Senate Standing Committee

for the Scrutiny of Bills

The Work of the Committee

during the 39th Parliament

November 1998 – October 2001

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

DURING THE 39TH PARLIAMENT

Senator B Cooney (Chairman)[1]

Senator W Crane (Deputy Chairman)[2]

Senator Coonan[3]

Senator T Crossin[4]

Senator J Ferris[5]

Senator B Mason[6]

Senator A Murray[7]

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1 Appointed 24 November 1998. Elected Chairman 25 November 1998. Committee member and Chairman during previous Parliaments.

2 Appointed 24 November 1998. Appointed Deputy Chairman 25 November 1998. Committee member and Deputy Chairman during previous Parliament.

3 Appointed 24 November 1998. Discharged 31 August 1999.

4 Appointed 24 November 1998.

5 Appointed 24 November 1998.

6 Appointed 31 August 1999.

7 Appointed 24 November 1998.

Preface

This report discusses the work of the Senate Standing Committee for the Scrutiny of Bills during the 39th Parliament. It gives an account of the operation of the Committee during that period, including examples of the kinds of issues which arose under each of the five criteria against which the Committee tests the legislation with which it deals.

CHAPTER 1

OPERATION OF THE COMMITTEE

Introduction

The Senate Standing Committee for the Scrutiny of Bills was established on 19 November 1981. On 25 November 1991, the Committee held a seminar to mark the tenth anniversary of its establishment. The published proceedings of that seminar – *Ten Years of Scrutiny* – includes a paper presented by the then Chairman of the Committee, Senator Barney Cooney. In that paper, Senator Cooney sought to provide an update to 'The Operation Paper' – a paper on the early work of the Committee given by his predecessor as Chairman, Senator Michael Tate, in 1985. [1]

1.1 In October 1993 the Committee published a report on its work during the 36th Parliament.[2] In June 1997 it published a report on its work during the 37th Parliament,[3] and in June 1999 it published a report on its work during the 38th Parliament.[4] These documents are the main source for persons wishing to know more about the work of the Committee.

1.2 In a similar manner, this Report outlines the work of the Committee during the 39th Parliament. In this context, it is useful first to re-examine the main features of the operation of the Committee, including the background to its establishment.

Report of the Standing Committee on Constitutional and Legal Affairs

1.3 On 9 June 1978, on the motion of then Senator Fred Chaney, the Senate referred to its then Standing Committee on Constitutional and Legal Affairs the following matter:

> The desirability and practicability of referring all legislation introduced into the Parliament to a committee of the Senate for the purpose of its examining the legislation and reporting to the Senate as to whether there are provisions in the Bills, whether by express words or otherwise, which:
>
> a) place the onus of proof on a defendant in a criminal prosecution;

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1 Senator M Tate, 'The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills 1981-1985', paper presented to the Conference of the Australasian Study of Parliament Group, Adelaide, August 1985.

2 *Report on the Operation of the Senate Standing Committee for the Scrutiny of Bills during the 36th Parliament* (Parliamentary Paper No 208/1993).

3 *The Work of the Committee during the 37th Parliament: May 1993-March 1996*. (Parliamentary Paper No 116/1997).

4 *The Work of the Committee during the 38th Parliament: May 1996-August 1998.* (Parliamentary Paper No 146/1999).

b) confer a power of entry onto land or premises other than by warrant issued according to law;

c) confer a power of search of the subject, land or premises other than by warrant issued according to law;

d) confer a power to seize goods other than by warrant issued according to law;

e) purport to legislate retrospectively;

f) delegate authority to amend any Act of the Parliament of the Commonwealth, or to create exemptions from the operations of any such Act, by means of subordinate legislation;

g) authorise administrative decisions affecting the rights and liberties of the subject without prescribing objective criteria to govern such decisions or without providing a right of appeal to a Court or competent Tribunal;

h) affect the liberty of the subject by controls upon freedom of movement, freedom of association, freedom of expression, freedom of religion or freedom of peaceful assembly; or

i) otherwise trespass unduly on personal rights and liberties, or make the rights and liberties of citizens dependent upon administrative rather than judicial decisions.[5]

1.4 Following its inquiry, the Constitutional and Legal Affairs Committee tabled its *Report on Scrutiny of Bills* on 23 November 1978.[6] That report recommended the establishment of a new Parliamentary Joint Committee to highlight provisions in bills which had an impact on persons, either by interfering with their rights, or by subjecting them to the exercise of undue delegations of power. The Committee recommended that, in particular, this new Committee should examine the clauses of all bills introduced into the Parliament to determine, whether by express words or otherwise, they:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and obligations unduly dependent on insufficiently defined administrative powers or non-reviewable administrative decisions; or

(iii) inappropriately delegate legislative power or insufficiently subject its exercise to parliamentary scrutiny.

Establishment of the Scrutiny of Bills Committee

1.5 As a consequence of the Committee's report, a Standing Committee for the Scrutiny of Bills was established, by resolution of the Senate, on 19 November 1981.[7] Its establishment was

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5 Senate, *Hansard*, 9 June 1978, p 2689.

6 Parliamentary Paper No 329/1978.

7 Senate, *Hansard*, 19 November 1981, pp 2418-2428.

by no means easy, and owed much to the work of its first Chairman, the late Senator Alan Missen. As Professor Dennis Pearce, the Committee's first legal adviser, told the Committee's tenth anniversary seminar:

> The resistance ... was quite extraordinary. The Government had, pursuant to the ordinary arrangements that existed, the standard arrangements, responded to the [Constitutional and Legal Affairs] Committee's proposal and it opposed the establishment of this Committee. But the resistance to this suggestion was so great that you even find the Opposition refusing to allow Senator Missen to table the Government's response to the Legal and Constitutional Affairs Committee's proposals. And this was done not once but twice.
>
> It really was quite remarkable that the Senate seemed to be worried by the thought that it might be able to engage in informed legislating. There was a problem in relation to the joint committee proposal and there was a problem in relation to the timing proposal. But they seemed to be used as much as anything to resist this notion that a parliamentary committee should actually begin to identify problems relating to legislation that were recognised as being inappropriate in delegated legislation.
>
> Two more years went by and Senator Missen again moved to establish the Committee. He had had various forays along the way. He was supported, very strongly, in November 1981, by Senator Tate. The Government was still opposed to this proposal - this radical and wicked proposal. A compromise was suggested by Senator Hamer that the Committee should have a six-month probationary period, in effect, and that the work should be done by the Constitutional and Legal Affairs Committee. With that compromise, there was an acceptance of the Committee, and it finally did get under way.[8]

1.6 Professor Pearce's account of the establishment of the Committee was supported by the Hon Fred Chaney, formerly the Federal member for Pearce and a former member of the Senate:

> I think that those who are concerned about the parliamentary institution can learn something from the history of this Committee. One thing is that a relatively obscure backbencher can have an influence on the way the institution operates. When I put forward this proposition, originally in a speech in February 1978 and then in a formal motion later in the same year, I had been in the Senate for less than four years and it was possible to get one's colleagues to focus on a proposal for change. We used the existing committee system (which again had been forced upon the Government of the relevant day by senators) to examine this proposition. Indeed, I had a wonderful and unusual chance to see both sides of the operation.
>
> Shortly after the Senate committee commenced its consideration of the resolution [relating to the establishment of the Committee], I was appointed to the Ministry. This, some people say, is on the basis that, if you are enough trouble, that is one way to shut you up. I then sat in the Fraser Cabinet room as a non-Cabinet Minister and listened to the discussion of the proposition that we should have this Committee as was recommended by the Constitutional and Legal Affairs Committee. I then was in the embarrassing position of having to come into the Senate to defend a decision which I totally disagreed with: to oppose the establishment of the committee that I had advocated.[9]
>
> I must say that it gave me great pleasure to find that senators really were not terribly impressed by the Executive Government's decision. They, in fact, took it into their own hands to establish this Committee, originally through putting its functions into the Constitutional and Legal Affairs Committee. I think the first thing to remember about it is that this was done not at the behest of or with the approval of the Executive Government, but against the objection of the

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8 Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny*, pp 5-6.

9 Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny*, pp 24-25.

> Executive Government. Of course, the Executive Government's concern was that the legislative process would be slowed down, and effective and efficient government would be impeded.[10]

1.7 Though the Constitutional and Legal Affairs Committee had recommended that a joint committee be established, the Scrutiny of Bills Committee has always been a Senate committee. As noted above,[11] for the first six months of its operation, it had the same membership as the Constitutional and Legal Affairs Committee. On 25 May 1982, the Senate finally resolved to establish a distinct Scrutiny of Bills Committee.[12]

1.8 For the first six years of its operation, the Committee existed by virtue of a Senate resolution and, later, of a Senate Sessional Order. The relevant resolution or Sessional Order established the Committee and set out its terms of reference and its method of operation. A consequence of this approach was that the Committee had to be re-established at the commencement of each new Parliament. However, on 17 March 1987, the Committee became a permanent feature of the Senate committee system, with the adoption of a new Senate Standing Order 36AAA.[13] This was in similar terms to the previous resolutions and Sessional Orders. When the Senate Standing Orders were re-numbered, it became Standing Order 24, which currently governs the operations of the Committee.

Senate Standing Order 24

1.9 Senate Standing Order 24 provides:

> 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.

1.10 The Committee has six members, three of whom are members of the government party, and three of whom are members of non-government parties (as nominated by the Leader of the Opposition in the Senate or by any minority groups or independent Senators).

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10 Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny*, p 25.

11 See para 1.6.

12 Senate, *Hansard*, 25 May 1982, pp 2341-2342.

13 Senate, *Hansard*, 17 March 1987, pp 775-776.

1.11 The Committee Chair is a member appointed on the nomination of the Leader of the Opposition in the Senate. The Chair may, from time to time, appoint a member to be Deputy Chair. The Chair, or Deputy Chair when acting as Chair, has a casting vote when votes on a question before the Committee are equally divided. However, the relative numbers of the political groupings represented on the Committee has proved to be of little or no significance to the Committee's operation. The culture of the Committee is, and always has been, non-partisan.

1.12 Standing Order 24 sets out various other matters, including the Committee's power to appoint subcommittees, and its power to send for persons and documents. One of the most significant powers of the Committee is that of appointing a legal adviser.

The Committee's legal adviser

1.13 Since its inception, the Committee has always taken the opportunity to engage an eminent legal adviser to assist it in its work. As noted above, the Committee's first legal adviser was Professor Dennis Pearce. However, its longest-serving legal adviser is the current appointee – Emeritus Professor Jim Davis, formerly of the ANU Law Faculty – who has been with the Committee since 1983. Professor Davis's tenure was interrupted by a 13 month leave of absence, during which time the Committee was assisted by the late Professor Douglas Whalan, also of the ANU Law Faculty.

1.14 At the tenth anniversary seminar, Senator Cooney noted the Committee's great debt to its legal advisers. He recorded the Committee's appreciation "for the hours of hard work, largely undertaken over weekends, put in by these three eminent legal minds", and also recorded the Committee's gratitude "to the Law Faculty of the Australian National University, from whence they have all been poached".[14]

The operation of the Committee

1.15 As stated above, the operation of the Committee and the role of its legal adviser is governed by Senate Standing Order 24. Within the limits set out in that Standing Order, the Committee has evolved a method of operation which is now well-established. It is appropriate to outline that method of operation.

1.16 Copies of all bills introduced in either House of the Parliament are provided to the Committee by the Friday of each sitting week. A copy of each bill, together with its Explanatory Memorandum and the Minister's Second Reading Speech, is then forwarded to the Committee's legal adviser. The legal adviser examines each bill against the five principles set out in Standing Order 24, and provides a written report to the Committee by the following Monday. This report draws the attention of the Committee Secretariat and of the members of the Committee to those clauses of any of the bills which appear to infringe one or more of the five principles.

1.17 During the 39th Parliament, the Committee Secretariat also began systematically examining parliamentary amendments to bills. Amendments agreed to by either the House of

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14 Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny*, p 16.

Representatives or the Senate, as noted in the relevant *Parliamentary Debates* and recorded in the *Votes and Proceedings of the House of Representatives* and the *Journals of the Senate,* are also evaluated and, where appropriate, drawn to the Committee's attention.

The Alert Digest

1.18 On the basis of the legal adviser's report, the Secretariat prepares a draft *Alert Digest* which is considered by the Committee at its regular meeting on the Wednesday morning of each sitting week. The *Digest* contains a brief outline of each of the bills introduced in the previous week, and any amendments made to bills in that week. It sets out any comments the Committee wishes to make in relation to a particular bill or amendment. Comments are usually made by reference to the relevant principle. The *Alert Digest* is tabled in the Senate on the Wednesday afternoon or the Thursday morning of each sitting week.

1.19 Where concerns are raised in a *Digest*, correspondence on the matter is forwarded to the Minister responsible for the bill or the amendment on the Thursday following the tabling of the *Digest*. This correspondence invites the Minister to respond to the Committee's concerns. The Committee requests that any response be received in sufficient time for it to be circulated to members for consideration prior to the next Committee meeting.

Committee Reports

1.20 When a Minister or Parliamentary Secretary responds to a concern raised in a *Digest*, the Committee produces a *Report* when the bill is introduced in the Senate. The *Report* contains the relevant extract from the *Digest*, the text of the Minister's response, and any further comments or requests for information the Committee may wish to make as a result. As with the draft *Digests*, the draft *Reports* are considered at the Committee's regular meeting. The Committee agrees on their content and they are then presented to the Senate on the Wednesday afternoon or the Thursday morning of each sitting week.

1.21 The Committee wishes to place on record its thanks to Ministers and Parliamentary Secretaries for the promptness and comprehensiveness of the responses provided during the 39th Parliament. The co-operation and goodwill shown by Ministers and Parliamentary Secretaries has greatly assisted the Committee in the effective performance of its duties.

Publication on the Internet

1.22 Copies of *Digests* and *Reports* are provided to all Senators, relevant Ministers and other interested persons and institutions. They are also made available electronically on the Internet (see www.aph.gov.au/senate/committee/scrutiny/index.htm).

1.23 Occasionally, the Committee produces reports on matters specifically referred to it by the Senate. For example, during the 39th Parliament the Committee held an inquiry, and tabled a report, on the issue of entry and search provisions in Commonwealth legislation (see *Fourth Report of 2000*, which is discussed further in Chapter 7).

Monitoring of penalty provisions for 'information' offences

1.24 In addition to its legislative scrutiny work as outlined above, during the 39th Parliament the Committee also monitored the penalties specified for 'information' offences in Commonwealth legislation. In its *Eighth Report of 1998*, the Committee reported on the appropriate basis for penalty provisions where legislation created offences involving the giving or withholding of information. This matter was referred to the Committee after debate in the Senate about the appropriateness of specifying a penalty of imprisonment for failing to provide information to the Productivity Commission – an organisation which provided the Government with general advice on microeconomic reform.

1.25 In its Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were more consistent, more appropriate, and made greater use of a wider range of non-custodial penalties. In December 1998, the Minister for Justice and Customs responded that the issue of penalties for offences of this type would be dealt with progressively as part of the development of the Commonwealth *Criminal Code*.

1.26 Since the publication of its Report, the Committee has continued to monitor the penalties imposed for such offences. Imprisonment continues to be provided for as an appropriate penalty for such offences on some occasions. During the 39th Parliament it was specified as a penalty in a number of bills, including the ACIS Administration Bill 1999; Australian Securities and Investments Commission Bill 2001; Financial Sector Reform (Amendments and Transitional Provisions) Bill (No 1) 1999; Fuel Quality Standards Bill 2000; Gene Technology Bill 2000; Health Insurance Amendment (Professional Services Review) Bill 1999; National Crime Authority Amendment Bill 2000; Migration Legislation Amendment (Overseas Students) Bill 2000; Postal Services Legislation Amendment Bill 2000; Proceeds of Crime Bill 2000; Renewable Energy (Electricity) Bill 2000; Social Security (Administration) Bill 1999; Textile Clothing and Footwear Strategic Investment Program Bill 1999; and Tradex Scheme Bill 1999.

Monitoring of national scheme legislation

1.27 During the 39th Parliament, Committee *Digests* also monitored the introduction of Commonwealth bills which proposed to give effect to national schemes of legislation (ie legislation which is uniform, or substantially uniform, and has an application in more than one Australian jurisdiction) or decisions reached at Ministerial Councils. The Committee undertook this task as a participant in the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees. One of the tasks of this Working Group is to determine an appropriate system for the national scrutiny of such legislation.

Liaison with scrutiny committees in other jurisdictions

1.28 In addition to its membership of the Working Group of Australian Scrutiny Committees, the Committee also meets with individual State and Territory scrutiny committees. During the period covered by this report the Committee sought permission from

the Senate to meet formally with the Queensland Scrutiny of Legislation Committee, the Victorian Scrutiny of Acts and Regulations Committees, and the NSW Law and Justice Committee on its inquiry into a Bill of Rights in NSW. The Committee also met jointly with the Senate Regulations and Ordinances Committee to discuss issues involving the scrutiny of national schemes of legislation.

Consensus

1.29 Since its inception, the Committee has operated in a non-partisan and apolitical way, on the basis of consensus. In reporting to the Senate, the Committee's practice is to express no concluded view on any of the provisions in a bill, but rather to advise Senators (and other readers of its reports) of the risk that particular provisions may infringe one or more of the criteria in Standing Order 24. In essence, the Committee sees its task as drawing the Senate's attention to provisions in legislation which may infringe people's civic entitlements. Whether the legislation should be passed as introduced, or amended, is properly a matter for the Senate to decide.

The Committee's workload

1.30 Each year the Committee analyses approximately 200 to 250 bills. The following table sets out the bills and amendments considered during the 39th Parliament.

Year	Bills considered	Bills commented on	Amended bills considered	Amended bills commented on	Digests tabled	Reports tabled
Nov 1998 –	57	26	-	-	2	2
1999	269	117	-	-	19	21
2000	211	105	-	-	18	17
2001	202	86	106	16	17	13

The Committee's effectiveness

1.31 Determining the Committee's effectiveness depends on which particular impact is being measured. Its effectiveness can be assessed quantitatively in terms of the numbers of bills commented on, of ministerial responses received, of amendments moved, of amendments passed, and so on. Some of these details are set out in Appendix III of this report. Others can be found in the Department of the Senate's Annual Reports.[15]

1.32 While this is one obvious indicator of effectiveness, others are impossible to quantify – for example, the effectiveness of the Committee in preventing issues arising, rather than drawing

[15] For example, Department of the Senate, Annual Reports for 1993-4 (pp 73-77) and 1994-5 (pp 56-61).

attention to them once they have arisen. During the 39th Parliament Committee staff gave presentations to a number of departments and agencies (including the Department of Communications, Information Technology and the Arts and the Australian Taxation Office) and to officials at seminars organised by the Senate Procedure Office in an effort to alert those present to the Committee's method of operation and issues of concern.

1.33 Another possible indicator of effectiveness is the extent to which Ministers respond to the comments contained in *Alert Digests*. The number of ministerial responses to committee comments can be measured. Each *Alert Digest* contains a running index of bills commented on by the committee. This shows whether a ministerial response was sought and, if so, from whom, and whether or not one has been received.

1.34 More impressionistic indicators of the Committee's effectiveness are comments made about it by people who have experienced its work. For example, in 1998 Senator the Hon Robert Ray noted that he had originally voted against the establishment of the Committee:

> My concern at that time was not that bills should be scrutinised but that the job would be delegated to staff and consultants and that senators would merely rubber stamp the recommendations that came through.
>
> What became clearly obvious from the work on both sides of the chamber on this committee as it evolved in the 1980s is that the committee took its task very seriously. It looked at legislation. I found it most valuable as a minister when we had legislation up before the chamber. Quite often, matters brought up by the Standing Committee for the Scrutiny of Bills had not been thought of by the minister in scrutinising the legislation. It was quite a useful tool for a minister to have some other body away from departmental advice evaluating the legislation and pointing out weaknesses in it. So I have to say – this is very difficult for me – that back in 1981 and 1982 I was probably in error in voting against it.[16]

Explanatory Memorandums

1.35 During the 39th Parliament the Committee had cause to express concern at a number of deficiencies in Explanatory Memorandums. A corrigendum which was to be included with an Explanatory Memorandum was not included.[17] The failure to include an explanation for a delayed commencement period in an Explanatory Memorandum led to an otherwise unnecessary need to seek advice from a Minister,[18] as had the failure to provide reasons for the imposition of strict liability in relation to an offence, [19] as had the failure to note that retrospectivity in relation to certain therapeutic goods had had beneficial consequences. [20]

1.36 The Committee's dissatisfaction culminated in comments made in its *Twenty First Report of 1999* in relation to the National Crime Authority Amendment Bill 1999. The Committee drew attention to the bill's retrospective application – which covered a period of

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16 Senate, *Parliamentary Debates*, 1 July 1998, p 3977 (Senator R Ray).

17 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 359.

18 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 447.

19 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 383.

20 Scrutiny of Bills Committee, *Second Report of 2001*, p 62.

18 years. The Explanatory Memorandum simply noted that the bill "clarifies the nature of the State and Commonwealth legislative framework that supports the National Crime Authority". The bill did 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".

1.37 It seemed that the amendments proposed in the bill were simply declaratory of the intended operation of the Principal Act. However, neither the Explanatory Memorandum nor the Minister's Second Reading Speech fully explained the effect of the changes being made, or why such changes were necessary, and why those changes should operate retrospectively from 1984. The Committee continued:

> 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. [21]

1.38 The Committee ultimately thanked the Minister for Justice and Customs for a response which indicated that in this instance, retrospectivity was required to avoid possible challenges to a number of NCA actions since 1984 which had been authorised under State laws. The Committee noted that "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," and that "a growing number of Explanatory Memoranda do not satisfactorily explain what is being proposed in a particular bill".[22]

Principles stated or reaffirmed during the 39th Parliament

1.39 The Committee works by applying principles to the legislation it scrutinises. A number of principles were stated or reaffirmed during the 39th Parliament. These included:

- the issue of personal rights and liberties is one of principle, and 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.

- laws which affect rights and liberties should not be drafted on the assumption that those using them will necessarily always be of good faith – laws which assume good faith are inevitably misused by those whose motives are less than good;

- amendments to procedural law, where there is no evidence of its abuse, in anticipation of its possible abuse at some time in the future, represent an unfortunate precedent;

- where a provision authorises a Minister to make a decision on objective criteria, then the bona fides of its exercise are transparent, and may be assessed. But where a provision

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21 Scrutiny of Bills Committee, *Alert Digest No 19 of 1999*, pp 19-20.

22 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 533.

authorises a Minister to make a decision on subjective grounds – such as the 'national interest' – then it is much more difficult to assess the bona fides of its exercise.

1.40 This Report now turns to more detailed consideration of the work of the Committee in the 39th Parliament. This will be discussed by considering how the Committee tested bills coming before it against the five criteria which govern its work.

CHAPTER 2

UNDUE TRESPASS ON PERSONAL RIGHTS AND LIBERTIES

Application of criterion set out in Standing Order 24(1)(a)(i)

2.1 Under Standing Order 24(1)(a)(i), the Committee is required to report on whether legislation trespasses unduly on personal rights and liberties. Legislation may trespass **unduly** on personal rights and liberties in a number of ways. For example, it might:

- have a retrospective and adverse effect on those to whom it applies;
- not only operate retrospectively, but its proposer (invariably the Government) might treat it as law before it is enacted – usually from the date the intention to legislate is made public; this is often referred to as **legislation by press release;**
- abrogate the common law right people have to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved;
- reverse the common law onus of proof and require people to prove their innocence when criminal proceedings are taken against them;
- impose strict liability on people when making a particular act or omission an offence;
- give authorities the power of search and seizure without requiring them to obtain a judicial warrant prior to exercising that power;
- take away people's privilege to keep confidential professional communications with their legal advisers;
- equip officers with oppressive powers; or
- take away Parliament's right to obtain information from the Executive.

2.2 Standing Order 24(1)(a)(i) may also apply in other circumstances: for example, where legislation directly affects fundamental entitlements such as the right to vote. It may apply where legislation increases certain powers of the Executive which may infringe rights such as the right to privacy: for example, by allowing the more extensive use of tax file numbers, data-matching techniques or the interception of telecommunications. It may also apply where legislation provides for organisations other than the police force to exercise what are essentially police powers – usually where there is a perceived threat to public safety. Explanations and specific examples of each of these situations are detailed below.

Retrospectivity

2.3 Legislation has retrospective effect when it makes a law applicable to an act or omission which took place before the legislation was enacted. Criticism of this practice is longstanding. For example, in 1651, Thomas Hobbes in *Leviathan* observed that "No law, made after a Fact done, can make it a Crime", and "Harme inflicted for a Fact done before there was a Law that forbad it, is not Punishment, but an act of Hostility".[1]

2.4 Similarly, in 1765, Sir William Blackstone, in his *Commentaries*, referred to the vice of making laws but not publicly notifying those subject to them. He then went on to say:

> There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro,* and be notified before their commencement; which is implied in the term *"prescribed"*. But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.[2]

2.5 The Committee endorses the traditional view of retrospective legislation. Its approach is to draw attention to bills which seek to have an impact on a matter which has occurred prior to their enactment. It will comment adversely where such a bill has a detrimental effect on people. However, it will not comment adversely if:

- apart from the Commonwealth itself, the bill is for the benefit of those affected;
- the bill does no more than make a technical amendment or correct a drafting error; or
- the bill implements a tax or revenue measure in respect of which the relevant Minister has published a date from which the measure is to apply and that publication took place prior to that date.

2.6 In the Committee's view, where proposed legislation is to have retrospective effect, the Explanatory Memorandum should set out in detail the reasons retrospectivity is sought.

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1 Hobbes T, *Leviathan*, as referred to by Toohey J in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 687.

2 Blackstone, W, *Commentaries on the Laws of England*, Book 1 (1765, Clarendon Press, Oxford), pp 45-6 as referred to in *Polyukhovich* (1991) 172 CLR 501 at 534 per Mason CJ.

2.7 During the 39th Parliament retrospectivity remained one of the principal reasons for the Committee reporting on clauses in bills. Some examples of the Committee's approach to the issue are set out below.

Example: Petroleum (Submerged Lands) Legislation Amendment Bill (No 3) 2000

2.8 This bill was introduced into the Parliament on 6 December 2000. In *Alert Digest No 1 of 2001*, the Committee noted that certain amendments dealing with the removal of property from the seabed were to commence retrospectively on 7 March 2000. Another amendment (which corrected a minor technical error which "thwarted the intention" of amendments made in 1998) was to commence retrospectively on 30 July 1998. In each case, the Committee sought an assurance that no one would be adversely affected by the retrospective commencement of these provisions.

2.9 The Minister consulted the Attorney-General's Department, which advised that it had overlooked the significance of an offence provision in section 107 of the *Petroleum (Submerged Lands) Act* 1967:

> The Attorney-General's Department has advised that retrospective application of an offence provision or civil liability is contrary to Commonwealth legal policy. The Department has therefore recommended that a Government amendment be moved making it clear that no criminal or civil liability will retrospectively fall on any person as a result of the Schedule 1 Part 3 amendments being backdated to 7 March 2000.
>
> I have accepted this advice and have now sought the Prime Minister's approval to move a Government amendment in the House of Representatives inserting in the Bill a new transitional item 28A. If the Government moves the amendment, my Department will be able to forward you a copy of it without delay. With this amendment, I can confirm that no person will be adversely affected by the proposed retrospective commencement of the amendments in Schedule 1 Part 3.
>
> I am able to make the same confirmation about the proposed retrospective commencement of Schedule 3 of the Bill, specifically the technical correction to Schedule 1 clause 47 of the *Primary Industries and Energy Legislation Amendment Act (No. 1) 1998*.[3]

2.10 The Committee thanked the Minister for this response and for the amendment foreshadowed.

Example: Migration Legislation Amendment Bill (No 2) 1998

2.11 This bill concerned the sources of information to be given to people in immigration detention. In general terms, it was similar in form to the Migration Legislation Amendment Bill (No 2) 1996 ("the 1996 bill"), which was introduced into

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3 Scrutiny of Bills Committee, *Fifth Report of 2001*, p 197.

the Senate on 20 June 1996, and on which the Committee reported in its *Sixth Report of 1996.*[4]

2.12 The Committee's concern with both bills was identical. The commencement clause in the 1998 bill provided that the proposed amendments were to commence on the date the bill was introduced into the Senate (ie 3 December 1998).

2.13 In commenting on this provision, the Committee noted that there had been a similar provision in the 1996 bill. This had seen the law administered (for more than 2 years, between 1996 and 1998) on the basis of legislation which had been operating retrospectively, and yet which was never passed by the Parliament. It was conceivable that such a situation might again arise in the case of the present bill. It was also conceivable that the bill might ultimately be passed in an amended form. Again, this might have implications for the way the law was being administered in the period between the introduction of the bill, and its final passage through the Parliament.

2.14 The Committee reiterated its opposition 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.

2.15 Given the experience with the 1996 bill, the Committee sought the Minister's advice as to why the 1998 bill had been made operative from its introduction rather than its passage. It also sought advice on the implications of this approach for Departmental officers and administration should the bill again not be passed, or be passed in an amended form.[5]

2.16 The Minister responded that the present Bill had a commencement date of 3 December 1998, being the date of the Bill's re-introduction into the Senate. This date had been 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.

2.17 The Minister assured 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".[6]

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4 See generally Scrutiny of Bills Committee, *The Work of the Committee during the 38th Parliament (May 1996-August 1998)* p 19.

5 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, pp 257-58.

6 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, p 258.

2.18 The Committee thanked the Minister for this response, and accepted his assurance that there had been no intervening events to be retrospectively validated. Noting the Minister's assurance that both the Human Rights Commissioner and the Ombudsman had undertaken to carry out their functions "as if the Bill has been passed," the Committee sought further advice as to whether the bill was currently being applied to those people who were attempting to enter Australia or had been found in Australian waters in Queensland, the Northern Territory and Christmas Island during February and March, and to the functions of the Human Rights Commissioner and the Ombudsman under their respective legislation in relation to these people.

2.19 The Minister reiterated that:

- no situation covered by the bill had yet occurred;
- if such a situation were to arise then the bill would be administered as if it had been passed; and
- failure to proceed with the bill would mean that inconsistencies in Commonwealth law which had been highlighted in the 1996 Teal case would continue.[7]

2.20 The Committee thanked the Minister for this further response but continued to be concerned by the bill's approach to commencement, pointing out that, in effect, a bill had been introduced and its provisions were being applied even though it had not been passed, was not passed during the previous Parliament, and, indeed, might never be passed. The Committee stated that such an approach permits legislation to be introduced and enforced without Parliament ever being required to finally vote on the matter.[8] Given this, the Committee sought further advice from the Minister and from the Attorney-General as to the following matters:

- the authority under which a Department or statutory body could exempt itself from administering the provisions of the law in a manner determined by the Parliament and the courts; and
- the legal effect of actions taken in administering a law which is declared to be retrospective but which is not passed by the Parliament.

2.21 Notwithstanding that the bill was passed on 30 June 1999, the Minister for Immigration and Multicultural Affairs responded:

> It is my understanding that a Department or statutory body such as HREOC does not have authority to exempt itself from administering the provisions of the law as it has been determined by the Parliament and the courts. However, there may be circumstances where a body may be able to take action, consistently with its

7 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, pp 259-60.

8 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, p 260.

> current statutory responsibilities, which nevertheless has regard to the impending retrospective change to the law.
>
> In relation to your specific reference to HREOC, I believe that under the HREOC Act, the Commission is given certain powers to assist it in carrying out its functions. However, whether the Commission uses a particular power in any investigation is a matter of discretion for the Commission, who is not under any obligation to use all or any of its powers when inquiring into any matter before it.
>
> Furthermore, I do not believe that action by the Commission or the Ombudsman to discontinue the practice of sending information to people in immigration detention in circumstances where there had been no previous complaint was unlawful, given the terms of the HREOC Act and the Ombudsman Act as they existed at the time the undertaking was given. In particular, neither the Commission nor the Ombudsman had a duty, as opposed to a power, to send information to non-citizens in immigration detention in such circumstances.[9]

2.22 The Attorney-General also responded, advising that he understood that the bill had been passed by the Parliament and received Royal Assent on 16 July 1999. "This being the case, the situation to which the Committee has referred does not arise, and for this reason, it appears that little purpose would be served in the Attorney providing the Committee with the advice sought."[10]

2.23 As the bill had been passed, and any further correspondence would therefore have been of no effect, the Committee thanked the Ministers for their responses.

Example: Australia New Zealand Food Authority Amendment Bill 1999

2.24 In *Alert Digest No 6 of 1999*, the Committee considered an amendment proposed in this bill which was designed to enable the making of food standards that related to "particular brands of food in addition to a type of food generally". While the bill was introduced on 31 March 1999, this amendment was to commence retrospectively on 30 July 1998. The Explanatory Memorandum intimated that this amendment was necessary to remove doubts about the enforceability of some food standards made by the Australia New Zealand Food Authority (ANZFA) since 30 July 1998, and the Committee sought advice on this issue.

2.25 The Parliamentary Secretary to the Minister for Health and Aged Care responded that all standards issued by ANZFA since July 1998 were enforceable, with the possible exception of the standard which regulated the making of health claims in relation to food. The possible invalidity of this standard was based on an interpretation of section 9 of the Principal Act which, it was argued, might not permit the making of standards in relation to specific brands of food. Making the amendment retrospective was necessary to ensure the legality of specified health claims in relation to folate which had appeared on more than 100 food products under a pilot health claims standard:

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9 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 13.

10 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 14.

> 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.[11]

2.26 The Committee thanked the Parliamentary Secretary for this response, which clarified the issue.

Example: Agriculture, Fisheries and Forestry Legislation Amendment Bill (No 2) 1999

2.27 Certain amendments proposed in a Schedule to this bill (which was introduced on 30 June 1999) commenced retrospectively on 1 April 1999. The Explanatory Memorandum stated that these amendments were "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.

2.28 However, elsewhere, the Explanatory Memorandum seemed to suggest that these changes had already taken place in anticipation of the passage of this legislation, and that they now required retrospective validation – a matter on which the Committee usually comments.

2.29 The Minister responded that:

> 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.[12]

2.30 The Committee thanked the Minister for this response which had clarified the issue.

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11 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 304.

12 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 388-90.

Example: Border Protection (Validation and Enforcement Powers) Bill 2001

2.31 This bill (which was introduced on 18 September 2001) proposed to validate certain actions taken in relation to vessels carrying people reasonably believed to be intending to enter Australia unlawfully. The bill validated any action taken by the Commonwealth or others in relation to particular vessels (including the *MV Tampa* and the *Aceng*) from 27 August 2001 until the day on which the bill commenced. It also specified that any such action was lawful when it occurred, and provided that no proceedings against the Commonwealth or others could be instituted or continued in any court in relation to these actions.

2.32 These provisions raised a number of issues for the Committee. First, they sought to validate actions retrospectively from 27 August. Secondly, they sought to validate any action in relation to two specified vessels, and in relation to any other unspecified vessel carrying persons reasonably believed to be intending to enter Australia unlawfully for an undefined period. The Committee is usually concerned by provisions which retrospectively validate actions, particularly when they are expressed in such wide terms, and sought the Minister's advice as to:

- whether these provisions had the effect of making lawful acts which were currently unlawful, or which would have been unlawful had they occurred in Australia;
- why the validation was expressed so widely, and whether it would operate to validate all actions by an officer during the relevant period (including, for example, an action which caused the death of, or serious injury to, a person detained on a vessel);
- whether the actions which were retrospectively validated must have complied with guidelines as to conduct or other internal regulatory procedures, and what remedies would be available to a person where, for example, a Commonwealth official took action which was 'improper' but which was validated by the bill; and
- whether the phrase 'an intention to enter Australia' referred to Australian land or Australian territorial waters.[13]

2.33 Unfortunately, the Committee was still awaiting a response when the 39th Parliament was prorogued.

Example: Taxation Laws Amendment Bill (No 8) 1999

2.34 Certain amendments proposed in a Schedule to this bill (which was introduced on 3 June 1999) were to apply retrospectively from the 1992-93 income

13 Scrutiny of Bills Committee, *Alert Digest No 13 of 2001*, pp 5-8.

year. These amendments exempted from income tax any post-judgment interest received as part of an award of compensation in a personal injury case where that interest related to delays that had occurred while avenues of appeal were being pursued.

2.35 These amendments were beneficial to taxpayers and, as such, would usually attract no further comment from the Committee. However, given that they were to apply from the 1992-93 income year, the Committee sought the Treasurer's advice on what action was to be taken to inform taxpayers about the provisions to enable them to apply for the amendment of assessments going back over 7 years. Without such action, amendments which set out to benefit all taxpayers in a particular category might end up, somewhat capriciously, benefiting only some of those taxpayers.

2.36 The Assistant Treasurer responded that, in March 1999, he had issued a press release announcing the proposed exemption for post-judgment interest, which would apply to the 1992-93 and later years of income. In addition the Australian Taxation Office (ATO) had its own program to educate taxpayers about changes such as these:

- Tax agents would be advised of the new provisions and how they would affect their clients;
- Taxpayers would be advised of the new provisions through ATO publications, such as TaxPack;
- The ATO would put information outlining the new provisions on its Internet site; and
- The ATO anticipated sending information about the new provisions to insurance companies, since insurance companies are often responsible for making compensation payments.[14]

2.37 The Committee thanked the Assistant Treasurer for this response.

Legislation by press release and the 'six month' rule

2.38 Legislation by press release occurs where a bill is not only retrospective, but is treated by its proposer (invariably the government) as being the law from the time the intention to introduce it is made public. This intention is frequently announced by press release.

2.39 The Committee's practice is to draw attention to legislation by press release. The fact that a proposal to legislate has been announced is no justification for treating that proposal as if it were enacted legislation. As the Committee has previously noted, "publishing an intention to process a bill through Parliament does not convert its provisions into law; only Parliament can do that".[15]

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14 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, pp 409-10.

15 Scrutiny of Bills Committee, *The Work of the Committee during the 37th Parliament*, p 21.

2.40 As a general principle, the Committee disapproves of legislation by press release for two reasons. First, proposals are not enacted legislation and to treat them as such is to act outside the law. Secondly, when the legislation becomes an Act, the Act is drafted so that it operates retrospectively and therefore infringes the Committee's criteria. In its 1986-87 *Annual Report*, the Committee stated:

> the practice of 'legislation by press release' carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement. Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty. Persons such as lawyers and accountants who must advise their clients on the law are compelled to study the terms of the press release in an attempt to ascertain what the law is. As the Committee has noted on two occasions, one press release may be modified by subsequent press releases before the Minister's announcement is translated into law. The legislation when introduced may differ in significant details from the terms of the announcement. The Government may be unable to command a majority in the Senate to pass the legislation giving effect to the announcement or it may lose office before it has introduced the relevant legislation, leaving the new Government to decide whether to proceed with the proposed change to the law.[16]

2.41 The Committee has noticed that, since it made these comments, the use of legislation by press release in most portfolio areas seems to have declined. However, the issue does still frequently arise with amendments to tax legislation made retrospective to the date of their announcement, whether by press release or in the Budget. Some examples of the Committee's approach to this issue during the 39th Parliament are set out below.

Example: Sales Tax (Industrial Safety Equipment) (Transitional Provisions) Bill 2000

2.42 This bill, together with three related modification bills, was introduced into the Parliament on 11 May 2000. The package of bills related to the sales tax exemption for industrial safety equipment, particularly as interpreted by the Federal Court in *Commissioner of Taxation v NSW Cancer Council.*[17]. In that case, the Court held that sunglasses were exempt from sales tax as safety equipment because it could be demonstrated that outdoor workers used them to protect their eyes from glare and cancer.

2.43 In *Alert Digest No 7 of 2000*, the Committee noted that the amendment proposed in this bill would increase liability to sales tax retrospectively, but only in

16 Scrutiny of Bills Committee, *Annual Report 1986-87*, pp 12-13.

17 (1999) FCA 1146.

relation to dealings in goods after 5 October 1999 – the date of a Press Release issued by the Assistant Treasurer.

2.44 The bill was introduced more than 6 months after this announcement. The Committee was unaware of any draft bill having been published in the interim and sought the Treasurer's advice on the application to the bill of the resolution of the Senate of 8 November 1988. That resolution, which deals only with taxation 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 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.[18]

2.45 In response, the Assistant Treasurer acknowledged that the amendments were introduced into the Parliament 7 months after their proposed date of effect, in contravention of the 'six month rule'. However he noted that the announcement of the proposal on 5 October 1999 had been followed by the publication of further details in newspapers on 11 October 1999, by discussion of the proposal at the National Sales Tax Liaison Committee in November 1999 and by the issue of a Sales Tax Ruling on 12 January 2000. These announcements had effectively resulted in the cessation of credit claims in relation to dealings with the relevant goods, and therefore "changing the commencement date from 5 October 1999 to the date of introduction of the Bills would have little practical effect in relation to allowing taxpayers further time to lodge credit claims."[19]

2.46 The reason the bills had not been introduced earlier in the Parliamentary sittings was "because the heavy tax reform legislation program placed pressure on the limited drafting resources available to the ATO".

2.47 The Committee was not persuaded by this, concluding that "the 'six month rule' has rarely, if ever, been applied," and drew the Senate's attention to its resolution of 8 November 1988 in the context of this bill.[20] The Senate passed the bills without amendment.[21]

Example: Taxation Laws Amendment Bill (No 2) 1999

2.48 This bill was introduced into the Parliament on 3 December 1998, having been introduced into the previous Parliament on 2 July 1998 as Schedule 3 to the Taxation

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18 *Journals of the Senate*, 8 November 1988, pp 1104-5.

19 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 231-2.

20 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 234.

21 Senate, *Hansard*, 29 June 2000, p 16005.

Laws Amendment Bill (No 5) 1998 – a bill which lapsed when Parliament was prorogued for the election.

2.49 Certain amendments proposed in Schedule 4 to the bill had the effect of excluding Share Price Index futures from the operation of the related payments rule (which denies franking benefits where a taxpayer eliminates risk in respect of shares and makes a payment equivalent to the dividend to another person). These amendments were designed to implement a 1997 Budget Press Release and were to operate retrospectively from 13 May 1997.

2.50 Correspondence to the Committee from Mallesons Stephen Jaques suggested that these amendments went "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."[22]

2.51 In response, the Minister advised that:

> 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.[23]

2.52 The Committee thanked the Minister for this response and for the amendment proposed.

Example: Taxation Laws Amendment Bill (No 11) 1999

2.53 Schedule 1 to this bill (which was introduced into the Parliament on 9 December 1999) amended the *International Tax Agreements Act 1953* to overcome the decision of the Full Federal Court in the 1997 case of *Commissioner of Taxation v Lamesa Holdings BV*.[24] In that case, the court considered a situation in which a Dutch resident company disposed of shares in an Australian company which owned a subsidiary company which owned land in Australia. The court held that the Alienation of Property Article in the relevant Double Tax Agreement (DTA) entitled Australia to tax a Dutch resident which sold land in Australia, or a Dutch resident which sold shares in an Australian company where that company's assets consisted principally of land in Australia, but did not extend to the disposal of land owned through a chain of companies.

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22 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 312.

23 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 312.

24 (1997) 77 FCR 597.

2.54 The amendments proposed in the bill were intended to enable Australia to tax alienations or dispositions of shares or comparable interests in companies the value of whose assets was wholly or principally attributable (whether directly or indirectly) to land in Australia. These amendments applied retrospectively to gains from alienations or dispositions after 12 noon on 27 April 1998 – the date of a Press Release issued by the Treasurer.

2.55 Noting that transactions involving the disposal of shares in a company are negotiated and implemented over a lengthy period of time, the Corporate Tax Association queried the effect of these amendments on transactions which might not have been completed by the date of the Press Release, but which might have been well under way (and which might have become commercially irrevocable) by that date.

2.56 In *Alert Digest No 2 of 2000*, the Committee referred this issue to the Assistant Treasurer, who responded that:

> After the *Lamesa* decision, the Commissioner and the Government considered various ways in which Australia could act to preserve its DTA taxing rights, because of the ongoing potential for major revenue losses and the opportunities for relatively easy tax avoidance exposed by the decision. As you will be aware, it is not unprecedented for the Government of the day to legislate to close off risks to the revenue exposed by an adverse court decision.
>
> The approach outlined in the Treasurer's Press Release of 27 April 1998 was therefore decided upon, as a fair and balanced approach which reflected the intent of the DTA provisions, but did not affect already completed alienations. It is relevant that the ATO is not aware of any rulings being sought on the issue during the period while consideration was being given to the most appropriate response. Accordingly, those who relied on the Court decision, without checking the Commissioner's view, but had not actually alienated the property (the point at which the liability to tax arises) should be governed by the DTA rules clarified in the legislation.
>
> To make exceptions where alienations had not occurred, but were in train at the time of the Press Release, would put such arrangements in a privileged position (as compared with later transactions, or transactions without interposed entities) that would not appear to be justified, and would involve a large potential risk to the revenue. It would also allow for the argument that alienations a long time into the future were set in train prior to the Press Release, even if the alienation did not occur for months or perhaps even years later. A provision fairly dealing with transitional cases might also have to deal with each case on a factual, case by case, basis that could create uncertainties of its own.[25]

2.57 The Committee thanked the Assistant Treasurer for this response but noted that its concern was with incomplete transactions only where there was objective evidence that they were under way at the relevant date. Exempting such transactions from the retrospective operation of this bill did not confer a privilege, it removed a disadvantage, particularly where such transactions, though incomplete, had become commercially irrevocable.

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25 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 211-12.

2.58 Further, it was appropriate that taxpayers acted in reliance on the decisions of courts rather than on the view of the Tax Commissioner. The courts adjudicated on the law; the Commissioner administered it. The Committee reiterated the observation in its *Fifth Report of 1997* that "People are entitled to be dealt with for their actions and omissions in accordance with the law prevailing at the time of their occurrence and not with a legal regime instituted at a later date". Consequently, the Committee continued to draw the Senate's attention to this provision.

2.59 In debate, the Senate noted that this bill was an example of legislation by press release and debated a proposed amendment to the Second Reading of the bill expressing concern at the delay in bringing the legislation before the Parliament.[26] The Australian Democrats moved amendments designed to address the transitional problem identified by the Committee[27] but the bill was passed with retrospective operation.[28]

Example: Radiocommunications Legislation Amendment Bill 1999

2.60 This bill was introduced on 18 February 1999. In *Alert Digest No 3 of 1999*, the Committee considered a provision relating to the taxation of income from the use of spectrum licences owned by non-residents. This amendment was to apply retrospectively from 11 March 1998 – the date the proposal had been announced in a press release issued by the Treasurer. The Committee sought advice as to the applicability of the 'six month rule'.

2.61 The Minister 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 1998 the owners of spectrum licences could conceivably avoid capital gains tax."[29]

2.62 The Committee thanked the Minister for this response but concluded that, given that none of the spectrum licences had yet been used, this did not, of itself, seem a sufficient reason for the Senate to fail to apply the 'six month rule' and amend the commencement date accordingly. The Senate failed to apply the terms of its resolution of 8 November 1988 and the bills were passed with an unamended commencement date.[30]

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26 See, for example, Senate, *Hansard*, 16 August 2000, pp 16420, 16423 (Senator the Hon P Cook) 16426-7 (Senator A Murray).

27 Senate, *Hansard*, 16 August 2000, p 16438.

28 Senate, *Hansard*, 16 August 2000, p 16446-7.

29 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 111.

30 Senate, *Hansard*, 13 April 2000, p 14070.

Bills reintroduced in the 39th Parliament

2.63 The 39th Parliament saw the reintroduction of a number of tax bills which had not been passed during the previous Parliament. As the Assistant Treasurer observed in responding to the Committee on Taxation Laws Amendment Bill (No 2) 1998, the Senate Resolution of 8 November 1988 "does not specifically take into account Bills which lapse if Parliament is prorogued for a federal election. However, the Senate has previously agreed that a lapsed measure which is reintroduced should retain the status it had when first introduced, so far as the six month rule is concerned (for example, the Trust Loss measures contained in *Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997*. In the case of these measures, the spirit of the resolution has been met as the details of the proposed laws were made available to the public in the form of a Bill introduced into Parliament within the required 6 months".[31]

2.64 Similar considerations arose in relation to Taxation Laws Amendment Bill (No 5) 1999, which was introduced into the Parliament on 11 March 1999. Certain provisions applied retrospectively from 27 February 1998 – the date of a press release issued by the Treasurer. These provisions had originally been included in Taxation Laws Amendment Bill (No 4) 1998, which had been introduced in the previous Parliament on 2 April 1998 and referred to a Senate Committee which had recommended a number of technical amendments. In effect these provisions had been available for public scrutiny since April 1998 – within a period of six months from their date of application.

2.65 The Committee thanked the relevant Ministers for each of these responses.

Abrogation of the privilege against self-incrimination

2.66 At common law people can decline to answer a question on the grounds that their reply might tend to incriminate them. Legislation which interferes with this common law entitlement trespasses on personal rights and liberties and causes the Committee considerable concern.

2.67 At the same time, the Committee is conscious of the need government has for enough information to enable it to properly carry out its duties to the community. Good administration in some circumstances might necessitate the obtaining of information which can only be obtained, or can best be obtained, by forcing someone to answer questions even though this means that he or she must provide information showing that he or she may be guilty of an offence. Those proposing a bill which affects or removes a person's right to silence usually do so on this basis.

2.68 The Committee does not see the privilege against self-incrimination as absolute. However, before it accepts legislation which includes a provision affecting

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31 Scrutiny of Bills Committee, *First to Eleventh Reports of 1998*, p 250.

this privilege, the Committee must be convinced that the public benefit which will follow from its negation will decisively outweigh the resultant harm to the maintenance of civil rights.

2.69 When dealing with the Prawn Export Promotion Bill 1994, the Committee elaborated on this test as follows:

> While acknowledging that in some circumstances, such as national security or irreversible damage to the Great Barrier Reef, the need to obtain information may be seen as prevailing over the right not to incriminate oneself, the committee questions whether the advantages to be gained by this provision outweigh the trespass on personal rights in abrogating that right.[32]

2.70 One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. The Committee generally holds to the view that the interest of having government properly informed can more easily prevail where the loss of a person's right to silence is balanced by a prohibition against both the direct and indirect use of the forced disclosure.[33] The Committee is concerned to limit exceptions to the prohibition against such use. In principle, a forced disclosure should be available for use in criminal proceedings only when they are proceedings for giving false or misleading information in the statement which the person has been compelled to make.

Example: Australian Federal Police Legislation Amendment Bill 1999

2.71 Among other things, this bill inserted a new Part in the *Australian Federal Police Act 1979*, dealing with the command powers of the AFP Commissioner. This new Part included a number of provisions which abrogated the privilege against self-incrimination for employees and special members of the Australian Federal Police in certain circumstances. Those circumstances included giving information, answering questions and producing documents; providing information about the employee's financial affairs; and undergoing drug testing.

2.72 As noted above, provisions which abrogate the privilege against self-incrimination are usually a matter of concern to the Committee and, to some extent, this issue was recognised in the bill. The bill imposed some limits on the circumstances in which information obtained under compulsion could be used in evidence. For example, the results of drug and alcohol tests could 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 could only be used in disciplinary proceedings.

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32 Scrutiny of Bills Committee, *First to Nineteenth Reports of 1995* pp 94-95

33 See, for example, Choice of Superannuation Funds (Consumer Protection) Bill 1999 discussed in *Alert Digest No 15 of 1999*, p 12 and Air Passenger Ticket Levy (Collection) Bill 2001 discussed in *Alert Digest No 14 of 2001*, p 6.

2.73 In one sense these provisions might be seen as forming part of the conditions of employment of employees and special members of the Australian Federal Police. They did not apply to members of the public generally, and represented an attempt to reconcile the competing interests of obtaining information and protecting individual rights. However, in another sense, the provisions might be seen as creating a system of control which differed markedly from that which applied to other public servants, or to employees generally, or to members of the public. It seemed that information and testing could be compelled whether or not there was a reasonable suspicion of misconduct.

2.74 Secondly, it seemed that any AFP employee might be ordered to provide information – not only officers engaged in active operations. Finally, it was unclear what protections were available to AFP employees who considered that these powers may have been misused, or used inappropriately, by a future Commissioner, and it was not clear why the rights to which general members of the public were entitled could be properly restricted in relation to those who were also members of the AFP.

2.75 With regard to the issue of self incrimination in circumstances where there was no reasonable suspicion of misconduct, the Minister responded:

> 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).
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> 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.[34]

2.76 With regard to the application of the provisions to any AFP employee, rather than to AFP officers engaged in active operations, the Minister responded:

> 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

34 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999,* pp 472-477.

> 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.

2.77 With regard to the protections available against abuses of the powers, the Minister responded that:

- 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 (reg 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.

2.78 With regard to restricting the rights available to members of the public who are also members of the AFP, the Minister drew attention to the High Court's decision in *Police Service Board v Morris* where, in relation to the privilege against self incrimination, the court held that the relevant provision:

> "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).

2.79 The Committee thanked the Minister for this detailed response and acknowledged that the rights and liberties enjoyed by police officers as members of a "disciplined force" had 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 noted that this bill did appear to trespass on the rights enjoyed by AFP personnel, and left the issue of whether the bill trespassed unduly on those rights for the consideration by the Senate as a whole.

Reversal of the onus of proof

2.80 At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence; the accused is not required to prove anything. Provisions in some legislation reverse this onus and require the person charged with an offence either to prove or disprove some matter to establish his or her innocence (impose a legal burden on that person) or require that person to point to evidence that suggests a reasonable possibility that the matter exists or does not exist (impose an evidential burden on that person). The Committee usually comments adversely on a bill which places the onus on an accused person to disprove one or more of the elements of the offence with which he or she is charged.

2.81 The Committee's general practice over the years has been to adopt the approach of the (then) Senate Standing Committee on Constitutional and Legal Affairs, as expressed in its report *The burden of proof in criminal proceedings*. In that report, the Constitutional and Legal Affairs Committee stated that it was of the opinion that:

> no policy considerations have been advanced which warrant an erosion of what must surely be one of the most fundamental rights of a citizen: the right not to be convicted of a crime until he [or she] has been proved guilty beyond reasonable doubt. While society has the role by means of its laws to protect itself, its institutions and the individual, the Committee is not convinced that placing a persuasive burden of proof on defendants plays an essential or irreplaceable part in that role.[35]

2.82 In recent years, the Committee has commented on an apparently growing tendency in Commonwealth legislation to impose legal or evidential burdens on persons charge with offences. For example, in its *Nineteenth Report of 1992* the Committee discussed certain provisions of the Tobacco Advertising Prohibition Bill 1992 in the following terms:

> … there is an increasing tendency to reverse the onus in relation to such provisions. While the justification given, in most cases, appears reasonable, the Committee notes that the same justification is equally applicable in relation to murder and other serious

35 Parliamentary Paper No 319/1982, p 47.

> offences. The expanding use of the reversal of onus in legislation is, therefore, a matter of great concern to the Committee.[36]

2.83 During the 39th Parliament, the Committee commented on a number of clauses which reversed the onus of proof. Some examples are set out below.

Example: Dairy Industry Adjustment Bill 2000

2.84 In *Alert Digest No 2 of 2000* the Committee observed that certain provisions of this bill reversed the onus of proof where a person was prosecuted for disclosing information or documents relating to the Dairy Industry Adjustment Program. In general terms, the bill declared it an offence to record or disclose information or documents obtained in the course of a person's official employment. However, no offence would be committed where such information was recorded or disclosed for the purposes of the Dairy Structural Adjustment Program Scheme, or where the recording or disclosure happened in the course of the person's official duties, or where the disclosure was not likely to enable the identification of a particular entity, or was made to a related entity, or was connected with the administration of the Dairy Exit Program. The defendant bore an evidential burden in relation to each of these matters.

2.85 The Committee noted that the usual reason for imposing an evidential burden in these circumstances is that the matter to be raised is peculiarly within the knowledge of the defendant. While some of the matters referred to in the bill clearly were within the defendant's knowledge, others (for example, disclosure to a related entity, or disclosure not likely to enable identification) were not. The Committee sought the Minister's advice as to why the defendant should bear an evidential burden in relation to these matters.

2.86 The Minister responded by moving an amendment to remove the evidential burden in relation to those matters.

Example: Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999

2.87 Among other things, this bill amended the Criminal Code to provide for a range of extended geographical jurisdictional options which could apply to all Commonwealth offences. Each provision specifying the extent of geographical reach then allowed for a defence to the liability imposed by the preceding provisions in that provision. For example, proposed subsection 14.1(3) states that a person is not guilty of a relevant offence if the conduct constituting the alleged offence occurred wholly in a foreign country (but not on board an Australian aircraft or ship) and in the foreign

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36 Scrutiny of Bills Committee, *First to Twentieth Reports of 1992*, p 603.

country where the conduct took place there was no law that created a corresponding offence. The defendant bears an evidential burden in relation to these matters.

2.88 With regard to this provision, the Explanatory Memorandum states that it "provides the possibility of a defence" and that this defence is "that there was no offence in the place where the conduct occurred … the inquiry is not into whether the particular conduct alleged would have amounted to an offence of some kind or other under the law of [country] X … the inquiry is into whether [country] X has in its law a corresponding offence." While significant, these words provide no explanation for the adoption of this form of drafting, nor do they seek to justify the imposition of an evidential burden on a defendant to raise issues of the content of foreign law.

2.89 The Committee also queried the relationship between proposed subsections 14.1(2) and 14.1(3). Under subsection 14.1(2) the prosecution bore the onus of proving that the conduct constituting the offence occurred partly or wholly in Australia. Under proposed subsection 14.1(3) the defendant bore an evidential burden of showing that the conduct constituting the offence occurred wholly in a foreign country. It is not clear to the Committee how these two burdens would relate in practice.

2.90 The Minister for Justice and Customs responded that the provisions of concern to the Committee were "protective" of the rights of the citizen in that there was currently no specified defence of this nature under the existing *Crimes Act 1914* equivalent (section 3A).

> The defence is included to ensure there is no undue trespass on personal rights and liberties in relation to offences where standard or category A, B or C geographical jurisdiction applies. (There is, of course, no similar defence in relation to category D - unrestricted jurisdiction.)
>
> The provisions impose an *evidential burden* upon the defendant in relation to these matters. The Criminal Code defines an *evidential burden* as the burden on the defendant to adduce or point to evidence that suggests a reasonable possibility that there is no corresponding foreign law, (sections 13.3(3) and (6) of the *Criminal Code*). If this occurs, then it is for the prosecution to prove beyond a reasonable doubt that there is a corresponding law. The burden of proof on the defendant is not a particularly onerous requirement. It would be unacceptably onerous on the prosecution to prove in every case beyond a reasonable doubt that there were laws of a corresponding kind, even where there was no evidence that this was an issue.[37]

2.91 The Committee thanked the Minister for this response but continued to raise concerns about the way in which requiring a defendant to adduce evidence about the content of foreign law would operate in practice. The Minister provided a further response which stated that:

> If someone chooses to conduct his or her affairs in another country it is reasonable to expect the person to appreciate there is a risk he or she will offend some local law. For example, if the person goes to a very religious society and there are offences prohibiting the consumption of liquor, few would have any problem with

37 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 454-55.

> that person being prosecuted for breaking that law. It is reasonable to expect the person to be careful about differences in the law.
>
> However, an example relevant to the proposed provisions is where the defendant goes to that other country and does things that are illegal in his or her own society (such as having sex with a young child). Surely if that person has come to the view that the activity is not illegal in that other country, he or she should have some basis for that view and be able to point to something of substance which led him or her to reach that conclusion. If the person is able to point to something which suggests that there is a reasonable possibility that there is no corresponding foreign law, then the prosecution must prove such a law does exist beyond a reasonable doubt. This is both reasonable and good policy.[38]

2.92 The Committee thanked the Minister for this further explanation and for fully briefing the Committee.

The onus in issues of belief and intent

2.93 While an accused is generally in the best position to know what he or she believed at the time of an alleged crime, this alone should not determine the issue of who should bear the onus of proof in establishing whether or not a crime has in fact been committed. A person's belief in carrying out an action goes very much to the issue of his or her intent when doing so. The prosecution usually bears the onus of proving all elements of a charge it brings against a person, including his or her intent. This is so even with the most serious of charges such as those of murder and of rape.

2.94 There are means of proving a person's belief when carrying out an action, and his or her intent in doing so, other than by him or her giving evidence about them at a court hearing into the matter. For example, a prosecutor can use the circumstances and the context of an accused's action to show that he or she must have had a particular belief when carrying it out and a criminal intent while performing it. Or a prosecutor can make use of admissions made by the accused either by words or conduct prior to him or her coming to court.

2.95 Where a person's belief at the time he or she carries out an action goes to the issue of his or her intent in performing it then the onus of proving that belief should generally be on the prosecution.

2.96 Where legislation provides that a particular state of belief is to constitute an excuse for carrying out an action which would otherwise be a crime, and in that way allows a defence to a person who is accused of committing one, the Committee will more readily accept the onus of proof being placed on him or her to prove that excuse. The accused should have to discharge any onus on the balance of probabilities only.

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38 Scrutiny of Bills Committee, *Second Report of 2001, p 36.*

Strict and absolute liability offences

2.97 An offence is one of strict liability where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. In other words, someone is held to be legally liable for their conduct irrespective of their moral responsibility. A person charged with a strict liability offence has recourse to a defence of mistake of fact. Where an offence is expressed to be one of absolute liability, then this defence is unavailable.

2.98 The Committee will draw the Senate's attention to provisions which create such offences and has expressed the view that, where a bill creates such an offence, the reasons for its imposition should be set out in the Explanatory Memorandum which accompanies the bill.[39]

2.99 The imposition of strict liability may be appropriate in some circumstances. For example, in *Alert Digest No 10 of 2000*, the Committee queried the imposition of strict liability in relation to certain elements of offences created under the Criminal Code Amendment (United Nations and Associated Personnel) Bill 2000. The Attorney-General responded that the application of strict liability meant that the prosecution would not have to prove that an offender knew that their victim was a UN or associated person, or knew that the victim was engaged in a relevant UN operation, or (where the offence involved damage to property) that the property damaged was occupied or used by a UN or associated person:

> Those elements deal with the circumstances in which the relevant conduct occurs. The reason for including the elements is that they are necessary to trigger Commonwealth jurisdiction which would be based on the external affairs power arising from Australia's participation in the above Convention. The elements in question do not add to the gravity of the offences. A principle of criminal responsibility recognised under existing law, and preserved in the *Criminal Code,* is that the prosecution should not be required to prove awareness on the part of a defendant to an element of an offence which is prescribed only for jurisdictional reasons.
>
> A person will face criminal liability because of his or her conduct eg., in harming or causing the death of another person. To require proof that the person was also aware that the victim was a UN or associated person connected with a particular form of UN operation would seriously and unnecessarily inhibit the capacity of prosecutors to use the new offences, particularly in relation to attacks against civilians supporting UN operations. This is because a person accused of murdering or seriously injuring a UN worker might be able to argue that he or she did not even think about the status of the victim or the victim's connection with a UN operation … It would not be a just result if a person accused of committing a serious attack against a UN worker were to escape liability because of a technicality of this nature following proof of the other elements on an offence.[40]

2.100 The Committee accepted that strict liability might appropriately apply to those elements of offences which are included to attract Commonwealth jurisdiction.

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39 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000,* p 358.

40 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 374-5.

2.101 Strict liability is also more likely to be appropriate for:

- offences of a regulatory nature – particularly offences designed to discourage careless non-compliance with a statute (as well as intentional or reckless breaches);
- offences dealt with under an infringement notice scheme, with relatively low penalties – the greater the penalty, the less likely that strict liability will be appropriate; and
- offences where evidence of the relevant mental elements such as intention or recklessness is almost impossible to obtain in the absence of admissions or independent evidence (particularly where the conduct involves a failure to do an act by an entity such as a corporation).[41]

Example: Therapeutic Goods Legislation Amendment Bill 1999

2.102 In *Alert Digest No 3 of 1999*, the Committee considered certain strict liability offences relating to the publication of non-approved advertisements for therapeutic goods. These offences had been transposed from the Therapeutic Goods Regulations to the principal act to achieve a greater degree of consistency with provisions in the *Broadcasting Services Act 1992,* which created similar offences for the broadcasting of such advertisements, and to better reflect the serious nature of a breach of the relevant advertising code which was designed to discourage self-diagnosis and self-treatment of serious medical conditions.

2.103 The Committee acknowledged that moving these offence provisions to the principal act was clearly a worthwhile measure. However, in doing so, the opportunity to clarify a number of drafting and other issues– principally the persons affected and the need for imposing strict liability itself - had been lost.[42]

Example: Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999

2.104 This bill inserted a number of new absolute liability offences in the Criminal Code. One of these offences was knowingly and dishonestly causing a loss to a Commonwealth entity. The prosecution was not required to prove that the offender knew that a Commonwealth entity was involved. Another offence involved conspiracy to dishonestly cause a loss to a Commonwealth entity. Again, the prosecution was not required to prove that the offender knew that a Commonwealth entity was involved. The Explanatory Memorandum made no reference to the need for either of these provisions, and the Committee sought advice from the Minister.

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41 See, for example, discussion of the Financial Sector Legislation Amendment Bill (No 1) 2000 and the Excise Amendment (Compliance Improvement) Bill 2000 in Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 244-247 and 269-271.

42 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 70.

2.105 The Minister responded that:

> The essential reason for including this element (knowledge that a Commonwealth entity is involved) is to trigger Commonwealth jurisdiction. The element does not play any other role, eg in defining the gravity of the offence. Under the existing law the part of the offence which brings it within Commonwealth jurisdiction is not considered to be an element about which the prosecution must prove awareness on the part of the defendant …
>
> If a person steals property he or she should face the consequences regardless of whether there was an awareness as to Commonwealth ownership of that property. To require proof that the person was also aware that it was Commonwealth property would seriously and unnecessarily inhibit the capacity of the prosecutors to use the new offences. This is because many defendants would be able to convincingly demonstrate that they did not even think about who owned the property. Further it is also true that many in the community have very little appreciation of the divisions between Commonwealth and State/Territory functions. Many defendants would be able to demonstrate that they had no idea whether the property was owned by the Commonwealth or the State. It would not be a just result if defendants were able to escape liability following proof of all the other elements of each offence if a technicality of this nature were available to them.
>
> The same drafting technique is used in relation to a number of offences in the proposed Bill. Those responsible for preparing the legislation have been very careful to ensure that the use of absolute liability is limited to elements of offences which have no bearing on the true culpability of the defendant. The *Criminal Code* introduces an approach to the creation of offences which emphasises the principle that the prosecution must prove fault in relation to elements that amount to conduct, circumstances or results which when combined provide sufficient culpability to warrant the imposition of a criminal conviction and penalty. The use of absolute liability in these offences is one.[43]

2.106 The Committee thanked the Minister for this detailed response.

Effect of the adoption of the Criminal Code

2.107 The 39th Parliament saw the introduction of many bills which provided for the application of the Criminal Code to offence provisions in Commonwealth legislation. In general terms, the Criminal Code requires that legislation must now explicitly state that strict liability applies to an offence or to an element of an offence – strict liability can no longer be deemed to apply to an offence. The intention behind most of these amendments, therefore, was not to create new strict liability offences, but simply to identify existing offences of a strict liability character.

2.108 In considering these bills, the Committee accepted that existing strict liability offences should be identified and sought confirmation in each case that no new strict liability offences had been created.[44]

2.109 On 28 June 2001, the Committee received a reference from the Senate to inquire into the broader issue of the criteria used to characterise offences (or elements

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43 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 455-56.

44 See, for example, Scrutiny of Bills Committee, *Second Report of 2001*, pp 27, 43, 47.

of offences) as appropriate for absolute or strict liability.[45] A report on this inquiry will be tabled during the 40th Parliament.

Powers of search and seizure without warrant

2.110 The Committee consistently draws the Senate's attention to provisions which allow search and seizure without the issue of a warrant. As a general rule, a power to enter premises without the consent of the occupier, or without a warrant, trespasses unduly on personal rights and liberties, and the Committee will draw the grant of one to the Senate's attention. A provision giving an authority such a power will be acceptable only where the circumstances and gravity of the matter in question justify one being given.

2.111 During the 39th Parliament, the Committee produced a report specifically on the issue of search and entry provisions in Commonwealth legislation. That report is discussed in detail in Chapter 7 of this report.

2.112 The Committee rarely approves of provisions which give the power to issue warrants to legally unqualified or non-judicial officers, such as justices of the peace. This particular issue did not arise during the 39th Parliament.

Example: A New Tax System (Goods and Services Tax Administration) Act 1998

2.113 Among other things, this bill added a new section 66 to the *Taxation Administration Act 1953*. This new section allowed 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 was made for obtaining a judicially sanctioned warrant, which is a generally accepted safeguard in such circumstances.

2.114 In addition, the section did 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. The Committee sought the Treasurer's advice on these matters. The Treasurer responded that:

- proposed section 66 conferred the same powers of access on authorised officers as was currently conferred by section 263 of the *Income Tax Assessment Act 1936*, section 109 of the *Sales Tax Assessment Act 1992*, section 127 of the *Fringe Benefits Tax Assessment Act 1986*, and section 38 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (among other legislation administered by the Commissioner of Taxation);

45 *Journals of the Senate*, No 197, 28 June 2001, p 4439.

- requiring that a warrant be obtained before authorised officers entered premises to inspect documents or goods 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, was governed by The Taxpayers' Charter and comprehensive guidelines on the use of access and information gathering powers, both of which were publicly available; the ATO also controlled the use of these powers through a system of delegation and authorisation of ATO officers;
- the access powers, as currently framed, provided ATO officers with flexibility in managing the conduct of their activities according to the co-operation they receive – to impose a warrant requirement would produce an unnecessarily adversarial climate;
- delay resulting from the need to obtain a warrant could jeopardise the outcome of audits where crucial evidence may be at risk; and
- limiting or categorising, by reference to attributes or qualifications, those officers who might be authorised to exercise these powers was also opposed.[46]

2.115 The Committee thanked the Treasurer for this response, and noted the precedent access powers elsewhere in tax legislation. It further noted that, under section 66, authorised officers need not be ATO officers as intimated in the Treasurer's response. Proposed section 20 of the Administration Bill stated that an authorised officer meant "a person the Commissioner has authorised to exercise powers or perform functions". Elsewhere in the tax legislation, a person might even include a company. The Committee sought further advice from the Treasurer as to why this search and entry power had been expressed so broadly, and whether it should be restricted to senior ATO officers.

2.116 On this issue, the Treasurer responded that section 66 empowered 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):

> 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).

46 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 229-30.

> 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 ...
>
> [D]ealings 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.[47]

2.117 The Committee sought confirmation that the Commissioner might only authorise "an ATO officer" rather than "a person" to exercise access powers under the bill. The Treasurer responded that:

> 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

47 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 335-37.

> 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.[48]

2.118 The issue at the heart of the Committee's concern in relation to this bill was 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".

2.119 The search and entry powers available to the 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 to 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.

2.120 The GST Administration Act simply provided that 'a person' may be authorised to exercise the ATO's search and entry powers. The Treasurer's response clarified his expectation that, for the purposes of the indirect tax laws, such 'persons' would be ATO officers, but might otherwise be "officers of the Commonwealth, or employees of the Australian Public Service". The Committee noted 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".

2.121 It was clear that the potential class of 'authorised persons' was to be limited in practice. The Committee considered that it would have been helpful if this implicit limitation had been made explicit in the legislation itself. This had happened in other legislation administered by the Commissioner of Taxation – for example, proposed section 45 of the Superannuation (Unclaimed Money and Lost Members) Bill 1999 stated 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 included search and entry provisions. There seemed to be no difference in principle, or in practice, between that bill and the GST Administration Act.

2.122 Notwithstanding that the GST Administration Act had been passed, the Committee continued to draw the Senate's attention to this search and entry provision

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48 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 337-38.

and suggested that its scope should be addressed when amendments to the Act were next considered.

Example: Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000

2.123 This bill created a legal framework for an electronic business environment for cargo management. It also established a new approach to compliance management and improved controls over cargo and its movement where there had been a failure to comply with regulatory requirements. The bill inserted a number of provisions which repealed the existing 'audit' powers in the Customs Act, and replaced them with new 'monitoring powers'. In his Second Reading Speech, the Minister observed that these provisions had been drafted "in accordance with the Fourth Report of the Senate Standing Committee for the Scrutiny of Bills dated 6 April 2000 which examined entry and search provisions in Commonwealth legislation".

2.124 The Committee thanked the Minister for having regard to the principles set out in its Fourth Report of 2000, but sought further advice in relation to three principles which did not seem to have been addressed in this bill:

- whether occupiers should be informed of their rights and responsibilities, and given an opportunity to have an independent third party present, during a search;
- clarifying the situation of officers exercising monitoring powers who found evidence of an offence that was not a Customs-related offence; and
- whether Customs intended reporting annually to the Parliament on the exercise of its monitoring powers.[49]

2.125 The Minister responded that:

- Customs was currently developing guidelines on the administrative aspects of the exercise of its monitoring powers – the purpose of these guidelines was to provide a framework for Customs officers to administer specific elements of the legislation. These guidelines would include informing occupiers of their rights and responsibilities, regardless of whether the monitoring powers were exercised with the consent of the occupier or under a monitoring warrant, and rights such as the privilege against self-incrimination would be included in this notification;
- where a monitoring officer found evidence of the commission of an offence against a law that was *not* a Customs-related law, the monitoring officer was authorised to inform another relevant agency, usually the police; and

49 Scrutiny of Bills Committee, *Ninth Report of 2001*, p 374-75.

- it was proposed to continue the current practice of reporting statistical information on the result of compliance activities undertaken by Customs in the Annual Report of the Australian Customs Service. This information is reported quantitatively.[50]

2.126 The Committee thanked the Minister for this response and noted that guidelines were under development. The Committee was of the view that the development of such guidelines was important, but they were essentially administrative documents, and rights and liberties were too significant to be left to administrative documents. For the purposes of ensuring that occupiers received appropriate information, the Committee sought further advice as to whether these guidelines would be subject to parliamentary scrutiny. The Minister responded that the Government had now agreed to amend the bill to require Customs to formally notify occupiers of premises of their rights and obligations before monitoring powers were exercised on those premises.[51]

2.127 The Committee thanked the Minister for this response and for the amendment moved to give effect to its recommendation.

Removing professional privilege

2.128 There is a long-standing principle that professional communications between a person and his or her legal adviser should be confidential. The Committee closely examines legislation which removes or diminishes this right. This issue did not arise during the 39th Parliament.

Oppressive powers

2.129 The Committee will usually comment unfavourably on legislation which makes people subject to 'oppressive' bureaucratic powers.

2.130 For example, during the 39th Parliament, the Committee drew the Senate's attention to the provisions of the Proceeds of Crime Bill 2001, which proposed to establish a civil regime for the forfeiture of assets obtained as a result of criminal activity. This civil forfeiture regime would operate in addition to, and parallel with, the existing conviction-based regime.

2.131 The Committee noted that this bill seemed to authorise the removal of assets from a person's control simply because there was a reasonable suspicion that they were connected with serious criminal activity. Many long-established protections under the criminal law which, in general terms, were recognised in the existing *Proceeds of Crime Act 1987*, had not been included in this bill because they were seen

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50 Scrutiny of Bills Committee, *Ninth Report of 2001*, pp 376-77.

51 Scrutiny of Bills Committee, *Ninth Report of 2001*, pp 379.

to be inconvenient or to hinder law enforcement. Given this, the Committee stated that the bill seemed to trespass on the rights of persons who had neither been charged with, nor convicted of, any wrong-doing.[52]

2.132 The bill lapsed when the 39th Parliament was prorogued.

Data-matching and the use of tax file numbers

2.133 In recent years, the Committee has continued to comment on the growing use of tax file numbers and the increasing resort to the data-matching program. Under this program, data held by a range of Commonwealth agencies is identified with the aid of tax file numbers and compared.

2.134 For example, in its *Thirteenth Report of 2000* the Committee discussed the Social Security and Veteran's Entitlements Legislation Amendment (Private Trusts and Private Companies – Integrity of Means Testing) Bill 2000. This bill proposed to revise the means test treatment of private companies and private trusts under social security and veterans' affairs laws.

2.135 Among other things, the bill authorised the Secretary of the Department of Family and Community Services and the Repatriation Commission respectively to obtain from the Commissioner of Taxation the tax file number (TFN) of a trust even though that trust was not a recipient of, or an applicant for, benefits under the relevant Acts. The trust's TFN was to be provided if the Secretary (or the Commission) had reason to believe that the relationship between a particular trust and a particular individual (or an associate) might be relevant to the operation of the other new provisions to be inserted by the bill.

2.136 The Explanatory Memorandum noted that "Currently, with the exception of data-matching against tax returns conducted under the Data-matching Program, TFNs cannot be used in Centrelink/Australian Taxation Office information gathering for compliance purposes."

2.137 The Committee observed that these subsections marked yet another step in the process of providing information ostensibly collected solely for taxation purposes to persons outside the Tax Office.

2.138 This bill had been introduced with the intention of ensuring greater equity in the treatment of social security "customers" irrespective of how their assets were held. However, the Committee again noted 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:

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52 Scrutiny of Bills Committee, *Alert Digest No 14 of 2001*, pp 12-13.

> 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.
>
> This system is for the exclusive and limited use of the Tax Office – it will simply allow the better use of information the Tax Office already receives.

2.139 The Committee also noted 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".

2.140 The Committee stated that this process had 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 represented yet another example of this process.[53]

The continuing use of 'old' convictions

2.141 During the 39th Parliament, the Committee dealt with a number of bills which sought to make use of 'old' convictions when determining whether an applicant was a fit and proper person. For example, in *Alert Digest No 8 of 1999* the Committee considered the ACIS Administration Bill 1999.

2.142 Division 5 of this bill set out the formal requirements and procedures for registration under the Automotive Competitiveness and Investment Scheme. In determining whether an applicant (including the director of an applicant company) was a fit and proper person, the Departmental 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.

2.143 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 now, years later, may come to be denied registration as a consequence.

2.144 Secondly, such provisions seem 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 relationship between this 10 year period and limitation periods in other legislation was not clear.

2.145 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

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53 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 387-88.

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, permitted the fact of a conviction to affect aspects of an applicant's life for a further 9 years after that conviction had been dealt with.

2.146 Fourthly, the provision was 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 excluded rights by reference to the maximum penalty that is provided for an offence, rather than the actual penalty imposed. Under the provision in this bill, a person who was actually fined $50 for an offence punishable by imprisonment for a year must have this conviction taken into account.

2.147 Finally, the provision did not make clear how information about past convictions will come to the Secretary's attention - whether inquiries would be made of law enforcement authorities around Australia, or whether applicants would be required to disclose previous convictions.

2.148 The Committee noted that the bill required that past offences be taken into account – such offences would not necessarily preclude registration. However, there was a real possibility that such a provision might lead to the rejection of an application in circumstances of apparent unfairness.

2.149 In response, the Minister:

- disputed that the requirement to disclose past convictions was retrospective: the bill simply created a new entitlement (to register under the ACIS scheme), subject to certain preconditions, including disclosure of certain prior offences; there seemed 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;

- stated that the 10 year limitation period on disclosure of prior offences had been adopted to ensure consistency with existing 'spent convictions' provisions in the *Crimes Act 1914* – a lesser five year limitation period applied to the disclosure of offences committed as a minor, and this similarly applied to the disclosure requirement under the bill;

- was not persuaded that requiring an applicant for a licence or registration under a Commonwealth law to disclose a previous conviction was a 'double punishment' – people who do not commit serious offences were entitled to expect that their law abiding conduct would 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 – this is why a conviction need not be disclosed more than 10 years after it is imposed;

- was of the view that, to establish a disclosure threshold by reference to the actual punishment imposed, rather than the maximum penalty available, for an offence would create too much scope for ambiguity; and
- noted that an application for registration would be made on an approved form, which would ask an applicant to declare any relevant past convictions – it was not anticipated that the Secretary would, in the normal course of events, actively seek out information about past convictions.[54]

2.150 The Committee thanked the Minister for this comprehensive response. However, the issue arose again in relation to the Aged Care Amendment Bill 2000.[55] This bill made it an offence for a "disqualified individual" to be engaged as one of the key personnel of an approved aged care provider. An individual was a disqualified individual if he or she "has been convicted of an indictable offence" which occurred before, at or after the commencement of the section.

2.151 The Explanatory Memorandum stated that pre-commencement offences had been included "because of the concern that such individuals pose a risk to frail, often vulnerable, aged care recipients while they remain key personnel, particularly where they have direct responsibility (executive, management, overall nursing or day-to-day responsibility) for the care of those care recipients".

2.152 In addition to the issues noted above in relation to the ACIS Administration Bill, the Committee drew attention to two related issues. First, this particular provision did not specify which offences should lead to disqualification. This might see apparently 'irrelevant' offences taken into account while other apparently 'relevant' offences might be disregarded.

2.153 Section 4G of the *Crimes Act 1914 (Cth)* provides that, unless a contrary intention is apparent, indictable Commonwealth offences are those punishable by imprisonment for more than 12 months. Offences such as removing a fish from a net or trap without authority (under *Fisheries Act 1952* s 13A) or using a transmitter on a foreign vessel, aircraft or space object to transmit radio or television programs to the general public in Australia (under *Radiocommunications Act 1992* s 195(1)) or possessing unlawfully imported whale products (under *Environment Protection and Biodiversity Conservation Act 1999* s 233(1)) are all offences punishable by imprisonment for more than 12 months. Therefore, these are all apparently relevant indictable Commonwealth offences for the purposes of the bill. A person convicted of

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54 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 342-43.

55 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 438.

any of these offences at any time would be permanently disqualified from a position as a member of the key personnel of a provider of a residential aged care service.

2.154 However, a nursing home proprietor or employee found guilty of influencing the vote of a nursing home resident under section 325A of the *Commonwealth Electoral Act 1918* (an offence punishable by imprisonment for only 6 months) would not have committed an indictable offence, and would therefore not come within the definition of a disqualified individual. Arguably, a conviction for such an offence would be highly relevant to a person's fitness to be involved as a provider of a residential aged care service.

2.155 A second issue identified by the Committee concerned the inclusion of convictions recorded at any time before the commencement of the provision. Such a provision may be regarded as having retrospective effect, and exposing a person to double punishment for an offence which may have been committed many decades ago.

2.156 The Committee sought the Minister's advice as to why the bill could not set out a regime of offences which were relevant to the disqualification of key personnel of aged care providers, and why the bill placed no limit on the retrospective consideration of a person's previous offences.

2.157 With regard to including a regime of relevant offences in the bill, the Minister responded:

> The Committee suggests that, by way of a possible "list of offences ... the commission of which by a person may better reflect his or her suitability to provide aged care services", those "involving physical or emotional violence or cruelty, or fraud or dishonesty" might be appropriate. I strongly disagree, for a number of reasons.
>
> Such a list would inevitably be subject to interpretation. For example, it could be argued that apparently relevant offences for matters such as false imprisonment, or obstructing public officers would not fall within the list. It is unacceptable that such an additional raft of complexity should be allowed to cloud this important issue.
>
> Further, by way of comparison, no such distinction is made in laws concerning a variety of other situations across the social spectrum ...
>
> I am firmly of the opinion that, if the result of legislative intent and judicial process is such that a person's actions can be considered to amount to a serious crime, then that person should not be held out to the public as an appropriate person to have a position of substantial influence in relation to frail, vulnerable older Australians.[56]

2.158 With regard to the possibility that other relevant non-indictable offences might not be taken into account, the Minister responded:

> The Committee's suggestion that apparently 'relevant' offences may not be taken into account is also flawed to the extent that it fails to consider existing provisions

56 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 441.

> of the Act. Measures concerning the suitability of approved providers and their key personnel generally are contained in s. 8-3 of the Act, with further measures for revocation of approval in the event of unsuitability in terms of that section being contained in s. 10-3. The bill specifically provides (in Item 6 of Schedule 2) that the proposed amendments do not limit the operation of s. 8-3, with the effect that regard can still be had to the effect of conviction of key personnel for relevant non-indictable offences on the ongoing suitability of approved providers under the Act.[57]

2.159 With regard to taking into account offences committed at any time, the Minister responded:

> [I]t appears that the Committee may have overlooked the specific preservation by the bill (in the proposed sub-clause 10A-1(6)) of the operation of the spent convictions scheme in the Crimes Act. This provision is intended to ensure that only the most serious of convictions should be matters which preclude individuals from taking up responsible positions in the community in the long term after they have served the appropriate waiting time.[58]

2.160 In considering the Minister's responses, the Committee made a number of observations:

- the Minister contended that attempting to clarify offences relevant to a person's suitability to care for the frail aged would introduce "an additional raft of complexity". However, clause 58 of the Gene Technology Bill 2000 determined a person's suitability to hold a licence by reference to "relevant convictions" (defined in that bill as a conviction for an offence "relating to the health and safety of people or the environment"). It was this approach that prompted the Committee's suggestion.
- the Minister contended, by analogy, that Members of Parliament were ineligible for election under the Constitution if convicted of an offence punishable by imprisonment for one year or longer. The Committee noted that section 44(ii) of the Constitution only disqualifies a person who "has been convicted and is under sentence, or subject to be sentenced" for such an offence. Once such a person has served his or her sentence, their disqualification is at an end: see *Nile v Wood* (1988) 167 CLR 133 at 139.
- the Minister contended that applicants for vocational licences in various jurisdictions "are precluded from becoming licensed on the basis of conviction for indictable offences without qualification". The Committee reiterated its view that comparable Commonwealth legislation which it had examined recently had explicitly limited consideration of 'old' offences to those committed within the previous ten years (see, for

57 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 442.

58 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 442.

example, *Customs Amendment Act (No 2) 1999* s 67EB(3)(b); *ACIS Administration Act 1999* s 29; Gene Technology Bill 2000, clause 58).

- the Minister contended that "if the result of legislative intent and judicial process is such that a person's actions can be considered to amount to a serious crime, then that person should not be held out to the public as an appropriate person". The Committee accepted this observation. However, if a person has received only a small fine for an offence for which the maximum punishment is imprisonment for more than 12 months, then the result of the judicial process was that that person's actions can not be considered to have amounted to a serious crime. This was the point made by the Committee.

- finally, the Minister drew attention to the effect of the spent convictions scheme. However, this scheme is an example of legislation which operates by reference to the actual penalty imposed rather than the nominal maximum penalty. A conviction is spent where a person is not subject to imprisonment for an offence, or was not sentenced to imprisonment for more than 30 months.

2.161 The Committee concluded that, under this bill, a person who, 9 years ago, damaged a plant with intent to steal it (in NSW larceny is an indictable offence punishable by 5 years imprisonment), would be unsuitable to be involved in the management of an aged care facility. While the Committee remained mindful of the need to ensure the welfare of frail and vulnerable people in aged care, the operation of some of the provisions of this bill, as drafted, seemed somewhat arbitrary. The Committee continued to draw the provision to the Senate's attention.

The call out of the defence force in aid of the civilian power

2.162 In *Alert Digest No 10 of 2000* the Committee commented on a number of provisions in the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. This bill was introduced to modernise the procedures to be followed for the call out of the Defence Force, and to specify the powers and obligations of the Defence Force when used to assist the police, as a last resort, in the counter terrorist assault role and for related public safety tasks.

2.163 Provisions of concern to the Committee were those which:

- authorised search and entry of premises in a general security area without a warrant;

- did not define 'domestic violence', which was a precondition to the call out;

- did not define 'Commonwealth interests', which provided a trigger for the Defence Force to enter a State without a request from that State for assistance;
- required authorising ministers to be 'satisfied' that a State or Territory was not likely to be able to protect the relevant interests;
- failed to provide for a sunset clause; and
- failed to address all the consequences of the exercise of police powers by the Defence Force (for example, no provision was made for the evidentiary use that might be made of anything said by a person while detained by the Defence Force).

2.164 In addition to written advice from the Minister for Defence, the Committee received a briefing on the bill and concluded that the bill had attempted to clarify the law in a difficult area. The Committee accepted there was a need for legislation which set out the powers and responsibilities of the Defence Force when called out in aid of the civilian power. Clarifying those powers and responsibilities was of benefit to the Defence Force (which needed to be appropriately trained), to police forces (with which the Defence Force must work) and to the public whose lives were to be protected.

2.165 The Committee also accepted that such legislation should be flexible, and should enable a rapid and effective response to terror, danger or emergency. However, such legislation should not abrogate rights and liberties unnecessarily, and should not be capable of misinterpretation or misuse.

2.166 Legislation authorising the call out of the Defence Force, by its very nature, trespassed on personal rights and liberties. It was intended to operate at a time of extreme threat, and to provide adequate powers to deal with such circumstances. However, the use of undefined terms such as 'domestic violence' and 'Commonwealth interests' in the bill, and its failure to fully address the rights and obligations of those who find themselves in military detention, invited great reliance on the good faith of those at whose disposal these powers were placed.

2.167 The Committee noted that:

> Australia has a proud democratic tradition, and its governments have traditionally been governments of good faith. There is no question that good faith has been shown by all governments in the manner in which the existing call out powers have been exercised. However, laws which affect rights and liberties should not be drafted on the assumption that those using them will necessarily always be of good faith. Laws which assume good faith are inevitably misused by those whose motives are less than good. In the case of this bill, while terrorism is clearly encompassed by the term 'domestic violence', it is not clear what else might be.

2.168 The Committee considered that this bill represented an improvement over the vague and anachronistic provisions which it proposed to replace. It included

safeguards and accountability mechanisms that were lacking in the existing legislation, and it dealt with the role and powers of all those involved in a call out. Indeed, it was arguable that the bill had not taken the approach of clarification far enough.

2.169 In essence, the bill clarified the relationship between the Commonwealth and the States and Territories at a time of threat. The Committee welcomed this. However, by leaving key terms (such as 'domestic violence') undefined, by not fully addressing the implications of detention and the other powers available to members of the Defence Force – particularly the possible use in evidence of statements made by people detained by the Defence Force – the bill created uncertainty because it did not clarify the relationship between the Defence Force and citizens at a time of threat. In that sense, the process of clarification was incomplete.

2.170 The Committee suggested that one way in which the process of clarification should be continued would be for the bill to require that procedures or protocols be developed which addressed the relationship between the Defence Force and the public. These procedures or protocols should be available for public scrutiny. The Committee left the issue of whether the bill trespassed unduly on rights and liberties for the Senate as a whole to determine.[59]

2.171 The Senate passed the bill on 7 September 2000, making a number of amendments to the provisions concerning notification of the call out to the States and Territories, the use of the call out in circumstances of industrial unrest, reporting to the Parliament after a call out, and reviewing the operation of the provisions.

Mandatory sentencing

2.172 During the 39th Parliament the Committee considered provisions which both imposed and sought to remove mandatory sentences. In *Alert Digest No 13 of 2001* the Committee considered a provision inserted in the *Migration Act 1958* by the Border Protection (Validation and Enforcement Powers) Bill 2001. This provision imposed mandatory minimum sentences for various 'people-smuggling' offences under that Act.

2.173 The Committee noted that, in general, mandatory sentences limited the usual judicial discretion exercised when determining a proper sentence, given all the circumstances of a particular offence, and sought the Minister's advice as to why it was appropriate to give the Executive control by limiting judicial discretion in these circumstances.

2.174 The Committee was still awaiting a response when the 39th Parliament was prorogued.

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59 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 294-314.

2.175 In *Alert Digest No 13 of 2000*, the Committee considered the Human Rights (Mandatory Sentencing or Property Offences) Bill 2000 – a Private Senators Bill introduced by Senator Brown. This bill invoked Australia's commitments under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child as the basis for Commonwealth action to ban mandatory sentencing for property crimes under any Commonwealth, State or Territory law.

2.176 The Committee noted that, in a similar manner to the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 2000 which it considered in *Alert Digest No 6 of 2000*), these provisions sought to limit the powers of any Australian Parliament or Legislative Assembly to legislate in a particular area – in this case, in relation to the mandatory sentencing of offenders for property offences.

2.177 Such provisions raise a number of important, possibly contrasting, principles. On the one hand, the rights of individuals – particularly children – found guilty of committing a property offence are affected by mandatory punishment, where there is no scope for the exercise of a sentencing discretion by the court which takes account of the peculiar circumstances of a particular offence. However, the determination of appropriate maximum levels of punishment is a matter ultimately determined by the community, and expressed in legislation.

2.178 Parliaments and Assemblies in the Australian federal system are duly and democratically elected on the basis of a universal adult franchise. In giving effect to the law-making function of the elected Commonwealth Parliament, this bill, if passed, might diminish the law-making function of elected State Parliaments and Territory Assemblies. This was a matter ultimately to be determined by the High Court.

2.179 The Committee concluded by observing that there are some rights that are so fundamental that legislatures should not readily transgress them (for example, the confiscation of property rights without full and proper compensation). In the context of this particular bill, the resolution of these issues was a matter most appropriately left for consideration by the Senate as a whole.

The interception of telecommunications

2.180 During the 39th Parliament, the Committee commented on a number of bills which proposed to increase the number of agencies entitled to receive and use information gained from the interception of telecommunications.[60]

2.181 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 Act, which was introduced as

60 For example, the *Telecommunications (Interception) Amendment Act 1999*

part of a legislative package to reform the powers of ASIO, and to facilitate the investigation of narcotics offences.[61]

2.182 The Act had been amended on a number of occasions since 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.

2.183 In 1997 the Committee considered the Telecommunications (Interception) and Listening Devices Amendment Bill 1997,[62] which proposed to extend access to the telecommunications interception powers to the Police Integrity Commission. The Committee observed that that bill was "again an extension of an intrusive power and, as such, a fresh example of legislative creep".

2.184 In 2000, the Committee considered the *Telecommunications (Interception) Amendment Act 1999*, which proposed to further extend access to interception powers to the Anti-Corruption Commission of Western Australia and the Queensland Crime Commission for the purpose of investigating "corruption by public officials, paedophilia and organised crime". The Committee did not deny the need to adequately investigate these offences, and was conscious of the safeguards contained elsewhere in the Act. Nevertheless, it asked the Attorney-General why the prohibition contained in section 7 of the Principal Act should continue to be weakened, and why access to the Act's 'exceptional powers' should continue to be extended.

2.185 The Attorney-General responded that some of these amendments simply took account of a transfer of responsibilities between the Queensland Criminal Justice Commission and the Queensland Crime Commission. And given that the role of the Anti-Corruption Commission of Western Australia included "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 other amendments were within the 'special circumstances' exception to section 7.

2.186 The Committee thanked the Attorney for this response, which addressed its concerns.

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61 See Senate, *Hansard*, 8 March 1979, pp 646-49.

62 Scrutiny of Bills Committee, *Alert Digest No 7 of 1997*

CHAPTER 3

UNDUE DEPENDENCE UPON INSUFFICIENTLY DEFINED ADMINISTRATIVE POWERS

Application of criterion set out in Standing Order 24(1)(a)(ii)

3.1 Legislation may contain provisions which make rights and liberties unduly dependent on insufficiently defined administrative powers in a number of situations. For example, a provision might:

- give administrators ill-defined and wide powers;
- delegate power to a person without setting criteria which that person must meet; or
- fail to provide for people to be notified of their rights of appeal against administrative decisions.

3.2 Each of these situations is dealt with in more detail below.

Ill-defined and wide powers

3.3 Since its establishment in the early 1980s, the Committee has drawn the Senate's attention to legislation which gives administrators seemingly ill-defined and wide powers. Examples from previous Parliaments include a bill which authorised a person to take "necessary … measures",[1] and a bill which gave the Minister, the Secretary or an authorised Departmental officer an unfettered discretion to remit or refund all or part of a charge or penalty payable under the Act.[2]

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

3.4 Among other things, this bill contained a provision intended to deter the operation of schemes to reduce GST or increase refunds, or which conferred a benefit by altering the timing of payments or refunds. Where this was the dominant purpose or a principal effect of such a scheme, the Tax Commissioner was empowered to declare how much GST or refund would have been payable, and when it was payable, apart from the scheme. In making such a declaration, the Commissioner was authorised to:

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1 Scrutiny of Bills Committee, *First Report of 1982*, p 10, commenting on the Criminal Investigation Bill 1981.

2 Scrutiny of Bills Committee, *Seventh to Twelfth Reports of 1984*, p 37, commenting on the Air Navigation (Charges) Amendment Bill 1984.

- treat a particular event that actually happened as not having happened;
- 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).[3]

3.5 The Committee noted that these powers had been modelled on the Commissioner's existing powers in Part IVA of the *Income Tax Assessment Act 1936*, and that such declarations were to be reviewable. Nevertheless, it was reasonable to expect that the exercise of such wide powers would be subject to some guidelines or codes of practice, would occur infrequently, and their use should be reported to the Parliament. The Committee sought the Treasurer's advice on these concerns.

3.6 The Treasurer responded that the application of this 'power of reconstruction' was "a matter for careful case by case decision". The power was not unfettered – it could only be exercised "reasonably" and was subject to both administrative and judicial review. Its application to specific cases would also be considered by a Panel comprising senior ATO staff as well as external taxation experts engaged as consultants. Some guidelines had been included in the Explanatory Memorandum; further guidelines would be considered if any judicial pronouncements were made. Finally, the Commissioner would report on cases where he had applied the anti-avoidance provisions in his annual report.[4] The Committee thanked the Treasurer for this response.

Example: Electoral and Referendum Amendment Bill (No 1) 2001

3.7 Amendments contained in this bill gave a Divisional Returning Officer (DRO) or Australian Electoral Officer (AEO) a discretion to refuse to include certain names on the Electoral Roll if the officer considered that the name was fictitious, frivolous, offensive or obscene, or was not the name by which the person was usually known, or was not written in English, or that it would be "contrary to the public interest".

3.8 Decisions made by DROs under these amendments were reviewable by the relevant AEO, and decisions made by AEOs were reviewable by the Administrative Appeals Tribunal.

3.9 The Explanatory Memorandum attempted to justify these amendments by noting "an increasing tendency towards people using names which have electoral and political, and in some cases commercial, significance for enrolment and nomination. The placement of enrolled electors on the electoral roll, or candidates names on ballot

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3 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, p 184.

4 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, pp 185-6.

papers, was never intended to give electors or candidates free publicity for the particular cause they espouse or business that they run".

3.10 The Committee acknowledged that ballot papers should not include offensive or obscene or misleading names adopted by candidates. However, these amendments provided a returning officer or electoral officer with an apparently unqualified discretion to declare that a voter should not be enrolled under a particular name because someone considered that name to be "frivolous" or "contrary to the public interest" – terms which themselves seemed broad and lacking in definition. While a voter may have the right to seek review where their enrolment was refused, the AAT would be left with the same difficulties in interpreting a broadly expressed provision.

3.11 In the Committee's view, any candidate or voter was entitled to know, with some certainty, whether he or she complies with defined and specific criteria as to their eligibility. The expressions used in these provisions were not specific enough to give voters that certainty. The Committee therefore, sought he Minister's advice as to why the bill should not limit the exercise of these powers in some way, or better define them, and whether the AEC would be required to produce any criteria or guidelines governing how the powers would be exercised fairly, consistently and with certainty for those affected.

3.12 The Special Minister of State responded that the amendments had been prompted by people seeking to enrol under names such as Mr Prime Minister Piss the Family Court-Legal Aid, Mr Justice Abolish Child Support and Family Court and Mr Bruce The Family Court Refuses My Daughter's Right to Know Her Father:

> The inclusion of the "contrary to the public interest" provision in these sections is meant to allow the AEC the ability to protect the integrity of the electoral process and ensure that it is not brought into disrepute. The electoral roll is not an appropriate forum for people to obtain free publicity for the cause they espouse or the businesses that they run. This is more appropriately done through advertising, the publicising of political platforms or the distribution of how-to-vote material. The roll, and the electoral process as whole, is not the appropriate place for people to be able to denigrate the actions of certain organisations and people.[5]

3.13 Constraints on the 'inappropriate' use of these powers by the AEC included its reputation for fairness and integrity, which it wished to maintain; the fact that the decisions in question would be appellable; and the presence of statutory constraints such the provisions of the *Administrative Decisions (Judicial Review) Act 1977*. In addition, the AEC intended to develop guidelines (which would be included in its General Enrolment Manual) for the use of staff making decisions in this area.

3.14 The Committee thanked the Special Minister for this detailed response and noted that the AEC intended to develop guidelines to be used by DROs or AEOs when exercising their discretions under this bill. The Committee sought further advice

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5 Scrutiny of Bills Committee, *Sixth Report of 2001, p 214.*

as to whether these guidelines would be subject to Parliamentary scrutiny but no further advice had been received when the 39th Parliament was prorogued.

Delegation of power to 'a person'

3.15 Since its establishment, the Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to anyone who fits the all-embracing description of 'a person'.

3.16 Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Example: Adelaide Airport Curfew Bill 1999

3.17 In *Alert Digest No 5 of 1999*, the Committee considered a provision in this Private Members bill which permitted the Secretary to the Department of Transport to appoint "a person" to be an authorised officer for the purposes of the Act, with no indication of the qualifications or attributes that such an appointee should possess.

3.18 The Committee raised the matter with the member who sponsored the bill, who replied that:

> 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.[6]

3.19 On 17 February 2000, Senator Chapman moved an amendment in the terms set out above,[7] and the bill was then passed by the Senate.

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6 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, p 385.

7 Senate, *Hansard*, 17 February 2000, p 11995.

Example: Aboriginal and Torres Strait Islander Commission Amendment Bill 2000

3.20 In *Alert Digest No 18 of 2000*, the Committee noted that amendments proposed in this bill would:

- provide that a function conferred on the Aboriginal and Torres Strait Islander Commission need not be performed by ATSIC itself, but may be performed by "other persons" who were authorised to do so under contracts or agreements entered into by the Commission, or to whom the Commission has delegated the function; and
- provide that, insofar as a person is authorised to perform a function as an agent or delegate of the Commission, the person may exercise any of the ATSIC's powers for or in connection with the performance of the function.

3.21 Neither of these provisions imposed any limits on the functions or powers that might be delegated and the Committee sought the Minister's advice as to why the bill provided such a wide power of delegation.

3.22 The Minister responded that the relevant provisions did not, of themselves, empower ATSIC to delegate any power or function, but simply facilitated the performance of functions that ATSIC might validly delegate under other provisions of the Act. In addition, the power to delegate under the Act was limited, and the immediate effect of the bill would be to allow ATSIC (at its option) to delegate certain commercial functions to Indigenous Business Australia.[8]

3.23 However, the Committee pointed out that the provision concerned was worded more generally, applying to anyone 'authorised' under contract to perform a function (in effect, 'delegation' through outsourcing), and possibly applying more widely if the Principal Act were later amended to increase the scope for formal delegations. The Committee sought further advice as to why no limit was imposed on the functions or powers that the ATSIC might authorise 'other persons' to undertake on its behalf.

3.24 The Minister responded that the key provision in relation to the appointment of agents was new paragraph 10(2)(f). That provision allowed ATSIC to appoint as its agents "other persons who it is satisfied have qualifications and experience that are appropriate…" The Committee acknowledged that this provision limited the class of potential appointees. However, it did this by imposing what was essentially a subjective test – ATSIC must be satisfied that appointees have appropriate qualifications and experience. Where a subjective test is imposed, no criteria need be specified or applied.

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8 Scrutiny of Bills Committee, *First Report of 2001*, p 6.

3.25 The Committee expressed its preference for objective limitations on a class of potential appointees or delegates – appointees should occupy defined positions or possess defined qualifications or experience. The specification of criteria such as these (whether in the bill itself, or in documents produced by the Department) ensured that administrative powers were better defined. The Committee continued to draw the Senate's attention to this provision.[9]

Example: Migration Legislation Amendment Bill (No 2) 1999

3.26 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*.

3.27 Amendments in this bill proposed to substitute a new definition. The effect of this change would 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 did the bill refer to any qualifications or attributes which such persons must have as a condition of being authorised.

3.28 In *Alert Digest No 6 of 1999*, the Committee sought the Minister's advice as to why this unfettered discretion to appoint authorised officers ought not to be limited in some way – for example, by reference to qualifications or attributes which appointees should possess.

3.29 The Minister responded that:

> 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

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9 Scrutiny of Bills Committee, *First Report of 2001,* p 6; *Second Report of 2001*, pp 25-26.

> 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.[10]

3.30 The Committee thanked the Minister for this response.

Example: Radiocommunications Legislation Amendment Bill 1999

3.31 Among other things, this bill contained a provision which would 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 referred, specified any qualifications or attributes that such a body or organisation should possess, other than that it be approved by the ACA.

3.32 The Explanatory Memorandum observed that this new power to delegate "significantly reduces the administrative burden on the ACA". Under the new section, the delegate was "not entitled to make a final decision in refusing to issue a certificate of proficiency" – where the delegate decided not to issue a certificate, he or she must refer the application to the ACA for decision. This was 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".

3.33 The Committee referred to its practice of drawing attention to provisions which delegated powers to "a person", with no further limit on the categories of potential delegates. Similar considerations applied where powers were delegated to "a body or organisation". In this regard, the Committee drew attention to the fact that this delegated body may also be permitted (under another provision in the bill) to charge fees for conducting approved examinations and issuing certificates of proficiency.

3.34 The Committee observed that there were a number of possible approaches to limiting administrative powers of such apparent width. One approach had 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, sought the Minister's advice as to why the appointment of a body delegated to issue certificates of proficiency was not further defined or qualified in some way, and whether such an appointment should be subject to Parliamentary scrutiny.

3.35 The Minister responded that certain radiocommunications devices may be lawfully operated only by "qualified" persons:

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10 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, p 263.

> 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.[11]

3.36 The Committee thanked the Minister for this response, but continued to draw the provision to the Senate's attention, reiterating its view that an existing power cannot necessarily be used to legitimise the avoidance of parliamentary scrutiny under a proposed new power. And while Ministerial scrutiny represented a measure of oversight, it did not fully stand in the place of parliamentary scrutiny, and it might be that both sections should make provision for such scrutiny and review.

Example: Australian Securities and Investments Commission Bill 2001

3.37 Clause 102 of this bill permitted the Australian Securities and Investments Commission (ASIC) to delegate to "a person" (which includes a body) all or any of its functions and powers. Clause 119A provided ASIC members with a similar power of delegation.

3.38 In response to Committee concerns the Minister for Financial Services and Regulation pointed out that this bill was part of a legislative package introduced in response to the High Court's *Hughes* decision. This package would replace the current Corporations Law regime with a new corporate regulatory regime supported by referrals of power by the States.

3.39 The referrals of State power were to be provided, in part, in the form of a referral of the text of the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001 to the Commonwealth. As a result, it was crucial to the constitutional validity of the bill that it be in the same form as the text referred by the States, and that there be no substantial changes to law and policy under the

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11 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999,* pp 109-10.

Corporations Law regime. Given this, the Committee did not further canvass these delegation provisions.[12]

Notification of appeal rights

3.40 The Committee takes the view that, when legislation provides for the notification of a decision, it should also include a statement of any right of appeal available to the parties adversely affected by that decision.

3.41 The Committee has dealt with this issue on a number of occasions in the past.[13] It is happy to say that the issue did not directly arise during the course of the 39th Parliament.

12 Scrutiny of Bills Committee, *Seventh Report of 2001*, p 249.

13 See, for example, Scrutiny of Bills Committee, *One to Eight Reports of 1985*, p 3, concerning the Horticultural-Plant Variety Rights Bill 1984 [1985].

CHAPTER 4

UNDUE DEPENDENCE UPON NON-REVIEWABLE DECISIONS

Application of criterion set out in Standing Order 24(1)(a)(iii)

4.1 Criterion (iii) requires the Committee to report on legislation which makes "rights, liberties or obligations unduly dependent upon non-reviewable decisions". A bill may seek to exclude review on the merits by an appropriate appeal tribunal, or it may exclude judicial review of the legality of a decision, or it may provide that reasons need not be given for a decision.

No reasons for decisions

4.2 The Committee is concerned where a bill provides that no reasons need be given for a decision, thereby excluding the possibility of review.

Example: Broadcasting Services Amendment Bill 2000

4.3 This bill established a scheme for the regulation of international broadcasting services transmitted from Australia. The scheme enabled the Minister for Foreign Affairs to refuse an application for a licence, or to warn a licence-holder, or to suspend or cancel a licence, where an existing or proposed international broadcasting service was seen as contrary to Australia's national interest.

4.4 The bill also proposed to amend the *Administrative Decisions (Judicial Review) Act 1977* so that no statement of reasons had to be provided for these decisions. The Explanatory Memorandum sought to justify this provision on the basis that "the nature of these decisions is such that exposure of the reasons for the decisions could itself be contrary to Australia's national interest".

4.5 In *Alert Digest No 1 of 2000* the Committee expressed its concern at the apparent finality of these decisions – if there were no obligation to provide reasons it was not clear what other rights of merits review or appeal (if any) were available to licensees disadvantaged by the Minister's decision.

4.6 Under the bill, a licensee was to be given a reasonable opportunity to send a submission to the Australian Broadcasting Authority (ABA) where a licence was cancelled, and the ABA was required to forward this submission to the Minister. However, there seemed to be no obligation on the Minister to actually consider the submission, and no similar procedure for making a submission where a licence was suspended rather than cancelled.

4.7 The Minister for Communications, Information Technology and the Arts advised the Committee that "in addition to, or instead of, seeking review of a decision by the Minister for Foreign Affairs under proposed new Part 8B of the BSA under the AD(JR) Act, a person could seek review on common law grounds" (such as breach of the rules of natural justice, ultra vires, jurisdictional error, error of law on the face of the record, and failure to perform a duty).

4.8 There was no provision for merits review of these decisions. This was consistent with guidelines issued by the Administrative Review Council in July 1999 in relation to decisions which should be subject to merits review. The guidelines specified policy decisions of a high political content as a factor that might justify excluding merits review. In the guidelines, a specific example of a policy decision of a high political content is a decision affecting Australia's relations with other countries.[1]

4.9 In relation to specifically requiring the Minister for Foreign Affairs to consider any submission made in relation to a proposed cancellation of a licence, the Minister advised that such a provision was unnecessary – a failure to consider a submission would amount to a breach of the rules of natural justice, which was a ground for review of a decision under the AD(JR) Act and is a common law ground of review.

4.10 In relation to the differing procedures to be followed where a licence was cancelled or suspended, the Minister advised that cancellation was a "very significant act" whereas suspension "would have a more modest impact on a broadcaster …it was considered inappropriate to include a mandatory consultation requirement before suspension because of the need to ensure that swift temporary action could be taken by the Minister for Foreign Affairs in the national interest." However, in practice, if the Minister were considering suspending a licence, it would be incumbent on him or her to have regard to the rules of natural justice, including the hearing rule – failure to do so could render a decision void, as it would be a ground for review of a decision to suspend a licence.

4.11 The Committee thanked the Minister for this response and accepted that there might be difficulties in providing for administrative review where policy decisions involved a high political content. However, this provision authorised the Minister to make decisions which, in effect, restricted freedom of expression in Australia. Where a provision authorises a Minister to make such a decision on objective criteria, then the bona fides of its exercise are transparent, and may be assessed. But where a provision authorises a Minister to make such a decision on subjective grounds – such as the 'national interest' – then it is much more difficult to assess the bona fides of its exercise. The Committee noted that one approach that may be taken in these circumstances is appropriate consultation. For example, appointments of judicial

1 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 498.

officers are discretionary, but only made after appropriate (and non-partisan) consultation.

4.12 The Committee sought further advice from the Minister as to whether there were any criteria against which such a Ministerial decision to restrict freedom of expression could later be assessed, or whether it was proposed that there be any non-partisan consultation prior to its exercise.

4.13 The Minister subsequently responded that:

- the Government had agreed to amend the bill to provide that a statement of reasons for a decision must be provided if requested, or the Minister for Foreign Affairs must prepare a statement about the decision and cause a copy to be laid before each House of the Parliament;
- it was not possible to be more precise about the specific criteria for determining national interest issues in relation to licensing decisions under this legislation, and this had been recognised by the Senate Foreign Affairs, Defence and Trade Legislation Committee;
- while there were no specific criteria for a national interest assessment, the Minister would take into account all relevant circumstances relating to Australia's international relations with the country or countries targeted by the international broadcasting service concerned;
- where an existing licence was involved, it was open to the Minister to seek a report from the ABA on the service's compliance with the international broadcasting guidelines;
- guidelines would be developed by the ABA, drawing on the Transborder Satellite Broadcasting Principles developed by broadcasting regulatory agencies in the Asia-Pacific region, and these guidelines would provide a degree of transparency and objectivity in terms of applying the national interest test; and
- the suggestion that there should be 'non-partisan consultation' was not appropriate given the sensitivity and complexity of issues relating to Australia's foreign relations, and was likely to be impracticable given the urgency that may be involved in assessing whether a broadcasting service was contrary to Australia's national interest.[2]

4.14 The Committee thanked the Minister for this response and for the amendment moved in relation to providing statements of reasons.

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2 Scrutiny of Bills Committee, *First Report of 2001*, pp 12-13.

Excluding merits review

4.15 Since its establishment, the Committee has consistently drawn attention to provisions which explicitly exclude review by relevant appeal bodies (for example, the Social Security Appeals Tribunal) or otherwise fail to provide for administrative review.

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

4.16 One provision in this bill authorised the Taxation Commissioner to extend the time for payment of GST-related amounts, or to allow them to be paid by instalments or on terms. Under another provision, if the Commissioner had 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 was reviewable and, in *Alert Digest No 1 of 1999,* the Committee sought the Treasurer's advice on this issue.

4.17 The Treasurer responded that administrative review was not available for decisions made under corresponding provisions in other Acts administered by the Commissioner. He stated that decisions to extend the time for payment of tax "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 a debtor. In addition, he contended that, if such decisions were subject to administrative review, there would be a high risk of abuse of process with the result of deferring recovery of tax in situations where the merits of the case clearly did not warrant an extension of time to pay.

4.18 With regard to the bringing forward of payments where persons sought to escape their tax liabilities by leaving Australia before their liabilities fell due, the Treasurer asserted that administrative review of such decisions "would be an invitation to abuse:

> 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.[3]

4.19 Decisions under both provisions were subject to judicial review in accordance with the *Administrative Decisions (Judicial Review) Act 1977*.

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3 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 179-80.

4.20 The Committee thanked the Treasurer for this response and accepted that administrative review was currently not available under corresponding provisions in similar legislation. However, the issue of personal rights and liberties was 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.

4.21 The Committee noted that, properly exercised, the Commissioner's discretion to extend the time for the payment of GST-related amounts conferred a benefit on taxpayers, and subjecting it to administrative review was probably unnecessary. However, it seemed that guidelines governed the exercise of a similar discretion under section 206 of the *Income Tax Assessment Act 1936*. Arguably, this discretion should similarly be governed by guidelines.

4.22 The Committee then considered the Commissioner's discretion to truncate the time for the payment of certain GST-related amounts where he or she believed that a person "may leave Australia". Such a provision was clearly designed to prevent someone avoiding the payment of a tax to which they would eventually become liable by leaving Australia before it becomes payable. The Committee acknowledged the public interest that gave rise to such a provision, and recognised that providing for administrative review might lead to its abuse. However, the language used in the section would seem to make it applicable to any person leaving Australia, for example on a business venture, or on a holiday, and with every intention of returning. In these circumstances, the Committee invited the Senate to consider whether the discretion ought to be available only where the Commissioner considered that persons intended leaving Australia with the intention of escaping their tax liabilities.[4] In the event, the Senate passed the bill without amendment.

Example: Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000

4.23 Among other things, this bill proposed to amend the *Defence Act 1903* to authorise the Governor-General to call out the Reserves for continuous full time service in circumstances such as war, defence, emergency, defence preparation, peacekeeping or peace enforcement, civil aid, humanitarian assistance or disaster relief.

4.24 In making or revoking a call out, the Governor-General is required to act with the advice of the Executive Council. However if, after the Defence Minister has consulted the Prime Minister, he or she is satisfied that, for reasons of urgency, the Governor-General should act on his or her advice alone, then the Governor-General must call out the troops on the advice of the Minister alone.

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4 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 180-81.

4.25 The exercise of these discretions was not subject to any form of review, other than the general accountability of the Executive Council to the Parliament. Where the Reserves were called out on the advice of the Defence Minister alone, not even this level of accountability existed. The Committee sought the Minister's advice as to why the bill provided no scope for review of the exercise of these discretions.

4.26 The Minister responded that:

> A decision to call out the Reserves is not one that will be taken lightly or frequently. The decision to call out effectively transforms the Reservist into a Regular and he or she is therefore liable to render such periods of full time military service as required. The decision to call out is an Executive one and is not regarded as being subject to appeal. Given the circumstances in which a potential challenge to the exercise of the discretion would be rare, it is not considered necessary to include a separate review provision in this Bill. Of course, a member may make representations to the Commanding Officer of his or her unit and seek consideration of extenuating circumstances.
>
> The Commanding Officer may accept these and allow a period of leave of absence (or may not). A member, if unsatisfied with the decision of the superior officer, may seek further consideration of the case under the usual Defence Force administrative processes. However, the member is still, theoretically subject to the call out and therefore liable to render the required service. It is hoped that in the majority of cases, negotiation and commonsense will prevail. However a call out would only be invoked because the ADF actually requires the capability.[5]

4.27 The Committee thanked the Minister for this response.

Example: Trade Practices Amendment (Telecommunications) Bill 2001

4.28 This bill proposed to streamline the regime for access to the telecommunications network. Specific provisions encouraged commercial negotiation and the expedited resolution of access disputes notified to the Australian Competition and Consumer Commission (ACCC). One provision proposed to limit the rights of parties following an arbitration by the ACCC. It did this by specifying the matters which the Australian Competition Tribunal might consider when it conducted a review of a determination by the ACCC following its arbitration of a telecommunications access dispute.

4.29 At present, review by the Tribunal is a re-arbitration of the dispute, and the Tribunal may take into account any information, documents or evidence which it considers relevant, whether or not those matters were before the ACCC when it made its initial determination. The proposed amendment would, in effect, limit the Tribunal to considering only the information, documents or evidence which were before the ACCC initially.

4.30 The Explanatory Memorandum sought to justify this provision by observing that ACCC determinations involved "a lengthy and complex hearing process" –

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5 Scrutiny of Bills Committee, *Third Report of 2001*, p 127.

restricting the material that the Tribunal might consider would ensure that the Tribunal was involved in "a review of the Commission's decision, rather than a complete re-arbitration of the dispute".[6] The Explanatory Memorandum went on to observe that "although this option should reduce delay in the review of Commission decisions, it will reduce the extent of Tribunal review. On balance, it is considered that the limitations on the review are justified on the basis of the length and depth of the Commission's arbitration process".

4.31 Given that the provision was explicitly intended to reduce the extent of Tribunal review, the Committee sought the Minister's advice as to how the existing review processes had been abused, and whether the Tribunal was consulted about the proposed changes.

4.32 The Minister responded that:

- the Tribunal had commenced only one review of an ACCC determination;
- this review related to disputes which had commenced in December 1998 and February 1999;
- the review was unlikely to be finalised before late 2002 – 18 months after the conclusion of the agreement to which it related;
- the lengthy arbitration process undertaken by the ACCC would be replicated in future Tribunal hearings if there were no limitation on the evidence that could be put before the Tribunal;
- the resulting delay had the potential to cause continued investor uncertainty and would advantage incumbent owners of telecommunications infrastructure;
- while there was no direct evidence that the first stages of the Tribunal hearings had been abused, the proposed amendment would "remove the potential for procedural abuse in the future"; and
- the Tribunal did not have a role in providing policy advice to the Government and had not been consulted in relation to these amendments.[7]

4.33 Given that there had been a lengthy delay in resolving one access dispute, but there was no direct evidence of abuse, only the suggestion of potential abuse, the Committee sought further advice as to the reasons for this delay. It was not clear whether the Tribunal was simply in the process of developing its hearing procedures, or whether it has been asked by the parties to consider significant quantities of new material (and whether any such material assisted it in its ultimate decision), or whether there were other reasons for the delay. It was also not clear whether the

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6 Scrutiny of Bills Committee, *Thirteenth Report of 2001*, p 607.

7 Scrutiny of Bills Committee, *Thirteenth Report of 2001*, pp 607-8.

Tribunal had made any comments about the use of new material during the course of its hearings.

4.34 The Minister responded that:

> The ACCC has advised that witness statements in relation to the existing Tribunal hearings are not due until November 2001, but that Telstra has already introduced fresh evidence through its statement of issues in contention. The ACCC also expects that parties will use their existing rights to adduce further new evidence when filing witness statements in November. Due to the private nature of Tribunal hearings, no comment has been made on the value of the new material introduced to date. While there is no direct evidence of existing procedural abuse, the proposed amendment is concerned with removing the potential for procedural abuse in the future.

4.35 The Committee thanked the Minister for this further response and noted that an amendment to procedural law, where there was no evidence of its abuse, in anticipation of its possible abuse at some time in the future, appeared to represent an unfortunate precedent. The Committee sought further advice on the necessity for this approach in the circumstances covered by this bill. The bill was passed by the Senate in September 2001.

Excluding judicial review

Example: Jurisdiction of Courts Legislation Amendment Bill 2000

4.36 In *Alert Digest No 3 of 2000*, the Committee noted that the amendments to be made by Schedule 2 to this bill would reduce the review rights of defendants. Specifically, these amendments removed the right of defendants to access federal administrative law procedures and remedies. For example, defendants would no longer be able to use the *Administrative Decisions (Judicial Review) Act 1977* to challenge decisions to prosecute, or other decisions taken in the criminal justice process at any time after a prosecution has commenced, or when an appeal is on foot. Nor would defendants in State and Territory courts be able to use section 39B of the *Judiciary Act 1903* to bring an application in the Federal Court to review decisions of Commonwealth officers made in the prosecution process.

4.37 The Committee was concerned at such a significant reduction in the rights available to defendants and asked the Attorney-General why such action was appropriate; how it was proportionate to the mischief it was aimed at; and whether it might not be better to take an alternative approach involving the imposition of time-limits on applications for review.

4.38 The Attorney-General responded that the bill addressed the divided jurisdiction in criminal proceedings to prevent the bringing of applications in the Federal Court system for judicial review of decisions made in prosecuting federal offences in State and Territory courts:

> The tactic of bringing collateral proceedings in the Federal Court is frequently used in relation to white collar crime as a means of stalling a prosecution. The amendments will ensure that where a State or Territory court is hearing a criminal prosecution that arises under a Commonwealth law, the State or Territory courts will also be able to deal with any related administrative law challenge to decisions that were taken in the criminal justice process.
>
> The main disadvantage of the existing law is that it provides the means to remove an action from the State or Territory court that is hearing the trial into the Federal Court system. That causes a loss of priority for the prosecutions in the State or Territory courts and substantially increases the duration and cost of proceedings.
>
> It also allows the tactical use of delay by providing a separate three tiered appeal system which suspends the trial while issues are finally resolved. In addition to the direct costs of delay, there is also the consequence of loss of recall on the part of witnesses, and the possible unavailability of documentary evidence for investigators. These cannot be seen to be in the public interest ...
>
> Defendants are not being denied judicial review remedies. Relevant decisions will still be subject to review by a court, either in the course of the criminal trial itself, when issues of the admissibility of improperly or unlawfully obtained evidence are being considered; or under the section 39B Judiciary Act jurisdiction which is being conferred on State and Territory Supreme Courts by the Bill (amendments of the *Corporations Act 1989* proposed new section 51AA, and *Judiciary Act 1903* proposed new subsections 39B(1B) and (1C). That is a balanced outcome, and one which serves to streamline the criminal justice process.
>
> The new system would place defendants in Commonwealth prosecutions in essentially the same position as their State counterparts. It would remove a means of attempting to defeat justice which is not open to State and Territory defendants, while preserving the safeguards against injustice required in a fair criminal justice system. I believe that the proposed amendments are proportionate to the forms of mischief they address, and streamline the procedures in a system where cost and delay currently present a major challenge to the administration of justice.[8]

4.39 With regard to the imposition of time limits, the Attorney stated that, subject to judicial discretion, time limits already applied to applications for judicial review and the lodging of appeals. He was of the view that the imposition of time limits on the management of proceedings in the Federal Court system was unlikely to adequately address the issue of a defendant who sought to delay a criminal trial until challenges to criminal justice decisions (and the appeals arising from those challenges) had been dealt with.

4.40 Given confirmation that administrative law challenges to pre-trial decisions had not been removed, but were now to be heard by the court hearing the criminal prosecution, the Committee thanked the Attorney for this response. The Committee reiterated its concern should the bill have any significant effect on the jurisdiction of the federal administrative law system.

4.41 The Attorney responded that the bill suspended the jurisdiction of the Federal Court "in relation to decisions made in the criminal justice process for the period

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8 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 157.

between the commencement of a prosecution and the final determination of any appeal(s) arising from it":

> Only jurisdiction in relation to a decision to prosecute will be removed. For that period, the relevant jurisdiction is vested in the State and Territory courts which deal with the prosecutions.
>
> Before commencement of a prosecution and following its conclusion, including any appeals, the jurisdiction of the Federal Court remains available to determine any administrative law issues which the defendant may wish to have resolved.[9]

4.42 Given that the Federal Court had expressed no concerns about the effect of the bill, and that the changes were supported by the States and Territories, the Committee thanked the Attorney for this further advice.

Decisions for which review was accepted as unnecessary

4.43 During the 39th Parliament the Committee accepted that certain decisions need not be subject to review. These included:

- decisions by the Minister under the States Grants (Primary and Secondary Education Assistance) Bill 2000 to refuse to authorise, or to delay, payments to non-government bodies on 'solvency' grounds, or to change funding levels where he or she is satisfied that a school's SES score has not been determined correctly – these were seen as budgetary decisions of a policy nature which did not immediately affect any particular person's interests and so were within an exception identified by the Administrative Review Council in its report on decisions appropriate for merits review;[10]
- the decision by the CEO of Customs under the Excise Amendment (Compliance Improvement) Bill 2000 to withdraw an infringement notice, the possible consequences of which were that the recipient of the notice would either be prosecuted or subject to no further action;[11]
- decisions by the Secretary under the A New Tax System (Family Assistance and Related Measures) Bill 2000 to make an advance payment to an approved child care service – given that the amount of the advance was an interim payment, it was not considered appropriate to provide a formal review procedure for its determination;[12] and

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9 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 173.

10 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 419.

11 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 274-5.

12 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 151-2.

- decisions under the A New Tax System (Indirect Tax Administration) Bill 1999 which had been declared non-reviewable simply as a result of a drafting misdescription.[13]

13 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 187-8.

CHAPTER 5

INAPPROPRIATE DELEGATION OF LEGISLATIVE POWER

Application of criterion set out in Standing Order 24(1)(a)(iv)

5.1 Criterion (iv) requires the Committee to draw the Senate's attention to legislation where Parliament's power to make laws may have been delegated inappropriately.

5.2 In considering this criterion, a threshold question sometimes arises: is the power proposed to be delegated legislative in nature? At times it is difficult to determine whether the instruments which Parliament empowers another body or person to make are legislative in character. Such instruments might be ministerial guidelines, codes of practice, codes of conduct or practice statements. They are often described as made under a power to direct, determine, notify, order, instruct, declare, issue or publish.[1]

5.3 Examples of provisions which may inappropriately delegate legislative power include those which:

- enable subordinate legislation to amend an Act of Parliament (often called a Henry VIII clause);
- provide that matters which should be regulated by Parliament are to be dealt with by subordinate legislation;
- provide that a levy or a charge be set by regulation; or
- give to the Executive the unfettered control over whether and when an Act passed by the Parliament should come into force.

'Henry VIII' clauses

5.4 An express provision which authorises the amendment of either the empowering legislation, or any other legislation, by means of delegated legislation is called a 'Henry VIII' clause. The *Macquarie Dictionary of Modern Law* defines a 'Henry VIII' clause as "a clause in an enabling Act providing that the delegated legislation under it overrides earlier Acts or the enabling Act itself; so named because of its autocratic flavour".[2] Since its establishment, the Committee has consistently drawn attention to such clauses.

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1 This issue is also discussed at paras 6.30-6.32 of this report.

2 See also Pearce DC, *Delegated Legislation in Australia and New Zealand* (Butterworths, Sydney, 1977).

5.5 For example, in *Alert Digest No 3 of 2000*, the Committee considered the Child Support Legislation Amendment Bill 2000, which proposed to amend a number of Acts "to enable Australia to fulfil its international maintenance obligations". It did this by inserting a regulation-making power into each of the Principal Acts to allow regulations to be made prescribing (in relation to countries with which Australia has maintenance enforcement arrangements) all matters relevant to the recognition and enforcement of child support and spousal maintenance liabilities.

5.6 The Explanatory Memorandum observed that the purpose of this approach was "to allow the regulations to vary the operation of the … Act where the existing provisions are not appropriate for the purpose of meeting Australia's international maintenance obligations".

5.7 The Committee noted that it consistently draws attention to Henry VIII clauses. While the explanation put forward in the case of this bill seemed to provide a justification for including these particular provisions, the Committee nevertheless reiterated its concern whenever subordinate legislation took precedence over the primary legislation which created it, and drew the Senate's attention to the provision.[3]

5.8 In *Alert Digest No 6 of 2001*, the Committee considered a Henry VIII clause in the Corporations Bill 2001. This provision authorised the making of regulations which would modify the operation of the Corporations legislation so that its provisions did not apply to a matter that was dealt with by a State or Territory law, or so that no inconsistency arose between its operation and the operation of a provision of a State or Territory law. The Explanatory Memorandum observed that this provision was necessary to ensure the constitutional validity of the legislation, and the Committee made no further comment on the provision.

Example: Social Security (International Agreements) Bill 1999

5.9 In *Alert Digest No 9 of 1999*, the Committee considered this bill, which provided for the consolidation of existing international social security agreements into a separate Act. These agreements, which were set out in a series of Schedules to the bill, provided for international reciprocity in the provision of social security benefits.

5.10 One provision in the bill authorised the text of these Schedules to be amended by regulation; another authorised the addition of new scheduled international agreements by regulation, and another authorised the repeal of a Schedule by regulation.

5.11 The Committee noted that, while this was clearly a delegation of legislative power, it had no means of ascertaining whether or not it was appropriate, as neither

3 Scrutiny of Bills Committee, *Alert Digest No 3 of 2000*, p 10.

the Explanatory Memorandum nor the Second Reading Speech clarified the need for a Henry VIII clause in these circumstances. The Minister responded that:

> 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.[4]

5.12 The Committee thanked the Minister for his response which addressed its concerns.

Example: Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 1999

5.13 This bill, which accompanied the Administrative Review Tribunal Bill 2000 (the ART Bill), proposed various consequential and transitional amendments. It included a Henry VIII clause permitting the making of regulations which amended primary legislation. Referring to this provision, the Explanatory Memorandum stated that it would "ensure that any necessary consequential amendments that are inadvertently not provided for in the bill can be made without the need for the enactment of another Act".

5.14 The Committee acknowledged the possibility that the bill might have inadvertently overlooked, for example, a cross-reference to the Administrative Appeals Tribunal in another Act, and that that other Act might subsequently need to be amended. However, this bill dealt with more than such technical matters – it made substantive amendments to a number of other Acts which modified the ART Bill as it applied for the purposes of review of certain decisions made under those Acts.

5.15 The Committee expressed its concerned at the possible use of this Henry VIII clause to authorise regulations to further modify the application of the ART Bill in relation to these (or other) Acts.

5.16 The Attorney-General responded that:

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4 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 396.

> The power in clause 6 is expressly restricted to the making of regulations that:
>
> - make amendments consequential on the enactment of the ART Bill and the repeals and amendments made by the Schedules to the ART (CTP) Bill; or
> - are of a transitional or saving nature arising from the transition from the *Administrative Appeals Tribunal Act 1975* to the ART Bill or from the repeals and amendments made by the Schedules to the ART (CTP) Bill, or by consequential regulations.
>
> The regulation-making power in paragraph 6(1)(a) is already restrictive and can only be used to effect minor and technical changes.[5]

5.17 The Committee thanked the Attorney for this response, which indicated the restrictions on this Henry VIII clause. However, while this approach was a convenient method for making such technical amendments, the Committee reiterated its concern wherever subordinate legislation was permitted to amend primary legislation, and stated that "it would be wrong if the approach adopted in this bill were to become a more widely accepted practice".

5.18 In the event, the Senate did not pass either this bill or the accompanying ART Bill.[6]

Example: Migration Amendment (Excision from Migration Zone) Bill 2001

5.19 A provision in this bill proposed to add a new definition of 'excised offshore place' in the *Migration Act 1958*. Paragraph (d) of this definition extended the meaning of this term to "any other external Territory that is prescribed by the regulations". Paragraph (e) of this definition extends the meaning of the term to "any island that forms part of a State or Territory and is prescribed for the purposes of this paragraph".

5.20 The Committee expressed its concern that these provisions authorised a statutory definition to be amended simply by the passing of a regulation. While such regulations would be subject to Parliamentary scrutiny and disallowance, they would nevertheless have full force and effect from the time they were made and, depending on the pattern of Parliamentary sittings, might not be scrutinised by the Parliament for a period of some months.[7]

5.21 The Committee therefore sought the Minister's advice as to why it was appropriate that such a significant definition be amended by regulation. The Committee was still awaiting a response when the 39th Parliament was prorogued.

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5 Scrutiny of Bills Committee, *Ninth Report of 2001,* p 366.

6 Senate, *Hansard*, 26 February 2001, pp 21927-28.

7 Scrutiny of Bills Committee, *Alert Digest No 13 of 2001*, pp 9-10.

Determination of important matters by regulation

5.22 The Committee also draws attention to provisions which inappropriately delegate legislative power of a kind which ought to be exercised by Parliament alone. One example of such a provision (from a previous Parliament) was a clause which conferred power on the Executive to define a word or phrase in an Act. The definition determined the way in which the Act was to operate.[8] In such circumstances, the Committee will argue that the defining of the word or phrase is too crucial a matter to be left to subordinate legislation, and should be undertaken by the Parliament.

5.23 An example which arose during the 39th Parliament involved certain provisions in the General Insurance Reform Bill 2001. These provisions imposed criminal liability on a person who failed to comply with either a determination made, or a condition imposed, by the Australian Prudential Regulation Authority (APRA), and also appeared to give APRA power to create criminal liability, without reference to the Parliament.

5.24 The Committee sought the Minister's advice as to why this delegation of legislative power was appropriate, and whether a person affected had any review rights.

5.25 The Minister replied that:

> Decisions relating to whether criminal liability should be imposed on those who fail to comply with a condition imposed by APRA are necessary for an effective prudential enforcement regime. While it is true that such decisions have direct implications for the commercial interests of the parties concerned, the broader consequences of such decisions for policyholders and the financial system as a whole are also of concern.
>
> The most competent authority in Australia to assess these implications will be APRA, which is required under its legislation to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality. It would be undesirable to have APRA's decisions in this critical area altered by another body that is unlikely to have the same degree of specific competence or interest and expertise in the public interest dimension of the financial system. For example, there may be times when decisions relating to whether a breach of authorisation conditions form part of a broader intervention strategy to resolve a substantial prudential concern, and maximum certainty of outcome will be highly desirable.
>
> That said, decisions relating to the imposition of criminal liability for those who fail to comply with a determination made, or a condition imposed by APRA will still be subject to judicial review under the *Administrative Decision (Judicial Review) Act 1977*. Taking this into account, together with the wider concerns outlined above, judicial review is seen as providing an appropriate balance between private and public protections in this case.[9]

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8 See, for example, *Alert Digest No 7 of 1992*, commenting on the Commonwealth Electoral Amendment Bill 1992; and *Alert Digest No 14 of 1992*, commenting on the Student Assistance Amendment Bill 1992.

9 Scrutiny of Bills Committee, *Eleventh Report of 2001*, p 480.

5.26 The Committee thanked the Minister for this response which indicated that the imposition of criminal liability for a failure to comply with a condition imposed by APRA was necessary for "an effective prudential enforcement regime". The Committee felt that this was a matter best left for determination by the Senate as a whole.

5.27 Interestingly, in *Alert Digest No 12 of 2001* the Committee noted a Senate amendment to the Measures to Combat Serious and Organised Crime Bill 2001. This amendment proposed to insert a new section 15HB in the Crimes Act. This new section defined a serious Commonwealth offence as, among other things, an offence "that is of any other prescribed kind".

5.28 This amendment would permit the offence provisions of the Act to be amended by regulation. In speaking to this amendment, the Minister for Justice and Customs observed that:

> The government does support the opposition's proposal to list the types of offences for which controlled operations can be undertaken. This might create difficulties for law enforcement; however the opposition has agreed with a government proposal that a list can be updated by regulation. Accordingly, the government will accept these amendments to secure passage of the bill. The government also undertakes that no operation will be authorised on the basis of a new category of offences added by regulation until the disallowance period for that regulation has ended.[10]

5.29 Given this undertaking, the Committee made no further comment on this amendment.

Setting the rate of a 'levy' by regulation

5.30 The Committee has consistently drawn attention to legislation which provides for the rate of a 'levy' to be set by regulation. This creates a risk that the levy may, in fact, become a tax. It is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

Providing a statutory maximum rate or a rate-setting formula

5.31 Where the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations rather than the enabling statute. If a compelling case can be made for the rate to be set by subordinate legislation, the Committee seeks to impose some limit on the exercise of this power. For example, the Committee will seek to have the enabling Act prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

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10 Senate, *Hansard*, 27 August 2002, p 26708.

Some examples

5.32 In considering a failure to specify an upper limit on charges in the Classification (Publications, Films and Computer Games) Charges Bill 1998 the Committee accepted an explanation from the Attorney-General that:

- the bill implemented a budget-related decision to impose full cost recovery for the services provided by the office of Film and Literature Classification (OFLC);
- while the OFLC's costs had remained fairly constant over time, the revenue generated from year to year varied greatly;
- given that revenue would be obtained from a broad range of application-based charges, the Government's preferred approach (regulations to set initial charges, subject to a formula included in the bill) could not be applied;
- alternative approaches (such as inserting a general but uncertain formula in the bill, or including an artificially high upper level charge) were also rejected for practical reasons; and
- any fees set by regulation would be disallowable.[11]

5.33 In considering a similar failure to specify a maximum amount of annual Fund contributions which would be paid by providers of education services to overseas students under the Education Services for Overseas Students (Assurance Fund Contributions) Bill 2000, the Committee accepted the Minister's explanation that the Assurance Fund was intended to operate essentially as a form of industry-based insurance. However, the Committee suggested that the bill might contain an additional clause which specifically stated that the amount of any levy or contribution cannot be such as to amount to taxation.[12]

5.34 In its consideration of the Aged Care Amendment (Accreditation Agency) Bill 1998, the Committee queried a provision which enabled subordinate legislation (the Accreditation Grant Principles) to set fees for accrediting aged care services, or "a way of determining such fees." While the bill did not specify an upper limit on these fees, another provision stated that fees charged for a service must be reasonably related to the cost of providing the service and "must not amount to taxation".[13] The Committee sought advice from the then Minister for Aged Care concerning the lack of an upper limit, and also the appropriateness of delegating the power to set a formula. Interestingly, this was one of the rare occasions on which a Minister failed to respond to correspondence from the Committee.

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11 Scrutiny of Bills Committee, *Alert Digest No 11 of 1998*, pp 7-8.

12 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 522.

13 Scrutiny of Bills Committee, *Alert Digest No 10 of 1998*, p 14.

5.35 In considering the Gene Technology (Licence Charges) Bill 2000, the Committee again queried a provision which permitted charges to be set by regulation with no upper limit specified in the Principal Act. The Explanatory Memorandum noted that the intention of the bill was to ensure cost recovery by the Gene Technology Regulator – though this limitation was not contained in the bill itself. As it stood, the bill seemed to permit taxes to be levied through delegated legislation.[14] On 8 December 2000, the Senate passed the bill without amendment.

Commencement by Proclamation: Office of Parliamentary Counsel Drafting Instruction No 2 of 1989

5.36 The Committee is wary of provisions which enable legislation to commence on a date "to be proclaimed" rather than on a determinable date. Where a Bill (or part of a Bill) is expressed to commence on proclamation, the date proclaimed should be no later than 6 months after the Parliament passes the relevant measure.

5.37 The Committee takes the view that Parliament, as the elected holder of Federal legislative power, is responsible for determining when the laws it makes are to come into force. In taking this view, the Committee is conscious of Drafting Instruction No 2 of 1989 issued by the Office of Parliamentary Counsel. This provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the "fixed time"). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the "repeal" option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).[15]

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14 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, pp 467-68.

15 Senate, *Hansard*, 12 April 1989, pp 1464-1465.

5.38 Where the rules set out in the Drafting Instruction are not followed, the Committee prefers to see the reason for this departure set out in the Explanatory Memorandum. For example, where a 6 month period is said to be impractical, the Committee likes to see another period – such as a period of 12 months – specified, rather than no period at all.

5.39 A number of bills considered by the Committee provided for indefinite commencement on proclamation because their application depended on uncertain events – either on the passing of complementary legislation in other jurisdictions (for example, the Albury-Wodonga Development Amendment Bill 1999 and the Australian Radiation Protection and Nuclear Safety (Consequential Amendments) Bill 1998,[16]) or on the entering into force of an international Convention (for example, the Anti-Personnel Mines Convention Bill 1998 and the Damage by Aircraft Bill 1999[17]). These provisions were of a kind contemplated by the relevant Drafting Instruction and the Committee noted them without further comment.

Example: Administrative Review Tribunal Bill 2000

5.40 Clause 2 of this bill provided that those provisions which dealt with the review of ART decisions were to commence on proclamation or 12 months after assent. This was a departure from Drafting Instruction No 2 of 1989 and no reasons were provided in the Explanatory Memorandum. The Committee sought an explanation from the Attorney-General who advised that the default commencement date was amended in the House of Representatives and was now 6 months.[18]

Example: Health Legislation Amendment Bill (No 4) 1998

5.41 Among other things, this bill contained amendments which broadened the Minister's power to monitor changes to health fund rules relating to premiums. A number of these amendments transferred the premium monitoring provisions from the Minister to the Private Health Insurance Administration Council. These amendments commenced on Proclamation, or no later than 2 years after a certain date. Other amendments "at an appropriate time" increased the independence and flexibility that health funds had with respect to premium increases. These amendments commenced on Proclamation, or no later than 2 years after transfer provisions commenced.

5.42 In *Alert Digest No 1 of 1999* the Committee noted that these provisions would commence at a time that was fixed by reference to the date of Assent. To that extent, their commencement was not a matter of Executive discretion. However, the

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16 Scrutiny of Bills Committee, *Alert Digest No 19 of 1999*, p 5 and *Thirteenth Report of 1999*, p 361.

17 Scrutiny of Bills Committee, *Alert Digest No 10 of 1998*, pp 17-18 and *Alert Digest No 5 of 1999*, p 28.

18 Scrutiny of Bills Committee, *Ninth Report of 2001*, p 359.

Explanatory Memorandum provided no reason for the considerable length of time between Assent to the bill and the possible coming into force of these particular provisions (a period of up to 48 months).

5.43 The Committee sought advice from the Minister or Health and Aged Care, who responded that these delayed commencement provisions had been removed during detailed consideration of the bill in the Senate.[19]

Example: Child Support Legislation Amendment Act 1998

5.44 Certain amendments proposed in this bill were expressed to commence up to 12 months after assent. The Explanatory Memorandum failed to provide a reason for this extended commencement period. The Committee sought advice from the Minister for Family and Community Services, who responded that it was desirable that these provisions should commence at the same time as a new child support assessment year (ie 1 July). Given that it was not certain whether the bill would be passed and receive Royal Assent before 1 July 1998, it was expressed to commence from 1 July 1999.[20]

5.45 The Committee thanked the Minister for this response and noted that this explanation should have been included in the Explanatory Memorandum.

Example: Fuel Quality Standards Bill 2000

5.46 Clause 2 permitted this bill to commence on proclamation, with no further time specified within which its provisions must necessarily come into force. The Explanatory Memorandum expressed an intention that the offence provisions would commence on the same date that the first determinations setting out petrol and diesel standards took effect – this date had not been specified because consultations on the standards would not be finalised until after the Bill was introduced.

5.47 However, elsewhere the bill provided that the Minister was not required to consult the Fuel Standards Consultative Committee in relation to any such determinations made within 6 months after commencement. This was because of "an extensive consultation process involving State and Territory agencies, industry and community stakeholders. These consultations will have concluded before the Fuel Quality Standards Bill is enacted". Given this provision, and this explanation, there seemed little justification for providing the open-ended discretion as to commencement.

5.48 The Minister responded that:

> [C]onsultations with stakeholders will be completed before the Bill is enacted. Following consultations there will, however, be a further process within the

19 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, p 254.

20 Scrutiny of Bills Committee, *First to Twenty-First Reports of 1999*, p 446.

> Commonwealth, of determining the whole of government position on the content of the standards. This position will be considered by the Minister for the Environment and Heritage when he makes relevant decisions under the new legislation.
>
> It would be inappropriate to pre-empt this process by determining, in advance, a date by which standards must take effect. This, together with the concerns about the timing of commencement of those provisions which rely upon the existence of standards, supports the discretion as to the commencement not being limited.[21]

5.49 The Committee thanked the Minister for this response which indicated that the bill was expressed to commence on proclamation because the date on which the proposed fuel standards would take effect – a date which was critical for stakeholders – was unknown. However, the Committee remained concerned that legislation which was expressed to commence on proclamation might, in fact, never commence. In the case of this bill, the Committee considered it preferable that a date be fixed – no matter how long after assent – by which standards must be determined and the bill must either commence or be repealed.

21 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 410.

CHAPTER 6

INSUFFICIENT PARLIAMENTARY SCRUTINY OF THE EXERCISE OF LEGISLATIVE POWER

Application of the criterion set out in Standing Order 24(1)(a)(v)

6.1 Constitutional propriety demands that Parliament carry out its legislative function. Parliament should not inappropriately delegate its power to legislate to the Executive. Whenever Parliament delegates the power to legislate to others, it must address the question of how much oversight it should maintain over the exercise of the delegated power. The criterion set out in Standing Order 24(1)(a)(v) requires that the Committee advise the Senate where bills seek to delegate legislative power but fail to provide for a proper auditing of its use.

6.2 A bill may insufficiently subject the exercise of delegated legislative power to parliamentary scrutiny in a number of circumstances. For example, it may:

- give a power to make subordinate legislation which is not to be tabled in Parliament or, where tabled, is free of the risk of disallowance;
- provide that regulations to be made under primary legislation may incorporate rules or standards of other bodies as in force from time to time;
- require subordinate legislation to be tabled and subject to disallowance, but with a disallowance period so short that Parliament may not be able to scrutinise it properly; or
- give a Minister or other person the ability to issue guidelines, directions or similar instruments influencing how powers granted under a law are to be exercised without any obligation for them to be tabled in Parliament or without them being subject to disallowance.

Not tabled or not subject to disallowance

6.3 During the 39th Parliament, a number of bills were amended in response to Committee concerns about subordinate legislation which was not subject to Parliamentary scrutiny.

6.4 In *Alert Digest No 10 of 2000*, the Committee noted that the Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No 2) 2000, among other things, authorised the Minister to make determinations which could potentially modify the way in which specific legislative provisions were applied to various persons. As such, the determinations appeared to be legislative in

character and yet did not appear to be disallowable. The Committee queried this with the Minister who agreed and prepared amendments to make the determinations disallowable.[1]

6.5 Similarly, in *Alert Digest No 7 of 1999*, the Committee considered the Broadcasting Services Amendment (Online Services) Bill 1999 – a bill which established a scheme for regulating certain aspects of the Internet industry. Among other things, the bill empowered the Australian Broadcasting Authority (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 had to have regard to the objective of protecting children from exposure to unsuitable Internet content, and other relevant matters. A copy of any such declaration had to be tabled in the Parliament, but no provision was made for disallowance. The Committee queried this with the Minister who agreed and prepared amendments to make the declarations disallowable.[2]

6.6 In *Alert Digest No 11 of 1998*, the Committee considered the National Environment Protection Measures (Implementation) Bill 1998. A number of provisions in this bill authorised the Minister, by notification in the *Gazette*, to apply or not apply provisions of State and Territory law to the Commonwealth or its authorities. The exercise of this power was essentially legislative in nature and the Committee sought the Minister's advice as to why these declarations were not disallowable. The Minister responded that, prior to passing the bill, the Senate had agreed to amendments which made these declarations disallowable.

Example: Horticulture Marketing and Research and Development Services Bill 2000

6.7 This bill proposed the creation of a 'not for profit' company to provide marketing and research and development services to the horticulture industry. This company, which was to replace the Australian Horticultural Corporation, the Australian Dried Fruits Board, and the Horticultural Research and Development Board, would have industry representative bodies and voluntary funding contributors as members, with voting rights allocated according to the amount of funds provided.

6.8 However, the Minister retained certain powers under the bill, including:

- the power to declare a single company (or separate companies) to be the industry services body (which used Commonwealth funds to provide marketing and research and development programs to the industry) and the export control body (which administered export control powers on behalf of the industry, issuing licences and charging fees for the purpose);

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1 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 422.

2 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, p 96

- the power to declare that either company should cease to be the relevant industry services or export control body; and
- the power to give a written direction to either the industry services or export control body if the Minister was satisfied that such a direction was in the national interest "because of exceptional and urgent circumstances" – under subclause 29(2), the relevant body had to comply with such a direction.

6.9 Copies of declarations in the first two categories were required to be published in the *Gazette*, but no provision was made to ensure that they were subject to Parliamentary oversight.

6.10 Copies of declarations in the third category were required to be tabled (unless the Minister determined in writing that doing so would be likely to prejudice the national interest of Australia or the body's commercial activities) but were not disallowable. The bill did not define either "the national interest" or "exceptional and urgent circumstances" and where the Minister decided not to table such a direction, it was not clear whether, and how, Parliament would be informed of the fact that such a determination had been made.

6.11 The Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry advised the Committee that declarations in the first two categories were "administrative decisions" which would be subject to judicial review and that the Parliament would be in a position to question the Minister about these declarations "through the normal Parliamentary processes". Declarations in the third category were intended to provide:

> a reserve power to the Minister in circumstances where the direction is needed in the national interest because of exceptional and urgent circumstances. Such circumstances may arise for example where the industry services body is required to immediately suspend an R&D program or marketing program because to continue the spending would place the national interest at risk (eg ongoing joint research expenditure with a country which Australia has suspended all diplomatic and commercial relations). Similarly in the case of the export control powers, a case may arise where the powers need to be suspended urgently for similar national interest reasons.
>
> It is also possible circumstances may arise where a horticulture disease outbreak could occur, requiring urgent national response, including urgent research and development and/or marketing initiatives to be taken in the national interest. This provision of the Bill would allow the Minister to immediately engage the company and, if necessary, direct the company to allocate resources to the necessary R&D and marketing programs required, should the company not be sure of the position.[3]

6.12 It was suggested that disallowance was inappropriate "given the exceptional and urgent national interest grounds on which a direction can be given by the Minister".

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3 Scrutiny of Bills Committee, *First to Seventeenth Reports of 2000*, p 534.

6.13 The Committee thanked the Parliamentary Secretary for this response, but pointed out that, under the arrangements proposed in the first two categories, while some Parliamentary oversight might be possible (for example, through the authority of Senate Legislation Committees to inquire into annual reports and the performance of departments and agencies), it was clear that this oversight would be more limited than that which presently existed. For example, it was unlikely that any declared industry services corporation would remain subject to the Senate Estimates process.

6.14 And while the arrangements proposed in the third category had been imposed to ensure public accountability, given that "levy payer and Government matching funds for R&D are involved," the Committee pointed out that they did not enable the Parliament to adequately scrutinise the Minister's directions. For example, Ministerial directions expressed to be made 'in the national interest because of exceptional and urgent circumstances' might not come to the attention of the Parliament until it was informed "through the regular reporting requirements imposed on the company" by a Deed of Agreement. In addition, while the Deed specified that the company report on the impact of any Ministerial direction, this would be "subject to any commercial confidentiality and public interest restrictions". Given the apparent lack of Parliamentary scrutiny in each case, the Committee continued to draw the provisions to the attention of the Senate.

6.15 Following debate on the bills, on 30 November 2000, the Senate agreed to amend these provisions and make the declarations disallowable.[4]

Example: Pig Industry Bill 2000

6.16 This bill proposed the creation of a similar 'not for profit' services body for the pig industry. This body would be responsible for industry's strategic policy development as well as the marketing and R&D services formerly provided by the Australian Pork Corporation (APC) and the Pig Research and Development Corporation (PRDC).

6.17 In *Alert Digest No 18 of 2000*, the Committee considered provisions in the bill which gave the Minister discretions similar to those in the Horticulture Marketing and Research and Development Services Bill 2000. Specifically, the bill authorised the Minister to:

- enter into a contract with, and declare, an eligible body to be the pig industry services body; and
- give a binding written direction to that body if he or she was satisfied that such a direction was "in Australia's national interest because of exceptional and urgent circumstances", and it would not require the body to incur expenses greater than amounts paid to the body under the Act,

4 Senate, *Hansard*, 30 November 2000, pp 20230-36.

> and if the Minister has given the directors an adequate opportunity to discuss the need for the proposed direction and its impact on the body's commercial activities.

6.18 Only the latter direction was required to be tabled. Neither direction was disallowable.

6.19 The Committee drew attention to this lack of parliamentary scrutiny, and drew the Senate's attention to its previous amendments to the Horticulture Marketing and Research and Development Services Bill 2000. Following debate on this bill, on 26 March 2001, the Senate agreed to amend these provisions and make the Ministerial directions disallowable.[5]

Example: Roads to Recovery Act 2000

6.20 This bill proposed to appropriate money for the Roads to Recovery Program and provided a mechanism for specifying the funding to be received by each local government body and the conditions on which the funds were provided. The Explanatory Memorandum listed the local government bodies to be funded and the grants payable over the life of the program.

6.21 Clause 3 of the bill defined a 'tabled list' as "the funding allocation list that was tabled in the House of Representatives in relation to the Bill for this Act" (emphasis added). With reference to this provision, the Explanatory Memorandum stated that the 'tabled list' was "the list attached to this Explanatory Memorandum".

6.22 The Committee noted that the usual procedure whenever documents were to be tabled is to require that they be tabled in each House of the Parliament. Indeed, this was recognised elsewhere in this bill – for example, clause 10 required that an annual report on the operation of the Act "be tabled in each House of the Parliament".[6] The Committee sought the Minister's advice as to why the bill provided for the list tobe tabled in one House only.

6.23 The Minister responded that there had been an oversight, and acknowledged that it would have been better to have made reference in the bill to tabling in both Houses. The bill did not reflect a trend towards tabling in the House of Representatives alone.

Incorporating material as in force from time to time

6.24 Section 49A of the *Acts Interpretation Act 1901* lays down a general rule that allows a regulation to adopt or incorporate material external to it and to give it the

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5 Senate, *Hansard*, 26 March 2001, pp 22955-59.

6 Scrutiny of Bills Committee, *Sixth Report of 2001*, pp 230-1.

force of law. Where the material adopted is not itself an Act or a regulation, the general rule allows for its adoption in the form that it exists at the time of its adoption, but not "as in force from time to time".

6.25 There are a number of reasons for imposing such a rule. Without it, a person or organisation outside the Parliament may change the obligations imposed by a regulation without the Parliament's knowledge, or without the opportunity for Parliament to scrutinise and (if so minded) disallow the variation. In addition, such a rule also encourages more certainty in the law, and requires that lawmakers ensure that those obliged to obey a law have adequate access to its terms. While this is a general rule, it may be ousted by a statement of contrary intent in an Act.

6.26 In previous Parliaments the Committee has occasionally considered and commented on legislation which incorporated standards proposed or approved by the Standards Association of Australia "as in force or existing from time to time.[7]

6.27 During the 39th Parliament, this issue arose only once – in relation to an amendment moved to the General Insurance Reform Bill 2000 in the House of Representatives.[8] A provision in that bill authorised the Australian Prudential Regulation Authority to determine prudential standards. These determinations were disallowable instruments. However, an amendment agreed to by the House of Representatives enabled these standards to apply, adopt or incorporate any matter contained in an instrument or other writing as in force from time to time, contrary to section 49A of the *Acts Interpretation Act 1901*.

6.28 In the absence of any explanation, the Committee sought the Minister's advice as to why it was appropriate that these standards should be able to incorporate any extrinsic material as it existed from time to time. Unfortunately no reply had been received when the 39th Parliament was prorogued.

Insufficient time

6.29 During previous Parliaments, the Committee has considered bills which limited the time for the possible disallowance of certain instruments. For example, in *Alert Digest No 1 of 1996* the Committee considered a provision in the Primary Industries and Energy Legislation Amendment Bill (No 1) 1996 which limited the time for disallowance of a ministerial instrument to 3 sitting days (rather than the usual 15 sitting days). This issue did not arise during the 39th Parliament.

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7 See, for example, Scrutiny of Bills Committee, *First to Nineteenth Reports of 1997*, pp 128-31.

8 Scrutiny of Bills Committee, *Alert Digest No 11 of 2001*, p 29.

Quasi-legislation

6.30 The Committee draws attention to provisions which give power to a particular person or body to issue guidelines, directions or similar instruments which determine the way authority given under an Act of Parliament is to be exercised. The Committee usually suggests that such instruments be tabled in Parliament and, where appropriate, be disallowable by either House.

6.31 In considering whether a particular piece of legislation comes within the fourth criterion of its terms of reference, the Committee must resolve whether the power the bill delegates is legislative in nature, or bears some other character. Where the power delegated is administrative in nature, the bill does not come within the criterion. Where the power delegated is legislative in nature, the Committee must decide whether or not the legislation establishes a sufficient regime of scrutiny over the exercise of that power.

6.32 The Committee sets out its views about appropriate levels of Parliamentary scrutiny over guidelines, directions and similar instruments on a case-by-case basis. What is appropriate will depend on the particular issues raised by each piece of legislation.

Some examples

6.33 On a number of occasions the Committee accepted that instruments were administrative rather than legislative in character. This approach was based on a distinction drawn by Latham CJ in *Commonwealth of Australia v Grunseit* (1943) 67 CLR 58. In that case, his Honour held that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular circumstances.

6.34 Instances during the 39th Parliament in which the Committee accepted that particular instruments were administrative included:

- directions issued by the Minister for Finance, which might override the provisions of any other Commonwealth law, relating to the liability of the Commonwealth and Commonwealth entities for the payment of luxury car tax and wine tax;[9] and
- written orders issued by the Commissioner of the Australian Federal Police relating to the general administration of, and control of the operations of, the Australian Federal Police.[10]

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9 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 189-94.

10 Scrutiny of Bills Committee, *First to Twenty First Reports of 1999*, pp 470-72.

6.35 Under the Intelligence Services Bill 2001, the Minister responsible for the Australian Secret Intelligence Service and the Defence Signals Directorate was authorised to make written rules "regulating the communication and retention by the relevant agency of intelligence information concerning Australian persons". In making these rules, the Minister had to have regard to the need to ensure that the privacy of Australians was preserved as far as is consistent with the proper performance by the agencies of their functions.

6.36 The Committee queried whether these rules ought to be disallowable but, given that they were designed to limit the circumstances in which information about Australians could be collected and distributed, and to "ensure that the foreign (intelligence) collection agencies act lawfully, with propriety, and in accordance with the Government's commitment to privacy and civil liberties" the Committee accepted that Parliamentary scrutiny through the Joint Select Committee on the Intelligence Services was appropriate.[11]

Example: General Insurance Reform Bill 2001

6.37 This bill amended the *Insurance Act 1973* to introduce a revised regulatory framework for general insurers in accordance with the supervisory regime for authorised deposit-taking institutions and life insurers. The bill included a provision which permitted the Australian Prudential Regulation Authority (APRA) to issue a determination that "all or specified provisions of [the *Insurance Act 1973*] do not apply to a person".

6.38 This provision appeared to allow APRA to exercise a legislative function, but did not subject the exercise of that function to Parliamentary scrutiny by, for example, ensuring that such determinations were disallowable. The Committee queried this provision with the Minister who responded that APRA needed to be an "independent and operationally autonomous regulator to ensure the financial safety of policyholders":

> Determinations that certain provisions of the Act do not apply, allows flexibility and allow APRA to respond very quickly and continuously to developments in financial products or the system, as a whole, or where there may be prudential or other concerns about an institution. Recent events in the insurance industry demonstrate that events in financial markets can move unpredictably and with great speed, and that the regulatory environment must respond quickly, and with certainty, to these changes. It is therefore crucial that APRA be able to respond with certainty in the making of exemptions, and also in relation to their revocation or variation (for example, to impose additional conditions) where necessary.
>
> Furthermore, a determination under section 7 could contain commercial-in-confidence information about an individual general insurer which should not be

11 Scrutiny of Bills Committee, *Thirteenth Report of 2001*, pp 603-5.

> made public. On this basis it is considered that it is not appropriate for a determination under section 7 to be a disallowable instrument.[12]

6.39 The Committee accepted the significance of APRA' role but found it difficult to see how parliamentary scrutiny of its determinations would imperil the financial safety of policyholders.

6.40 On 27 August 2001, the Senate passed the bill with no amendment to this provision.

Example: Judiciary Amendment Bill 1998

6.41 This bill was re-introduced in the 39th Parliament, having not been passed during the previous Parliament. As noted in the Committee's 38th Parliament Report,[13] the bill proposed to establish the Australian Government Solicitor as a separate statutory authority, and conferred on the Attorney-General a power to issue Legal Services Directions relating to the performance of Commonwealth legal work – whether performed by a person under the control of the Commonwealth or by some other person. It appeared to the Committee that these Directions might be legislative in character, yet the bill made no provision for their disallowance under the *Acts Interpretation Act 1901*.

6.42 The Attorney-General had previously 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 Directions that were legislative in character to be subject to Parliamentary scrutiny under the Legislative Instruments Act.[14]

6.43 Noting that the Legislative Instruments Bill had been in existence in various forms since 1994, but had not yet become law, the Committee suggested, as an interim measure, that Legal Service Directions of a legislative character be subject to parliamentary scrutiny under the *Acts Interpretation Act 1901*.

6.44 The Attorney-General responded that he remained 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

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12 Scrutiny of Bills Committee, *Eleventh Report of 2001*, p 478.

13 See Scrutiny of Bills Committee, *The Work of the Committee During the 38th Parliament (May 1996-August 1998)*, pp 75-6.

14 Scrutiny of Bills Committee, *First to Eleventh Reports of 1998*, p 5.

> which will provide a comprehensive regime for effective Parliamentary scrutiny of instruments of a legislative nature.[15]

6.45 The Committee acknowledged that the Legislative Instruments Bill undoubtedly represented the most effective and comprehensive regime for Parliamentary scrutiny of such instruments. However, it pointed out that that bill had been introduced into the Parliament in 1994, had not been passed during the 37th or 38th Parliaments, and was not currently on the Senate Notice Paper. It was reasonable to conclude that it might be some years yet before the Parliament agreed to its passage. Given this, the Committee concluded that the extent to which Legal Services Directions that were legislative in nature should be scrutinised in the interim was a matter best determined by the Senate as a whole.

6.46 In debate, the Australian Democrats moved amendments to the bill to address the Committee's concerns, but these amendments were not passed by the Senate.[16]

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15 Scrutiny of Bills Committee, *First to Twenty-first Reports of 1999*, p 45.

16 Senate, *Hansard*, 9 March 1999, pp 2492-93.

CHAPTER 7

ENTRY AND SEARCH PROVISIONS IN COMMONWEALTH LEGISLATION

Introduction

7.1 During the 39th Parliament, in addition to its legislative scrutiny work, the Committee undertook an inquiry into a specific matter referred to it by the Senate. On 10 December 1998, the Senate referred the following matter to the Committee for inquiry and report:

> A review of the fairness, purpose, effectiveness and consistency of right of entry provisions in Commonwealth legislation authorising persons to enter and search premises.[1]

Conduct of the Inquiry

7.2 The Committee received a total of 31 submissions (including supplementary submissions). It received a briefing on the issues from officers of the Attorney-General's Department on 22 June 1999, and held public hearings in Canberra on 3 and 4 August 1999 and 13 September 1999, and in Melbourne on 14 September 1999.

7.3 The Committee's report was tabled on 6 April 2000.[2] In that report, the Committee noted that, at common law, every unauthorised entry onto premises was a trespass, and that the modern authority to enter and search premises was essentially a creation of statute. As such, it should always be regarded as an exceptional power, not a power granted as a matter of course.

7.4 While there is a public interest in the effective administration of justice and government, there is also a public interest in preserving people's dignity and protecting them from arbitrary invasions of their property and privacy, and disruption to the functioning of their businesses. Neither of these interests can be insisted on the exclusion of the other, and proper and fair laws which authorise the entering and searching of premises can only be made where the right balance is struck between these two interests.

7.5 Statutory provisions which authorise the entry and search of premises should conform with a set of principles. These principles are set out below.

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1 *Journals of the Senate*, No 15, 10 December 1998, p 374.

2 Scrutiny of Bills Committee, *Fourth Report of 2000*.

Principles

When powers to enter and search may be granted

7.6 The relevant principles governing the grant of entry and search powers are:

- people have a fundamental right to their dignity, to their privacy, to the integrity of their person, to their reputation, to the security of their residence and any other premises, and to respect as a member of a civil society;
- no person, group or body should intrude on these rights without good cause;
- such intrusion is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process;
- powers to enter and search are clearly intrusive, and those who seek such powers should demonstrate the need for them before they are granted, and must remain in a position to justify their retention;
- when granting such powers, Parliament should do so expressly, and through primary, not subordinate, legislation;
- a power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required;
- in considering whether to grant such a power, Parliament should take into account the object to be achieved, the degree of intrusion involved, and the proportion between the two – in the light of that proportion, Parliament should decide whether or not to grant the power and, if the power is granted, Parliament should determine the conditions to apply to the grant and to the execution of the power in specific cases;
- the criteria which individuals, groups and organisations must satisfy before they are allowed to enter and search premises should be consistent across all jurisdictions – rights should not be inviolate in one jurisdiction but capable of being violated in another;
- consistency should be achieved by ensuring that all entry and search provisions conform to a set of guidelines or principles;
- those who seek powers to enter and search which do not accord with this set of guidelines must justify why they are seeking, and why they should retain, such broader powers; and
- legislation conferring a power of entry and search should specify the powers exercisable by the officials carrying out the action. It should

preserve the right of occupiers not to incriminate themselves and, where applicable, their right to the protection of legal professional privilege.

When entry and search may be authorised

7.7 The relevant principles governing the authorisation of entry and search are:

- legislation should authorise entry onto, and search of, premises only with the occupier's genuine and informed consent, or under warrant or equivalent statutory instrument, or by providing for a penalty determined by a court for failure to comply;
- where legislation provides for entry and search with consent (or alternatively under a warrant), it should make clear that the consent must be a genuine and ongoing consent, and it should impose no penalty or disadvantage if an occupier fails to co-operate in the search, or subsequently withdraws consent – requiring an occupier to co-operate is inconsistent with the idea of consent;
- where legislation provides for entry and search, but does not contemplate the possibility of entry by force under warrant, then a refusal of entry should attract a penalty imposed by a court;
- the power to issue warrants to enter and search premises should only be conferred on judicial officers; justices of the peace should not have this power, nor should a Minister or departmental officer;
- to ensure consistency with warrants issued by judicial officers, where a statute authorises an entry and search by permit or for monitoring purposes without prior judicial approval, it should provide for an appeal to a judicial officer;
- circumstances may arise which may make it impractical to obtain a warrant before an effective entry and search can be made. Impracticality should be assessed in the context of current technology. If an official exercises a power to enter and search in circumstances of impracticality, that official must then, as soon as reasonably possible, justify that action to a judicial officer; and
- simply because a person has received financial assistance from the Commonwealth, or is liable to pay a levy under legislation, it does not follow that that person has thereby consented to entry and search by officials seeking to monitor compliance with the legislation, and no such implication should be drawn unless those subject to entry and search in these circumstances were informed in writing in plain English about those powers when receiving the assistance or on becoming liable to pay the levy.

Who may enter and search premises

7.8 The relevant principles governing the choice of people on whom a power to enter and search is to be conferred are:

- a power to enter and search should be conferred only on those officials who are subject to obligations which make them accountable for the use and any misuse of the power;
- such a power should be conferred only on those officials who are of sufficient maturity to exercise it and who have received appropriate training – legislation should not confer such a power on a recipient categorised simply as 'a person' or as a member of a particular Department or organisation; and
- such a power should not be conferred on a particular recipient simply because it is the most economically or administratively advantageous option.

How broad is the power to be conferred

7.9 The relevant principles governing the extent of the power to be granted are:

- the extent of a power to enter and search will vary with the circumstances applicable, but the powers of entry and search given to the Australian Federal Police (AFP) under the *Crimes Act 1914* should be seen as a 'high water mark'; officials in other organisations might be given lesser powers, but greater powers should be conferred only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising those powers are subject to proper scrutiny; and
- officials should be given no greater power to enter and search premises than is necessary to carry out their duties.

Which matters give rise to a power to enter and search

7.10 The relevant principles governing the kinds of matters which might attract the grant of a power are:

- the power to enter and search can properly be conferred in relation to both civil and criminal matters, but not as a matter of course, and only with provision for due process; and
- it is appropriate to grant a power of entry and search:
    - to assist in the investigation of serious crime where the investigation is genuine and has a reasonable chance of success;

- to assist in the gathering of evidence to support a prosecution for a serious offence where the evidence sought is of significance and there is a reasonable chance that it will be found on the premises;
- to determine whether a person has complied with legislation under which that person has accepted a commercial benefit, subject to being monitored by entry and search;
- to determine whether a person has complied with legislation which imposes a commercial levy in relation to a serious matter, in circumstances where the legislation provides for this in specific terms; and
- to monitor civil matters which are serious, cannot otherwise be checked, and where the powers are used with maturity and are proportionate to the benefit gained.

How should the power be exercised

7.11 The relevant principles governing the manner in which the power is exercised are:

- the power of entry and search should be carried out in a manner consistent with human dignity and property rights;
- as a general rule, such powers should be exercised during reasonable hours and on reasonable notice, unless this would defeat the legitimate purpose to be achieved by the exercise;
- where entry and search is likely to involve force or physical interference with people and their property, it is preferable that the power be exercised only by, or with the assistance of, police officers. If such a power is to be granted to people other than police officers in such circumstances, their maturity, training and experience should be comparable to that of the AFP; and
- entry and search of premises, especially if carried out with the authority to use force, should be recorded on video or audio tape, unless this is impractical in all the circumstances.

What information should be provided to occupiers

7.12 The relevant principles governing the provision of information to occupiers are:

- the occupier of premises which have been entered and searched should be:
  - given a copy of any relevant warrant;

- informed in writing or, if that is impractical, informed orally, of his or her rights and responsibilities under the relevant legislation; and
- given a genuine opportunity to have an independent third party, legal adviser or friend present throughout the search;

These requirements should be waived only where circumstances are critical, or where an official is threatened with violence, or where it is absolutely impractical to follow them;

- legislation conferring a power to seize documents or other articles should provide:
  - that any material seized be itemised;
  - that the occupier and any others affected be entitled to a copy of that itemised list and copies of any other business or personal records seized;
  - that the occupier and any others affected be entitled to receive copies of any video or audio tape recordings made, or transcripts of those recordings, within 7 days;
  - a procedure for dealing with disputed seizures; and
  - a time limit for the return of any material seized.

People exercising entry and search powers should be protected

7.13 Where people enter and search premises under a power that accords with these principles, and exercise that power appropriately and in accordance with due process, they are entitled to do so without being subject to violence, harassment or ridicule, and are entitled to the protection of the law and to respect as persons carrying out their duty on behalf of the community.

When warrants should be issued

7.14 The principles of relevance to judicial officers in the issue of warrants (as set out in *Tillett*'s case) are:

- when approached to issue a warrant, a judicial officer should act as an independent authority, exercising his or her own judgment and not automatically accepting the informant's claim;
- the judicial officer has a discretion which must be exercised judicially – to enable its proper exercise, the informant must put forward adequate sworn evidence;
- the warrant itself must clearly state the findings of the judicial officer;

- as a corollary of the power of seizure, a particular offence must be specified, both in the information and in the warrant – even where the statute simply uses the words "any offence" and makes no clear reference to a need to specify a particular offence;
- a warrant must not authorise the seizure of things in general, or things which are related to offences in general, but only the seizure of things by reference to the specified offence;
- a warrant may be struck down for going beyond the requirements of the occasion in the authority to search; and
- the time for execution of a warrant must be strictly adhered to.

Other considerations

7.15 Each agency which exercises entry and search powers should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.

Conclusions and recommendations on issues of general principle

7.16 On the issue of general principles, the Committee concluded that while powers of search and entry may be necessary for the effective administration of the law in certain circumstances, they remain inherently intrusive. One basic form of protection is to ensure that all such powers are drafted according to a set of principles along the lines of those set out above. These principles should apply both to existing search and entry provisions and to proposed new provisions, should be administered by the Attorney-General's Department, and should have statutory force.

7.17 Where greater powers are proposed than are recognised in these principles, Parliament should acknowledge the exceptional circumstances that give rise to the proposal. The Explanatory Memorandum accompanying a bill should make the reasons for any departure from the guidelines explicit, and those greater powers should be made explicit in the bill itself.

7.18 Where entry provisions have been granted, their exercise should be recorded, monitored and reported on, and the powers themselves should be subject to periodic long-term review.

7.19 On this issue, the Committee **recommended** that:

- all entry and search provisions in legislation including bills should have to conform with a set of fundamental principles rather than long-standing practice. These principles should be enshrined in stand-alone legislation based on the principles set out in this Report. This legislation should take as its starting point the search warrant provisions set out in the *Crimes Act 1914 (Cth)*;

- the entry and search powers available to the Australian Federal Police under the *Crimes Act 1914 (Cth)* should constitute the 'high-water mark' for such powers generally. By law, the powers of entry and search available to any other agency, person or organisation may be less than these, but should only exceed the powers available to the Australian Federal Police in exceptional and critical circumstances; and
- each agency, person or organisation which exercises powers of entry and search under legislation should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.[3]

The purpose of entry provisions: conclusions and recommendations

7.20 Powers to enter and search are often included in legislation which imposes obligations on people, and in the legislation which establishes regulatory or investigatory agencies. These powers are included to assist such agencies in undertaking their statutory duties. Where necessary, these powers are also included to assist agencies to enforce the provisions of their legislation (for example, through prosecution). Specifically, such powers assist agencies in gathering information, documents or other relevant things, and are seen by those agencies as essential powers for their effectiveness as regulators.

7.21 Powers to enter and search are included in legislation for two main purposes. Their traditional purpose is to enable the gathering of evidence of possible offences (offence-related warrants). However, such powers are also included to enable the monitoring of compliance with a statute (monitoring warrants). Monitoring warrants are generally easier to obtain than offence related warrants, but the powers available to officers exercising them are generally more limited – inspections and audits are usually permitted but seizures and arrest are not.

7.22 The Committee noted that some statutes confer powers of access to information on certain non-government organisations and their officials for defined purposes. For example, company auditors have a right of access to company records for the purposes of conducting an audit, and must report certain breaches of the law to the Australian Securities and Investments Commission (ASIC). The Official Receiver in Bankruptcy is entitled to access to the premises and books of a bankrupt for the purposes of the bankruptcy legislation. Under State law, RSPCA inspectors are entitled to access to premises for the purposes of legislation which prohibits cruelty to animals. And under the *Workplace Relations Act 1996*, certain trade union officials are entitled to enter premises where work is being performed, either to investigate suspected breaches of that Act, or to hold discussions with employees.

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3 Scrutiny of Bills Committee, *Fourth Report of 2000*, p 55.

7.23 The Committee concluded that search and entry provisions were appropriate for both evidence-gathering and compliance-monitoring purposes but that, in either case, the provisions should conform with the general principles set out above. These principles should apply both to government officials and non-government officials who exercise statutory powers of entry and search.

7.24 On this issue, the Committee **recommended** that:

- the principles it set out should apply to both government and non-government agencies, persons and bodies which seek to enter and search premises by virtue of statutory authorisation; and
- the right of entry provisions in the *Workplace Relations Act 1996* should also conform with the principles set out above.[4]

The consistency of entry provisions: conclusions and recommendations

7.25 It is important that search and entry provisions should be as consistent as practicable across all agencies which exercise those powers. Consistency is an issue for occupiers, who may otherwise find themselves subject to different procedures and obligations depending on the agency which happens to exercise its powers. It is similarly an issue for agencies, as they may find themselves administering, and having to train staff in the administration of, quite different provisions.

7.26 The Committee took the term consistency to mean consistency with principle rather than with long-standing precedent. While consistency is a guiding principle, it should not be seen as absolute. There may be occasions when different powers may be required because different functions need to be performed.

7.27 The Committee noted that model search warrant provisions had been included in the *Crimes Act* in 1994. Evidence suggested that these provisions had operated reasonably consistently. The Attorney-General's Department also used preferred model provisions where it was proposed to include monitoring warrant provisions in a bill.

7.28 Following amendments to the search and entry powers exercisable by the Australian Customs Service, the major remaining areas of inconsistency in search and entry provisions were:

- the access provisions administered by the Australian Taxation Office (ATO), which entitle the Commissioner, at all times, to "full and free access to all buildings, places, books, documents and other papers" for any of the purposes of the tax legislation – there was no requirement that the Commissioner obtain a warrant in the absence of genuine consent;

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4 Scrutiny of Bills Committee, *Fourth Report of 2000*, pp 56-58.

- the entry powers administered by the Department of Immigration and Multicultural Affairs (DIMA), which empower the Secretary of the Department to authorise officers to enter and search any premises where they had reasonable cause to believe that they would find either unlawful non-citizens or persons in breach of their visa conditions, or relevant documents – again there was no requirement that a warrant be obtained from a judicial officer;

- the inspection powers exercised by the Australian Transaction Reports and Analysis Centre (AUSTRAC) which empower the Director of AUSTRAC to require certain defined persons to give authorised officers access to their business premises – again with no requirement that a warrant be obtained from a judicial officer in the absence of genuine consent; and

- the entry powers administered by the Australian Security and Intelligence Organisation (ASIO), and under the Defence (Areas Control) Regulations, which, in each case, empower the relevant Minister (rather than an independent judicial officer) to issue a warrant to enter and search.

7.29 Following the conferring of additional statutory functions on the ASIC, the various entry provisions which it exercised were not consistent with each other, and certain other provisions also contained anomalies.

7.30 The Committee concluded that there ought to be consistency in the legislative provisions granting powers of entry and search to all comparable authorities. All such provisions should accord with a common set of guidelines unless compelling reasons are advanced to justify a departure from them.

7.31 The Committee accepted the view of the Acting Privacy Commissioner that, with some notable exceptions, most of the statutory provisions granting powers of entry and search appear to be consistent and broadly in accord with the existing indicative guidelines administered by the Attorney-General's Department. However, the powers exercisable by DIMA, AUSTRAC, ASIO and Defence made no provision for any independent judicial oversight. There seemed to be no objection, in principle, to making such provision.

7.32 The ATO argued that its provisions were different. As a result of the self-assessment system of taxation he ATO accepts taxpayers' statements of their taxable income, subject to a right to verify those statements subsequently. In addition, given the number of occasions on which the ATO seeks access to taxation records, requiring it to obtain a warrant on every occasion would prove impractical.

7.33 However, under self-assessment the ATO sought access to records essentially to monitor compliance with the relevant legislation – in the same manner as many other agencies. It obtained access with consent on most occasions, and would continue to do so in the same manner as most other agencies which monitor compliance. Where consent is refused, the Committee considered that the ATO, like

those other agencies, and in accordance with principle, should be required to obtain a warrant from a judicial officer. A similar view was put by the Joint Committee of Public Accounts in its 1993 Report *An Assessment of Tax*. In the words of the Acting Privacy Commissioner, "such a measure would be a welcome strengthening of privacy protection and would enhance the consistency and fairness of Commonwealth law".

7.34 On this issue, the Committee **recommended**:

- that all existing entry and search provisions in legislation, including those contained in regulations, be reviewed and amended by 1 July 2001 to ensure that they conform with the principles set out in Chapter 1 of the Committee's report;
- that, as a priority, all entry and search powers that go beyond the entry powers in the Crimes Act, including the powers exercisable by the Australian Taxation Office, the Department of Immigration and Multicultural Affairs, the Australian Transaction Reports and Analysis Centre, the Australian Security Intelligence Organisation and the Minister for Defence under the Defence (Areas Control) Regulations, should be reviewed and amended so that they are consistent with the principles set out in Chapter 1 of the Committee's Report; and
- that the Commonwealth Ombudsman undertake a regular, random "sample audit" of the exercise by the Australian Taxation Office of its entry and search powers to ensure that those powers have been exercised appropriately.[5]

The fairness of entry provisions: conclusions and recommendations

7.35 Fairness is essentially a matter of the way in which search and entry provisions are exercised. A provision may be 'fair' in its form, but administered in an 'unfair' manner. Or a provision may be 'unfair' in its form, but administered by the relevant agency in a way that renders it 'fair'.

7.36 The Committee noted that, in some circumstances, fairness was not an issue. Powers were exercised to obtain information from disinterested third parties such as financial institutions. These institutions invited the use of an agency's formal entry powers almost as a protective measure, to overcome duties of client confidentiality.

7.37 Elsewhere, aspects of fairness are addressed in legislation itself – either in the statute conferring a right of entry (for example, occupiers might be given a specific right to receive a copy of the warrant, or to observe the search, or to be given a receipt for anything seized), or in legislation which provides for the investigation

5 Scrutiny of Bills Committee, *Fourth Report of 2000*, p 61.

and review of the exercise of the powers (for example, the *Ombudsman Act 1976*, the *Privacy Act 1988* and the *Administrative Decisions (Judicial Review) Act 1977*).

7.38 In certain circumstances, fairness is imposed by the courts, which interpret entry and search provisions strictly, and resolve any ambiguity in favour of occupiers. Courts also insist on strict compliance with the statute and the conditions on which a warrant is authorised. Through doctrines such as legal professional privilege, the courts also seek to impose restrictions on the categories of documents to which officials may gain access.

7.39 The Committee considered a proposal for the legislative recognition of a professional privilege for accountants and their clients co-extensive with legal professional privilege. Some restrictions on the Tax Commissioner's right of access to accountants' advice and working papers were set out in voluntary ATO Guidelines but it was suggested that the Commissioner had now decided to test the boundaries of these Guidelines.

7.40 While there was some force in the argument that legal professional privilege should be extended to advice provided by some other professionals, such as accountants, the Committee considered that, at this time, the problems referred to did not seem sufficiently widespread to warrant such an approach.

7.41 The Committee accepted that the majority of agencies exercised their entry powers fairly. Fairness was imposed on agencies by statute and by the courts and was a result of the supervision over the warrant process which was exercised by the Commonwealth DPP. Fairness also seemed to have been deliberately pursued as part of the enforcement culture of some agencies. Indeed, the procedures followed in obtaining and executing search warrants seemed to be of a high standard.

7.42 However there were a number of ways in which the exercise of entry provisions may be made fairer, principally by ensuring that all those who enter premises and search them have appropriate training, and that occupiers are informed of their rights, and are not further penalised by prejudicial publicity should they challenge the execution of a warrant.

7.43 On this issue, the Committee **recommended** that:

- unless there are exceptional circumstances involving clear physical danger, all occupiers of premises which are to be entered and searched should be given a written document setting out in plain words their rights and responsibilities in relation to the search. Occupiers should be informed that the proposed entry and search is either for the purpose of monitoring compliance with a statute, or for the purpose of enforcement or gaining evidence and possible prosecution, but not for both purposes;

- where search and entry powers are used by an investigative authority:

- those who are being investigated should have an ongoing right to be informed of the current status of those investigations; and
- where an investigation has been concluded with no charges laid, those who have been investigated should have the right to be informed of this fact immediately; the right to have all seized material returned to them; and the right to compensation for any property damage and damage to reputation;

- all agencies which exercise powers of entry and search should introduce best practice training procedures and other internal controls to ensure that the exercise of those powers is as fair as possible, and should set out the appropriate procedures and scope for the exercise of those powers in enforcement and compliance manuals;
- where practical, all executions of warrants be video-taped or tape-recorded, and that where the person is a suspect, a verbal caution be given and tape-recorded;
- the Attorney-General implement a system enabling courts to hear challenges to warrants in camera, or in a way which does not lead to prejudicial publicity for the person challenging the warrant; and
- that the procedure applicable in Victoria and in some other jurisdictions be followed where, after execution, a warrant is returned to the court which issued it.

The effectiveness of entry provisions: conclusions and recommendations

7.44 Like fairness, effectiveness is essentially a matter of administration. It raises issues such as whether search and entry powers are used, and whether their use achieves the purposes for which they were granted. All agencies which made submissions to the inquiry used their entry powers, and felt that their work would be significantly impeded without them.

7.45 A number of improvements were suggested to the search warrant provisions in the Crimes Act, including:

- recording verbal applications for warrants sought by telephone to reduce any concerns judicial officers might have about the accuracy of records made of any application and the terms of any warrant issued;
- authorising applications for an extension of time to be made by telephone where searches take longer than the time specified in a warrant;
- given that a warrant must specify the time within which it remains in force (eg 7 days from the date of issue), clarifying precisely when on the seventh day it ceases to be in force;

- clarifying the right of Commonwealth officers executing a Commonwealth warrant to seize any evidence relevant to a State offence; and
- the right to conduct searches, under warrant, without first notifying the occupier (covert searches).

7.46 A number of improvements were also suggested to the search warrant provisions in the Customs Act, including:

- extending the period for which evidential material might be retained;
- clarifying whether evidence of serious customs offences collected by means of a customs warrant may be used in a prosecution under the Crimes Act;
- clarifying the right to seize forfeited goods as evidence;
- reviewing the telephone warrant provisions of the Customs Act; and
- making a number of other minor amendments.

7.47 While the Committee was not in a position to definitively decide, many of these proposals would seem to make the administration of these search and entry provisions more effective without affecting the fair operation of those provisions. However, the Committee expressed reservations about authorising the AFP to conduct covert searches, which the AFP itself noted remained a "sensitive issue".

7.48 On this issue, the Committee **recommended** that:

- the Attorney-General and the Minister for Justice and Customs examine the amendments to the *Crimes Act 1914* proposed by the AFP, and the amendments to the *Customs Act 1901* proposed by the Australian Customs Service, and introduce legislation to implement those amendments'; and
- while aware that covert searches might make law enforcement easier, the risks are such that the Committee is opposed to recommending such searches.

Post report

7.49 As at the date of this report the government had yet to formally respond to the recommendations in the search and entry report. However, the Committee notes that, in his Second Reading Speech on the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, the Minister for Justice and Customs stated that the proposed search and entry powers in that bill were "drafted in

accordance with the Fourth Report of the Senate Standing Committee for the Scrutiny of Bills".[6]

7.50 In May 2000 members of the Committee addressed the Australian Federal Police Fraud Liaison Forum on the recommendations in the report.

Barney Cooney
Chairman

6

APPENDIX I

COMMITTEE SUPPORT

LEGAL ADVISER

Professor Jim Davis	August 1983 - present

SECRETARIAT

Secretary

James Warmenhoven	April 1998 - present

Administrative Officer

Margaret Lindeman	January 1995 - present

Research Officer

Sue Blunden	November 1993 – December 1999
Bev Orr	December 1999 - present

APPENDIX II

STATISTICS

STATISTICS

	1985/ 1986	1986/ 1987	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1992/ 1993	1993/ 1994	1994/ 1995	1995/ 1996	1996/ 1997	1997/ 1998	1998/ 1999	1999/ 2000	2000/ 2001
Bills considered	250	204	221	238	192	248	201	210	249	225	132	227	266	235	215	219
Reports from legal adviser	21	20	18	22	16	23	25	13	24	21	14	23	20	18	20	22
Bills commented upon by legal adviser	93	101	93	153	95	126	106	79	119	94	53	82	104	98	85	94
Bills commented upon by Committee	88	74	58	105	64	130	102	70	121	93	54	89	105	100	94	105
Meetings of Committee	20	19	17	20	15	22	22	13	21	20	15	23	21	15	33	19
Reports issued	20	19	17	19	13	20	21	12	18	19	12	19	18	13	19	16

APPENDIX III

BILLS COMMENTED ON IN ALERT DIGESTS

AND

REPORTED UPON

DURING 39TH PARLIAMENT

BILLS COMMENTED ON IN ALERT DIGESTS/REPORTS DURING 39th PARLIAMENT - NOVEMBER 1998 TO OCTOBER 2001

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
A New Tax System (Australian Business Number) Bill 1998	1/99	1(a)(i)	subclause 16(3): reversal of the onus of proof		4/99
A New Tax System (Family Assistance) (Administration) Bill 1999	9/99		proposed new paragraph 7(2)(b) and clause 61: use of tax file numbers	NRR	-
A New Tax System (Family Assistance and Related Measures) Bill 2000	3/00		schedule 2, items 6 and 60; use of tax file numbers	NRR	-
		1(a)(iii)	schedule 2, item 103: non-reviewable decisions		5/00
A New Tax System (Family Assistance) (Consequential and Related Measures) Bill (No. 2) 1999	9/99		subclauses 2(6) and 2(7): retrospective application	NRR	-
			subitem 68(2) of Schedule 10: retrospective application	NRR	-
A New Tax System (Fringe Benefits Reporting) Bill 1998	1/99		schedule 3, item 2: retrospectivity	NRR	-
A New Tax System (Goods and Services Tax Administration) Act 1999	1/99	1(a)(iii)	proposed new section 62: non-reviewable discretions?		8/99
		1(a)(i)	proposed new section 66: search and entry		8-10/99
A New Tax System (Goods and Services Tax) Bill 1998	1/99	1(a)(ii)	proposed new division 165: apparently excessive powers		8/99
A New Tax System (Indirect Tax Administration) Bill 1999	5/99	1(a)(iii)	schedule 1, item 66: reviewable decisions?		8/99
A New Tax System (Indirect Tax and Consequential Amendments) Bill 1999	16/99		schedule 5, items 1 and 4: drafting correction	NRR	-
A New Tax System (Luxury Car Tax) Bill 1999	5/99	1(a)(v)	subclause 21-1(2): insufficient parliamentary scrutiny		8/99
A New Tax System (Trade Practices Amendment) Bill 2000	4/00		subclauses 2(2) and (3): retrospective application	NRR	-
		1(a)(i)	proposed new sections 75AYA and 76A: reversal of the onus of proof	NRR	-
A New Tax System (Wine Equalisation Tax) Bill 1999	5/99	1(a)(v)	subclause 27-20(2): insufficient parliamentary scrutiny		8/99
Aboriginal and Torres Strait Islander Commission Amendment Bill 2000	18/00	1(a)(ii)	schedule 1, items 13 and 17: delegation to 'a person'		1/01 2/01
Aboriginal and Torres Strait Islander Heritage Protection Bill 1998	10/98	1(a)(i)	subclause 67(2): strict liability offence	NRR	A/D10/98
	(5/98)	1(a)(i)	subclause 70(2): onus of proof	NRR	A/D10/98

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1999	7/99		subclause 2(3): commencement	NRR	-
			clause 3: retrospective application	NRR	-
			proposed new subparagraph 67A(6)(b)(i): retrospective application	NRR	-
ACIS Administration Bill 1999	8/99	1(a)(i)	proposed new paragraphs 29(1)(a) and 2(b): old convictions, continuing consequences		12/99
Acts Interpretation Amendment Bill 1998	10/98	1(a)(ii) 1(a)(iv)	schedule 1, items 2, 5 and 7: retrospective validation		10/98
Adelaide Airport Curfew Bill 1999	5/99	1(a)(ii)	subclause 22(1): appointment of "a person" as an authorised officer		14/99
Administrative Decisions (Effect of International Instruments) Bill 1999	17/99		general comment	NRR	-
Administrative Review Tribunal Bill 2000	10/00	1(a)(iv)	subclause 2(3): commencement		9/01
		1(a)(i)	subclauses 50(1) and (4): wide power of delegation		9/01
		1(a)(ii)			
Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000	15/00	1(a)(iv)	paragraph 6(1)(a): Henry VIII clause		9/01
		1(a)(ii)	schedule 14, item 195: wide power of delegation		9/01
Aged Care Amendment (Accreditation Agency) Bill 1998	10/98	1(a)(iv)	schedule 1, item 1: imposing a levy by regulation		
Aged Care Amendment Bill 2000	13/00	1(a)(i)	proposed new paragraph 10A-1(1)(a): old convictions, continuing consequences		15/00
Aged Care Amendment (Omnibus) Bill 1999	9/99		subclause 2(3): retrospective application	NRR	-
			subclause 2(4): retrospective application	NRR	-
			schedule 2, item 13 and schedule 3, item 21	NRR	-
Agriculture and Veterinary Chemicals Legislation Amendment Bill 2001	6/01		schedule 1, item 4: retrospective application	NRR	-
Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 1999	11/99		subclause 2(3): retrospective application	NRR	-
		1(a)(i)	subclause 2(4): retrospective application		14/99

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 1) 2000	10/00		subclause 2(3) and schedule 2, item 8: retrospective application	NRR	-
Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001	9/01	1(a)(i)	various provisions: strict liability offences		12/01
Aircraft Noise Levy Collection Amendment Bill 2001	3/01		proposed new subsection 7(7): retrospective validation	NRR	-
Air Passenger Ticket Levy (Collection) Bill 2001	14/01	1(a)(iv) 1(a)(v)	clause 12: cessation of levy by Ministerial determination		
			subclause 20(4): abrogation of the privilege against self-incrimination	NRR	-
		1(a)(v)	clause 22: insufficient Parliamentary scrutiny of entitlement scheme		
Albury-Wodonga Development Amendment Bill 1999	19/99		subclause 2(2) and schedule 1, part 2: commencement by proclamation	NRR	-
Amendment of the Northern Territory (Self-Government) Act 1978 Bill 2000	6/00		schedule 1: individual rights and the rights of citizens	NRR	-
Anti-Personnel Mines Convention Bill 1998	10/98		clause2: commencement	NRR	-
Assistance for Carers Legislation Amendment Bill 1998	3/99		subclauses 2(3) and (4): retrospective effect	NRR	-
Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2]	16/00	1(a)(i)	clause 21: search and entry provisions		17/00
			clause 23: abrogation of the privilege against self-incrimination	NRR	-
Auditor of Parliamentary Allowances and Entitlements Bill 2000	18/00	1(a)(i)	clause 21: search and entry provision	NRR	-
			clause 23: abrogation of the privilege against self-incrimination	NRR	-
Australia New Zealand Food Authority Amendment Bill 1999	6/99	1(a)(i)	subclause 2(2) and schedule 1, item 13: retrospective application		11/99
Australia New Zealand Food Authority Amendment Bill 1999 [No. 2]	17/99		subclause 2(2) and schedule 1, item 13: retrospective application	NRR	-
Australia New Zealand Food Authority Amendment Bill 2001	2/01	1(a)(i)	subclauses 2(3) and (4): retrospective commencement		4/01

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Australian Federal Police Legislation Amendment Bill 1999	16/99	1(a)(v)	proposed new section 38: non-disallowable instruments		19/99
		1(a)(i)	proposed new subsections 40A(1), 40L(5), 40M(3) and 40N(5):abrogation of the privilege against self-incrimination		19/99
		1(a)(i)	schedule 2, item 1: no reasons for dismissal		19/99
Australian National Training Authority Amendment Bill 1998	10/98 (9/98)	1(a)(i)	subclause 2(2) and schedule 1, item 17: retrospective application	NRR	A/D10/98
Australian Radiation Protection and Nuclear Safety Act 1998	10/98	1(a)(i)	subclause 66(2): abrogation of the privilege against self-incrimination		13/99
Australian Radiation Protection and Nuclear Safety (Consequential Amendments) Act 1998	10/98	1(a)(iv)	subclause 2(2) and schedule 1, item 5: commencement		13/99
Australian Radiation Protection and Nuclear Safety (Licence Charges) Bill 1998	10/98) (6/98)	1(a)(iv)	clauses 4 and 5: imposing a levy by regulation	NRR	A/D10/98
Australian Securities and Investments Commission Bill 2001	6/01		clause 68: abrogating the privilege against self-incrimination	NRR	-
		1(a)(ii)	clauses 102 and 118A: delegation to 'a person'		7/01
Authorised Non-operating Holding Companies Supervisory Levy Determination Validation Bill 1999	11/99		clause 4: retrospective application	NRR	-
Aviation Fuel Revenues (Special Appropriation) Amendment Bill 1999	9/99		schedule 1, item 6: retrospective application	NRR	-
Aviation Legislation Amendment Bill (No. 2) 2000	6/00		subclause 2(2) and schedule 2: retrospective application	NRR	-
Aviation Legislation Amendment Bill (No. 2) 2001	6/01	1(a)(iv)	subclause 2(5): commencement		
			proposed new sections 20A and 21D: abrogating the privilege against self-incrimination	NRR	-
Aviation Noise Ombudsman Bill 2000	13/00	1(a)(iv)	clause 2: commencement on proclamation		DC
Border Protection Bill 2001	12/01		clause 2: retrospective commencement	NRR	-
			clause 4: non-reviewable discretion	NRR	-
			subclause 7(2): immunity from civil and criminal liability	NRR	
			clause 8: denial of access to the courts	NRR	

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Border Protection Legislation Amendment Bill 1999	15/99		subclause 2(3): retrospective application	NRR	-
		1(a)(i)	proposed new subsections 245F(3) and 245G(2): search and entry at sea		18/99
		1(a)(i)	proposed new section 189A: rights and liberties and the carrying of firearms		18/99
		1(a)(i)	proposed new paragraphs 84(1)(ia) and (ic): detention on suspicion		18/99
Border Protection (Validation and Enforcement Powers) Bill 2001	13/01	1(a)(i)	part 2: retrospective validation of 'any action'		
		1(a)(i)	Schedule 1, items 3 and 4; schedule 2 items 8 and 9: detention and search of persons		
		1(a)(i)	proposed new section 233C: mandatory minimum sentences		
Broadcasting Services Amendment Bill (No. 3) 1999	1/00	1(a)(iii)	schedule 3, part 1, item 1: no reasons for decision		7/00
Broadcasting Services Amendment Bill (No. 4) 1999 (new citation: Broadcasting Services Amendment Bill 2000)	1/00	1(a)(iii)	schedule 1, part 1, item 1: no reasons for decision		16/00 1/01
Broadcasting Services Amendment (Online Services) Bill 1999	7/99	1(a)(v)	clause 3 of schedule 5: non-disallowable instruments		9/99
Charter of Political Honesty Bill 2000	15/00	1(a)(iii)	subclauses 9(1) and (3): non-reviewable discretion		17/00
Child Support Legislation Amendment Act 1998	10/98	1(a)(iv)	subclause 2(10): commencement		18/99
		1(a)(iv)	subclauses 5(3): inappropriate delegation of legislative power		18/99
Child Support Legislation Amendment Bill 2000	3/00	1(a)(iv)	schedule 1, items 2, 4 and 5: Henry VIII clause	NRR	-
Child Support Legislation Amendment Bill (No. 2) 2000	12/00		subclauses 2(5) to (10): retrospective application	NRR	-
		1(a)(i)	schedule 5, items 30 and 57: use of tax file numbers		15/00
		1(a)(i)	schedule 6, part 1: abrogation of the privilege against self-incrimination		15/00
			schedule 6, part 1: strict liability offence	NRR	-
Choice of Superannuation Funds (Consumer Protection) Bill 1999	15/99		subclause 2(2): retrospective application	NRR	-
			clause 55: abrogation of the privilege against self-incrimination	NRR	-
Classification (Publications, Films and Computer Games) Charges Bill 1998	11/98 (18/97)		clause 13: setting a rate of levy by regulation	NRR	-
Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 1999	1/00		subclause 2(2): commencement	NRR	-
			proposed new subsections 23A(4) 39(7) and 44A(3):strict liability offence	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Coal Industry Repeal Bill 2000	10/00		clause 2: commencement	NRR	-
Commonwealth Electoral Legislation (Provision of Information) Bill 2000	14/00		clause 3: retrospective application	NRR	-
Commonwealth Superannuation Board Bill 1998	10/98		subclause 8(1): inappropriate delegation of legislative power	NRR	A/D10/98
	(1/98)	1(a)(i)	subclause 8(11): inappropriate delegation of legislative power	NRR	A/D10/98
Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000	1/01	1(a)(i)	schedule 1, items 4, 12, 38, 44, 46, 56, 57, 60, 74, 92, 94, 96, 98, 99, 148 and 154: strict liability offences		2/01
Compensation for Non-economic Loss (Social Security and Veterans' Entitlements Legislation Amendment) Bill 1999	5/99		subclause 2(3): commencement	NRR	-
Convention on Climate Change (Implementation) Bill 1999	14/99	1(a)(i)	clause 26: an uncertain offence		
		1(a)(iii)	clause 30: no provision for merits review		
Copyright Amendment (Digital Agenda) Bill 1999	14/99		proposed new subsections 116A(6), 116B(3) and 116C(3)	NRR	-
		1(a)(i)	proposed new subsections 132(5F), (5G), (5H) and 5(K) and 135AS(2) and (3)		10/00
Copyright Amendment (Parallel Importation) Bill 2001	3/01	1(a)(iv)	subclause 2(2): commencement		9/01
			subclause 2(4): retrospective commencement	NRR	-
Corporate Law Economic Reform Program Bill 1998	1/99		schedule 7, item 12: retrospective effect	NRR	10/99
		1(a)(i)	proposed new sections 206A, 606, 670D, 670F, 732, 732 and 733: reversal of the onus of proof		10/99
Corporations Bill 2001	6/01		clause 2: commencement on proclamation	NRR	-
			clause 51: Henry VIII clause	NRR	-
			clauses 670A and 670D: strict liability offence	NRR	-
Crimes Amendment (Age Determination) Bill 2001	4/01	1(a)(iv)	proposed new section 3ZQA: inappropriate delegation of legislative power		5/01
Crimes Amendment (Forensic Procedures) Bill 2000	12/00	1(a)(ii)	proposed section 23YQ: wide power of delegation		13/00
Crimes at Sea Bill 1999	16/99		subclause 2(3): commencement	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Criminal Assets Recovery Bill 2000	4/00	1(a)(i)	clauses 10, 24 and 36: trespass on rights and liberties		
		1(a)(i)	clause 13: abrogation of the privilege against self-incrimination		
Criminal Assets Recovery Bill 2001	6/01		clauses 10, 13, 24 and 36: trespass on rights and liberties	NRR	-
Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999	4/99	1(a)(i)	proposed sections 70.3 and 70.4: reversal of the onus of proof		6/99
Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999	5/99	1(a)(i)	proposed new sections 270.1 and 270.3: penalties, definitions and the reversal of the onus of proof		7/99
Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999	19/99	1(a)(i)	proposed new sections 14.1, 15.1, 15.2 and 15.3: reversal of the onus of proof		15/00 2/01
			proposed new subsections 131.1(3), 132.4(8), 132.6(2), 134.1(2) and 134.2(2): imposition of absolute liability	NRR	-
		1(a)(i)	proposed new subsections 135.1(6) and 135.4(6): imposition of absolute liability		15/00
		1(a)(i)	proposed new subsections 136.1(2), (3), (5) and (6); 137.1(2) and (3) and 137.2(2): reversal of the onus of proof		15/00
			proposed new subsections 141.1(2); 142.1(2); 144.1(2), (4), (6) and (8); 145.1(2), (4), (6) and (8); and 145.2(2), (4), (6) and (8): reversal of the onus of proof	NRR	-
Criminal Code Amendment (United Nations and Associated Personnel) Bill 2000	10/00	1(a)(i)	proposed new subsections 71.2(2) to 71.11(2): strict liability offences		13/00
			sections 71.14 and 71.15: reversal of the onus of proof	NRR	-
Customs Amendment Bill (No. 1) 1999	6/99	1(a)(i)	subclause 2(2): retrospective application		12/99
Customs Amendment Bill (No. 2) 1999	5/99	1(a)(i)	proposed new paragraph 67EB(3)(b): old convictions, continuing consequences		10/99
Customs Amendment (Warehouses) Bill 1999	9/99		subclause 2(2): retrospective application	NRR	-
Customs (Anti-dumping Amendments) Bill 1998	1/99	1(a)(i)	subclause 2(3) retrospective effect		5/99
			subclause 2(4): retrospective effect	NRR	-
Customs Depot Licensing Charges Amendment Bill 2000	1/01		schedule 1, item 6: retrospective application	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001 (previous citation: Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000	1/01		subclause 2(6): commencement on Proclamation	NRR	-
		1(a)(i)	proposed new subdivision J of Division 1 of Part XII: search and entry provisions		4-7-9/01
		1(a)(i)	proposed new sections 243SA, 243SB, 243T, 243U and 243V: strict liability offences		4-7-9/01
	3/01		general comment	NRR	-
	4/01	1(a)(i)	**Amendments:** proposed new sections 113(1A), 114BA(7), 114E 115(2), 117A(1A), 118(1A) 102A(5): strict liability offences		
Customs Legislation Amendment (Criminal Sanctions and Other Measures) Bill 1999	2/00	1(a)(i) 1(a)(iv)	schedule 1: the opening of drug-related postal articles		
Customs Tariff Amendment (Aviation Fuel Revenues) Bill 1999	9/99		subclause 2(2): retrospective application	NRR	-
Customs Tariff Amendment Bill (No. 2) 1999	10/99		subclauses 2(6) and 2(7): retrospective application	NRR	-
Customs Tariff Amendment Bill (No. 3) 1999	1/00		subclauses 2(2), (3) and (4): retrospective commencement	NRR	-
Customs Tariff Amendment Bill (No. 1) 2000	2/00		subclauses 2(2) and (3): retrospective application	NRR	-
Customs Tariff Amendment Bill (No. 3) 2000	10/00		subclause 2(2) and schedule 1: retrospective application	NRR	-
			subclause 2(3) and schedule 2: retrospective application	NRR	-
Customs Tariff Amendment Bill (No. 4) 2000	1/01		subclauses 2(2) to (5): retrospective commencement	NRR	-
Customs Tariff Amendment Bill (No. 2) 2001	4/01	1(a)(i)	subclauses 2(2) and (3): retrospective commencement		6/01
Customs Tariff Amendment Bill (No. 4) 2001	9/01		subclauses 2(2) to 2(5): retrospective commencement	NRR	-
Customs Tariff (Anti-Dumping) Amendment Bill (No. 2) 1998	1/99	1(a)(i)	subclause 2(1): retrospective effect		5/99
Customs (Tariff Concession System Validations) Bill 1999	10/99		clauses 5 and 6: retrospective application	NRR	-
Cybercrime Bill 2001	9/01	1(a)(i)	proposed subsections 477.1(2), 477.2(2), 477.3(2), 478.1(2) and 478.2(2): Absolute liability offences and jurisdiction		13/01
Dairy Industry Adjustment Bill 2000	2/00		clauses 39 and 112: abrogation of the privilege against self-incrimination	NRR	-
		1(a)(i)	subclause 42(3): reversal of the onus of proof		

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Damage by Aircraft Bill 1999	5/99		subclause 2(1): commencement on proclamation	NRR	-
Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000	10/00	1(a)(i)	general comment		11/99
		1(a)(i)	proposed new section 51L: search and entry provision		11/99
		1(a)(v)	proposed new sections 51X(3) and (4): tabling "in the Parliament"		11/99
Defence Legislation Amendment (Application of Criminal Code) Bill 2001	12/01	1(a)(i)	various provisions: strict liability offences		
Defence Legislation Amendment Bill (No. 1) 1999	6/99		subclause 2(5): retrospective application	NRR	-
Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000	17/00	1(a)(iv)	subclause 2(3): commencement		2-3/01
		1(a)(iii)	schedule 1, item 1: non-reviewable discretion		2-3/01
Diesel and Alternative Fuels Grants Scheme (Administration and Compliance) Bill 1999	15/99		proposed new sections 42 and 52: abrogation of the privilege against self-incrimination	NRR	-
		1(a)(i)	proposed new section 47: search and entry without warrant		18/99
Diesel and Alternative Fuels Grants Scheme Bill 1999	10/99	1(a)(iv)	clause 2: commencement (some amends done in Diesel and Altern. Fuels Grants Scheme (Administration & Compliance) Bill 1999		
Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001	5/01		clause 2: commencement	NRR	7/01
			clause 3: a necessary validation?		7/01
Dried Vine Fruits (Rate of Primary Industry (Excise) Levy) Validation Bill 2001	5/01		clause 2 and subclauses 3(1) and (2): commencement	NRR	7/01
			clause 3: retrospective validation		7/01
Education Services for Overseas Students (Assurance Fund Contributions) Bill 2000	12/00	1(a)(iv)	clause 6: unlimited amount of levy		17/00
		1(a)(v)			
Education Services for Overseas Students Bill 2000	12/00	1(a)(i)	subclauses 104(2) and 105(2): strict liability offences		17/00
Education Services for Overseas Students (Registration Charges) Amendment Bill 2000	12/00	1(a)(iv)	proposed new section 5A: unlimited amount of levy		17/00
Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001	10/01	1(a)(i)	various provisions: strict liability offences		12/01

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Electoral Amendment (Political Honesty) Bill 2000	15/00	1(a)(i)	proposed new subsection 329(5): reversal of the onus of proof		17/00
Electoral and Referendum Amendment Bill (No. 2) 1998	11/98		voting rights	NRR	A/D11/98
	(7/98)	1(a)(iv)	commencement		A/D11/98 3/99
Electoral and Referendum Amendment Bill (No. 1) 2001	4/01		clause 2: commencement on proclamation	NRR	-
		1(a)(ii)	proposed new subsections 93A(3) and 98A(3): refusing enrolment in the 'public interest'		6/01
Employment Security Bill 2000	6/00		schedule 2, item 1: drafting note	NRR	-
Employment Security Bill 2001	3/01		schedule 2, item 1: drafting note	NRR	-
Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Bill 2001	11/01	1(a)(i)	various provisions: strict liability offences		13/01
Environmental Reform (Consequential Provisions) Bill 1998	1/99		subclauses 2(3) and (4): retrospective effect	NRR	-
Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000	1/01	1(a)(i)	schedule 1, items 16, 20, 24, 34, 39, 42, 43, 45, 53, 55, 57, 59, 61-65, 68, 85, 87, 89, 91, 93, 95, 98, 101, 103, 108, 110-115, 117-118, 125, 127, 130-133, 135, 137, 140, 149, 151, 157, 159-161, 167, 169, 171, 174-176: strict liability offences and reversals of the onus of proof		2/01
Environment and Heritage Legislation Amendment Bill 1999	6/99	1(a)(i)	proposed new section 15: reversal of the onus of proof		10/99
Environment and Heritage Legislation Amendment Bill (No. 2) 2000 [2001]	8/01	1(a)(v)	proposed new sections 324W and 341W: insufficient parliamentary scrutiny of heritage principles		10/01
Environment Protection and Biodiversity Conservation Bill 1998 [1999]	10/98	1(a)(v)	clause33: non-disallowable declarations		7/99
			subclause 112(4): abrogation of the privilege against self-incrimination	NRR	-
		1(a)(i)	subclauses 196(3), 211(3), 229(3), 236(1) and 254(3): strict liability offences		7/99
		1(a)(i)	clauses 235, 255 and 492: reversal of the onus of proof		7/99
Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001	9/01	1(a)(v)	**Amendments -** proposed new section 303FP: non disallowable instrument		

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Excise Amendment (Compliance Improvement) Bill 2000	9/00	1(a)(i)	proposed new subsections 39K(4), 39L(7), 39M(3), 44(5), 61(3), 61A(6), 61C(4B), 117(2) to 117H(2) and 117I(3): strict liability offences		10/00
		1(a)(i)	proposed new paragraphs 39B(b), 39C(b), 39H(b) and 39I(b): old convictions, continuing consequences		10/00
		1(a)(iii)	proposed new subsection 129F(1): apparently non-reviewable discretion		10/00
Excise Tariff Amendment (Aviation Fuel Revenues) Bill 1999	9/99		subclause 2(2): retrospective application	NRR	-
Excise Tariff Amendment Bill (No. 1) 2000	2/00		subclauses 2(2) and (3): retrospective application	NRR	-
Excise Tariff Amendment Bill (No. 1) 2001	4/01	1(a)(i)	subclauses 2(2) and (3): retrospective commencement		6/01
Export Finance and Insurance Corporation Amendment Bill 1999	11/99		subclause 2(2): retrospective application	NRR	-
			subclauses 2(3) and 2(4): commencement	NRR	-
Excise Tariff Amendment (Crude Oil) Bill 2001	12/01		subclause 2(2): retrospective commencement	NRR	-
Fair Prices and Better Access for All (Petroleum) Bill 1999	14/99	1(a)(i)	clauses 5 and 8 and schedule 1: rights and liberties and contracts and compensation		
Fair Prices and Better Access for All (Petroleum) Bill 2001	8/01	1(a)(i)	clauses 5 and 8 and schedule 1: rights and liberties and contracts and compensation		11/01
Family and Community Services Legislation Amendment Bill 2000	3/00		subclause 2(2) and schedule 1, item 7: retrospective application		6/00
Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001	11/01	1(a)(i)	various provisions: strict liability offences		13/01
Family and Community Services Legislation Amendment (New Zealand Citizens) Bill 2001	3/01		proposed new subsections 7(2A) to (2D): retrospective application	NRR	-
Family and Community Services Legislation (Simplification and Other Measures) Bill 2001	7/01		subclauses 2(3), (5) and (6): retrospective commencement	NRR	-
Family Law Amendment Bill 1999	15/99		subclause 2(2) and schedule 3, item 41: retrospective application	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Family Law Legislation Amendment (Superannuation) Bill 2000	6/00		subclause 2(2) and schedule 1: commencement	NRR	-
	7/01	1(a)(iv)	**Amendments -** clause 2: commencement		8/01
			proposed clause 5: retrospective application	NRR	-
Farm Household Support Amendment Bill 1999	19/99		subclause 2(2): retrospective application	NRR	-
Finance and Administration Legislation Amendment Application of Criminal Code) Bill 2001	10/01	1(a)(i)	**Amendments** various provisions: strict and absolute liability offences		13/01
Financial Management and Accountability Amendment Bill 2000	7/00	1(a)(v)	proposed new section 30A: indefinite appropriation		8/00
Financial Management Legislation Amendment Bill 1999	2/99		proposed new section 22: insufficient parliamentary scrutiny	NRR	-
Financial Sector (Collection of Data) Bill 2001	6/01	1(a)(iv)	subclause 2(3): commencement		10/01
		1(a)(i)	subclauses 9(10), 13(11), 14(4) and 17(10): strict liability offences		10/01
	10/01	1(a)(iv)	**Amendments -** subclause 2(3): commencement		13/01
Financial Sector Legislation Amendment Bill (No. 1) 2000	6/00	1(a)(i)	division 1 of part 2 of schedule 3: strict liability offences		9/00
Financial Sector Reform (Amendments and Transitional Provisions) Bill (No. 1) 1999	4/99		subclauses 3(2), 3(6) and 3(16): commencement on proclamation	NRR	-
			subclauses 3(7), 3(8) and 3(9): retrospective application	NRR	-
Financial Sector Reform (Amendments and Transitional Provisions) Bill (No. 2) 1999	11/99		clause 2: retrospective application	NRR	-
Financial Services Reform Bill 2001	6/01	1(a)(iv)	subclause 2(6): commencement		9/01
		1(a)(i)	proposed new sections 952C, 952E, 952G, 952I, 952J, 993B, 993C, 993D, 1021C, 1021E, 1021H, 1021M, 1021O: strict liability offences		9/01
		1(a)(i)	proposed new section 1043M: reversal of the onus of proof		9/01
	11/01	1(a)(iv)	**Amendment:** proposed new section 854B: Henry VIII clause		
Financial Services Reform (Consequential Provisions) Bill 2001	7/01	1(a)(iii)	schedule 1, item 1: no review of decisions		9/01
		1(a)(i)	schedule 1, various items: strict liability offences		9/01
Fisheries Legislation Amendment Bill (No. 1) 1999	14/99	1(a)(i)	schedule 1, items 9, 11, 12 and 14		
		1(a)(i)	proposed new subsections 100A(4) and (5), 101A(4) and (5), 103(1B) and (1E), 105B(3) and (4), 105C(3) and (4) and 105F(3) and (4)		

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Bill 2000	1/01	1(a)(i)	schedule 1, items 4-7, 9, 12, 17, 21-23, 30, 41-42: strict liability offences and reversals of the onus of proof		5/01
Freedom of Information Amendment (Open Government) Bill 2000	13/00		subclauses 2(2) and (3): commencement	NRR	-
Fuel Quality Standards Bill 2000	13/00	1(a)(v)	clause 2: commencement on proclamation		14/00
		1(a)(i)	subclause 12(2): reversal of the onus of proof		14/00
		1(a)(i)	subclause 67(6): strict liability offence		14/00
		1(a)(i)	general comment: transitional provisions		14-16/00
General Insurance Reform Bill 2001	9/01	1(a)(v)	proposed new section 7: non disallowable determinations		11/01
		1(a)(iv)	proposed new sections 7A, 14, 20: inappropriate delegation of legislative power		11/01
		1(a)(i)	proposed new sections 7A, 9(1), 10(1), 10(2), 14, 20: strict liability offences		11/01
		1(a)(iii)	proposed new sections 15 and 21: non-reviewable discretions		11/01
		1(a)(i)	proposed new section 49D: abrogation of the privilege against self-incrimination		11/01
	11/01	1(a)(i)	**Amendments -** various provisions: strict liability offences		
		1(a)(v)	**Amendments -** proposed new subsection 32(6): incorporation of extrinsic material as in force from time to time		
		1(a)(ii)	**Amendments -** proposed new paragraph 59(1)(b): delegation to a 'class of persons'		
General Insurance Supervisory Levy Determination Validation Bill 1999	11/99		clause 4: retrospective application	NRR	-
Gene Technology Bill 2000	9/00	1(a)(i)	clauses 33, 35, 36 and 37: strict liability offences		15/00
		1(a)(i)	clause 38: aggravated offences and "significant damage"		15/00
		1(a)(i)	clause 58: old convictions, continuing consequences		15/00
		1(a)(i)	clause 158: search and entry without a warrant		15/00
Gene Technology (Licence Charges) Bill 2000		1(a)(iv)	subclause 4(2): setting a rate of levy by regulation		15/00
Great Barrier Reef Marine Park Amendment Act 2001 (previous citation: Great Barrier Reef Marine Park Amendment Bill) 2001	6/01	1(a)(i)	proposed new subsections 38A(3), 38CB(2), 38J(1C), 38M(3), 38MA(2), 38MA(4) and 38MC(3): strict liability offences		9/01
		1(a)(i)	proposed new subsections 38CC(2) and 38MB(2): liability for negligent acts		9/01

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001	10/01	1(a)(i)	various provisions: strict liability offences		
Health Insurance Amendment (Professional Services Review) Act 1999	9/99	1(a)(i)	proposed new section 106ZPQ: abrogating the right to silence and patient privacy		11-20/99
Health Legislation Amendment Bill (No. 4) 1998 (new citation: Health Legislation Amendment Bill (No. 2) 1999)	1/99	1(a)(iv)	subclauses 2(4) and (5): commencement		FRR 5/99 10/99
Health Legislation Amendment Bill (No. 3) 1999	4/99		subclause 2(5) and schedule 3: retrospective application	NRR	-
Health Legislation Amendment Bill (No. 2) 2001	6/01	1(a)(i)	subclauses 2(2) and (3): retrospective commencement		8/01
Horticulture Marketing and Research and Development Services Bill 2000	14/00	1(a)(v) 1(a)(v)	clauses 9 and 10: parliamentary scrutiny of ministerial decisions clause 29: non-disallowable ministerial directions		17/00 17/00
Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Bill 2000	14/00		schedules 1 and 2: contingent commencement schedule 3: contingent commencement schedule 4: contingent commencement	NRR NRR NRR	- - -
Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999	13/99	1(a)(i)	part 1: individual rights and self-government rights	NRR	-
Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 2000	6/00	1(a)(i)	section 5: individual rights and the rights of citizens	NRR	-
Human Rights (Mandatory Sentencing for Property Offences) Bill 2000	13/00	1(a)(i)	sections 5 and 6: individual rights and the rights of citizens	NRR	-
Import Processing Charges Amendment Bill 1999	5/99	1(a)(i)	subclause 2(2): retrospective application		10/99
Import Processing Charges Amendment (Warehouses) Bill 1999	9/99		subclause 2(2): retrospective application	NRR	-
Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Bill 2001	11/01	1(a)(i)	various provisions: strict liability offences		13/01
Innovation and Education Legislation Amendment Bill 2001	6/01	1(a)(i)	proposed new section 98E: extension of tax file number regime	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Innovation and Education Legislation Amendment Act (No. 2) 2001	11/01	1(a)(i)	proposed new section 98E: extension of tax file number regime		13/01
Intelligence Services Bill 2001	9/01	1(a)(v)	clause 15: inappropriate delegation of legislative power		13/01
Interactive Gambling (Moratorium) Bill 2000	11/00		clause 11: retrospective imposition of criminal liability	NRR	-
		1(a)(i)	clause 11: reversal of the onus of proof		13/00
			subclause 5(5): insufficiently defined administrative powers		13/00
International Maritime Conventions Legislation Amendment Bill 2001	6/01	1(a)(i)	new subsections 9(1B), 10(3), 21(1B), 26AB(3), 26BC(2A), 26D(3) 26F(3), 26FA4), 26FB(2), 26FC(5) and 26FD(4): strict liability offences		10/01
Interstate Road Transport Charge Amendment Bill 2000	3/00		subclause 2(2): commencement	NRR	-
Job Network Monitoring Authority Bill 2000	16/00	1(a)(iv)	subclause 2(1): commencement on proclamation		
Job Network Monitoring Authority Bill 2000 (No. 2)	16/00	1(a)(iv)	subclause 2(1): commencement on proclamation		
Judiciary Amendment Bill 1998	1/99	1(a)(v)	proposed new Part VIIIC: insufficient parliamentary scrutiny		3/99
Jurisdiction of Courts Legislation Amendment Bill 2000	3/00	1(a)(i) 1(a)(iii)	schedule 2: reducing the review rights of defendants		5-6/00
Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000	1/01	1(a)(i)	various provisions: strict liability, absolute liability and reversals of the onus of proof		2/01
Law and Justice Legislation Amendment Bill 1998	1/99		subclauses 2(2) to (9): retrospective effect	NRR	-
Life Insurance Supervisory Levy Determination Validation Bill 1999	11/99		clause 4: retrospective application	NRR	-
Measures to Combat Serious and Organised Crime Bill 2001	6/01		schedule 4, item 10: commencement on proclamation	NRR	-
		1(a)(i)	proposed new section 15J: the authorisation of controlled operations	BRIEFING	8/01
	12/01	1(a)(iv)	**Amendments:** proposed new paragraph 15HB(a): Henry VIII clause	NRR	-
Migration Amendment (Excision from Migration Zone) Bill 2001	13/01	1(a)(i)	schedule 1, item 2: retrospective operation		
		1(a)(iv)	schedule 1, item 1: Henry VIII clause		
			proposed new section 46A: wide discretion	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001	13/01	1(a)(iii)	proposed new section 494AA: bar on certain legal proceedings		
Migration Legislation Amendment (Application of Criminal Code) Bill 2001	6/01	1(a)(i)	schedule 1, items 6, 8, 11, 12, 17, 20, 22, 24, 25, 26, 28, 31, 35, 53, 60 to 64, 67, 70, 77, 80, 82, 85, 89, 92 and 96: strict liability and absolute liability offences		7/01
Migration Legislation Amendment Bill (No. 1) 1998	10/98		subclauses 2(4) to 2(8): retrospective application	NRR	-
			schedule 1, item 10: non-reviewable decisions	NRR	-
Migration Legislation Amendment Bill (No. 2) 1998	1/99	1(a)(i)	clause 2: retrospective effect and the current bill		4-10/99
			issue of access to justice	NRR	-
			issue of hierarchy of Acts	NRR	-
			issue of right to knowledge	NRR	-
		1(a)(i)	issue of International Covenant on Civil and Political Rights	NRR	-
Migration Legislation Amendment Bill (No. 2) 1999	6/99	1(a)(ii)	schedule 3: appointment of 'a person'		10/99
Migration Legislation Amendment Bill (No. 1) 2001 (previous citation: Migration Legislation Amendment Bill (No.2) 2000)	4/00	1(a)(i)	subclause 2(4) and schedule 2, part 1: retrospective application		2-6/01
			subclauses 2(5) and (6) and schedule 2, items 8, 9 and 10: retrospective application	NRR	-
		1(a)(i)	schedule 1, item 7: retrospective application		2/01
Migration Legislation Amendment Bill (No. 6) 2001	13/01	1(a)(i)	proposed new sections 91V and 91W: drawing inferences from a refusal to produce documents		
			schedule 1, item 10: drafting note	NRR	-
Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001	6/01	1(a)(i)	subclauses 2(4) to (6): retrospective commencement		7/01
Migration Legislation Amendment (Immigration Detainees) Bill 2001	6/01 8/01	1(a)(i)	proposed new sections 252A, 252B and 252F: search powers	BRIEFING	8/01
			Amendments – proposed new sections 252A, 252B and 252F: Search powers	NRR	-
Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001	9/01	1(a)(v)	proposed new sections 7A, 14, 20: inappropriate delegation of legislative power		11/01

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Migration Legislation Amendment (Integrity of Regional Migration Schemes) Bill 2000	18/00	1(a)(i)	proposed new subsection 137Q(2): rights and liberties on the termination of employment		4/01
Migration Legislation Amendment (Judicial Review) Bill 1998	1/99	1(a)(i)	proposed new part 8: ousting of judicial review	NRR	-
Migration Legislation Amendment (Overseas Students) Bill 2000	12/00		schedule 2, item 2: abrogation of the privilege against self-incrimination	NRR	-
Migration Legislation Amendment (Parents and Other Measures) Bill 2000	8/00	1(a)(iv)	subclause 2(6) and schedule 3: commencement		9/00
Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998	10/98	1(a)(iv)	clause 2: commencement		A/D10/98
	(16/97)		clause 2: commencement (more info requested)		1/99
		1(a)(iv)	schedule 1, item 12: insufficiently defined administrative powers	NRR	A/D10/98
		1(a)(ii)	schedule 1, item 23: insufficiently defined administrative powers	NRR	A/D10/98
Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999	7/99	1(a)(i) 1(a)(ii)	schedule l, items 3, 7, 10, 11, 12 and 13: rights and non-reviewable decisions	NRR	-
Migration (Visa Application) Charge Amendment Bill 1998	1/99		clause 2: retrospective effect	NRR	-
National Crime Authority Amendment Bill 1999	19/99	1(a)(i)	subclause 2(2): retrospective application		21/99
National Crime Authority Amendment Bill 2000	4/00	1(a)(i)	proposed new subsection 30(4): abrogation of the privilege against self-incrimination		
National Crime Authority Amendment Bill 2000 (Senate)	1/01	1(a)(i)	general comment		7/01
		1(a)(i)	schedule 1, part 1, items 1, 3, 5, 11: defence of reasonable excuse		7/01
		1(a)(i)	schedule 1, part 1, item 12: abrogation of the privilege against self-incrimination		7/01
National Environment Protection Measures (Implementation) Act 1998	11/98	1(a)(v)	subclauses 11(2), 12(2), 16(2) and 17(2): insufficient parliamentary scrutiny		5/99
		1(a)(i)	clause 28: inadmissible audit report		5/99
National Residue Survey Levies Regulations (Validation and Commencement of Amendments) Bill 1999	15/99		clause 3: retrospective validation	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
New Business Tax System (Capital Allowances) Bill 1999	18/99		schedule 1, item 11; schedule 2 subitem 23(1); schedule 3, item 14; schedule 4, item 12 and schedule 5, item 6: legislation by press release	NRR	-
			schedule 2, items 17 and 18: retrospective application	NRR	-
New Business Tax System (Capital Allowances) Act 2001 (previous citation: New Business Tax System (Capital Allowances) Bill 2001	7/01		subclause 2(2) and schedule 2: retrospective commencement	NRR	-
		1(a)(i)	subclause 2(3) and schedule 3: retrospective commencement		9/01
New Business Tax System (Capital Gains Tax) Bill 1999	19/99		schedule 1, part 3: legislation by press release	NRR	-
New Business Tax System (Integrity and Other Measures) Bill 1999	18/99	1(a)(i)	subclause 2(2) and schedule 5; schedule 1, item 18 and schedule 2, item 5: legislation by press release		19/99
			schedule 6, item 16; schedule 7, part 3; schedule 8, item 10 and schedule 9, items 14, 21, 30 and 32: legislation by press release	NRR	-
New Business Tax System (Integrity Measures) Bill 2000	6/00		schedule 2, part 1: legislation by press release	NRR	-
New Business Tax System (Miscellaneous) Bill (No. 2) 2000	6/00		subclause 2(2) and schedule 1, items 18 and 67: tax legislation and the six month rule	NRR	-
			schedule 1, subitems 68(1) and (3): tax legislation and the six month rule	NRR	-
		1(a)(i)	schedule 1, subitem 68(2): tax legislation and the six month rule		9/00
			schedule 1, subitems 68(4) and (6): tax legislation and the six month rule	NRR	-
		1(a)(i)	schedule 4, item 6: tax legislation and the six month rule		9/00
			schedule 5, item 34: retrospective application	NRR	-
			schedule 8, item 11: retrospective application	NRR	-
Norfolk Island Amendment Bill 1999	6/99	1(a)(i)	schedule 1, items 5, 7 and 9: the rights and liberties of electors		9/99
Parliamentary (Choice of Superannuation) Bill 2001	4/01	1(a)(iv)	clause 2: commencement on proclamation		
Patents Amendment Bill 2001	7/01		subclause 2(4) and schedule 2: retrospective commencement	NRR	-
Petroleum (Submerged Lands) Legislation Amendment Bill (No. 3) 2000	1/01	1(a)(i)	subclauses 2(3) and (5): retrospective commencement		5/01
Pig Industry Bill 2000	18/00	1(a)(v)	subclause 9(1): parliamentary scrutiny of Ministerial decision		4/01
			clause 12: non disallowable Ministerial directions		4/01

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Pooled Development Funds Amendment Bill 1999	1/00	1(a)(i)	schedule 1, subitem 27(5): retrospective application		6/00
Postal Services Legislation Amendment Bill 2000	5/00	1(a)(v)	proposed new sections 153T and 153TA: legislative instruments not subject to scrutiny		
		1(a)(i)	proposed new section 153TF: abrogation of the privilege against self-incrimination		
Primary Industries (Customs) Charges Bill 1998	1/99		schedule 14: setting a rate of levy by regulation	NRR	-
Primary Industries (Excise) Levies Bill 1998	1/99		schedule 27: setting a rate of levy by regulation	NRR	-
Primary Industries Legislation Amendment (Vegetable Levy) Bill 2000	9/00		clause 2: retrospective commencement	NRR	-
Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001	4/01	1(a)(i)	schedule 1, items 5, 13, 15, 20, 22, 26: strict liability offences		6/01
Privacy Amendment (Private Sector) Bill 2000	6/00	1(a)(iv)	subclause 2(1): commencement		17/00
		1(a)(iv)	proposed new subsections 6A(2) and 6B(2): inappropriate delegation of legislative power		17/00
Proceeds of Crime Bill 2001	14/01	1(a)(i)	general comment: trespass on rights and liberties		
		1(a)(i)	clause 14: restrospective application		
		1(a)(i)	subclauses 190(1) and paragraph 191(2)(a): abrogation of the privilege against self-incrimination		
			clauses 200 and 259: abrogation of the privilege against self-incrimination	NRR	-
		1(a)(i)	subclause 324(3): forfeiture of property where no person convicted of an offence		
Product Grants and Benefits Administration Bill 2000	6/00	1(a)(i)	clause 43: abrogation of the privilege against self-incrimination		7/00
		1(a)(i)	clause 48: search and entry without judicial warrant		7/00
Protection of the Sea (Civil Liability) Amendment Bill 2000	10/00	1(a)(i)	proposed new subsection 19C(5): strict liability offences		12-13/00
Public Employment (Consequential and Transitional) Amendment Bill 1999	6/99		subclauses 14(4) and (5): delegation of legislative power	NRR	-
			subclause 14(7): regulations with retrospective effect	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Quarantine Amendment Bill 1998	1/99	1(a)(v)	schedule 1, items 51, 60, 110 and 141: non-reviewable subordinate legislation		5/99
		1(a)(i)	schedule 1, items 145, 153, 183, 242, 259, 263, 267 and 269: strict liability offences		5/99
			proposed new section 79A: abrogation of the privilege against self-incrimination	NRR	-
Radiocommunications Legislation Amendment Bill 1999	3/99	1(a)(ii)	proposed new subsection 122A(1): delegation of power to "a body"		5/99
		1(a)(i)	schedule 3, item 1: legislation by press release		5/99
			schedule 3, item 3: retrospective effect	NRR	-
Reconciliation and Aboriginal and Torres Strait Islander Affairs Legislation Amendment (Application of Criminal Code) Bill 2001	7/01	1(a)(i)	various provisions: strict liability offences		11/01
Remuneration Tribunal Amendment Bill 2000	18/00	1(a)(iv)	schedule 1, items 2 and 6: inappropriate delegation of legislative power		4/01
Renewable Energy (Electricity) Bill 2000	9/00	1(a)(i)	subclauses 24(1) and 154(1): strict liability offences		10/00
Retirement Savings Account Providers Supervisory Levy Determination Validation Bill 1999	11/99		clause 4: retrospective application	NRR	-
Roads to Recovery Act 2000	18/00	1(a)(v)	clause 3: tabling in one house of the Parliament		6/01
Road Transport Charges (Australian Capital Territory) Amendment Bill 2000	3/00		subclause 2(2): commencement	NRR	-
Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000	1/01	1(a)(i)	schedule 2, part 4: retrospective application		7-10/01
Sales Tax (Customs) (Industrial Safety Equipment) Bill 2000	7/00		clause 6: retrospectivity and legislation by press release	NRR	-
Sales Tax (Excise) (Industrial Safety Equipment) Bill 2000	7/00		clause 6: retrospectivity and legislation by press release	NRR	-
Sales Tax (General) (Industrial Safety Equipment) Bill 2000	7/00		clause 6: retrospectivity and legislation by press release	NRR	-
Sales Tax (Industrial Safety Equipment) (Transitional Provisions) Bill 2000	7/00	1(a)(i)	schedule 1, item 6: retrospectivity and legislation by press release		8/00

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Sales Tax Legislation Amendment Bill (No. 1) 1998	1/99	1(a)(iv)	subclause 2(2): indeterminate commencement		4/99
Sex Discrimination Amendment Bill (No. 1) 2000	11/00		schedule 1: discrimination legislation	NRR	-
Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000	4/00	1(a)(v)	proposed new section 27A: apparently non-disallowable instruments		
Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000 [No. 2]	4/00	1(a)(v)	proposed new section 27A: apparently non-disallowable instruments		13/00
Social Security (Administration and International Agreements) (Consequential Amendments) Bill 1999	9/99		subclauses 2(1), 2(2) and 2(3): drafting note	NRR	14/99
Social Security (Administration) Bill 1999	9/99	 1(a)(iii)	clauses 74, 75 and 76: use of tax file numbers clause 144: non reviewable decisions	NRR	14/99
Social Security Amendment (Disposal of Assets) Bill 1999	11/99	1(a)(i)	clause 2: retrospective application		13/99
Social Security and Veterans' Entitlements Legislation Amendment (Miscellaneous Matters) Bill 2000	4/00		subclauses 2(6), (7) and (10): retrospective application	NRR	-
Social Security and Veterans' Entitlements Legislation Amendment (Private Trusts and Private Companies—Integrity of Means Testing) Bill 2000	11/00	1(a)(i)	proposed new subsections 1209H(2) and 52ZZZT(2): extension of tax file number regime		13/00
Social Security and Veterans' Entitlements Legislation Amendment (Retirement Assistance for Farmers) Bill 2001	12/01		schedules 1 and 2: retrospective operation	NRR	-
Social Security (International Agreements) Bill 1999	9/99	1(a)(iv)	clauses 7, 8 and 9: Henry VIII clauses		14/99
States Grants (Primary and Secondary Education Assistance) Bill 2000	11/00	1(a)(iii)	proposed sections 18, 20 and 38: non-reviewable decisions		14/00
Superannuation Contributions and Termination Payments Taxes Legislation Amendment Bill 1999	11/99	1(a)(i)	subclauses 2(2) and 2(3): retrospective application subclause 2(4): retrospective application	 NRR	13/99 -
Superannuation Contributions and Termination Payments Taxes Legislation Amendment Bill 2001	8/01		subclauses 2(2) to (4): retrospective commencement	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Superannuation Legislation Amendment Bill 1998	1/99		subclause 2(3) and schedule 2, part 3: retrospective effect	NRR	-
Superannuation Legislation Amendment Bill (No. 2) 1999	4/99	1(a)(i)	schedule 2: legislation by press release		10/99
			schedule 3: retrospective application	NRR	-
Superannuation Legislation Amendment Bill (No. 3) 1999	6/99	1(a)(i)	proposed new subsection 252A(4): strict liability offence and penalties		9/99
Superannuation Legislation Amendment Bill (No. 4) 1999	12/99	1(a)(i)	schedule 1, item 45: retrospective application		16/99
Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 199	10/98	1(a)(iv)	schedule 1, item 2: inappropriate delegation of legislative power		3/99
Superannuation Legislation Amendment (Post-retirement Commutations) Bill 2000	1/01	1(a)(i)	schedule 1, items 29 and 30; schedule 2, items 7 and 8: retrospective application		3/01
Superannuation Legislation Amendment (Resolution of Complaints) Act 1998	11/98	1(a)(iv)	schedule 1, item 10: termination by proclamation		1/99
Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 1998	10/98	1(a)(i)	subclauses 2(3) to 2(5): retrospective application		1/99
		1(a)(i)	subclause 2(6) and schedule 1, part 5: retrospective application		1/99
			subclause 2(10) and schedule 13, items 3 to 6: retrospective application	NRR	-
			schedule 1, item 15: retrospective application	NRR	-
		1(a)iv)	schedule 1, item 18 and schedule 3, item 10: inappropriate		
		1(a)(v)	delegation of legislative power		1/99
Superannuation Legislation (Commonwealth Employment) Repeal and Amendment (Consequential Amendments) Bill 1998	10/98		subclause 2(2) and schedule 1: retrospective application	NRR	-
Superannuation Supervisory Levy Determination Validation Bill 1999	11/99		clause 4: retrospective application	NRR	-
Superannuation (Unclaimed Money and Lost Members) Bill 1999	11/99		clause 46: search and entry provisions	NRR	-
Superannuation (Unclaimed Money and Lost Members) Consequential and Transitional Bill 1999	11/99		subclause 2(5): retrospective application	NRR	-
Sydney Harbour Federation Trust Bill 1999	1/00	1(a)(ii)	clauses 48 and 72: delegation to ‘a person’		

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Taxation Laws Amendment Bill (No. 2) 1998	10/98	1(a)(i)	subclause 2(2) and schedule 7, part 3: retrospective application		11/98-1/99
		1(a)(i)	schedule 1, part 2 and schedule 9: legislation by press release		11/98
			schedules 2, 3 and 5: retrospective application	NRR	-
		1(a)(i)	schedule 7, parts 1 and 2, and schedule 8: retrospective application		11/98
			schedule 10: retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 2) 1999 (Taxation Laws Amendment Bill (No. 4) 1998)	1/99	1(a)(i)	subclause 2(2) and schedule 4, item 24: retrospective effect		6/99
			schedule 1, items 39 and 46: retrospective effect	NRR	-
			schedule 5: retrospective effect	NRR	-
			schedule 6: retrospective effect	NRR	6/99
		1(a)(i)	schedules 3, 4 and 7: legislation by press release		6/99
			in response to Mallesons Stephen Jaques concerns		11/99
Taxation Laws Amendment Bill (No. 5) 1998	1/99		subclauses 2(5) to (7) and schedule 3, items 3 to 8: retrospective effect	NRR	-
Taxation Laws Amendment Bill (No. 4) 1999	4/99		schedules 2 and 4: retrospective application	NRR	-
		1(a)(i)	schedule 3, items 1 and 2: retrospective application		10/99
Taxation Laws Amendment Bill (No. 5) 1999	4/99		schedule 1: retrospective application	NRR	-
		1(a)(i)	schedule 2: retrospective application		10/99
Taxation Laws Amendment Bill (No. 6) 1999	6/99		schedules 1, 2, 3 and 4: retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 7) 1999	8/99		schedules 1 and 2: retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 8) 1999	11/99		subclauses 2(3) to 2(7): retrospective application	NRR	-
		1(a)(i)	schedule 1, part 1: retrospective application		15/99
			schedule 2: retrospective application	NRR	15/99
			schedule 9, parts 1 and 3: retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 10) 1999	17/99		subclauses 2(2) and (3) and Schedule 4, item 4: retrospective application	NRR	-
			schedule 5, item 2: legislation by press release	NRR	-
Taxation Laws Amendment Bill (No. 11) 1999	1/00	1(a)(i)	subclause 2(2) and schedule 4, items 43 and 44: retrospective commencement		7/00
		1(a)(i)	schedule 1: legislation by press release		7/00
			schedule 4, subitem 82(1): retrospective application	NRR	-
	2/00	1(a)(i)	schedule 1, retrospectivity, certainty and Australia's double taxation treaties		7/00

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Taxation Laws Amendment Bill (No. 5) 2000	2/00		schedule 1: retrospective application	NRR	-
			schedule 2: retrospective application	NRR	-
			schedule 3: retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 6) 2000	7/00		schedule 1, subitems 8(2) and (3): retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 7) 2000	10/00		subclause 2(3) and schedule 4, items 46 and 50: retrospective application	NRR	-
			schedule 4, item 65: retrospective application	NRR	-
			schedule 3, item 17: retrospective application	NRR	-
			schedule 6, item 6: retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 8) 2000	15/00		subclause 2(2): retrospective application	NRR	-
			subclauses 2(3) to 2(8): retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 2) 2001	7/01		schedule 1, part 1: retrospective application	NRR	-
			schedule 2: retrospective application	NRR	-
		1(a)(i)	schedule 3: retrospective application		9/01
			schedule 4: retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 3) 2001	6/01		subclauses 2(2) and (3); schedule 1, item 22 and schedule 3, items 8, 17, 19, 29 and 32: retrospective commencement or application	NRR	-
Taxation Laws Amendment Bill (No. 4) 2001	9/01		schedules 3, 4 and 5: retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 5) 2001	11/01	1(a)(i)	subclause 2(2): retrospective commencement		
			schedule 1, items 3, 6 and 9: retrospective application	NRR	-
		1(a)(i)	schedule 3, item 4: retrospective application		
			schedule 5: retrospective application	NRR	-
Taxation Laws Amendment Bill (No. 6) 2001	12/01		schedule 1, part 2: retrospective application	NRR	-
			schedule 4: retrospective application	NRR	-
			schedule 5: retrospective application	NRR	-
			schedule 6: retrospective application	NRR	-
Taxation Laws Amendment (CPI Indexation) Bill 1999	4/99		subclause 2(2) and schedule 1, items 3 and 4: retrospective application	NRR	-
Taxation Laws Amendment (Demutualisation of Non-insurance Mutual Entities) Bill 1999	4/99		schedule 2H, proposed paragraph 326-5(1)(e): retrospective application	NRR	-

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Taxation Laws Amendment (Political Donations) Bill 1999	4/99		schedule 1, part 4: retrospective application	NRR	-
Taxation Laws Amendment (Research and Development) Bill 2001	9/01		subclause 2(2), schedule 1 and schedule 2, part 3, Div 1: retrospective commencement	NRR	-
Taxation Laws Amendment (Software Depreciation) Bill 1999	2/99		item 21: retrospective effect	NRR	-
Taxation Laws Amendment (Superannuation Contributions) Act 2001	13/00 14/00	1(a)(i)	schedule 1, item 11: legislation by press release schedules 1, 2 and 3: the superannuation rights of Australians temporarily working overseas	NRR	- 15/00
(previous citation: Taxation Laws Amendment (Superannuation Contributions) Bill 2000	2/01	1(a)(i)	**Amendment** – schedule 1, item 11: retrospectivity		9/01
Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 1) 2000	7/00	1(a)(iii)	schedule 1, items 16 and 18: non-reviewable discretion		10/00
Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 2) 2000	10/00	1(a)(v)	proposed new subsections 8D(4), 9A(5) and 20C(3): non-disallowable declarations		14/00
Telecommunications (Interception) Amendment Bill 1999	14/99	1(a)(i)	general comment		17/99
Telecommunications (Interception) Legislation Amendment Bill 2000	3/00		schedule 1: widening access to intercepted telecommunications schedule 2: possible width of intercepted services and telecommunications proposed new subsections 9B(2) and 11D(1): search and entry without judicial warrant	NRR NRR	- - 6/00
Telecommunications Legislation Amendment Bill 1998	10/98		schedule 1, item 15: abrogation of the privilege against self-incrimination	NRR	-
Telecommunications (Universal Service Levy) Amendment Bill 2000	10/00		schedule 1, item 3: drafting note	NRR	- 14/00
Textile, Clothing and Footwear Strategic Investment Program Bill 1999	2/99		clause 36: abrogation of the privilege against self-incrimination	NRR	-
Therapeutic Goods Amendment Bill (No. 3) 2000	10/00		proposed new section 31F: abrogation of the privilege against self-incrimination	NRR	-
Therapeutic Goods Amendment Bill (No. 4) 2000	1/01	1(a)(i)	schedule 1, subitems 36(2) and (3): retrospective application		2/01

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Therapeutic Goods Amendment (Medical Devices) Bill 2001	5/01		subclause 2(4): commencement	NRR	-
		1(a)(i)	proposed new sections 41JC and 41JJ: abrogation of the privilege against self-incrimination		9/01
Therapeutic Goods Legislation Amendment Bill 1999	3/99		subclause 2(3): retrospective effect	NRR	-
		1(a)(v)	proposed new subsections 17(5) and (6): insufficient Parliamentary scrutiny		4/99
			proposed new Part 4A: definitions and interpretation		4/99
		1(a)(i)	proposed new sections 42C and 42D: strict liability and other offences		4/99
Timor Gap Treaty (Transitional Arrangements) Bill 2000	2/00		subclause 2(2): retrospective application	NRR	-
Trade Marks Amendment (Madrid Protocol) Bill 2000	10/00		clause 2: commencement	NRR	-
			proposed new subsection 189A(3): Henry VIII clause	NRR	-
Trade Practices Amendment (Telecommunications) Bill 2001	10/01	1(a)(i)	proposed new section 152DOA: limiting the rights of parties to arbitration		12-13/01
		1(a)(i)	proposed new sections 152DPA and 152DR: imposing limits on judicial review		12/01
Trade Practices Amendment (Unconscionable Conduct—Saving of State and Territory Laws) Bill 2000	8/00	1(a)(i)	general comment		
Tradex Scheme Bill 1999	10/99	1(a)(i)	subclause 28(2): strict liability offence		A/D17/99
	&		subclauses 30(2) and (3): abrogation of the privilege against self-incrim.	NRR	-
Tradex Scheme Bill 1999 [No. 2]	17/99	1(a)(ii)	subclause 45(1): appointment of 'a person'		A/D17/99-20/99
		1(a)(ii)	clause 48: excessively wide delegation		A/D17/99-20/99
Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2001	14/01	1(a)(i)	various provisions: strict liability offences		
Transport Legislation Amendment Bill 2000	7/00		subclause 2(2) and schedule 2, item 1: retrospective application	NRR	-
Treasury Legislation Amendment (Application of Criminal Code) Bill 2000	10/00		schedule 1, item 257: strict liability offences	NRR	-
Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001	6/01	1(a)(i)	various provisions: strict liability offences		11/01

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 3) 2001	9/01	1(a)(i)	various provisions: strict liability offences		11/01
Veterans' Affairs Legislation Amendment (Application of Criminal Code) Bill 2000	18/00		schedule 1, items 2, 5, -8-10, 13, 23-26, 29 32 and 40: strict liability offences	NRR	-
Veterans' Affairs Legislation Amendment Bill (No. 1) 1999	11/99		subclauses 2(3) to 2(6): retrospective application	NRR	-
Veterans' Affairs Legislation Amendment Bill (No. 1) 2000	10/00	 1(a)(ii)	subclause 2(2) and schedule 1, part 4: retrospective application schedule 1, part 6: wide power of delegation	NRR	- 12
Veterans' Affairs Legislation Amendment (Budget Measures) Bill 2000	10/00		schedule 4: retrospective application	NRR	-
Veterans' Affairs Legislation Amendment (Further Budget 2000 and Other Measures) Bill 2001	9/01		subclause 2(2): retrospective commencement	NRR	-
Wool Services Privatisation Bill 2000	13/00		subclause 2(2): commencement on proclamation	NRR	-
Workplace Relations Amendment (Minimum Entitlements for Victorian Workers) Bill 2001	10/01		proposed new subsections 542(8) and (9): abrogration of the privilege against self-incrimination	NRR	
Workplace Relations Amendment (Tallies) Bill 2000	3/01		item 1, schedule 1: commencement	NRR	-
Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001	12/01		schedule 7: entry provisions	NRR	-
Workplace Relations Legislation Amendment (Youth Employment) Bill 1998	11/98	1(a)(i)	schedule 1, item 4: general comment		2/99
Workplace Relations Legislation Amendment (Youth Employment) Bill 1998 [No. 2]	10/99		schedule 1, item 4: general comment	NRR	-
Workplace Relations (Registered Organisations) (Consequential Provisions) Bill 2001	7/01		subclause 2(2): retrospective commencement subclause 2(3): retrospective commencement	NRR NRR	- -

BILL	DIGEST	PRINCIPLE	CLAUSE / SECTION	ACTION	REPORT
Youth Allowance Consolidation Bill 1999	2/99	1(a)(i)	subclauses 2(3) to (13): retrospective effect		7/99
		1(a)(i)	proposed new sections 1061ZZBP and 1061ZZBQ: use of tax file numbers		7/99