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 that 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.

4.3 During the 40th Parliament, the Committee examined the Australian Crime Commission Amendment Bill 2003, which aimed to facilitate the transition from the National Crime Authority to the Australian Crime Commission. The bill included amendments to the A*dministrative Decisions (Judicial Review) Act 1977* to exempt certain decisions under the *Australian Crime Commission Act 2002* from being subject to requests for statements of reason. The Committee sought the Minister's advice as to the reasons for amending the *Administrative Decisions (Judicial Review) Act 1977.*[1]

4.4 The Minister for Justice and Customs provided a comprehensive response to the Committee advising that:

> Section 13 of the AD(JR) Act [*Administrative Decisions (Judicial Review) Act 1977]* provides that, in specified circumstances, reasons for an administrative decision may be obtained by an applicant. Schedule 2 of the AD(JR) Act sets out classes of decisions that are exempt from the operation of section 13. The current exemptions include 'decisions relating to the administration of criminal justice'. Item 1 of Schedule 2 of the Bill would amend Schedule 2 of the AD(JR) Act to ensure that decisions made under the ACC Act in connection with intelligence operations or investigations of State offences that have a federal aspect fall within the list of exempt decisions.
>
> In seeking advice as to the reason for the proposed amendment, the Committee notes that decisions of the [Australian Crime Commission's] predecessor, the National Crime Authority, 'were not removed from the

1 Scrutiny of Bills Committee, *Alert Digest No. 1 of 2004*, p. 7.

> purview of the *Administrative Decisions (Judicial Review) Act 1977'*. That interpretation is not accurate. Decisions in connection with investigations of offences against a law of the Commonwealth or a Territory under the National Crime Authority Act 1984 (the NCA Act) were exempt from the operation of section 13 of the AD(JR) Act by virtue of paragraph (e) of Schedule 2 of the AD(JR) Act. Those decisions fell within the exempt class of 'decisions relating to the administration of criminal justice', which includes 'decisions in connection with investigations' (which is limited to offences against a law of the Commonwealth or a Territory).
>
> …All decisions of the ACC in connection with the investigation of offences should be exempt from the operation of section 13 of the AD(JR) Act, irrespective of whether the offences are against a law of the Commonwealth or a Territory, or against a law of the state with a federal aspect. The proposed amendment would broaden the scope of the exemptions in Schedule 2 of the AD(JR) Act to this effect…

4.5 The Committee thanked the Minister for this response, which addressed the Committee's concerns.

Excluding merits review

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

Example: Communications Legislation Amendment Bill (No. 2) 2003

4.7 In its *Alert Digest No. 8 of 2003,* the Committee drew attention to a number of provisions that would give the Attorney-General a discretion to:

- direct the Australian Communications Authority to refuse to grant a carrier licence to a person; and
- direct a carriage service provider to deny carriage services to a particular person.

4.8 The Committee noted that, while the bill specified that the Attorney-General could only exercise these discretions if he or she considered that the grant of a licence or the use of carriage services would be 'prejudicial to security', it did not make any provision for independent review of these decisions. The Committee sought the Minister's advice as to the reasons for excluding merits review of these decisions.

4.9 The Minister for Communications, Information Technology and the Arts responded that the proposals to exempt these decisions of the Attorney-General from review under the *Administrative Decisions (Judicial Review) Act 1997* were consistent with existing policy and that there were some avenues of review available:

> Decisions made on grounds of security, or which have security implications, under for example, the Intelligence Services Act 2001;

> Telecommunications (Interception) Act 1979; Foreign Acquisitions and Takeovers Act 1975; and Australian Security Intelligence Organisation Act 1979, are currently exempt from review under the [*Administrative Decisions (Judicial Review) Act 1997*].
>
> There will, however, be a number of avenues for independent review. Judicial review of decisions made by the Attorney-General under the proposed amendments would be available in the Federal Court under section 39B of the *Judiciary Act 1903* and in the High Court under section 75(v) of the Constitution.
>
> In addition, the proposed new sections 35 and 38A of the *Australian Security Intelligence Organisation Act 1979* will enable a carrier licence applicant or a carrier/carriage service provider who is the subject of an adverse or qualified security assessment provided by ASIO to the Attorney-General to seek merits review of that assessment in the Security Appeals Division of the Administrative Appeals Tribunal.[2]

4.10 The Committee thanked the Minister for this response, noting the advice that the proposals were based on a policy relating to the judicial review of decisions based on sensitive material. Notwithstanding the Minister's advice, the Committee considered that these provisions may make rights or liberties dependent upon non-reviewable decisions, but left it to the Senate as a whole to decide if they did so *unduly*. The bill was not amended to satisfy the Committee's concerns.

Example: Financial Services Reform (Consequential Provisions) Bill 2001[3]

4.11 In *Alert Digest No. 7 of 2001*, the Committee commented on a provision in the Financial Services Reform (Consequential Provisions) Bill 2001 which provided that decisions of the Securities Exchanges Guarantee Corporation under Part 7.5 of the *Corporations Act 2001*, and decisions by the Minister under Division 1 of Part 7.4 of the same Act, would not be subject to review under the *Decisions (Judicial Review) Act 1977*. The Committee sought the Minister's advice as to why these particular decisions should be exempt from review under that Act.

4.12 The Minister for Financial Services and Regulation responded in a letter dated 7 August 2001, advising the Committee, amongst other things, that:

- the Securities Exchanges Guarantee Corporation (SEGC) operated in a commercial environment and its activities might be unduly constrained by requirements of judicial review of its decision-making;
- adverse decisions by the SEGC on claims against the National Guarantee Fund would continue to be reviewable in the Federal Court and the State and Territory Supreme Courts; and

---

2 Scrutiny of Bills Committee, *Eighth Report of 2003*, p. 185.

3 Note: While this bill was introduced during the 39th Parliament, the Committee's final report on the bill was not tabled until the 40th Parliament, thus its inclusion in this report.

- administrative review of decisions by a Minister that an acquisition is, or is not, in the national interest was inappropriate and this approach was consistent with the approach taken in relation to comparable decisions under the *Foreign Acquisitions and Takeovers Act 1975.*[4]

4.13 The Committee thanked the Minister for this response, but sought further information as to what remedies were available to claimants who were dissatisfied with a compensation decision made by the SEGC.

4.14 The Parliamentary Secretary to the Treasurer responded on 13 May 2002, advising that:

> Section 888H of the *Financial Services Reform Act 2001* provides that where the SEGC has disallowed a claim, the claimant may bring proceedings in the Federal Court or a state or territory supreme court to establish a claim if the claim has been disallowed. The provision also provides that if the SEGC has not decided the claim within a reasonable period the claimant may bring proceedings in the Federal Court or a state or territory supreme court to establish the claim…

4.15 The Committee thanked the Parliamentary Secretary for this further advice.

Excluding judicial review

4.16 The Committee is of the view that, where a decision may have a substantial impact on a person's rights and interests, judicial review should generally be available to ensure that such decisions are lawfully made. Since its establishment the Committee has drawn attention to provisions that explicitly exclude judicial review.

Example: Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001[5]

4.17 In its *Alert Digest No. 13 of 2001*, the Committee commented on proposed new section 494AA of the *Migration Act 1958*, which would prohibit the institution or continuance of any legal proceedings against the Commonwealth, or an officer of the Commonwealth, or anyone acting on behalf of the Commonwealth, which related to offshore entry persons. The Committee noted that the explanatory memorandum indicated that this provision was intended to ensure that court proceedings were not used by an 'offshore entry person' to "frustrate the resolution of his or her immigration status, movement to a 'declared country' or to obtain desirable migration outcomes."[6] The Committee sought the Minister's advice as to how court proceedings

---

4 Scrutiny of Bills Committee, *Ninth Report of 2001*, pp. 397-398.

5 Note: While this bill was introduced during the 39th Parliament, the Committee's final report on the bill was not tabled until the 40th Parliament, thus its inclusion in this report.

6 Scrutiny of Bills Committee, *Alert Digest No. 13 of 2001*, p. 13.

had been used by 'offshore entry persons' to frustrate the resolution of their immigration status.

4.18 The Minister for Immigration and Multicultural and Indigenous Affairs responded that the provision was intended to limit the potential for **future** abuse of legal proceedings. The Minister provided no information on how court proceedings may have been used to this end in the past.[7]

4.19 The Committee thanked the Minister for this response but noted its continued concern about 'provisions which remove access to the courts. Such provisions are contrary to the principles and traditions of our judicial system which see judicial review and due process as fundamental rights.'[8] While noting that the bill had already been enacted, the Committee continued to draw the provision to the attention of Senators on the basis that it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions.

Example: Anti-terrorism Bill (No. 2) 2004

4.20 In *Alert Digest No. 8 of 2004*, the Committee commented on new paragraphs (xb) and (xc) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*, to be inserted by item 1 of Schedule 4 of this bill, which would remove from the purview of the *Administrative Decisions (Judicial Review) Act 1977*, two types of decisions made by the Attorney-General relating to the transfer of prisoners. The Committee noted that the explanatory memorandum, while describing the effect of these changes, did not provide any reason for denying judicial review of administrative decisions. The Committee indicated its concern with bills that would reduce the review rights of defendants, 'specifically if they remove the right of defendants to access federal administrative law procedures and remedies' and sought advice from the Attorney-General as to the reason for the proposed amendment.

4.21 The Attorney-General responded that the decisions to be exempted from the *Administrative Decisions (Judicial Review) Act 1977* were decisions that involved consideration of 'security' issues and that:

> I consider it inappropriate for decisions about transfers on security grounds to be subject to review under the ADJR Act. These decisions will require consideration of national security issues and are likely to be of a sensitive nature. The threat to 'security' may arise, for example, from concerns about the prisoner's actions or from concerns that someone may wish to harm a prisoner (for example, because he or she is going to give certain evidence in court). Disclosure of such information in proceedings may alert prisoners or suspects to activities of investigative authorities.[9]

---

7 Scrutiny of Bills Committee, *First Report of 2002*, p. 46.

8 ibid.

9 Scrutiny of Bills Committee, *Tenth Report of 2004*, p. 188.

4.22 The Attorney-General advised that exclusion of decisions of this type from review under the *Administrative Decisions (Judicial Review) Act 1977* was consistent with the exemption under that Act of other decisions involving national security considerations. He also indicated that there were a number of constraints on the making of these decisions, namely:

- the Attorney-General's power to make decisions of this nature could not be delegated;
- appropriate Ministers in the sending and receiving jurisdictions had to consent to the transfer in writing;
- before making a transfer order, the Attorney General must 'believe on reasonable grounds that it is necessary in the interests of security' and this belief could be reviewed by the Federal Court under section 39B of the *Judiciary Act 1903;* and
- the order must be reviewed (by the Attorney-General) within 3 months of the day on which it was made or last reviewed, in order to ensure the appropriateness of the order continuing.

4.23 The Committee thanked the Attorney-General for this response, noting that where a bill excludes judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the Committee generally expects other safeguards and constraints on the exercise of the power to be strongly evident. The Committee noted from the Attorney-General's response that a number of such constraints and safeguards were present in this instance. Not withstanding these safeguards, however, the Committee considered that the seriousness of excluding judicial review increased over time. In particular, each time such an order was reviewed and a decision on the continued appropriateness of the order was made, the potential existed for the denial of rights and liberties implicit in the exclusion of judicial review to be compounded.

4.24 The Committee noted that the proposed amendments related to decisions requiring consideration of national security issues and that, as such, were likely to be of a sensitive nature. Nevertheless, the Committee considered that the proposed amendments may make rights and liberties dependent upon non-reviewable decisions, but left it to the Senate as a whole to decide whether they did so *unduly*. The bill was not amended to provide for judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

Decisions for which review was accepted as unnecessary

4.25 During the 40th Parliament, the Committee accepted that certain decisions need not be subject to review. These included:

- decisions taken by the Minister under the Australian Heritage Council Bill 2002, when reviewing decisions of the Australian Heritage Council to enter or remove a place from the Register of the National Estate - such decisions need to be made on heritage grounds, employing the use of heritage expertise and there are no statutory implications for owners, occupiers or interested parties

as a result of entering or removing places from the Register of the National Estate[10]; and

- the Minister's discretion, provided for in the Customs Legislation Amendment (Application of International Trade Modernisation and Other Measures) Bill 2003, to order Customs to detain certain goods – used only in extreme circumstances and importers would be entitled to receive compensation on just terms.[11]

10 Scrutiny of Bills Committee, *Fifteenth Report of 2002*, pp. 500-501.

11 Scrutiny of Bills Committee, *Fourth Report of 2004*, pp. 106-108.