is to taken to be repealed at that time. The *Drafting Instruction* concludes that clauses providing for commencement by proclamation without the restrictions mentioned above should be used "only in unusual circumstances, where the commencement depends on an event whose timing is uncertain".

Paragraph 3.13 of the Explanatory Memorandum to this bill states that the new rules for exported goods will start from a date to be prescribed "to give exporters time to apply for accreditation". If exporters were given a fixed time after Assent within which to apply for accreditation, then the amendments referred to in subclause 2(2) would commence as suggested within the Drafting Instruction. The Committee, therefore, **seeks the Minister's advice** as to why this commencement provision cannot be made more certain by fixing a time for exporters to apply for accreditation.

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

Relevant extract from the response from the Assistant Treasurer

As you will be aware, subclause 2(2) refers to the commencement date for provisions relating to the export of various computer goods. The provisions will commence on a date to be fixed by Proclamation, which can be at any time after Royal Assent, with no time fixed for automatic commencement or repeal. The Committee asked why it was not possible for the provisions to have a fixed starting date.

The provisions which will commence on Proclamation will form part of the recently enacted rules to combat sales tax evasion in the computer industry. At the moment, the main features of the scheme - the system of accreditation of reputable traders and authorisation of transactions by the Commissioner - only apply to goods (personal computers and related equipment) for use in Australia.

Since exports are exempt from sales tax, there is a fear that dishonest traders may try to exploit this and the proposed provisions will extend accreditation and authorisation to goods for export. It is known that industry members are aware of the possibility of evading tax by abusing the export exemption, and a slight increase in

exports of the relevant goods (not enough to warrant immediate action) has been noticed.

The Committee asked why the start date could not be more certain.

The Government's intention was that the start date should be as flexible as possible. A flexible approach is necessary because of the entrenched nature of the evasion and the ease and speed with which evaders will adopt new methods of evasion. It is hoped that these amendments will act as a deterrent, to discourage this kind of evasion from developing. The deterrent value would be limited if a quick response to an emerging problem was not possible.

Moreover, under these provisions, the potential compliance costs for some exporters could be significant. If the provisions do operate effectively as a deterrent to evasion, it may be possible to defer the start date and associated costs indefinitely. Industry was consulted on the design of the legislation and wanted provisions which targeted evasion but had a limited impact on complying taxpayers and markets. Flexibility as to the starting date of these new rules for exports is in line with the industry's view on the design of the legislation.

Avoiding compliance costs in this case is specially desirable, because it is intended that sales tax will end on 1 July 2000. Even if the legislation had a fixed starting date, that date would not be until several months after Royal Assent, because time would have to be allowed for public education and the processing of applications. The starting date would then be no more than 9 or 10 months before 1 July 2000, and, in the absence of proof of abuse of the export exemption, it would not be cost effective for either the industry or the Tax Office, to incur expenditure to prevent abuse.

It should be noted that there is a similarly open-ended commencement date with respect to the retailer withholding regime, which is another anti-evasion measure aimed at the computer industry.

I trust this information is of assistance to the Committee.

The Committee thanks the Assistant Treasurer for this response.

Therapeutic Goods Legislation Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 1999*, in which it made various comments. The Parliamentary Secretary to the Minister for Health and Aged Care has responded to those comments in a letter dated 11 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Parliamentary Secretary's response are discussed below.

The Committee notes that this bill was passed by the Senate on 11 March 1999, and so these comments are made for the information of Senators.

Extract from Alert Digest No. 3 of 1999

This bill was introduced into the Senate on 17 February 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Health and Aged Care]

The bill proposes to provide a new framework for the regulation and management of complementary medicines by amending the *Therapeutic Goods Act 1989* and the *Therapeutic Goods Amendment Act 1997* to:

- amend key definitions to delineate between foods, complementary medicines and other medicines such as over the counter and prescription medicines;
- establish the existing Complementary Medicines Evaluation Committee as a statutory committee;
- enable sponsors of relatively low-risk products to market those products without delay by enabling the efficient listing of the products on the Register;
- ensure that all sponsors of listable goods must hold evidence to substantiate therapeutic claims made in the market place;
- describe offences and penalties in relation to the publication of certain advertisements in print media; and
- establish a statutory body, the National Drugs and Poisons Schedule Committee.

Insufficient Parliamentary scrutiny
Proposed new subsections 17(5) and (6)

Item 10 of Schedule 1 to the bill proposes to insert a new subsection 17(5) in the *Therapeutic Goods Act 1989*. This subsection enables the Minister, by publishing a *Gazette* notice, to add to the Register of listed goods. Proposed new subsection 17(6) then provides for such a notice to cease to have effect if the regulations are amended to include those goods as either listed or registered goods. The Explanatory Memorandum notes that these amendments should "reduce delays in the marketing of low-risk products by allowing these to be included in the Register as listed goods, rather than registered goods".

However, it appears that one effect of proposed new subsection 17(5) is that it may enable additions to the Register of listed goods to be made without the need to include them in regulations. If so, this may avoid Parliamentary scrutiny of such additions. The Committee, therefore, **seeks the Minister's advice** on whether additions to the Register for listed therapeutic goods under proposed subclause 17(5) will be subject to parliamentary scrutiny.

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

Extract from the response from the Parliamentary Secretary

The Government notes the Committees concern about insufficient Parliamentary scrutiny of proposed subsection 17(5) and (6) of the Act.

The Parliament does not scrutinise the approval of any therapeutic goods except new, low risk complementary medicines substances. This is an historical anomoly. Approval for marketing of prescription medicines, over-the-counter medicines and therapeutic devices is granted following consideration by expert committees and is not subject to disallowable procedures.

These amendments will ensure timely market availability by gazettal of low risk complementary medicines only after they have been evaluated by the expert Complementary Medicines Evaluation Committee.

However, the TGA has undertaken to include the approved substances from the Commonwealth Gazette notices in the Schedules to the *Therapeutic Goods Regulations* every time the Regulations are updated (currently 4-5 times per annum). The scheduling of the gazettal notices will ensure that there is an easily accessible, consolidated list of all gazettals and will, at the same time, provide Parliament with an opportunity to disallow any such schedule.

The Committee thanks the Parliamentary Secretary for this response.

Definitions and interpretation
Proposed new Part 4A

Item 12 of Schedule 1 to the bill proposes to insert a new Part 4A in the *Therapeutic Goods Act 1989*. This new Part, which previously resided in the Therapeutic Goods Regulations, deals with the advertising of designated therapeutic goods.

As a general observation, the Committee notes that it is difficult to understand the meaning of many of these provisions unless the reader has a set of the Therapeutic Goods Regulations close at hand.

Secondly, proposed new section 42B, which contains relevant definitions, defines ***mainstream media*** as "any magazine or newspaper for consumers containing a range of news, public interest items, advertorials, advertisements or competitions". The Committee notes that, in some respects, this definition is broad – possibly extending to magazines containing a range of competitions – and yet does not refer to other common means of advertising therapeutic goods, such as on the Internet.

The definition also refers to "consumers" with no further indication of the products or services likely to be consumed. The definition also includes the word "advertorial", with no further explanation of its meaning. While this term is apparently referred to in guidelines for *Advertising Therapeutic Goods to the Public*, it is appropriate that it should be more formally defined or referred to in the legislation itself.

The Committee is aware of some previous correspondence on these issues between the Senate Standing Committee on Regulations and Ordinances and the Parliamentary Secretary to the Minister for Health and Family Services as incorporated in the Senate *Hansard* on 13 May 1998. However, the Committee **seeks the Minister's advice** on why these drafting issues have not been clarified in introducing this legislation.

Extract from the response from the Parliamentary Secretary

> The Government notes the Committee's concerns regarding definitions of advertising. The definitions for "mainstream media" is taken from the *Therapeutic Goods Regulations* and reflects exactly the definition currently employed.
>
> The term "Mainstream" is intended to encompass only mediums of mass communication, for example newspapers or magazines for national or regional general circulation. "Mainstream" is not intended to apply to internal industry or organisation publications such as newsletters or bulletins for practitioners or targeted membership audiences.
>
> Assurances along these lines will be given in the Senate and the House of Representatives Second Reading Speech.
>
> I also note that the definition of "advertorial' is now included in the Macquarie Dictionary.

The Committee thanks the Parliamentary Secretary for this response, and for the assurances to be given in the Second Reading Speech. The Committee remains of the view that such clarifications are more appropriately a matter for inclusion in the legislation itself, rather than in the material accompanying the legislation.

Strict liability and other offences
Proposed new sections 42C and 42D

Proposed new section 42C deals with offences relating to the publication of non-approved advertisements for therapeutic goods. Proposed subsection 42C(7) provides that these are strict liability offences. However, the Explanatory Memorandum provides no guidance as to the need for imposing strict liability in these circumstances.

Proposed subsection 42C(1) states that section 42C "does not apply to a publisher in respect of an advertisement received by the publisher for publication or insertion in the ordinary course of business". Publishers are instead subject to proposed new section 42D, which creates an offence of 'knowingly or recklessly publishing or inserting a non-approved advertisement'. A ***publisher*** is defined as "a person whose business it is to publish or insert, or to arrange for the publication or insertion of, advertisements in any publication".

Given that publishers are not subject to section 42C, it is not entirely clear to whom that section is intended to apply. For example, an advertising agency is, arguably, within the definition of a publisher (being in the business of arranging for the publication of advertisements) and so outside the scope of section 42C. Individuals may publish advertisements, but these are likely to be classified advertisements only.

The Committee therefore, **seeks the Minister's advice** on why proposed section 42C creates offences of strict liability, and on those persons who are likely to be subject to those offences.

Pending the Minister's advice, the Committee draws Senators' attention to this 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 the response from the Parliamentary Secretary

The Government also notes your concerns regarding the strict liability nature of penalty provisions for advertising breaches.

Under the Therapeutic Goods Regulations, advertisements placed in mainstream print media are required to be cleared by the Secretary before they may be published. The Secretary has, under the terms of the Regulations, delegated this function to the Proprietary Medicines Association of Australia (PMAA) and the Complementary Healthcare Council of Australia (CHC). The offences and penalties relating to advertisements in mainstream print media that are required to be pre-cleared by the CHC or the PMAA, have been moved from the Regulations into the *Therapeutic Goods Act 1989.*

The offence provisions in the new Section 42C are identical to those that are currently in the *Therapeutic Goods Regulations* at regulation 5D and 5E.

The inclusion of these offence and penalty provisions in the Act will enhance the pre-clearance scheme. Under the existing Regulations the maximum penalty that could be imposed, in accordance with Commonwealth government legal policy as reflected in section 63 of the Act, is 10 penalty units ($1,000). While this penalty was recognised as inappropriate at the time, it was considered more important that the offences be included in order to lend some support to the pre-clearance decision making of the (then) Nutritional Foods Association of Australia (NFAA) and PMAA.

The offences and penalty provisions have been moved from the Regulations into the Act, and penalties have been increased for two key reasons:

(a) to lend greater support to industry decisions and consumer confidence, though the CHC and PMAA clearance process. Moving the offences and penalties to

the Act reflects the importance of the provisions and provides greater recognition to the role of the CHC and PMAA in assessing the appropriateness of advertisements for publication in mainstream media; and

(b) to achieve a degree of consistency with similar provisions in the *Broadcasting Services Act 1992*.

The *Broadcasting Services Act* (BSA) describes the offences and penalties in relation to the broadcast of advertisements in electronic media under a similar pre-clearance scheme. A similar offence for publishing advertisements that are in breach of the *Therapeutic Goods Advertising Code* under the *Broadcasting Services Act 1992* attracts a penalty of $200,000. By contrast, the maximum penalty available under the *Therapeutic Goods Regulations* is $1,100.

Penalties should as far as possible be consistent across Commonwealth legislation ("like penalties for like offences"). While the proposed new penalties for inclusion in the amendment Bill are still significantly less than those in the *Broadcasting Services Act*, they fit within the penalty levels imposed under the Act and the Attorney General's Department have advised that, whilst still low, they are acceptable.

The Attorney General's Department has advised that, the offences should attract strict liability in view of the fact that the penalties are significantly lower than the penalties currently applying under the *Broadcasting Services Act* for comparable offences. This also properly reflects the serious nature of a breach of the *Therapeutic Goods Advertising Code* applying to medicines, which in part is designed to discourage self diagnosis and self-treatment of serious and major medical conditions.

I hope that these explanations assist the Committee and trust that these amendments, introduced mainly at the behest of industry and consumer groups, will see smooth passage through Parliament and implementation.

The Committee thanks the Parliamentary Secretary for this response. While the transposition of these provisions from the regulations to the bill is clearly a worthwhile measure, this seems to the Committee to have been an opportunity lost to clarify some of the drafting and other issues. For example, those persons or organisations to whom section 42C is intended to apply remain unclear.

For this reason, the Committee continues to draw Senators' attention to this 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

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH 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 H Coonan
Senator T Crossin
Senator J Ferris
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 1999

The Committee presents its Fifth Report of 1999 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 (Anti-dumping Amendments) Bill 1998

Customs Tariff (Anti-Dumping) Amendment Bill (No. 2) 1998

Health Legislation Amendment Bill (No. 4) 1998
(new citation: Health Legislation Amendment Bill (No. 2) 1999)

National Environment Protection Measures (Implementation) Act 1998

Quarantine Amendment Bill 1998

Radiocommunications Legislation Amendment Bill 1999

Customs (Anti-dumping Amendments) Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 25 February 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Customs Act 1901* to:

- provide a special approach for determining normal value of allegedly dumped goods from countries that are in the process of transition to a market economy when it is established that the selling price of those goods is subject to government control;
- provide a new methodology for determining the normal value of allegedly dumped goods from countries that are in the process of transition to a market economy and a raw material input into the goods which accounts for more than 10 per cent of the costs of producing or manufacturing the goods is supplied by a State owned enterprise;
- clarify provisions which relate to the manner in which interim dumping and countervailing duties are collected; and
- ensure consistency with amendments implemented by the *Customs Legislation (Anti-dumping Amendments) Act 1998*.

Retrospective effect
Subclause 2(3)

By virtue of subclause 2(3) of the bill, a number of the amendments proposed are to commence retrospectively on 1 January 1993. The Explanatory Memorandum notes that these amendments all involve "clarifying" the collection of interim dumping

and countervailing duties. An interim duty regime was introduced by the *Customs Legislation (Anti-Dumping Amendments) Act 1992*, which commenced on 1 January 1993. Interim duties have been collected since that date in accordance with the intention of that regime and these amendments are designed to ensure "that approximately $12 million in interim duties collected since 1 January 1993 is not subject to legal challenge". The Explanatory Memorandum also states that the amendments "will not require importers to pay an amount of dumping duty beyond that which has previously been demanded".

Provisions in a similar form were previously commented on by the Committee in its consideration of the Customs Legislation (Anti-Dumping) Amendment Bill 1997 (see *Nineteenth Report of 1997*). In response to a request from the Committee for advice, the then Minister for Customs and Consumer Affairs noted:

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.

The Committee thanked the Minister for this response. Approximately 16 months have passed since that response was received. The Committee, therefore, **seeks the Minister's advice** as to whether any cases have arisen since the bill was last introduced (or are pending) which might be affected by the passage of these proposed amendments.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

I refer to the Committee's comments in Alert Digest No. 1 of 1999 in relation to subclause 2(3) of the Customs (Anti-Dumping Amendments) Bill 1998 and subclause 2(1) of the Customs Tariff (Anti-Dumping) Amendment Bill (No. 2) 1998.

These provisions were also contained in the Customs Legislation (Anti-Dumping) Amendment Bill 1997 and Customs Tariff (Anti-Dumping) Amendment Bill 1997 ("the 1997 Bills"). 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 1997 Bills lapsed upon prorogation of Parliament.

During 1997, the Committee sought advice on whether the relevant provisions of the 1997 Bills had been the subject of judicial interpretation, and whether there were any cases pending which would be affected by the passage of the proposed amendments. The former Minister for Customs and Consumer Affairs advised the Committee that there were no such cases.

Since it has been approximately 16 months since that reply was given, the Committee has sought my advice on whether any cases have subsequently arisen, or are pending, since the 1997 Bills were introduced, and which might be affected by the passage of these proposed amendments.

I again confirm that the relevant provisions have not been the subject of judicial interpretation since the last response was provided, and there are no cases currently pending which would be affected by the passage of the proposed amendments.

I trust this meets the concerns of the Committee.

The Committee thanks the Minister for this response.

Customs Tariff (Anti-Dumping) Amendment Bill (No. 2) 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 25 February 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Customs Tariff (Anti-Dumping) Act 1975* to clarify provisions of that Act and the *Customs Act 1091* relating to the manner in which interim dumping and countervailing duties are collected.

Retrospective effect
Subclause 2(1)

By virtue of subclause 2(1) of the bill, a number of the amendments proposed are to commence retrospectively on 1 January 1993. As noted above (with reference to the Customs (Anti-Dumping Amendments) Bill 1998), these amendments are said to involve "clarifying" the collection of interim dumping and countervailing duties, and ensuring that the collection of interim duties since 1 January 1993 is not potentially subject to legal challenge.

A Ministerial explanation involving provisions in a similar form was previously accepted by the Committee in its examination of the Customs Tariff (Anti-Dumping) Amendment Bill 1997 (see *Nineteenth Report of 1997*). Nevertheless, the Committee notes that approximately 16 months have passed since that explanation was received. The Committee, therefore, **seeks the Minister's advice** as to whether any cases have arisen since the bill was last introduced (or are pending) which might be affected by the passage of these proposed amendments.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

I refer to the Committee's comments in Alert Digest No. 1 of 1999 in relation to subclause 2(3) of the Customs (Anti-Dumping Amendments) Bill 1998 and subclause 2(1) of the Customs Tariff (Anti-Dumping) Amendment Bill (No. 2) 1998.

These provisions were also contained in the Customs Legislation (Anti-Dumping) Amendment Bill 1997 and Customs Tariff (Anti-Dumping Amendment Bill 1997 ("the 1997 Bills"). 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 1997 Bills lapsed upon prorogation of Parliament.

During 1997, the Committee sought advice on whether the relevant provisions of the 1997 Bills had been the subject of judicial interpretation, and whether there were any cases pending which would be affected by the passage of the proposed amendments. The former Minister for Customs and Consumer Affairs advised the Committee that there were no such cases.

Since it has been approximately 16 months since that reply was given, the Committee has sought my advice on whether any cases have subsequently arisen, or are pending, since the 1997 Bills were introduced, and which might be affected by the passage of these proposed amendments.

I again confirm that the relevant provisions have not been the subject of judicial interpretation since the last response was provided, and there are no cases currently pending which would be affected by the passage of the proposed amendments.

I trust this meets the concerns of the Committee.

The Committee thanks the Minister for this response.

Health Legislation Amendment Bill (No. 4) 1998

(New citation: Health Legislation Amendment Bill (No. 2) 1999)

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Minister for Health and Aged Care has responded to those comments in a letter dated 23 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the following Acts:

National Health Act 1953 to:

- enable the Minister to determine the maximum percentage of discount that a health fund can offer contributors, based on the administrative savings of the health fund;
- enable health funds to offer loyalty bonus schemes to contributors in recognition of the period of time over which they have paid premiums;
- allow for waiting periods to be extended for certain conditions, ailments or illnesses;
- allow health funds to cover the Pharmaceutical Benefits Scheme patient co-payment for prescribed pharmaceutical benefits for in-hospital treatment;
- allow procedures which would otherwise have been performed in a hospital or day hospital facility to be performed in an "approved procedures facility";
- allow the Minister to specify which Medicare Benefit Schedule items are procedures facility";

- create a new class of benefit payable by health funds to cover specialist medical services;

- establish separate provisions to deal with health fund rule changes which relate to changes in premium rates and all other rule changes;

- enable the Minister to disallow any given rule changes on two additional grounds; and

- transfer the rates of contribution rule change provisions from the Minister to the Private Health Insurance Administration Council; and

National Health Act 1953 and ***Health Insurance Act 1973*** to make consequential amendments.

Commencement
Subclauses 2(4) and (5)

In general terms, Schedule 3 of this bill contains provisions which broaden the Minister's power to monitor changes to health fund rules relating to premiums. Items 8 to 15 of this Schedule contain provisions which, within two years, transfer the premium monitoring provisions from the Minister to the Private Health Insurance Administration Council. Items 16 to 18 of this Schedule contain provisions which "at an appropriate time" increase the independence and flexibility that health funds have with respect to premium increases.

Specifically, subclause 2(4) of the bill provides that the amendments proposed by items 8 to 15 are to commence on a day to be fixed by Proclamation that occurs after, but not more than 24 months after, the day on which the items referred to in subsection 2(3) commence. Subclause 2(5) provides that the amendments proposed by items 16 to 18 are to commence on a day to be fixed by proclamation that occurs after, but not more than 24 months after, the day on which the items referred to in subsection (4) commence.

In effect, these provisions are to commence at a time that is fixed by reference to the date of Assent. To that extent, their commencement is not a matter of Executive discretion, which has often been a matter of concern to the Committee. However, the Explanatory Memorandum provides no reason for the considerable length of time between Assent to the bill and the coming into force of these particular provisions (up to 48 months). In this respect, the Committee notes that *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel, refers to the desirability of an explanation where a commencement period longer than 6 months after Royal Assent is chosen. The Committee, therefore, **seeks the Minister's advice** on the reasons for the length of time provided for before proclaiming the commencement of these provisions.

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

Extract from the response from the Minister

These subsections deal specifically with the commencement of provisions transferring the 'rates of contribution' rule change powers at Schedule 3 from myself as Minister to the Private Health Insurance Administration Council.

As the Explanatory Memorandum explains, the intention of the provisions at Schedule 3 is to provide increased independence and flexibility to health funds with respect to their rates of contribution rule changes. These administrative changes are consistent with the overall direction of the Bill to improve the efficiency of the private health insurance industry and make private health insurance more attractive to consumers by enabling greater product flexibility. These provisions are also consistent with this Government's desire to minimise its regulatory impact on the private health insurance sector.

The transfer of these functions to PHIAC will make it's role more consistent with other government regulatory prudential organisations and regulatory bodies in general insurance. These changes in no way limit the Government's primary responsibility as policy maker.

In respect of the specific subsections in question, my Department in drafting the Bill had consideration for the following factors:

- fiscal certainty for private health insurance funds;
- the annual cycle for the application and consideration of rates of contribution rule changes; and
- the need for significant consultation with industry prior to the transfer of the provisions.

I hope this information is of assistance to the Committee.

The Committee thanks the Minister for this response, and notes the need for fiscal certainty for health funds and consultation with the industry prior to the transfer of functions to PHIAC. However, the Minister's response does not make clear why a period of up to 48 months may be required before the legislation fully commences. The Committee, therefore, **seeks the Minister's further advice** on the need for this extended period of time before the bill is to fully commence.

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

National Environment Protection Measures (Implementation) Act 1998

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 11 of 1998*, in which it made various comments. The Minister for Environment and Heritage has responded to those comments in a letter dated 30 March 1999. It is noted that this bill received Royal Assent on 21 December 1998, however, extracts from the *Alert Digest* and the Minister's response are discussed below for the information of Senators. A copy of the letter is attached to this report.

Extract from Alert Digest No. 11 of 1998

This bill was introduced into the Senate on 25 November 1998 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill proposes to provide for the implementation of national environment protection measures (NEPMs) in respect of certain activities by or on behalf of the Commonwealth and Commonwealth authorities by:

- extending the application of certain provisions of applied State laws to Commonwealth activities in Commonwealth places;
- extending the application of certain provisions of States or Territory laws to Commonwealth activities;
- making regulations;
- implementing environmental audits and environment management plans;
- providing for Administrative Appeals Tribunal review of any reviewable decisions made under an applied provision of an applied State law or applied provision of a State or Territory law;
- providing that certain persons must not disclose information obtained during their presence while searching premises occupied by the Commonwealth or a Commonwealth authority;

- providing that regulations may declare premises to be ***exempt premises*** in relation to premises the Environment Minister considers to be of national interest and to which access into, or search of, should be restricted or prohibited;

- enabling the Commonwealth or a Commonwealth authority to pay a fee or charge to a State or Territory or a State or Territory authority in certain circumstances;

- enabling the Environment Minister to make an arrangement with an appropriate Minister of a State or Territory in relation to the exercise of a power, or the performance of a duty or function by a State or Territory, a State or Territory authority or by one of their officers;

- requiring the preparation and tabling of an annual report on the implementation of NEPMs; and

- applying the Criminal Code to certain provisions.

Insufficient parliamentary scrutiny
Subclauses 11(2), 12(2), 16(2) and 17(2)

By virtue of subclauses 11(2), 12(2), 16(2) and 17(2), the Environment Minister may enable provisions of State and Territory law to apply, or not apply, to the Commonwealth or its authorities following notification in the *Gazette*. The exercise of this power by the Minister is essentially legislative in that a *Gazette* notice will determine whether or not the Commonwealth is subject to the legislative provisions of a State or Territory.

The exercise by a Minister of what appears to be a legislative power would ordinarily be carried out by a disallowable instrument rather than by *Gazette* notice. The Explanatory Memorandum makes no further reference to the matter. The Committee, therefore, **seeks the Minister's advice** on the reasons why declarations under subclauses 11(2), 12(2), 16(2) and 17(2) are not disallowable.

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

Relevant extract from the response from the Minister

During passage through the Senate, several amendments were made. Included in those amendments were clauses brought to our attention through your letter.

Relevant amendments were:

- Subclauses 11(2), 12(2) and 16(2) were amended to include an additional subclause stating:
  "Within 15 sitting days after making a declaration for the purposes of subsection (1), the Minister must cause a copy of the declaration to be tabled in each House of Parliament."

  The effect of these amendments will be to allow Parliamentary Scrutiny of any decision made by the Minister in relation to these subclauses.

- In relation to clause 11, exemption from the application of NEPMs to Commonwealth activities in Commonwealth places can only occur if an alternative Commonwealth regime is already in place which will achieve the environmental outcomes specified in the NEPM. Further, exemptions will only occur either because the activity involves a specified matter of national interest or for reasons of administrative efficiency.

- Clause 12 has additional requirements under subclauses (4) and (5) for regulations to be made and for relevant State officers to be involved in the preparation of those regulations. Regulations are, of course, disallowable, and would fulfil the committee's requirements in this matter.

- In relation to subclause 17(2) no additional subclause was added. Discussion in the Senate at the time of the Second Reading focussed on the range of public documentation available, including the tabling of National Environment Protection Council Annual Reports, which would make public the decisions of the Minister in making declarations that State or Territory law implementing NEPMs is to apply to the Commonwealth and its authorities.

Inadmissible audit report
Clause 28

Clause 28 of the bill provides that a report of an environmental audit, and any information obtained as a direct or indirect result of the making of that report, is not admissible in evidence in any civil or criminal proceedings against the Commonwealth or its authorities if the audit relates to activities carried on or to be carried on by the Commonwealth or the authority. The Explanatory Memorandum provides no reason for the inclusion of this provision. The Committee, therefore, **seeks the Minister's advice** on the reasons why an environmental audit report should not be admissible in proceedings against the Commonwealth.

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

Relevant extract from the response from the Minister

- Clause 28 was deleted in full.

I apologise for the delay in responding to the Standing Committee for the Scrutiny of Bills.

The Committee thanks the Minister for this response and for his advice regarding the amendments moved.

Quarantine Amendment Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 10 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *Quarantine Act 1908* to:

- extend the scope of quarantine to the environment and economic activities;
- require consultation with the Minister for Environment in certain circumstances;
- amend provisions relating to the managed risk approach;
- clarify pre-arrival reporting obligations;
- provide greater flexibility in relation to where a vessel is to perform quarantine;
- bring the detail of the Quarantine (Plants) Regulations into the Act and allow for the destruction of plants grown from plants that have been ordered into quarantine;
- provide that quarantine officers may be accompanied by animals and use the animal to assist them in the exercise of certain powers;
- enable an emergency response not only in relation to diseases that have been declared by proclamation to be quarantinable diseases, but also to unproclaimed diseases or pests;

- provide that offending goods can be required to be exported from Australia in order to encourage compliance with Australia's quarantine requirements and to keep quarantine issues off-shore;

- introduce a system of rectification enabling importers to rectify deficiencies that might otherwise cause their goods to be seized and disposed of;

- enable a consistent approach in relation to the special risks associated with overseas vessels and aircraft travelling in the Special Quarantine Zone and the Protected Zone;

- provide a framework for the issuing, revoking and suspension of approvals for commercial quarantine premises

- clarify that compliance agreements can be entered into in relation to procedures under the Act, regulations, proclamations, conditions on permits or approvals and in connection with activities carried out in the performance of functions related to quarantine;

- redraft offence provisions so elements of an offence are distinguished and the rules in relation to mental and fault elements, the burden of proof and evidentiary provisions apply; and

- make miscellaneous and technical amendments.

Non-reviewable subordinate legislation
Schedule 1, items 51, 60, 110 and 141

Schedule 1 to this bill extensively amends the *Quarantine Act 1908*. Item 51 amends the Act to define a quarantinable pest as any pest declared by the Governor-General, by Proclamation, to be so declared. Item 60 amends the Act to enable the Minister to declare Special Quarantine Zones. Item 110 refers to Proclamations exempting certain animals or plants from import prohibitions. Item 141 inserts two new provisions dealing with entry by air from certain proclaimed places, and aircraft subject to quarantine landing at unauthorised places.

Each of these instruments is apparently legislative in character, and yet no provision seems to have been made for Parliamentary scrutiny of them. Therefore, the Committee **seeks the Minister's advice** on the reasons for exempting the above subordinate legislation from Parliamentary scrutiny. The Committee also **seeks the Minister's advice** on the feasibility of tabling, in each House of the Parliament, an annual report indicating the frequency with which such Proclamations and Declarations have been made, and outlining in broad terms the circumstances which have prompted their use.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

I appreciate the opportunity to provide advice to your Committee on the concerns raised on a number of items in Schedule 1 of the *Quarantine Amendment Bill 1998.*

In relation to the Committee's concerns about non-reviewable subordinate legislation I would like to assure the Committee that, although proclamations under the *Quarantine Act 1908* are not disallowable instruments, my Department tables proclamations and accompanying explanatory statements as a matter of courtesy. I undertake that the Department will continue this practice. In addition, my Department will provide details in its Annual Report of any Quarantine Proclamations made, and of any declarations of Special Quarantine Zones made by the Minister during the period covered by each Report.

I understand that, based on the advice of the Attorney-General's Department, the strict liability offences identified by the Committee are declaratory of the existing law. I confirm that the reason for including an express specification is to bring the offences into conformity with the *Criminal Code*. I consider it necessary to continue to impose strict criminal liability in these situations in order to maintain the integrity of the barrier controls which are so important to Australia's quarantine security.

I enclose a detailed item by item consideration of the issues raised in the Alert Digest for your Committee's attention.

I hope that this response is of assistance to the Committee in allaying its concerns.

Item 51

(a) Reasons for exempting Item 51 from Parliamentary Scrutiny.

This item reflects an existing premise of the *Quarantine Act 1908* (the Act) which is that the Governor General can proclaim diseases of humans, animals and plants. The relevant existing provisions are in sub-section 5(1) of the Act. They are:

"Disease" *in relation to animals, means glanders, farcy, pleuro-pneumonia contagious, foot and mouth disease, rinderpest, anthrax, Texas or tick fever, hog cholera, swine plague, mange, scab, surra, dourine, rabies, tuberculosis, actinomycosis, variola ovina, or any disease, parasite or pest declared by the Governor-General by proclamation to be a disease affecting animals;*
"Disease", *in relation to plants, means any disease, pest or plant declared by the Governor-General by proclamation, or by the Minister by notice published in the Gazette, to be a disease or pest affecting plants or a noxious plant;*

"Quarantinable disease" *means plague, cholera, yellow fever, typhus fever, or leprosy, or any disease declared by the Governor-General, by proclamation, to be a quarantinable disease;*

The *Quarantine Amendment Bill 1998* (the Bill) (Items 16, 17, 49, 51 and 94)) seeks to both reflect modern practices in regard to, and simplify the way the Act deals with, quarantinable diseases, diseases in relation to animals and diseases in relation to plants. The Bill reduces the definitions from three to two: q*uarantinable pest* will apply to plants, and q*uarantinable disease* will apply to animals and humans. In addition, the Bill provides that the only mechanism by which these diseases and pests may be declared is by proclamation. Currently the Act allows for three possible mechanisms: by the Act itself which lists, inter alia, farcy, foot and mouth disease, mange, plaque, yellow fever; by notice in the Gazette for plant diseases, and by proclamation. In practice, pests and diseases are declared by proclamation.

(b) Feasibility of tabling in each House of Parliament, an annual report indicating the frequency with which such Proclamations and Declarations have been made, outlining in broad terms the circumstances which have prompted the use.

My Department tables proclamations and accompanying explanatory statements as a matter of courtesy and I undertake that my Department will continue to do this. My Department will also detail in its Annual Report all proclamations made during the period covered by the Report.

Item 60.

(a) Reasons for exempting Item 60 from Parliamentary Scrutiny.

Item 60 has been introduced a light-handed alternative to the existing powers of the Governor General under sub-section 13(1) of the Act. Under sub-section 13(1) the Governor-General may, by proclamation:
(h) declare any part of the Commonwealth or of the Cocos Islands in which any quarantinable disease or any disease or pest affecting animals or plants exists, or is suspected to exist, to be a quarantine area; or
(i) declare that any vessel, persons, animals, plants, or goods in any quarantine area, or in any part of the Commonwealth or of the Cocos Islands in which any quarantinable disease, or any disease or pest affecting plants or animals, exists, or is suspected to exist, shall be subject to quarantine.

The Governor-General has proclaimed an area between the Torres Strait Protected Zone and Australia to be a quarantine area to enable appropriate measures to be taken to protect Australia from pest and disease incursions, such as papaya fruit fly and melon fly, from the Torres Strait. The use of these powers in relation to the Torres Strait is considered to be appropriate to provide protection against the possible introduction of pests and diseases affecting humans, animals or plants which may be carried into Australia from the Protected Zone.

However, there may be occasions when an area needs to be targetted for special quarantine attention in circumstances which do not warrant the full range of controls applicable if the Governor-General makes declarations under paragraphs 13(1)(h) and (i) of the Act. In order to accommodate this situation, the *Quarantine Amendment Bill 1998* introduces the concept of a *Special Quarantine Zone*. The declaring of a *Special Quarantine Zone* attracts only limited barrier controls under

the Act, such as the requirement to produce arrival reports and to answer questions, and the power to examine goods (Items 159 and 242).

Declaration of a Special Quarantine Zone by the Minister, rather than by the Governor General, is considered to be an appropriate way to provide the flexibility to deal with a situation which requires an immediate but relatively low level response.

(b) Feasibility of tabling in each House of Parliament, an annual report indicating the frequency with which such proclamations and declarations have been made, outlining in broad terms the circumstances which have prompted the use.

My Department will indicate in its annual report whether any such declarations are made, and outline in broad terms the circumstances which have prompted the use.

Item 110

(a) Reasons for exempting Item 110 from Parliamentary Scrutiny.

This item applies the same mechanism to exempt traditional inhabitants from prohibitions on the removal of goods from an area as the mechanism which currently applies in the *Quarantine Act 1908* (the Act) to impose the removal prohibition; that is, by proclamation. This item is also consistent with existing provisions under section 13 of the Act which allow for the imposition of prohibitions on importations and for the exemption of traditional inhabitants from prohibitions on importations by proclamation.

(b) Feasibility of tabling in each House of Parliament, an annual report indicating the frequency with which such proclamations and declarations have been made, outlining in broad terms the circumstances which have prompted the use.

My Department tables proclamations and accompanying explanatory statements as a matter of courtesy and I undertake that my Department will continue to do this. My Department will also detail in its Annual Report all proclamations made during the period covered by the Report.

Item 141

(a) Reasons for exempting Item 141 from Parliamentary Scrutiny.

Item 141 substantially reflects the existing section 20B, and 20C of the *Quarantine Act* 1908 (the Act). In relation to the new ***section 20B*** the key differences are that it is drafted in a more modern style, takes account of the new definition of aircraft, *commander* and *operator* and sets out the offence and penalty provision in accordance with current Commonwealth policy.

In relation to new ***section 20C,*** the key differences are that it is drafted in a more modern style, takes account of the new definition of *aircraft* and provides that the Director of Quarantine may give directions as to how an aircraft, a person, an animal, a plant or other goods that have been landed at a place that is not a *landing place*, are to be dealt with rather than providing for detailed prescription in regulations.

Subsection 20C(3) specifies to whom the direction may be given and subsection 20(5) provides that it is an offence not to comply with a direction. The section does not apply where a person has been granted permission under section 20AA of the Act as long as any condition attached to such a permission has been complied with.

Section 20C is an enabling provision to empower the Director of Quarantine to give directions to an individual person. The administrative nature of the power in section 20C is highlighted by sub-section 20C(3) which specifies the person to whom the direction may be given as follows:

(3) A direction under subsection (2) may be given, as appropriate, to:
(a) the operator or commander of the aircraft; or
(b) any person who is on board the aircraft or was on board it when it landed; or
© the importer of, or any person in control of, the animal, plant or other goods.

(b) Feasibility of tabling in each House of Parliament, an annual report indicating the frequency with which such Proclamations and Declarations have been made, outlining in broad terms the circumstances which have prompted the use.

I believe that a direction under new section 20C would be an administrative, not a legislative activity. In relation to new section 20B, my Department tables proclamations and accompanying explanatory statements as a matter of courtesy and I undertake that my Department will continue to do this. My Department will also detail in its Annual Report all proclamations made during the period covered by the Report.

The Committee thanks the Minister for this comprehensive response.

Strict liability offences
Schedule 1, items 145, 153, 183, 242, 259, 263, 267 and 269

Items 145, 153, 183, 242, 259, 263, 267 and 269 of Schedule 1 to the bill specify that offences are to be offences of strict liability. While the Committee normally seeks advice about the creation of such offences, in each of the cases referred to above it appears that the specification of the offence as one of strict liability is simply declaratory of the existing law. The reason for including an express specification would seem to be that item 312 of Schedule 1 applies Chapter 2 of *Criminal Code* to all offences against the Principal Act. Chapter 2 provides that offences are of strict liability only when expressly specified.

Nevertheless, the Committee **seeks the Minister's assurance** that the amendments noted above are no more than declaratory of the existing law. If so, the Committee also **seeks the Minister's advice** on why it is thought necessary to continue to impose strict criminal liability in the situations referred to above.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

Item 145

(a) Is the amendment is no more than declaratory of existing law?

The form of offences in the current *Quarantine Act 1908* (the Act) makes it difficult to determine with absolute certainty whether they were intended to be strict liability or fault element offences. However, the advice of the Attorney-General's Department) is that the existing section 21 of the Quarantine Act 1908 can be considered to be a strict liability offence. On the basis of this advice, I am of the view that Item 145 is declaratory of existing law.

(b) If so, why is it necessary to continue to impose strict criminal liability in this case?

Item 145 relates to the section dealing with the display of quarantine signals. The display of quarantine signals is an important element of barrier control. It is crucial for ships and aircraft which are subject to quarantine to comply with this requirement so that their quarantine status is unambiguous. The imposition of strict liability in such cases sends clear messages about the high standard of compliance Australia expects in maintaining the integrity of its quarantine barriers.

Item 153

(a) Is the amendment is no more than declaratory of existing law?

The form of offences in the current *Quarantine Act 1908* (the Act) makes it difficult to determine with absolute certainty whether they were intended to be strict liability or fault element offences. However, the advice of the Attorney-General's Department is that the existing section 24 of the Act can be considered to be a strict liability offence. On the basis of this advice, I am of the view that Item 153 is declaratory of existing law.

(b) If so, why is it necessary to continue to impose strict criminal liability in this case?

Item 153 relates to the section dealing with unauthorised persons boarding or approaching vessels or installations that are subject to quarantine or display the quarantine signal. The control of persons who come into contact with vessels or installations which have not yet received quarantine clearance is an important element of barrier control. The imposition of strict liability in such cases sends clear messages about the high standard of compliance Australia expects in maintaining the integrity of its quarantine barriers.

Item 183

(a) Is the amendment is no more than declaratory of existing law?

The form of offences in the current *Quarantine Act 1908* (the Act) makes it difficult to determine with absolute certainty whether they were intended to be strict liability or fault element offences. However, the advice of the Attorney-General's Department is that the existing offence in section 38 of the Act can be considered to be a strict liability offence. On the basis of this advice, I am of the view that Item 183 is declaratory of existing law.

(b) If so, why is it necessary to continue to impose strict criminal liability in this case?

Item 183 relates to section dealing with the requirement of a master of a vessel or installation to deliver relevant papers to a quarantine officer on request. These papers, such as the ship's passenger list, manifest, log and journal provide information on details such as where the ship has come from, where passengers came aboard and where ballast water was loaded. This information is crucial to enable quarantine officers to assess the disease and pest status of the ship and to decide whether further inspection is necessary. Without this information, quarantine officers would be unable to maintain effective barrier controls. The imposition of strict liability in such cases sends clear messages about the high standard of compliance Australia expects in maintaining the integrity of its quarantine barriers.

Item 242

(a) Is the amendment is no more than declaratory of existing law?

The form of offences in the current *Quarantine Act 1908* (the Act) makes it difficult to determine with absolute certainty whether they were intended to be strict liability or fault element offences. However, the advice of the Attorney-General's Department is that the existing offence in section 70A(3) of the Act can be considered to be a strict liability offence. On the basis of this advice I am of the view that Item 242 is declaratory of existing law.

(b) If so, why is it necessary to continue to impose strict criminal liability in this case?

Item 242 deals with the section relating to the power to search and examine certain goods, and ask questions of persons associated with those goods. It is important that quarantine officers be fully informed about the goods so that they can make an assessment of their quarantine risk and take effective measures to keep the risks offshore (for instance, to prevent the movement of fruit infested with papaya fruit fly from the Torres Strait Protected Zone to Australia).

Item 259

(a) Is the amendment is no more than declaratory of existing law?

The form of offences in the current *Quarantine Act 1908* (the Act) makes it difficult to determine with absolute certainty whether they were intended to be strict liability or fault element offences. However, the advice of the Attorney-General's Department is that the existing offences in sub- sections 72 (2), (3), (4) and (6) of the Act can be considered to be a strict liability offences. On the basis of this advice, I am of the view that Item 259 is declaratory of existing law.

(b) If so, why is it necessary to continue to impose strict criminal liability in this case?

Item 259 deals with the section relating to the power of a quarantine officers to assess the infection status of persons on or in the vicinity of vessels and installations and to require such persons to undergo medical examinations if necessary. This is an important barrier control in respect of the management of human diseases.

Item 263

(a) Is the amendment is no more than declaratory of existing law?

The form of offences in the current *Quarantine Act 1908* (the Act) makes it difficult to determine with absolute certainty whether they were intended to be strict liability or fault element offences. However, the advice of the Attorney-General's Department is that the existing offence in section 73(3) of the Act can be considered to be a strict liability offences. On the basis of this advice, I am of the view that Item 263 is declaratory of existing law.

(b) If so, why is it necessary to continue to impose strict criminal liability in this case?

Item 263 deals with the section relating to the power of a quarantine officer to make enquiries of the master or medical officer of a vessel or installation about sickness on the vessel or the sanitary condition of the vessel and to make enquiries of a person subject to quarantine about his health or liability to infection. It is important for effective barrier controls that persons cooperate in responding to the quarantine officers enquiries. The imposition of strict liability in such cases sends clear messages about the high standard of compliance Australia expects in maintaining the integrity of its quarantine barriers.

Item 267

(a) Is the amendment is no more than declaratory of existing law?

The form of offences in the current *Quarantine Act 1908* (the Act) makes it difficult to determine with absolute certainty whether they were intended to be strict liability or fault element offences. However, the advice of the Attorney-General's Department is that the existing offence in section 74(2) of the Act can be considered

to be a strict liability offences. On the basis of this advice, I am of the view that Item 267 is declaratory of existing law.

(b) If so, why is it necessary to continue to impose strict criminal liability in this case?

Item 267 deals with the section relating to the affixing of quarantine notices on vessels or goods subject to quarantine, and on quarantine stations and quarantine areas. For the creation and maintenance of an effective quarantine barrier, it is crucial that appropriate notices can be displayed The section provides that it is an offence for unauthorised persons to remove or deface quarantine notices. The imposition of strict liability in such cases sends clear messages about the high standard of compliance Australia expects in maintaining the integrity of its quarantine barriers.

Item 269

(a) Is the amendment is no more than declaratory of existing law?

The form of offences in the current *Quarantine Act 1908* (the Act) makes it difficult to determine with absolute certainty whether they were intended to be strict liability or fault element offences. However, the advice of the Attorney-General's Department is that the existing offence in section 74AA of the Act can be considered to be a strict liability offences. On the basis of this advice, I am of the view that Item 269 is declaratory of existing law.

(b) If so, why is it necessary to continue to impose strict criminal liability in this case?

Item 269 deals with the section requiring that the master of a ship or aircraft travelling to Australia provides notice to all persons onboard of Australia's quarantine measures. The conveying of this information is crucial to minimising quarantine infringements by the large number of tourists and other visitors travelling to Australia each year. The imposition of strict liability in such cases sends clear messages about the high standard of compliance Australia expects in maintaining the integrity of its quarantine barriers.

The Committee thanks the Minister for this comprehensive response, and notes his observation that "the form of offences in the current *Quarantine Act 1908* (the Act) makes it difficult to determine with absolute certainty whether they were intended to be strict liability or fault element offences". From this observation, it would seem that neither the Department of Agriculture, Fisheries and Forestry nor the Attorney-General's Department is fully aware of the intention in the mind of the original framers of this legislation. In these circumstances, it could be said that those who have been required to comply with these aspects of the legislation since 1908 have been required to comply with legislation that is less than certain.

Radiocommunications Legislation Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 1999*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 23 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 3 of 1999

This bill was introduced into the House of Representatives on 18 February 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Radiocommunications Act 1992* and the *Radiocommunications Taxes Collection Act 1983* to:

- allow the Australian Communications Authority (ACA) to regulate communications with space objects;
- enable the ACA to regulate reflectors as radiocommunications transmitters or radiocommunications receivers;
- enable the ACA and the Australian Broadcasting Authority to make an agreement allowing the ACA to issue radiocommunications licences in the broadcasting services bands;
- allow the Minister to direct the ACA to limit to zero the amount of spectrum that a specified person may acquire;
- require the ACA to include a condition in spectrum licences which ensures that Australian tax applies to income, profits or gains which are attributable to a spectrum licence;
- require that a frequency assignment certificate states that correct frequency coordination procedures have been followed before the issue of apparatus licenses;

- enable the ACA to delegate the power to issue certificates of proficiency to persons who have become qualified operators of transmitters;

- ensure that when a licence is renewed it commences from the time of expiry;

- enable the ACA to make conditions relating to matters existing or arising at, before or after the time of accreditation;

- require that all relevant documents relating to products' standards are inspected when the ACA audits compliance documentation assembled by manufacturers or importers;

- enable the ACA to determine that bodies conducting approved examinations, issuing certificates of proficiency, and performing accreditation and approving functions under the Act may charge for the services they provide to users of radiocommunications services;

- simplify and reduce the penalties payable in lieu of prosecution for offences committed under the Act and allow a penalty in lieu of prosecution to be imposed on a manufacturer or importer who fails to meet requirements including retaining appropriate records concerning a device covered by mandatory ACA standards; and

- ensure that apparatus licence tax imposed on the anniversary of the day on which the instrument came into force is payable on that anniversary.

Delegation of power to "a body"
Proposed new subsection 122A(1)

Item 13 of Schedule 2 to this bill proposes to insert a new subsection 122A(1) in the *Radiocommunications Act 1992*. This provision will allow the Australian Communications Authority (ACA) to delegate the power to issue a certificate of proficiency in the operation of a specified class of transmitters to "a body or organisation". Neither the proposed new section, nor the existing subsection 122(2) to which it refers, specifies any qualifications or attributes that such a body or organisation should possess, other than that it be approved by the ACA.

The Explanatory Memorandum observes that this new power to delegate "significantly reduces the administrative burden on the ACA". It also notes that, under proposed new subsection 122A(2), the delegate "is not entitled to make a final decision in refusing to issue a certificate of proficiency" – where the delegate decides not to issue a certificate, he or she must refer the application to the ACA for decision. This is intended to ensure that "any person who is refused a certificate can avail themselves of the review rights in Part 5.6 of the Act".

The Committee has frequently drawn attention to provisions which delegate powers to "a person", with no further limit on the categories of potential delegates. Similar considerations apply where powers are delegated to "a body or organisation". In this regard, the Committee draws attention to the fact that this delegated body may also be permitted, by virtue of proposed new section 298A (to be inserted by item 21), to charge fees for conducting approved examinations and issuing certificates of proficiency.

There are a number of possible approaches to limiting administrative powers of such apparent width. One approach that the Committee has noted in the past has been to make approval of the delegated body or organisation subject to Parliamentary scrutiny – for example, by including it in a disallowable instrument to be tabled in each House of the Parliament. The Committee, therefore, **seeks the Minister's advice** as to why the appointment of a body delegated to issue certificates of proficiency under section 122A is not further defined or qualified in some way, and whether such an appointment should be subject to Parliamentary scrutiny.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to make rights and liberties unduly dependent on insufficiently defined administrative powers in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Radiocommunications Legislation Amendment Bill 1999 (the Bill) contains various minor, unrelated amendments which have been requested over several years by the Australian Communications Authority (ACA), and the ACA's predecessors, in consultation with the telecommunications industry and consumers.

Delegating the issuing of certificates of proficiency Certain radiocommunications devices may be lawfully operated only by "qualified" persons. The ACA already has the power, under subsection 122(2), to devolve the examination and assessment process persons must undergo in order to become "qualified", and the Wireless Institute of Australia (WIA) and the Australian Maritime Safety Authority (AMSA) already perform these tasks in relation to amateurs and Global Maritime Distress and Safety System (GMDSS) respectively. The ACA does not, however, have the power to devolve the final step of this process - that is the issuing of certificates of proficiency to persons who have become "qualified".

The Bill proposes to amend the *Radiocommunications Act 1992* so that the ACA may devolve the issuing of certificates and so reduce its administrative workload. Since the ACA already has the power to devolve the examination and assessment process for operators of radiocommunications devices what this amendment is seeking to do is relatively minor. Moreover, under the *Australian Communications Authority Act 1997*, section 7, the ACA is required to advise and assist the radiocommunications community and report to and advise the Minister for

Communications in relation to the radiocommunications community. The ACA would be acting in a manner inconsistent with the spirit of this Act were it to inappropriately delegate the authority to issue certificates and, as the ACA must report its actions to the Minister, it is subject to Ministerial review. Given the minor nature of this proposal and the fact that it is simply an extension of the existing examination and assessment process, I consider Ministerial review to be sufficient oversight.

The Committee thanks the Minister for this response. However, the Committee considers that an existing power in subsection 122(2) cannot necessarily be used to legitimise the avoidance of parliamentary scrutiny under proposed section 122A. While Ministerial scrutiny represents a measure of oversight, it does fully stand in the place of parliamentary scrutiny, and it may be that both sections should make provision for such scrutiny and review.

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

Legislation by press release
Schedule 3, item 1

By virtue of item 1 of Schedule 3 to the bill, the amendments to be made by items 8 and 9 of Schedule 2 are to apply from 11 March 1998. This is the date the Treasurer issued a press release setting out measures to ensure that Australia was able to assert its taxing rights over income from the use of spectrum licences owned by non-residents.

These amendments will obviously widen the scope of persons who may be liable to Australian tax. As such, they are examples of 'legislation by press release' which fall within the resolution of the Senate of 8 November 1988. This resolution, which deals specifically with tax legislation 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 the 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".

As more than 6 months have elapsed between the date of the announcement and the introduction of the bill, and as the Committee is not aware of any publication of a draft bill within that period, the Committee draws these provisions to the attention of Senators and **seeks the Minister's advice** on the matter.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

Date of commencement of tax legislation The proposed amendments relating to the taxation of spectrum licences were announced by the Treasurer in a press release of 11 March 1998. Consequently I sought the advice of the Treasurer on this matter. He advised that it was desirable to "maintain the date of effect at 11 March 1998, as previously announced, to preclude problems of tax avoidance". Specifically, while none of the spectrum licences to which the tax legislation applies has yet been used, capital gains might be accruing on them and if the date of effect for the legislation is not maintained at 11 March 1999 the owners of spectrum licences could conceivably avoid capital gains tax.

Retrospective effect of amendments to various penalties Amendment of the penalty provisions of the *Radiocommunications Act 1992* will simplify and reduce the penalties that may be imposed. The retrospective effect will therefore not impose any burden and I note the Committee's intention to make no further comment on this matter.

I trust this information addresses the Committee's concerns.

The Committee thanks the Minister for this response. On this issue, the Minister observes that he sought the advice of the Treasurer, who advised that it was desirable to maintain the nominated date of effect because "the owners of spectrum licences could conceivably avoid capital gains tax". Given that none of the spectrum licences has yet been used, this does not, of itself, seem a sufficient reason for the Senate to fail to apply the terms of its resolution of 8 November 1988 and amend the commencement date accordingly.

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

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTH REPORT

OF

1999

21 April 1999

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTH 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 H Coonan
Senator T Crossin
Senator J Ferris
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 1999

The Committee presents its Sixth Report of 1999 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:

Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999

Taxation Laws Amendment Bill (No. 2) 1999
(previous citation: Taxation Laws Amendment Bill (No. 4) 1998)

Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999

The Committee dealt with this bill in *Alert Digest No. 4 of 1999,* in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 30 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 4 of 1999

This bill was introduced into the Senate on 10 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes to give effect to the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions by amending the *Criminal Code Act 1995* to:

- prohibit providing or offering a benefit which is not legitimately due to another person with the intention of influencing a foreign public official in the exercise of their duties in order to obtain or retain business or business advantage that is not legitimately due to the recipient or intended recipient;
- apply the prohibition to conduct within and outside Australia and when the conduct occurs wholly outside Australia, the person is an Australian citizen or the company is a company incorporated in Australia; and
- ensure that the ancillary offences of attempt, complicity, incitement and conspiracy which occur within and outside Australia apply where they relate to conduct involved in the primary offence.

Reversal of the onus of proof
Proposed sections 70.3 and 70.4

This bill proposes to amend the *Criminal Code Act 1995* by inserting Division 70 as part of a new Chapter 4 into the *Criminal Code*. Proposed new section 70.2 sets out the elements of the offence of bribing a foreign public official.

Proposed new sections 70.3 and 70.4 provide relevant defences. Section 70.3 sets out the terms of the defence of conduct lawful in the country of the foreign public official. Section 70.4 provides a defence where a payment is a "facilitation payment made to expedite or secure the performance of a routine government action of a minor nature". Each of these sections imposes an evidential burden on defendants, requiring them to prove certain matters if they wish to avoid a finding of guilt.

Proposed new section 70.5 also sets out various matters akin to a defence. In general terms, this section provides that a person does not commit an offence under section 70.2 unless the conduct constituting the offence occurs in Australia, or (if it occurs outside Australia) the offender is an Australian citizen or corporation. In this instance, however, the prosecution bears the onus of showing that the terms of this section have been complied with.

The Committee, therefore, **seeks the Minister's advice** as to why proposed sections 70.3 and 70.4 impose an evidential burden on defendants, and whether those sections may be phrased in similar terms to proposed section 70.5, thereby leaving the burden of proof of the matters under those sections on the prosecution.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

The Committee has sought my advice as to why proposed sections 70.3 and 70.4 impose an evidential burden on defendants and whether those sections should be phrased in similar terms to proposed section 70.5 thereby leaving the burden of proof of the matters under those sections on the prosecution.

I write to reassure you that the imposition of an evidential burden on a defendant does not put a legal burden of proof on a defendant and is consistent with the common law and with the *Criminal Code*.

When a defendant wishes to take advantage of a defence it is always the case at common law and under the *Criminal Code* (which codifies the common law on this and other points) that the defendant has the light burden of merely adducing or pointing to some evidence that suggests a reasonable possibility that the matter exists or does not exist. When the defendant discharges this light burden the prosecution then has a legal burden of proof to disprove the matter beyond reasonable doubt.

On occasions where a defendant raises proposed section 70.5 as a defence the same evidential burden will fall on the defendant and, when the evidential burden has been discharged, the prosecution will then acquire a legal burden of proof in relation to the matter and be required to disprove it beyond reasonable doubt.

I conclude by confirming that proposed sections 70.3, 70.4 and 70.5 are all consistent with one another, with the *Criminal Code* and with the common law.

The Committee thanks the Minister for this response.

Taxation Laws Amendment Bill (No. 2) 1999

(previous citation: Taxation Laws Amendment Bill (No. 4) 1998)

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in two letters dated 6 April 1999 and a separate letter received on 22 March 1999. Copies of the letters are attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's responses are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury] The bill was first introduced into Parliament on 2 July 1998 as Schedule 3 to the Taxation Laws Amendment Bill (No 5) 1998, but lapsed when Parliament was prorogued for the election.

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 to:

- widen the interest withholding tax (IWT) exemption provided by removing, for debentures issued by companies, the present requirements that they be issued outside Australia and that the interest be paid outside Australia;
- allow the issue of debentures or interests in debentures to Australia residents and allow the IWT exemption;
- extend the definition of ***company*** to include a company acting in the capacity of a resident trustee, provided the trust is not a charitable trust and the beneficiaries of the trust are companies;
- make a consequential amendment relating to the issue of bearer debentures to residents operating a business offshore;
- extend the range of entities eligible to register as offshore banking units;
- provide a tax exemption for income and capital gains of overseas charitable institutions managed by an offshore banking unit;

- extend the range of eligible offshore banking unit activities;
- remove an anti-avoidance measure preventing Australia being used as a conduit to channel loans to other countries;
- reduce the capital gains tax liability where non-residents dispose of interests in offshore banking unit offshore investment trusts;
- provide a foreign tax credit for foreign tax paid by Australian resident offshore banking units regardless of whether a double tax agreement applies;
- remove the requirement that offshore banking units maintain separate nostro and vostro accounts for transactions;
- reduce the rate of offshore banking unit withholding penalty tax for breaches of the IWT concession from 300 per cent to 75 per cent;
- enable Australian subsidiaries of a foreign bank to raise certain ITW exempt funds and on-lend those funds to a related Australian branch without affecting the subsidiary's thin capitalisation position;
- provide an exemption from the foreign investment fund (FIF) measures for interests in certain US;
- change the calculation method in FIF measures; and
- make consequential amendments to provisions relating to taxing trusts;
- require that the forgiven amount of a debt be applied, where relevant, to reduce unrecouped net capital losses in respect of all years of income before the forgiveness year of income, rather than the immediately preceding year of income;
- require that where a taxpayer incurs a net capital loss in a year of income earlier than the forgiveness year of income, and the loss is reduced by the operation of the debt forgiveness provisions, the loss will also be reduced for the purposes of the capital gains tax provisions;
- prevent franking credit trading and misuse of the intercorporate dividend rebate by denying the franking benefit or intercorporate dividend rate from a dividend where the taxpayer does not satisfy certain rules;
- limit the source of franking credits available for trading by introducing a new rule; and

- prevent franking credit trading and misuse of the intercorporate dividend rebate by denying the franking benefit or intercorporate dividend rate from a trust or partnership distribution attributable to a dividend where the distribution is equivalent to interest;

Income Tax Assessment Act 1997 to:

- set a common base for the depreciation deductions for plant that can be claimed by exempt entities which become taxable and by taxable entities which purchase plant from an exempt entity in connection with the acquisition of a business; and

- allow deductions for gifts of $2 or more made to the Menzies Research Centre Public Fund.

Retrospective effect
Subclause 2(2) and Schedule 4, item 24

By virtue of subclause 2(2), item 24 of Schedule 4 is to commence retrospectively on 16 April 1998. This item modifies the definition of a family trust in Schedule 2F to the *Income Tax Assessment Act 1936* "to include a category of trust where the only group able to benefit under the trust are family members" (whether or not they are able to control the trustee). The Explanatory Memorandum gives no indication of the reason for retrospectivity in this instance. The Committee, therefore, **seeks the Treasurer's advice** as to the reasons for retrospectivity in this instance.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Assistant Treasurer

> The amendment in question is retrospective but provides a concession sought by taxpayers. It will not operate to the detriment of any person.
>
> Schedule 4 sets out the 45 day rule, which is a measure targeting franking credit trading. As an anti-avoidance measure, taxpayers who hold interests in shares under a trust will be required under the 45 day rule to have a sufficient interest in the trust holding to expose them to at least 30% of the risks of loss or opportunities for gain in respect of the shares included in the trust estate in order to qualify for franking benefits.
>
> Consequently, beneficiaries of discretionary trusts will generally not be entitled to franking benefits because they do not have a fixed interest in the trust holding. As a

concession, however, the requirement will not apply to family trusts (as defined in the trust loss provisions), deceased estate trusts and employee share scheme trusts.

A trust is a family trust under the trust loss provisions if it makes 'a family trust election'. A trust cannot make a family trust election unless it is controlled by the relevant family from the time the election comes into effect. This generally requires control of the application of income or capital of the trust by family members. The trust loss provisions are set out in Schedule 2F to the *Income Tax Assessment Act 1936*. The relevant rules relating to family trust elections are set out in sections 272-80 and 272-87.

The proposed amendment will amend the trust loss provisions relating to family trust elections to allow a family trust election to be made if persons in the family group are the only persons who can obtain the beneficial enjoyment of the income and capital of the trust. This involves an amendment to subsection 272-87(2). The amendment will be effective on and from 16 April 1998 because this is when the trust loss provisions commenced.

This concession was sought by taxpayers. Under the current rules relating to family trust elections, a trust would be precluded from making a family trust election in these circumstances unless the beneficiaries were able to control the trustee. The amendment will enable, for example, a damages trust administered for the benefit of a disabled accident victim to make a family trust election.

The proposed amendment will add another, alternative ground for family groups to pass the family control test and therefore be eligible to make a family trust election and remain entitled to franking benefits. The amendment will not change the position of any family group that is currently able to make a family trust election under the trust loss provisions. It will not operate to the detriment of any person or family group in any circumstances.

The Committee thanks the Assistant Treasurer for this response.

Retrospective effect
Schedule 6

Schedule 6 to the bill, which amends the Act to allow income tax deductions for gifts of $2 or more made to the Menzies Research Centre Public Fund, will apply from 2 April 1998. The Explanatory Memorandum states that this was the date after which this measure was intended to operate when it was first introduced into the previous Parliament. Elsewhere, the Explanatory Memorandum notes that this proposal was first announced by the Treasurer's in his Press Release No 102, dated 10 October 1996.

The measure included in Schedule 6 is clearly beneficial to taxpayers, and would not normally be the subject of further comment from the Committee. However, the significant lapse of time between the date of announcement and the date of effect of this measure prompts the Committee to **seek the Treasurer's advice** as to whether proposed changes to the tax laws which are beneficial to taxpayers ought not to be applied from the date of their announcement in the same manner as occurs with changes to the taxation laws which seek to increase revenue.

While seeking the Treasurer's advice, the Committee makes no further comment on this provision.

Relevant extract from the response from the Assistant Treasurer

In its comments, the Committee noted that Schedule 6 of the Bill, which was introduced into the Parliament on 3 December 1998, allows income tax deductions for gifts made to the Menzies Research Centre Public Fund after 2 April 1998. The Committee also noted that there was a significant lapse of time between the date when the proposal was first announced by the Treasurer in his Press Release No. 102 dated 10 October 1996 and the date from which gifts would be deductible.

The Committee has sought the Treasurer's advice as to whether proposed changes to the taxation law which are beneficial to taxpayers ought not apply from the date of their announcement, as occurs with changes to the taxation law which seek to increase revenue.

As a general rule, the Government will announce that a proposed change to the income tax law is intended to have effect from the date of the announcement in a budgetary context, or because it is necessary to protect the revenue in circumstances where, for example, there is evidence of taxpayers being involved in tax avoidance arrangements. Other changes to the tax law generally are not intended to come into operation from the date of the announcement, and instead have later commencement dates.

In relation to the Menzies Research Centre in particular, the Treasurer issued a press release on 10 October 1996 announcing the Government's decision to amend the law to allow deductions made to the Centre. The press release also stated that, after the Centre satisfies the usual public fund requirements, the Government would issue a separate press release specifying the date from which gifts to the Centre would be tax deductible. Clearly, the obligation to satisfy the public fund requirements prior to securing gift deductibility status allows donors, and taxpayers in general, to be confident that the integrity of the tax provisions are not being undermined.

The Fund subsequently established by the Menzies Research Centre did satisfy the public fund requirements. The introduction of the measure in *Taxation Laws Amendment Bill (No. 4) 1998* on 2 April 1998, (which subsequently lapsed on 31 August 1998) announced the date after which gifts would be tax deductible, so there was no need for a separate press release to be issued.

I trust that this advice will be of assistance to the Committee.

The Committee thanks the Assistant Treasurer for this response.

Legislation by press release
Schedules 3, 4 and 7

By virtue of subitem 33(1), Schedule 3 to the bill (which deals with the way in which depreciation is to be calculated on plant owned by a previously exempt entity) will, in general terms apply from 4 August 1997. This date has been chosen as the date on which the Treasurer issued a Press Release on the matters covered by this Schedule.

By virtue of item 25, Schedule 4 to the bill (which seeks to prevent franking credit trading and misuse of the intercorporate dividend rebate) will, in general terms, apply from 1 July 1997. Some provisions are to apply from 13 May 1997 (the night of the 1997 Budget) and others from 31 December 1997 (being the date on which the Assistant Treasurer issued an amending Press Release).

Schedule 7 to the bill (which seeks to ensure that certain trust or partnership distributions which consist of dividends, but which are effectively in the nature of interest, do not carry franking benefits or receive the intercorporate dividend rebate) will also commence on 13 May 1997 – the night of the 1997 Budget.

In each case the legislation may effectively be regarded as 'legislation by press release'. In each case, the application date is well outside the 6 months referred to in the Senate resolution of 8 November 1988. The Committee, therefore, **seeks the Treasurer's advice** as to why it has taken between 16 and 19 months from the date of the Treasurer's announcements for the introduction of legislation giving effect to those announcements.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Assistant Treasurer

Schedule 3

Schedule 3 of the Bill will change the way that depreciation is calculated on plant previously owned by an exempt entity when that plant enters the tax net. This measure was announced by the Treasurer on 4 August 1997 in his Press Release No. 84 to apply from that date. Technical corrections to the proposed legislation were announced on 30 November 1998 in my Press Release No. AT/045 to apply from 4 August 1997. Following extensive consultations with State and Territory Governments, further details about the measures were announced by the Treasurer on 14 January 1998 in his Press Release No. 2 of 1998.

The Treasurer released draft legislation for the measures on 10 February 1998 in his Press Release No. 9 of 1998 (the 6 month period expired on 3 February 1998). The delay in releasing the draft legislation arose from the redrafting required to give effect to the consultations with State and Territory Governments. Draft legislation was introduced to the previous Parliament on 2 April 1998 in Schedule 10 to the former *Taxation Laws Amendment Bill (No. 4) 1998*. That Bill lapsed when the previous Parliament was prorogued. The proposed legislation was reintroduced to Parliament on 3 December 1998 in Schedule 3 to *Taxation Laws Amendment Bill (No. 4) 1998.*

Schedule 4: 45 day rule

Schedule 4 contains the 45 day rule and the related payments rule, which are franking credit trading measures. The 45 day rule requires taxpayers to hold shares at risk for a certain period to qualify for franking credits, the franking rebate or the intercorporate dividend rebate. The 45 day rule was announced in the 1997/98 Budget on 13 May 1997. Draft legislation for the measure was released on 31 December 1997, 6 months after its commencement date of 1 July 1997, so that the 6 month rule would therefore seem to be satisfied. Draft legislation was subsequently introduced into Parliament on 2 July 1998 in Schedule 6 to Taxation Laws Amendment (No. 5) Bill 1998.

Schedule 4: related payments rule

The related payments rule is closely connected to the 45 day rule, essentially consisting of an addition to the 45 day rule where a dividend-equivalent is passed to another party. The measure was announced in the 1997/98 Budget on 13 May 1997 and details were set out in Treasurer's Press Release No. 47 of 1997 released at the same time.

The related payments rule will apply to arrangements entered into after 7.30pm AEST on 13 May 1997 (including arrangements in respect of shares or interests in shares acquired before that time). Draft legislation for this measure was introduced into Parliament on 2 July 1998 in Schedule 7 to Taxation Laws Amendment (No. 5) Bill 1998.

The delay in introducing draft legislation for the related payments rule into Parliament was caused by the need to give priority to other franking credit trading measures which affected a far greater number of taxpayers: namely, the 45 day rule and the anti-streaming and general anti-avoidance rules. (The Anti-streaming and general anti-avoidance rules were included in *Taxation Laws Amendment Act (No. 3)*

1998.) The implementation of these other measures involved an extensive consultation process, which prevented resources being devoted to the related payments rule. However, the results of the consultation process, especially taxpayer suggestions for the measurement of risk reduction, were incorporated in the related payments rule. It is unlikely that any taxpayers have been disadvantaged by the delay in introducing provisions for the related payments rule because there has been little uncertainty about this measure.

Schedule 7: amendments to section 45Z

Schedule 7 contains another franking credit trading measure involving amendments to section 45Z and other provisions to prevent trust or partnership distributions which are equivalent to the payment of interest on a loan from providing an entitlement to franking benefits.

This measure announced in the 1997/98 Budget on 13 May 1997, and are explained in Treasurer's Press Release No. 46 of 1997 released at the same time. The measure will apply to interests created or acquired, and finance arrangements entered into, after 7.30pm AEST on 13 May 1997, and to existing arrangements extended after that time.

Draft legislation for the amendments to section 45Z was introduced into Parliament on 2 July 1998 in Schedule 7 to Taxation Laws Amendment (No. 5) Bill 1998. Draft legislation for this measure was delayed for the same reasons that draft legislation for the related payments rule was delayed.

The Committee thanks the Assistant Treasurer for this response, which addresses the concerns raised in the *Digest*. The Committee notes that, along with a number of other organisations, it has received some additional correspondence on this bill from Mallesons Stephen Jaques, which it has made available to the Assistant Treasurer's office. The Committee looks forward to the Assistant Treasurer's further advice on this correspondence in due course.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

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SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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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

SEVENTH REPORT OF 1999

The Committee presents its Seventh Report of 1999 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:

Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999

Environment Protection and Biodiversity Conservation Bill 1999

Youth Allowance Consolidation Bill 1999

Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 1999*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 27 April 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 5 of 1999

This bill was introduced into the Senate on 24 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes to:

- amend the *Criminal Code Act 1995* to create offences relating to slavery, sexual servitude and deceptive recruiting for sexual services; and
- repeal 6 Imperial Acts relating to slavery that still apply in Australia.

Penalties, definitions and the reversal of the onus of proof
Proposed new sections 270.1 and 270.3

Item 1 of Schedule 1 to this bill proposes to insert a new Division 270 in the *Criminal Code*. This new Division includes proposed section 270.3, which deals with slavery offences.

Proposed subsection 270.1 defines slavery as "the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person". Proposed subsection 270.3(1) makes it an offence to possess a slave or exercise over a slave any of the other powers attaching to the right of ownership, or to engage in slave trading. The maximum penalty for this offence is imprisonment for 25 years.

Proposed subsection 270.3(3) states that a person who enters into a transaction with the intention of securing the release of a person from slavery is not guilty of an offence against the section. Proposed subsection 270.4(4) states that the defendant bears the legal burden of proving this matter. The Explanatory Memorandum notes that the effect of this provision is that, to establish the defence, the defendant must prove, on the balance of probabilities, that his or her intention was to release the person.

These provisions raise a number of issues. First, it is clear that the penalties to be imposed for slavery offences are significant, as, indeed, are the penalties for all the offences created by this bill. The Committee would appreciate some further advice about where these penalties stand in relation to the general range of penalties for similarly serious offences.

Secondly, the Committee would appreciate some further advice regarding the statutory definition of 'slavery' – in particular, some indication of the range of situations to which it is intended to apply. The Committee notes that the Explanatory Memorandum states that whether a person is a slave "is a matter to be determined by the courts on a case by case basis" and that "slavery is more than merely the exploitation of another… it is where the power a person exercises over another effectively amounts to the power a person would exercise over property he or she owns". For example, given that slavery may arise "from a debt owed or contract entered into by the enslaved person", is the bill intended to apply to situations of forced labour in 'sweatshops'?

Thirdly, the Committee notes that subclause 270.3 provides a defence of entering into a transaction "with the intention of releasing [a] person from slavery". The defendant bears the legal burden of proving this defence. The Committee usually queries such reversals of the onus of proof, and would appreciate some further advice on the reason for its reversal in this instance. In particular, the Committee would appreciate advice on the reason for including this as a specific defence, and for imposing a "legal burden" on the defendant – in these circumstances, is a "legal burden" different from an evidential burden?

The Committee would also appreciate advice on the relationship between the intention to be proved by the prosecution in proving all the elements of the offence, and the intention to be proved by the defendant in proving this defence. For example, the Committee observes that a person charged with murder, where the issue of self-defence arises, cannot be convicted unless the prosecution proves beyond reasonable doubt that he or she did not act in self defence. Similarly, a person charged with rape cannot be convicted unless the prosecution proves beyond reasonable doubt that that person believed that the alleged victim was not consenting. This bill seems to impose a different burden on the prosecution in proving intent.

Therefore, the Committee **seeks the Minister's advice** about these matters.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

The offences in the Bill and the penalties that apply are based on the offences and penalties recommended by the Model Criminal Code Officers Committee ('MCCOC'), of the Standing Committee of Attorneys-General, in its final report on "Offences Against Humanity - Slavery". The report was prepared after nationwide consultation and forms part of the Model Criminal Code Project, which aims to ensure greater uniformity in criminal law across Australia.

Penalties

In recommending the level of penalties that should apply to the offences in the Bill MCCOC sought to achieve consistency with penalties for offences of comparable seriousness. In the case of the slavery offences, the recommended maximum penalty of 25 years imprisonment is the same as the penalty recommended by MCCOC for manslaughter and aggravated causing of serious harm. It is also appropriately higher than its recommended penalty for aggravated kidnapping (that is, 19 years). I note also that the penalty recommended by the Australian Law Reform Commission for the modern slavery offences was life imprisonment.

With regard to the sexual servitude offences, MCCOC considered the maximum penalty it recommended (in its report on "Sexual Offences Against the Person") for the basic sexual offence of penetration without consent (ie 15 years imprisonment) and concluded that the same maximum penalty is appropriate for those offences.

The deceptive recruiting offence is significantly less serious than slavery and sexual servitude. It relates to the method of recruiting sex workers and does not involve actually forcing or threatening a person to provide sexual services. MCCOC considered that the consequences of this offence has similarities with the level of harm a person may suffer as a result of fraud or deception, for which it has recommended a maximum penalty of 10 years imprisonment. However, because in its worst form fraud can involve much more serious consequences and multiple victims, the lesser maximum penalty of 7 years imprisonment was considered more appropriate for the deceptive recruiting offence.

The Bill includes an aggravated offence provision which allows the court to impose higher penalties for the sexual servitude and deceptive recruiting offences, where the victim is under the age of 18 years. This approach is consistent with the approach MCCOC has taken in relation to other Chapters of the Code including, the Chapters relating "Non Fatal Offences Against the Person" and "Serious Drug Offences".

The definition of slavery and forced labour

The slavery offences in the Bill are intended to apply in all cases where a person exercises any or all of the powers attaching to the right of ownership over another. Therefore, if the circumstances of a person's forced labour (or sexual servitude) are

such that she or he is dealt with as though she or he is the property of another, the slavery offences will apply.

As far as I am aware there is no settled exhaustive list of all of the rights of ownership. However, some of the more "standard" rights are identified by A.M. Honore, in an article in the Oxford Essays in Jurisprudence. They include the right to possess, the right to manage (ie the right to decide how and by whom a thing owned shall be used), the right to the income and capital derived from the thing owned, the right to security (ie to retain the thing whilst ever the owner is solvent) and the right to transmit your interest to successors. Therefore if, for example, a person is forced to work for another without receiving any reward for her or his labour, it is likely that the court would find that the person is a slave.

Reversal of the Onus of Proof

In my view the reversal of the onus of proof in relation to the defence of releasing a slave is consistent with the Committee's policy on this issue. Although it is not generally appropriate to place the legal burden on the accused to prove a defence, in some cases it may be appropriate if the matter to be proved is peculiarly within the knowledge of the accused, and it would be extremely difficult and costly for the prosecution to disprove beyond a reasonable doubt. In this case, the matter in issue is the motive of the accused in entering into the relevant transaction. This is something that will be peculiarly within the knowledge of the accused and very difficult (and in some cases very costly) for the prosecution to disprove beyond a reasonable doubt.

The difference between the legal and evidential burden of proof is set out in Part 2.6 of the Criminal Code. In this case the legal burden on the accused is to prove on the balance of probabilities that she or he entered into the transaction to release the slave (ss13.1(3), 13.4 and 13.5). If only the evidential burden applied the accused would simply have to adduce or point to evidence that suggested a reasonable possibility that she or he had that motive (s13.6), and the prosecution would have to disprove it beyond a reasonable doubt. In many cases it will be relatively easy for an accused to fabricate a story that she or he (say) purchased the slave to release her or him and, extremely difficult (and in some cases almost impossible) to disprove it beyond a reasonable doubt. Accordingly I believe that reversing the legal burden of proof in this case is justified.

With regard to Committee's final comments, the reference to 'intention' in the defence provision (subsection 270.3(3)) is not to intention as a fault element but rather to the person's motive in acting. Accordingly, to establish the slavery offences the prosecution will need to show beyond a reasonable doubt that the accused intentionally engaged in the conduct specified in paragraphs 270.3 (1)(a) or (b) (eg that the defendant meant to possess a person that he or she knew to be a slave). However, if the prosecution succeeds in demonstrating this, the accused will still escape liability if she or he proves on the balance of probabilities that her or his motive was to release the slave.

I should say finally that I do not consider the parallels the Committee draws between the proposed defence and the requirement that the prosecution prove absence of consent on a charge of rape is particularly apt. The actual conduct involved in the offence of rape is not, per se, criminal. It is only made criminal where the act of sexual intercourse is committed in the circumstances where the defendant is aware that the victim is not consenting or is reckless as to that matter. In contrast, the conduct involved in an offence under proposed section 270.3(1) is intrinsically

criminal ie proposed section 270.3.(3) constitutes an exception to what would otherwise be criminal conduct.

I trust this meets the concerns of the Committee.

The Committee thanks the Minister for this considered response.

Environment Protection and Biodiversity Conservation Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 1998*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 28 April 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 10 of 1998

This bill was introduced into the Senate on 12 November 1998 by the Assistant Treasurer. [Portfolio responsibility: Environment and Heritage]

The bill proposes to implement the 1997 Council of Australian Governments Agreement relating to the Commonwealth's role by reference to certain matters of national environmental significance. Primarily, the bill:

- introduces assessment and approval processes that apply to actions which will or are likely to have a significant impact on world heritage properties, certain Ramsar wetlands, nationally threatened species and communities, certain migratory species, nuclear actions, the Commonwealth marine environment, any additional matter specified by regulation, including actions on Commonwealth lands and actions by the Commonwealth and Commonwealth agencies;

- empower the Minister to enter into bilateral agreements with States or Territories in relation to actions impacting upon matters of national environmental significance;

- provides for the establishment of lists of nationally threatened native species and ecological communities, key threatening processes, internationally protected migratory species, and marine species;

- establishes the Australian Whale Sanctuary;

- regulates certain activities in Commonwealth areas which affect whales and dolphins, listed species and listed ecological communities;

- requires the Minister to prepare recovery plans for listed threatened species and communities and to prepare threat abatement plans for listed key threatening processes;

- specifies steps to be followed before a property can be nominated as a world heritage property or designated as a Ramsar wetland;

- empower the Minister to enter into conservation agreements with private landholders;

- enables regulations to be made about access to biological resources on Commonwealth land and waters; and

- replaces the *Endangered Species Protection Act 1992, Environment Protection (Impact of Proposals) Act 1974, National Parks and Wildlife Conservation Act 1975, Whale Protection Act 1980* and *World Heritage (Properties Conservation) Act 1983*.

Non-disallowable declarations
Clause 33

Clause 33 of this bill gives the Minister power to make various declarations. The Committee believes that some of these declarations are legislative in character. However, the bill does not provide for their scrutiny by the Parliament.

Accordingly, the Committee **seeks the advice of the Minister** on the reasons why the declarations which may be made under clause 33 are not disallowable instruments.

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

Relevant extract from the response from the Minister

> The Bill is intended to establish an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed. A key aspect of the Bill is that it provides for formal mechanisms to accredit Commonwealth and State environmental assessment and approval processes which meet prescribed standards or criteria. Accreditation will significantly streamline Commonwealth processes and reduce duplication between the Commonwealth and the States and between Commonwealth agencies. Declarations made under clause 33

provide the mechanism for accrediting specified processes of the Commonwealth or of specified Commonwealth agencies.

I do not consider that declarations under clause 33 are sufficiently legislative in character to be considered disallowable instruments. The declarations will neither determine the content of the law nor have general application, as they merely provide the means for applying a general mechanism for accreditation.

Clause 33 includes safeguards to ensure that accredited processes are consistent with the intent of the Bill. Under subclause 33(2) the Minister may make a declaration only if he or she is satisfied that the impacts of an action on relevant aspects of the environment protected by Part 3 of the Bill will be considered in deciding whether to approve that action. Under clause 33(3) Commonwealth laws and instruments which are, in effect, accredited under a declaration must meet any prescribed standards. As regulations these standards will be subject to Parliamentary scrutiny and be disallowable.

The Committee thanks the Minister for this response.

Strict liability offences
Subclauses 196(3), 211(3), 229(3), 236(1) and 254(3)

A number of provisions in the bill create criminal offences of strict liability. In each case, the Explanatory Memorandum does not provide a reason for imposing strict liability.

Accordingly, the Committee **seeks the advice of the Minister** on the reasons why the offences in subclauses 196(3), 211(3), 229(3), 236(1) and 254(3) are declared to be offences of strict liability, particularly given the levels of penalty imposed.

Pending the Minister'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.

Relevant extract from the response from the Minister

The Committee also sought advice on how appropriate penalties were determined for offences under the Bill, particularly for the strict liability offences.

The penalties for many of the offences in the Bill were based on those in existing Acts which are to be replaced by the Bill. In some cases, these penalties were increased to ensure consistency with more recent environment legislation or to strengthen the deterrence provided by the penalties where necessary. Relevant offences from existing Acts and proposed new offences were analysed according to a number of categories, with a view to ensuring that penalties in the Bill: are fair and appropriate; reflect the seriousness of the offences, particularly their impact on achieving the objects of the Act and their impact on the environment; reflect community attitudes; reflect the level of criminal responsibility involved; are consistent within the Bill; and where appropriate, are consistent with penalties for offences in other Commonwealth legislation or, in some cases, State legislation. The Bill also contains a balance of civil penalties and custodial and non-custodial sanctions for criminal offences. Advice on the construction of offence provisions and penalty levels was sought from Attorney-General's Department.

Penalties for the strict liability offences mentioned in the Alert Digest were determined in this context. Subclause 236(1) contains a penalty of 500 penalty units, which is equivalent to the penalty applying to the corresponding offence in the *Whale Protection Act 1980* (($50,000) and a similar offence in section 102 of the *Fisheries Management Act 1991* (500 penalty units). A higher penalty level of 1000 penalty units applies to subclauses 196(3), 211(3) 229(3) and 254(3), as these offences result in more direct and serious impacts on the environment and involve higher levels of criminal intent.

I will write to you again shortly to address the comments made by the Committee in relation to the strict liability offences contained in subclauses 196(3), 211(3), 229(3), 236(1) and 254(3) of the Bill.

The Committee thanks the Minister for this response, noting that further correspondence will be forthcoming.

Reversal of the onus of proof
Clauses 235, 255, and 492

A number of provisions in the bill expressly impose an evidential burden on a defendant to criminal charges. These provisions require a defendant wishing to escape liability to show the existence of certain circumstances. These circumstances include some matters which may be within the specific knowledge of the defendant (eg. the taking of actions that are reasonably necessary to deal with an emergency, or that occur as a result of an unavoidable accident). Other circumstances seem less likely to be within the defendant's specific knowledge (eg. the taking of actions which are covered by a relevant Ministerial declaration). The Explanatory

Memorandum does not provide a reason for imposing an evidential burden on the defendant in these circumstances.

Accordingly, the Committee **seeks the advice of the Minister** on the reasons why clauses 235, 255 and 492 impose an evidential burden on a defendant in the circumstances set out.

Pending the Minister'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.

Relevant extract from the response of the Minister

> The intention of these provisions is to qualify offence provisions relating to possessing or treating unlawfully imported cetaceans, taking listed marine species, and providing false or misleading information. The provisions establish specific statutory defences, with the defendant bearing the evidential burden.
>
> The Committee has suggested that the circumstances covered by these provisions may not be within the specific knowledge of the defendant, such as whether the taking of an action is covered by a Ministerial declaration. In all cases, the defences involve matters which should be within the specific knowledge of the defendant. For example subclause 33(1) provides an exception for classes of actions covered by declarations identified wholly or partly by reference to the fact that their taking has been approved by the Commonwealth or a specified Commonwealth agency in a specified manner. A defendant would require some form of approval by the Commonwealth or a Commonwealth agency to carry out an action identified in a declaration and would necessarily be aware of that fact. A similar argument applies to actions which are authorised under a permit, a recovery plan, a wildlife conservation plan, or an approval under Part 9 of the Bill.
>
> Clause 492 qualifies the offences of providing false and misleading information created in clauses 489, 490 and 491. The offences apply only where a person provides information or a document and knows that, or is reckless as to whether, the information or document is false or misleading. Clause 492 provides a defence where the defendant has explained to the recipient that the information or document was false or misleading and has indicated how it was false and misleading. Knowledge of whether a document provided by the defendant is false or misleading will be within the defendant's specific knowledge.

The Committee thanks the Minister for this response.

Youth Allowance Consolidation Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 1999*, in which it made various comments. The Minister for Family and Community Services has responded to those comments in a letter dated 5 March 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 2 of 1999

This bill was introduced into the House of Representatives on 11 February 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the:

- *Social Security Act 1991* to incorporate provisions contained in the Social Security (Fares Allowance) Rules 1998, Social Security Student Financial Supplement Scheme 1998, the Social Security (Family Actual Means Test) Regulations 1998; and

- *Social Security Act 1991* and five other Acts to make consequential and technical amendments related to the implementation of the youth allowance package.

Retrospective effect
Subclauses 2(3) to (13)

Schedule 4 to this bill proposes to amend the *Social Security Act 1991* "to address certain technical issues identified during the implementation of the youth allowance package". The Explanatory Memorandum notes that these amendments make "minor drafting clarifications and technical refinements to ensure that the youth allowance package operates in line with the original policy intentions, including the alignment where appropriate with the pre-existing AUSTUDY provisions". By virtue of subclauses 2(3) to (13), the items in Part 2 of Schedule 4 are to be taken to have commenced at various times on 1 July 1998.

Schedule 5 to the bill amends legislation other than the Social Security Act to reflect the new placement and structure of the student financial supplement scheme provisions. By virtue of subclause 2(3), Part 2 of Schedule 5 is also to be taken to have commenced on 1 July 1998.

By virtue of subclause 2(14), Part 3 of Schedule 4 is to be taken to have commenced on 20 September 1998, and by virtue of subclause 2(15), Part 4 of Schedule 4 is to be taken to have commenced on 1 January 1999.

While it is likely that the various amendments proposed in these Schedules are technical or consequential, and make no substantive change to the law, the Explanatory Memorandum does not clarify the need for retrospectivity. The Committee, therefore, **seeks the Minister's advice** on the need for retrospectivity in the application of Schedules 4 and 5 of the bill.

Pending the Minister'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.

Relevant extract from the response from the Minister

These amendments are essentially to fine-tune the large and complex youth allowance package. They make minor drafting clarifications and technical refinements to ensure that the youth allowance package operates in line with the original policy intentions, including the alignment where appropriate with the pre-existing AUSTUDY provisions. That is, the amendments are either:

- to refine provisions in line with the original policy intent;
- for necessary alignment with other programs and provisions;
- to close technical loopholes or clarify the operation of the existing provisions; or
- to make minor technical corrections and drafting refinements.

The amendments that carry retrospective effect in this way do not adversely affect customers. Their effect is technically either beneficial or neutral. Accordingly, the retrospectivity is to give customers the full benefit of the intended operation of the substantive provisions. A full description of what each amendment achieves is contained in the Explanatory Memorandum for the Bill.

The Committee thanks the Minister for this response.

Use of tax file numbers
Proposed new sections 1061ZZBP and 1061ZZBQ

Schedule 2 to this bill proposes to amend the *Social Security Act 1991* (the Act) to incorporate the student financial supplement provisions currently contained in separate legislation. The Explanatory Memorandum notes that, for the most part, "there is no change in effect between the provisions of the Financial Supplement Scheme and those of the new Chapter 2B [of the Social Security Act]".

Among the provisions to be incorporated in Chapter 2B of the Act are proposed new sections 1061ZZBP and 1061ZZBQ. These sections, if enacted, would make the payment of financial assistance to category 2 students conditional upon the recipient providing either his or her tax file number, or that of his or her parent or parents.

With regard to these provisions, the Explanatory Memorandum states that "the tax file number provisions have been put into the standard Social Security Act form". It further states that "these provisions are applicable only to category 2 students because category 1 students are already subject to such rules under their substantive payments".

The Committee recognises that these clauses are not new, and have been included to minimise the opportunity for fraud against the Commonwealth. The provision of a tax file number is now a common requirement throughout social security (and other related) legislation. However, the Committee notes the words of the then Treasurer in the Parliament on 25 May 1988 when referring to the proposed introduction of the tax file number scheme:

> The only purpose of the file number will be to make it easier for the Tax Office to match information it receives about money earned and interest payments.
>
> The system is for the exclusive and limited use of the Tax Office - it will simple allow the better use of information the Tax Office already receives.

The Committee also notes the words of the then member for Kooyong in the Parliament on 21 December 1990, that "since the inception of the tax file number in 1988 as an identifying system, we have seen the gradual extension of that system to other areas by way of a process sometimes referred to as function creep".

This process has continued and grown over a number of years, irrespective of the governing party of the day, and in spite of assurances that it would not occur. The provisions of this bill represent yet another example of this process.

In these circumstances, 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.

Relevant extract from the response from the Minister

The second group of comments made by your Committee concerns a requirement for a person to provide tax file numbers (TFNs). This requirement is part of the provisions, relocated from a disallowable instrument in the ***Social Security Act 1991*** (the Social Security Act) by this Bill, relating to the student financial supplement scheme as it applies to category 2 students. Your Committee has expressed concern that this requirement, while included to minimise the opportunity for fraud against the Commonwealth, 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.

Whether a person is eligible for financial supplement as a category 2 student depends, among other things, on the person being excluded from receiving youth allowance only because of either the parental income test or the family actual means test. Furthermore, during the period of that exclusion, the person's combined parental income or family actual means must remain below a certain threshold level (currently $55,350). Beyond this, a category 2 student must satisfy all of the usual youth allowance eligibility criteria, including the personal income test. For these reasons, details of the student's and his or her parents' income and actual means are vital in assessing eligibility for financial supplement.

Under a data-matching program provided by the ***Data-matching Program (Assistance and Tax) Act 1990***, certain income details disclosed by people to Centrelink for social security purposes are checked automatically against income disclosed to the Australian Taxation Office (ATO) and other paying agencies. The income details checked include, for youth allowance family actual means test purposes, involvement in a business, partnership or trust.

People who are eligible for the student financial supplement scheme as category 1 students must be receiving one of the existing Social Security Act student payments (youth allowance, austudy payment or pensioner education supplement). Therefore, such people are already subject to TFN provisions through their substantive student payment. Category 2 students are not so subject because they are not actually receiving a current payment.

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 parent is not contactable or is violent).

Some 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 were 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 taxpayers. By using TFNs,

Centrelink compares ATO income and actual means details only in respect of social security customers rather than all taxpayers.

The requests to provide TFNs as a condition of payment of student financial supplement to category 2 students are consistent with the requirements that apply to existing programs administered by Centrelink on behalf of the Department. It should also be noted that the TFN provisions included in the Bill merely replicate arrangements already in place for category 2 students under the current disallowable instrument (the ***Social Security Student Financial Supplement Scheme 1998*****)** and the current version of Chapter 2B of the Social Security Act. The Bill aims merely to house all relevant provisions in the Social Security Act itself and to put the provisions into a standard form.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTH 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 H Coonan
Senator T Crossin
Senator J Ferris
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

EIGHTH REPORT OF 1999

The Committee presents its Eighth Report of 1999 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:

A New Tax System (Goods and Services Tax) Administration Bill 1998

A New Tax System (Goods and Services Tax) Bill 1998

A New Tax System (Indirect Tax Administration) Bill 1999

A New Tax System (Luxury Car Tax) Bill 1999

A New Tax System (Wine Equalisation Tax) Bill 1999

A New Tax System (Goods and Services Tax Administration) Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Treasurer has responded to those comments in a letter dated 23 April 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Treasurer's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to amend the *Taxation Administration Act 1953* to:

- establish who is to administer the GST law;
- support the collection and recovery of GST;
- set maximum penalties for breaching GST obligations;
- permit entities to rely on the Commissioner's interpretation of the law;
- set time limits on GST liability and on credit entitlements;
- adopt existing mechanisms for the review of assessments and other GST decisions;
- confer powers on the Commissioner for the gathering of information; and
- protect the confidentiality of information disclosed for GST purposes.

Non-reviewable discretions?
Proposed new section 62

Item 7 of Schedule 1 to this bill adds a new Part VI to the *Taxation Administration Act 1953*. This Part includes proposed new section 62, which provides for the review of the exercise of many of the discretions granted to the Commissioner of taxation under the A New Tax System (Goods and Services Tax) Bill 1998 ("the GST Bill").

Under proposed section 33-20 of the GST Bill, the Commissioner may extend the time for payment of GST-related amounts, or may allow them to be paid by instalments or on terms determined by him or her.

Under proposed section 33-25 of the GST Bill, if the Commissioner has reason to believe that a person may leave Australia before a particular GST-related payment becomes due, then that amount becomes due for payment on the day the Commissioner fixes.

Neither of these discretions is reviewable under proposed section 62 of the Administration Act. The Committee, therefore, **seeks the Treasurer's advice** on the reasons for excluding these discretions from review under proposed section 62.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provisions, as 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.

Relevant extract from the response from the Treasurer

> The Committee is concerned that proposed sections 33-20 and 33-25 may make rights, liberties or obligations unduly dependent upon non-reviewable decisions in breach of principle 1(a)(iii) of its terms of reference. This is because decisions by the Commissioner under these provisions are not listed as 'reviewable GST decisions' in new section 62 of the *Taxation Administration Act 1953* (proposed to be inserted by the A New Tax System (Goods and Services Tax Administration) Bill 1998). Reviewable GST decisions are those to which objection and administrative review rights will be available under Part IVC of the *Taxation Administration Act 1953*.
>
> The suggestion that decisions under sections 33-20 and 33-25 should be 'reviewable GST decisions' is not supported. Administrative review is not available for decisions made under corresponding provisions in other Acts administered by the Commissioner such as sections 206 and 205 *Income Tax Assessment Act 1936*, sections 66 and 65 *Sales Tax Assessment Act 1992* and sections 92 and 91 *Fringe Benefits Tax Assessment Act 1986*.
>
> Decisions under section 33-20 (to extend the time for payment of GST) are concerned not with imposing obligations or varying rights but rather with suspending

action to recover debts that are overdue. The decision is exercised in particular cases where payment by the due date is prevented by circumstances beyond the control of the debtor. Recovery of tax debts is deferred for the period between the original due date for payment of the tax and the date specified in the decision extending the time to pay. Although the Commissioner has published guidelines for the exercise of the discretion under section 206 *Income Tax Assessment Act 1936* (Taxation Ruling IT2569) decisions must necessarily be made having regard to the circumstances of each particular case.

If decisions under section 33-20 were subject to administrative review there would be a high risk of abuse of process. This could have the absurd result of deferring recovery of tax in situations where the merits of the case clearly do not warrant an extension of time to pay.

It is considered that such decisions do not fall within a category of decisions for which administrative review is appropriate, and that this is consistent with the guidelines on the administrative law aspects of legislative proposals published by the Attorney-General's Department.

Administrative review in the circumstances in which section 33-25 is designed to apply, that is, persons seeking to escape their tax liabilities by leaving Australia before their liabilities fall due for payment, would be an invitation to abuse. Such action would frustrate the intended object of the provision. The provision is essentially one connected with the recovery of tax liabilities. Decisions made under the provision are concerned with the enforcement of existing obligations, that is, to pay taxes the liability to which has already been established. It is considered that such decisions do not fall within a category of decisions for which administrative review is appropriate and that this is consistent with the guidelines on the administrative law aspects of legislative proposals published by the Attorney-General's Department.

Decisions under sections 33-20 and 33-25 will be subject to judicial review in accordance with the *Administrative Decisions (Judicial Review) Act 1977*.

The Committee thanks the Treasurer for this response. It accepts that administrative review is currently not available under corresponding provisions in other Acts administered by the Commissioner.

Clearly, the issue of personal rights and liberties is one of principle. Therefore, a diminution of rights under one Act cannot be used as a precedent to diminish rights under other Acts. Similarly, rights and liberties cannot be diminished simply in the interest of administrative convenience.

Under section 33-20 of the GST Bill, the Commissioner has a discretion to extend the time for the payment of certain GST-related amounts. Properly exercised, this provision confers a benefit on taxpayers, and subjecting it to administrative review is probably unnecessary. The Committee notes that guidelines govern the exercise of a similar discretion under section 206 of the *Income Tax Assessment Act 1936*. Arguably, the discretion under section 33-20 should similarly be governed by guidelines.

Under section 33-25 of the GST Bill, the Commissioner has a discretion to truncate the time for the payment of certain GST-related amounts where the Commissioner believes that a person "may leave Australia". Such a provision is designed to prevent a person avoiding the payment of a tax to which he or she or it will eventually become liable by leaving Australia before it becomes payable. The Committee acknowledges the public interest that underlies such a provision, and recognises that providing for administrative review may lead to its abuse. However, the language used in section 33-25 would make it applicable to any person leaving Australia, for example on a business venture, or on a holiday, or to visit a sick relative or to go to a funeral, and with every intention of returning. In these circumstances, the Senate may like to consider whether this discretion ought to be available only where the Commissioner considers that persons intend leaving Australia with the intention of escaping their tax liabilities.

Search and entry
Proposed new section 66

As noted above, Item 7 of Schedule 1 to this bill adds a new Part VI to the *Taxation Administration Act 1953*. This Part includes proposed new section 66, which will allow an officer authorised by the Commissioner of Taxation to enter and search any premises and inspect and analyse any documents, goods and other property. No provision is made for obtaining a judicially sanctioned warrant, which is a generally accepted safeguard in such circumstances.

In addition, the clause does not attempt to limit or categorise those who might be authorised to carry out such searches – for example, by specifying certain required attributes or qualifications. Requiring such attributes or qualifications is an approach adopted in some other statutes (for example, section 258 of the *Superannuation Industry (Supervision) Act 1993*) and, arguably, provides some reassurance against possible abuses of a power of such width. The Explanatory Memorandum provides no information beyond that included in the clause itself. The Committee, therefore, **seeks the Treasurer's advice** on the reasons why proposed section 66 authorises entry onto premises without the need to obtain a warrant, and why that provision does not specify certain attributes or qualifications to be possessed by officers before they can become authorised officers.

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

Relevant extract from the response from the Treasurer

Proposed section 66 will confer the same powers of access to authorised officers as currently conferred by section 263 *Income Tax Assessment Act 1936*, section 109 *Sales Tax Assessment Act 1992*, section 127 *Fringe Benefits Tax Assessment Act 1986*, and section 38 *Superannuation Contributions Tax (Assessment and Collection) Act 1997* among others administered by the Commissioner of Taxation.

The suggestion that a judicially sanctioned warrant be obtained before authorised officers enter premises to inspect documents or goods is not supported. Such a requirement would impose a needless hindrance to the efficient conduct of the activities of the ATO.

The conduct of ATO officers, in a fair and professional manner, is governed by The Taxpayers' Charter and comprehensive guidelines on the use of access and information gathering powers. Both of these documents are publicly available. The ATO also controls the use of these powers through a system of delegation and authorisation of ATO officers.

The ATO has a policy of endeavouring to deal with taxpayers and their advisers co-operatively. This means that advance notice and requests for co-operation are part of the preferred method of obtaining access to taxpayers' premises. Formal approaches to seeking access will be made if taxpayer co-operation is not forthcoming or if the premises are occupied by persons other than the taxpayer. Likewise, urgent access action may be appropriate if an officer reasonably believes that the existence or integrity of documents or information is under threat. The guidelines state that urgent access action requires the approval of a senior officer. Taxpayers are informed that they may have a representative present at any time, and are given reasonable time and opportunity to consult with their representative.

The access powers, as currently framed, provide ATO officers with flexibility in managing the conduct of their activities according to the co-operation they receive. To require the obtaining of a judicially sanctioned warrant before an authorised officer can enter premises would produce an unnecessarily adversarial climate and would not be conducive to a relationship of mutual co-operation between ATO officers and taxpayers. It would undermine the promotion within the taxpaying community of voluntary compliance with the tax laws. Furthermore, delay resulting from the need to obtain a judicially sanctioned warrant could jeopardise the outcome of audits where crucial evidence may be at risk.

The suggestion that the provision should limit or categorise, by certain attributes or qualifications, those officers who might be authorised to exercise the powers is also not supported. The authority to access and gather information and evidence formally is delegated to officers under the relevant taxation laws. When entering premises or seeking documents officers are required to produce their identification and explain the purpose of their visit. The 'wallet authority' containing the authorisation for an officer to exercise access powers can only be used in relation to those powers.

The Committee has referred to section 258 of the *Superannuation Industry (Supervision) Act 1993* as an example of a provision that allows for the qualifications of an investigator to be specified. This provision concerns the giving of a notice by the Australian Prudential Regulation Authority (APRA) to the trustee of a superannuation entity to appoint an external investigator to investigate and report on the financial position of the entity. Legislative provision for the specification of

qualifications is appropriate in these circumstances because the external investigator would be appointed solely by the trustee of the entity being investigated. Such a requirement is not necessary where an investigation is undertaken by APRA staff. For example, section 268 the *Superannuation Industry (Supervision) Act 1993* does not specify the qualifications of an APRA inspector when that inspector is exercising the access powers specified in that Act. In essence, the power contained in section 268 is the same as that in proposed section 66 of the *Taxation Administration Act 1953*.

I trust that the above information is useful in the Committee's deliberations in relation to these matters.

The Committee thanks the Treasurer for this response, and notes that proposed section 66 will, in effect, confer the same powers of access on authorised officers as are currently conferred under other legislation administered by the Commissioner.

The Committee further notes that authorised officers need not be ATO officers as intimated in the Treasurer's response. Proposed section 20 of the Administration Bill states that an authorised officer means "a person the Commissioner has authorised to exercise powers or perform functions". Elsewhere in the tax legislation, a person may include a company.

The Committee consistently draws attention to provisions which allow the delegation of significant and wide-ranging powers to anyone who fits the all-embracing description of "a person". Such provisions may make rights and liberties unduly dependent on insufficiently defined administrative powers. Therefore, the Committee **seeks the Treasurer's further advice** on why the search and entry power is expressed so broadly, and whether it should be restricted to senior ATO officers.

The Committee notes that the Senate has agreed to refer the fairness, purpose, effectiveness and consistency of search and entry provisions in Commonwealth legislation to the Committee for inquiry and report. The desirability of provisions such as these which authorise entry without a warrant is best considered as part of this inquiry.

A New Tax System (Goods and Services Tax) Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Treasurer has responded to those comments in a letter dated 23 April 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Treasurer's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to implement a broad based indirect goods and services tax (GST) to replace the wholesale sales tax and a number of indirect State taxes by establishing:

- the basic rules for the GST;
- which supplies, acquisitions and importations are GST-free or input taxed;
- special rules, which modify the application of the general rules; and
- miscellaneous and interpretative provisions relating to the GST.

Apparently excessive powers
Proposed new Division 165

As noted in proposed new subsection 165-1, proposed Division 165 of this bill is intended to deter schemes to give benefits by reducing GST, increasing refunds or altering the timing of payment of GST or refunds. If the dominant purpose or a principal effect of a scheme is to give an entity such a benefit, the Commissioner may negate the benefit an entity gets from the scheme by declaring how much GST or refund would have been payable, and when it would have been payable, apart from the scheme.

In particular, under proposed new subsection 165-55, the Commissioner may, for the purposes of making such a declaration:

- treat a particular event that actually happened as not having happened; and
- treat a particular event that did not actually happen as having happened; and
- treat a particular event that actually happened as having happened at a time different from the time it actually happened, or having involved particular action by a particular entity (whether or not the event actually involved any action by that entity).

These are apparently wide discretionary powers. However, the Committee understands that, in general terms, these powers have been modelled on the Commissioner's existing powers in Part IVA of the *Income Tax Assessment Act 1936*. The Committee also notes that declarations under proposed section 165 are to be reviewable under amendments to the *Taxation Administration Act 1953*.

Nevertheless, the Committee would expect that the exercise of such wide powers would be subject to some guidelines or codes of practice. The Committee also expects that such powers would be used infrequently, and considers that the frequency of their use is something that should be brought to the attention of the Parliament. The Committee, therefore, **seeks the Treasurer's advice** as to whether any guidelines are to be issued to govern the exercise of the Commissioner's powers under Division 165. The Committee also **seeks the Treasurer's advice** on the feasibility of tabling, in each House of the Parliament, an annual report indicating the frequency with which the Commissioner has used these powers, and outlining in broad terms the general categories of conduct that have prompted their exercise.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Treasurer

> The policy underlying proposed provisions in section 165-55 is considered to be neither new nor exceptional in the context of a general anti-avoidance rule.
>
> Existing general anti-avoidance rules call for a conclusion to be reached about what would "reasonably be expected [to have happened] if the scheme had not been entered into or carried out" - see for example subsection 177C(1) *Income Tax Assessment Act 1936*, and subsection 93(1) *Sales Tax Assessment Act 1992*. In other words, they provide a power of reconstruction.
>
> The proposed GST anti-avoidance rule also provides a power of reconstruction. It is not considered that proposed section 165-55 provides any greater discretionary

power than already exists in the general anti-avoidance rules in the *Income Tax Assessment Act 1936* or the *Sales Tax Assessment Act 1992* for example. Proposed section 165-55 expressly sets out powers of reconstruction, and largely mirrors those already existing at subsection 93A(2) of the *Sales Tax Assessment Act 1992*.

The powers of the Commissioner are not unfettered. They can only be exercised "reasonably" (see proposed section 165-10), and their exercise is, as noted by the Committee, subject to both administrative and judicial review.

The application of a general anti-avoidance rule is a matter for careful case by case decision, as each case necessarily turns on its own facts when conclusions about "dominant purpose" or "principal effect" must be made.

Guidelines as to the scope and operation of the provisions are found in the Explanatory Memorandum. Further guidelines will be considered if any judicial pronouncements are made.

However, the Australian Taxation Office (ATO) has a Panel, involving senior ATO staff as well as external taxation experts engaged as consultants, which considers the application of general anti-avoidance rules to specific cases. The GST general anti-avoidance rule will also be part of that process. This approach ensures the consistent application and development of general anti-avoidance provisions across the range of taxes. It also provides taxpayers with the assurance the use of a general anti-avoidance rule involves an objective consideration of the issues at a senior level.

The Commissioner will report on cases where he has applied the anti-avoidance provisions in his annual report (required by proposed new section 64 of the *Taxation Administration Act 1953*) which provides the most efficient means of communicating this information.

The Committee thanks the Treasurer for this response.

A New Tax System (Indirect Tax Administration) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 30 April 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 5 of 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Taxation Administration Act 1953* to provide for the administration and collection of the wine equalisation tax and luxury car tax by the Commissioner of Taxation.

Reviewable decisions?
Schedule 1, item 66

Item 66 of Schedule 1 to this bill proposes to insert a new subsection 62(2A) in the *Taxation Administration Act 1953*. This subsection provides for review of a number of decisions under the Wine Tax Act. This Act is defined as the *A New Tax System (Wine Equalisation Tax) Act 1999* (see item 10 of Schedule 1 to the bill).

However, there seems to be no correlation between the decisions listed in proposed subsection 62(2A) and the nominated provisions of the Wine Tax Act. For example, subsection 62(2A) states that refusing to register a person for wine tax under section 79 of the Wine Tax Act is a reviewable decision. There is no section 79 in the A New Tax System (Wine Equalisation Tax) Bill 1999. Similarly, cancelling a person's registration for wine tax under subsection 80(1) is said to be a reviewable decision. There is no subsection 80(1) in the A New Tax System (Wine Equalisation Tax) Bill 1999.

The Committee, therefore, **seeks the Minister's advice** as to which decisions are reviewable under proposed subsection 62(2A).

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

Relevant extract from the response from the Assistant Treasurer

> There was an oversight in the preparation of this Bill which needs to be corrected. As there is no separate registration requirement in the WET Bill Items 1 to 3 in the proposed subsection 62(2A) are not relevant. The only reviewable decision that should be included as part of subsection 62(2A) is the current Item 4 relating to a decision to disallow the whole or part of a claim for a wine tax credit. The reference in the column headed "Provision of Wine Tax Act under which decision is made" should be section 17-45.

The Committee thanks the Assistant Treasurer for this response.

A New Tax System (Luxury Car Tax) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 30 April 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 5 of 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to implement a luxury car tax at the rate of 25 per cent on taxable supplies and importations of luxury cars, from 1 July 2000.

Insufficient Parliamentary scrutiny
Subclause 21-1(2)

Proposed subclause 21-1(1) of this bill exempts the Commonwealth and Commonwealth entities from actual liability for the payment of luxury car tax, but imposes on them a notional liability and requires them to notionally have luxury car tax adjustments. Proposed subclause 21-1(2) enables the Minister for Finance to give "such written directions" to give effect to this provision. By virtue of subclause 21-1(3), these directions override "any other Commonwealth law".

Clearly, such directions permit changes to be made to the application of other laws passed by the Parliament. However, it is not apparent from the bill or the Explanatory Memorandum whether these directions are to be given only to entities which are part of the Commonwealth, or may also be given to entities which are separate from the Commonwealth. The Committee has previously accepted that such directions may be given to Commonwealth entities without qualification. However, where they are given to entities which are separate from the Commonwealth, then they should, at the very least, be disallowable.

The Committee, therefore, **seeks the Minister's advice** as to whether these directions may be given to non-Commonwealth entities, and, if so, why they should not be tabled and subject to Parliamentary scrutiny.

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

Extract from the response from the Assistant Treasurer

The concerns raised by the Committee relate to the same provision in each of [the ANTS (Luxury Car Tax) Bill 1999 and the ANTS (Wine Equalisation Tax) Bill 1999]. The provisions relate to the application of the bills to the Commonwealth and Commonwealth entities. This provision is also included in the GST Bill. The proposed section in each of these bills ensures that the Commonwealth and Commonwealth entities are not liable to pay the tax payable under the Acts. However, it is intended that the Commonwealth and Commonwealth entities would be notionally liable to pay the tax and notionally entitled to credits arising under the Acts.

The purpose of the provision is to ensure that where relevant the Commonwealth and Commonwealth entities will pay notional amounts of luxury car tax and wine tax. These provisions will only apply to entities that are part of the Commonwealth. An entity that is not part of the Commonwealth will have an actual liability for any wine tax or luxury car tax payable.

The written directions to be given by the Minister for Finance referred to in these bills will therefore only apply to entities that are part of the Commonwealth.

Background

"Commonwealth entity" is defined in the bills to mean:

(a) an agency (within the meaning of the *Financial Management and Accountability Act 1997);* or

(b) a Commonwealth authority (within the meaning of the *Commonwealth Authorities and Companies Act 1997*);

that cannot be made liable to taxation by a Commonwealth law.

The term "agency" is defined in the *Financial Management and Accountability Act 1997* ("FMA Act") to mean:

(a) a Department of State:
  (i) including persons who are allocated to the Department (for the purposes of this Act) by regulations made for the purposes of this paragraph; but
  (ii) not including any part of the Department that is a prescribed Agency;

(b) a Department of the Parliament, including persons who are allocated to the Department (for the purposes of this Act) by regulations made for the purposes of this paragraph;

(c) a prescribed Agency.

The term "Commonwealth authority" is defined in section 7 of the *Commonwealth Authorities and Companies Act 1997* ("CAC Act"):

"(1) In this Act, Commonwealth authority means either of the following kinds of body that holds money on its own account:

(a) a body corporate that is incorporated for a public purpose by an Act;

(b) a body corporate that is incorporated for a public purpose by:

(i) regulations under an Act; or

(ii) an Ordinance of an external Territory (other than Norfolk Island) or regulations under such an Ordinance; and is prescribed for the purposes of this paragraph by regulations under this Act.

(2) None of the following are Commonwealth authorities:

(a) Corporations Law companies;

(b) Aboriginal associations incorporated under Part IV of the *Aboriginal Councils and Associations Act 1976;*

(c) associations of employees that are organisations within the meaning of the *Workplace Relations Act 1996*.

(3) For the purposes of subsection (1), all money that a body holds is taken to be held by it on its own account, unless the money is public money as defined in section 5 of the *Financial Management and Accountability Act 1997*."

The above two Acts are concerned with the financial management, accountability and audit of Commonwealth agencies, authorities and companies. The 2 Acts together with the *Auditor-General Act 1997* replaced the *Audit Act 1901*. The meaning of Commonwealth entity in the LCT Bill and the WET Bill does not include a wholly-owned Commonwealth company referred to in the FMA Act.

The FMA Act is concerned with the regulatory/accounting/accountability framework for dealing with and managing the money and property of the Commonwealth. Its scope covers the underlying principles that govern the activities of persons in organisations that, financially, are agents of the Commonwealth - that is Departments' those Statutory Authorities whose enabling legislation does not give them legal ownership of money or property separately from the Commonwealth; and any body, organisation or group of persons prescribed as an Agency on the basis of its dealing with and managing public money or public property on behalf of the Commonwealth.

The CAC Act deals with the financial management, accountability and audit of Commonwealth agencies, authorities and companies.

I trust that these comments address the concerns of the Committee.

The Committee thanks the Assistant Treasurer for this response.

A New Tax System (Wine Equalisation Tax) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter received on 30 April 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 5 of 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to implement a wine equalisation tax at the rate of 29 per cent on assessable dealings and importations of wine made on or after 1 July 2000.

Insufficient Parliamentary scrutiny
Subclause 27-20(2)

Proposed subclause 27-20(2) of this bill exempts the Commonwealth and Commonwealth entities from actual liability for the payment of wine tax, but imposes on them a notional liability and requires them to notionally have wine tax adjustments. Proposed subclause 27-20(2) enables the Minister for Finance to give "such written directions" to give effect to this provision. By virtue of subclause 27-20(3), these directions override "any other Commonwealth law".

Clearly, such directions permit changes to be made to the application of other laws passed by the Parliament. However, it is not apparent from the bill or the Explanatory Memorandum whether these directions are to be given only to entities which are part of the Commonwealth, or may also be given to entities which are separate from the Commonwealth. The Committee has previously accepted that such directions may be given to Commonwealth entities without qualification. However, where they are given to entities which are separate from the Commonwealth, then they should, at the very least, be disallowable.

The Committee, therefore, **seeks the Minister's advice** as to whether these directions may be given to non-Commonwealth entities, and, if so, why they should not be tabled and subject to Parliamentary scrutiny.

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

Relevant extract from the response from the Minister

The concerns raised by the Committee relate to the same provision in each of in each of [the ANTS (Luxury Car Tax) Bill 1999 and the ANTS (Wine Equalisation Tax) Bill 1999]. The provisions relate to the application of the bills to the Commonwealth and Commonwealth entities. This provision is also included in the GST Bill. The proposed section in each of these bills ensures that the Commonwealth and Commonwealth entities are not liable to pay the tax payable under the Acts. However, it is intended that the Commonwealth and Commonwealth entities would be notionally liable to pay the tax and notionally entitled to credits arising under the Acts.

The purpose of the provision is to ensure that where relevant the Commonwealth and Commonwealth entities will pay notional amounts of luxury car tax and wine tax. These provisions will only apply to entities that are part of the Commonwealth. An entity that is not part of the Commonwealth will have an actual liability for any wine tax or luxury car tax payable.

The written directions to be given by the Minister for Finance referred to in these bills will therefore only apply to entities that are part of the Commonwealth.

Background

"Commonwealth entity" is defined in the bills to mean:

(a) agency (within the meaning of the *Financial Management and Accountability Act 1997);* or

(b) a Commonwealth authority (within the meaning of the *Commonwealth Authorities and Companies Act 1997*);

that cannot be made liable to taxation by a Commonwealth law.

The term "agency" is defined in the *Financial Management and Accountability Act 1997* ("FMA Act") to mean:

(a) a Department of State:
  (i) including persons who are allocated to the Department (for the purposes of this Act) by regulations made for the purposes of this paragraph; but
  (ii) not including any part of the Department that is a prescribed Agency;

(b) a Department of the Parliament, including persons who are allocated to the Department (for the purposes of this Act) by regulations made for the purposes of this paragraph;

(c) a prescribed Agency.

The term "Commonwealth authority" is defined in section 7 of the *Commonwealth Authorities and Companies Act 1997* ("CAC Act"):

"(1) In this Act, Commonwealth authority means either of the following kinds of body that holds money on its own account:

(a) a body corporate that is incorporated for a public purpose by an Act;

(b) a body corporate that is incorporated for a public purpose by:

(i) regulations under an Act; or

(ii) an Ordinance of an external Territory (other than Norfolk Island) or regulations under such an Ordinance; and is prescribed for the purposes of this paragraph by regulations under this Act.

(2) None of the following are Commonwealth authorities:

(a) Corporations Law companies;

(b) Aboriginal associations incorporated under Part IV of the *Aboriginal Councils and Associations Act 1976;*

(c) associations of employees that are organisations within the meaning of the *Workplace Relations Act 1996*.

(3) For the purposes of subsection (1), all money that a body holds is taken to be held by it on its own account, unless the money is public money as defined in section 5 of the *Financial Management and Accountability Act 1997*."

The above two Acts are concerned with the financial management, accountability and audit of Commonwealth agencies, authorities and companies. The 2 Acts together with the *Auditor-General Act 1997* replaced the *Audit Act 1901*. The meaning of Commonwealth entity in the LCT Bill and the WET Bill does not include a wholly-owned Commonwealth company referred to in the FMA Act.

The FMA Act is concerned with the regulatory/accounting/accountability framework for dealing with and managing the money and property of the Commonwealth. Its scope covers the underlying principles that govern the activities of persons in organisations that, financially, are agents of the Commonwealth - that is Departments' those Statutory Authorities whose enabling legislation does not give them legal ownership of money or property separately from the Commonwealth; and any body, organisation or group of persons prescribed as an Agency on the basis of its dealing with and managing public money or public property on behalf of the Commonwealth.

The CAC Act deals with the financial management, accountability and audit of Commonwealth agencies, authorities and companies.

I trust that these comments address the concerns of the Committee.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
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 1999

The Committee presents its Ninth Report of 1999 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:

Broadcasting Services Amendment (Online Services) Bill 1999

Norfolk Island Amendment Bill 1999

Superannuation Legislation Amendment Bill (No. 3) 1999

Broadcasting Services Amendment (Online Services) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 1999*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 12 May 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 7 of 1999

This bill was introduced into the Senate on 21 April 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Broadcasting Services Act 1992* to provide for the regulation of online services by:

- establishing a complaints mechanism to enable complaints to be made to the Australian Broadcasting Authority (ABA) about offensive material online;
- defining material that will trigger action by the ABA, on the basis of current National Classification Board guidelines for film, as material Refused Classification and rated X, and material rated R that is not protected by adult verification procedures;
- giving powers to the ABA to issue notices to service providers aimed at preventing access to prohibited material which is subject to a complaint if it is hosted in Australia or, if the material is sourced overseas, to take reasonable steps to prevent access if technically feasible;
- providing indemnities for service providers to protect them from litigation by customers affected by ABA notices;
- providing a graduated scale of sanctions against service providers breaching ABA notices or the legislation;

- providing that the framework will not apply to private or restricted distribution communications such as e-mail (subject to the ability of the Minister to declare that a specified person who supplies, or proposes to supply, a specified Internet carriage service is an Internet service provider) – however, current provisions of the *Crimes Act 1914* (Cth) in relation to offensive or harassing use of a telecommunications service will apply in this context;

- establishing a community advisory body to monitor material, operate a 'hotline' to receive complaints about illegal material and pass relevant information to the ABA and police authorities, and also advise the public about options such as filtering software that are available to address concerns about online content;

- giving the Commonwealth responsibility for regulating the activities of Internet service providers and Internet content hosts, and providing that the Attorney-General is to encourage the development of uniform State and Territory offence provisions complementing the Commonwealth legislation that creates offences for the publication and transmission of proscribed material by users and content creators; and

makes a consequential amendment to the *Crimes Act 1914*.

Non-disallowable instruments
Clause 3 of Schedule 5

Item 10 of Schedule 1 to this bill proposes to add a new Schedule 5 to the *Broadcasting Services Act 1992*. This Schedule sets up a system for regulating certain aspects of the Internet industry.

Clause 3 of proposed Schedule 5 will permit the ABA to declare that "a specified access-control system is a restricted access system in relation to Internet content". In making such a declaration, the ABA must have regard to the objective of protecting children from exposure to Internet content which is unsuitable for children, and such other matters (if any) as the ABA considers relevant.

Subclause 3(3) states that a copy of any such instrument must be laid before each House of the Parliament within 15 days after the date on which the instrument was made. No provision seems to have been made for the possible disallowance of such instruments. The Committee, therefore, **seeks the Minister's advice** as to whether instruments made under clause 3 of Schedule 5 of the *Broadcasting Services Act 1992* are disallowable, and, if not, why they should be exempt from disallowance.

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

Relevant extract from the response from the Minister

> The Digest notes that clause 3 of proposed Schedule 5 of the *Broadcasting Services Amendment (Online Services) Bill 1999* (the Bill) will permit the ABA to declare that "a specified access-control system is a restricted access system in relation to Internet content." Subclause 3(3) provides that a copy of any such instrument must be laid before each House of the Parliament within 15 days. The Standing Committee seeks my advice as to whether instruments made under clause 3 of Schedule 5 of the Bill are disallowable and, if not, why they should be exempt from disallowance.
>
> The Bill does not currently provide for the disallowance of instruments made by the ABA under clause 3 of proposed Schedule 5. I propose provision for disallowance will be made through Government amendments of the Bill.

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

Norfolk Island Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 1999*, in which it made various comments. The Minister for Regional Services, Territories and Local Government has responded to those comments in a letter dated 13 May 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 6 of 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Regional Services, Territories and Local Government]

The bill proposes to amend the *Norfolk Island Act 1979* to:

- allow Commonwealth oversight of firearms legislation on Norfolk Island;
- provide for Deputy Administrators to be appointed by the Federal Minister responsible for Territories rather than the Governor-General;
- extend the right to vote in Legislative Assembly elections to all Australian citizens ordinarily resident on the Island;
- establish Australian citizenship as a qualification for enrolment and election to the Legislative Assembly; and
- preserve the existing enrolment rights of enrolled non-Australian citizens.

The rights and liberties of electors
Schedule 1, items 5, 7 and 9

Items 5, 7 and 9 of Schedule 1 to this bill propose to insert new paragraphs 38(ba), 39(2)(da) and 39A(1)(b) in the *Norfolk Island Act 1979*. These new paragraphs will require those who wish to stand for election to the Norfolk Island Legislative Assembly (the Assembly), and those who wish to vote in elections for that Assembly, to be Australian citizens.

The Explanatory Memorandum notes that the *Norfolk Island Act 1979* currently provides that a person may stand for election to the Assembly if he or she is at least 18 years of age, is entitled to vote at elections, and has been ordinarily resident on the Island for 5 years immediately preceding the date of nomination. The *Legislative Assembly Act 1979 (Norfolk Island)* provides that a person is qualified to enrol where that person is at least 18 years of age, and has been present on the Island for 900 days during the period of 4 years immediately preceding their application for enrolment.

The Explanatory Memorandum goes on to note that the 900 day qualifying period for enrolment on Norfolk Island far exceeds the one month period that applies to the Commonwealth and in all States and Territories on the mainland (with Tasmania having a qualifying period of 6 months). It also notes that the Assembly is the only Australian legislative body where non-Australian citizens are entitled to enrol and stand for election. Finally, on this issue, the Explanatory Memorandum notes that the enrolment rights of non-Australian citizens currently on the electoral roll will be preserved, but that the proposed amendments will apply to candidates and voters in the future.

This bill will effectively override subsection 6(1) of the *Legislative Assembly Act 1979 (Norfolk Island)*. In *Alert Digest No 7 of 1996*, the Committee outlined a number of concerns raised by the Euthanasia Laws Bill 1996, which similarly proposed to overturn a law duly passed by a Territory Assembly. Specifically, the Committee noted that the Territory Assemblies are all elected democratically on a universal adult franchise. The Euthanasia Laws Bill seemed "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".

The Committee has received representations from the Government of Norfolk Island which express similar views about this bill (copy appended to this *Digest*). Specifically, the Island's Chief Minister questions the urgency of the legislation, which is based on proposals first advanced in 1991, and observes that the proposals were rejected in a local referendum in August 1998. He goes on to state that requiring all residents of Norfolk Island to become Australian citizens in order to vote in local elections is "of utmost concern" to the people of the Island, and that "it is not proper for the Commonwealth of Australia to interfere in our local electoral laws".

Norfolk Island enjoys an unusual status as an External Territory under the authority of Australia and attached to it only by historical accident and geographic proximity. The Commonwealth of Australia finds our status "an anomaly" given that we pay no taxes, are not represented in the Australian parliament, receive no medicare benefits, nor social security. We prefer it that way and regard it as unique. We have our own Parliament and Government. We are self-sufficient, relying largely on tourism for our income and levying local taxes to support social welfare, health, education, and a range of local government functions.

For the past twenty years we have been moving progressively toward full self government. This has been a successful transition and we anticipate a harmonious relationship with Australia during the final phases of transition.

It has, therefore, been both confrontational and provocative for the Commonwealth of Australia to pursue a course of action which few on the Island would support and which, in essence, achieves nothing of consequence for either Australia or Norfolk Island.

Our residency qualifications prior to voting are no more onerous than those of Australia. In Australia you must be resident for 2 of the previous 5 years (including 12 continual months in the past 24 months) in order to become a citizen and vote. On Norfolk you must be resident for 2 years and five months in order to vote. Our immigration laws are similar to Australia's but we have much stricter residency requirements.

We do not think transient Australians have any more real place or interest voting in our local elections than we do if temporarily resident in Australia for the purposes of business or study …

Approximately one-quarter of our residents are not Australian citizens, and do not choose to alter their citizenship status. Non-Australian citizens would no longer be able to be enrolled if the proposed amendments succeed.

The Committee, therefore, **seeks the Minister's advice** on the concerns expressed by the Chief Minister of the Government of Norfolk Island, which address the effect of the bill on the rights and liberties of electors on the Island, and also on the relationship between this bill and Norfolk Island's transition to self-government.

Pending the Minister'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.

Relevant extract from the response from the Minister

Australian citizenship – Voting & Membership of the Territory Assembly

In summary, the proposed changes will:

(i) give Australian citizens on Norfolk Island the right to enrol to vote at Assembly Elections (after 6 months residence on the Island);

(ii) make Australian citizenship a prerequisite for new enrolments to vote;

(iii) preserve the enrolment and voting rights of persons already on the electoral roll, irrespective of citizenship; and

(iv) make Australian citizenship a prerequisite for standing for election to the Legislative Assembly.

I note the preliminary observation in the Committee's Alert Digest 6/99 that "the provisions may be considered to trespass unduly on personal rights and liberties". On

the contrary, they will extend to Australian citizens in this part of Australia personal rights and liberties already enjoyed by all Australian citizens in every other Australian jurisdiction. The personal rights and liberties of foreigners in the Territory will be preserved to the extent that persons already enrolled to vote in Norfolk Island Legislative Assembly elections will have their enrolments preserved, irrespective of citizenship. Further, persons who are already Members of the Assembly will be entitled to serve out in full the terms for which they have been elected, again irrespective of citizenship.

I now turn specifically to the letter to you from the Norfolk Island Chief Minister. Mr Smith mentions a local referendum on the electoral issues. The rights of Australian citizens are national issues for determination by the Federal Parliament, not the subject of local plebiscites by small community groupings, especially where (a) not all resident Australians are permitted to vote and (b) non citizen residents can vote on an essentially national issue.

Mr Smith also says that Norfolk Island enjoys "an unusual status as an External Territory under the authority of Australia and attached to it only by historical accident and geographic proximity". His letter implies that Norfolk Island is temporarily connected to Australia for the time being; that a progressive "transition to full self-government" will somehow result in a grant of a status for the Island separate from Australia.

This is incorrect. Norfolk Island is and will remain an integral part of the Commonwealth of Australia in the same way as Australia's other inhabited island Territories of Christmas Island and the Cocos (Keeling) Islands, and indeed like the mainland Territories of the ACT, the Northern Territory and the Jervis Bay Territory. As with the ACT and the Northern Territory, the Federal Parliament has devolved a degree of internal self government on the Norfolk Island Legislative Assembly. While the revenue raising and sharing arrangements differ substantively, and there is variation in the range of powers exercised from those of the Northern Territory, the models of internal self government provided for in the self government legislation in these two Territories in 1978 and 1979 are very similar indeed.

The Federal Government remains open to realistic proposals from the Norfolk Island Government for the enhancement of internal self government including the possible transfer of further powers and functions between the Commonwealth and the Territory Assembly. However any such enhancement would occur within the existing constitutional status of the Territory as an integral part of Australia. It would also need to take account of the findings in the recent Commonwealth Grants Commission study of the Island economy that the Island Government is having difficulty effectively funding and discharging its present range of functions.

Mr Smith's letter suggests that "transient Australians" should not be entitled to vote in Territory elections; that Australian citizens moving between Australian jurisdictions should be obliged to acquire over a period of years "an understanding of our life, its benefit and its disadvantages and they may vote". In all other Australian jurisdictions the residency qualification for enrolment to voting is one month, except Tasmania where it is six months. We have adopted that longer period in respect of Norfolk Island but it is not an acceptable premise that Australian citizens need detailed local knowledge for voting purposes when moving between Australian parliamentary jurisdictions.

Mr Smith's letter implies that "Australia" is somehow a foreign country for citizenship purposes. It needs to be remembered that the *Australian Citizenship Act*

1948 has applied in Norfolk Island since inception in the same way as in the rest of Australia, and children born on Norfolk Island have been Australian by birth under the same rules applied on the mainland.

I have attached a copy of an article recently published in the local newspaper *The Norfolk Islander* which may assist the Committee.

The Committee thanks the Minister for this detailed response. Clearly, the bill raises the issue of the constitutional status of Norfolk Island as an external territory of Australia. It also raises the issue of the effect of prescribed residency qualifications on the voting rights of Australian citizens and Norfolk Island residents. These are issues of fundamental policy and are, therefore, best determined by the Senate itself.

Superannuation Legislation Amendment Bill (No. 3) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 24 May 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 6 of 1999

This bill was introduced into the House of Representatives on 31 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* to:

- establish a new category of small superannuation fund with fewer than five members to be called a self managed superannuation fund; and
- provide for the transfer of the regulation of self managed superannuation funds from the Australian Prudential Regulation Authority to the Australian Taxation Office, effective from 1 July 1999; and

make consequential amendments to seven other Acts.

Strict liability offence and penalties
Proposed new subsection 252A(4)

Item 56 of Schedule 1 to this bill proposes to insert a new section 252A in the *Superannuation Industry (Supervision) Act 1993*. This new provision authorises the Australian Prudential Regulation Authority or the Commissioner of Taxation to request certain information from a regulated superannuation fund with fewer than 5 members.

Subsection 252A(3) makes it an offence to fail to provide this information, and subsection (4) makes it an offence of strict liability. Penalties on a conviction are noted in the Table appended to this *Digest*. Imposing strict liability would seem to absolve the prosecution from having to prove any intention, recklessness or lack of care on the part of an accused who failed to provide the information required within the time specified.

The Explanatory Memorandum provides no reason for departing from the normal practice, which requires the prosecution to prove that an accused person intended to act contrary to the law. The Committee, therefore, **seeks the Treasurer's advice** on the reasons for departing from this normal practice, and on whether the Committee's *Eighth Report of 1998* (*The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996*) was taken into consideration in developing the penalty provisions in this bill.

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

Relevant extract from the response from the Assistant Treasurer

I am responding to your letter as the Minister responsible for the SLA Bill.

The Digest notes that Item 56 of Schedule 1 to the SLA Bill proposes to insert a new section 252A in the *Superannuation Industry (Supervision)* (SIS) *Act 1993*. This new provision authorises the Australian Prudential Regulation Authority or the Commissioner of Taxation to request certain information from a regulated superannuation fund with fewer than five members. Subsection 252A(3) makes it an offence to fail to provide this information, and subsection (4) makes it an offence of strict liability. Imposing strict liability would seem to absolve the prosecution from having to prove any intention, recklessness or lack or care on the part of an accused that failed to provide information within the specified time.

The Committee is seeking the Treasurer's advice on the reasons for departing from the normal practice, which requires the prosecution to prove that an accused person intended to act contrary to the law and on whether the Committee's *Eighth Report of 1998* (*The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996*) was taken into consideration in developing the penalty provisions in this bill.

The offence provision in new section 252A was developed having regard to Commonwealth criminal law policy on strict liability offences. That is, strict liability offences should be restricted to offences that are essentially regulatory in nature and which impose only minor penalties.

New section 252A will provide APRA and the ATO with the ability to serve a notice on a fund in order to assess whether the fund is regulated by APRA or the ATO. Without the provision a 'regulator' would not be able to determine with certainty whether they had the power to regulate a given fund. In this regard the provision is central to the operation of the supervisory regime in the SIS Act and is clearly of a regulatory nature. The maximum monetary penalty for a person convicted of a breach of new section 252A is 50 penalty units which is appropriate for a minor offence.

Furthermore, it is considered that the inclusion of a 'fault' element in the offence provision would make the new section 252A unenforceable thereby leading to non-compliance with the provision by superannuation funds. In particular, it would be almost impossible for a prosecution to demonstrate that the contravention of the provision was reckless or deliberate (i.e. intentional) in order to secure a conviction.

Finally, while consideration was not specifically given to Committee's *Eighth Report of 1998* when developing the penalty provisions in the bill, the offence provision in new section 252A is consistent with similar provisions in other Commonwealth legislation which apply to the provision of information for regulatory purposes.

I trust this information will be of assistance to you.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TENTH 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 H Coonan
Senator T Crossin
Senator J Ferris
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 1999

The Committee presents its Tenth Report of 1999 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:

A New Tax System (Goods and Services Tax Administration) Bill 1998

Corporate Law Economic Reform Program Bill 1998

Customs Amendment Bill (No. 2) 1999

Environment and Heritage Legislation Amendment Bill 1999

Health Legislation Amendment Bill (No. 4) 1998
(new citation: Health Legislation Amendment Bill (No. 2) 1999

Import Processing Charges Amendment Bill 1999

Migration Legislation Amendment Bill (No. 2) 1998

Migration Legislation Amendment Bill (No. 2) 1999

Superannuation Legislation Amendment Bill (No. 2) 1999

Taxation Laws Amendment Bill (No. 4) 1999

Taxation Laws Amendment Bill (No. 5) 1999

A New Tax System (Goods and Services Tax Administration) Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Treasurer responded to those comments in a letter dated 23 April 1999.

In its *Eighth Report of 1999*, the Committee made some further comments in relation to proposed new section 66. The Treasurer has responded to those comments in a letter dated 18 June 1999. A copy of the letter is attached to this report. An extract from the *Eighth Report* and relevant parts of the Treasurer's further response are discussed below.

Extract from Eighth Report of 1999

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to amend the *Taxation Administration Act 1953* to:

- establish who is to administer the GST law;
- support the collection and recovery of GST;
- set maximum penalties for breaching GST obligations;
- permit entities to rely on the Commissioner's interpretation of the law;
- set time limits on GST liability and on credit entitlements;
- adopt existing mechanisms for the review of assessments and other GST decisions;
- confer powers on the Commissioner for the gathering of information; and
- protect the confidentiality of information disclosed for GST purposes.

Search and entry
Proposed new section 66

As noted above, Item 7 of Schedule 1 to this bill adds a new Part VI to the *Taxation Administration Act 1953*. This Part includes proposed new section 66, which will allow an officer authorised by the Commissioner of Taxation to enter and search any premises and inspect and analyse any documents, goods and other property. No provision is made for obtaining a judicially sanctioned warrant, which is a generally accepted safeguard in such circumstances.

In addition, the clause does not attempt to limit or categorise those who might be authorised to carry out such searches – for example, by specifying certain required attributes or qualifications. Requiring such attributes or qualifications is an approach adopted in some other statutes (for example, section 258 of the *Superannuation Industry (Supervision) Act 1993*) and, arguably, provides some reassurance against possible abuses of a power of such width. The Explanatory Memorandum provides no information beyond that included in the clause itself. The Committee, therefore, **seeks the Treasurer's advice** on the reasons why proposed section 66 authorises entry onto premises without the need to obtain a warrant, and why that provision does not specify certain attributes or qualifications to be possessed by officers before they can become authorised officers.

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

Relevant extract from the earlier response from the Treasurer dated 23 April 1999

> Proposed section 66 will confer the same powers of access to authorised officers as currently conferred by section 263 *Income Tax Assessment Act 1936*, section 109 *Sales Tax Assessment Act 1992*, section 127 *Fringe Benefits Tax Assessment Act 1986*, and section 38 *Superannuation Contributions Tax (Assessment and Collection) Act 1997* among others administered by the Commissioner of Taxation.
>
> The suggestion that a judicially sanctioned warrant be obtained before authorised officers enter premises to inspect documents or goods is not supported. Such a requirement would impose a needless hindrance to the efficient conduct of the activities of the ATO.
>
> The conduct of ATO officers, in a fair and professional manner, is governed by The Taxpayers' Charter and comprehensive guidelines on the use of access and information gathering powers. Both of these documents are publicly available. The

ATO also controls the use of these powers through a system of delegation and authorisation of ATO officers.

The ATO has a policy of endeavouring to deal with taxpayers and their advisers co-operatively. This means that advance notice and requests for co-operation are part of the preferred method of obtaining access to taxpayers' premises. Formal approaches to seeking access will be made if taxpayer co-operation is not forthcoming or if the premises are occupied by persons other than the taxpayer. Likewise, urgent access action may be appropriate if an officer reasonably believes that the existence or integrity of documents or information is under threat. The guidelines state that urgent access action requires the approval of a senior officer. Taxpayers are informed that they may have a representative present at any time, and are given reasonable time and opportunity to consult with their representative.

The access powers, as currently framed, provide ATO officers with flexibility in managing the conduct of their activities according to the co-operation they receive. To require the obtaining of a judicially sanctioned warrant before an authorised officer can enter premises would produce an unnecessarily adversarial climate and would not be conducive to a relationship of mutual co-operation between ATO officers and taxpayers. It would undermine the promotion within the taxpaying community of voluntary compliance with the tax laws. Furthermore, delay resulting from the need to obtain a judicially sanctioned warrant could jeopardise the outcome of audits where crucial evidence may be at risk.

The suggestion that the provision should limit or categorise, by certain attributes or qualifications, those officers who might be authorised to exercise the powers is also not supported. The authority to access and gather information and evidence formally is delegated to officers under the relevant taxation laws. When entering premises or seeking documents officers are required to produce their identification and explain the purpose of their visit. The 'wallet authority' containing the authorisation for an officer to exercise access powers can only be used in relation to those powers.

The Committee has referred to section 258 of the *Superannuation Industry (Supervision) Act 1993* as an example of a provision that allows for the qualifications of an investigator to be specified. This provision concerns the giving of a notice by the Australian Prudential Regulation Authority (APRA) to the trustee of a superannuation entity to appoint an external investigator to investigate and report on the financial position of the entity. Legislative provision for the specification of qualifications is appropriate in these circumstances because the external investigator would be appointed solely by the trustee of the entity being investigated. Such a requirement is not necessary where an investigation is undertaken by APRA staff. For example, section 268 the *Superannuation Industry (Supervision) Act 1993* does not specify the qualifications of an APRA inspector when that inspector is exercising the access powers specified in that Act. In essence, the power contained in section 268 is the same as that in proposed section 66 of the *Taxation Administration Act 1953*.

I trust that the above information is useful in the Committee's deliberations in relation to these matters.

The Committee thanks the Treasurer for this response, and notes that proposed section 66 will, in effect, confer the same powers of access on authorised officers as are currently conferred under other legislation administered by the Commissioner.

The Committee further notes that authorised officers need not be ATO officers as intimated in the Treasurer's response. Proposed section 20 of the Administration Bill states that an authorised officer means "a person the Commissioner has authorised to exercise powers or perform functions". Elsewhere in the tax legislation, a person may include a company.

The Committee consistently draws attention to provisions which allow the delegation of significant and wide-ranging powers to anyone who fits the all-embracing description of "a person". Such provisions may make rights and liberties unduly dependent on insufficiently defined administrative powers. Therefore, the Committee **seeks the Treasurer's further advice** on why the search and entry power is expressed so broadly, and whether it should be restricted to senior ATO officers.

The Committee notes that the Senate has agreed to refer the fairness, purpose, effectiveness and consistency of search and entry provisions in Commonwealth legislation to the Committee for inquiry and report. The desirability of provisions such as these which authorise entry without a warrant is best considered as part of this inquiry.

Relevant extract from the further response from the Treasurer dated 18 June 1999

Section 66 empowers officers authorised by the Commissioner of Taxation to access documents, goods or other property for the purpose of administering the indirect tax laws (Goods and Services Tax, Luxury Car Tax and Wine Equalisation Tax).

The Committee is concerned that the provision allows the delegation of significant and wide-ranging powers to anyone who fits the all-embracing description of "a person" and that this may make rights and liberties unduly dependent on insufficiently defined administrative powers. The Committee has drawn attention to the fact that new section 66 refers to an 'authorised officer', an expression defined in proposed new section 20 of the *Taxation Administration Act 1953* as:

> '…a person the Commissioner has authorised to exercise powers or perform functions under that provision.'

The Committee notes that elsewhere in the tax legislation a 'person' may include a company. It is true that the A New Tax System (Goods and Services Tax) Bill 1998 proposes to define the term 'person' as including a company (as does paragraph 22(1)(a) of the *Acts Interpretation Act 1901*). This meaning is, however, subject to the rider applicable to all defined terms 'except so far as the contrary intention

appears' (section 195-1). In the context of a provision concerning an 'authorised officer' it is clearly apparent that the meaning attributable to the term 'person' is intended to be confined to natural persons. Distinguishing between natural persons and artificial persons in such a provision would impose an unnecessary complication and awkwardness to the drafting of the law. Identical constructions occur in other parts of the tax law, for example, section 16 of the *Income Tax Assessment Act 1936* (secrecy provision) and section 109 of the *Sales Tax Assessment Act 1992* (access provision).

In reply to the question of whether the exercise of the power conferred by proposed new section 66 should be restricted to senior ATO officers the following matters are relevant.

Firstly, the earlier response to the Committee's request for advice about new section 66 set out much of the background to the use of access powers by the Australian Taxation Office (ATO). In promoting compliance with the tax laws the ATO prefers that field officers perform their educative and audit functions by dealing with taxpayers co-operatively, that is, without exercising access powers.

The ATO's published guidelines, as expressed in the Taxpayer's Charter and the Access and Information Gathering Manual, emphasise an informal approach unless there is reason to suspect that the existence or integrity of relevant information is under threat. It is stressed that a rigid formal approach based on indiscriminate exercise of the access power in field activities would not be conducive to the promotion of a relationship of mutual trust and respect between the ATO and the taxpaying community.

It cannot be ignored, however, that dealings with some taxpayers would not be conducted as effectively as at present if it were not for the existence of the access powers as currently framed. The express exclusion of some field officers from authority to exercise the access power would provide non-cooperative taxpayers with a means of resisting the efficient conduct of an audit. The consequent delay in exercising the access power in such circumstances could result in the loss of relevant information to the ATO, and of revenue to the community as a whole through undisclosed tax liability. Alternatively, it could result in higher administrative costs for the ATO and ultimately the community and lower respect for ATO officers who, although not within the senior category suggested, are nevertheless experienced and efficient field officers.

Secondly, new section 66 is consistent with access provisions contained in other taxation laws. The exercise of access powers by ATO officers is subject to a formal system of delegation and authorisation and to both internal and external controls. Authorised officers are subject to a rigorous selection process to ensure their suitability for the duties they perform. An understanding of the policies and procedures articulated in the Taxpayer's Charter and the Access and Information Gathering Manual is acquired by them in the course of their training. In accordance with those guidelines, the exercise of access powers is subject to supervision by, and sometimes the approval of, superior officers. Quality assurance mechanisms apply currently (and would also apply to indirect tax compliance activities) to ensure adherence to best practice in field operations, including when and how access powers should be used. External controls that apply to the use of these powers include judicial supervision through administrative law actions and the requirements of the Privacy Act to respect taxpayers' privacy.

Thirdly, it is proposed that field officers engaged in indirect tax compliance activities will perform audit and educative functions that may also embrace liability to income tax and fringe benefits tax. It would be incongruous and open to ridicule if officers found themselves in a position where they were authorised to seek access to documents for income tax and fringe benefits tax purposes but not for GST purposes. Compliance with the tax laws is best promoted if there is consistency in the application of access powers.

Having regard to these factors, the suggestion that the law provide for exercise of the indirect tax access powers to be expressly limited to a defined category of senior ATO officers is not supported. I trust that the above information is useful in the Committee's deliberations in relation to this matter.

The Committee thanks the Treasurer for this detailed response, and notes that it awaits confirmation that the Commissioner may only authorise "an ATO officer" rather than "a person" to exercise access powers under the bill.

Corporate Law Economic Reform Program Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Minister for Financial Services and Regulation has responded to those comments in a letter dated 8 June 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to implement key elements of the Corporate Law Economic Reform Program (CLERP) in the areas of fundraising, directors' duties and corporate governance, accounting standards and takeovers.

Retrospective effect
Schedule 7, item 12

By virtue of subclause 2(4), the amendment proposed by item 12 of Schedule 7 to the bill is taken to have commenced retrospectively on the day on which the *Financial Sector Reform (Consequential Amendments) Act 1998* received Royal Assent. However, the purpose of this amendment appears to be solely to correct a drafting error in earlier legislation.

In these circumstances, the Committee makes no further comment on this provision.

Relevant extract from the response from the Minister

Bill Schedule 7, item 12

The Committee has drawn attention to Schedule 7, item 12 of the Bill, which will be taken to have commenced retrospectively on the day on which the *Financial Sector Reform (Consequential Amendments) Act 1998* received Royal Assent. As noted by the Committee, the purpose of the amendment is to correct a drafting error in that earlier Act. The Government considers the retrospective commencement will not

detrimentally affect rights. On this basis, the Government considers the retrospective effect is appropriate.

Reversal of the onus of proof
Proposed new sections 206A, 606, 670D, 670F, 731, 732 and 733

The prosecution is normally required to prove all the elements of a criminal offence. A number of provisions proposed to be inserted by this bill require an accused person to disprove criminal liability in a variety of circumstances. These circumstances include managing a corporation while disqualified; acquiring a relevant interest in the voting shares of certain companies; making a misstatement in certain takeover and other offer documents; not proceeding with a publicly proposed bid; and making a misstatement in a prospectus or other similar document. It is not clear whether these sections simply represent a continuation of provisions currently included in the legislation, or a change to those provisions. The Committee, therefore, **seeks the Minister's advice** on whether these provisions represent a change in policy, and, if so, on any reasons for that change in policy.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

Bill section 206A

The Committee has drawn attention to the reversal of the onus of proof in Bill section 206A. This provision is largely based on current section 229 of the Corporations Law, however under the Bill there has been what may be regarded as a shift in the evidential burden of proof rather than a reversal. Section 229 of the Corporations Law provides that a disqualified person shall not manage a corporation without the leave of the Court. Under this provision, the prosecution is required to prove both that the person was disqualified and that the person did not have leave of the Court.

Bill section 206A prohibits persons who have been disqualified from managing corporations from engaging in this conduct. In the Government's view there is no change in the onus of proof in establishing the offence as it is the prosecution who must prove the prohibited conduct beyond reasonable doubt.

Bill section 206A provides that it is a defence to a contravention if the person had the permission (either of the Australian Securities and Investments Commission, or of the Court) to manage the corporation. Under this section, once the prosecution has proved that the person managing the corporation was disqualified, the disqualified person would need to adduce evidence that they had permission to manage. It is only

to this extent that Bill section 206A shifts the evidential burden and places that burden on the accused.

The Government considers that once the substantive offence has been proved by the prosecution, the evidential onus may fairly be placed upon the defendant to raise the defence as relevant information is clearly within the defendant's own knowledge. The shift in the evidential burden does not go to the substance of the conduct. It merely requires the defendant, once the conduct constituting the offence has been proved, to adduce evidence of a matter which would not only be peculiarly within their own knowledge, but also in their interest to bring to the immediate attention of the Court.

Bill section 606

The Committee has drawn attention to the reversal of the onus of proof in Bill section 606. Bill section 606 prohibits a person from acquiring a relevant interest in the voting shares of a company which would result in their voting power increasing above 20 per cent. It is a defence if the section was contravened because of inadvertence, mistake or not being aware of a relevant fact or occurrence.

Bill section 606 continues current sections 610 and 615 of the Corporations Law and therefore represents no change in policy. The prohibition in Bill section 606 is of central importance to the takeover provisions of the Corporations Law. It will ensure that a person can only acquire control of a company as allowed by the Law, for example, by making a takeover bid which is regulated by the Corporations Law, where appropriate disclosure is made and where all shareholders have an equal opportunity to participate in the takeover. In these circumstances, the Government considers that retaining the current reversal of the onus of proof is appropriate.

Bill section 670D

The Committee has drawn attention to the reversal of the onus of proof in Bill section 670D. Bill section 670D sets out the defences available to a person who may be liable for a misstatement in a takeover disclosure document. To some extent the section continues current subsection 704(6) of the Corporations Law. However, one of the reforms of the Bill is to ensure that the fundraising and takeover disclosure and liability provisions are generally consistent. As a result Bill section 670D has been brought into line with Bill sections 732 and 733.

The Government considers the reversal of the onus of proof in Bill section 670D is appropriate as it broadly continues the current position in the Corporations Law and for reasons similar to those set out below in relation to Bill sections 732 and 733.

Bill section 670F

The Committee has drawn attention to the reversal of the onus of proof in Bill section 670F. Bill section 631 makes it an offence if a person publicly announces a takeover bid and the person does not proceed with the bid within 2 months or knows that the proposed bid will not be made. Bill section 670F provides that it is a defence if the person proves that they were unaware of certain circumstances or that circumstances have changed since they proposed the takeover bid.

These provisions continue current subsections 746(2), (4) and (10) of the Corporations Law and therefore represent no change in policy. The announcement of a takeover bid, where a person has no intention of proceeding with the bid, could

have a material effect on the integrity of the market. In these circumstances, the Government considers that retaining the current reversal of the onus of proof is appropriate.

Bill sections 731, 732 and 733

The Committee has drawn attention to the reversal of the onus of proof in Bill sections 731, 732 and 733. These sections contain a uniform set of defences for all persons who are potentially liable in relation to disclosure documents.

Bill section 731 provides that a person will not be liable for a misstatement in a prospectus if they made reasonable inquiries and they believed on reasonable grounds that the prospectus did not contain any misstatements or omissions.

Bill section 732 provides that a person will not be liable for a misstatement in a profile statement or offer information statement if they prove that they did not know that it contained a misstatement or omission. Bill section 732 is a modified version of Bill section 731. The modifications take account of the reduced disclosure requirements for profile statements and offer information statements (in particular, there is no requirement for the issuer to undertake reasonable inquiries).

Bill section 733 contains a number of defences which will apply to all disclosure documents. For example, a person who places reasonable reliance on information provided by someone else will also have a defence to any liability that arises from misstatements in relation to that information (Bill subsection 733(1)).

Bill section 731 reflects current subsections 1008A(4) and 1009(4) of the Corporations Law. The defences in Bill section 733 are a continuation of existing sections 1008, 1009 and 1011 of the Corporations Law. However, the current provisions are inconsistent in their application. The Bill will ensure that uniform defences apply to those people who are involved in preparing a prospectus. The Government considers that Bill sections 731, 732 and 733 are a substantial continuation of existing Corporations Law provisions and therefore represent no change in policy.

In addition, the Government considers that continuing the reversal of the onus of proof is appropriate for the following reasons:

- The reforms have been supported by those groups most likely to be potentially liable under the reversal of onus provisions. In particular, the introduction of a uniform set of defences for all persons who are potentially liable in relation to disclosure documents has received strong support. These uniform defences replace the existing complex set of defences in the Corporations Law.

- The prospectus liability provisions, including the defences in Bill sections 731 and 733, are carefully designed to balance the general disclosure test in Bill section 710. The general disclosure test requires a prospectus to contain all the information that investors and their professional advisors would reasonably require to make an informed assessment of the offer. This ‘due diligence’ requirement is reflected in the defences in Bill sections 731 and 733 and seeks to address the information imbalance between issuers and potential investors. This ensures that, when seeking to raise funds from the public, an issuer provides potential investors with adequate disclosure about the securities being offered. Similarly, the liability provisions for profile statements and offer information

statements, including the defences in Bill section 732 and 733, are designed to balance the relevant disclosure requirements in Bill sections 714 and 715.

- As at present, the prosecution will need to establish that the false or misleading statement or omission was material (Bill subsection 728(3)).

The Committee thanks the Minister for this comprehensive response.

Customs Amendment Bill (No. 2) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 1999*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 27 May 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 5 of 1999

This bill was introduced into the House of Representatives on 25 March 1999 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Customs Act 1901* to introduce a registration and electronic cargo reporting scheme for owners of ships and aircraft bringing high volume low value consignments into Australia.

Old convictions, continuing consequences
Proposed new paragraph 67EB(3)(b)

This bill proposes to introduce a new registration and electronic cargo reporting scheme for owners of ships or aircraft bringing "high volume low value" cargo into Australia. Under the scheme, owners of ships and aircraft may apply for registration as "special reporters" and, if registered, are permitted to electronically report low value cargo in a less detailed form than is required by the Customs Act for other cargo.

Specifically, Item 12 of Schedule 1 to the bill proposes to insert a new Subdivision in the *Customs Act 1901*. This covers the registration, rights and obligations of 'special reporters'. This new subdivision includes proposed new subsection 67EB(3), which sets out certain matters to which the CEO of Customs must have regard in deciding whether an applicant for registration is a fit and proper person.

Matters to which the CEO must have regard include:

- whether the person has been convicted of an offence against the Customs Act within the previous 10 years;
- whether the person is an insolvent under administration;

- whether the person was, within the previous 2 years, concerned in the management of a company that had been wound up, or had had its registration as a special reporter cancelled; and
- whether any misleading information or document has been furnished in relation to the application, or information or documents that are, to the knowledge of the applicant, false.

Some of these matters are clearly relevant to an applicant's fitness. However, under proposed subparagraph 67EB(3)(b), the CEO must also have regard to whether the person has been convicted of any offence against another law of the Commonwealth, or of a State or Territory, in the previous 10 years, where that offence is punishable by imprisonment for one year or longer. This provision raises a number of issues.

First, it seems retrospective. An applicant may have been convicted of an offence up to 10 years before the passing of this bill, and not been affected in any way by that conviction, but may now, years later, come to be denied registration as a consequence.

Secondly, the provision seems somewhat arbitrary. An applicant who applies for registration 10 years and 1 day after having committed such an offence is regarded as fully rehabilitated, and the fact of the conviction may not be taken into account. Were he or she to apply for registration 2 days earlier, the fact of the conviction must be taken into account. While any specified period may be seen as arbitrary, the Committee seeks advice as to the relationship of this 10 year period and limitation periods in other legislation.

Thirdly, the provision may be regarded as exposing a person to double punishment for the same offence. The view is commonly expressed that, once a person has completed a sentence of imprisonment for an offence, they have paid their debt to society and should be left to live their life without having to continually face the stigma of the sentence served. This provision, however, permits the fact of a conviction to affect aspects of an applicant's life for a further 9 years after that conviction has been dealt with.

Fourthly, the provision is potentially inequitable in referring to offences "punishable" by imprisonment for one year or longer. In its *Seventh Report of 1998*, in a somewhat different context (the voting rights of prisoners), the Committee referred to the potential unfairness of provisions which exclude rights by reference to the maximum penalty that is provided for, rather than the actual penalty imposed. Under proposed subparagraph 67EB(3)(b), a person who has actually served a sentence of imprisonment of 9 months for an offence which was punishable by imprisonment for 9 months would not have this sentence taken into account. However, a person who was fined $50 for an offence punishable by imprisonment for a year would have this sentence taken into account.

Under the proposed provision, a person's application for registration as a 'special reporter' might be affected if, 10 years ago, they were convicted of using abusive language to a fisheries officer (see section 14(1)(f) of the *Fisheries Act 1952 (Cth)*), or stealing a dog (see section 132 of the *Crimes Act 1900 (NSW)*), or wrongfully delivering a postal article (see section 85N of the *Crimes Act 1914 (Cth)*).

Finally, the bill does not make clear how information about past convictions will come to the attention of the CEO considering an application. Is it intended that inquiries be made of law enforcement authorities around Australia, or will applicants be required to disclose previous convictions? If the latter approach is adopted, what consequences are envisaged should an applicant fail to disclose an old conviction for a relatively minor offence?

The Committee notes that the bill merely requires that past offences be taken into account in considering an application – such offences do not necessarily preclude registration. However, there is a real possibility that such a provision may lead to the rejection of an application in circumstances of apparent unfairness and, notwithstanding the additional appeal provisions, this situation is unsatisfactory. Therefore, the Committee **seeks the Minister's advice** about these matters.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

Retrospectivity

The Committee is concerned that the proposed provision may be retrospective.

While I appreciate the Committee's argument, I believe that the requirement to disclose prior convictions is not retrospective because the requirement does not remove or replace any pre-existing immunity from disclosure of prior convictions. Rather, the new cargo reporting scheme set up by the Bill is creating a new entitlement (to registration as a 'special reporter'), subject to certain preconditions including disclosure of certain prior offences. There is no retrospectivity in making prior conduct relevant to a new entitlement, unlike a circumstance, where the scheme was attempting to make prior conduct the trigger for a new liability. In such a case, there would be retrospectivity.

Arbitrary Period

The Committee is concerned that the proposed provision seems somewhat arbitrary.

The 10 year limitation period on disclosure of prior offences is necessary for consistency with existing provisions under both the *Customs Act 1901* ("the Customs

Act") and the *Crimes Act 1914* ("the Crimes Act"). Under the Customs Act, there is a 10 year limitation period on the disclosure of prior offences in an application to be a customs agent (see paragraph 183CC(4)(a)).

Part VIIC of the Crimes Act, lays down a 'spent convictions' scheme, which sets out the circumstances in which a person is not required to disclose a prior offence. The 'spent convictions' scheme applies to the disclosure requirements under the Bill (see proposed subsection 67EB(5)). The same 10 year limitation period applies under this scheme, in relation to 'adult' convictions after which a conviction need not be disclosed. It is also worth noting that under the 'spent convictions' scheme, a lesser 5 year limitation period applies to a person convicted as a minor, after which a conviction need not be disclosed. This will apply to the disclosure requirement under the Bill.

Double Punishment

The Committee is concerned that the proposed provision may expose a person to double punishment.

A requirement that a person disclose a conviction in the course of applying for a licence or registration under Commonwealth law is not a 'double punishment'. People who do not commit serious offences are entitled to expect that their law abiding conduct will count in their favour where the availability of a licence or registration is limited on account of the need to protect the public revenue from dishonesty and fraud.

Maximum and Actual Penalty

The Committee is also concerned that the proposed provision is potentially inequitable in referring to offences "punishable" by imprisonment for one year or longer.

A disclosure threshold relating to the actual punishment imposed rather than the maximum penalty available for an offence would create too much scope for ambiguity. The sentence that a court imposes may not be the sentence actually served (eg, due to early release), which would create doubt as to which offences should be taken into account. In any case, a prosecutor is unlikely to pursue a charge for an offence punishable by 12 months or more imprisonment for a trivial offence deserving punishment only by a small fine. Even if this does occur, a person who applies for registration under the Bill can put forward arguments as to the perceived triviality of his or her offence.

Method of Disclosure of Past Convictions

Finally, the Committee is concerned as to the method by which past convictions will be brought to the attention of the CEO considering an application.

It is intended that inquiries will be made of law enforcement authorities around Australia to obtain information about past convictions. An application for registration under the scheme will be made in writing in an approved form (see proposed subsection 67EC(2)). The approved form will notify an applicant that he or she will be the subject of a police record check and that the information obtained will be used to satisfy the requirement of a "fit and proper" person under the scheme.

This approach is consistent with the Customs Depot Licensing scheme introduced in 1997 (see part IVA of the Customs Act).

Thank you for bringing your concerns to my attention and I trust that the foregoing has adequately addressed them.

The Committee thanks the Minister for this clear and detailed response.

Environment and Heritage Legislation Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 1999*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 29 May 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 6 of 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill proposes to amend the following Acts:

Environment Protection (Sea Dumping) Act 1981 to:

- implement the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972;
- clarify that the Commonwealth has responsibility for regulating the construction of artificial reefs, and to limit the potential liability of the Commonwealth and officers exercising a power under the Act in relation to artificial reefs;
- make the Act applicable to the Exclusive Economic Zone;
- revise offence and penalty provisions and apply chapter 2 of the Criminal Code to offences under the Act;
- revise the defence force exemption and the exemption in relation to the naval, military or air forces of a foreign country;
- simplify the rollback provision authorising the Minister to make a declaration regarding the application of the Act to a State or the Northern Territory;

- include officers of the Australian Customs Service as *ex officio* inspectors for the purposes of the Act; and

- make technical and drafting amendments; and

Sea Installations Act 1987 to remove the prohibitions on issuing, or varying, a permit that would authorise a sea installation to be located partly within and partly outside an adjacent area in respect of a State or an affected Territory.

Reversal of the onus of proof
Proposed new section 15

Item 26 of Schedule 1 to this bill proposes to repeal the existing section 15 of the *Environment Protection (Sea Dumping) Act 1981*, which contains defences to a charge of a specified offence under the Act, and to substitute a revised section. This revised section imposes an evidential burden on a person charged with an offence against proposed new sections 10A, 10B, 10C, 10E and 36 to prove one of the exceptions set out in the proposed new section.

For example, under one of the exceptions listed, an accused person must show, on the balance of probabilities, that he or she had been granted a permit to dump waste in non-Australian waters by a foreign country. To obtain a conviction, it would then be up to the prosecution to show, beyond reasonable doubt, that there was (for example) some defect in the permit.

If this evidential burden were not imposed on the person accused, it seems that the prosecution would, in every case, be required to prove that the accused could not establish one of the exceptions listed in the proposed new section.

While reversing the onus of proof in such circumstances may be seen as reasonable, some aspects of the operation of the bill are not immediately clear. For example, proposed section 10A, among other things, makes it an offence to dump controlled material into Australian waters, or into any waters from an Australian vessel. Proposed section 15 provides a 'defence' in relation to dumping into non-Australian waters in accordance with a foreign permit. It is not clear whether this 'defence' is available only to operators of Australian vessels who obtain foreign permits to dump in non-Australian waters, or whether it is to be more widely available. The relationship between the onus of proof under the new provision, and the onus of proof in relation to the existing defences, is also not clear. The Committee, therefore, **seeks the Minister's advice** on these matters.

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

Relevant extract from the response from the Minister

As the Committee points out, on page 19 of the Digest, the Bill includes amendments to the Sea Dumping Act which will revise the offence and penalty provisions and apply Chapter 2 of the *Criminal Code Act 1995* (the Criminal Code) to offences under the Act.

The relevant items of the Schedule 1 of the Bill are:

- item 23 - which will insert a new section, section 8A, into the Sea Dumping Act, which will apply Chapter 2 of the Criminal Code to all offences, and therefore any exceptions to those offences, under that Act;

- item 25 - which will repeal the existing offences and penalties contained in sections 9A to 14, and insert revised and new offences and penalties to be contained in sections 10A to 10F;

- item 26 - as outlined above; and

- item 70 - which will revise the offence regarding breech of permit conditions, contained in section 36.

Scope of Revised Section 15

In the fourth paragraph on page 20 of the Digest, the Committee expressed some uncertainty regarding the scope of the revised subsection 15(1) exception. Specifically the Committee stated that:

> **"Proposed section 15 provides a 'defence' in relation to dumping in non-Australian waters in accordance with a foreign permit. It is not clear whether this 'defence' is available only to operators of Australian vessels who obtain foreign permits to dump in non-Australian waters or whether it is more widely available."**

It is also worth noting that in the second paragraph on the same page, the Committee erroneously stated that:

> **"…under one of the** (revised) **exceptions listed, <u>an accused person must show, on the balance of probabilities, that he or she had been granted a permit</u> to dump waste in non-Australian waters by a foreign country."** (emphasis added)

The revised subsection 15(1) will provide that sections 10A and 10B do not apply in respect of dumping into the sea, and incineration at sea, respectively, if that dumping or incineration:

- occurs into, or in, waters that are not Australian waters; and

- is accordance [sic] with a permit granted by a party to the Protocol (other than Australia), in accordance with the Protocol.

The effect of this subsection will be that:

- dumping into the sea of controlled material from an Australian vessel or Australian aircraft; and

- incineration at sea on an Australian vessel;

will not constitute an offence against paragraphs 10A(1)(b), 10A(1)(d) or 10B(1)(b), respectively, if the above conditions are satisfied.

Therefore, with respect to this exception (*as is the case with respect to the subsection 15(2) exception*) there is no requirement that the party seeking to rely on this exception actually holds the foreign permit themselves.

On the contrary, it will be sufficient that the relevant activity (*ie the specified dumping or incineration*) is simply in accordance with a permit, being a permit that satisfies the criteria specified.

Clearly then, the foreign permit could be held by a party that is not actually involved in any of the specified activities that, but for this exception, would otherwise constitute an offence against paragraphs 10A(1)(b), 10A(1)(d) or 10B(1)(b), under the revised Sea Dumping Act.

For example, the holder of the foreign permit which authorised the dumping at sea of dredge spoil, could employ the services of an Australian vessel to undertake the authorised dumping activity.

In such instances the exception provided by subsection 15(1) would be available, subject to the specified conditions being satisfied (*ie the dumping of the dredge spoil occurred in non-Australian waters, in accordance with a permit granted by a party to the Protocol, etc*), to any person charged with an offence under paragraph 10A(1)(b), in respect of their conduct that constituted the dumping.

The subsection 15(1) exemption would also be available, in these circumstances, to the owner and the person in charge of the Australian vessel from which the dumping occurred, and the owner of the dredge spoil dumped, where they were charged with an offence against section 10F, by virtue of their relationship to the activity (*ie the dumping of the dredge spoil*) that, but for the exception, would otherwise constitute the primary offence (*ie the paragraph 10A(1)(b) dumping offence*).

Furthermore, the exception would also be available to any person who was charged with an ancillary offence under the *Crimes Act 1914* (the Crimes Act), in respect of that dumping (*eg against section 5 for aiding or abetting the dumping, or section 7A for inciting to or urging the dumping*).

Note a comprehensive explanation of the scope of the revised section 15 exceptions is provided at pp29-32 of the Bill's Explanatory Memorandum.

It is also worth noting that the subsection 15(2) and 15(3) exceptions would be available to any person charged with an ancillary offence (*eg section 10F of the Sea Dumping Act, or sections 5 or 7A of the Crimes Act*), where liability for that ancillary offence was conditional upon an offence being committed against one of those specified in the subsection 15(2) or (3), and, of course, where a relevant exception could be made out.

The Defence's Burden of Proof - Existing and Revised Section 15

In the second paragraph on page 20 of the Digest the Committee implies that the revised section 15 exceptions imposes a legal burden upon a defendant (*see the second extract under the proceeding heading*).

Additionally, in the last paragraph on page 20 of the Digest, the Committee stated that:

> **"[t]he relationship between the onus** [ie the burden] **of proof under the new provision and the onus of proof in relation to the existing defences is also not clear".**

As indicated above, item 23 of the Bill will amend the Sea Dumping Act, by inserting a new section, section 8A, which will apply Chapter 2 of the Criminal Code to the offences, and therefore the revised section 15 exceptions, under the Sea Dumping Act.

Subsection 13.3(3) of the Criminal Code provides that a defendant bears the evidential burden in respect of any exception to an offence he or she seeks to rely on. Furthermore, section 13.4 of the Criminal Code makes it clear that it is only the evidential burden, and not the legal burden as well, that is imposed on the defendant seeking to rely on a revised section 15 exception.

Subsection 13.3(6) of the Criminal Code provides that the evidential burden is:

> **"the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exists [sic]"**

This statutory application of the evidential burden upon a defendant in respect of a revised section 15 exception is a lesser burden, and requisite standard of proof, than that which is borne by a defendant who currently seeks to rely on a defence under the existing section 15.

This is because the existing section 15, when read with section 14 of the Crimes Act, imposes both an evidential burden and a legal burden on a defendant in respect of the defences specified in that section.

The legal burden is a more onerous burden than the evidential burden. With respect to the existing section 15, it is the burden of proving the existence of the relevant defence specified in that section, on the balance of probabilities.

Note that although subsection 15(4) specifically provides that the defendant bears the evidential burden in respect of an exception provided by that section, inserting this subsection is not strictly necessary given the effect of subsection 13.3(3) and section 13.4 of the Criminal Code, as applied by proposed section 8A. Rather the inclusion of subsection 15(4) was for the purpose of clarity.

Justification for the Reversal of Onus

As the Committee recognises (*third paragraph on page 20 of the Digest*), if the evidential burden were not imposed upon the defendant to establish one of the exceptions, in proceedings for a relevant offence, the prosecution would be required to prove, in each of these proceedings, that each of the relevant revised section 15 exceptions did not apply, in order to establish a *prima facie* case.

Such a requirement on the prosecution would pose significant evidentiary problems and make the costs of enforcement prohibitive. Arguably, each of these offence provisions would be rendered unenforceable, and consequently the intention of the Sea Dumping Act would be frustrated.

For example, at present there are 77 Contracting Parties to the London Convention. Conceivably, each one of these countries could become a Contracting Party to the Protocol.

It is also reasonable to assume that other nations, which are not currently parties to the London Convention, may nonetheless become Contracting Parties to the Protocol (*eg Singapore which is not currently a Contracting Party to the London Convention, but which is reviewing options for implementing and ratifying the Protocol*).

Furthermore, given that in Australia there is more than one party that has been delegated the authority to issue permits under the Sea Dumping Act, it is also conceivable that other current and future Contacting Parties to the Protocol may establish more than one issuing authority, to issue permits in accordance with Protocol.

Therefore, in respect of a prosecution for an offence for which the subsection 15(1) or (2) exception could theoretically be available (*ie dumping into the sea outside Australian waters (specifically ss10A(1)(b) and (d)), incineration at sea outside Australian waters (specifically ss10B(1)(b)), or loading for dumping into the sea, or incineration at sea, outside Australian waters (generally within the scope of s10C(1))*) the prosecution would, as a part of its case, have to adduce evidence from each issuing authority, of each Contracting Party, to determine whether a foreign permit had been issued that authorised the relevant activity.

Similarly, in respect of a prosecution for an offence for which the subsection 15(3) exception could theoretically be available (*ie all dumping into the sea (s10A), all incineration at sea (s10B), all loading for dumping into the sea or incineration at sea (s10C), all artificial reef placements (s10E) and all breach of permit conditions (s36)*) the prosecution would also face significant difficulties in establishing that each of the circumstances and conditions specified in that subsection were not applicable, and/or not complied with, at the relevant time.

Alternatively, existing section 15 could be repealed, as is currently proposed (*and indeed required if the Protocol is to be implemented*), and the revised section 15 provision could be omitted from the Bill, with the result being that there would be no exceptions or defences (*other than those provided in the Code*) to the offences provided under the revised Sea Dumping Act.

This would mean that in the circumstances envisaged by the revised subsection 15(1) and (2) exceptions, parties (*eg Australian vessel owners who are contracted to engage in dredging, and subsequent sea disposal of excavated spoil, in foreign countries that are contracting parties to the Protocol*) would be required to apply for dual authorisations (*ie from the relevant foreign country as well as from Australia*) to avoid potential criminal liability. This would necessarily involve a duplication of assessment processes and an increase in costs to the applicant.

Unfortunately, with respect to the circumstances envisaged by the revised subsection 15(3) 'emergency exception', the only alternative available for parties seeking to avoid potential criminal liability would be for those parties to apply for, and have granted, an 'emergency permit', which authorised the relevant activity, under the Sea

Dumping Act. However, given the nature of emergencies generally, this will, at best, be impracticable in most instances and, at worst, undoubtedly impossible in many, if not the majority of instances. In those circumstances where a permit is not sought, or is sought but not granted in time, potential criminal responsibility will be unavoidable, notwithstanding that the decision to prosecute will be an administrative one.

Arguably, this alternative would be more onerous to those parties concerned than including regulatory exceptions, as proposed in the revised section 15 provision, which impose an evidential burden upon a defendant.

Furthermore, it should be noted, as indicated above, that the revised section 15 exceptions impose a lesser burden upon a defendant than is currently provided by the existing section 15 defences.

Finally, given that when Parliament approved the Criminal Code it endorsed the policy of imposing an evidential burden upon a defendant who seeks to rely on a defence or exception to a Commonwealth offence, the revised section 15 exceptions, as proposed in the Bill, seem more appropriate, equitable and indeed desirable, than the alternatives reviewed above.

Conclusion

It is therefore the Minister's submission that, for the reasons outlined above, the revised section 15 provision does not trespass unduly on the personal rights and liberties of individuals.

Consequently, it is not in breach of principle 1(a)(i) of the Committee's terms of reference.

The Committee thanks the Minister for this comprehensive response.

Health Legislation Amendment Bill (No. 4) 1998

(New citation: Health Legislation Amendment Bill (No. 2) 1999)

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Minister for Health and Aged Care responded to those comments in a letter dated 23 March 1999.

In its *Fifth Report of 1999*, the Committee made further comments regarding the Bill's commencement provisions. The Minister for Health and Aged Care has responded to those comments in a letter dated 2 June 1999. A copy of the letter is attached to this report. An extract from the *Fifth Report* and relevant parts of the Minister's response are discussed below.

Extract from Fifth Report of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the following Acts:

National Health Act 1953 to:

- enable the Minister to determine the maximum percentage of discount that a health fund can offer contributors, based on the administrative savings of the health fund;
- enable health funds to offer loyalty bonus schemes to contributors in recognition of the period of time over which they have paid premiums;
- allow for waiting periods to be extended for certain conditions, ailments or illnesses;
- allow health funds to cover the Pharmaceutical Benefits Scheme patient co-payment for prescribed pharmaceutical benefits for in-hospital treatment;

- allow procedures which would otherwise have been performed in a hospital or day hospital facility to be performed in an "approved procedures facility";

- allow the Minister to specify which Medicare Benefit Schedule items are procedures facility";

- create a new class of benefit payable by health funds to cover specialist medical services;

- establish separate provisions to deal with health fund rule changes which relate to changes in premium rates and all other rule changes;

- enable the Minister to disallow any given rule changes on two additional grounds; and

- transfer the rates of contribution rule change provisions from the Minister to the Private Health Insurance Administration Council; and

National Health Act 1953 and ***Health Insurance Act 1973*** to make consequential amendments.

Commencement
Subclauses 2(4) and (5)

In general terms, Schedule 3 of this bill contains provisions which broaden the Minister's power to monitor changes to health fund rules relating to premiums. Items 8 to 15 of this Schedule contain provisions which, within two years, transfer the premium monitoring provisions from the Minister to the Private Health Insurance Administration Council. Items 16 to 18 of this Schedule contain provisions which "at an appropriate time" increase the independence and flexibility that health funds have with respect to premium increases.

Specifically, subclause 2(4) of the bill provides that the amendments proposed by items 8 to 15 are to commence on a day to be fixed by Proclamation that occurs after, but not more than 24 months after, the day on which the items referred to in subsection 2(3) commence. Subclause 2(5) provides that the amendments proposed by items 16 to 18 are to commence on a day to be fixed by proclamation that occurs after, but not more than 24 months after, the day on which the items referred to in subsection (4) commence.

In effect, these provisions are to commence at a time that is fixed by reference to the date of Assent. To that extent, their commencement is not a matter of Executive discretion, which has often been a matter of concern to the Committee. However, the Explanatory Memorandum provides no reason for the considerable length of time between Assent to the bill and the coming into force of these particular provisions (up to 48 months).

In this respect, the Committee notes that *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel, refers to the desirability of an explanation where a commencement period longer than 6 months after Royal Assent is chosen. The Committee, therefore, **seeks the Minister's advice** on the reasons for the length of time provided for before proclaiming the commencement of these provisions.

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

Relevant extract from the earlier response from the Minister dated 23 March 1999

These subsections deal specifically with the commencement of provisions transferring the 'rates of contribution' rule change powers at Schedule 3 from myself as Minister to the Private Health Insurance Administration Council.

As the Explanatory Memorandum explains, the intention of the provisions at Schedule 3 is to provide increased independence and flexibility to health funds with respect to their rates of contribution rule changes. These administrative changes are consistent with the overall direction of the Bill to improve the efficiency of the private health insurance industry and make private health insurance more attractive to consumers by enabling greater product flexibility. These provisions are also consistent with this Government's desire to minimise its regulatory impact on the private health insurance sector.

The transfer of these functions to PHIAC will make it's role more consistent with other government regulatory prudential organisations and regulatory bodies in general insurance. These changes in no way limit the Government's primary responsibility as policy maker.

In respect of the specific subsections in question, my Department in drafting the Bill had consideration for the following factors:

- fiscal certainty for private health insurance funds;
- the annual cycle for the application and consideration of rates of contribution rule changes; and
- the need for significant consultation with industry prior to the transfer of the provisions.

I hope this information is of assistance to the Committee.

The Committee thanks the Minister for this response, and notes the need for fiscal certainty for health funds and consultation with the industry prior to the transfer of functions to PHIAC. However, the Minister's response does not make clear why a period of up to 48 months may be required before the legislation fully commences. The Committee, therefore, **seeks the Minister's further advice** on the need for this extended period of time before the bill is to fully commence.

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

Relevant extract from the further response from the Minister dated 2 June 1999

> You will be aware, the commencement provisions the Committee was concerned about were removed during detailed consideration of the Bill in the Senate. This fact was possibly not brought to the Committee's attention prior to production of its report.
>
> I am advised that an officer of my Department has discussed this matter with Mr Warmenhoven who has indicated that he is happy with this response.
>
> I hope this information is of assistance to the Committee.

The Committee thanks the Minister for this response.

Import Processing Charges Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 1999*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 28 May 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 5 of 1999

This bill was introduced into the House of Representatives on 25 March 1999 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

Complementary to the Customs Amendment Bill (No. 2) 1999, the bill proposes to amend the *Import Processing Charges Act 1997* to impose a lower amount screening charge to apply to those owners of a ship or aircraft who are registered as special reporters under the electronic cargo reporting scheme.

Retrospective application
Subclause 2(2)

By virtue of subclause 2(2) of this bill, item 1 of Schedule 1 is to commence retrospectively on 26 February 1997. This item proposes to amend the definition of the term *line* in section 3 of the *Import Processing Charges Act 1997*. The Explanatory Memorandum states that this amendment implements the original intention of the framers of the legislation. However, the Explanatory Memorandum does not indicate whether this retrospectivity will adversely affect any importers of goods who would now come within the scheme. Therefore, the Committee **seeks the Minister's advice** as to whether this retrospectivity will adversely affect any person.

Pending the member's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

The Committee is concerned as to whether the retrospective effect of the amendment to the definition of the term *line* will adversely affect any importers of goods who would now come within the new cargo reporting scheme for high volume low value cargo ("the scheme").

I have been advised that the amendment will not adversely affect any importers of goods who would now come within the scheme.

The operative provision that imposes the liability to pay screening charge is section 64ABC of the *Customs Act 1901* ("the Act"). That provision already requires a person communicating a cargo report, whether documentary or electronic, to pay a screening charge. People currently making electronic cargo reports covered by this provision are already paying a screening charge based on the amount determined by section 7 of the *Import Processing Charges Act 1997* ("the Charges Act").

Upon commencement of subclause 2(2) of the Bill, the amendment to the term *line* would merely correct a technical inconsistency between section 64ABC of the Act and the current definition of the term *line* in section 3 of the Charges Act. That definition should have included electronic as well as documentary reports since section 64ABC imposes liability on both electronic and documentary reports.

The amendment, therefore, does not impose any new retrospective liability on any person.

Consequently, a person who registers with the scheme upon its commencement will not be liable to pay an additional screening charge for any electronic cargo report which had already been made under section 64ABC of the Act before the person came within the scheme.

In fact, upon coming within the scheme a person will be paying less screening charge under the reduced amount of screening charge provided in the amendment to section 7 of the Charges Act for electronic reports under the scheme.

Thank you for bringing your concerns to my attention and I trust that the foregoing has adequately addressed them.

The Committee thanks the Minister for this response and notes that the amendment proposed will not adversely affect any importers. The Committee endorses the Minister's often reiterated comments regarding the unfortunate need to amend legislation because drafting errors have been made which were not picked up initially.

Migration Legislation Amendment Bill (No. 2) 1998

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999*, in which it made various comments. The Minister for Immigration and Multicultural Affairs responded to those comments in a letter dated 23 March 1999.

In its *Fourth Report of 1999*, the Committee made some further comments in relation to clause 2. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 22 June 1999. A copy of the letter is attached to this report. An extract from the *Fourth Report* and relevant parts of the Minister's response are discussed below.

Extract from Fourth Report of 1999

This bill was introduced into the Senate on 3 December 1998 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Immigration and Multicultural Affairs]

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

- ensure that provisions of the *Human Rights and Equal Opportunity Commission Act 1986* and the *Ombudsman Act 1976* do not apply to persons who are in immigration detention, having arrived in Australia as unlawful citizens, unless such persons themselves initiate a written complaint to HREOC or orally or in writing to the Ombudsman; and

- clarify the duties of the Minister and officials concerning advice relating to applications for visas and on access to legal and other advice.

Introduction

In general terms, this bill is similar in form to the Migration Legislation Amendment Bill (No 2) 1996 ("the 1996 bill"), which was introduced into the Senate on 20 June 1996, and on which the Committee reported in its *Sixth Report of 1996*.

Retrospective effect and the current bill
Clause 2

Clause 2 of the 1998 bill provides that the proposed amendments are to commence on the date the bill was introduced into the Senate (ie 3 December 1998). In commenting on this provision, the Committee notes that, for more than 2 years between 1996 and 1998, the law was apparently administered on the basis of legislation which was said to operate retrospectively and yet was never passed by the Parliament. It is conceivable that such a situation might again arise in the case of the present bill.

It is also conceivable that the bill may ultimately be passed in an amended form. Again, this may have implications for the way the law will be administered in the period between the introduction of the bill, and its final passage through the Parliament.

The Committee reiterates that it is opposed in principle to retrospective legislation which detrimentally affects rights. The Committee considers that, in principle, legislation which changes the nature of people's access to justice should commence from the date it is passed by the Parliament rather than the date it is introduced into the Parliament. Given the experience of the 1996 bill, the Committee **seeks the Minister's advice** on the reasons for making this bill operative from its introduction rather than its passage, and on the implications of this for Departmental officers and administration should the bill again not be passed, or be passed in an amended form.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from earlier response from the Minister dated 23 March 1999

> The Committee has noted that the Bill commences on the date of its introduction into Parliament, rather than its passage. The Committee believes that this 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.
>
> This Bill is largely the same as the Migration Legislation Amendment Bill (No. 2) 1996, which was before the last Parliament. That Bill was introduced on 20 June 1996 and had a commencement date linked to my public announcement on the issue on 19 June 1996.
>
> The present Bill has a commencement date of 3 December 1998, being the date of the Bill's re-introduction into the Senate. This date was chosen to take into account

the two-year delay associated with the previous Bill and because there had been no events between 20 June 1996 and 3 December 1998 that could have required retrospective validation.

I assure the Committee that making the Bill operative from the date of introduction rather than its passage does not have implications for Departmental officers or administration as both the Human Rights Commissioner and the Commonwealth Ombudsman have given undertakings that they will carry out the functions under their respective legislation as if the Bill has been passed.

I trust that these comments will be of assistance to the Committee.

The Committee thanks the Minister for this response, and accepts his assurance that "there were no events between 20 June 1996 and 3 December 1998 that could have required retrospective validation". The Committee also notes the Minister's assurance that making the bill operative from the date of its introduction rather than its passage has no implications for Departmental officers or administration "as both the Human Rights Commissioner and the Commonwealth Ombudsman have given undertakings that they will carry out the functions under their respective legislation as if the Bill has been passed". However, the Committee continues to be concerned at the potential implications of the bill's approach to its commencement.

For example, the Committee notes recent media reports that 95 illegal immigrants had entered Australia or been found in Australian waters at Cairns, Gove, Christmas Island and off the coast of Darwin in February and March of this year. The Committee **would appreciate the Minister's further advice** as to whether this bill is currently being applied to these people, and to the functions of the Human Rights Commissioner and the Commonwealth Ombudsman under their respective legislation in relation to these people.

Pending the Minister's advice, the Committee continues to draw Senators' attention to this 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.

Relevant extract from further response from the Minister dated 22 June 1999

The Committee has sought further advice as to whether this Bill is currently being applied to the recent unauthorised boat arrivals, and to the functions of the Human Rights Commissioner and the Commonwealth Ombudsman under their respective legislation in relation to these people, and it's retrospective nature.

This Bill provides for a retrospective commencement date of the Bill's re-introduction into the parliament. It is retrospective to ensure that if a set of circumstances similar to the Teal incident occurred between the date of introduction and the Bill's passage, that it would be covered by the provisions of the Bill.

As of the day of writing no such situation has occurred. If a situation were to arise between introduction and commencement of the Bill, the Human Rights Commissioner has given an undertaking that HREOC will act consistent with the protocol detailed in my letter of 12 March 1999. This means that HREOC would act as if the Bill has been passed. The subsequent commencement of the Bill would sanction such interim use of the protocol. These undertakings, of course, continue to apply to recent boat arrivals.

Failure to proceed with the legislation will mean that inconsistencies in Commonwealth law highlighted in the 1996 Teal case will continue and that tensions arising from departure from the agreement may not be readily resolved.

I trust these comments will be of assistance to the Committee.

The Committee thanks the Minister for this further response and acknowledges that, to date, no circumstances similar to the 'Teal' case have re-occurred.

However, the Committee remains concerned by the approach to commencement and administration taken in the bill. In essence, a bill has been introduced and its provisions are being applied even though it has not been passed, was not passed during the previous Parliament, and, indeed, may never be passed. Such an approach permits legislation to be introduced and enforced without Parliament ever being required to finally vote on the matter.

Given this, the Committee would appreciate **the Minister's further advice** and **the advice of the Attorney-General** on the following matters:

- under what authority can a Department or statutory body such as the Human Rights and Equal Opportunity Commission exempt itself from administering the provisions of the law in a manner determined by the Parliament and the courts; and
- what is the legal effect of actions taken in administering a law which is declared to be retrospective but which is not passed by the Parliament.

Migration Legislation Amendment Bill (No. 2) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 1999*, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 2 June 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 6 of 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Immigration and Multicultural Affairs]

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

- provide powers to cancel approvals of business sponsorships;
- introduce monitoring provisions in relation to business sponsorships;
- enact regulations which prescribe the criteria and requirements that must be met for a visa application to be valid;
- permit the authorisation of classes of persons as "officers" and "authorised officers" for the purposes of the Act;
- enable the transfer of non-citizens, who are deportees or removees, from prison custody into immigration detention without effecting their release from custody;
- provide for merits review of decisions to refuse an application that was made outside Australia for a permanent visa where the visa can be granted while the visa applicant is either in the migration zone or outside Australia;
- exempt applicants from "capping" in certain circumstances;
- extend the period applications for certain visa categories may remain in the "pool" from 12 months to 24 months;

- remove the age limit affecting the appointment of full-time members to the Refugee Review Tribunal; and

- ensure decisions made by the Migration Review Tribunal are treated in the same way as those made by the Immigration Review Tribunal.

Appointment of 'a person'
Schedule 3

In general terms, section 5(1) of the *Migration Act 1958* defines an "officer" for the purposes of that Act as an officer of the Department, or a customs officer, or a protective service officer, or a police officer, or any other person authorised by the Minister by notice published in the *Gazette*.

The amendments proposed by Schedule 3 to this bill will substitute a new definition. The effect of this change will be to define an officer as "a person who is authorised in writing by the Minister to be an officer" or "any person who is included in a class of persons authorised in writing by the Minister to be officers" for the purposes of the Act. In neither case does the bill refer to any qualifications or attributes which such persons must have as a condition of being authorised.

The Committee often draws attention to provisions which delegate power to anyone who fits the all-embracing description of 'a person'. As a general rule, the Committee prefers to see some limits placed either on the powers which can be delegated or on the class of potential delegates. Similar considerations apply to the appointment of officers authorised for the purposes of an Act of Parliament. As a general rule, the Committee would prefer that potential appointees be required to have some qualifications or attributes before they are eligible for appointment. The Committee, therefore, **seeks the Minister's advice** on why the unfettered discretion to appoint authorised officers ought not be limited in some way, for example, by reference to qualifications or attributes which appointees should possess.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

Schedule 3 to the Bill - Authorisation of officers

Item 1 of Schedule 3 to the Bill amends the definition of "officer" contained in subsection 5(1) of the *Migration Act 1958* ("the Act") to permit the Minister to

authorise classes of persons as "officers" by way of instrument in writing. It also ensures that future members of any such class are included in the authorisation without the need for the Minister to sign another instrument.

Item 2 of Schedule 3 amends the Act to require that, where the Minister has authorised a person, or class of persons, under the amended definition of "officer", then the Minister must publish a notice of those authorisations in the *Gazette*.

Whereas previously the notification in the *Gazette* was the mechanism for giving effect to the authorisation, any authorisations made by the Minister under the new provisions take effect immediately, and are not dependent on the publication of the notice. Furthermore, the validity of those authorisations is not affected should a notice of those authorisations not be published in the *Gazette*. However, in neither case is the Minister's obligation to publish notice of the authorisations affected.

Identifying attributes of potential "officers"

The Committee has queried why the amendments contained in Schedule 3 to the Bill do not contain any reference to any qualifications or attributes of the person whom the Minister wishes to authorise as an "officer" for the purposes of the Act. The Committee notes that, as a general rule, it would prefer that potential appointees be required to have some qualifications or attributes before they are eligible for appointment.

The changes proposed in Schedule 3 are not that different to the current situation, whereby appointment of an "officer" is done by way of notice published in the *Gazette*. Under the amended Act, the only relevant difference is that the appointment is not contingent upon the actual gazettal, but has immediate effect. The requirement to publish notice of any such authorisation still remains. Public transparency in the authorisation process is retained.

In my opinion, specifying in legislation the requisite qualifications or attributes which appointees should possess before they can be appointed as "officers" under the Act is inappropriate, for the following reasons.

Firstly, in an environment of changing approaches to workplace practices and to the delivery of Government services, it would be very difficult to foresee in each case what attributes or characteristics future "officers" might have, or might be required to have, before they could be considered for appointment. The provisions, as drafted, retain flexibility for this and future Governments to continue to ensure better outcomes in the delivery of Government services.

Secondly, while I agree that "officers" should possess specific attributes and qualifications, I am of the view that the Act is not the appropriate place to specify these attributes and qualifications. In the current environment, the qualities of persons employed by a service provider are more appropriately detailed in contractual arrangements between the service provider and the Department. In the case of other public service officials who may be made "officers" under the Act, their qualities or characteristics are set out in the relevant legislation which deals with their employment status.

I trust that these comments will be of assistance to the Committee.

The Committee thanks the Minister for this response.

Superannuation Legislation Amendment Bill (No. 2) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 21 April 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 4 of 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following:

Small Superannuation Accounts Act 1995 to change the arrangements governing the early release of monies from the Superannuation Holding Accounts Reserve to individuals on whose behalf the monies are held;

Income Tax Assessment Act 1936 so that special income of a complying superannuation fund, approved deposit fund (ADF) or pooled superannuation trust (PST) will include:

- distributions from all trusts other than where the superannuation fund, ADF or PST has a fixed entitlement to income from that trust; and
- non arm's length trust distributions of income where the superannuation fund, ADF or PST has a fixed entitlement to income from that trust; and

Superannuation Guarantee (Administration) Regulations to continue from 1 August 1996 an exemption from the Superannuation Guarantee for employers in respect of certain senior foreign executives.

Legislation by press release
Schedule 2

The amendments proposed by Schedule 2 to this bill are to apply from 25 November 1997 (see item 3). The Explanatory Memorandum notes that this is the date of a press release issued by the Treasurer.

This would suggest that the bill was not introduced until some 16 months after the issue of the press release. However, the Explanatory Memorandum goes on to observe that the amendments "were originally introduced on 2 July 1998 in Taxation Laws Amendment Bill (No 5) 1998". That bill lapsed on the announcement of the federal election.

However, even given this explanation, it is apparent that the original bill was introduced more than 7 months after the date of the press release. The Committee has consistently drawn attention to the Senate Resolution of 8 November 1988, which deals with tax legislation and which provides 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.

The Committee, therefore, **seeks the Minister's advice** as to the effect of this Senate resolution on the proposed commencement date of the bill.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Assistant Treasurer

The Bill will commence on Royal Assent of the Bill (Clause 2 of the Bill). The application provision in Item 3 of Schedule 2 of the Bill is an anti-avoidance provision and applies to income derived after the Treasurer's Press Release of 25 November 1997.

Schedule 2 of the Bill was introduced as soon as practicable on 2 July 1998 as part of Taxation Laws Amendment Bill (No. 5) 1998. This Bill lapsed with the dissolution of Parliament last year. The short delay in introducing Schedule 2 was due to modifications and consultation necessary to achieve the position announced in the Treasurer's Press Release. These modifications were completed shortly before the Schedule was introduced on 2 July 1998 and accordingly, the Schedule could not be published as a draft Schedule as indicated by the Senate Resolution referred to by the Committee.

Schedule 2 of the Bill is a key part of the Government's response to ensure that the superannuation system is more equitable for all Australians. It will close a loophole that allowed certain trust distributions to superannuation funds to be taxed at the concessional rate of 15% instead of 47%. The closure of this loophole from the date of the Treasurer's Press Release will increase taxpayers' confidence in the fairness of concessions provided to superannuation.

The Committee thanks the Assistant Treasurer for this response.

Taxation Laws Amendment Bill (No. 4) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 13 April 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 4 of 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1997 to:

- allow income tax deductions for gifts made to certain funds and organisations;
- ensure grants paid to eligible businesses by the Katherine District Business Re-establishment Fund are exempt from income tax;
- treat all public entities as having had a change in underlying interests at 30 June 1999, unless they can satisfy the Commissioner of Taxation that they have maintained continuity of majority underlying interests;
- ensure that public entities include those that are jointly owned by one or more public entities;
- amend provisions relating to small business retirement exemption rules that exempt a capital gain made by an individual, private company or a trust from a CGT event happening to an asset used in a business; and
- extend the small business retirement exemption rules to land and buildings held by a taxpayer where the land and buildings are used by another entity connected with the taxpayer;
- rewrite the small business roll-over rules;

- rewrite the measure that adjusts the costs bases and reduced costs bases of shares (and loans) where there has been an underlying shift between companies under common ownership;

- make changes relating to how taxpayers keep their records for determining their capital gains tax liability;

- exempt reimbursements or payments of expenses under the M4/M5 Cashback Scheme for tolls paid on the M4 and M5 toll roads; and

- make consequential and technical amendments;

Income Tax Assessment Act 1936 to:

- remove the Commissioner of Taxation's power to disregard the "notional holder" rule which public entities may use to calculate the majority underlying interests in their assets;

- enable participants in the Commonwealth Development Employment Projects (CDEP) Scheme to claim the beneficiary tax rebate in respect of the income support component of their CDEP wages; and

- make consequential and technical amendments; and

Taxation Administration Act 1953 to enable the Commissioner of Taxation to disclose information acquired under a taxation law to the New South Wales Police Integrity Commission and the Queensland Crime Commission.

Retrospective application
Schedule 3, items 1 and 2

By virtue of item 3 of Schedule 3, the amendments proposed in items 1 and 2 of that Schedule are to apply retrospectively to a public entity "if the test time (within the meaning of Division 20 of Part IIA of the *Income Tax Assessment Act 1936*) was on or after 20 January 1997". These amendments repeal section 160ZZSQ of that Act, and the note to section 160ZZSJ.

The Explanatory Memorandum notes that the financial impact of these amendments will be negligible, but it does not refer to any possible adverse effects on taxpayers, or indicate why 20 January 1997 has been chosen as an effective date. The Committee, therefore, **seeks the Treasurer's advice** as to whether the amendments will adversely affect any taxpayers, and why the date of 20 January 1997 was chosen as the date from which the amendments are to apply.

Pending the Treasurer's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Assistant Treasurer

The Committee queried whether the amendments will adversely affect any taxpayers and why the date of 20 January 1997 was chosen as the date from which the amendments are to apply.

The removal of section 160ZZSQ of the *Income Tax Assessment Act 1936* (the 1936 Act) is a measure sought by Industry Representatives. The section currently gives the Commissioner the power to override the concessional tracing rules known as the notional holder rule (Subdivision 20E of Part IIIA of the 1936 Act and subdivision 149-D of the *Income Tax Assessment Act 1997*). The notional holder rule allows certain public entities to treat interests of less than 1% as if they were unchanging.

Removing 160ZZSQ of the 1936 Act from 20 January 1997 provides a substantial concession as it guarantees that public entities can rely on the concessional notional holder rules without risk of the Commissioner subsequently overriding their majority underlying ownership determination. The likely result of the Commissioner overriding a public entity's majority underlying ownership determination by disregarding the notional holder is that the assets relating to the determination will become post-CGT assets. The repeal of 160ZZSQ will, therefore, not adversely affect public entities and the date of effect, being 20 January 1997, was chosen as it is the commencement date of the concessional tracing rules for public entities.

In summary, the removal of section 160ZZSQ from 20 January 1997 provides a substantial concession to public entities. The notional holder rule first commenced on that date as did the discretion for the Commissioner to disregard that rule. Although the amendments will have the effect of removing the notional holder rule from 30 June 1999 the retrospective application of the removal of the Commissioner's discretion will have the same effect as if the Commissioner had never had a discretion to override the rule.

The Committee thanks the Assistant Treasurer for this response.

Taxation Laws Amendment Bill (No. 5) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 1999,* in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 25 May 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 4 of 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Sales Tax (Exemptions and Classifications) Act 1992 to ensure that the sales tax exemption for goods incorporated into property owned by, or leased to, always exempt persons (AEPs) or the government of a foreign country is only available where the property is occupied principally by an AEP or the government of a foreign country, or where the property is used principally for the provision of services to an AEP or government of a foreign country; and

Income Tax Assessment Act 1936 and the *Income Tax Assessment Act 1997* to:

- include an amount in the assessable income of a taxpayer where amounts are unpaid on the termination of a hire purchase or limited recourse debt arrangement;
- treat taxpayers who acquire capital assets by hire purchase or instalment sale as the owners of those assets for the purpose of determining eligibility for capital allowance deductions and relevant ant-avoidance provisions; and
- treat hire purchase or instalment sales as though they were loan transactions; and
- make consequential amendments.

Retrospective application
Schedule 2

In general terms, the amendments proposed by Schedule 2 treat hire purchasers as the owners of assets under hire purchase, and hire purchase arrangements as sale, loan and debt transactions. These amendments are to apply retrospectively from 27 February 1998. The Explanatory Memorandum indicates that this was apparently the date on which the Treasurer issued a second press release amending to some extent proposals originally included in the 1997-98 Budget speech.

The Committee has consistently drawn attention to the Senate Resolution of 8 November 1988, which deals with tax legislation and which provides 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.

The Committee, therefore, **seeks the Treasurer's advice** as to the effect of this Senate resolution on the proposed commencement date of the bill.

Pending the Treasurer's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Assistant Treasurer

In the 1997-98 Budget the Government announced that it would amend the taxation law to rectify an anomaly in the capital allowance provisions in relation to property acquired under hire purchase or limited recourse finance. The changes in the law were to apply from 13 May 1997.

On 27 February 1998 the Treasurer announced a number of substantial technical changes to the proposed amendments outlined in the 1997-98 Budget to ensure that they would operate as intended. In conformity with that announcement, proposed Division 240 treats a hire purchase as a sale and loan transaction and proposed Division 243 ensure that capital allowance deductions do not exceed the total amounts expended for the cost of depreciable property finances by limited recourse debt or hire purchase.

Those Divisions were first included in Taxation Laws Amendment Bill (No. 4) 1998 (TLAB (4) 1998) which was introduced in the House of Representatives on 2 April 1998. On introduction in the Senate it was referred to the Senate Economics Legislation Committee. Before the Committee could report, the Parliament was prorogued and the Bill lapsed.

A number of submissions were made to the Committee and the Government about certain aspects of the proposed limited recourse debt amendment. The Government considered those submissions and consulted with various representative and industry bodies. Consequently, several technical changes were made to draft Division 243. The revised amendments were reintroduced in Taxation Laws Amendment Bill (No. 5) 1999 (TLAB (5) 1999) on 11 March 1999.

As I understand it, the Senate six month rule provides that where the Government has announced by press release its intention to introduce a Bill to amend the tax law, and the amendments have not been introduced into Parliament or released in draft form within six months, the Senate may amend the Bill so that its application date is either the date of introduction or the date of publication of earlier draft legislation.

The application date for the proposed amendments is the date of the Treasurer's Press Release, 27 February 1998. A Bill giving effect to them (TLAB (4) 1998) was introduced in the Parliament within five weeks of that announcement. From that time, 2 April 1998, taxpayers have been able to examine the measures and consider how they might apply to their particular circumstances. When the measures were reintroduced in March 1999 as part of TLAB (5) 1999, several technical changes were incorporated as a result of submissions to the Senate Economics Legislation Committee and consultation with affected taxpayer groups. The major changes are favourable to taxpayers, while others merely improve clarity to reflect public consultation. The major changes are:

- A termination of debt by way of an arm's length refinancing will not trigger an adjustment under Division 243.

- Debt arrangements will not be treated as limited recourse where the conditions of the debt and any associated security arrangements do not, in practice, have a limiting effect.

The provisions as originally contained in TLAB (4) 1998 are substantively the same as those contained in TLAB (5) 1999. Effectively, therefore, the provisions have been available for public scrutiny since TLAB (4) 1998 was introduced on 2 April 1998. Notwithstanding the gap between the Treasurer's announcement of 28 February 1998 and introduction of TLAB (5) 1999 in March 1999, there has been no real breach of the Senate six month requirement because, at the very least, TLAB (4) 1998 was equivalent to draft legislation released within the necessary timeframe. TLAB (4) 1998 was introduced only five weeks after the relevant Government announcement.

I trust this satisfies the Committee's concerns.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

1999

30 June 1999

SENATE STANDING COMMITTEE

FOR

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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 H Coonan
Senator T Crossin
Senator J Ferris
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 1999

The Committee presents its Eleventh Report of 1999 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:

Australia New Zealand Food Authority Amendment Bill 1999

Health Insurance Amendment (Professional Services Review) Bill 1999

Taxation Laws Amendment Bill (No. 2) 1999
(previous citation: Taxation Laws Amendment Bill (No. 4) 1998)

Australia New Zealand Food Authority Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 1999*, in which it made various comments. The Parliamentary Secretary to the Minister for Health and Aged Care has responded to those comments in a letter dated 20 June 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Parliamentary Secretary's response are discussed below.

Extract from Alert Digest No. 6 of 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Australia New Zealand Food Authority Act 1991* to:

- create objectives for the Act to clarify the role, functions and regulatory objectives of the Australia New Zealand Food Authority;
- enable the Authority to tailor consultation processes, allocate more resources where there are significant concerns and streamline processes for minor issues;
- allow effective implementation and enforceability of the new food safety standards and permit the restriction of sale and advertising of foods where necessary to protect public health;
- enable the Authority to prioritise and direct resources to its agreed work program and to the food standards matters which are of major public interest; and
- enable the Authority to charge for certain applications which are outside the work program.

Retrospective application
Subclause 2(2) and Schedule 1, item 13

Item 13 of Schedule 1 to the bill inserts a provision which "enables standards to relate to particular brands of food in addition to a type of food generally". By virtue of subclause 2(2), this item is to commence retrospectively on 30 July 1998. The Explanatory Memorandum simply observes that this commencement date has been chosen to ensure that "existing standards are enforceable". This would seem to suggest that there is doubt as to the enforceability of standards made by the Australia New Zealand Food Authority since that date. The Committee, therefore, **seeks the Minister's advice** on the status and enforceability of standards issued by the Food Authority since 30 July 1998, and on whether the retrospective commencement of this provision will adversely affect any person.

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

Relevant extract from the response from the Parliamentary Secretary

As Parliamentary Secretary with executive responsibility for the Australia New Zealand Food Authority (ANZFA), I am responding on behalf of the Government. I apologise for the delay in responding.

The comments raise two concerns:

1. **Subclause 2(2) of the Bill provides for the retrospective application of Item 13 of Schedule 1 in order to ensure that existing standards are enforceable. The Committee has asked the Minister to advise on the status and enforceability of standards issued by ANZFA since 30 July 1998.**

   All standards issued by ANZFA since July 1998 are enforceable. A possible exception is the health claims standard.

   Prior to the health claims standard, the making of health claims in relation to food was illegal because the Food Standards Code expressly prohibited such claims. The revised health claims standard establishes a pilot system for regulating health claims on particular brands of food products.

   Advice from the Australian Government Solicitor has indicated that the pilot health claims standard implemented in 1998 might be found to be partly invalid if challenged in a court. This advice is based on an interpretation that section 9 of the *Australia New Zealand Food Authority Act 1991*, which provides what matters may be included in standards, may not allow the making of standards in relation to specific brands of food.

Item 13 of Schedule 1 of the Bill is designed to rectify this by providing that standards can be made in relation to a particular brand of food. Making Item 13 retrospective will overcome any potential difficulties. The standard permits over 100 food products to carry a specified health claim in relation to folate. These foods might be found to be illegal if their status were challenged in a court. Retrospectivity will ensure that those foods have been legal since their release.

This permission is part of a trial of a health claim regime to help establish the feasibility of allowing health claims on foods and to test a particular set of administrative arrangements. Folate was chosen for this purpose because of the need to encourage periconceptional women to eat appropriate amounts of it in order to reduce the probability of their babies suffering from spina bifida or other neural tube defects. Therefore, there are strong health and social reasons for ensuring that such products are able to remain on the market lawfully.

2. **The Committee also draws Senators' attention to the provision in so far as it may be considered to trespass unduly on personal rights and liberties.**

   Retrospectivity will have only a limited effect and will not detrimentally affect anyone, in particular it will not trespass unduly on personal rights and freedoms. Rather, the opposite is true. Retrospectivity will ensure the legality of over 100 food products that have been permitted to carry a health claim in relation to folate prior to the passing of the Bill. This will benefit the manufacturers and sellers of those foods and help ensure continued availability to consumers of food label information to allow them to identify folate-rich products.

Thank you for the opportunity to respond to the Committee's comments.

The Committee thanks the Parliamentary Secretary for this response which clarifies the issue.

Health Insurance Amendment (Professional Services Review) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 1999*, in which it made various comments. The Minister for Health and Aged Care has responded to those comments in a letter dated 29 June 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 9 of 1999

This bill was introduced into the House of Representatives on 2 June 1999 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Health Insurance Act 1973* to implement changes to the Professional Services Review (PSR) Scheme as a result of a review of the Scheme. The PSR Scheme provides for a system of peer review to determine whether a practitioner has inappropriately rendered or initiated services which attract a Medicare benefit, or has inappropriately prescribed under the Pharmaceutical Benefits Scheme, and to apply sanctions to those who practise inappropriately.

Abrogating the right to silence and patient privacy
Proposed new section 106ZPQ

Among other things, this bill proposes to insert a new section 106ZPQ in the *Health Insurance Act 1973*. This provision states that a person must produce documents for inspection even though those documents may tend to incriminate that person. The Explanatory Memorandum states that this section "mirrors subsection 105A(6) of the current Act".

Under proposed section 89B and 105A, the documents to be produced may include clinical or practice records of services rendered not only by the person under review, but also by practitioners employed by that person, or by practitioners employed by a body corporate of which the person under review is an officer. These documents must be produced to a Committee member or his or her nominee (mirroring the existing legislation) and also to the Director or his or her nominee.

Proposed new section 106ZPQ goes on to limit the use that may be made of any documents or information produced. Under proposed subsection 106ZPQ(2) such documents or information are not admissible against the person producing them in civil or criminal proceedings (other than proceedings for providing false or misleading information, or proceedings before a Committee or the Determining Authority).

The Committee notes that proposed new section 106ZPQ attempts to strike a balance between the need to obtain information and the need to protect rights. However, some aspects of its operation remain unclear. Therefore, the Committee **seeks the Minister's advice** on the following matters:

- how any incriminating documents or information might be used against a person under investigation in proceedings before a Committee or Determining Authority;
- whether "a person" nominated by a Committee member or the Director to receive confidential documents will be required to hold any particular position or possess any special qualifications;
- in requiring the production of patient records, how the bill proposes to protect the doctor/patient relationship, which is founded on confidence and is necessary for appropriate treatment; and
- in requiring the production of patient records, how the bill proposes to protect the privacy of patients.

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

Relevant extract from the response from the Minister

I note the preliminary observation in the Committee's Alert Digest 9/99 that the proposed new section 106ZPQ of the Bill 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'*.

I believe the amendments contained in the Bill in no way breach these principles. The Committee has sought advice on four matters.

How any incriminating documents or information might be used against a person under investigation in proceedings before a Committee or Determining Authority

The new section 106ZPQ of the Bill makes explicit that any documents or information obtained during a PSR process are not admissible in evidence against

the person under review in either criminal or civil proceedings, other than criminal proceedings for an offence against section 106ZPP, or any civil proceedings before a Committee or Determining Authority.

The insertion of a new section 106ZPQ is consistent with provisions which already existed in the *Health Insurance Act 1973* (the Act), specifically subsections 106E(3) and (4) which relate to the use of evidence given by the person under review during the Committee hearing. It does not infringe to any greater degree on the personal rights and liberties than currently provided in the Act under the PSR Scheme.

It needs to be highlighted that the PSR process involves an inquiry into the professional conduct of a practitioner by a committee of peers. It is not concerned with possible criminal conduct as an objective.

In determining whether a practitioner's professional conduct was inappropriate, a committee must have regard to all relevant matters. Any documents or information furnished as part of the investigation by the Director, or during the Committee proceeding, may well be relevant matters. However, there are a range of other considerations including data from the Health Insurance Commission, the evidence given during the Committee hearing, and any submissions received from the person under review. It is unlikely that documents provided by the person under review would prove inappropriate practice by themselves.

- **Whether "a person" nominated by a Committee member or the Director to receive confidential documents will be required to hold any particular position or possess any special qualifications;**

- **In requiring the production of patient records, how the bill proposes to protect the doctor/patient relationship, which is founded on confidence and is necessary for appropriate treatment; and**

- **In requiring the production of patient records, how the bill proposes to protect the privacy of patients.**

Subsection 83(1) of the current Act requires that the Director of PSR must be a medical practitioner. The Director may engage staff to assist in the performance of his or her duties. The existing secrecy provisions in section 130 of the Act, and the relevant non-disclosure provisions in the *Crimes Act 1903* apply to the Director, and any staff he or she engages (including committee members). Section 106ZR of the Act requires the non-disclosure of Committee deliberations. Subsection 95(4) of the Act specifies that a PSR committee must comprise practitioners who belong to the profession in which the practitioner was practising when he or she rendered or initiated the referred services. This means, if the person under review is a medical practitioner, then the committee of peers will also be medical practitioners. Subsection 98(3) of the Act currently provides for the proceedings of the Committee to be held in private.

In addition to the non-disclosure provisions in the Acts referred to above, the major participants in the peer review process are medical practitioners who are acutely aware of the need for confidentiality and protecting the doctor/patient relationship.

I hope this has clarified the intended operation of the new section 106ZPQ and addressed the concerns of the Committee.

The Committee thanks the Minister for this response which addresses most of its concerns.

The Committee notes that, under proposed paragraphs 89B(2)(c) and 105A(2)(c), documents must be produced to "a person" nominated by the Director or a Committee member. While members of staff are clearly within this definition, it seems that it may extend more widely, to include any person at all. It is in this context that the Committee sought advice on whether the definition ought be limited to the holders of particular positions, or nominees who possess special qualifications. The Committee would, therefore, **appreciate the Minister's further advice** on whether the class of people covered by this definition is too wide.

Taxation Laws Amendment Bill (No. 2) 1999

(previous citation: Taxation Laws Amendment Bill (No. 4) 1998)

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 1999,* in which it made various comments. The Assistant Treasurer responded to those comments in two letters dated 6 April 1999 and a separate letter received on 22 March 1999. In its *Sixth Report of 1999,* the Committee sought further advice regarding an issue raised by Solicitors Mallesons Stephen Jaques. The Assistant Treasurer has further responded in a letter dated 22 June 1999. A copy of the letter is attached to this report. Extracts from *Alert Digest No. 1 of 1999* and the *Sixth Report of 1999,* together with relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 1 of 1999

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury] The bill was first introduced into Parliament on 2 July 1998 as Schedule 3 to the Taxation Laws Amendment Bill (No 5) 1998, but lapsed when Parliament was prorogued for the election.

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 to:

- widen the interest withholding tax (IWT) exemption provided by removing, for debentures issued by companies, the present requirements that they be issued outside Australia and that the interest be paid outside Australia;
- allow the issue of debentures or interests in debentures to Australia residents and allow the IWT exemption;
- extend the definition of ***company*** to include a company acting in the capacity of a resident trustee, provided the trust is not a charitable trust and the beneficiaries of the trust are companies;
- make a consequential amendment relating to the issue of bearer debentures to residents operating a business offshore;
- extend the range of entities eligible to register as offshore banking units;

- provide a tax exemption for income and capital gains of overseas charitable institutions managed by an offshore banking unit;
- extend the range of eligible offshore banking unit activities;
- remove an anti-avoidance measure preventing Australia being used as a conduit to channel loans to other countries;
- reduce the capital gains tax liability where non-residents dispose of interests in offshore banking unit offshore investment trusts;
- provide a foreign tax credit for foreign tax paid by Australian resident offshore banking units regardless of whether a double tax agreement applies;
- remove the requirement that offshore banking units maintain separate nostro and vostro accounts for transactions;
- reduce the rate of offshore banking unit withholding penalty tax for breaches of the IWT concession from 300 per cent to 75 per cent;
- enable Australian subsidiaries of a foreign bank to raise certain ITW exempt funds and on-lend those funds to a related Australian branch without affecting the subsidiary's thin capitalisation position;
- provide an exemption from the foreign investment fund (FIF) measures for interests in certain US;
- change the calculation method in FIF measures; and
- make consequential amendments to provisions relating to taxing trusts;
- require that the forgiven amount of a debt be applied, where relevant, to reduce unrecouped net capital losses in respect of all years of income before the forgiveness year of income, rather than the immediately preceding year of income;
- require that where a taxpayer incurs a net capital loss in a year of income earlier than the forgiveness year of income, and the loss is reduced by the operation of the debt forgiveness provisions, the loss will also be reduced for the purposes of the capital gains tax provisions;
- prevent franking credit trading and misuse of the intercorporate dividend rebate by denying the franking benefit or intercorporate dividend rate from a dividend where the taxpayer does not satisfy certain rules;
- limit the source of franking credits available for trading by introducing a new rule; and

- prevent franking credit trading and misuse of the intercorporate dividend rebate by denying the franking benefit or intercorporate dividend rate from a trust or partnership distribution attributable to a dividend where the distribution is equivalent to interest;

Income Tax Assessment Act 1997 to:

- set a common base for the depreciation deductions for plant that can be claimed by exempt entities which become taxable and by taxable entities which purchase plant from an exempt entity in connection with the acquisition of a business; and
- allow deductions for gifts of $2 or more made to the Menzies Research Centre Public Fund.

Extract from Sixth Report of 1999

The Committee notes that, along with a number of other organisations, it has received some additional correspondence on this bill from Mallesons Stephen Jaques, which it has made available to the Assistant Treasurer's office. The Committee looks forward to the Assistant Treasurer's further advice on this correspondence in due course.

Extract from letter from Mallesons Stephen Jacques

Executive Summary

Some aspects of the franking credit amendments proposed in Schedule 4 of *Taxation Laws Amendment Bill (No. 4) 1998* ("**TLAB No. 4 1998**") are unfairly retrospective, in that they:

(a) have a material adverse penal impact on ordinary prudent investors; and

(b) operate from 13 May 1997 but were not foreshadowed in the original or any subsequent Government announcement, prior to the release of the draft amendments on 3 July 1998.

Reasons

The amendments are designed to implement a 1997 Budget Press Release (Press Release No. 47 of 1997, 13 May 1997) ("**May 1997 Press Release**").

The amendments were not released until 3 July 1998 (in the now lapsed Taxation Laws Amendment Bill No. 5 1998) almost 14 months after the May 1997 Press

Release. Following the 1998 election, the provisions were reintroduced in TLAB No. 4 1998.

The Government currently intends that a significant component of those provisions will apply from 13 May 1997.

Unfortunately, some of the draft legislation goes well beyond what the May 1997 Press Release had indicated or what any investor could reasonably have foreseen even from the wide terms of the announcement. And the draft legislation has a penal impact on ordinary transactions implemented by ordinary prudent investors in the period from 13 May 1997 to 3 July 1998.

The relevant provisions potentially impact all Australian resident investors (individuals, companies, trusts and partnerships) who have invested in Australian shares if they have reduced their risk of holding such shares by commonplace hedging strategies. This is so even though the investor acquired their shares before 13 May 1997. Such retrospectivity is not justified.

Because of this retrospectivity, we respectfully suggest that fairness dictates that the commencement date of those particular provisions be moved from 13 May 1997 to 3 July 1998.

In our opinion, the Government, the Treasury and the ATO have not satisfied the very heavy burden of proof that such penal retrospectivity is justified. The retrospectivity involves specific provisions which were not foreshadowed in any previous Government or ATO announcement or statement but which have a penal impact on commonplace transactions (as distinct from blatant tax avoidance or artificial transactions) entered into by ordinary prudent investors.

Relevant extract from the response from the Assistant Treasurer

The Committee seeks further advice in response to issues raised by Mallesons Stephens Jacques (Mallesons).

In their letter of 12 March 1999 Mallesons sought a change to the date of effect for the related payments rule, an anti-franking credit trading measure set out in Schedule 4 of the Bill. They requested that the operation of the related payments rule in relation to notional payments be changed to 3 July 1998, when draft legislation was introduced into Parliament. I understood that their concern is with the effect of the related payments rule on Share Price Index (SPI) futures, which they argue was not adequately described in the relevant Press Release. The amendments sought would have the effect of excluding SPI futures from the operation of the related payments rule until 3 July 1998.

The Government has decided to move an amendment to the Bill in the Senate to postpone the date of effect of the related payments rule as it relates to Share Price Index (SPI) futures to 2 July 1998, when draft legislation was first introduced into the Parliament (in Taxation Laws Amendment Bill (No. 5) 1998). Apart from this change, the Government proposes that the related payments rule should apply from 13 May 1997.

The related payments rule denies franking benefits where a taxpayer eliminates risk in respect of shares and makes a payment equivalent to the dividend paid on those

shares (the 'related payment') to another person. 'Related payment' is broadly defined to include notional payments, for example, where the equivalent of a dividend is deducted from another amount, and not actually paid to the person.

One kind of security to which the related payments rule will apply is SPI futures. A SPI future is a derivative which is commonly used to hedge baskets of shares corresponding with the shares in the All Ordinaries Index. In calculating the amount payable under a SPI future, an amount equivalent to the dividends on the shares in the All Ordinaries Index is passed from the seller to the buyer.

Accordingly, a person who holds a basket of shares corresponding with the All Ordinaries Index, and sells SPI futures, eliminates risk in respect of the shares and passes the equivalent of the dividends to the buyer of the SPI future; thus he fails the related payment rule and loses franking benefits on dividends paid on the shares.

You will appreciate that every effort is made to ensure that Press Releases concerning changes to the tax law state the proposed changes clearly, accurately and completely. However, it is not possible for a Press Release to specify all the consequences for taxpayers of changes to the law and instead, general statements of principle supported by examples are provided.

While the Treasurer's Press Release No. 47 of 13 May 1997 did not expressly refer to the effect of the related payments rule on SPI futures, I think it was apparent from the general principles expressed in the Press Release what that effect would be. Following consultations with the Australian Stock Exchange, it was subsequently announced in the Treasurer's Press Release No. 89 of 11 August 1997 that taxpayers using the institutional carve-out would be exempt from the related payments rule for related payments under SPI futures. Although this later Press Release did not expressly state that SPI futures would otherwise be subject to the related payments rule, again I believe that this conclusion was readily apparent.

The Government is not aware of any taxpayers other than Mallesons' clients who did not appreciate the effect of the related payments rule on SPI futures.

However, there was a significant delay in this case between the announcement of the measure and introduction of the Bill into the Parliament, which may have contributed to Mallesons' clients' problems. Therefore, the Government has decided to postpone the application of the related payments rule in relation to SPI futures.

The Committee thanks the Assistant Treasurer for this response and for the amendment relating to the application of the related payments rule in relation to Share Price Index futures.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWELFTH REPORT

OF

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SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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Senator H Coonan
Senator T Crossin
Senator J Ferris
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

TWELFTH REPORT OF 1999

The Committee presents its Twelfth Report of 1999 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:

A New Tax System (Goods and Services Tax Administration) Act 1998

ACIS Administration Bill 1999

Customs Amendment Bill (No. 1) 1999

A New Tax System (Goods and Services Tax Administration) Act 1998

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 1 of 1999,* in which it made various comments. The Treasurer responded to those comments in a letter dated 23 April 1999.

In its *Eighth Report of 1999*, the Committee made some further comments in relation to proposed new section 66. The Treasurer responded to those comments in a letter dated 18 June 1999.

In the Committee's *Tenth Report of 1999*, the Committee sought further confirmation regarding proposed new section 66 and the delegation of powers to 'a person'. The Treasurer has further responded in a letter dated 6 August 1999. A copy of the letter is attached to this report. Extracts from the *Eighth* and *Tenth Reports* and relevant parts of the Treasurer's further response are discussed below.

Extract from Eighth Report of 1999

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to amend the *Taxation Administration Act 1953* to:

- establish who is to administer the GST law;
- support the collection and recovery of GST;
- set maximum penalties for breaching GST obligations;
- permit entities to rely on the Commissioner's interpretation of the law;
- set time limits on GST liability and on credit entitlements;
- adopt existing mechanisms for the review of assessments and other GST decisions;
- confer powers on the Commissioner for the gathering of information; and

- protect the confidentiality of information disclosed for GST purposes.

Search and entry
Proposed new section 66

As noted above, Item 7 of Schedule 1 to this bill adds a new Part VI to the *Taxation Administration Act 1953*. This Part includes proposed new section 66, which will allow an officer authorised by the Commissioner of Taxation to enter and search any premises and inspect and analyse any documents, goods and other property. No provision is made for obtaining a judicially sanctioned warrant, which is a generally accepted safeguard in such circumstances.

In addition, the clause does not attempt to limit or categorise those who might be authorised to carry out such searches – for example, by specifying certain required attributes or qualifications. Requiring such attributes or qualifications is an approach adopted in some other statutes (for example, section 258 of the *Superannuation Industry (Supervision) Act 1993*) and, arguably, provides some reassurance against possible abuses of a power of such width. The Explanatory Memorandum provides no information beyond that included in the clause itself. The Committee, therefore, **seeks the Treasurer's advice** on the reasons why proposed section 66 authorises entry onto premises without the need to obtain a warrant, and why that provision does not specify certain attributes or qualifications to be possessed by officers before they can become authorised officers.

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

Relevant extract from the earlier response from the Treasurer dated 23 April 1999

> Proposed section 66 will confer the same powers of access to authorised officers as currently conferred by section 263 *Income Tax Assessment Act 1936*, section 109 *Sales Tax Assessment Act 1992*, section 127 *Fringe Benefits Tax Assessment Act 1986*, and section 38 *Superannuation Contributions Tax (Assessment and Collection) Act 1997* among others administered by the Commissioner of Taxation.
>
> The suggestion that a judicially sanctioned warrant be obtained before authorised officers enter premises to inspect documents or goods is not supported. Such a requirement would impose a needless hindrance to the efficient conduct of the activities of the ATO.
>
> The conduct of ATO officers, in a fair and professional manner, is governed by The Taxpayers' Charter and comprehensive guidelines on the use of access and

information gathering powers. Both of these documents are publicly available. The ATO also controls the use of these powers through a system of delegation and authorisation of ATO officers.

The ATO has a policy of endeavouring to deal with taxpayers and their advisers co-operatively. This means that advance notice and requests for co-operation are part of the preferred method of obtaining access to taxpayers' premises. Formal approaches to seeking access will be made if taxpayer co-operation is not forthcoming or if the premises are occupied by persons other than the taxpayer. Likewise, urgent access action may be appropriate if an officer reasonably believes that the existence or integrity of documents or information is under threat. The guidelines state that urgent access action requires the approval of a senior officer. Taxpayers are informed that they may have a representative present at any time, and are given reasonable time and opportunity to consult with their representative.

The access powers, as currently framed, provide ATO officers with flexibility in managing the conduct of their activities according to the co-operation they receive. To require the obtaining of a judicially sanctioned warrant before an authorised officer can enter premises would produce an unnecessarily adversarial climate and would not be conducive to a relationship of mutual co-operation between ATO officers and taxpayers. It would undermine the promotion within the taxpaying community of voluntary compliance with the tax laws. Furthermore, delay resulting from the need to obtain a judicially sanctioned warrant could jeopardise the outcome of audits where crucial evidence may be at risk.

The suggestion that the provision should limit or categorise, by certain attributes or qualifications, those officers who might be authorised to exercise the powers is also not supported. The authority to access and gather information and evidence formally is delegated to officers under the relevant taxation laws. When entering premises or seeking documents officers are required to produce their identification and explain the purpose of their visit. The 'wallet authority' containing the authorisation for an officer to exercise access powers can only be used in relation to those powers.

The Committee has referred to section 258 of the *Superannuation Industry (Supervision) Act 1993* as an example of a provision that allows for the qualifications of an investigator to be specified. This provision concerns the giving of a notice by the Australian Prudential Regulation Authority (APRA) to the trustee of a superannuation entity to appoint an external investigator to investigate and report on the financial position of the entity. Legislative provision for the specification of qualifications is appropriate in these circumstances because the external investigator would be appointed solely by the trustee of the entity being investigated. Such a requirement is not necessary where an investigation is undertaken by APRA staff. For example, section 268 the *Superannuation Industry (Supervision) Act 1993* does not specify the qualifications of an APRA inspector when that inspector is exercising the access powers specified in that Act. In essence, the power contained in section 268 is the same as that in proposed section 66 of the *Taxation Administration Act 1953*.

I trust that the above information is useful in the Committee's deliberations in relation to these matters.

The Committee thanks the Treasurer for this response, and notes that proposed section 66 will, in effect, confer the same powers of access on authorised officers as are currently conferred under other legislation administered by the Commissioner.

The Committee further notes that authorised officers need not be ATO officers as intimated in the Treasurer's response. Proposed section 20 of the Administration Bill states that an authorised officer means "a person the Commissioner has authorised to exercise powers or perform functions". Elsewhere in the tax legislation, a person may include a company.

The Committee consistently draws attention to provisions which allow the delegation of significant and wide-ranging powers to anyone who fits the all-embracing description of "a person". Such provisions may make rights and liberties unduly dependent on insufficiently defined administrative powers. Therefore, the Committee **seeks the Treasurer's further advice** on why the search and entry power is expressed so broadly, and whether it should be restricted to senior ATO officers.

The Committee notes that the Senate has agreed to refer the fairness, purpose, effectiveness and consistency of search and entry provisions in Commonwealth legislation to the Committee for inquiry and report. The desirability of provisions such as these which authorise entry without a warrant is best considered as part of this inquiry.

Relevant extract from the further response from the Treasurer dated 18 June 1999

Section 66 empowers officers authorised by the Commissioner of Taxation to access documents, goods or other property for the purpose of administering the indirect tax laws (Goods and Services Tax, Luxury Car Tax and Wine Equalisation Tax).

The Committee is concerned that the provision allows the delegation of significant and wide-ranging powers to anyone who fits the all-embracing description of "a person" and that this may make rights and liberties unduly dependent on insufficiently defined administrative powers. The Committee has drawn attention to the fact that new section 66 refers to an 'authorised officer', an expression defined in proposed new section 20 of the *Taxation Administration Act 1953* as:

> '…a person the Commissioner has authorised to exercise powers or perform functions under that provision.'

The Committee notes that elsewhere in the tax legislation a 'person' may include a company. It is true that the A New Tax System (Goods and Services Tax) Bill 1998 proposes to define the term 'person' as including a company (as does paragraph 22(1)(a) of the *Acts Interpretation Act 1901*). This meaning is, however, subject to the rider applicable to all defined terms 'except so far as the contrary intention

appears' (section 195-1). In the context of a provision concerning an 'authorised officer' it is clearly apparent that the meaning attributable to the term 'person' is intended to be confined to natural persons. Distinguishing between natural persons and artificial persons in such a provision would impose an unnecessary complication and awkwardness to the drafting of the law. Identical constructions occur in other parts of the tax law, for example, section 16 of the *Income Tax Assessment Act 1936* (secrecy provision) and section 109 of the *Sales Tax Assessment Act 1992* (access provision).

In reply to the question of whether the exercise of the power conferred by proposed new section 66 should be restricted to senior ATO officers the following matters are relevant.

Firstly, the earlier response to the Committee's request for advice about new section 66 set out much of the background to the use of access powers by the Australian Taxation Office (ATO). In promoting compliance with the tax laws the ATO prefers that field officers perform their educative and audit functions by dealing with taxpayers co-operatively, that is, without exercising access powers.

The ATO's published guidelines, as expressed in the Taxpayer's Charter and the Access and Information Gathering Manual, emphasise an informal approach unless there is reason to suspect that the existence or integrity of relevant information is under threat. It is stressed that a rigid formal approach based on indiscriminate exercise of the access power in field activities would not be conducive to the promotion of a relationship of mutual trust and respect between the ATO and the taxpaying community.

It cannot be ignored, however, that dealings with some taxpayers would not be conducted as effectively as at present if it were not for the existence of the access powers as currently framed. The express exclusion of some field officers from authority to exercise the access power would provide non-cooperative taxpayers with a means of resisting the efficient conduct of an audit. The consequent delay in exercising the access power in such circumstances could result in the loss of relevant information to the ATO, and of revenue to the community as a whole through undisclosed tax liability. Alternatively, it could result in higher administrative costs for the ATO and ultimately the community and lower respect for ATO officers who, although not within the senior category suggested, are nevertheless experienced and efficient field officers.

Secondly, new section 66 is consistent with access provisions contained in other taxation laws. The exercise of access powers by ATO officers is subject to a formal system of delegation and authorisation and to both internal and external controls. Authorised officers are subject to a rigorous selection process to ensure their suitability for the duties they perform. An understanding of the policies and procedures articulated in the Taxpayer's Charter and the Access and Information Gathering Manual is acquired by them in the course of their training. In accordance with those guidelines, the exercise of access powers is subject to supervision by, and sometimes the approval of, superior officers. Quality assurance mechanisms apply currently (and would also apply to indirect tax compliance activities) to ensure adherence to best practice in field operations, including when and how access powers should be used. External controls that apply to the use of these powers include judicial supervision through administrative law actions and the requirements of the Privacy Act to respect taxpayers' privacy.

Thirdly, it is proposed that field officers engaged in indirect tax compliance activities will perform audit and educative functions that may also embrace liability to income tax and fringe benefits tax. It would be incongruous and open to ridicule if officers found themselves in a position where they were authorised to seek access to documents for income tax and fringe benefits tax purposes but not for GST purposes. Compliance with the tax laws is best promoted if there is consistency in the application of access powers.

Having regard to these factors, the suggestion that the law provide for exercise of the indirect tax access powers to be expressly limited to a defined category of senior ATO officers is not supported. I trust that the above information is useful in the Committee's deliberations in relation to this matter.

The Committee thanks the Treasurer for this detailed response, and notes that it awaits confirmation that the Commissioner may only authorise "an ATO officer" rather than "a person" to exercise access powers under the bill.

Relevant extract from the further response from the Treasurer dated 6 August 1999

The Committee has sought confirmation that only "ATO officers" may be authorised by the Commissioner of Taxation to exercise the access power conferred by new section 66 of the *Taxation Administration Act 1953*. New section 66 empowers authorised officers to access documents, goods or other property for the purpose of administering the indirect tax laws (Goods and Services Tax, Luxury Car Tax and Wine Equalisation Tax).

I refer to my letter of 18 June 1999 to the Committee which explained that the meaning of the word 'person', in the context of the provision as drafted, was limited to natural persons and would not include companies.

Although it is expected that persons who are to be authorised to exercise the access power will occupy positions within the Australian Taxation Office it would not be appropriate to give the categorical confirmation the Committee has requested. This is because such persons are essentially officers of the Commonwealth, or employees of the Australian Public Service.

It would be inappropriate to deny the possibility, albeit exceptional, that officers of the Commonwealth, or employees of the Australian Public Service, other than those occupying positions within the Australian Taxation Office may at some time be authorised to exercise the access power for the purposes of an indirect tax law. For instance, it is proposed that the Australian Customs Service will perform some functions, under delegation from the Commissioner, in the collection of GST on importations. The possibility is that officers occupying positions in another agency may, in future, be authorised to exercise powers under the direction of the Commissioner.

The Commissioner of Taxation, who is responsible for the administration of our taxation laws, has advised that any such officers who are authorised to exercise access powers will be obliged to observe the relevant guidelines contained in the Taxpayers' Charter and the Access and Information Gathering Manual.

I trust that the above information is of use to the Committee in its deliberations in relation to this matter.

The Committee thanks the Treasurer for this further response.

The issue at the heart of the Committee's concern in relation to this bill is the exercise of search and entry powers. As the Commonwealth Ombudsman has pointed out, these are "highly intrusive powers" and there should be "safeguards, checks and balances, and clearly enunciated legal frameworks to limit the opportunities for [their] abuse".

The search and entry powers available to the Australian Taxation Office (ATO) may be exercised without the need to first obtain a judicially sanctioned warrant – the most obvious safeguard. This combination of inherently intrusive powers and the absence of any judicial oversight means that the exercise of the powers ought be limited in some other way. One way of ensuring that such powers are not abused is to ensure that those authorised to exercise them are appropriately qualified or trained or otherwise aware of their responsibilities.

The GST Administration Act simply provides that 'a person' may be authorised to exercise the ATO's search and entry powers. The Treasurer's response clarifies his expectation that, for the purposes of the indirect tax laws, such 'persons' are to be ATO officers, but may otherwise be "officers of the Commonwealth, or employees of the Australian Public Service". The Committee notes the Commissioner's assurance that any such officers "will be obliged to observe the relevant guidelines contained in the Taxpayers' Charter and the Access and Information Gathering Manual".

It is clear that the potential class of 'authorised persons' is to be limited in practice. It would be helpful if this implicit limitation were made explicit in the legislation itself.

Notably, such a limitation has been made explicit in other legislation administered by the Commissioner of Taxation. For example, proposed section 45 of the Superannuation (Unclaimed Money and Lost Members) Bill 1999 states that "the Commissioner may, by writing, authorise a person who is an officer or employee within the meaning of the *Public Service Act 1922* to be an authorised officer for the purposes of a provision or provisions of this Act". These provisions include search and entry provisions.

There would seem to be no difference in principle, or in practice, between that bill and the GST Administration Act.

Notwithstanding that the GST Administration Act has now been passed, the Committee continues to draw Senators' attention to this 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. The scope of section 66 of that Act should be addressed when amendments to the Act are next considered.

ACIS Administration Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 1999*, in which it made various comments. The Minister for Industry, Science and Resources has responded to those comments in a letter dated 14 July 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 8 of 1999

This bill was introduced into the House of Representatives on 13 May 1999 by the Minister representing the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to establish the Automotive Competitiveness and Investment Scheme (ACIS) to commence from 1 January 2001.

Old convictions, continuing consequences
Proposed new paragraphs 29(1)(a) and (2)(b)

Division 5 of this bill deals with the formal requirements for, and procedures for the consideration of, applications for registration under the Automotive Competitiveness and Investment Scheme.

Under proposed section 26(2), the Departmental Secretary must be satisfied that individual and corporate applicants, and the directors of applicant companies, are fit and proper persons. In determining whether such a person is fit and proper, under proposed paragraphs 29(1)(a) and (2)(b), the Secretary must have regard to any conviction for an offence committed within the previous 10 years which was punishable by imprisonment for one year or more.

The Committee has noted previously that such provisions raise a number of issues. First, they invoke an element of retrospectivity. An applicant may have been convicted of an offence up to 10 years before the passing of this bill, and not been affected in any way by that conviction, but may now, years later, come to be denied registration as a consequence.

Secondly, the provision seems somewhat arbitrary. Applicants who apply for registration 10 years and 1 day after having committed such an offence are regarded as fully rehabilitated. Applicants who apply for registration 9 years and 11 months after having committed such an offence are not. While any nominated period may be seen as arbitrary, the Committee seeks advice as to the relationship of this 10 year period and limitation periods in other legislation.

Thirdly, such provisions may be regarded as exposing an applicant to double punishment for the same offence. The view is commonly expressed that, once a person has completed a sentence of imprisonment for an offence, they have paid their debt to society and should not have to continually face the stigma of the sentence served. This provision, however, permits the fact of a conviction to affect aspects of an applicant's life for a further 9 years after that conviction has been dealt with.

Fourthly, the provision is potentially inequitable in referring to offences "punishable" by imprisonment for one year or longer. In its *Seventh Report of 1998*, in a somewhat different context (the voting rights of prisoners), the Committee referred to the potential unfairness of provisions which exclude rights by reference to the maximum penalty that is provided for, rather than the actual penalty imposed. Under proposed paragraphs 29(1)(a) and (2)(b), a person who was actually fined $50 for an offence punishable by imprisonment for a year must have this conviction taken into account.

Finally, the bill does not make clear how information about past convictions will come to the Secretary's attention. Will inquiries be made of law enforcement authorities around Australia, or will applicants be required to disclose previous convictions? If the latter approach is adopted, what consequences are envisaged should an applicant fail to disclose an old conviction for a relatively minor offence?

The Committee notes that the bill merely requires that past offences be taken into account in considering an application – such offences will not necessarily preclude registration. However, there is a real possibility that such a provision may lead to the rejection of an application in circumstances of apparent unfairness, notwithstanding the review provisions in proposed section 114(d). Therefore, the Committee **seeks the Minister's advice** about these matters.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

The first concern raised by the Committee is that these provisions involve an element of retrospectivity. On the basis of advice my Department has received from the Attorney General's Department, I believe the requirement to disclose prior convictions is not retrospective. This requirement does not remove, nor replace, any pre-existing immunity from disclosure of prior convictions. Rather, a new entitlement (to register under the Automotive Competitiveness and Investment Scheme) is being created, subject to certain preconditions, including disclosure of certain prior offences. There appears to be no retrospectivity in making prior conduct relevant to a new entitlement, which can be contrasted with making prior conduct the trigger for a new liability.

The second concern raised by the Committee is that the 10 year period referred to in these provisions appears to be arbitrary. I should explain that the Attorney General's Department was consulted on this point when the Bill was being drafted, and that the 10 year limitation period on disclosure of prior offences has been adopted to ensure consistency with existing provisions under the *Crimes Act 1914*.

Parliament has already expressed its view on this issue through part VIIC of the *Crimes Act 1914*. This part lays down a 'spent convictions' scheme, which sets out the circumstances in which a person is not required to disclose a prior offence. The 'spent convictions' scheme applies to the disclosure requirements under the Bill (refer to proposed subsection 29(3) of the Bill). The same 10 year limitation period applies under this scheme, in relation to 'adult' convictions after which a conviction need not be disclosed. It is also worth noting that under the spent convictions scheme, a lesser five year limitation period applies to a person convicted as a minor, after which a conviction need not be disclosed. This will apply to the disclosure requirement under the Bill.

The third concern raised by the Committee is that these proposed provisions may be regarded as exposing an applicant to 'double punishment' for the same offence. My Department has consulted the Attorney General's Department on this point and I am not persuaded that a requirement for a person to disclose a conviction in the course of applying for a licence or registration under a Commonwealth law is a 'double punishment'. It seems to me that people who do not commit serious offences are entitled to expect that their law abiding conduct will count in their favour where the availability of a licence or registration is limited on account of the need to protect the public revenue from dishonesty and fraud. Concern about 'double punishment' has greater force where a person has shown, by subsequent law abiding behaviour, that they have put their prior offending in the past. That is why a conviction need not be disclosed more than 10 years after it is imposed. It is also why a lesser disclosure period of five years applies to a person convicted as a minor.

The fourth concern raised by the Committee is the issue of 'maximum' versus 'actual' punishment being the basis for determining the seriousness of an offence. My Department has also consulted the Attorney General's Department on this point and I am inclined to accept their view that to establish a disclosure threshold relating to the actual punishment imposed rather than the maximum penalty available for an offence, would create too much scope for ambiguity. The sentence that a court imposes may not be the sentence actually serviced (eg. due to early release), which would create doubt as to which offences should be reported. In any case, the Attorney General's Department has advised my Department that a prosecutor is unlikely to pursue a charge for an offence punishable by 12 months or more

imprisonment for a trivial offence deserving punishment only by a small fine. I should also point out that even if this does occur, a person who applies for registration under this Bill can put forward arguments as to the perceived triviality of his or her offence.

The Committee's final concern was how information about past convictions would come to the Secretary's attention. In this regard I note that proposed paragraph 23(1)(b) stipulates that an application for registration would be made on an approved form. The approved form would ask an applicant to declare any relevant past convictions (that is, of the kind mentioned in proposed subsections 29(1) and (2)) so that the Secretary could take these into account when deciding whether registration should be granted. While this is the most likely avenue by which information about past convictions would come to the Secretary's attention, it is also possible that past convictions may be brought to the attention of the Secretary by third parties. It is not anticipated, however, that the Secretary would in the normal course of events actively seek out information about past convictions. Rather, the most likely avenue would be through provision of required information at the time of an application for registration. Proposed subsection 27(1) would also enable the Secretary, if necessary, to seek further information from an application before making a decision under proposed subsection 26(1).

I am pleased to respond to the Committee's concerns. Thank you for bringing them to my attention.

The Committee thanks the Minister for this comprehensive response.

Customs Amendment Bill (No. 1) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 1999*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 19 July 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Relevant extract from Alert Digest No. 6 of 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes to address the possible consequences of the recent decision of the Supreme Court of Queensland in the matter of *Prechelt* by amending the *Customs Act 1901* to:

- make it clear that duty must be paid on imported goods that do not require a formal entry for home consumption before those goods can be delivered into home consumption;
- provide that the rate of duty is to be fixed at the time information in relation to those goods is given to Customs or the time when the goods were imported into Australia, whichever is the later; and
- commence these amendments retrospectively from 1 September 1992.

Retrospective application
Subclause 2(2)

By virtue of subclause 2(2), items 4 and 5 of Schedule 1 to this bill are to commence retrospectively on 1 September 1992. As indicated in the Explanatory Memorandum, the reason for this retrospectivity is to correct a mistake in the drafting of earlier amendments to the *Customs Act 1901*. This mistake came to light in a recent court case in Queensland.

The Committee accepts that a failure to make the amendments retrospective could ultimately jeopardise a significant amount of revenue. However, some aspects of the operation of the bill are not immediately clear. For example, it is not clear whether the bill will affect the rights of the importer or other parties in the *Prechelt* case, and whether any other cases are pending following the decision in that case.

The Committee, therefore, **seeks the Minister's advice** on the implications of the bill's retrospective application for the litigants in the *Prechelt* case, and whether any other litigation is pending following the decision in that case.

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

Relevant extract from the response from the Minister

The Committee has sought clarification on the retrospective operation of items 4 and 5 of Schedule 1 to the Bill. In particular, you have sought my advice on the implications of the Bill's retrospective application on the litigants in the *Prechelt* case and whether any other litigation is pending following the decision in that case.

The purpose of the Bill is to address the consequences of the decision of the Supreme Court of Queensland in the matter of *Prechelt*. In that case the Court held that approximately $1400 in customs duty was not payable on a consignment of cigarettes valued at $180. The basis of this decision was that because the terms of section 68 of the *Customs Act 1901* (the Act) exempted consignments of a value of less than $250 from formal import entry requirements, and section 132 of the Act fixed the rate of duty by reference to the date of entry of goods, no duty was payable in respect of goods that are not required to be entered (referred to below as "non-entry goods").

In accordance with the decision of the Court, Customs released the cigarettes to Mr Prechelt without requiring payment of the $1,400 in duty that had previously been considered payable.

The amendment to section 132 of the Act at item 4 of Schedule 1 to the Bill will make it clear that the rate of duty to apply to non-entry goods is the rate in force at the later of the time when the goods arrive in Australia, or the time when information in relation to the goods is given to Customs. This amendment has a retrospective commencement of 1 September 1992 and is expressed to apply to goods imported after that date (item 5 refers).

Item 6 of Schedule 1 to the Bill has the effect of validating all amounts of money paid to Customs *as duty* on non-entry goods imported between 1 September 1992 and passage of the Bill. It does this by reducing the actual duty liability of the non-entry goods (which can now be ascertained because of the amendment at item 4) by any amount of money that has already been paid to, or collected by, Customs *as duty*. This method of validating previous payments to Customs will allow corrective

action (through the normal refund and recovery provisions of the Act) where there has been a gross over or under-payment of duty.

The retrospective operation of these amendments does apply to the facts of the *Prechelt* case. That is, after passage of the Bill it will be possible to assert that the $1400 in duty was in fact payable on the $180 consignment of cigarettes the subject of the decision. Customs ability to recover that amount, however, is dependent on the CEO of Customs exercising the statutory discretion in section 165 of the Act to demand the payment of duty short paid within 12 months of the short payment. I am advised the CEO of Customs does not intend to exercise this discretion after the passage of the Bill in a way that will reverse the outcome of the Court's decision in the *Prechelt* case and that this would continue to be the case if Customs is successful in its appeal of the decision.

Finally, there is no other litigation pending as a result of the *Prechelt* decision that might be affected by the retrospective operation of these amendments. This is primarily because amendments were made to the Customs Regulations soon after the decision that now make it a requirement for low value consignments of certain tobacco and alcohol to be formally entered. The regulation amendments also introduced a 12 months time limit for refund applications for overpaid duty on non-entry goods (consistent with the time limit for entered goods). Even so, Customs has received no refund applications for duty paid on low value consignments of non-entry goods in reliance on the decision in *Prechelt*.

Thank you for bringing the Committee's concerns to my attention and I trust that the foregoing has adequately addressed them.

The Committee thanks the Minister for this full and detailed response.

Retrospectively affecting rights or imposing liabilities is a matter which the Committee views with concern. However, given that in this instance the CEO of Customs does not intend to use the retrospective application of this bill to reverse the outcome of the court's decision in the *Prechelt* case, and given the Minister's assurance that there is no other litigation pending as a result of that decision that might be affected by the retrospective operation of these amendments, the Committee proposes to make no further comment.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

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1 September 1999

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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 T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT OF 1999

The Committee presents its Thirteenth Report of 1999 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:

Australian Radiation Protection and Nuclear Safety Act 1998

Australian Radiation Protection and Nuclear Safety (Consequential Amendments) Act 1998

Social Security Amendment (Disposal of Assets) Bill 1999

Superannuation Contributions and Termination Payments Taxes Legislation Amendment Bill 1999

Australian Radiation Protection and Nuclear Safety Act 1998

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 10 of 1998*, in which it made various comments. The Minister for Health and Aged Care has responded to those comments in a letter dated 25 August 1999. A copy of the letter is attached to this report. Although this bill has now been passed by both Houses (and received Royal Assent on 24 December 1998) the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Extract from Alert Digest No. 10 of 1998

This bill was introduced into the House of Representatives on 11 November 1998 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to establish a scheme to regulate the operation of nuclear installations and the management of radiation sources, including ionizing material and apparatus and non-ionizing apparatus, where these activities are undertaken by Commonwealth entities.

Abrogation of the privilege against self-incrimination Subclause 66(2)

Subclause 66(1)(e) of this bill authorises an inspector to require any person on particular premises to answer any questions put by the inspector and produce any documents requested by the inspector. Subclause 66(2) seems to make compliance an absolute requirement.

Subclause 66(2) is in the same form as subclause 55(2) in a bill of the same name which was introduced into the House of Representatives on 8 April 1998 and on which the Committee reported in its *Seventh Report of 1998*. In that Report, the Committee referred to correspondence from the Parliamentary Secretary to the Minister for Health and Family Services. This correspondence confirmed the Government's intention that the bill should <u>not</u> abrogate the privilege against self-incrimination, and proposed to clarify this by including a statement to this effect in the Explanatory Memorandum to the bill.

The Committee notes that neither the current bill, nor its Explanatory Memorandum, refers to the privilege against self-incrimination. The Committee also notes the different approach taken in subclause 16(2) of the Anti-Personnel Mines Convention Bill 1998, presently before the Parliament, which specifies that a person is guilty of an offence if that person recklessly contravenes a requirement to answer questions or produce documents. The Explanatory Memorandum to this bill states that the offence created does not abrogate the privilege against self-incrimination.

Accordingly, the Committee reiterates the observations in its *Seventh Report of 1998* and **seeks the advice of the Minister** as to:

- the reason why neither the bill nor its Explanatory Memorandum clarifies the intention to retain the privilege against self-incrimination; and
- the disadvantages, if any, of the different approach to the same issue adopted in the Anti-Personnel Mines Convention Bill 1998.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

> As detailed in previous correspondence to the Committee on this matter, the Attorney-General's Department advised that subclause 66(2) is highly likely not to abrogate the privilege against self-incrimination. When the Bill was before Parliament in June 1998, my former Parliamentary Secretary, the Hon P.M. Worth MP, wrote to the Committee agreeing to issue a corrigendum to the Explanatory Memorandum to clarify the intent of the provision in this regard. Unfortunately, when the Bill was reintroduced into Parliament following the Federal election, the change to the explanatory memorandum was not made. However, it is my clear intention that the provision not abrogate the privilege against self-incrimination. I believe this is supported by the original advice from the Attorney-General's Department which indicates that:
>
> - there is no express contrary intention that clause 55 (now section 67) alters the application of the privilege against self-incrimination; and
> - the language and character of the clause, and the character and purpose of the clause within the context of the legislation, indicates that it is highly unlikely that the clause abrogates the privilege against self-incrimination by necessary implication.

The Committee thanks the Minister for this response.

Australian Radiation Protection and Nuclear Safety (Consequential Amendments) Bill 1998

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 10 of 1998*, in which it made various comments. The Minister for Health and Aged Care has responded to those comments in a letter dated 25 August 1999. A copy of the letter is attached to this report. Although this bill has now been passed by both Houses (and received Royal Assent on 24 December 1998) the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are discussed below.

Extract from Alert Digest No. 10 of 1998

This bill was introduced into the House of Representatives on 11 November 1998 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to make consequential changes to the *Australian Nuclear Science and Technology Organisation Act 1987* and to provide for transitional arrangements to cover the operation of controlled facilities and the handling of radiation sources while applications for licences to cover these facilities and activities are being made under the proposed Australian Radiation Protection and Nuclear Safety Bill 1998. The bill also proposes to repeal the *Environment Protection (Nuclear Codes) Act 1978*.

Commencement
Subclause 2(2) and Schedule 1, item 5

By virtue of subclause 2(2), the amendment proposed by item 5 of Schedule 1 to the bill is to commence on Proclamation, with no further time specified within which the bill either must come into force or be repealed. The Committee notes that paragraph 6 of Office of Parliamentary Counsel *Drafting Instruction No 2 of 1989* suggests that such an approach should be used only in unusual circumstances, where commencement depends on an event whose timing is uncertain.

Accordingly, the Committee **seeks the advice of the Minister** on the reason for departing from the Drafting Instruction.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

The Committee sought an explanation on why subclause 2(2) provides for the commencement of an amendment repealing the *Environment Protection (Nuclear Codes) Act 1978* on Proclamation. The Committee advised that Office of Parliamentary Counsel *Drafting Instructions No. 2 of 1989* suggest that this approach should only be used in unusual circumstances where commencement depends on an event whose timing is uncertain.

Such circumstances exist in the present case. Each of the States and Territories has legislation regulating radiation and nuclear activities in that jurisdiction. The various pieces of legislation reference Codes developed under the *Environment Protection (Nuclear Codes) Act 1978*. Before the Act is repealed, it will be necessary for all jurisdictions to make minor amendments to their legislation to enable continued reference to the three Codes developed to date, under the *Environment Protection (Nuclear Codes) Act 1978*. Consultations are currently underway with all jurisdictions and, subject to Parliamentary timeframes, it is anticipated that the provision repealing the *Environment Protection (Nuclear Codes) Act 1978* will be proclaimed before January 2000.

I trust this addresses the Committee's concerns.

The Committee thanks the Minister for this response.

Social Security Amendment (Disposal of Assets) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 1999*, in which it made various comments. The Minister for Family and Community Services has responded to those comments in a letter dated 24 August 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 11 of 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

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

- reduce from $10,000 to $5,000 the "free area" that a person or couple may gift before that gift begins to impact on the level of assistance provided to them; and
- change the basis of the concession from "pension year" to "financial year".

Retrospective application
Clause 2

Clause 2 of this bill provides that, to some extent, it is to commence retrospectively, on 1 July 1999. Further, the bill will adversely affect recipients of social security benefits by reducing the value of assets of which they may dispose in any year without affecting their entitlement to those benefits.

However, item 20 of the Schedule proposes to protect social security beneficiaries from those adverse effects where they dispose of assets between 1 July 1999 and the date on which the bill is assented to. The Explanatory Memorandum observes that the effect of this item is that "amounts paid prior to the Royal Assent under the existing disposal rules are protected from recovery insofar as the provisions of this Act are concerned".

While the bill is expressed to apply retrospectively, this item seems to reverse the effect of that retrospectivity. Given this, it is not clear why retrospectivity is thought necessary. It is also not clear whether this protection provided by item 20 will be available to all social security beneficiaries, or only a particular class of beneficiaries. The Committee, therefore, s**eeks the Minister's advice** to clarify why the bill has taken this approach to retrospectivity, and whether any particular group of social security beneficiaries may be disadvantaged by the approach taken.

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

Relevant extract from response from the Minister

Your Committee has sought my advice on the question of the method chosen to ensure that the Bill does not operate retrospectively.

The relevant provisions in the Bill are:

> Clause 2 of the Bill provides that the Bill commences on 1 July 1999.
>
> Item 20 in the Schedule inserts a new Item 127 into Schedule 1A of **the *Social Security Act 1991***. New Item 127 provides that where the ***Social Security (Disposal of Assets) Act 1999*** commences on or after 1 July 1999, amounts paid prior to the Royal Assent under the existing disposal rules are protected from recovery insofar as the provisions of that Act are concerned.

Your Committee correctly observes that the new item reverses the effect of what would otherwise be a retrospective commencement. This is not to say, however, that the 1 July 1999 commencement is completely negated.

It is true that social security payments paid **prior** to the eventual commencement of the Act are completely protected by this provision, and I should add that this provision provides this protection for all social security recipients.

However, social security payments paid **after** the commencement of the Act may still be affected by the new disposal limits **on and from 1 July 1999**. That is to say, if on and after 1 July 1999 an amount is disposed of in the terms of the Act, and that amount exceeds the new limit of $5000, then from the date of commencement of the new provisions that amount will be taken into account under the new rules to reduce social security payment amounts paid after the commencement.

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

The Committee thanks the Minister for this response.

Superannuation Contributions and Termination Payments Taxes Legislation Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 30 August 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 11 of 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Superannuation Contributions Tax (Assessment and Collection) Act 1997 to:

- remove the requirement for the Commissioner to determine an advance instalment if superannuation contributions surcharge is payable for a member for a financial year; and
- provide for a system of self assessment for specified superannuation funds;

Superannuation Contributions Tax (Assessment and Collection) Act 1997 and *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* to:

- clarify what surchargeable contributions are and how they are to be calculated;
- clarify the identity of the holder of the surchargeable contributions of a member for a particular financial year who is to pay the surcharge liability;
- provide a means for members of constitutionally protected schemes who transfer benefits to another fund to direct the transferee provider to pay the surcharge liability from the benefits transferred;

- ensure that members of all superannuation funds who commute part of a pension to pay a surcharge liability are treated equitably;

- provide alternative reporting requirements for superannuation providers to reduce administration costs incurred in reporting surcharge information to all members; and

- clarify what is to be reported to the Commissioner in respect of surchargeable contributions and contributed amounts; and

Superannuation Contributions Tax (Assessment and Collection) Act 1997, *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* and *Termination Payments Tax (Assessment and Collection) Act 1997* to:

- distinguish between the making of an assessment and the assessment notice;

- support the making and electronic transmission of assessments;

- provide that the validity of an assessment (and determination of advance instalment where appropriate) is not affected by any non-compliance;

- limit the time in which the Commissioner can amend an assessment; and

- expand the objection provisions and remove current limits on the rights of members and providers to object against surcharge assessments; and

Income Tax Assessment Act 1936, the *Superannuation Industry (Supervision) Act 1993* and the *Taxation Laws Amendment Act (No. 3) 1997* to make technical amendments.

Retrospective application
Subclauses 2(2) and 2(3)

Subclause 2(2) of the bill provides that the substantive provisions in Schedule 1 are taken to have commenced retrospectively on 5 June 1997. Similarly, subclause 2(3) provides that the substantive provisions in Schedule 2 are taken to have commenced retrospectively on 7 December 1997. The Explanatory Memorandum simply notes that "Some of the amendments will apply retrospectively to ensure the surcharge measure applies equitably to both defined benefit fund members and to members of funds other than defined benefit funds".

In addition, item 28 of Schedule 1 to the bill proposes to insert a new subsection 42(2) in the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*. This will allow for the making of regulations with retrospective effect, contrary to subsection 48(2) of the *Acts Interpretation Act 1901*. The Committee **seeks the Treasurer's advice** as to why so many of the provisions proposed by this bill are to operate retrospectively; why the bill is to apply retrospectively for a period as long as 2 years; whether this retrospective application will detrimentally affect anyone; and why the bill authorises the making of regulations with retrospective effect.

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.

Relevant extract from the response from the Minister

The Senate Standing Committee was concerned that the provisions of the Bill may be considered to trespass unduly on personal rights and liberties, in breach of principal 1(a)(i) of the Committee's terms of reference and has sought the Treasurer's advice as to:-

i) why so many of the provisions proposed by this Bill are to operate retrospectively;

ii) why the Bill is to apply retrospectively for a period as long as 2 years;

iii) whether this retrospective application will detrimentally affect anyone; and

iv) why the Bill authorises the making of regulations with retrospective effect.

The Government regards the introduction of the superannuation contributions surcharge for high income earners as a major superannuation reform initiative. It was concerned to make the superannuation system more equitable for all Australians, while also ensuring that superannuation remains an attractive savings option. In this regard, high income earners were benefiting from the concessional taxation arrangements to a much greater extent than low income earners.

The Government has always been of the view the legislation applying to the surchargeable contributions of high income earners from 20 August 1996 is unambiguous and sets out what is required to be reported and what is surchargeable. This was more so after the relevant legislation was amended in December 1997 to address a perception that the surcharge may not apply to defined benefit funds or to defined benefit funds on 'contribution holidays'.

The majority of funds (in excess of 95%) reported surchargeable contributions for the years ended 30 June 1997 and 1998 based on the requirements of the legislation, notwithstanding the fact that a number of funds had received legal advice that there may be issues about the application of the legislation to funds. Unfortunately, a small

number of funds (estimated to be less than 5% of all funds) have lodged reports with reduced or nil surchargeable contributions. Some of these funds have reported on the basis that there were no actual contributions because the fund was on a contributions holiday, irrespective of the December 1997 amendments.

The Government decided to move amendments to remove any doubt about what superannuation contributions are subject to the surcharge, how those amounts are to be calculated, what guidelines actuaries are to use to calculate notional factors and what is to be reported to the Commissioner of Taxation for surcharge purposes. In conjunction with these amendments, it decided to clearly identify the holder of the surchargeable contributions of a member for a particular financial year who is to pay the surcharge liability. It also decided to remove the need to determine an advance instalment and to provide for a self-assessment regime for specified funds.

Prior to the drafting of the Bill, there was extensive consultation with industry representatives and industry bodies to seek other suggestions for enhancements to the legislation that would address concerns about the certainty of the law and facilitate administrative ease and convenience that would reduce costs for funds. It is the Government's understanding that there is generally widespread support for the amendments.

Provisions which may be of concern to the Committee

The primary provisions of the Bill which apply from the commencement of the original legislation that may be of concern to the Committee are those that:-

- are specifically designed to remove any doubt about what superannuation contributions are subject to the surcharge, how those amounts are to be calculated and what guidelines actuaries are to use to calculate notional factors (which are complemented by provisions that clearly set out what is to be reported for surcharge purposes);

- clearly identify the holder of the surchargeable contributions of a member for a particular financial year who is to pay the surcharge liability; and

- limit the time for amendments.

- *Provisions removing doubt about what contributions are subject to surcharge and how they are to be calculated*

It is appropriate the particular provisions that remove any doubt about what superannuation contributions are subject to surcharge, how those amounts are to be calculated, what guidelines actuaries are to use to calculate notional factors and what is to be reported, which are the basis of the measure and virtually the sole reason the Government agreed to amend the law in the first place, should have effect from the commencement of the original legislation.

The Commissioner of Taxation issued Superannuation Contributions Ruling SCR 97/1 in August 1997 to provide guidelines for actuaries to calculate notional factors. This Ruling was prepared in conjunction with the Australian Government Actuary who had received input for the Ruling from the Institute of Actuaries of Australia.

Legal advice to some defined benefit funds was that as this Ruling did not have the force of law, it could not be considered to be 'Australian actuarial practice'. The

amendments now incorporate the Ruling into the legislation to remove concerns about the existence of 'Australian actuarial practice' and to give actuaries guidelines to calculate notional factors for the purposes of the legislation.

As a result of these provisions, the minority of funds that have not reported surchargeable contributions for the 1997 and 1998 financial years in line with the requirements of the legislation will be required to submit new reports with surchargeable contributions calculated correctly. To require otherwise would result in an inequitable result for the majority of funds that reported correctly for both the 1997 and 1998 financial years.

The decision to insert a provision to enable the making of Regulations with effect from the commencement of the original legislation was made because the Australian Taxation Office has been informed that there is a likelihood there will be a need to be able to address particular issues with the minority of funds that will be required to submit new reports for the 1997 and 1998 financial years. However, it is generally expected that Regulations likely to result in a change to the method of calculating notional factors will have prospective application to full financial years.

The vast majority of funds (in excess of 95% of funds) that have reported surchargeable contributions calculated in line with the legislation, including in line with methods approved in writing by the Commissioner of Taxation or the Australian Government Actuary on behalf of the Commissioner, will not have to submit new reports. Similarly, there will be no need for adjustments to be made to assessments that have been based on the correct surchargeable contribution amounts.

- *Provisions identifying the holder of contributions*

Presently, there is some confusion and inconsistency about the liability to pay surcharge when a member dies. A surcharge liability for a deceased member of a constitutionally protected fund would be paid by the trustee or beneficiary of the deceased member's estate irrespective of whether a lump sum, or a pension or annuity, has been paid by the fund. However, if a member of any other fund dies and the fund pays a lump sum, or a pension or annuity, to a person other than the member before an assessment of surcharge is given to the fund, then no liability arises.

On the other hand, surcharge continues to be payable by a fund if an assessment is given to the fund before the fund pays a lump sum, or a pension or annuity, even if the member has died. Similarly, if the fund has paid a lump sum, or a pension or annuity, to the member and the member subsequently dies, the trustee or beneficiary of the member's estate is liable to pay any unpaid surcharge liability assessed.

The provisions identifying the holder of contributions may be perceived to adversely impact the beneficiaries of the estates of deceased members. The proposed amendments ensure surcharge liabilities in relation to deceased members of funds are treated consistently (there is no intention that the Commissioner revisit any decisions already made in respect of the surcharge liabilities of deceased members). At the same time, the amendments remove any liability to surcharge in relation to the contributions for the financial year in which a member dies, or later financial years.

- *Provisions imposing a time limit for amendment*

The current legislation does not impose any time limit in which an assessment can be amended and the provisions that set the time period for which surcharge records are

to be retained are inconsistent with an unlimited time in which amendments can be made. The absence of a time limit means that funds incur additional costs (that would inevitably be passed on to members) in having to keep records for lengthy periods in expectation there may be a dispute some time into the future.

The provisions in the Bill that limit the time in which an amendment can be made to 4 years from the date of issue for a debit amendment and 4 years from the due date for a credit amendment where the Commissioner of Taxation does not form the opinion that there has been fraud or evasion are similar to provisions in other taxing statutes. Subject to the qualification about fraud and evasion, the law will preclude the Commissioner amending an assessment outside these time limits.

The provisions in the Bill do not impose any time limit for amendments to assessments raised because the Commissioner could not identify a fund member that has not quoted a Tax File Number. These assessments will continue to be able to be amended at any time.

Beneficial impact of other provisions

Other provisions that are to apply from the commencement of the original legislation will either have a beneficial impact, provide certainty or will effectively apply prospectively. Those provisions are the ones that:-

- relax fund reporting requirements to members;
- remove the requirement to determine an advance instalment;
- clearly distinguish between the making of an assessment and the assessment notice;
- ensure minor defects do not affect the validity of an assessment;
- support the making of, and the electronic transmission of, assessments;
- expand the grounds for objection and remove current limits on the rights of members and providers to object to assessments;
- establish a self-assessment regime for specified funds;
- provide an avenue for members of constitutionally protected funds who transfer benefits to another fund to direct that other fund to pay the surcharge liability from the benefits transferred;
- ensure that members of all superannuation funds who commute part of a pension to pay a surcharge liability are treated equitably;
- rectify a technical difficulty to ensure capital gains tax amounts paid as an eligible termination payment are not counted as surchargeable contributions;
- renumber a section;
- bring the definition of ‘adjusted taxable income’ in the constitutionally protected legislation into line with the definition in other surcharge legislation; and
- alter the definition of ‘unfunded defined benefit fund’ to ensure only genuinely unfunded schemes fall within its ambit).

I do not believe these provisions would be seen to breach principle 1(a)(i) of the Committee's terms of reference.

I trust this information satisfies the concerns raised by the Committee.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
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

FOURTEENTH REPORT OF 1999

The Committee presents its Fourteenth Report of 1999 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:

Adelaide Airport Curfew Bill 1999

Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 1999

Social Security (Administration and International Agreements) (Consequential Amendments) Bill 1999

Social Security (Administration) Bill 1999

Social Security (International Agreements) Bill 1999

Adelaide Airport Curfew Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 1999*, in which it made various comments. Mrs Gallus MP has responded to those comments in a letter dated 15 September 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of Mrs Gallus' response are discussed below.

Extract from Alert Digest No. 5 of 1999

This bill was introduced into the House of Representatives on 22 March 1999 by Mrs Gallus as a Private Member's bill.

The bill proposes to:

- establish a curfew at Adelaide Airport between 11pm and 6am and impose a penalty for breach of the curfew;
- impose a penalty of up to $22,000 for breach of the curfew;
- provide for certain aircraft movements during the curfew;
- allow the Minister to grant dispensations in certain circumstances;
- empower authorised officers to request certain information and provide for penalties in relation to false information;
- allow the Minister to delegate powers to grant permissions or give dispensations;
- provide for appointment of authorised persons; and
- provide guidance to a court in prosecutions for an offence by a body corporate.

Appointment of "a person" as an authorised officer
Subclause 22(1)

Proposed subclause 22(1) will permit the Secretary to the Department of Transport to appoint "a person" to be an authorised officer for the purposes of the Act. However, the bill gives no indication of the qualifications or attributes that such an appointee should possess.

Since its establishment, the Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to "a person". Generally the Committee likes to see some limits placed on potential delegates, whether by reference to them as holders of nominated offices, or as members of the Senior Executive Service, or by reference to their possession of special qualifications or attributes. Therefore, the Committee **seeks the advice of the member sponsoring the bill** as to whether subclause 22(1) should provide some limit on the otherwise unfettered discretion of the Secretary in appointing authorised officers.

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

Relevant extract from the response from Mrs Gallus MP

I have examined, in consultation with the Department of Transport and Regional Services, the matter raised by the Committee in relation to the appointment of "a person" as an authorised officer under subclause 22(1) of the Bill. Whilst it was intended that such appointments be limited, I agree with the Committee's view that the Bill as drafted provides an unfettered discretion for the Secretary to the Department of Transport and Regional Services in appointing authorised officers.

Accordingly, when the Bill is considered by the Senate I will arrange for it to be amended to limit the power of the Secretary under subclause 22(1) to appoint only the following persons as authorised officers:

- an officer of the Department of Transport and Regional Services, or
- an employee of Airservices Australia.

This is consistent with authorisations made under the *Sydney Airport Curfew Act 1995* for the performance of similar functions under that Act and with arrangements in place for the administration of curfews at other Australian airports where such curfews are in place.

Thank you for writing on this matter.

The Committee thanks Mrs Gallus for this response and for the proposed amendment.

Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 1999*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in letters dated 7 September and 20 September 1999. Copies of the letters are attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's responses are discussed below.

Extract from Alert Digest No. 11 of 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the following Acts:

Australian Wine and Brandy Corporation Act 1980 to:

- ensure that all relevant details of the transformation of wine from grape to retail sale are duly recorded;
- ensure that all documents and records relevant to the claims made on wine labels can be inspected; and
- make technical amendments;

Natural Resources Management (Financial Assistance) Act 1992 to rename the National Landcare Advisory Committee as the Australian Landcare Council;

Plant Breeder's Rights Act 1994 to:

- provide relief to applicants affected by a reduction of the allowable period for "prior sale" during the transition from the *Plant Variety Rights Act 1987* to the current Act;
- remove the requirement to maintain a copy of the Register of Plant Varieties in each State and Territory;
- attribute costs associated with a request for a test growing;

- extend public access to information;
- clarify the payment of prescribed fees; and
- make minor technical amendments;

Primary Industry Councils Act 1991 to repeal the Schedule establishing the Grains Industry Council (which is no longer relevant following privatisation of the Australian Wheat Board and other changes to grain marketing arrangements);

Primary Industries Levies and Charges Collection Act 1991 to:

- clarify and update levy and export charge collection techniques used in rural industries, including the association between producers and intermediaries; and
- upgrade powers for authorised persons to align them with those used by inspectors under the *Export Control Act 1982*;

Rural Adjustment Act 1992 to rename the Rural Adjustment Scheme Advisory Council as the National Rural Advisory Council and to change the role and functions of the Council; and

Australian Horticultural Corporation Act 1987, the *Farm Household Support Act 1992* and the *Primary Industries and Energy Legislation Amendment Act (No. 1) 1996* to make technical amendments.

Retrospective application
Subclause 2(4)

By virtue of subclause 2(4), the amendments proposed by Schedule 6 to the bill are to commence retrospectively on 1 April 1999. Schedule 6 deals with amendments to the *Rural Adjustment Act 1992*. The Explanatory Memorandum (at page 4) states that the amendments proposed "are relatively minor", aimed at redefining the roles and functions of the Rural Adjustment Scheme Advisory Council in the light of the winding-down of the Rural Adjustment Scheme.

However, the Explanatory Memorandum (at pages 20-21) offers a more detailed explanation of the various provisions in Schedule 6. This suggests that the changes proposed in Schedule 6 may have already taken place in anticipation of the passage of this legislation, and that these changes now require retrospective validation – a matter on which the Committee usually comments. The Committee, therefore, **seeks the Minister advice** on the need for making these relatively minor amendments retrospective.

Pending the Minister'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.

Relevant extract from the response from the Minister dated 7 September

On 30 June 1998 the Rural Adjustment Scheme (RAS) effectively ceased to operate. To address issues associated with farm competitiveness, farm family welfare and adjustment, the Government introduced the "Agriculture - Advancing Australia" package. In light of these changes, the functions and title of the Rural Adjustment Scheme Advisory Council have been reconsidered and new arrangements put forward, as set out in the portfolio's amendment Bill.

The role of the new Council, the National Rural Advisory Council (NRAC), is purely advisory. The Council will provide advice to me on exceptional circumstances issues, a range of rural adjustment matters and any other relevant matter that I request advice on. NRAC will not have any powers or capability that will decide on personal entitlements. For these reasons, the changes do not trespass on personal rights and liberties.

The amendments to the Rural Adjustment Act 1992 will therefore align legislation and the functions of the Council, making implementation effective as at 1 April 1999. It further aligns the Council's function with the new membership appointed from that date.

Thank you again for raising this matter with me.

Relevant extract from the response from the Minister dated 20 September

Further to my letter to you of 7 September 1999 I am writing to you concerning proposed amendments to the Rural Adjustment Act 1992. Following discussions this week between officers of Agriculture, Fisheries and Forestry and the Secretary of the Standing Committee for the Scrutiny of Bills, I would like to clarify the issue of alleged retrospective validation.

The Rural Adjustment Scheme Advisory Council (RASAC) has had some functions since 1992, as set out under the Act. Its functions included a management role in relation to the Rural Adjustment Scheme (RAS), as well as provision of advice to the Minister on exceptional circumstances and other matters relating to rural adjustment.

As the Rural Adjustment Scheme ceased to operate in 1997, it is necessary to amend the legislation to reflect the fact that the Council no longer has a role in relation to the RAS. The role of the Council is now purely advisory. The amendments will also change the name of the Council to the National Rural Advisory Council (NRAC).

Because Council's role will continue unchanged, other than the removal of its previous management role in relation to the RAS, it will have performed no functions that will need to be retrospectively validated. The chief intention of the proposed amendments to the Rural Adjustment Act 1992 is to ensure that the Act properly reflects the role of the Council, and aligns this with the appointment of the present Council on 1 April 1999.

Thank you again for raising this matter with me.

The Committee thanks the Minister for these responses which clarify the matter.

Social Security (Administration and International Agreements)(Consequential Amendments) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 1999*. Whilst the Committee did not seek a response in relation to comments made regarding a drafting note, the Minister for Family and Community Services has, nevertheless, noted those comments in a letter dated 5 August 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are noted below.

Extract from Alert Digest No. 9 of 1999

This bill was introduced into the House of Representatives on 3 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

Complementary to the Social Security (Administration) Bill 1999 and the Social Security (International Agreements) Bill 1999, this bill proposes to:

- amend the repeal provisions of the *Social Security Act 1991* consequential on the proposed Social Security (Administration) Act 1999 and the Social Security (International Agreements) Act 1999; and

- repeal Part 9 of the proposed Social Security (Administration) Act 1999 as a consequence of the commencement of the provision of that Act which contains a single rounding provision that applies to all social security payments.

Drafting note
Subclauses 2(1), 2(2) and 2(3)

Schedule 1 to this bill contains amendments consequent on the enactment of the Social Security (Administration) Act 1999. Subclause 2(2) states that these amendments are to commence on 20 March 2000 – the date on which the Administration Act is to commence.

Schedule 2 to this bill contains amendments consequent on the enactment of the Social Security (International Agreements) Act 1999. Subclause 2(3) states that these amendments are to commence on 1 July 2000. However proposed section 2 of the International Agreements Act states that it is to commence on 20 March 2000.

Schedule 3 to this bill repeals Part 9 of the Administration Act. Subclause 2(1) would have this commencing on Royal Assent. However, proposed subsection 2(3) of the Administration Act indicates that Part 9 should cease to have effect on 1 July 2000.

It would seem more appropriate that subclause 2(2) of the Consequential Provisions Bill refer to both Schedules 1 and 2, while subclause 2(3) of that bill should refer to Schedule 3.

Other than this, the Committee makes no further comment on these provisions.

Relevant extract from the response from the Minister

> I agree that a drafting error has occurred in relation subclauses 2(2) and (3). It is proposed that Government amendments will be moved in the House of Representatives so that subclause 2(2) refers to Schedules 1 and 2 while subclause 2(3) will refer to Schedule 3.
>
> I trust I have assisted the Committee with my response.

The Committee thanks the Minister for this advice and notes that amendments will be moved in the House of Representatives to correct the drafting error.

Social Security (Administration) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 1999*, in which it made various comments. The Minister for Family and Community Services has responded to those comments in a letter dated 5 August 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 9 of 1999

This bill was introduced into the House of Representatives on 3 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

Complementary to the Social Security (International Agreements) Bill 1999 and the Social Security (Administration and International Agreements)(Consequential Amendments) Bill 1999, this bill proposes to consolidate all the machinery and most of the administrative provisions relating to social security.

Non reviewable decisions
Clause 144

Proposed clause 144 of this bill lists a number of decisions which are not reviewable by the Social Security Appeals Tribunal. This clause appears to be unexceptionable in that the decisions referred to are either currently listed in section 1250 of the *Social Security Act 1991*, or are otherwise inappropriate for such review. However, in setting out the intended effect of clause 144, the Explanatory Memorandum simply states that "this clause provides that the SSAT may not review certain decisions. The clause sets out what those decisions are".

Accordingly, the Committee **seeks the Minister's confirmation** that this clause does not change the existing law.

Pending the Minister's confirmation, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

As stated in the Explanatory Memorandum, clause 144 of the Social Security (Administration) Bill 1999 provides that the Social Security Appeals Tribunal (*SSAT*) may not review certain decisions. While clause 144 essentially replicates the existing law there some minor differences to the rights to external review under the Bill. The differences are as follows:

(a) Rights of review have been provided in relation to all relevant provisions of the *Health Insurance Act 1973*.

(b) Rights of review have been provided in relation to section 603AA of the *Social Security Act 1991* to the extent that they are currently limited by the combined operation of paragraph 1239(2) and subsections 1240(1) and 1247(1) of that Act because there is no equivalent to paragraph 1239(2)(b) in the Social Security (Administration) Bill. This has the effect of making the rights of review in relation to newstart allowance the same as for youth allowance.

(c) Rights of review have been excluded in relation to clauses 57 and 58 (which reflect the current law) because those clauses exclude further Commonwealth liability where a payment has been made. If the Secretary refuses to pay an amount at all, external review continues to be available.

(d) Paragraph 144(1) of the Social Security (Administration) Bill is a new provision that relates to subparagraph 127(2)(i) that has been inserted to remove any doubt as to the extent that a party has to be informed of the details of an application in relation to a decision under subsection 91A(3) of the *Child Support (Assessment) Act 1989* without providing information that may endanger the applicant, such as providing the applicant's address, telephone number or place of employment.

I agree that clause 144 is unexceptional because additional rights of review have been provided in the Social Security (Administration) Bill and rights of review expressly limited by clause 144 where external review is inappropriate.

The Committee thanks the Minister for this considered response.

Social Security (International Agreements) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 1999*, in which it made various comments. The Minister for Family and Community Services has responded to those comments in a letter dated 5 August 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 9 of 1999

This bill was introduced into the House of Representatives on 3 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

Complementary to the Social Security (Administration) Bill 1999 and the Social Security (Administration and International Agreements)(Consequential Amendments) Bill 1999, this bill proposes to provide for:

- the consolidation of existing social security international agreements;
- new social security international agreements to be added by regulation; and
- existing social security international agreements to be varied by way of regulation.

Henry VIII clauses
Clauses 7, 8 and 9

As noted above, this bill provides for the consolidation of existing international social security agreements into a separate Act. These agreements, which are set out in 11 Schedules to the bill, provide for international reciprocity in the provision of social security benefits.

Proposed clause 7 of the bill authorises the text of these Schedules to be amended by regulation. Proposed clause 8 authorises the addition of new scheduled international agreements by regulation, and proposed clause 9 authorises the repeal of a Schedule by regulation.

While this is clearly a delegation of legislative power, the Committee has no means of ascertaining whether or not it is appropriate. Neither the Explanatory Memorandum nor the Second Reading Speech clarifies the need for authorising amendment by regulation in these circumstances. The Committee therefore **seeks the Minister's advice** as to why it is appropriate that the provisions of the bill be amended by regulation, and whether these regulations are to be disallowable.

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

Relevant extract from the response from the Minister

I do not agree that clauses 7, 8 and 9 involve inappropriate delegation of legislative power because they do not operate to remove Parliamentary scrutiny of the delegated legislative powers in those clauses.

The use of regulation making powers to change domestic law where an international convention or treaty is involved is unexceptional. Precedents for the legislative approach adopted in the Social Security (International Agreements) Bill 1999 are to be found in the *Chemical Weapons (Prohibition) Act 1994* (see the definition of "Convention" in section 7), the *Anti-Personnel Mines Convention Act 1998* (see the definition of "Convention" in section 4) and the *Mutual Assistance in Criminal Matters Act 1987* (see subsection 7(2)).

The use of regulation making powers in the Social Security (International Agreements) Bill will mean that changes to the law to give effect to new international social security agreements with foreign countries, and changes to existing international social security agreements, can be made more quickly because such changes will not be dependent on the Government's legislative programme or Parliamentary Sittings. This result can be achieved without any diminution in Parliamentary scrutiny because the regulations will be disallowable and subject to the scrutiny of the Senate Committee on Regulations and Ordinances.

The Committee thanks the Minister for this response which addresses its concerns.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF

1999

29 September 1999

SENATE STANDING COMMITTEE

FOR

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FIFTEENTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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TERMS OF REFERENCE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 1999

The Committee presents its Fifteenth Report of 1999 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:

Taxation Laws Amendment Bill (No. 8) 1999

Taxation Laws Amendment Bill (No. 8) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 24 August 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 11 of 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 to remove anomalies preventing the intended Australian taxation of capital gains arising on deemed disposals of tainted assets of a controlled foreign company (CFC) where that CFC ceases to be a member of a group and has previously benefited from capital gains tax roll-over relief;

Income Tax Assessment Act 1936 and *Income Tax Assessment Act 1997* to:

- exempt from income tax post-judgment interest received in personal injury compensation cases;
- allow an income tax deduction to certain funds, authorities and institutions and to political parties for a gift of property worth more than $5,000, regardless of when or how the property was acquired;
- provide a capital gains tax (CGT) exemption for testamentary gifts of property to certain funds, authorities and institutions and to political parties unless the property is reacquired by the estate, a beneficiary of the estate or an associate;
- provide a CGT exemption for gifts of property made under the Cultural Gifts Program unless the property is reacquired for less than market value by the donor or an associate;
- allow concessional taxation treatment for specified private funds which will not be required to seek donations from the public but will be subject to the other requirements applying to public funds;

- allow the apportionment of deductions for donations made under the Cultural Gifts Program over a period of up to five income years; and

- extend to companies two concessional tracing rules which are available to trusts under trust loss measures;

Income Tax Assessment Act 1936 and the *Taxation Laws Amendment Act (No. 3) 1998* to:

- allow a deduction where franking rebates exceed the ceiling imposed under the benchmark portfolio ceiling method;

- treat shares and interests in shares held by a bare trust as if they were held by the beneficiaries of the trust;

- remove the restrictions on exempting credits for dividends paid by former exempting companies for natural persons where all the shares are owned by natural persons and there has been no change in ownership of the company; and

- extend the scope of a transitional concession for the general anti-avoidance rule and the specific anti-streaming rule;

Income Tax Assessment Act 1997 to:

- disallow a deduction for bribes made to foreign public officials; and

- make technical amendments;

Taxation (Deficit Reduction) Act (No.2) 1993 to maintain the rate of tax imposed on the eligible insurance business of friendly societies and other registered organisations at 33% for the 1999-2000 income year;

Income Tax Assessment Act 1936, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to:

- provide machinery provisions to collect untainting tax;

- ensure that distributions from share premium accounts are within the ambit of the capital streaming and dividend substitution rules;

- ensure that bonus shares deemed to be a dividend have a cost base of the dividend amount where the shares are held on revenue account; and

- make minor technical changes;

Income Tax Assessment Act 1936 and the *Taxation Laws Amendment (Trust Loss and Other Deductions) Act 1997* to allow an extended period for making family trust elections and interposed entity elections.

Retrospective application
Schedule 1, Part 1

The amendments proposed by Part 1 of Schedule 1 are to apply from 13 May 1997 – the date of the 1997 Budget. While the Committee generally accepts the need for Budget announcements to apply from the date of the Budget, on this occasion it seems to have taken more than 2 years for these changes to take legislative form. The Committee, therefore, **seeks the Treasurer's advice** as to the reasons for such retrospectivity in these circumstances, and which taxpayers or categories of taxpayers will be disadvantaged by that retrospectivity.

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.

Relevant extract from the response from the Assistant Treasurer

Schedule 1, Part 1 - Controlled foreign companies and capital gains tax

It is intended that these measures, which were announced in the 1997-98 Budget, will apply after 7.30 pm by legal time in the Australian Capital Territory, on 13 May 1997. A press release issued at the time described the amendments and noted that since it was an anti-avoidance measure, the amendments would apply from the 1997-98 Budget night.

These measures are directed at closing off specific avoidance arrangements which take advantage of anomalies in the interaction between the controlled foreign companies measures and the capital gains tax provisions of the Australian tax law.

It is necessary for the measures to apply from the date of announcement, to ensure that the anomalies identified in the 1997-98 Budget are addressed, and to prevent taxpayers from taking advantage of the anomalies after the announcement. A further rationale for retaining the start date as introduced is to prevent taxpayers who may have acted in accordance with the announced measures from being disadvantaged as compared to taxpayers who ignored the announcement.

Taxpayers affected by the amendments: The measures are only likely to impact Australian based multinational companies seeking to take advantage of the anomalies in the tax law to avoid tax, where the companies undertake corporate reconstructions involving controlled foreign companies, and capital gains tax roll-over relief has been utilised in respect of certain assets.

In addition, the amendments will only apply if an Australian resident taxpayer has an attribution interest (generally a greater than 10% interest) in a controlled foreign company that has obtained capital gains tax roll-over relief for the inter-group transfer of tainted assets. The operation of the proposed measures is further targeted to disposals of tainted assets (assets held to derive tainted income such as interest or dividends) where the controlled foreign company is deemed to have disposed of the tainted assets when it ceased to be a member of a wholly-owned company group.

The Committee thanks the Assistant Treasurer for this response.

Retrospective application
Schedule 2

The amendments proposed by Schedule 2 to the bill are to apply from the 1992-93 year of income. These amendments exempt from income tax any post-judgment interest received as part of an award of compensation in a personal injury case where that interest relates to delays that have occurred while avenues of appeal are being pursued. The amendments are beneficial to taxpayers and, as such, would usually attract no further comment from the Committee.

However, given that the amendments are to apply from the 1992-93 income year the Committee **seeks the Treasurer's advice** on any action proposed to be taken to inform taxpayers of this legislation to enable them to apply for the amendment of assessments going back over 7 years. Without such action, amendments which set out to be beneficial to all taxpayers in a particular category may end up, somewhat capriciously, benefiting only some of those taxpayers.

Other than this, the Committee makes no further comment on these provisions.

Relevant extract from the response from the Assistant Treasurer

Schedule 2 - Post-judgment interest

The Committee has sought advice as to how taxpayers will be informed that these provisions will exempt post-judgment interest from the 1992-93 income year onwards, giving taxpayers the right to seek amendments of their assessments to exclude post-judgment interest for 1992-93 and later years.

Firstly, the Assistant Treasurer issued a press release (copy attached) in March 1999, announcing the proposed exemption for post-judgment interest, which noted that the changes would apply to the 1992-93 and later years of income.

Secondly, the Australian Taxation Office (ATO) has a wide range of programs to educate taxpayers about changes to the law:

- Tax agents will be advised of the new provisions and how they will affect their clients;
- Taxpayers will be advised of the new provisions through ATO publications, such as TaxPack;
- The ATO will have information outlining the new provisions located on its Internet site; and
- The ATO is anticipating sending information about the new provisions to insurance companies, since insurance companies are often responsible for making compensation payments.

The above measures will form part of an ongoing process by the ATO to inform taxpayers of the legislation and should ensure that all affected taxpayers will become aware of their entitlements in relation to the new exemption.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF

1999

13 OCTOBER 1999

SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT OF 1999

The Committee presents its Sixteenth Report of 1999 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:

Superannuation Legislation Amendment Bill (No. 4) 1999

Superannuation Legislation Amendment Bill (No. 4) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 29 September 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 12 of 1999

This bill was introduced into the House of Representatives on 11 August 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* to:

- provide a definition of a related party of a superannuation fund, a Part 8 associate of a member of a fund, a standard employer-sponsor of a fund, and a Part 8 associate of a standard employer-sponsor of a fund;
- provide definitions of a Part 8 associate and of a related trust;
- amend the coverage of in-house asset rules to include investments in, loans to, and leases and lease arrangements with, a related party of the fund. In-house investments will also include investments in a related trust;
- provide that in-house asset rules do not cover business real property leased by a superannuation fund with less than 5 members, or investments in widely held unit trusts;
- provide transitional arrangements for the changes to the in-house asset provisions;
- amend provisions applicable when an investment is not an in-house asset, but has the effect of achieving an investment in an in-house asset;
- amend provisions relating to the acquisition of assets from members and relatives, so that they apply to acquisitions from all related parties, with specified exceptions; and

- enable superannuation funds with fewer than 5 members to use up to 100 per cent of their assets to purchase business real property.

Retrospective application
Schedule 1, item 45

Item 45 of Schedule 1 to this bill provides that most of the proposed amendments are to apply either from 12 May 1998 (the night of the 1998 Budget) or from the date on which the bill was introduced into the Parliament. The bill, therefore, has a measure of retrospective effect.

However, subitem 45(6) provides that neither the criminal sanctions nor the civil penalty sanctions of the Principal Act are to apply to conduct engaged in before the commencement of the provisions contained in the bill if that conduct would not have constituted an offence or contravention under the law as it stood before those amendments came into force.

Subitem 45(6) provides some protection against the inherent problems when legislation is made to operate retrospectively. However, the period of retrospective application in the case of this bill is approximately 15 months. The Explanatory Memorandum observes that a decision to amend the investment rules was announced in the 1998-99 Budget. A number of representations were then received, but an exposure draft bill was not released until 22 April 1999 (more than 11 months later). Various submissions were then received in response to that exposure draft.

The Committee is aware of the value of consultation in developing legislative proposals. It also notes the mitigating effect of proposed subitem 45(6) on the application of offence and penalty provisions. However a period of 11 months between the announcement of a proposal and the appearance of exposure draft legislation giving effect to that proposal seems somewhat lengthy. The Committee, therefore, **seeks the Treasurer's advice** on whether the consultation process was the sole reason for the delay in introducing this bill, and whether those consultations differed from the process typically followed.

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.

Relevant extract from the response from the Assistant Treasurer

The Committee has sought the Treasurer's advice as to:

- whether the consultation process was the sole reason for the delay in introducing this Bill and whether those consultations differed from the process typically followed.

The consultations undertaken and the consideration of view raised by interested parties was a significant factor underlying the timing of the legislation. As noted by the Committee, the process included the release of an exposure draft of the legislation for public comment. A number of amendments were made to the legislation as a result of this part of the consultation process, including the provision of broader transitional arrangements.

Consultation processes vary between different pieces of legislation, having regard to the subject matter and interest groups involved. The Government considers the approach chosen was appropriate for this legislation.

As noted by the Committee, provisions in the Bill ensure that a person is not guilty of an offence and civil penalty sanctions do not apply in respect of conduct engaged in before the commencement of the provisions contained in the Bill, if the conduct would not have been an offence or a contravention before those amendments.

The Bill also contains transitional provisions that ensure that a range of transactions are not affected by the new provisions. For instance, a small superannuation fund (with fewer than 5 members) can elect to have grandfathering provisions apply to investments made in a related trust until 30 June 2009, up to the amount of the outstanding debt of the trust at 12 May 1998.

I also note that, given the objective of preserving the integrity of the superannuation investment rules, it is appropriate that aspects of the provisions take effect from the date of the original announcement.

In view of these considerations, I do not believe that these provisions should be regarded as breaching principal 1(a)(i) of the Committee's terms of reference.

I trust this information satisfies the concerns raised by the Committee.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF

1999

20 October 1999

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT OF 1999

The Committee presents its Seventeenth Report of 1999 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:

Telecommunications (Interception) Amendment Bill 1999

Telecommunications (Interception) Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 1999*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 18 October 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 14 of 1999

This bill was introduced into the House of Representatives on 2 September 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Telecommunications (Interception) Act 1979* and the *Telecommunications (Interception) and Listening Device Amendment Act 1997* to permit the Anti-Corruption Commission of Western Australia (ACC) and the Queensland Crime Commission (QCC) to:

- receive intercepted information originally obtained by another agency where that information appears to relate to conduct that the ACC or QCC may investigate;
- use intercepted information for an investigation it is undertaking in relation to its functions;
- obtain warrants to intercept information, provided the Attorney-General first issues a declaration under section 34 of the Interception Act; and
- permit the Minister to continue to nominate specified members of the AAT to issue interception warrants for law enforcement.

General comment

This bill proposes to further increase the number of agencies entitled to receive and use information gained from the interception of telecommunications.

The core provision of the *Telecommunications (Interception) Act 1979* is section 7. This section prohibits the interception of communications passing over a telecommunications system. The balance of the Act as originally passed set out certain specified exceptions to this provision in "special circumstances". These exceptions were intended to achieve the objects of the bill, which was introduced as part of a legislative package to reform the powers of ASIO, and to facilitate the investigation of narcotics offences (see Senate, *Hansard*, 8 March 1979, pp 646-649).

The Act has since been amended to widen the number of exceptions to section 7, and to increase the range of "special circumstances". For example, in 1992 there were four exceptions in the balance of section 7. By 1998, these exceptions had grown to eight.

In *Alert Digest No 7 of 1997*, this Committee considered the Telecommunications (Interception) and Listening Devices Amendment Bill 1997. In discussing that bill, the Committee expressed its concern at the proposed extension to the Police Integrity Commission of access to the telecommunications interception powers. The Committee observed that that bill was "again an extension of an intrusive power and, as such, a fresh example of legislative creep".

This bill now seeks to extend access to the telecommunications interception powers to the Anti-Corruption Commission of Western Australia and the Queensland Crime Commission. It is yet another "fresh example of legislative creep".

While conscious of the need to adequately investigate "corruption by public officials, paedophilia and organised crime", which is the explanation for the latest extensions, and while remaining conscious of the safeguards contained elsewhere in the Act, the Committee **seeks the Attorney-General's advice** as to the reasons for the continuous weakening of the prohibition contained in section 7 of the Principal Act, and the continuous extension of access to the Act's exceptional powers.

Pending the Attorney's advice, the Committee draws 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.

Extract from the response from the Attorney-General

> The Committee is concerned that conferring eligible authority status on the Western Australian Anti-Corruption Commission (ACC) and the Queensland Crime Commission (QCC) might be an extension of an intrusive power by legislative creep. I do not believe this is the case.
>
> The QCC was established under the *Crime Commission Act 1997* (QLD). It has a responsibility to investigate criminal paedophilia and major and organised crime.

The proposed amendments to the *Telecommunications (Interception) Act 1979* (the Act) dealing with the QCC will not permit any wider use of telecommunications interception than is currently possible. The Bill merely takes into account the decision of the Queensland Parliament to transfer responsibilities for investigating organised and major crime from the Queensland Criminal Justice Commission (CJC) to the QCC. In performing its statutory functions, in relation to organised and major crime, the QCC will not have any powers under the Act which were not available to the CJC for the same purpose. The amendments also support the use of telecommunications interception for the investigation of criminal paedophilia. The QCC's investigations in this area are special circumstances which warrant an exception from the provisions in section 7 of the Act.

The ACC is established by the *Anti-Corruption Commission Act 1988* (WA). The ACC's role includes the receiving of or initiating allegations of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct about police officers and other public officers. The matters which the ACC investigate are of a serious nature and require the best tools of investigation. I consider that enabling the ACC to receive intercepted material and, if declared, to undertake interception in its own right, is an exception to section 7 of the Act which constitutes the special circumstances envisaged when the Act was originally passed.

Experience has shown that covert surveillance is one of the most powerful investigative tools for uncovering and prosecuting crime. In the 1997/98 Telecommunications (Interception) Act's Annual Report, the following results were reported:

- 625 arrests on the basis of information that was or included lawfully obtained information;
- 451 prosecutions on the basis of lawfully obtained information;
- 329 convictions on the basis of lawfully obtained information;
- 4 prosecutions on the basis of lawfully obtained information by eligible authorities of a State; and
- 2 convictions on the basis of lawfully obtained information by eligible authorities of a State.

The Committee thanks the Attorney-General for this response which addresses most of its concerns. However, it is not clear whether the Queensland Criminal Justice Commission is to retain any interception powers under this bill in addition to those interception powers to be conferred on the Queensland Crime Commission. The Committee **would appreciate the Attorney's further advice** on this issue.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF

1999

24 November 1999

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT OF 1999

The Committee presents its Eighteenth Report of 1999 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:

Border Protection Legislation Amendment Bill 1999

Child Support Legislation Amendment Act 1998

Diesel and Alternative Fuels Grants Scheme (Administration and Compliance) Bill 1999

Border Protection Legislation Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 1999*, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 22 November 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 15 of 1999

This bill was introduced into the House of Representatives on 22 September 1999 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 and the *Customs Act 1901* to revise and strengthen existing powers of investigation and enforcement at sea to take account of Australia's rights and obligations under the United Nations Convention on the Law of the Sea and customary international law by providing for:

- the boarding and searching of ships and aircraft, in certain circumstances, in Australia's territorial sea, Australia's contiguous zone, the High Seas, and Australia's exclusive economic zone;
- hot pursuit of ships whose master has not complied with a request to board;
- hot pursuits of motherships in certain circumstances; and
- the moving and/or destroying of ships which are unseaworthy, which pose a serious risk to navigation, quarantine, safety or public health, or which pose a serious risk of damage to property or the environment; and

Customs Act 1901 to enable Customs officers to carry and use approved firearms and other approved items of personal defence equipment in certain circumstances; and

Fisheries Management Act 1991 to:

- authorise Customs officers to be officers for the purposes of the Act;

- enable Customs officers (exercising powers as fisheries officers) to carry and use approved firearms and other approved items of personal defence equipment in certain circumstances; and

- enable an officer to detain and search a person who is in Australia or a Territory but who is not an Australian citizen or resident to determine whether to charge the person with an offence relating to illegal fishing; and

Migration Act 1958 to:

- provide for automatic forfeiture (followed by seizure and possible disposal) of ships and aircraft which have been used to bring to Australia persons who have no authority to come to Australia, or have been involved in the entry or proposed entry into Australia of such persons;

- provide a scheme by which fishermen can be taken to have held a visa immediately upon enforcement action by fisheries officers;

- revise offence provisions relating to bringing unauthorised arrivals into Australia;

- ensure that, where the Commonwealth arranges for or requires a person without a visa to be brought into Australia, those involved in doing so are not exposed to offences under the Act; and

- ensure that refugee claimants who arrive unlawfully in an Australian territory are able to be brought to the mainland promptly to have those claims considered and be detained as unlawful non-citizens.

A penalty provision for a failure to answer questions or produce documents is noted on page 23 of this *Digest*.

Search and entry at sea
Proposed new subsections 245F(3) and 245G(2)

Item 2 of Schedule 1 to this bill proposes to insert a new Division 12A in Part 2 of the *Migration Act 1958*. This new Division, which deals with the chasing and boarding of ships and aircraft, includes proposed new subsections 245F(3) and 245G(2).

Proposed new paragraphs 245F(3)(a) and 245G(2)(a) will permit officers authorised under the Act to board and search a ship or aircraft without obtaining a judicially sanctioned warrant. In addition, proposed new paragraph 245F(3)(f) will permit an authorised officer to arrest without warrant any person whom the officer suspects of having committed an offence against the *Migration Act 1958*.

Provisions in this form are usually regarded with some concern by the Committee. The Committee is mindful of the fact that the amendments proposed by this bill are intended specifically to strengthen Australia's maritime investigatory and enforcement powers, and have been designed to fully utilise the jurisdiction derived from the United Nations Convention on the Law of the Sea. The Committee is also mindful of the fact that these particular search and entry powers are to be exercised at sea, where the opportunity to seek or obtain a warrant may be more difficult. Nevertheless, the Committee notes that warrants are usually required before search and entry powers are exercised and, in practice, may be obtained by modern technology. Whether by telephone or otherwise, modern technology enables applications for warrants to be made without undue difficulty from remote regions and from the oceans.

The Committee, therefore, **seeks the Minister's advice** on how these particular provisions differ from those currently available, how they differ from the usual practice in such situations, and their consistency with Australia's rights and obligations under the United Nations Convention on the Law of the Sea.

Pending the Minister'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.

Relevant extract from the response from the Minister

Migration Act - boarding and searching a ship or aircraft without a judicially sanctioned warrant

New Provisions vs Current Provisions & Usual Practice

Pursuant to existing subsection 251(1) of the Act, officers may at any time go on board and search a vessel in which he or she has reason to suspect that there may be found an unlawful non-citizen or a person seeking to enter Australia in circumstances in which the person would become an unlawful non-citizen. There is no requirement for a warrant, or even a request to board, in such circumstances.

It is an aim of the Bill to extend the current regime to Australia's contiguous zone and to the high seas.

Subsection 251(1) applies to:

- in relation to foreign vessels - to officers acting in "Australia", a concept encompassing, in essence, the migration zone (as defined in subsection 5(1)) and Australia's territorial sea; and
- in relation to Australian vessels - to officers acting in or outside Australia.

The new provisions contained in this Bill and referred to above

- incorporate the substance of existing boarding and search powers in subsection 251(1), but make the exercise of such powers dependent upon the making of a request to board (unless the ship is an Australian ship or a foreign ship which is being chased);

- extend the availability of boarding and search powers, in relation to ships in respect of which proposed new section 245F applies, and in accordance with UNCLOS, beyond Australia's migration zone and territorial sea to Australia's contiguous zone (and, in relation to ships in respect of which proposed new section 245G applies, to the high seas);

  - again, the exercise of such powers would be dependent upon the making of a request to board, which (unless the ship is an Australian ship) in turn could be made only in certain specified circumstances (such as where there is a reasonable suspicion that the master's ship is, will be or has been involved in a contravention, or an attempted contravention, in Australia of the Act);

- describe in more detail what officers are actually empowered to do when the relevant provisions are enlivened; and

- bring the powers available to officers in line with powers available to officers of other front-line agencies, in particular Customs officers.

While I appreciate the Committee's concerns and the suggestion that, in practice, warrants may be obtained by modern technology, I do not share the view that, at sea, obtaining a search warrant is practical. I recognise the importance of using warrants in certain land-based investigatory work, but I do believe that there are circumstances at sea where it is necessary for officers to be able to board, search, question as soon as possible and without warrant if those officers are to fulfil their border protection responsibility.

In relation to the suggestion that use could be made of "telephone warrants" I would like to draw the Committee's attention to a number of significant problems likely to be associated with the obtaining of such warrants:

- Magistrates are likely to be reluctant - understandably - to issue warrants based on a telephone call rather than having the usual evidence before them;

  - This would be even more likely if the call was made after hours and the Magistrate not versed in the relevant legislation (indeed, the magistrate may not have access at all to an up to date Act);

  - Even if the telephone was used, a significant amount of paperwork would in all likelihood still be required; creation of this paperwork would be time-consuming and may, in certain circumstances, defeat the purpose of using the telephone in circumstances where action is required urgently;

- The time taken to obtain a warrant over the telephone would enable many suspect vessels to travel well outside the reach of our jurisdiction;

- While telecommunications are much better than they used to be, they are still not totally reliable. Weather conditions, sunspot activity and 'black spots' can all affect ship to shore communications.

    - This would be a particular problem if a line was to be kept open for one or two hours while talking with the Magistrate;

    - There is also the possibility of the terms of the warrant being misinterpreted due to, for example, an unclear line or simply a transcription error on the part of the Magistrate or the warrant applicant.

In summary, it is my view that obtaining warrants is not practical in situations where decisions are required to be made at sea in time-critical conditions.

The proposed new provisions contained in the Bill address these difficulties whilst carefully limiting the steps officers can take and describing the manner in which they are to go about their duties.

I believe the balance thus reflected in the Bill is appropriate in circumstances of a "first response" to a suspect infringement of our legislation.

Consistency with UNCLOS

Under UNCLOS, the sovereignty of a coastal state extends to its territorial sea, which is the adjacent band of coastal water (article 2). The territorial sea may be no wider than 12 nautical miles (article 3). Foreign vessels enjoy the right of innocent passage through the territorial sea. However, the passage of a foreign ship is deemed to be prejudicial to the peace, good order and security of the coastal state if various activities are undertaken including the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws of the coastal state, fishing or any other activities not having a direct bearing on passage (article 19). Coastal states can apply their customs, fiscal, immigration and sanitary laws in the territorial seas and take measures to enforce them (article 21). Enforcement powers include boarding, inspection and arrest.

In the contiguous zone, that is the band of water between 24 nautical miles from the territorial sea baselines and the outer limit of the territorial sea, a coastal state may take measures to prevent the infringement of its customs, quarantine, fiscal and immigration laws, and measures for the punishment of any infringements of laws dealing with those subjects (article 33).

In its exclusive economic zone, which includes the territorial sea and the contiguous zone, and also extends out to 200 nautical miles from the coast, the coastal state may take measures including boarding, inspection, arrest and judicial proceedings in respect of infringements of fishing, resource exploration or exploitation laws and pollution laws (article 73).

In high seas areas, ships may be boarded or inspected where there are reasonable grounds for suspecting the ship concerned is engaged in piracy, the slave trade, or unauthorised broadcasting or there are doubts as to the nationality of the ship (article 110). States are also under a duty to cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances on the high seas (article 108).

Australian flagged vessels are subject to Australian jurisdiction in all areas of the ocean, other than in the territorial seas of other countries, as well as being subject to foreign jurisdiction as provided for in UNCLOS.

There is no requirement under UNCLOS that boarding, search or arrest powers in relation to ships be exercised pursuant to a judicially sanctioned warrant. It is entirely a matter for domestic law whether a warrant should be a prerequisite for the exercise of such powers.

The proposed amendments contained in this Bill revise, and enhance where appropriate, existing powers of investigation and enforcement at sea to take account of Australia's rights and obligations under UNCLOS and customary international law.

The Committee thanks the Minister for this comprehensive response.

Rights and liberties and the carrying of firearms
Proposed new section 189A

Item 32 of Schedule 2 to this bill proposes to insert a new section 189A in the *Customs Act 1901*. This new section permits authorised officers to carry firearms and other items of personal defence equipment (such as batons, capsicum sprays and anti-ballistic clothing).

Such a provision has the potential to trespass on the rights and liberties of those in relation to whom such officers may exercise their powers. The right to carry firearms is usually restricted to highly trained and accountable military or police officers. This provision now proposes to extend this right to certain civilians in circumstances where judgement about its use might need to be exercised in a context of considerable tension. There is, therefore, significant risk that a firearm or item of defence equipment might be used inappropriately. This could lead to unwarranted death or injury. (This may have the potential to cause an incident with diplomatic or international ramifications.)

The extent to which this provision departs from current practice is not apparent from the Explanatory Memorandum. It is not apparent whether customs officers to be authorised to carry firearms will receive high quality training such as, for example, police officers. It is not apparent whether there is to be any monitoring of the use of the new powers, and whether any safeguards against inappropriate use are to be put in place. The Committee, therefore, **seeks the Minister's advice** as to these matters.

Pending the Minister'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.

Relevant extract from the response from the Minister

Customs Act - authorised officers permitted to carry firearms and other items of personal defence equipment

It might assist the Committee if I provide some background to the decision to provide firearms and protective equipment to officers of Customs' marine fleet.

The ability for Customs officers to carry firearms in the course of their duty is not new. Australian Customs Vessels (ACV) have for many years carried a rifle and shotgun - principally for protection against animals such as crocodiles and sharks during patrols in remote areas.

In March 1999, the Chief Executive Officer (CEO) of Customs commissioned a former Commissioner of South Australian police, Mr David Hunt, to provide a report on whether Customs marine officers had sufficient capacity to protect themselves.

This was against the background of the acquisition of a new generation of Customs vessels - the Bay Class vessels - which are capable of operating far out to sea for over 20 days at a time, meaning that it would not always be possible to embark armed Federal or State police in the event that an armed response to any particular situation became necessary. Additionally, recent interceptions of large drug shipments and changes in the modus operandi of people smugglers suggests a greater involvement of international organised crime in these types of offences.

In this report to the CEO, Mr Hunt recommended that in order to be able to exercise their duties safely, Customs officers aboard ACVs should have available to them a range of firearms and other protective equipment. This includes one automatic rifle per ACV, handguns, batons, capsicum spray, handcuffs and anti-ballistic clothing.

In accepting Mr Hunt's recommendations, the CEO was mindful of the sensitivity of this issue and the absolute necessity for accountability in the use of the equipment.

Consequently, the following is proposed:

- The Australian Federal Police (AFP) will provide the necessary training to Customs marine officers. This would be the same training as provided to police, tailored to the marine environment. The training is of about six weeks' duration and emphasises conflict resolution and situation de-escalation, with use of weapons a last resort.
- Consistent with AFP practice, officers who successfully complete the training would be accredited by the AFP and would be required to be reaccredited each year.
- No officer who has not been accredited would be permitted to use or access firearms.
- Officers will not routinely carry firearms - they will be securely stored in purpose-built armouries aboard each ACV and only issued when there is an operational need.
- Standard Operating Procedures will be developed based on best practice AFP and State police procedures. Mr Hunt is providing detailed advice on the development of the necessary procedures.
- Standard Operating Procedures will include a requirement for a detailed report on any use of weapons.

The provision of weapons and protective equipment to Customs' marine officers is a regrettable but necessary response to the increased risks faced by Customs officers in exercising their powers.

The measures I have outlined above and other measures will ensure that Customs officers will meet the highest standards of accountability in the use of the equipment and that risks involved in the use of weapons are kept to a minimum.

The Committee thanks the Minister for this comprehensive response.

Detention on suspicion
Proposed new paragraphs 84(1)(ia) and (ic)

Among other things, item 4 of Schedule 3 to this bill proposes to insert new paragraphs 84(1)(ia) and (ic) in the *Fisheries Management Act 1991*. Proposed new paragraph 84(1)(ia) will permit an officer authorised under that Act to detain a person if the officer has reasonable grounds to believe that the person is not an Australian citizen or resident, and was on a foreign boat when it was used in the commission of a specified offence. Such detention is for the purposes of determining whether or not to charge the person, and, by virtue of proposed new section 84A, is limited to a maximum period of 168 hours.

Proposed new paragraph 84(1)(ic) will permit an authorised officer to search such a detainee without the sanction of a warrant. Such a search is said to be for the purpose of finding out whether the person has any concealed weapons.

The Committee usually views such provisions with some concern. While the Explanatory Memorandum observes that these powers are currently possessed by officers authorised under the Migration Act, the reasons for, and the implications of, extending them to fisheries officers are not clear. Precedence alone is not sufficient reason for pursuing a practice if it is tainted or flawed. The Committee, therefore, **seeks the Minister's advice** on the reasons for extending these particular powers, and whether officers authorised to exercise these powers are to receive any training or be given any guidance as to their exercise.

Pending the Minister'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.

Relevant extract from the response from the Minister

Fisheries Act - detention on suspicion

The Committee has noted that the proposed new paragraph 84(1)(ia) will permit a fisheries officer to detain a foreign person if the officer has reasonable grounds to believe that person was on board a foreign fishing boat used in the commission of certain specified offences. By virtue of the proposed new section 84A that person may be detained for up to 168 hours for the purposes of determining whether or not to charge the person. Under proposed new paragraph 84(1)(ic) the detainee may be searched without a warrant.

The Committee has sought advice on the reasons for extending these powers to fisheries officers and whether these officers will receive any training in their exercise.

It may assist the Committee if I initially provide some background. Fisheries officers in the course of fisheries enforcement bring foreign fishermen apprehended within the Australian fishing zone into Australia. Several fisheries officers are currently empowered under the *Migration Act 1958* to detain these foreign fishermen as non-citizens whilst determining whether they will be charged and the duration of proceedings until they were repatriated. The Commonwealth Ombudsman reported on the "Administrative Arrangements for Indonesian Fishermen Detained in Australia" in 1998 and made recommendations on changes to the legislative and administrative arrangements, including that fisherman should not be detained under migration legislation for the purposes of fisheries enforcement.

Proposed provisions in Schedule 3 of the *Border Protection Legislation Amendment Bill* provide fisheries officers with the power to detain illegal foreign fisherman until they are charged with a Fisheries Act offence or for up to 168 hours (7 days). In practice this is a transfer of administrative arrangements between Migration and

Fisheries legislation and therefore will implement one of the recommendations of the Ombudsman. Such a step would also improve the lines of accountability and responsibility for the detained fishermen, the caretakers and departments.

At the end of the detention period, the foreign fisherman ceases to be in fisheries detention (under an enforcement visa) and the continued the detention of that person would revert to the Migration Act. Under s.189 of that Act these detained "non citizens" should be repatriated "as soon as practicable". The cessation of the enforcement visa can occur when either the fisherman escapes detention, the lapsing of 168 hours, the person being charged, or a decision not to charge is made.

Fisheries officers detaining the foreign fishermen are also to be empowered to search the detainee under fisheries legislation. This is the same action that they have been conducting under Migration Act powers. To date, immigration officers have provided training to these fisheries officers in the exercise of these powers and similar training would be provided to new fisheries officers. As the fishermen are held in low security caretaker facilities a search for concealed weapons is for the safety of other detained fishermen, the operator of the caretaker facility and fisheries officers.

The Committee thanks the Minister for this comprehensive response.

Child Support Legislation Amendment Act 1998

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 10 of 1998*, in which it made various comments. The Minister for Family and Community Services has responded to those comments in a letter dated 16 November 1999. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses (and received Royal Assent on 15 December 1998) the Minister's response may, nevertheless be of interest to Senators. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 10 of 1998

This bill was introduced into the House of Representatives on 11 November 1998 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the following Acts:

- *Child Support (Assessment) Act 1989* to:
- modify the child support administrative formula;
- limit the disclosure of information relating to children of a parent on the notice of assessment;
- provide for a $260 minimum annual rate of child support;
- modify the effect of care arrangements on assessments;
- provide that the starting date of liability for applications for administrative assessment will be the date the application is made to the Registrar;
- allow a person in receipt of more than the minimum rate of Family Allowance to elect to end their administrative assessment where approval based on risk assessment has been granted by the Secretary to the Department of Social Security;
- give clients the right to lodge objections to decisions made by the Registrar;

- modify the process relating to departure from administrative assessment of child support;
- modify the income on which a child support liability is raised;
- enable child support assessments to be calculated using the taxable income for the financial year immediately preceding the assessment;
- allow a person to lodge an income estimate election up to 31 July, and to allow the Registrar to reject an income estimate election;
- allow a person to apply for an administrative assessment to pay child support; and
- make corrections to out of date or incorrect references;
- *Child Support (Assessment) Act 1989* and *Child Support (Registration and Collection) Act 1988* to:
- enable a child support assessment to continue to the end of the school year in which a full-time secondary student turns 18; and
- modify the date of effect of information provided to or obtained by the Registrar and the manner in which information is provided to the Registrar;
- *Child Support (Registration and Collection) Act 1988* to:
- allow the Registrar to request deductions to be made from social security pensions and benefits and applied towards child support liabilities;
- to enable private collection of child support between parents;
- allow the Registrar to hold in reserve money collected where a paying parent has lodged an application to the Family Court seeking a declaration that they are not a person from whom child support may be sought;
- allow for debts between two persons who owe child support in respect of their children to be offset;
- modify the way in which non agency payments may be credited against a child support liability; and
- enable payers to elect to pay their child support in accordance with a nominated period rather than having to pay a monthly amount by the seventh of each month; and

- *Social Security Act 1991* to:
- require deductions to be made from social security pensions and benefits where requested by the Registrar; and
- ensure 50 per cent of any child support paid by a paying parent will be deducted from the income which is used to calculate their entitlement to Family Allowance.

Commencement
Subclause 2(10)

By virtue of subclause 2(10), the amendments referred to in subclauses (2), (4) or (9) may commence up to 12 months after assent.

The Committee notes that paragraph 4 of Office of Parliamentary Counsel *Drafting Instruction No 2 of 1989* suggests that, where a commencement period after Royal Assent is chosen, it should be no longer than 6 months. "If it is longer, Departments should explain the reason for this in the Explanatory Memorandum."

The Committee notes that the Explanatory Memorandum in this instance fails to provide such a reason.

Accordingly, the Committee **seeks the advice of the Minister** on the reason for departing from the Drafting Instruction.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

> In effect, subclause 2(10) provided that if certain provisions were not proclaimed to commence within 12 months after Royal Assent to the Bill, those provisions would then commence. However, the Committee noted that paragraph 4 of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 suggested that where a commencement period after Royal Assent is chosen, it should be no longer than 6 months.
>
> In implementing the Bill, the Government was keen to ensure that the changes made by some of the Bill's provisions would coincide with the commencement of a new child support assessment year, that is, 1 July. Given that it was not certain when the Bill was introduced in the 1998 Autumn Sittings that the Bill would receive Royal Assent before 1 July 1998, subclause 2(10) was drafted so that it would facilitate a 1 July 1999 commencement.

In the event, the Bill received the Royal Assent on 15 December 1998.

The Committee thanks the Minister for this response which explains the need for a longer commencement period. Had this explanation been included in the Explanatory Memorandum, it would have avoided the need to seek further advice.

Inappropriate delegation of legislative power
Subclause 5(3)

Subclause 5(3) of the bill permits the modification by regulation of the operation of proposed section 6, or of the legislation referred to in proposed paragraph 5(2)(c). The Explanatory Memorandum again fails to explain why such an approach is necessary in these circumstances.

Accordingly, the Committee **seeks the advice of the Minister** on the reasons for authorising the modification of these provisions by regulation.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

The Committee suggested that the subclause appeared to provide for an inappropriate delegation of legislative power in permitting the modification by regulation of the operation of transitional matters arising out of the amendments made by the Bill to the *Child Support (Assessment) Act 1989,* the *Child Support (Registration and Collection) Act 1988* and the *Social Security Act 1991* and the modification by regulation of the operation of transitional provisions contained in clause 6.

The use of regulation making powers to ensure smooth transitional arrangements has been commonplace in legislation that has been enacted in recent years and is unexceptional. Further, any regulations made would be disallowable and subject to the scrutiny of the Senate Committee on Regulations and Ordinances.

The Committee thanks the Minister for this response.

Diesel and Alternative Fuels Grants Scheme (Administration and Compliance) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 1999*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 10 November 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 15 of 1999

This bill was introduced into the House of Representatives on 23 September 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Diesel and Alternative Fuels Grants Scheme Act 1999* to insert machinery and administrative provisions, including compliance mechanisms, relating to the Act. The bill further proposes to make consequential amendments to the *Taxation Administration Act 1953* and the *A New Tax System (Australian Business Number) Act 1999*. A penalty provision for a failure to provide information or produce documents is noted on page 23 of this *Digest*.

Search and entry without warrant
Proposed new section 47

Among other things, item 40 of Schedule 1 to this bill proposes to include a new section 47 in the *Diesel and Alternative Fuels Grants Scheme Act 1999*. This section, which provides a right of access to premises, applies where an authorised officer has reason to believe that any documents or goods or other property relevant to the operation of the Act may be found on any premises.

In such circumstances, the authorised officer may at all reasonable times enter and remain on those premises, is entitled to full and free access to all documents, goods or other property, may make copies and take samples, and is entitled to receive "all reasonable facilities and assistance for the effective exercise of powers" under this provision. No provision is made for obtaining a warrant, and the only 'protection' available to an occupier is to request the production of an identity card.

While provisions authorising entry without a warrant are atypical in most legislation, such provisions are common in legislation administered by the Commissioner of Taxation. Their existence is often used as a precedent for the inclusion of similar powers in new legislation which is to be administered by the Commissioner.

The Committee is presently considering the appropriateness of such provisions as part of its general inquiry into entry and search provisions in Commonwealth legislation. During the course of the inquiry, concerns have been expressed about entry powers of such character, and their inclusion in legislation simply on the basis of long-standing precedent. Precedent alone is not sufficient reason for pursuing a practice if it is tainted or flawed.

Seeking access to information is inherently intrusive. The Committee, therefore, **seeks the Treasurer's advice** as to why such powers are now to be included in the *Diesel and Alternative Fuels Grants Scheme Act 1999*, as that Act has effectively changed many of the arrangements relating to the concessional treatment of diesel fuel. In particular, the Committee would appreciate the Treasurer's advice as to:

- the geographical zones or areas in which it will be necessary to apply these search and entry provisions;
- which diesel and alternative fuels these provisions are to apply to: and
- the anticipated circumstances which would require information to be gathered in this way.

The Committee also **seeks the Treasurer's advice** as to whether these entry powers differ from those exercised by the Tax Commissioner under other legislation, particularly in requiring an occupier to assist an officer, and whether officers using these entry powers are to be required to provide occupiers with any written information about their rights and obligations. In particular, the Committee would appreciate the Treasurer's advice as to why, in these circumstances, it is appropriate that an identity card be produced to an occupier, but not appropriate that a warrant be obtained.

Pending the Treasurer's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Assistant Treasurer

Congruence with other Access Powers exercised by the ATO

Section 47 will confer the same powers of access to authorised officers as are currently conferred by section 263 *Income Tax Assessment Act 1936*, section 109 *Sales Tax Assessment Act 1992*, section 127 *Fringe Benefits Tax Assessment Act 1986*, and section 38 *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, among other Acts administered by the Commissioner of Taxation.

The conduct of all ATO officers, in a fair and professional manner, is governed by The Taxpayers' Charter and comprehensive guidelines on the use of access and information gathering powers. The ATO also controls the use of these powers through a system of delegation and authorisation of ATO officers.

Congruence with other ATO powers of access is of fundamental importance to the operation of the Diesel and Alternative Fuels Grants Scheme (DAFGS) with the ATO. Field Officers engaged in compliance activities may be performing audit and educative functions that involve a range legislation administered by the Commissioner of Taxation. It would be inconsistent, and may open the ATO to ridicule, should field staff find themselves in a position where they were empowered to seek access to documents for income tax, fringe benefits tax and GST purposes but not for the DAFGS.

Anticipated use of Access Powers

The ATO has a policy of endeavouring to deal with taxpayers and their advisers co-operatively. This means that advance notice and requests for co-operation are part of the preferred method of obtaining access to taxpayers' premises. Formal approaches seeking access will be made only if taxpayer co-operation is not forthcoming or if the premises are occupied by persons other than the taxpayer. Likewise, urgent access action may be appropriate if an officer reasonably believes that the existence or integrity of documents or information is under threat. The guidelines state that urgent access action requires the approval of a senior officer.

Taxpayers are informed that they may have a representative present at any time, and are given reasonable time and opportunity to consult with their representative. Taxpayers are also provided with a copy of Booklet 10 of the Taxpayers' Charter - "If you are subject to enquiry or audit". The Taxpayers' Charter as whole, and ATO guidelines, create a legitimate expectation in taxpayers and their professional representatives that a co-operative approach will be fostered between the ATO and their clients.

The ATO has over 1,000,000 business clients and about 1200 ATO field officers at present. If there were any systemic problems with the ATO access powers the expectation is that they would quickly surface. The Special Taxation Adviser to the Ombudsman has advised that in the previous twelve months the Ombudsman received approximately 2000 complaints relating to the ATO. One of these related to access under s 263 of the *Income Tax Assessment Act 1936*, and it is still under review by the Ombudsman.

Provision of Assistance

The provision in the proposed section 47 which requires an occupier to "provide the officer with all reasonable facilities and assistance for the effective exercise of powers under the section" is in conformity with s.263(3) of the *Income Tax Assessment Act 1936* which also requires an occupier to provide an "officer with all reasonable facilities and assistance for the effective exercise of powers under this section". Officers are instructed that this power is a limited power which enables an officer to require answers to questions which concern the location of records.

Identity Cards/Warrants

The Committee has sought advice as to why it is appropriate that an identity card be produced to an occupier, but not appropriate that a warrant be obtained.

When entering premises or seeking documents officers must have the appropriate access delegation. They are required to produce to the client an identification demonstrating their authority under that delegation, and to explain the purposes of their visit. The identity card or "wallet authority" specifies the authorisation for an officer to exercise access powers and can only be used in relation to those access powers which have been delegated to that officer.

The DAFGS will operate as a self assessment regime. Claimants will be asked to retain information to support their claim for a grant. It will be in situations where the ATO is seeking to review the basis for the claims that the ATO will rely on the proposed access provisions.

As mentioned above the access powers covered by section 47 are exactly the same as others that have long been in use by the ATO. Governments of all persuasions have supported this system rather than requiring a judicially sanctioned warrant.

Requiring a judicially sanctioned warrant before authorised officers enter premises to inspect documents or goods would have a severe impact on costs and the effectiveness of the ATO as well as the court system.

The current framework which restricts access power to a limited group of authorised officers in a framework of training, ATO Access Guidelines, case selection and the Taxpayers Charter assures an appropriate use of the section 47 access.

Definition of Fuel

The access provisions will apply to all fuels listed in the definition of "type of fuel" in section 5 of the *Diesel and Alternative Fuels Grants Act 1999*. The definition of "alternative fuel" in section 5 of the Act provides that "alternative fuel" means (a) compressed natural gas; or (b) liquefied petroleum gas; or (c) recycled waste oil, or (d) ethanol; or (e) canola oil; or (f) such other fuel as is specified in the regulations. Before any other alternative fuel will be prescribed by regulation, the ATO will consult with the Australian Greenhouse Office.

Geographical Zones

The access provisions apply within all parts of Australia and it would not be possible to predict where business records will be located. It is noted that, the more remote an area, the more likely it is that there may be a delay in obtaining warrants.

I trust that the above information is useful in the Committee's deliberations in relation to these matters.

The Committee thanks the Assistant Treasurer for this detailed response. The Committee proposes to comment on search and entry powers generally when its report on that issue is tabled.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINETEENTH REPORT

OF

1999

1 December 1999

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 T Crossin
Senator J Ferris
Senator B Mason
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

NINETEENTH REPORT OF 1999

The Committee presents its Nineteenth Report of 1999 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 Federal Police Legislation Amendment Bill 1999

New Business Tax System (Integrity and Other Measures) Bill 1999

Australian Federal Police Legislation Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 16 of 1999*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 23 November 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 16 of 1999

This bill was introduced into the House of Representatives on 30 September 1999 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Australian Federal Police Act 1979* to:

- abolish the rank based structure of the Australian Federal Police;
- abolish the statutory fixed term appointment regime;
- clarify the Commissioner's command powers as head of a disciplined force; and
- empower the Commissioner to amend or revoke a determination in relation to the Australian Federal Police Adjustment Scheme; and

makes consequential amendments to 24 other Acts.

Non-disallowable instruments
Proposed new section 38

Item 46 of Schedule 1 to this bill proposes to insert a new Part IV in the *Australian Federal Police Act 1979*. This new Part deals with the command powers of the Commissioner and related matters.

Proposed new Part IV includes a new section 38. This authorises the Commissioner to issue written orders with respect to the general administration of, and the control of the operations of, the Australian Federal Police (AFP). Some of these orders would seem to be legislative in character – even though they are to operate only in relation to members of the AFP – but no provision has been made in this bill to make such orders disallowable.

The Committee therefore, **seeks the Minister's advice** as to why section 38 orders that are legislative in character should not be scrutinised by the Parliament.

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

Relevant extract from the response from the Minister

Commissioner's orders under section 38

The Committee sought advice as to why section 38 orders that are legislative in character should not be scrutinised by the Parliament.

Section 38 replaces the power to issue General Orders and General Instructions in section 14 with Commissioner's Orders. Section 39 replaces the obligation to comply in regulation 3 of the Australian Federal Police (Discipline) Regulations.

There are currently three General Orders:

- GO1: administration of General Orders;
- GO5: referral of complaints to the Internal Investigation Division;
- GO6: allegations and disciplinary matters to which the *Complaints (Australian Federal Police) Act 1981* does not apply;

and one General Instruction:

- Use of force and related matters.

These are procedural guidelines providing for the Australian Federal Police (AFP) operational framework and internal management. As such they are administrative in character. Commissioner's Orders, in replacing General Orders and General Instructions, will retain this administrative character. Even if a contrary view is taken to the effect that some orders would be legislative in character, there are strong policy reasons for not making those orders disallowable.

It may be difficult to draw the line between what constitutes an administrative instrument and a legislative instrument. It is recognised that orders, like regulations, rules and by-laws, may be legislative or administrative in character: *Minister for Industry and Commerce v Tooheys Ltd.* (1982) 60 FLR 325, 331 approving *Tooheys Ltd. v Minister for Business and Consumer Affairs* (1981) 54 FLR 421. Generally, instruments that determine the content of the law as a rule of conduct or a declaration as to a power, right or duty are legislative instruments, whereas administrative instruments apply the law: *Commonwealth v Grunseit* (1943) 67 CLR 58.

It is important to note that the requirement to comply with Commissioner's Orders in section 39 operates with the Australian Federal Police (Discipline) Regulations, which provide for the consequences of a breach of an order. Both the *Australian Federal Police Act 1979* (AFP Act) and Regulations are subject to Parliamentary scrutiny. The Parliament has the power to scrutinise the legal obligation to comply with an order and to scrutinise the legal consequences of not complying with an

order. The mere making of an order does not, of itself, affect rights and obligations, which might otherwise justify making orders subject to scrutiny.

The power to issue orders with respect to the general administration of, and control of the operations of, the AFP is necessary for the Commissioner's command of a disciplined force. The command power is a common law power recognised by the courts: *Police Service Board v Morris* (1995) 156 CLR 399 and *Anderson v Sullivan* 47 ALD 604. Command decisions of the Commissioner are made within the unique backdrop of operational and administrative necessity.

Police forces traditionally operate independently of Parliament. Indeed, under the AFP Act, Parliament operates at arms length from the command of the AFP. There is, however, a power to issue Ministerial directions as to general policy under section 13 (section 37 of the Bill). Under that section, the Minister may also request reports from the Commissioner relating to the administration and the performance of the functions of the AFP.

I advise the Committee that most Commissioner's orders will continue to be administrative in character. However, if an order was classed as legislative in character, such an order should nevertheless continue to not be disallowable. The nature of the Commissioner's power to make orders in the exercise of the command of a disciplined force, the overall administrative and managerial nature of the expected orders and, of significant importance, the independence of the AFP, are sound policy reasons for not providing for Orders to be disallowable instruments.

In ensuring the independence of the AFP, the current Parliamentary scrutiny of the AFP Act and regulations and the Ministers' power to issue directions, provide an appropriate balance between the powers of the Commissioner to command and manage the AFP (by making orders for the control and administration of the AFP), with the important role of Parliament in overseeing the rule making process and the way it affects the rights and obligations of particular citizens.

The Committee thanks the Minister for this response.

Abrogation of the privilege against self-incrimination
Proposed new subsections 40A(1), 40L(5), 40M(3) and 40N(5)

As noted above, Item 46 of Schedule 1 to this bill proposes to insert a new Part IV in the *Australian Federal Police Act 1979*, dealing with the command powers of the AFP Commissioner. The Explanatory Memorandum states that the bill clarifies the Commissioner's command powers as confirmed by the Federal Court in *Anderson v Sullivan* (1997) 148 ALR 633, and specifically retains those command powers to the exclusion of the Workplace Relations Act.

The new Part IV includes proposed subsections 40A(1), 40L(5), 40M(3) and 40N(5). Each of these provisions abrogates the privilege against self-incrimination for employees and special members of the Australian Federal Police in certain circumstances. These circumstances include giving information, answering questions and producing documents; providing information about the employee's financial affairs; and undergoing drug testing.

Provisions which abrogate the privilege against self-incrimination are usually a matter of concern to the Committee and, to some extent, this issue is recognised in the bill. Proposed new subsections 40A(2) and 40L(6), and new section 40Q, limit the circumstances in which information obtained under compulsion may be used in evidence. For example, the results of drug and alcohol tests may be admitted as evidence against an AFP employee or special member only in legal proceedings relating to discipline and probity, or by the Commonwealth as a shield in worker's compensation proceedings. Information obtained by compulsion under other provisions may only be used in disciplinary proceedings.

In one sense these provisions may be seen as simply forming part of the conditions of employment of employees and special members of the Australian Federal Police. They do not apply to members of the public generally, and represent an attempt to reconcile the competing interests of obtaining information and protecting individual rights.

However, in another sense, the provisions may be seen as creating a system of control which differs markedly from that which applies to other public servants, or to employees generally, or to members of the public. It seems that information and testing may be compelled whether or not there is a reasonable suspicion of misconduct (unlike the guidelines considered in *Anderson*'s case, which was itself concerned with compulsory drug testing rather than compelling officers to provide personal financial information).

Secondly, it seems that any AFP employee may be ordered to provide information, not only officers engaged in active operations. Finally, it is unclear what protections are available to AFP employees who consider that these powers may have been misused, or used inappropriately, by a future Commissioner.

The Committee is conscious of the need to ensure that the highest standards of probity and conduct apply throughout the AFP. Nevertheless the Committee is also conscious of the need not to trespass unduly on the right and liberties of AFP employees. The Committee therefore, **seeks the Minister's advice** on the following matters:

- whether persons should be compelled to incriminate themselves in circumstances where there is no reasonable suspicion of misconduct;

- why the provisions are expressed to apply to any AFP employee, and are not restricted to AFP officers engaged in active operations;
- whether any protections are available to ensure that these powers may not be misused; and
- on what basis the rights to which general members of the public are entitled can be properly restricted in respect of those who are also members of the AFP.

Pending the Minister's advice, the Committee draws 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.

Relevant extract from the response from the Minister

Abrogation of the privilege against self-incrimination:
Subsection 40A(1) and section 40L

The Committee sought advice in relation to the provisions of the Australian Federal Police Legislation Amendment Bill 1999 (the Bill) which abrogate the privilege against self-incrimination.

These provisions, in proposed subsections 40A(1) and 40L(5), abrogate the privilege in respect of

- information given, answers to questions or documents produced as a result of:
  - compliance with Commissioner's orders under section 30;
  - compliance (under section 40) with a lawful direction, instruction or order including:
    a direction under section 40M related to testing for alcohol and prohibited drugs;
    a direction under section 40N related to testing for alcohol and prohibited drugs after certain incidents;
- giving a financial statement under section 40L.

The Committee noted that proposed subsections 40A(2) and 40L(6) and proposed section 40Q limit the circumstances in which information obtained under compulsion may be used in evidence. Information relating to, or results of, a drug or alcohol test may be used only in proceedings relating to discipline or probity or by the Commonwealth as a shield in worker's compensation proceedings. Information obtained by compulsion under other provisions may only be used in disciplinary proceedings.

The Committee sought advice on the following specific matters:

- **whether persons should be compelled to incriminate themselves in circumstances where there is no reasonable suspicion of misconduct**

The Bill replaces the Commissioner's power to issue General Orders and Instructions in section 14 of the AFP Act with a single class of instrument called Commissioner's

Orders. The obligation to comply with these Orders, and with any lawful direction instruction or order, presently in the AFP (Discipline) Regulations (regulations 3 and 5) has been moved into the AFP Act (sections 39 and 40). The partial abrogation of the privilege against self-incrimination in proposed section 40A is currently found in regulation 5(2).

The issue of reasonable suspicion significantly arises in relation to an order to undergo a test for alcohol or prohibited drugs. The statutory expression of this power in sections 40M and 40N do not require "reasonable suspicion", however the circumstances in section 40N are different from those in section 40M. In section 40N the requirement for tests is triggered by a serious incident.

Section 40M provides for general testing of AFP employees for alcohol or prohibited drugs. It is recognised by the police and the general public that the issue is not whether there is a reasonable suspicion that a particular police officer is engaging in criminal activity but that illicit drug use or substance abuse is not compatible with a disciplined police force. In *Anderson v Sullivan* Finn J referred to the Employment Policy on the Use of Illicit Drugs signed by the Commissioner of the AFP and the AFPA in November 1996. It states:

> "The AFP's personnel are routinely called upon to make reasoned, impartial and frequently spontaneous judgements which affect, sometimes significantly and even irrevocably, the rights and freedoms of their fellow citizens. The public and government therefore place considerable faith and trust in law enforcement, conditional always on officials exercising their authorities and powers rationally.
>
> The AFP and AFPA accordingly view the use of illicit drugs by AFP personnel as entirely incompatible with the ethical standards expected of law enforcement. The AFP and AFPA recognise and uphold the fundamental duty of care to all AFP personnel who have the right to be part of a drug-free workplace, safe from the risk of personal threat or compromise posed by the illicit drug trade and drug-using colleagues.
>
> The AFP's drug policy is a complementary part of broader human resource development and management strategies that focus on standards of employment suitability, training and education, and occupational health and safety which, in the context of this policy, encompass rehabilitation and drug testing."

The judge also referred to the report of the Royal Commission into the New South Wales Police Service. In relation to drug and alcohol testing that report states:

> "The problems of substance abuse for police are obvious. They include the circumstances that:
>
> - the nature of police duties which call for calm and careful decisions, a clear head and a balanced exercise of discretion, and the need to use motor vehicles and weapons are utterly incompatible with the impaired judgement and co-ordination that can result from drug and alcohol use;
> - public respect for the Service, and the maintenance of good order and discipline are impossible in an environment that tolerates the presence of police at clubs, hotels and the like where they are seen to be affected by alcohol or drugs;

- the bonding influence of long liquid lunches and the shared inappropriate use of drugs is likely to promote the negative aspects of the police culture previously mentioned;
- the necessary association of any police officer who uses drugs, even for recreational purposes, with a supplier creates opportunities for compromise, blackmail and corruption, particularly if the habit becomes expensive to feed;
- a user of prohibited drugs is unlikely to approach the enforcement of drug laws with any degree of conviction;
- participation in any form of criminal offence by a police officer is in fundamental conflict with the sworn duty of the officer to uphold the law;
- the productivity of officers with a drug and alcohol problem is likely to be substantially reduced and the example they provide to other police is not only unacceptable but is a threat to the Service; and
- the presence of any significant degree of substance abuse suggests that the welfare programs of the Service are not working and that it is otherwise failing in its responsibility for the occupational health and safety of its employees."

(Royal Commission into the New South Wales Police Service: *Final Report: Volume II: Reform*, May 1997 para 8.52)

- **why the provisions are expressed to apply to any AFP employee, and are not restricted to AFP officers engaged in active operations**

The Bill establishes the AFP as a unified workforce. The conferral of the status of member which is currently an incident of employment is, under the Bill, separate from the engagement of AFP employees. The significant aspect of being a member is the discretion (and in some respects the duty) to exercise police powers. Employees who are not members either because they have never undertaken duties which require the exercise of police powers or because their member status has been revoked because they are not required to undertake such duties at the present time, will nevertheless, be part of a unified disciplined organisation with the same obligations of discipline and probity.

A primary purpose of the Bill is to provide the AFP with a flexible framework for management of a modern and professional police organisation. The challenges of organised crime on a global scale demand specialist roles which do not always correspond to the traditional duties of community policing. Financial analysts, scientific and computing experts and those who manipulate data are the police of the present and future. It may be computer records rather than suspects that are interrogated. In this framework, the workforce as a whole is engaged in performing the primary functions of the AFP with operational involvement and access to operational information. This is reflected in the new employment framework and in the duties and obligations of the workforce.

Further, experience shows that one of the most valuable opportunities for corruption is in access to information. This access is potentially available to all employees.

- **whether any protections are available to ensure that these powers may not be misused**

The following protections exist in relation to these powers:

- provisions in the Bill limit the circumstances in which information obtained by compulsion may be used in evidence;

- the Australian Federal Police (Discipline) Regulations create a disciplinary offence for the improper use of the information (regulation 13);

- the *Privacy Act 1988* regulates the collection, use, disclosure and storage of personal information and provides a regime under which the Privacy Commissioner can investigate complaints; and

  the *Complaints (AFP) Act 1981* provides that a complaint may be made to the Ombudsman concerning action taken by a Deputy Commissioner, an AFP employee or a special member.

- **on what basis the rights to which general members of the public are entitled can properly be restricted in respect of those who are also members of the AFP.**

The abrogation of the privilege against self-incrimination in respect of a lawful order to members of the Victoria Police was the subject of the High Court's decision in *Police Service Board v Morris*. While that case dealt with the interpretation of a provision of the Victorian Police Regulations (Regulation 95A(7)) which required a member to obey a lawful order, the Court drew on the nature of the legislation as relevant to the issue of the availability of the privilege against self-incrimination.

> "The provisions of the Act itself are relevant only in so far as they show that the provision now directly in question (reg.95A(7)) is part of a statutory scheme which provides for the regulation and control of a police force – a body upon whose efficiency and probity the State must depend for the security of the lives and property of its citizens and a body which can operate effectively only under proper discipline …"
>
> "…[I]t seems to me that the character of the regulation, which is primarily designed to secure the obedience to orders rather than to compel the answering of questions, indicates both that the application of the privilege would be inappropriate and that the obligation to obey lawful orders is not intended to be subject to the unexpressed qualification. This view is supported by the fact that if it were possible to claim the privilege, a difficulty would arise as to when and by whom it should be decided whether the claim was properly made." (per Gibbs CJ at p 404)
>
> "It is essential to bear in mind that the Act and Regulations here are dealing with a disciplined force, the members of which voluntarily undertake the curtailment of freedoms which they would otherwise enjoy. It is in that context that it may be necessary to draw the implication that the privilege is excluded by a provision designed to further the effectiveness of an organisation based upon obedience to command." (per Wilson and Dawson JJ at p 409)
>
> It is incumbent on the Commissioner, as commander of a disciplined force, to provide a system whereby directions, orders or instructions are followed and to implement a pro-active system of integrity testing to exclude any potential for corruption within the AFP.

The Committee thanks the Minister for this detailed response. The Committee observes that the rights and liberties enjoyed by police officers as members of a "disciplined force" have historically not always corresponded, and may not now correspond, in all situations with the rights and liberties enjoyed by other members of society. However, the Committee notes that this bill does appear to trespass on the rights enjoyed by AFP personnel. It leaves the issue of whether the bill trespasses unduly on those rights for the consideration by the Senate as a whole.

No reasons for dismissal
Schedule 2, item 1

Item 1 of Schedule 2 to this bill amends the *Administrative Decisions (Judicial Review) Act 1977*. The effect of this amendment is that, should the AFP Commissioner exercise his or her power to dismiss an employee under new section 28 of the *Australian Federal Police Act 1979*, the Commissioner is not required to give reasons for that dismissal.

As a matter of principle, providing reasons where the employment of an employee is terminated is an issue of natural justice for the person dismissed, and deters capricious action by the person terminating that employment.

Proposed new section 28 concludes with a note that the *Workplace Relations Act 1996* has rules which apply to the termination of employment. However, proposed new section 69B of the *Australian Federal Police Act 1979* (to be inserted by this bill) states that the operation of the Workplace Relations Act is to be limited in certain circumstances, including in relation to the termination of employment of AFP employees.

There seems to be a lack of clarity in the rules governing dismissed AFP employees and their entitlement to be told why they are being dismissed. There would also seem to be no provisions which prevent proposed section 28 from being used capriciously to terminate the employment of an otherwise efficient and effective AFP employee. The Committee, therefore, **seeks the Minister's advice** as to the current rights of AFP employees to receive reasons for their dismissal, and to seek a review of such a decision, and how the proposed amendments will affect those rights.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Minister

Reasons for Dismissal: Schedule 2, Item 1

The Committee sought advice as to the current rights of AFP employees to receive reasons for their dismissal, and to seek a review of such a decision, and how the proposed amendment will affect those rights.

As noted in the Alert Digest, item 1 of Schedule 2 of the Bill amends the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act). It repeals paragraphs (z) and (za) of Schedule 2 which provides that the following are classes of decisions that are not decisions to which section 13 of that Act applies:

> (z) decisions relating to promotions, transfers, temporary performance of duties, or appeals against promotions or selections for temporary performance of duties, of or by individual members or staff members of the Australian Federal Police;
>
> (za) determinations under section 26E of *the Australian Federal Police Act 1979* relating to individual members or staff members of the Australian Federal Police;

and replaces the paragraphs with new paragraph (z)

> (z) decisions under section 28, 40F or 40H of the *Australian Federal Police Act 1979*;

Proposed section 40F is the Commissioner's power to second AFP employees to other police forces and proposed section 40H is the Commissioner's power to assign duties etc.

Proposed section 28 is a power to terminate employment which replaces the power in section 26E to end an appointment before the end of the term of the appointment.

The amendment to Schedule 2 of the AD(JR) Act therefore does not remove a right but re-enacts the current exemption for reasons for termination under section 13 of the AD(JR) Act.

The situation has not changed in relation to reasons under section 13 of the AD(JR) Act. That is, there remains no right to reasons under that section. However the AD(JR) Act continues to apply. That is, an AFP employee has a right under that Act to review of the decision to terminate employment

Moreover, the exclusion of section 13 reasons does not mean that an employee whose employment is terminated under proposed section 28 will not receive reasons for the termination. The preservation of existing rights under the unfair dismissal provisions of the *Workplace Relations Act 1996* (WR Act) ensures that employees will be given reasons for dismissal.

Proposed section 69B, in excluding the operation of the WR Act in relation to the termination of employment of AFP employees, specifically preserves the operation of Division 3 of Part VIA of that Act (the unfair dismissal provisions). Section 170CM provides that an employer must give notice. Section 170CE(1)(a) provides that a person may apply to the Australian Industrial Relations Commission for relief where a termination was harsh, unjust or unreasonable. Subsection 170CG(3)

establishes the framework within which the Commission must operate to establish whether a termination is harsh, unjust or unreasonable and, therefore, unfair. Within that framework, paragraph 170CG(3)(b) requires that the Commission must have regard to whether an employee is notified of the reason for termination of employment.

> "Termination of employment at the initiative of the employer may be 'harsh, unjust or unreasonable' on three principal grounds:
> - lack of valid reason for termination of employment; or
> - lack of procedural fairness afforded to an employee; or
> - circumstances surrounding termination of employment.
>
> (*The Workplace Relations Handbook: A guide to the Workplace Relations Act 1996 (Cth)* Butterworths 1998 para: 7.5.7)

The Attorney-General confirmed in the House of Representatives on 20 October 1999:

> "The bill does not take away any rights in relation to unfair dismissal that are available under the *Workplace Relations Act 1996*. AFP employees will have a right to reasonable notice of termination of employment under the *Workplace Relations Act 1996* and also to reasons for termination."

The Committee thanks the Minister for this response.

New Business Tax System (Integrity and Other Measures) Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 18 of 1999*, in which it made various comments. The Treasurer has responded to those comments in a letter dated 29 November 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Treasurer's response are discussed below.

Extract from Alert Digest No. 18 of 1999

This bill was introduced into the House of Representatives on 21 October 1999 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of bills to implement the New *Business* Tax System, this bill proposes to amend the following Acts:

Income Tax Assessment Act 1997 and the *Income Tax (Transitional Provisions) Act 1997* to:

- include an amount in the assessable income of a taxpayer that disposes of an interest in leased plant or a lease of plant;
- trigger a balancing charge for 100% subsidiaries of wholly-owned groups; and
- where the balancing charge is triggered, make the subsidiary and all the companies that were members of the group immediately before the time the subsidiary was transferred, jointly and severally liable if the subsidiary does not pay tax arising from the balancing charge within six months of the due date for payment;

Income Tax Assessment Act 1997 and the *Income Tax Assessment Act 1936* to:

- deal with CGT value shifting that occurs where, broadly, a debt owed by one commonly owned company to another is forgiven; and
- remove deduction limits on exploration and prospecting expenditure and allowable capital expenditure on mine development;

Income Tax Assessment Act 1997 to:

- defer recognition of capital losses or deductions which would otherwise be realised in certain circumstances;

- remedy defects in the continuity of ownership test, currently applying to tax losses, net capital losses and bad debts of a company, and proposed to apply to companies with unrealised net losses;

- limit the extent of unrealised loss duplication by applying the same business test to company losses where there has been a substantial change in a company's ownership or control,

- prevent indexation of the cost base of CGT assets acquired after the start time and freezes the indexation amount of the cost base of CGT assets acquired at or before the start time and disposed of after that time; and

- provide a CGT discount to individuals, complying superannuation entities and trusts;

Income Tax Assessment Act 1997, the *Income Tax (Transitional Provisions) Act 1997*, the *Income Tax Assessment Act 1936* and the *Financial Corporations (Transfers of Assets and Liabilities) Act 1993* to prevent the duplication of a tax loss or a net capital loss which has been transferred between wholly-owned group companies in certain circumstances; and

Income Tax Assessment Act 1936 to remove the "13 month rule" (which allows immediate deductions of prepayments for things to be done within 13 months) and spread the deduction over the period the prepayment occurs.

Legislation by press release

Subclause 2(2) and Schedule 5; Schedule 1, item 18 and Schedule 2, item 5

Some of the amendments proposed by this bill are to commence on 22 February 1999, or will apply from that date. The Explanatory Memorandum notes that this date was chosen because it was the date of the Treasurer's Review of Business Taxation Press Release No 4. The Explanatory Memorandum goes on to note that this was followed by a subsequent press release – No 58 of 21 September 1999.

The Committee has consistently drawn attention to the Senate Resolution of 8 November 1988, which deals with tax legislation and which provides 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.

This bill has been introduced more than 6 months after the date of the Treasurer's press release. The Committee, therefore, **seeks the Treasurer's advice** as to the time taken in introducing this bill, and as to the effect of the Senate resolution on the proposed commencement date of the bill.

Pending the Treasurer's advice, the Committee draws Senators' attention to this 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.

Relevant extract from the response from the Treasurer

The measures in the Bill which commence on 22 February 1999 were foreshadowed in my Press Release of that date. The Press Release was issued in response to a letter to me from the Chairman of the Review of Business Taxation, Mr John Ralph AO, which accompanied the release of the Review's second discussion paper, *A Platform for Consultation*. Mr Ralph canvassed with me the need to address abuses of potential deficiencies in the current business tax system in the period between the release of the second discussion paper and when the legislation is enacted. I made my 22 February 1999 announcement to allow the Review to have full and frank discussion of the deficiencies and possible measures to address them.

The Review presented its final report, *A Tax System Redesigned*, to the Government on 2 August 1999, including recommendations on measures to address the matters raided in my announcement of 22 February 1999. After considering the Review's final report, I announced on 21 September 1999 the measures the Government would take to address the deficiencies.

The commencement of the measures from 22 February is necessary in order to protect the revenue from the identified deficiencies being abused during the period between the release of the second discussion paper and my 21 September 1999 announcement. While the time between the announcement and introduction was greater than 6 months, this was necessary to allow sufficient time for the Review to complete its report and the Government to consider the recommendations of the Review.

If the commencement date of these measures was changed, it could open up the possibility of taxpayers abusing the deficiencies between the release of the second discussion paper and the new commencement date. This could have major revenue implications.

The Committee thanks the Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWENTIETH REPORT

OF

1999

8 December 1999

SENATE STANDING COMMITTEE

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(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

TWENTIETH REPORT OF 1999

The Committee presents its Twentieth Report of 1999 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:

Health Insurance Amendment (Professional Services Review) Act 1999

Tradex Scheme Bill 1999 [No. 2]

Health Insurance Amendment (Professional Services Review) Act 1999

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 1999*, in which it made various comments. The Minister for Health and Aged Care responded to those comments in a letter dated 29 June 1999.

In its *Eleventh Report of 1999*, the Committee sought further comments in relation to proposed new section 106ZPQ. The Minister for Health and Aged Care has responded in a letter dated 29 November 1999. A copy of the letter, together with a copy of a letter the Minister has written to the Director of Professional Services Review, are attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Eleventh Report of 1999

This bill was introduced into the House of Representatives on 2 June 1999 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Health Insurance Act 1973* to implement changes to the Professional Services Review (PSR) Scheme as a result of a review of the Scheme. The PSR Scheme provides for a system of peer review to determine whether a practitioner has inappropriately rendered or initiated services which attract a Medicare benefit, or has inappropriately prescribed under the Pharmaceutical Benefits Scheme, and to apply sanctions to those who practise inappropriately.

Abrogating the right to silence and patient privacy
Proposed new section 106ZPQ

Among other things, this bill proposes to insert a new section 106ZPQ in the *Health Insurance Act 1973*. This provision states that a person must produce documents for inspection even though those documents may tend to incriminate that person. The Explanatory Memorandum states that this section "mirrors subsection 105A(6) of the current Act".

Under proposed section 89B and 105A, the documents to be produced may include clinical or practice records of services rendered not only by the person under review, but also by practitioners employed by that person, or by practitioners employed by a body corporate of which the person under review is an officer. These documents must be produced to a Committee member or his or her nominee (mirroring the existing legislation) and also to the Director or his or her nominee.

Proposed new section 106ZPQ goes on to limit the use that may be made of any documents or information produced. Under proposed subsection 106ZPQ(2) such documents or information are not admissible against the person producing them in civil or criminal proceedings (other than proceedings for providing false or misleading information, or proceedings before a Committee or the Determining Authority).

The Committee notes that proposed new section 106ZPQ attempts to strike a balance between the need to obtain information and the need to protect rights. However, some aspects of its operation remain unclear. Therefore, the Committee **seeks the Minister's advice** on the following matters:

- how any incriminating documents or information might be used against a person under investigation in proceedings before a Committee or Determining Authority;
- whether "a person" nominated by a Committee member or the Director to receive confidential documents will be required to hold any particular position or possess any special qualifications;
- in requiring the production of patient records, how the bill proposes to protect the doctor/patient relationship, which is founded on confidence and is necessary for appropriate treatment; and
- in requiring the production of patient records, how the bill proposes to protect the privacy of patients.

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

Relevant extract from the response from the Minister dated 29 June 1999

> I note the preliminary observation in the Committee's Alert Digest 9/99 that the proposed new section 106ZPQ of the Bill 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'*.

I believe the amendments contained in the Bill in no way breach these principles. The Committee has sought advice on four matters.

How any incriminating documents or information might be used against a person under investigation in proceedings before a Committee or Determining Authority

The new section 106ZPQ of the Bill makes explicit that any documents or information obtained during a PSR process are not admissible in evidence against the person under review in either criminal or civil proceedings, other than criminal proceedings for an offence against section 106ZPP, or any civil proceedings before a Committee or Determining Authority.

The insertion of a new section 106ZPQ is consistent with provisions which already existed in the *Health Insurance Act 1973* (the Act), specifically subsections 106E(3) and (4) which relate to the use of evidence given by the person under review during the Committee hearing. It does not infringe to any greater degree on the personal rights and liberties than currently provided in the Act under the PSR Scheme.

It needs to be highlighted that the PSR process involves an inquiry into the professional conduct of a practitioner by a committee of peers. It is not concerned with possible criminal conduct as an objective.

In determining whether a practitioner's professional conduct was inappropriate, a committee must have regard to all relevant matters. Any documents or information furnished as part of the investigation by the Director, or during the Committee proceeding, may well be relevant matters. However, there are a range of other considerations including data from the Health Insurance Commission, the evidence given during the Committee hearing, and any submissions received from the person under review. It is unlikely that documents provided by the person under review would prove inappropriate practice by themselves.

- **Whether "a person" nominated by a Committee member or the Director to receive confidential documents will be required to hold any particular position or possess any special qualifications;**
- **In requiring the production of patient records, how the bill proposes to protect the doctor/patient relationship, which is founded on confidence and is necessary for appropriate treatment; and**
- **In requiring the production of patient records, how the bill proposes to protect the privacy of patients.**

Subsection 83(1) of the current Act requires that the Director of PSR must be a medical practitioner. The Director may engage staff to assist in the performance of his or her duties. The existing secrecy provisions in section 130 of the Act, and the relevant non-disclosure provisions in the *Crimes Act 1903* apply to the Director, and any staff he or she engages (including committee members). Section 106ZR of the Act requires the non-disclosure of Committee deliberations. Subsection 95(4) of the Act specifies that a PSR committee must comprise practitioners who belong to the profession in which the practitioner was practising when he or she rendered or initiated the referred services. This means, if the person under review is a medical practitioner, then the committee of peers will also be medical practitioners. Subsection 98(3) of the Act currently provides for the proceedings of the Committee to be held in private.

In addition to the non-disclosure provisions in the Acts referred to above, the major participants in the peer review process are medical practitioners who are acutely aware of the need for confidentiality and protecting the doctor/patient relationship.

I hope this has clarified the intended operation of the new section 106ZPQ and addressed the concerns of the Committee.

The Committee thanks the Minister for this response which addresses most of its concerns.

The Committee notes that, under proposed paragraphs 89B(2)(c) and 105A(2)(c), documents must be produced to "a person" nominated by the Director or a Committee member. While members of staff are clearly within this definition, it seems that it may extend more widely, to include any person at all. It is in this context that the Committee sought advice on whether the definition ought be limited to the holders of particular positions, or nominees who possess special qualifications. The Committee would, therefore, **appreciate the Minister's further advice** on whether the class of people covered by this definition is too wide.

Relevant extract from the further response from the Minister dated 29 November 1999

I understand that the Standing Committee is concerned that the class of people who could be nominated by the Director or a PSR Committee member may be too wide and could extend beyond members of staff of the PSR to include any person at all.

The Standing Committee has sought further advice on "whether the class of people covered by this definition is too wide". I am advised that technically, the Standing Committee is correct, and the Director or a PSR Committee member could nominate any person, regardless of their qualifications. However, in practice I understand that a nominated person will be limited to staff of the PSR (including other Commonwealth officers) and consultants engaged by the Director.

The *Health Insurance Act 1973* (the Act) makes explicit provisions for the types of people who may assist the Director in the performance of his or her functions or duties (sections 106ZM, 106ZN, 106ZP, 90), and requires that the Director must arrange for the provision of services to every Committee (section 106ZPL). The Act also provides for the Director to consult with a Panel (Committee) member and any consultant or learned professional body (Section 90). It is these people who can assist the Director or a PSR Committee member discharge his or her statutory duties. In any case, a nominee of the Director or a PSR Committee member would be subject to existing secrecy provisions in section 130 of the *Health Insurance Act 1973*, and the relevant non-disclosure provisions in the *Crimes Act 1914.*

To address the concerns of the Standing Committee I have written to the Director of Professional Services Review, and requested that this practical limitation on the class

of people who can be nominated under paragraphs 89B(2)(c) and 105A(2)(c) be explicitly reflected in the internal procedures of the PSR agency. A copy of this letter is attached.

I trust this allays any continuing concerns the Standing Committee may have in respect of this matter.

The Committee thanks the Minister for this further response.

Tradex Scheme Bill 1999 [No. 2]

Introduction

The Committee dealt with this bill in *Alert Digest No. 17 of 1999*, in which it made various comments. The Minister for Industry, Science and Resources has responded to those comments in a letter dated 1 December 1999. A copy of the letter, together with the Department's Chief Executive Instructions No. 1, are attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 17 of 1999

This bill was introduced into the House of Representatives on 14 October 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

One of a package of four bills to implement the Tradex Scheme, this bill proposes to establish the Tradex Scheme and provide for the administration of the scheme. The objective of the Tradex Scheme is to allow for the importation of goods, without payment of customs duty or other taxes, provided the goods are subsequently exported or incorporated in other goods that are exported. Penalty provisions for a failure to provide information or produce documents are noted on page 22 of this *Digest*.

Background

While not apparent from the Explanatory Memorandum or the Minister's Second Reading Speech, this bill is apparently identical to a bill of the same name introduced into the House of Representatives on 24 June 1999, and on which the Committee commented in *Alert Digest No 10 of 1999*. The Minister responded to the Committee's comments in a letter dated 2 August 1999 (copy attached to this *Digest*).

The earlier Tradex Scheme Bill was not introduced into the Senate, and was subsequently discharged from the House of Representatives Notice Paper on 14 October 1999.

The following discussion in relation to this bill draws on the Committee's previous comments in *Alert Digest No 10 of 1999*, and the Minister's letter in response.

Appointment of 'a person'
Subclause 45(1)

In a similar manner to the earlier Tradex Scheme bill, subclause 45(1) of this bill enables the Secretary, by writing, to "appoint persons to be authorised officers for the purposes of this Act". The bill makes no reference to any qualifications or attributes which such persons must have as a condition of being authorised, and the Explanatory Memorandum does not elaborate further on this provision.

In commenting on this provision in the earlier bill, the Committee observed that it often drew attention to provisions which delegated power to anyone who fitted the all-embracing description of 'a person'. As a general rule, the Committee preferred to see some limit placed either on the powers to be delegated or on the class of potential delegates. Similar considerations applied to the appointment of officers authorised for the purposes of an Act of Parliament. As a general rule, the Committee preferred that potential appointees be required to possess some qualifications or attributes before they were eligible for appointment. The Committee sought the Minister's advice on these matters.

In responding, the Minister agreed that 'authorised officers' should possess specific attributes and qualifications, but suggested that this particular bill was not the appropriate place that these be specified. In the case of public service officials who were appointed as authorised officers under the Act, "their qualities or characteristics are set out in the relevant legislation which deals with their employment status".

In addition, the Minister averred that the provisions as drafted "retain flexibility for this and future Governments to continue to ensure better outcomes in the delivery of Government services".

The Committee thanks the Minister for this response in relation to the earlier bill, which remains relevant to this provision. Given the Minister's agreement that 'authorised officers' should possess specific attributes and qualifications, the question becomes whether this bill is the appropriate place to specify those attributes and qualifications.

While the qualities or characteristics of public servants who are made 'authorised officers' under the bill may be set out in the legislation dealing with their employment status, that legislation does not apply to non-public servants who may be authorised under the bill. In addition, that legislation deals only with the attributes and qualifications expected of public servants generally, and not with the attributes and qualifications expected of those officials who may be appointed to undertake specific functions under a specific bill.

There seems to be a continuing trend toward authorising 'persons' to exercise powers and functions under specific legislation. Such provisions are usually included in the interests of administrative flexibility. However, the powers exercisable by these authorised persons are often wide in scope, and it is implicitly recognised that such persons will need specialised skills or training before exercising those powers. A bill which provides for appointments of such width should similarly make some explicit reference to these skills, attributes or qualifications.

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

Excessively wide delegation
Clause 48

In a similar manner to the earlier Tradex Scheme bill, clause 48 of this bill permits the Secretary, by writing, to "delegate to an officer of, or a person employed in, the Department all or any of the Secretary's functions and powers under this Act".

In commenting on this provision in the earlier bill, the Committee observed that the bill authorised the Secretary to exercise functions and powers that were wide in scope. These included suspending a tradex order, causing infringement notices to be served, reconsidering various decisions made under the legislation, extending certain time periods and providing certificates which had evidentiary force.

Given the scope and variety of these powers, the Committee sought the Minister's advice on why some limit should not be placed on potential delegates – for example, by limiting the class of potential delegates to officers in the Senior Executive Service.

In responding, the Minister acknowledged that, while no limits were placed on the power to delegate, "it is expected that the Secretary would, in the interests of good administration, exercise due diligence and care in determining that only officers who occupy sufficiently senior positions in the Department would exercise those functions and powers as his delegates".

The Committee thanks the Minister for this response in relation to the earlier bill, which remains relevant to this provision, and notes his expectation that the Secretary's functions and powers will be delegated only to officers with appropriate seniority, expertise and relevant responsibilities.

However, given the apparent width of the functions and powers that are available for delegation, this issue should be more than simply a matter of reasonable expectation – it should be addressed in the provisions of the bill. It is appropriate that the bill itself or a related publicly available document restrict the class of potential delegates to officers of relevant seniority and expertise. The Committee, therefore, **seeks the Minister's further advice** as to why the appropriate delegation of the Secretary's functions and powers should be a matter of "reasonable expectation" with no legislative effect.

Pending the Minister's further advice, the Committee continues to draw Senators' attention to this 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.

Relevant extract from the response from the Minister

I note the Committee's concerns in relation to subclause 45(1) and clause 48 of the Bill and, in addition to my letter of 2 August 1999, I provide the following response.

Both subclause 45(1) and clause 48 of the Bill provide the Secretary of the Department with powers to appoint authorised officers and delegate powers and functions under the Bill. The Committee has also indicated its preference that the Bill itself or a related publicly available document prescribe the qualifications or attributes a person must possess to be eligible for appointment as an authorised officer or delegate.

As a matter of good Government practice and administration, the Secretary has introduced formal instructions relating to the appointment of authorised officers and delegates. These instructions are contained in the Department's Chief Executive Instructions No.1 ("the CEI"). For your information, I attach a copy of the CEI. In addition, the CEI is publicly available via the Department's website at http://www.isr.gov.au/department/ceis.html

Specifically, in relation to the delegation of officers, paragraph 1.4 of section 2 of the CEI requires the delegator to:

> *… ensure that the delegation(s) of powers or functions are appropriate in terms of the level and position of the delegate(s) within the organisation, and that the directions or conditions that might apply to the exercising of the delegation (including any accountability process) are clear and appropriate. Moreover, the delegator should make sure that the delegate is adequately supervised, appropriately trained and have ready access to the relevant source and reference materials.*

In relation to authorisation of officers, paragraph 1.2 of section 3 of the CEI states that:

As with delegations, there is an onus on the person giving the authorisation to ensure that the authorised person is appropriately equipped to carry out the particular task or function. This is achieved by having formal Chief Executive Authorisations instruments.

This section applies to both the authorisation of public servants and non-public servants so that only persons appropriately equipped to carry out the particular task or function are so authorised.

Consequently, I believe that there are reasonable and public parameters contained in the CEI to ensure that only properly qualified persons are appointed as authorised officers or delegates under the Bill.

In the context of subclause 45(1) and clause 48, the Secretary himself is the person who is empowered to appoint authorised officers or delegate powers and functions under the Bill.

I trust that the Committee's concerns are adequately addressed by the CEI. The parameters prescribed in the CEI will ensure that powers under subclause 45(1) and clause 48 are exercised responsibly by the Secretary of my Department.

The Committee thanks the Minister for this response which sets out the parameters imposed in relation to the appointment of authorised officers and delegates. These parameters reduce the apparent width of the class of potential appointees and delegates, which prompted the Committee's initial concern.

However, it would seem that the Chief Executive could, if so minded, simply change these Instructions at will, with no real oversight or review of any such change. Accordingly, the Committee leaves the issue of the appropriateness of imposing limits on potential delegates or appointees by way of Chief Executive's Instructions for decision by the Senate as a whole.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWENTY-FIRST REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
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

TWENTY-FIRST REPORT OF 1999

The Committee presents its Twenty-first Report of 1999 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:

National Crime Authority Amendment Bill 1999

National Crime Authority Amendment Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No. 19 of 1999*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 7 December 1999. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 19 of 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *National Crime Authority Act 1984* to clarify that States and Territories may confer powers, functions and duties on the National Crime Authority in relation to the Authority's investigation of relevant criminal activity.

Retrospective application
Subclause 2(2)

Subclause 2(2) of this bill states that the amendments proposed in the bill are to have commenced on 1 July 1984. The substantive amendments proposed are to omit the words "being a power, function or duty that is also conferred or imposed by this Act" from subsection 55A(1)(a) of the Principal Act, and to omit the word "similar" from subsection 55A(2) of the Principal Act.

The Explanatory Memorandum simply notes that the bill "clarifies the nature of the State and Commonwealth legislative framework that supports the National Crime Authority" (NCA). The bill does this by making clear "that States and Territories may confer powers, functions and duties on the National Crime Authority in relation to the Authority's investigation of relevant criminal activity".

The Minister's Second Reading Speech provides some additional information. It observes that the States confer powers, duties and functions on the NCA in relation to a variety of State investigative laws including laws for the use of assumed identities, controlled operations and electronic surveillance. "This amendment makes clear that the States can confer such powers, duties and functions without the need for the National Crime Authority Act to specifically contain similar provisions".

It seems that the amendments proposed in the bill are simply declaratory of the intended operation of the Principal Act. However, neither the Explanatory Memorandum nor the Minister's Second Reading Speech fully explains the effect of the changes being made, or why such changes are necessary, and why those changes should operate retrospectively from 1984.

As indicated by its name, an Explanatory Memorandum should explain what is being proposed. It should enable a reader of legislation to understand the reason for its introduction, the changes it proposes to make and the anticipated effect of those changes.

In the case of this bill, it is unclear whether it is simply attempting to remedy a long-standing drafting error, or addressing a factual situation that has developed, or is seeking to validate something that has taken place. It is unclear whether the bill has been introduced in response to a judgment, or in anticipation of litigation, or is totally unconnected with either. The Committee, therefore, **seeks the Minister's advice** as to the effect of the changes proposed in this bill, why such changes are necessary, and why the changes are to operate retrospectively from 1984.

Pending the Minister'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.

Relevant extract from the response from the Minister

I refer to the Committee's comments on the *National Crime Authority Amendment Bill 1999* in Alert Digest no 19 of 1999.

The Committee commented on the following matters:

1. the effect of the changes proposed in this bill;
2. why the changes are necessary; and
3. why the changes are to operate retrospectively from 1984.

Introduction

The National Crime Authority (NCA) is established under a cooperative network of Commonwealth, State and Territory legislation. This approach was adopted in order to allow the NCA to investigate organised crime in such a manner that it would not be impeded in its work by artificial jurisdictional boundaries, whilst still being fully accountable for the powers conferred upon it. The NCA was to have the function of investigating breaches of State and Territory laws, as well as of Commonwealth laws.

Section 55A was inserted into the Act shortly after the original Act was passed by the Parliament in 1984. Section 55A of the principal Act provides a mechanism

whereby powers, functions and duties may be conferred upon the NCA by a State or Territory without triggering Section 109 of the *Constitution.*

At the time that section 55A was inserted into the principal Act (in 1984, by the *Statute Law (Miscellaneous Provisions) Act (No 2) 1984*) the range of powers that might be conferred upon the NCA under State law was very limited.

Since 1984 the States have progressively conferred on the NCA powers relating to the use of controlled operations and electronic surveillance. They have also included the NCA in statutes such as those relating to witness protection. Some examples of the types of legislation the States have enacted includes the *Surveillance Devices Act 1999*(Vic), the *Law Enforcement (Controlled Operations) Act 1997* (NSW) and the *Listening Devices Act 1972* (SA).

Doubt has now been expressed about the efficacy of section 55A of the principal Act in allowing such powers to be conferred upon the NCA by State laws. The aim of the Bill is to remove this doubt, both for the future and also in relation to powers, functions or duties conferred upon the NCA since 1984.

The amendments to section 55A of the Act arise from recent evidence given to the Parliamentary Joint Committee on the National Crime Authority by the Queensland Police. Queensland is developing controlled operations legislation and were considering including the NCA in the legislation. The Queensland Police asked whether the Act allowed the States to confer powers on the NCA that were not already specifically contained in the Principal Act. The Parliamentary Joint Committee on the NCA referred the issue to the Attorney-General's Department.

1. The effect of the proposed changes

The Bill amends section 55A of the *National Crime Authority Act 1984* by omitting the words 'being a power, function or duty that is also conferred or imposed by this Act' from paragraph 55A(1)(a), and the word 'similar' from subsection 55A(2).

These changes mean that State legislation can include the NCA in a range of state law enforcement legislation such as controlled operations and surveillance device legislation. The States can do this without reference to the powers, functions and duties already conferred by the *National Crime Authority Act 1984.*

The powers given to the NCA by State laws are general investigative powers that are also held by State law enforcement agencies. The States and the Commonwealth understood the section to allow the States to impose powers, functions and duties on the NCA to enable it to perform its investigative function.

The Opposition proposes amending the Bill to limit the powers that the States may confer on the NCA to those powers that the Commonwealth has itself conferred on the NCA. The powers the States may confer on the NCA are, however, not to be limited only to the investigation of offences specified in Commonwealth legislation.

2. Why the changes are necessary

The amendments are necessary to put beyond doubt the ability of the States to legislate to confer powers, functions and duties on the NCA.

As noted above, the NCA is supported by Commonwealth and States complementary legislation. The then Attorney-General, Senator Evans, explained the nature of the Commonwealth and State interaction envisaged in the Act, stating it was:

> crucially necessary for the Commonwealth authority to be clothed with the formal authority from the States which would make it possible for that Commonwealth body to do its proper investigative job (Senate Hansard, 5 June 1984, page 2523)

The Hansard from the time and the Explanatory Memorandum do not indicate that Parliament intended Section 55A to limit the general investigative powers of the NCA under State laws.

The main purpose of Section 55A is to avoid any inconsistency problem which might trigger Section 109 of the Constitution. However, it is arguable that its drafting has the effect of limiting the powers that the States might provide to the NCA.

A review, by the Attorney-General's Department, of the types of State powers, duties and functions that are imposed on the NCA confirmed that the range of law enforcement powers conferred by the States are sufficiently different from those powers contained in the *National Crime Authority Act 1984* to create doubt as to whether they may be applied.

The Bill is intended to make quite clear that such State conferrals are valid, while also preserving the original intention of Section 55A.

3. Why the changes are needed retrospectively

Without retrospective operation NCA actions since 1984, authorised under State law, could be challenged. This would jeopardise a range of matters where the evidence was obtained by reliance on State powers, such as the confiscation of drugs and the prosecution and subsequent conviction of persons involved in organised crime.

The Committee thanks the Minister for this response which indicates that retrospectivity is required to avoid possible challenges to a number of NCA actions authorised under State laws since 1984. Had the information provided in this response been included in the Explanatory Memorandum, there would have been no need to seek any advice from the Minister. The Committee notes that a growing number of Explanatory Memoranda do not satisfactorily explain what is being proposed in a particular bill.

Barney Cooney
Chairman