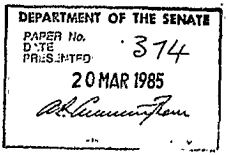
AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT
OF 1985

20 MARCH 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1985

20 MARCH 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines
Senator the Hon. D.B. Scott

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT
OF 1985

The Committee has the honour to present its First Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills, which contain provisions that the Committee considers may fall within principles 1(a) (i) to (v) of the Resolution of the Senate of 22 February 1985:

Australian Capital Territory Smoking and Tobacco Products Advertisement Prohibition Bill 1983 [1985]

Horticultural-Plant Variety Rights Bill 1984 [1985]

Justices (Long Leave Payments) Amendment Bill 1985

Property Rights Protection Bill 1984 [1985]

Trust Recoupment Tax Assessment Bill 1985

AUSTRALIAN CAPITAL TERRITORY SMOKING AND TOBACCO PRODUCTS ADVERTISEMENTS PROHIBITION BILL 1983 [1985]

This Bill was first introduced into the Senate by Senator Jack Evans on 6 September 1983. Following the 1984 election it was restored to the Notice paper by Resolution of the Senate of 22 February 1985. The purpose of the Bill is to prohibit advertisements relating to smoking and tobacco products in the Australian Capital Territory.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 4 - Advertisements Prohibited

Sub-clause (1) of this clause establishes the offence of "... publishing or causing to be published any advertisement" in relation to tobacco products. Sub-clause (2) states that if any advertisement contains the name of a tobacco product then that will be prima facie evidence that the advertisement contains an implied inducement to purchase and use tobacco products. This clause is objectionable on two grounds. Firstly it creates an absolute offence without any express provision that a person must knowingly or intentionally publish the offending advertisement. Secondly sub-clause (2) reverses the burden of proof in that any advertisement is presumed to be an implied inducement to smoke.

The possible application of this clause may be seen from the following example:

If a car owner from outside the ACT whose vehicle displays a bumper sticker promoting "Benson and Hedges World Series Cricket" drives into the ACT, he could be guilty of an offence under clause 4. The Committee draws the attention of the Senate to this clause under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

HORTICULTURAL-PLANT VARIETY RIGHTS BILL 1984 [1985]

This Bill was first introduced into the Senate on 11 October 1984 by Senator Hill. Following the general election of 1984 it was restored to the Notice Paper by Resolution of the Senate of 22 February 1985.

The purpose of the Bill is to establish an Australia-wide scheme for the granting of proprietary rights to plant breeders over any new horticultural varieties they may develop.

General comment

This Bill gives to the Secretary of the Department of Primary Industry a number of discretions. The exercise of each of these discretions is reviewable before the Administrative appeals Tribunal. The Committee notes that when informing a person of a decision the Secretary is not obliged to indicate that avenues of appeal against the decision do exist. This Committee has taken the view in the past that notification of a decision should include a statement of the rights of appeal available to the parties adversely affected by the decision.

JUSTICES (LONG LEAVE PAYMENTS) AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 22 February 1985 by the Attorney-General.

The purpose of this Bill is to amend the High Court Justices (Long Leave Payments) Act 1979 and the Judges (Long Leave Payments) Act 1979 to provide for pro rata payment in lieu of long leave to Judges of the High Court and other federal courts, who retire with entitlement to a pension under the Judges' Pension Act 1978 although not having served for ten years, and to exclude Judges of the Northern Territory Supreme Court from the scope of the Judges (Long Leave Payments) Act 1979.

General comment.

The Attorney-General, in his Second Reading Speech, (House of Representatives Hansard, 22 February 1985, pp.83-84) drew attention to the origins of the Principal Acts now being amended. In this context he stated that the two Acts were "enacted following Parliamentary pressure for legislation to regulate payments to retiring Judges in lieu of long leave." In clarifying this statement the Committee draws the attention of the Senate to a resume of the background to the passing of the Principal Acts.

During the examination of proposed Additional Expenditure for the Attorney-General's Department by Estimates Committee F in April - May 1977, material presented in response to questions by Senators Wright, Wheeldon and James McClelland revealed conclusively that there was no statutory provision for judges of federal courts, including the High Court, to take long service leave or to receive payment in lieu of such leave and that arrangements for such leave or payments were based on convention and were at the

discretion of the government of the day. This matter had previously been raised in the course of hearings by Estimates Committee B in April 1971 and by Estimates Committees A and B in October 1973.

Estimates Committee F reported to the Senate, on 5 May 1977, that "in no circumstances should such payments to Justices of the High Court and Judges of the various federal courts be seen to be dependent upon favourable government decision, but rather upon statutory authority. [This] would enable the Parliament to exercise its historical and proper function of openly scrutinising all actions of the Executive." The then Attorney-General, Mr R.J. Ellicott, Q.C., agreed with this principle and undertook to give early consideration to recommending appropriate amendments to the relevant legislation.

In introducing the necessary legislation in 1979, the then Attorney-General, Senator P.D. Durack, reminded the Senate of the undertaking given to Estimates Committee F and restated the principle that such payments should depend not upon the exercise of Executive discretion, but on legislation. During the ensuing debate it was pointed out that the Bills did not include a provision for pro rata payment of long service leave in the event of a Judge leaving the bench prior to the completion of ten years of service. By providing for this eventuality the current Bill completes the package of legislation which was identified by Senate Estimates Committee F in 1977 as being fundamentally important in further improving parliamentary scrutiny of executive action and in reinforcing the independence of the judiciary.

PROPERTY RIGHTS PROTECTION BILL 1984 [1985]

This Bill was first introduced into the Senate on 10 May 1984 by Senator Janine Haines. Following the 1984 election it was restored to the Notice Paper by Resolution of the Senate of 22 February 1985. The purpose of this Bill is to protect private property from unjust acquisition by State Governments.

The Committee draws the attention of the Senate to the following clause of this Bill:

Clause 7 - Retrospectivity

Clause 7 of the Bill states that just compensation will be payable to a person for the unjust acquisition of property if that acquisition occurred after 13 November 1980, being the day on which the International Covenant on Civil and Political Rights entered into force for Australia.

The Committee notes that it is the clear policy intention of the Bill that it have retrospective effect. Nevertheless the Committee draws this clause to the attention of the Senate under principle 1(a)(i) in that such retrospectivity might be considered to trespass unduly on personal rights and liberties.

TRUST RECOUPMENT TAX ASSESSMENT BILL 1985

This Bill was introduced into the House of Representatives on 22 February 1985 by the Treasurer.

The purpose of the Bill is to impose a tax in respect of incomes of certain 'new generation' trust stripping schemes.

The Committee drew attention to the following clauses in its Alert Digest No. 1 of 20 March 1985.

Clauses 5, 12 & 13 - Retrospectivity

Clause 5 defines 'Taxable amounts' which will be subject to the legislation. By paragraph 5(1)(c) the legislation will apply to all trusts entered into for the purpose of tax avoidance on or after 1 July 1980.

Clause 12, sub-sections (1) and (2) seek to impose a retrospective penalty tax from 28 April 1983. The penalty is fixed by reference to movement in the Consumer Price Index and is designed to preserve the real value of the tax assessed by this Bill.

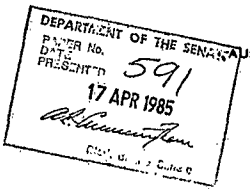
Clause 13 seeks to nullify the effect of any transfers of property that have taken place since 28 April 1983 where the purpose of the transfer was to minimize the collection of tax to be assessed by this Bill.

The Committee notes that it is the clear policy of the Government to use retrospective legislation to put an end to particular tax avoidance schemes. Nevertheless the Committee draws these clauses to the attention of the Senate under principle 1(a)(i) in that such retrospectivity might be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman

20 March 1985

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT
OF 1985

17 APRIL 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF 1985

17 APRIL 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines
Senator the Hon. D.B. Scott

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT
OF 1985

The Committee has the honour to present its Second Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills, which contain provisions that the Committee considers may fall within principles 1(a) (i) to (v) of the Resolution of the Senate of 22 February 1985:

Australian Meat and Live-stock Legislation (Consequential Amendments and Transitional Provisions) Bill 1985

Australian Meat and Live-stock Research and Development Corporation Bill 1985

Extradition (Commonwealth Countries) Amendment Bill 1985

Extradition (Foreign States) Amendment Bill 1985

Foreign Ownership and Control Registration Bill 1985

Taxation System Reform Bill 1985

Tax Avoidance Schemes Bill 1985

AUSTRALIAN MEAT AND LIVE-STOCK LEGISLATION (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 1985

This Bill was introduced into the House of Representatives on 20 March 1985 by the Minister for Primary Industry.

This Bill is complementary to the Australian Meat and Live-stock Research and Development Corporation Bill 1985. Its purpose is, firstly, to effect consequential amendments to the enabling Acts of three related instrumentalities. Secondly, the Bill seeks to repeal the existing Meat Research Legislation and thirdly, it proposes transitional provisions for the period before the new research and development arrangements become fully operational.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 2(4) - Retrospectivity

Clause 2(4) of this Bill makes the commencement of sections 5,6,8, sub-sections 13(1), 15(1) and 21(1) and section 32 retrospective to 6 July 1984, being the date on which the Australian Meat and Livestock Corporation Amendment Act 1984 commenced. Each provision appears largely to be a drafting change designed to correct errors in the 1984 Act.

The Committee draws this clause to the attention of the Senate under principle 1(a)(i) in that it might be considered to trespass unduly on personal rights and liberties.

Clause 14 - General comment

Section 30B(4) of the Australian Meat and Live-stock Corporation Act 1977, an amendment introduced in 1984, sets out the purposes for the convening of an annual general meeting of the Corporation. Sub-sections 30G(1), (2) and (3) of the Principal Act specify the persons eligible to vote at annual general meetings. Eligible persons will be entered on two registers: firstly, of live-stock producers, who are entitled to multiple voting (based on the number of live-stock owned); and secondly, exporters of meat and live-stock or processors of meat, who are entitled to one vote.

Clause 14 amends the Principal Act by substituting sub-section 30G(4) with a new sub-section which provides that a motion to endorse a recommendation to the Minister to vary the live-stock slaughter levy or the live-stock export charge shall be deemed to be passed unless 75% of all the eligible voters entered on both registers reject it.

This clause also amends the Principal Act by substituting sub-section 30G(6) with a new sub-section which provides that to pass a motion of no confidence in the Chairman or the Corporation the supporting vote, on both registers, must exceed 75% of the total registered voting entitlements.

The Committee draws this clause to the attention of the Senate under principle 1(a)(i) in that it would appear to contain provisions which infringe on normal democratic principles in the conduct of the business of meetings.

AUSTRALIAN MEAT AND LIVE-STOCK RESEARCH AND DEVELOPMENT CORPORATION BILL 1985

This Bill was introduced into the House of Representatives on 20 March 1985 by the Minister for Primary Industry.

The purpose of the Bill is to replace the Australian Meat Research Committee with an incorporated body, the Australian Meat and Live-stock Research and Development Corporation (AMLRDC), so as to improve the efficiency and effectiveness of meat and live-stock research and development (R&D) and improve accountability for R&D expenditure.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 27 - General comment

The comments on clause 14 of the Australian Meat and Live-stock Legislation (Consequential Amendments and Transitional Provisions) Bill 1985 apply to the voting procedures to be adopted at annual general meetings of the Research and Development Corporation as set out in clause 27 of this Bill.

EXTRADITION (COMMONWEALTH COUNTRIES) AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 20 March 1985 by the Attorney-General.

The purpose of the Bill is to regulate extradition between Australia and all other Commonwealth countries based on the London Scheme, agreed to by Commonwealth Law Ministers in 1966 and to incorporate amendments to improve the practical operation of the existing legislation.

General comment

Some parts of this Bill are identical to provisions contained in a similarly titled Bill introduced by the Attorney-General on 30 May 1984 but which lapsed when the House of Representatives was dissolved following the calling of the 1984 election. The Committee draws the attention of the Senate to the following clauses of this Bill:

Clause 4 - Henry VIII clause

This clause, which is similar to one included in the earlier Bill and commented on in Alert Digest No.7 of 1984, inserts a new section 4A into the Principal Act. The section provides that "... regulations may amend the list of crimes for which extradition may be granted to give effect to obligations which Australia may undertake in the future pursuant to a treaty. This clause will remove the need for amending the Principal Act whenever Australia becomes party to a treaty..." (Explanatory Memorandum p.3).

In 1984 the Committee drew this clause to the attention of the Senate under principle 1(a)(iv) in that a "Henry VIII" clause might be considered to be an inappropriate delegation of legislative power.

In its Eighth Report of 1984 (5 September 1984) the Committee noted that the Attorney-General had responded to this comment. His response noted that the power granted by the amendment would be rarely used and would refer only to the most serious crimes and that:

> The serious nature of the crimes which will be covered by such treaties and the fact that all normal extradition safeguards will apply suggest that a fugitive will not be unfairly disadvantaged by this amendment. In particular it should be noted that the double criminality rule will apply and accordingly no fugitive will be able to be extradited for a 'convention offence' unless the acts or omissions constituting that offence would also constitute an offence under Australia's general criminal law.

The present Attorney-General has provided a further response to the Committee's comments contained in its Alert Digest No. 2 of 1985. The Attorney-General refers to the comments quoted above and continues:

> In particular, I would wish to stress that where a convention imposes an obligation to create offences for which signatories agree to extradite then an Act of Parliament will be required to create those offences for the purpose of domestic law. Until that is done the dual criminality test for the purposes of extradition cannot be satisfied. (See for example the Crimes (Hijacking of Aircraft) Act 1973). Consequently, if the Parliament agrees with the international community and creates the new offences, it follows that extradition should be granted for such offences. Having created the offences, it

should be unnecessary for the Parliament to reconsider the question in relation to the extradition legislation and it is appropriate for the Regulations to modify the schedule in the Extradition legislation so as to encompass those offences.

The Committee is still not persuaded that it is appropriate to change the list of extraditable offences by regulation such that the only action available to a House of the Parliament is the negative action of disallowance of the regulation. If legislation is necessary to create a new offence it would surely be a simple matter to introduce consequential amendments to the Schedule to the Extradition (Commonwealth Countries) Act 1966 at the same time.

The Committee therefore continues to draw this clause to the attention of the Senate under principle 1(a)(iv) in that a "Henry VIII" clause might be considered to be an inappropriate delegation of legislative power.

Clause 8 - Unreviewable discretion

Proposed section 12(2)(b), which is similar to one included in the earlier Bill and commented on in Alert Digest No. 7 of 1984, vests in the Attorney-General a discretion to determine whether an offence is of a political character. If the offence is considered to be a political offence the Attorney-General shall not give notice under sub-section (1) initiating the process of extradition. At present it is the responsibility of a magistrate to determine whether an offence is of a political character. Whereas the fugitive can initiate proceedings for habeas corpus when such a decision is taken by a magistrate, thus reviewing the grounds for the magistrate's decision, no

avenue for review of the merits of the Attorney-General's decision is available under this amendment.

In 1984 the Committee drew this clause to the attention of the Senate under principle 1(a)(iii) in that it might be considered to make personal rights, liberties and/or obligations unduly dependent on non-reviewable administrative decisions.

In its Eighth Report of 1984 (5 September 1984) the Committee noted that the Attorney-General had provided a lengthy response to this comment. The response is quoted again for the information of the Senate:

> As the legislation stands the decision whether an offence is an offence of a political character may be taken by either the magistrate or the Attorney-General. In the former case the decision is reviewable by way of habeas corpus; in the latter case there is no merits review. The amendment will provide that the decision may only be taken by the Attorney-General. To the extent that the amendment will deny a fugitive the ability to review a decision in this area, the situation is correctly stated by the Committee and the question whether the amendment makes personal rights unduly dependent on non-reviewable administrative decisions must be addressed.
>
> One reason for the amendment is that decisions of the courts on what constitutes an offence of a political character are singularly unhelpful and that, not surprisingly in view of this, there are great difficulties in providing an adequate definition of this type of offence. To provide that the decision should be taken by the executive alone is consistent with the existing provisions

in the extradition legislation that the Attorney-General alone can refuse extradition if he is satisfied that a fugitive will be prosecuted or prejudiced because of his political opinions (section 11 of the Extradition (Commonwealth Countries) Act; section 14 of Extradition (Foreign States) Act). A decision to reject a claim that political persecution will arise if extradition is permitted is not reviewable on the merits. The policy behind the proposed amendment is also consistent with the handling of applications for refugee status in this country pursuant to the Convention relating to the Status of Refugees.In these cases the D.O.R.S. Committee makes a recommendation to the Minister for Immigration and Ethnic Affairs on whether the applicant has a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. A decision by the Minister to refuse to grant refugee status is not reviewable on the merits. Another reason for the amendment is that decisions in this area obviously have serious implications for Australia's relations with foreign countries and should accordingly be taken by the Executive Government and not be subject to review. On the basis of this consideration and existing policy in the area of 'political persecution' I consider that it is reasonable that decisions in this area be not reviewable.

The present Attorney-General has provided a further response to the Committee's comments contained in its Alert Digest No.2 of 1985 in relation to this clause also. The Attorney-General refers to the comments quoted above and emphasizes the following points in favour of the position that the Attorney-General's decision in this area should be non-reviewable -

- the Attorney-General's final discretion to refuse extradition for political offences is consistent with the handling of applications for refugee status where the decision of the Minister is not reviewable;

- a decision under both Extradition Acts to refuse to extradite a fugitive because he would be prejudiced because of his political opinions is one for the Attorney-General and is not reviewable; and

- decisions in this area have various implications for Australia's relations with foreign countries and accordingly the final decision should be taken by the Executive Government and not be subject to review.

With the inclusion of the original clause, without amendment, in the current Bill, the Committee reiterates the comment made in its Eighth Report of 1984:

> The Committee acknowledges the difficulties inherent in relying on the Courts to determine whether an offence is of a political character and also the parallels between the policy embodied in these Bills and the policy relating to the determination of refugee status.

Nevertheless the Committee continues to draw this clause to the attention of the Senate under principle 1(a)(iii) in that it might be considered to make personal rights, liberties and/or obligations unduly dependent on non-reviewable administrative decisions.

Clause 9 - Issue of warrants

This clause, which was not included in the 1984 Bill, inserts a new sub-section 14 (4A). It entitles police officers who have a warrant for the arrest of a person and who possess "reasonable grounds for suspecting" the presence of evidence to enter, search for and seize such material on land and in buildings and other property without having first obtained a warrant relating specifically to those premises. The normal practice is that the right to enter and search buildings and property is accompanied by a requirement that a warrant specifically directed to such action be obtained beforehand, see for example Crimes Act 1914 s.10.

The Committee drew the attention of the Senate to this clause in its Alert Digest No. 2 of 1985 under principle 1(a)(i) in that it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has informed the Committee that it is proposed that amendments will be moved in the Senate which will -

- provide that a police officer in arresting a fugitive may only search the person and clothing of the fugitive and property under his control for evidence relevant to the alleged extradition crimes or property acquired as a result of those crimes. Any such evidence or property would then be able to be seized; and

- require any additional search of land, premises, vessels, aircraft or vehicles and seizure of evidence or property to be undertaken only pursuant to a warrant issued by a Magistrate.

The Committee thanks the Attorney-General for this response, which appears in substance to meet the concerns of the Committee.

Clause 16 - Powers of entry, search and seizure

The comment on clause 9 above applies to clause 16 (new section 25A) of this Bill.

EXTRADITION (FOREIGN STATES) AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 20 March 1985 by the Attorney-General.

The purpose of this Bill is to provide for amendments to the Extradition (Foreign States) Act 1966. That Act regulates Australia's extradition relations with countries that are not members of the Commonwealth and with which Australia has extradition arrangements.

The comments on clauses 8 and 9 of the Extradition (Commonwealth Countries) Amendment Bill 1985 apply to clauses 6 (new section 15(2)(b): unreviewable discretion) and 7 (new section 16(4A): issue of warrants) of this Bill.

FOREIGN OWNERSHIP AND CONTROL REGISTRATION BILL 1985

This Bill was introduced into the Senate on 20 March 1985 by Senator Jack Evans.

The purpose of the Bill is to establish a public register of foreign corporations which own or control major Australian properties or other assets.

This Bill is virtually identical to one introduced by Senator Jack Evans on 13 September 1984. As indicated in Alert Digest No. 12 of 1984 (3 October 1984) and in Report No. 11 of 1984 (10 October 1984) the Committee draws the attention of the Senate to the following clause of the Bill:

Clause 12 - Reversal of the burden of proof

Sub-clause (3) states that any officer or agent of a foreign corporation registered under the Companies Act in a State or Territory "...shall, unless the contrary is proved, be deemed to be knowingly concerned in and party to any contravention by the corporation..." or failure by the corporation to comply with sub-section 12(1).

The Committee draws this clause to the attention of the Senate under principle 1(a)(i) in that such a shifting of the burden of proof may be considered to trespass unduly on personal rights and liberties.

TAXATION SYSTEM REFORM BILL 1985

This Bill was introduced into the Senate on 21 March 1985 by Senator Jack Evans.

The purpose of the Bill is to provide for the establishment of an all party Joint House Committee. The Committee, with the assistance and advice of consultants and staff has the following functions -

(a) to review -

(i) the reports of the Taxation Review Committee (the 'Asprey' Committee); and

(ii) the report of the Committee of Inquiry into taxation and inflation (the 'Matthews' Committee);

(b) to formulate, in the light of its review of those reports and of any evidence taken by the Committee for the purposes of that review, comprehensive reforms of the taxation system; and

(c) to prepare draft legislation to give effect to those reforms.

The Committee draws the attention of the Senate to the following clause of this Bill:

Clause 26(1) - Burden of proof

Clause 26(1) seeks to reverse the burden of proof in proceedings for an offence against that clause by requiring the accused to prove a reasonable excuse rather than insisting that the prosecution prove all

the elements of the crime. It would appear that no explanation for this provision is provided in the material accompanying the Bill.

The Committee draws this clause to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

TAX AVOIDANCE SCHEMES BILL 1985

This Bill was introduced into the Senate on 22 March 1985 by Senator Jack Evans.

The purpose of this Bill is to fulfil two objects:

(i) to declare the opinion of the parliament concerning the extent to which legislation for preventing the operation of blatant tax avoidance schemes can be expressed to apply retrospectively; and

(ii) to provide a means whereby persons can guard themselves against entering into transactions that may later be affected by retrospective taxation legislation.

The Committee draws the attention of the Senate to the following clauses of this Bill:

Clause 6(3) - Unreviewable discretion

Clause 6 of the Bill includes a proposed sub-section which vests an unappealable discretion in the Minister. It provides that a person may apply to the Treasurer for a declaration that a particular taxation minimisation scheme will not be treated as "a blatant tax avoidance scheme". Authority is vested in the Treasurer to determine the question of the issue of such a declaration within 90 days after the receipt of an application.

The nature of the question of what constitutes "a blatant tax avoidance scheme" is such that it might be argued that there should exist at the least, provision for judicial review of the decision.

The Committee draws this provision to the attention of the Senate under principle 1(a)(iii) in that it might be regarded as making rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Clause 8(1) - General comment

Clause 8 sets out the effect of a declaration made under clause 6. Under its provisions every person concerned in the scheme is entitled to treat the declaration as a firm assurance that, if the scheme is entered into in exact conformity with the particulars of the scheme identified in the declaration, no Commonwealth government will propose or support legislation which would retrospectively alter adversely to that person the tax law relating to that scheme.

This provision appears to be an attempt to fetter future Parliaments in the kind of legislation which they will pass. It can therefore be argued that the impact of this provision serves only to arouse expectations which may well be dashed by the legislative action of a future Parliament.

Michael Tate
Chairman

17 April 1985

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN:

MR PRESIDENT,

I PRESENT THE SECOND REPORT OF 1985 OF THE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

AUSTRALIAN MEAT AND LIVE-STOCK LEGISLATION (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 1985

AUSTRALIAN MEAT AND LIVE-STOCK RESEARCH AND DEVELOPMENT CORPORATION BILL 1985

EXTRADITION (COMMONWEALTH COUNTRIES) AMENDMENT BILL 1985

EXTRADITION (FOREIGN STATES) AMENDMENT BILL 1985

FOREIGN OWNERSHIP AND CONTROL REGISTRATION BILL 1985

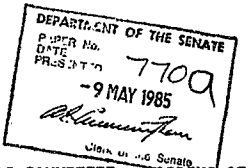
TAXATION SYSTEM REFORM BILL 1985

TAX AVOIDANCE SCHEMES BILL 1985

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 3 DATED 17 APRIL 1985.

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.



SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN:

MR PRESIDENT,

I PRESENT THE THIRD AND FOURTH REPORTS OF 1985 OF THE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

AUSTRALIAN MEAT AND LIVE-STOCK LEGISLATION (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 1985

AUSTRALIAN MEAT AND LIVE-STOCK RESEARCH AND DEVELOPMENT CORPORATION BILL 1985

AUTOMOTIVE INDUSTRY AUTHORITY AMENDMENT BILL 1985

BOUNTY (INJECTION-MOULDING EQUIPMENT) AMENDMENT BILL 1985

CORPORATIONS (EMPLOYEE-OWNED CO-OPERATIVES) BILL 1985

CUSTOMS ADMINISTRATION BILL 1985

CUSTOMS ADMINISTRATION (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1985

DIVIDEND RECOUPMENT TAX BILL 1985

FOREIGN OWNERSHIP AND CONTROL REGISTRATION BILL 1985

PETROLEUM (SUBMERGED LANDS) (CASH BIDDING) AMENDMENT BILL 1985

SUPERANNUATION LEGISLATION AMENDMENT BILL 1985

TAXATION SYSTEM REFORM BILL 1985

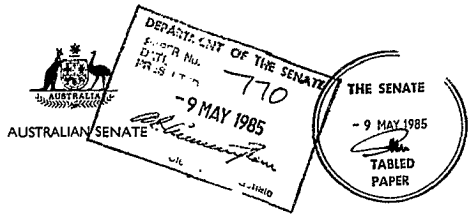
TAXATION (UNPAID COMPANY TAX) ASSESSMENT BILL 1985

TAX AVOIDANCE SCHEMES BILL 1985

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 4 DATED 8 MAY 1985.

MR PRESIDENT,

I MOVE THAT THE REPORTS BE PRINTED.



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT
OF 1985

8 MAY 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1985

8 MAY 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines
Senator the Hon. D.B. Scott

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT
OF 1985

The Committee has the honour to present its Third Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bill, which contain provisions that the Committee considers may fall within its principles 1(a) (i) to (v) of the Resolution of the Senate of 22 February 1985:

Automotive Industry Authority Amendment Bill 1985

AUTOMOTIVE INDUSTRY AUTHORITY AMENDMENT BILL 1985

This Bill was introduced into the Senate on 17 April 1985 by the Minister for Industry, Technology and Commerce.

This Bill proposes to amend the Automotive Industry Authority Act 1984 to incorporate the Motor Vehicles and Components Development Grants Scheme announced on 29 May 1984. The grants scheme is designed to provide financial assistance to the Australian automotive industry to promote the development of motor vehicles and automotive components of Australian design.

General comment

The Bill would amend the Principal Act to empower the Automotive Industry Authority to enter into agreements for the making of grants of financial assistance to eligible companies - companies engaged in, or which intend to engage in, the manufacture of classes of motor vehicles which the Minister has declared to be classes of eligible products - in respect of expenditure to be incurred in automotive development projects. Although the Bill would confer a number of discretions on the Authority no provision has been made for the review of its exercise of those discretions. The Committee acknowledges the policy underlying the failure to provide for review on the merits and notes that the lack of such review would appear to be in accord with general guidelines

promulgated by the Administrative Review Council in its Eighth Annual Report 1983-84 to the effect that a decision is not appropriate for review where the decision involves apportioning a finite resource. Nevertheless, as is its custom, the Committee draws the lack of review on the merits to the attention of the Senate under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Clause 8

Clause 8 inserts a new Part IVA in the Principal Act dealing with the Motor Vehicles and Components Development Grants Scheme. New section 26A would empower the Minister to declare a class of motor vehicles to be a class of eligible products by notice in writing in the Gazette. As the eligibility of companies for grants under the scheme is determined by whether they are engaged in, or intend to engage in, the manufacture of eligible products, the effect of this section is to make an important element of the scheme turn on a declaration by the Minister which is neither the subject of parliamentary scrutiny nor open to any form of review (otherwise than as to its legality). While the majority of the Committee recognises the need for flexibility in such a scheme and considers that the nature of the Minister's decision does not lend itself to parliamentary disallowance it considers that the Minister's decision should be brought to Parliament's attention by the tabling of the Gazette notice.

Michael Tate
Chairman

8 May 1985

AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT
OF 1985

8 MAY 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF 1985

8 MAY 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines
Senator the Hon. D.B. Scott

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT
OF 1985

The Committee has the honour to present its Fourth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills, which contain provisions that the Committee considers may fall within principles 1(a) (i) to (v) of the Resolution of the Senate of 22 February 1985:

Australian Meat and Live-stock Legislation (Consequential Amendments and Transitional Provisions) Bill 1985

Australian Meat and Live-stock Research and Development Corporation Bill 1985

Bounty (Injection-moulding Equipment) Amendment Bill 1985

Corporations (Employee-owned Co-operatives) Bill 1985

Customs Administration Bill 1985

Customs Administration (Transitional Provisions and Consequential Amendments) Bill 1985

Dividend Recoupment Tax Bill 1985

Foreign Ownership and Control Registration Bill 1985

Petroleum (Submerged Lands) (Cash Bidding) Amendment Bill 1985

Superannuation Legislation Amenddment Bill 1985

Taxation System Reform Bill 1985

Taxation (Unpaid Company Tax) Assessment Bill 1985

Tax Avoidance Schemes Bill 1985

AUSTRALIAN MEAT AND LIVE-STOCK LEGISLATION (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 1985, AUSTRALIAN MEAT AND LIVE-STOCK RESEARCH AND DEVELOPMENT CORPORATION BILL 1985

The Committee commented on these Bills in its Alert Digest No. 2 of 1985 (27 March 1985) and its Second Report of 1985 (17 April 1985). The Bills have since been passed by the Senate but the Minister Representing the Minister for Primary Industry in the Senate has provided a response to the Committee's comments and as is its usual practice the Committee reproduces the relevant parts of the Minister's response for the information of the Senate.

Clause 2(4) - Retrospectivity

The Committee noted that sub-clause 2(4) of the Australian Meat and Live-stock Legislation (Consequential Amendments and Transitional Provisions) Bill 1985 made the commencement of sections 5, 6, 8, sub-sections 13(1), 15(1), and 21(1) and section 32 retrospective to 6 July 1984, the date on which the Australian Meat and Live-stock Corporation Amendment Act 1984 came into effect. The Minister has responded:

> It is fully appreciated that, as a general principle, retrospective provisions in legislation are to be avoided. In this instance, however, the retrospective commencement of the various amending provisions listed in clause 2(4) will not prejudicially affect the rights of any individual, nor will it impose liabilities retrospectively.
>
> The amendments identified in clause 2(4) are designed to remedy oversights and drafting imperfections which occurred during the reform of

> meat and livestock legislation last year. For legal reasons, it is desirable to correct these defects retrospectively to the date on which the reform took effect (6 July 1984). This will place the validity of actions taken since then beyond any possible doubt and remove technical obligations which should have ceased on the date in question.

This response answers the Committee's concern in relation to the clause.

Clauses 14 and 27

Clause 14 of the Australian Meat and Live-stock Legislation (Consequential Amendments and Transitional Provisions) Bill 1985 and clause 27 of the Australian Meat and Live-stock Research and Development Corporation Bill 1985 required 75% of all eligible voters to vote for motions rejecting a variation of the live-stock slaughter levy or the live-stock export charge or motions of no confidence in the Chairperson or the Corporation if such motions were to be passed at an annual general meeting. The Committee drew attention to the clauses under principle 1(a)(i) on the ground that they appeared to contain provisions infringing normal democratic principles in the conduct of the business of meetings. The Minister has responded:

> It should be noted that the requirement for a 75% majority of the total AGM constituency applies only to the two types of motion identified by the Committee. All other motions moved at an annual general meeting require merely a simple majority of the votes cast, in person or by proxy, at the meeting.

With regard to the first-mentioned motions, it is necessary to bear in mind that -

(i) motions of no confidence in the chairman or the Corporation will, if passed, cause the removal from office of the person(s) concerned

(ii) rejection of motions to endorse Corporation proposals for changes in levies financing the Corporation will prevent such changes.

It is clear that either eventuality would disrupt or seriously handicap the orderly functioning of the Corporation. Accordingly, the requirement for 75% majority is intended to be a safeguard against a situation where a small number of voters at a poorly attended annual general meeting could throw out a carefully selected board of skilled persons, or prevent an increase in levies that was needed for the Corporation to meet inescapable commitments.

It was the express wish of the industry that the requirement for a 75% majority apply in respect of motions of no confidence or rejection of levy increases.

It is, of course, not uncommon for organisations or companies to require more than a simple majority for motions of particular importance, especially where - as in this case - voting is voluntary and it is not practicable to set a quorum.

The Committee concedes that it is becoming more common in commercial practice to require more than a simple majority for motions of particular importance. However it believes that the eventuality sought to be guarded

against - the actions of a small number of voters at a poorly attended annual general meeting - could have been met in other ways, for example by requiring a simple majority of all eligible voters (rather than merely those present at the annual general meeting), rather than by requiring a 75% majority.

The Committee thanks the Minister for his response.

BOUNTY (INJECTION-MOULDING EQUIPMENT) AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 20 March 1985 by the Minister Representing the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to continue bounty assistance to the industry producing injection-moulding machines for the production of plastic goods, and parts for such machines, for a further four years.

The bounty will be paid at the rate of 20 per cent of value added in the first and second years, reducing to 10 per cent of the value added in the third and fourth years.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 2 - Retrospectivity

This clause makes the commencement of the Bill retrospective to 23 November 1984. The Explanatory

Memorandum accompanying the Bill states that that is the date following the expiry of the Principal Act. The Committee notes that the retrospectivity is beneficial to the recipients of the bounty.

The Committee however, continues to take the view that the Senate should be alerted to retrospectivity in legislation and thus draws attention to this clause under principle 1(a)(i) in that it might be considered to trespass unduly on personal rights and liberties.

CORPORATIONS (EMPLOYEE-OWNED CO-OPERATIVES) BILL 1985

This Bill was introduced into the Senate on 25 March 1985 by Senator Jack Evans.

The purpose of this Bill is to provide a legal framework and financial assistance for existing corporations to undergo a transition to become co-operatives. The Bill does not seek to replace existing corporate structures. It seeks to provide a class of organisational structure which will allow businesses to be responsive and responsible to employees and other interest groups and thereby to create businesses which are more durable and efficient, and of greater benefit to the country as a whole.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 30 - Review of decisions

Clause 30 provides for the review of decisions by the Employee-owned Corporations Board which would be

established by the Bill under the Administrative Decisions (Judicial Review) Act 1977. Sub-clause 30(2) provides that, apart from review under the Administrative Decisions (Judicial Review) Act 1977, the decisions of the Board are to be final and conclusive and may not be challenged in any court. The purpose of clause 30 would therefore appear to be to deprive persons aggrieved by a decision of the Board of any avenue of review other than the Administrative Decisions (Judicial Review) Act 1977. Clause 30 does not confer a right of review but merely acknowledges the fact that decisions of the Board would be reviewable under the Administrative Decisions (Judicial Review) Act 1977 anyhow. Further, while the Administrative Decisions (Judicial Review) Act 1977 provides for the review of a decision as to its legality, it does not provide an avenue for the review of decisions on their merits. Given the nature of the discretionary powers vested in the Board it might be considered that review by the Administrative Appeals Tribunal would be more appropriate.

The Committee drew this clause to the attention of the Senate under principle 1(a)(iii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions. Senator Jack Evans has responded to the Committee indicating that he would be willing to agree to an amendment in the Committee stage of the Bill to allow appeal to the Administrative Appeals Tribunal, should such an amendment be moved. The Committee thanks the Senator for his response.

CUSTOMS ADMINISTRATION BILL 1985

This Bill was introduced into the Senate on 23 April 1985 by the Minister for Industry, Technology and Commerce.

This Bill proposes to establish an Australian Customs Service and create the statutory office of the Comptroller-General of Customs.

The Comptroller-General of Customs -

(i) is to be appointed by the Governor-General;

(ii) shall be appointed for a period of 7 years and be eligible for re-appointment;

(iii) is subject to the usual provisions of other similar statutory office holders in respect of such matters as outside employment, remuneration, leave, resignation, disclosure of financial interests and suspension and removal from office.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 14 - Delegation

Clause 14 enables the Comptroller-General to delegate all or any of his powers or functions under a law of customs or excise or any other law of the Commonwealth (other than the power of delegation) to "any person".

The Committee is concerned that the provision imposes no limitation on the power of delegation and gives no guidance as to the attributes of the persons to whom powers or functions may be delegated. The Committee draws the clause to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

CUSTOMS ADMINISTRATION (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1985

This Bill was introduced into the Senate on 23 April 1985 by the Minister for Industry, Technology and Commerce.

The main purpose of this Bill is to invest the general administration of the legislation to be administered by the proposed Australian Customs Service in the Comptroller-General of Customs.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 3 - Delegation

Clause 3 amends various Acts as set out in the Schedule. In particular it will insert a new section 8 in the Excise Act 1901 empowering the Minister to delegate all or any of the Minister's powers under any Excise Act (other than the power of delegation) to "a person".

Once again the Committee is concerned that the provision imposes no limitation on the exercise of this power and

gives no guidance as to the attributes of the persons to whom powers may be delegated. The Committee draws the clause to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

DIVIDEND RECOUPMENT TAX BILL 1985, TAXATION (UNPAID COMPANY TAX) ASSESSMENT AMENDMENT BILL 1985

These Bills were introduced into the House of Representatives on 27 March 1985 by the Treasurer.

The Bills were substantially the same as Bills with similar titles introduced into the House of Representatives on Budget night 1983 and again on 2 May 1984. On each occasion the Bills were passed by the House of Representatives but the second reading of the Bills was negatived in the Senate.

On this occasion, once again, the second reading of both Bills was negatived in the Senate on 19 April 1985.

General comment

The Committee noted in its Alert Digest No. 3 of 1985 (17 April 1985) that the Taxation (Unpaid Company Tax) Assessment Amendment Bill 1985 would have extended provisions of the Taxation (Unpaid Company Tax) Assessment Amendment Act 1982 so that personal income tax avoided by former owners of companies stripped of pre-tax profits would be subject to recoupment. As the Principal Act had retrospective effect to 1 January 1972

the Bill would in similar fashion have retrospectively altered the situation of taxpayers. The Dividend Recoupment Tax Bill 1985 would have imposed the tax on dividend amounts determined in accordance with the Taxation (Unpaid Company Tax) Assessment Amendment Bill 1985. The Committee therefore drew both Bills to the attention of the Senate under principle 1(a)(i) in that such retrospectivity might be considered to trespass unduly on personal rights and liberties.

FOREIGN OWNERSHIP AND CONTROL REGISTRATION BILL 1985

The Committee commented on this Bill in its Second Report of 1985 (17 April 1985). Senator Jack Evans has now responded to these comments.

Clause 12 - Reversal of the burden of proof

Sub-clause (3) states that any officer or agent of a foreign corporation registered under the Companies Act in a State or Territory "... shall, unless the contrary is proved, be deemed to be knowingly concerned in and party to any contravention by the corporation ..." or failure by the corporation to comply with sub-clause 12(1).

The Committee drew this clause to the attention of the Senate under principle 1(a)(i) in that such a shifting of the burden of proof might be considered to trespass unduly on personal rights and liberties. Senator Jack Evans has responded:

> I believe that this type of clause is necessary. Companies, as entities, are not easy to penalise. Foreign companies which may have their operations and assets outside Australia are even more difficult to penalise.
>
> This fact, together with the fact that contraventions by a corporation are actually commissioned and carried out by natural persons, makes it appropriate that the agent representing a foreign corporation should bear the responsibility for certain actions by that corporation.

The Committee thanks the Senator for his response but it observes that it does not appear to the Committee that the difficulty of penalising corporations (and the need therefore to fix liability on the directors, servants or agents of a corporation for actions of that corporation which they were knowingly involved in) provides any justification for the reversal of the ordinary burden of proof in criminal proceedings involving such directors, servants or agents. The Committee notes that it did not prove necessary to reverse the onus of proof in similar provisions in the Companies Act 1981 (for example section 563 dealing with the making of false or misleading statements). The Committee therefore continues to draw attention to this clause under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

PETROLEUM (SUBMERGED LANDS) (CASH BIDDING) AMENDMENT BILL 1985

This Bill was introduced into the Senate on 28 March 1985 by the Minister for Resources and Energy.

The purpose of this Bill is to amend the Petroleum (Submerged Lands) Act 1967 to provide for the award of highly prospective offshore petroleum exploration permits on the basis of cash bids. It will also amend the Petroleum (Submerged Lands) (Exploration Permit Fees) Act 1967 so that this Act will not apply to permits awarded by way of cash bidding.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 5 - Proposed section 22B

Proposed sub-sections 22B(1) and (2) would give the Joint Authority (comprising the Commonwealth Minister and the relevant State Minister) a discretion to reject applications for permits to explore for petroleum. No mechanism for review of the exercise of this discretion is provided for. While the Explanatory Memorandum indicates that it is proposed that the Joint Authority reject applications if the cash bid made is considered inadequate on account of insufficient competition, if there is evidence of collusive bidding, if the bidder does not have the technical or financial resources to carry out offshore operations effectively or if any conditions made known prior to the bidding round are not met, these criteria are not set out in the legislation. The scope for review pursuant to the Administrative Decisions (Judicial Review) Act 1977 is accordingly limited.

The Committee notes that the proposed provisions are in conformity with the existing provisions for the granting of permits in the Principal Act, sub-section 22(1) similarly failing to provide for review of the decisions of the Joint Authority. Nonetheless the Committee draws the proposed provisions to the attention of the Senate

under principle 1(a)(iii) in that such an unfettered discretion may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

SUPERANNUATION LEGISLATION AMENDMENT BILL 1985

This Bill was introduced into the Senate on 23 April 1985 by the Minister for Finance.

This Bill has three purposes:

- to amend the Superannuation Act 1976 in respect of the structure, responsibilities and operations of the Superannuation Fund Investment Trust;
- to provide the Commissioner for Superannuation with powers of a Secretary of a Department; and
- to amend the Superannuation Acts 1922 and 1976 to permit the Minister for Finance to decide certain matters relating to the recovery from employers of the cost of providing superannuation benefits for their staff.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 17 - Delegation

Clause 17 inserts a new section 39 empowering the principal member to delegate all or any of the principal member's powers under the Act (other than the power of delegation) to 'a person'. The Committee is concerned

that the new section imposes no limitation, and gives no guidance, as to the attributes of the person to whom a delegation may be made. The Committee draws the clause to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

TAXATION SYSTEM REFORM BILL 1985

The Committee commented on this Bill in its Second Report of 1985 (17 April 1985). Senator Jack Evans has now responded to these comments.

Clause 26 - Burden of proof

Sub-clause 26(1) provides that a person shall not fail *to appear as a witness, be sworn and so forth 'without* reasonable excuse (proof whereof shall lie on the person)'. The Committee drew this clause to the attention of the Senate under principle 1(a)(i) in that such a reversal of the burden of proof might be considered to trespass unduly on personal rights and liberties.

Senator Jack Evans has indicated that he would be willing to agree to an amendment omitting '(proof whereof shall lie on the person)' in the Committee stage of the Bill, should one be moved. The Committee thanks the Senator for his response.

TAX AVOIDANCE SCHEMES BILL 1985

The Committee commented on this Bill in its Second Report of 1985 (17 April 1985). Senator Jack Evans has now responded to the Committee's comments.

Clause 6 - Unreviewable discretion

Clause 6 provides that a person whose liability to taxation will or may be affected by a scheme proposed to be entered into or carried out may apply to the Treasurer for a declaration that the scheme will not be treated as a 'blatant tax avoidance scheme'. The Treasurer would be required within 90 days of receiving such an application to make the declaration sought or to refuse the application. The Committee noted that no provision was made for review of the Treasurer's decision and suggested that the nature of the question whether a scheme is a 'blatant tax avoidance scheme' was such that provision should be made for judicial review of the Treasurer's decision.

The Committee drew the clause to the attention of the Senate under principle 1(a)(iii) in that it might be regarded as making rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions. Senator Jack Evans has responded:

> I believe that for this Bill to "work", the decision needs to be the prerogative of the Treasurer alone, on behalf of the Government. Such a decision must be made apart from the bureaucracy. (It does NOT mean however that the Treasurer is unable to receive the advice of the

bureaucracy.) The clause was deliberately designed to put the onus for such a decision on an elected Minister.

The Committee notes, however, that the Treasurer is empowered, by clause 10 of the Bill, to delegate any of his powers under the Act to an officer of the Department of the Treasury. The Committee suggests that if the decision that a scheme will or will not be treated as a 'blatant tax avoidance scheme' is to be viewed as a declaration of the future policy intentions of the Government then the power should be exercised by the Treasurer alone and the document signed by the Treasurer declaring that a scheme will not be treated as a 'blatant tax avoidance scheme' or stating reasons for refusing to make such a declaration should be subject to parliamentary scrutiny by way of tabling.

The Committee therefore continues to draw attention to the clause.

Clause 8 - Effect of declaration

Clause 8 sets out the effect of a declaration made under clause 6. Under its provisions every person concerned in a scheme would be entitled to treat a declaration as a firm assurance that, if the scheme were to be entered into or carried out in exact conformity with the particulars of the scheme identified in the declaration, no government of the Commonwealth would propose or support legislation that would retrospectively alter adversely to that person the application to or in relation to the scheme of a law relating to taxation.

The Committee suggested that the clause appeared to be an attempt to fetter future Parliaments in the kind of legislation they might pass and, as such, could only

serve to arouse expectations which might well be dashed by the legislative action of a future Parliament. Senator Jack Evans has responded:

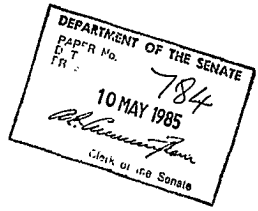
> I accept that legally a future Parliament may act contrary to an undertaking, however the realities of "realpolitik" would restrain a government from doing so. This Bill does not seek to fetter the Parliament, but rather to place a "moral/ethical" obligation upon governments.

The Committee thanks the Senator for his response but continues to draw attention to the clause under principle 1(a)(i) in that, by arousing expectations which cannot realistically be fulfilled, it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman

8 May 1985

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT
OF 1985

10 MAY 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF 1985

10 MAY 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines
Senator the Hon. D.B. Scott

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT
OF 1985

The Committee has the honour to present its Fifth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bill, which contain provisions that the Committee considers may fall within principles 1(a) (i) to (v) of the Resolution of the Senate of 22 February 1985:

Human Embryo Experimentation Bill 1985

HUMAN EMBRYO EXPERIMENTATION BILL 1985

This Bill was introduced into the Senate on 23 April 1985 by Senator Harradine.

The Bill seeks to prohibit experimenting on embryos created as a result of in vitro fertilization and to prohibit the creating of human embryos for experimentation.

General Comment

The Bill seeks in particular to prohibit experimenting engaged in by corporations throughout Australia and contributions for prohibited experimenting made by corporations. The Bill has no application to the acts of unincorporated bodies (such as partnerships) or natural persons (except in the Territories).

The Committee recognizes that the application of the Bill to corporations alone is the result of limitations on the Commonwealth's constitutional power but it observes that it may give the Bill very uneven application. Thus, for example, doctors who have chosen to form a company would be forbidden from engaging in "prohibited experimenting" whereas doctors working in a partnership or on their own account (outside the Territories) would not be prohibited from engaging in the same conduct.

The Committee draws this aspect of the Bill to the attention of the Senate under principle 1(a)(i) in that the application of the Bill to corporations and not to other persons or bodies may be considered discriminatory

in the absence of complementary State legislation applying to natural persons.

The Committee also draws the attention of the Senate to the following clauses of the Bill:

Clause 5 - Prohibited experimentation

Clause 6 creates offences where persons in the Territories or corporations engage in "prohibited experimenting". Sub-clause 5(1) defines "prohibited experimenting" as any "experimenting" that is undertaken on, or involves the use of, a human embryo created by means of in vitro fertilization before the embryo has been implanted in the womb and as including -

(a) any "manipulation" of such an embryo;
(b) any "procedure" undertaken on or involving the use of such an embryo;
(c) any "dissection" of such an embryo; and
(d) any process by way of testing reactions to a "drug" involving the use of such an embryo,

before the embryo has been so implanted. The terms "experimenting", "manipulation", "procedure", "dissection" and "drug" are not defined.

The Committee is concerned that offences carrying such heavy penalties - up to $20,000 or 4 years imprisonment for a natural person and up to $50,000 for a body corporate - should be created in terms capable of such a variety of interpretations as to give rise to uncertainty as to what conduct is to be prohibited. Thus, for example, embryo freezing may be regarded as an established clinical procedure at some institutions but may be regarded as "experimenting" at others where the technique is still being developed. Moreover, although the Second Reading Speech suggests that the Bill does

not raise the general question of whether or not in vitro fertilization should be prohibited, it has been pointed out to the Committee in private submissions made available to it[1] that the terms used in paragraphs (a), (b), (c) and (d) of the definition of "prohibited experimenting" may be regarded as including a variety of in vitro fertilization techniques. Thus "manipulation" may include pipetting an embryo or loading it into a transfer catheter to replace it in the womb, "procedure" may include the culture of cells or insemination and the components of embryo culture media may be regarded as "drugs". Identical twins occur through natural "dissection" of an embryo and the question arises whether, if such dissection were to occur in the course of an in vitro fertilization procedure, it would constitute "prohibited experimenting" under paragraph 5(1)(c).

Sub-clause 5(2) states that experimenting referred to in sub-clause 5(1) is not prohibited experimenting if it is undertaken "primarily for a benefit consistent with the development of the relevant human embryo's full human potential". In common with the terms used in sub-clause 5(1) the exemption created by this sub-clause is so broadly phrased as to make it difficult for a person to make any reasoned estimate of whether they are complying with the law or not. Not only is "full human potential" a phrase of indeterminate import, but the qualification that experimentation must be "primarily" for a particular purpose, and "consistent with" certain development adds to the confusion.

The Committee draws attention to the clause under principle 1(a)(i) in that the uncertainty as to what constitutes "prohibited experimenting" for the purposes of the offences in clause 6 may be considered to trespass unduly on personal rights and liberties.

Clause 6 - Offences in respect of prohibited experimenting

Sub-clause 6(2) prohibits a corporation or an authority of the Commonwealth from engaging in prohibited experimenting. By virtue of sub-clause 6(3) a corporation or authority is to be taken to engage in prohibited experimenting if it makes a contribution to another person for or towards prohibited experimenting. Sub-clause 6(4) requires a corporation or authority making a contribution to another person for or towards any medical research to obtain that person's agreement in writing that the person will ensure that the contribution is not used in prohibited experimenting and that, if it is, the contribution will be repaid. By virtue of sub-clause 6(6), where an agreement has been entered into under sub-clause 6(4) but the contribution has been used in prohibited experimenting, it is to be a defence to a prosecution of the corporation or authority under sub-clause 6(2) that the corporation or authority has recovered its contribution or has taken reasonable steps to recover the contribution pursuant to the agreement. However the onus will rest on the corporation or authority to establish this defence.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report on 'The Burden of Proof in Criminal Proceedings' (Parliamentary Paper No. 319/1982) that the persuasive onus - the burden of establishing all the elements of an offence beyond reasonable doubt - should remain on the prosecution throughout criminal proceedings and that the burden of establishing to the satisfaction of the court some defence should not be imposed on defendants in such proceedings.

The Committee draws sub-clause 6(6) to the attention of the Senate under principle 1(a)(i) in that such a reversal of the persuasive burden of proof may be considered to trespass unduly on personal rights and liberties.

The need for a defence such as that in sub-clause 6(6) brings to light the draconian way in which it is apparently intended that sub-clauses 6(2) and (3) will operate. If a corporation makes a contribution for general medical research, and obtains the agreement required by sub-clause 6(4), no offence has at that stage been committed. However if the donee of this contribution then breaks the agreement, and uses the money for prohibited experimentation, the only way in which sub-clause 6(6) can have any operation is if, in fact, it is the intention of the Bill that that previously legal contribution be then deemed to be an illegal one under sub-clause 6(2), as extended by sub-clause 6(3), that is, one that is "for or towards prohibited experimenting". In other words the corporation making the contribution is to be punished for the acts of the donee over which it has no control.

The Committee draws attention to this aspect of clause 6 also under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

Clause 12 - Liability of officers or employees

Clause 12 seeks to make liable officers or employees of a corporation or an authority of the Commonwealth knowingly concerned in the commission by that corporation or authority of an offence under clause 6. However while sub-clause 6(6) makes available a defence to the corporation or authority where a contribution made by it pursuant to an agreement under sub-clause

6(4) is misused no such defence is made available to the officers or employees of the corporation or authority concerned.

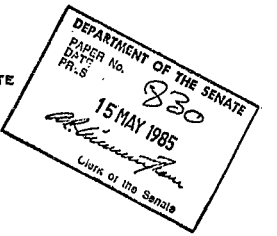
The Committee draws the lack of such a defence to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman

10 May 1985

1 Note: The private submissions referred to in the comment on clause 5 are available to interested Senators from the Secretary to the Committee.

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT
OF 1985

15 MAY 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1985

15 MAY 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines
Senator the Hon. D.B. Scott

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT
OF 1985

The Committee has the honour to present its Sixth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills, which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Ashmore and Cartier Islands Acceptance Amendment Bill 1985

Banks (Shareholdings) Amendment Bill 1985

Customs and Excise Legislation Amendment Bill 1985

Customs Tariff Amendment Bill 1985

Fishing Legislation Amendment Bill 1985

Human Embryo Experimentation Bill 1985

National Occupational Health and Safety Commission Bill 1985

Petroleum (Submerged Lands) (Cash Bidding) Amendment Bill 1985

ASHMORE AND CARTIER ISLANDS ACCEPTANCE AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 17 April 1985 by the Minister for Territories.

The Ashmore and Cartier Islands Acceptance Amendment Bill 1985 will apply in the Territory of Ashmore and Cartier Islands the law in force in the Northern Territory from time to time, thereby providing for the automatic up-dating of the laws in force in the Territory of Ashmore and Cartier Islands. The law currently applying in that Territory is the law in force in the Northern Territory as at 1 July 1978.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 7 - Delegation

Clause 7 inserts a new sub-section 11(3) enabling the Minister to delegate any of his powers under the section (other than the power of delegation) to "a person". The powers so enabled to be delegated would include not only the power under new sub-section 11(2) to direct that a power or function vested in a person or authority (other than a court) by a law in force in the Territory be exercised by a specified person or authority but also any powers similarly vested in a person or authority in respect of which no direction under sub-section 11(2) has been made and which are therefore vested in the Minister by the existing sub-section 11(1) of the Principal Act.

While such powers of delegation are becoming quite standard they impose no limitation, and give no guidance, as to the attributes of the person to whom a delegation may be made. The Committee accordingly draws this clause to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

BANKS (SHAREHOLDINGS) AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 17 April 1985 by the Treasurer.

The purpose of the Banks (Shareholdings) Amendment Bill 1985 is to introduce a number of amendments to the Banks (Shareholdings) Act 1972 (the Act) which will facilitate the establishment of new banks in Australia as well as improve the administration of the Act. The Banks (Shareholdings) Act will continue to serve as an important adjunct to the prudential supervision of banks in Australia. The Banks (Shareholdings) Amendment Bill 1984 was introduced into Parliament in the Budget sittings of 1984, but was not passed. The current Bill incorporates some additional amendments.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 6

Clause 6 makes a number of amendments to section 10 of the Principal Act.

Paragraph 6(d) substitutes a new sub-section 10(4) enabling the Governor-General by notice in the Gazette to permit a specified person to hold more than 15% of the voting shares in a bank if he is satisfied that to do so is in the national interest. New sub-section 10(4) may be regarded as a "Henry VIII" clause as it permits the upper limits on shareholdings fixed by sub-sections 10(1) and (2D) to be varied by executive instrument without any form of Parliamentary scrutiny. The Committee draws the paragraph to the attention of the Senate under principle 1(a)(v) in that it may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny.

Paragraph 6(o) adds new sub-sections 10(10) and (11) enabling the Treasurer to declare that a person's interest in a share by reason of his being deemed, under section 9 of the Principal Act, to be an associate of a person who has an interest in that share shall be disregarded in determining the shareholding of that person and to revoke such a declaration. No review of the Treasurer's decision is provided for and the Committee draws this paragraph to the attention of the Senate under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 23 April 1985 by the Minister Representing the Minister for Industry, Technology and Commerce.

This Bill principally proposes to amend the Customs Act 1901 and the Excise Act 1901, to give effect to various Government decisions relating to subject matter contained in those Acts. In addition, the Bill proposes to effect consequential penalty amendments to the Distillation Act 1901, the Spirits Act 1906, and the Coal Excise Act 1949.

The Committee drew the attention of the Senate to the following clauses of the Bill:

Clause 10 - Non-reviewable discretion

Clause 10 inserts a new section 128B in the Customs Act 1901 allowing the Minister to declare by notice in the Gazette that goods owned by a specified person taken on board a ship or aircraft for use as ship's or aircraft's stores may be dealt with by periodic returns rather than by way of individual entry. Although it is apparent that a valuable right is to be conferred by such a declaration, no indication is given as to how a person may apply to the Minister to make a declaration, no criteria are set out for the Minister's decision and no right of review is provided in respect of a refusal by the Minister to make a declaration.

The Committee drew the clause to the attention of the Senate under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

The Minister has responded indicating that new section 128B is cast in identical terms to the existing section 114A of the Customs Act 1901 and that the question of the provision of review rights in respect of section 114A has been the subject of recent discussions between his Department and the Administrative Review Council. The Minister has indicated that a decision on review rights under section 128B ought to await the recommendations of the Council on section 114A.

The Committee thanks the Minister for this response.

Clause 16 - Unauthorized use of cameras etc.

Clause 16 inserts a new offence section 234AB in the Customs Act 1901 which would prohibit a person (including a disembarking passenger) from operating a camera or using an appliance which records or transmits sound except by authority -

(a) at a place in relation to which a sign is displayed under sub-section 234AA(2), being a place used by officers for questioning passengers disembarking from a ship or aircraft and examining their personal baggage; or

(b) at a place (being a place that is part of a ship, of an aircraft or of a wharf) at a time when the personal baggage of passengers

disembarking from, or embarking on, a ship or aircraft is being examined at or in the vicinity of that place.

A fine of up to $1,000 may be imposed.

The Committee expressed concern that, in relation to paragraph (a), it would not appear necessary that the person prosecuted have seen the sign or even have been aware that the place was one in which unauthorized use of cameras and sound recorders was prohibited. Similarly, in relation to paragraph (b), it would not appear necessary that the person prosecuted have been aware that the personal baggage of passengers was being examined in the vicinity. In any case the Committee considered that paragraph (b) was cast far more broadly than was necessary. Presumably the intention is to catch persons actually photographing or recording officers questioning persons or examining their baggage yet as it stands the paragraph could, for example, catch a disembarking passenger standing on a wharf and filming his or her family descending the gangplank of a ship merely because 'in the vicinity of that place' the personal baggage of passengers was being examined.

The Committee drew the clause to the attention of the Senate under principle 1(a)(i) in that it might be considered to trespass unduly on personal rights and liberties.

The Minister has responded conceding that paragraph (b) is cast more broadly than is necessary or was intended and proposing that, rather than delay the passage of the Bill, the paragraph be omitted by the next Customs and Excise Legislation Bill, expected during the Budget Sittings. The Committee is dissatisfied with this undertaking, both in that the Bill will not be amended when it is before the Senate and in the implication

contained in the Minister's response that, even though the paragraph will thereby become law, he will take steps to ensure that it is not enforced. With regard to paragraph (a) the Minister has responded that:

> While the proposed provision has to establish the prescribed conduct as a punishable offence, its prime purpose is not to enable the prosecution of offenders but rather to provide a basis for officers to draw the attention of offenders to the presence of the signs advising that actions being objected to may amount to a punishable offence and will be dealt with as such unless such actions are discontinued forthwith.

This being the case the Committee observes that there would appear to be no reason why it should not be made an element of the offence that the person prosecuted saw the sign and knowingly contravened the prohibition. An alternative would be to give Customs officers power to direct persons filming or recording the examination of baggage or persons to leave an area where such examination is going on. Failure to comply with such a direction could be made an offence.

The Committee thanks the Minister for his undertaking with regard to paragraph (b) but continues to draw attention to paragraphs (a) and (b) under principle 1(a)(i) in that they may be considered to trespass unduly on personal rights and liberties.

Clause 17 - Vicarious liability

Clause 17 inserts a new section 257 in the Customs Act 1901 making bodies corporate and other persons responsible for conduct engaged in by, and the state of mind of, their servants or agents acting within the scope of their actual or apparent authority. The

Committee recognised that the High Court established in R. v. Australasian Films Ltd (1921) 29 CLR 195 that a principal may be responsible for an act done by his or her servant or agent in the course of his or her employment and for the state of mind of the agent or servant in doing that act if that can be said to be the intention of the legislature having regard to the ordinary principles of statutory interpretation. However the Committee expressed concern that new section 257 might be broader in its scope than the existing law and it raised for the consideration of the Senate whether it was just that a natural person in particular should be made criminally liable for the acts of servants or agents of which that person had no knowledge and for which that person had given no express authorisation.

The Committee drew the clause to the attention of the Senate under principle 1(a)(i) in that it might be considered to trespass unduly on personal rights and liberties.

The Minister has provided a lengthy response on this clause noting that customs prosecutions are not regarded in law as criminal proceedings, that the proposed section 257 is based upon section 84 of the Trade Practices Act 1974 as proposed to be amended according to a 1984 Green Paper, "The Trade Practices Act, Proposals for Change", and that it seems clear on the basis of submissions received in response to that Green Paper that the proposed amendments to section 84 are not contentious even though the section is applicable to both criminal and civil proceedings. The Minister's response is reproduced for the information of the Senate as an Appendix to this Report.

The Committee thanks the Minister for his response but continues to draw attention to the clause under principle 1(a)(i) in that, by extending the existing law to cover the acts of servants or agents within the scope of their apparent, as well as their actual, authority, and by imposing on non-corporate bodies the responsibility previously imposed only on corporate bodies, it may be considered to trespass unduly on personal rights and liberties.

Clause 23 - Revocation of concession orders

Clause 23 inserts a new sub-section 269P(2B) permitting the Minister to revoke a tariff concession order where the Minister becomes satisfied that, because of a mistake, an amendment of the Customs Tariff Act 1982 or otherwise, the description of the goods in the concession order was not a description of the goods in respect of which it was intended to make the order. By virtue of new sub-section 269P(3A) the revocation may be retrospective to the date on which the concession order came into effect. New sub-section 269P(11) provides that, having revoked a concession order, the Minister must make a new order declaring that the goods in respect of which it was intended to make the original concession order are the subject of a tariff concession.

It had been suggested to the Committee in a private submission that if, for example, a concession order were to be made in respect of 'brooms' and if the Minister were to become satisfied at some later date that it had been intended to make the order only in respect of 'millet brooms' and not other types of brooms (e.g. steel wire brooms), the new sub-sections would enable the Minister to revoke the concession order ab initio and to substitute a new order declaring that the tariff concession applied only to 'millet brooms' notwithstanding that this might have a significant

adverse effect on persons who had imported other types of brooms in the belief that the tariff concession applied to them. The Committee drew attention to the clause under principle 1(a)(i) in that it might be considered to trespass unduly on personal rights and liberties.

The Minister has responded drawing attention to amendments moved in the House of Representatives on 10 May 1985 intended to overcome the problems with this clause. The amendments answer the Committee's concerns with the provision and the Committee thanks the Minister for his response.

Clause 36 - Non-reviewable discretion

Clause 36 inserts a new section 58C in the Excise Act 1901 similar in effect to the new section 128B inserted in the Customs Act 1901 by clause 10. The comment on that clause also applies to this clause.

Clause 43 - Vicarious liability

Clause 43 inserts a new section 145A in the Excise Act 1901 in the same terms as the new section 257 inserted in the Customs Act 1901 by clause 17. The comment on that clause applies equally to this clause.

CUSTOMS TARIFF AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 27 March 1985 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Customs Tariff Amendment Bill 1985 proposes amendments to the Customs Tariff Act 1982. The Bill contains 4 schedules and is necessary to enact tariff changes which have been introduced into the Parliament in the 1985 Autumn sittings by Customs Tariff Proposals Nos. 1-4 (1985).

The Committee drew the attention of the Senate to the following clause of the Bill:

Clause 2 - Retrospectivity

Clause 2 provides for the amendments which would be made by the Bill to have effect from the dates on which they were originally notified, viz. 11 October 1984, 26 October 1984 and 1 January 1985 as appropriate. Customs tariff changes are initiated by Customs Tariff Proposals submitted to Parliament. When the Parliament is not sitting the Customs Act 1901 permits the Minister to notify in the Gazette his intention to propose in the Parliament a Customs Tariff or a Customs Tariff alteration. Customs Tariff Proposals Nos. 1 to 4 (1985) to which the Customs Tariff Amendment Bill 1985 will give legislative force were notified accordingly. By long established convention the new tariffs are charged from the date on which they are notified and, as in this case, the subsequent changes to the Customs Tariff Act are made retrospective to that date.

Although the Committee recognised that clause 2 of the Customs Tariff Amendment Bill 1985 was in accordance with established convention the Committee noted in Alert Digest No. 3 that it believed that in conformity with its usual practice such retrospectivity should be drawn

to the attention of the Senate under principle 1(a)(i) in that it might be considered to trespass unduly on personal rights and liberties.

The Minister for Industry, Technology and Commerce has provided a response to the Committee's comments suggesting that the existing procedures in regard to changes to the Customs Tariff represent a reasonable approach to the problem of effectively handling a large number of amendments which need to be introduced throughout the entire year. Part of his response is reproduced for the information of Senators:

> The Customs Act has contained the Gazette Notice provision since 1960. The provision recognises that Governments do have the need to introduce alterations to the Customs Tariff when Parliament is not sitting. One example contained in the Customs Tariff Amendment Bill 1985 illustrates this need. On 29 May last year I announced the Government's post-1984 assistance package for the Passenger Motor Vehicle Industry. Included in that assistance package was the fact that tender quota arrangements would be available for vehicles imported on and from 1 January 1985. Details of the actual tender quota rates to apply from 1 January 1985 were not available until November 1984, by which time the Parliament had been dissolved. The only way that the Government's commitment in regard to tender quotas could be put in place was by the use of the Gazette Notice provisions set out in Section 273EA. This was done by Notice of Intention to Propose Customs Tariff Alteration No. 12 (1984), published on 27 December 1984. This Notice was introduced as Customs Tariff Proposals No. 4 (1985) within 7 sitting days of the House of Representatives and now appears as part of

Schedule 4 to the Customs Tariff Amendment Bill 1985, operative, in accordance with Clause 2 of the Bill, on and from 1 January 1985.

The system of introducing changes to the Customs Tariff by Customs Tariff Proposals into the House of Representatives has a much longer history than even the Gazette Notice provision. In a situation where a Government may need to introduce a large number of separate amendments to the Customs Tariff Act in a year it is not practical from the viewpoint of available Parliamentary time for individual Bills to amend the Customs Tariff Act to be introduced each time such amendments are required. It is also necessary to be able to introduce tariff amendments with virtually immediate effect to prevent undue speculation.

The Committee thanks the Minister for his response which answers the concerns of the Committee with regard to the clause.

FISHING LEGISLATION AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 17 April 1985 by the Minister for Primary Industry.

The principal purpose of the Bill is to provide clear and legally-based powers for the development and implementation of management plans in accordance with the stated objectives of the Fisheries Act 1952 of

ensuring that the living resources of the Australian fishing zone are not endangered by over-exploitation and that there is optimum utilisation of those resources.

The Committee draws the attention of the Senate to the following clause of this Bill:

Clause 10 - Suspension of licences

Clause 10 inserts new sub-sections 10(1), (2) and (3) in the Fisheries Act 1952 empowering the Minister or the Secretary to suspend a fishing licence if the Minister or Secretary has reasonable grounds to believe that -

(a) there has been a contravention of a condition of the licence;

(b) the holder has done an act prohibited by a Ministerial notice under section 8; or

(c) the holder knowingly made a false or misleading statement in an application under the Act, the regulations or a plan of management.

A suspension remains in force for one month or, if proceedings for an offence against the Act in relation to the alleged act or omission by reason of which the licence was suspended are sooner instituted, until the completion of those proceedings.

No right of review is accorded in relation to the suspension of a licence although it is apparent that a licence may be the holder's livelihood and that a suspension may last for some months. The Committee draws the clause to the attention of the Senate under

principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

HUMAN EMBRYO EXPERIMENTATION BILL 1985

The Committee commented on this Bill in its Fifth Report of 1985 (10 May 1985). Senator Harradine has since provided 'preliminary comments' on the matters raised in that Report and as is its usual practice the Committee reproduces the relevant parts of those comments for the information of the Senate.

General Comment

The Committee raised as a general issue the application of the Bill to corporations but not to natural persons or unincorporated bodies and suggested that this might give the Bill very uneven application in that, for example, it would prohibit experimentation by doctors who have chosen to form a company but not by doctors working in a partnership. The Senator has responded:

> If the Commonwealth is to exercise its Constitutional powers, then it will always involve discrimination of the kind referred to here.

The Committee acknowledged in its original comment that the application of the Bill to corporations alone was the result of limitations on Commonwealth constitutional power. Nevertheless it believes that the constitutionally necessary discriminatory application of the Bill is a relevant consideration to be drawn to the

attention of the Senate in its deliberations on whether the Commonwealth's constitutional power should be exercised in this way.

Senator Harradine has also suggested that the Committee's comment does not fall under principle 1(a)(i) of its terms of reference - that clauses of Bills trespass unduly on personal rights and liberties - since the provision discriminates against corporate bodies and not natural persons. In the view of the Committee principle 1(a)(i) does not distinguish between corporate persons and natural persons. The Committee, for example, draws attention to provisions which reverse the onus of proof in the prosecution of corporate bodies as well as natural persons and provisions which retrospectively impose taxes on corporations as well as natural persons under this principle (see the comments on clause 52 of the National Occupational Health and Safety Commission Bill 1985 and clause 23 of the Customs and Excise Legislation Amendment Bill 1985 in Alert Digest No. 4 of 1985, issued on 8 May 1985).

The Committee therefore continues to draw the attention of the Senate to this aspect of the Bill under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

Clause 5 - Prohibited experimentation

The Committee drew attention to the fact that the terms used in the definition of "prohibited experimenting" - "experimenting", "manipulation", "procedure", "dissection" and "drug" - were undefined. It expressed concern that offences carrying such heavy penalties should be created in terms capable of such a variety of interpretations as to give rise to uncertainty as to what conduct is to be prohibited. It instanced that embryo freezing might be regarded as an established

clinical procedure at some institutions but as "experimenting" at others where the technique is still being developed. Senator Harradine has responded:

> "Experimenting" has a very clear meaning. It covers action taken for the trial of a hypothesis, on the chance of succeeding or to demonstrate a known fact. ... If embryo freezing is carried out in a non-experimental way it is not experimental, wherever it is carried out. It is an objective test, not one dependent on the view of the institution concerned.

The Committee also drew attention to the potentially uncertain application of sub-clause 5(2) which states that experimenting referred to in sub-clause 5(1) is not "prohibited experimenting" if it is undertaken "primarily for a benefit consistent with the development of the relevant embryo's full human potential". Senator Harradine has responded:

> Clearly, anything that is conducive to the embryo's normal development is covered. The question simply is: 'is what I am doing a step towards the normal development of the embryo?'

The Committee thanks the Senator for this response. The Committee believes, however, that the determination of what conduct is to constitute "prohibited experimenting" may still be attended by some uncertainty. The Committee acknowledges that if sub-clause 5(2) is satisfied, then experimental procedures may be undertaken. As the clause is framed "experimenting" which would otherwise be "prohibited" under sub-clause 5(1) is to be permitted pursuant to sub-clause 5(2) if it is undertaken "primarily for a benefit consistent with the development of the relevant embryo's full human potential". The Committee considers that what is

consistent with the development of an embryo's "full human potential" is by no means clear. The Committee questions, for example, whether allowing a genetically defective embryo to grow to full term would be consistent with the development of that embryo's "full human potential".

The uncertainty of the exception in sub-clause 5(2) has the result that the problems to which the Committee drew attention in relation to the definition of "experimenting" and other terms in sub-clause 5(1) assume importance as well. If procedures undertaken do not come within the exception in sub-clause (2) it will be necessary to establish that they did not constitute "experimenting" under sub-clause (1). It has been pointed out to the Committee that many common in vitro fertilization procedures are still regarded by the medical profession as "experimental". It is apparent that the borderline between what is "experimenting" and what is permitted will be difficult to draw, even relying on expert evidence. The Committee concedes that, as suggested by Senator Harradine, the test is an objective one but considers that it may give rise to uncertainty in its practical application.

Senator Harradine has also suggested that the uncertain application of a penal provision is not a matter falling within principle 1(a)(i) of the Committee's terms of reference. The Committee believes that it is a fundamental principle that penal provisions in statutes should be certain in their application. It cannot imagine a clearer example of a trespass on personal rights and liberties than the creation of an offence the content of which is not certain. The Committee therefore continues to draw attention to the clause under principle 1(a)(i).

Clause 6 - Offences in respect of prohibited experimenting

The Committee drew attention to the fact that sub-clause 6(6) imposed a persuasive onus of proof on the defendant - that is, the burden of satisfying the court on the balance on probabilities that the defence in that sub-clause applies to the defendant. Senator Harradine has responded:

> Clause 6(6) makes it a defence for the corporation to prove that a relevant agreement was entered into and that it has enforced the agreement. This evidence is wholly in the possession of the corporation. It is by way of exception to the offence provision and it has always been a rule of evidence that proof of an exception lies on the party claiming the benefit of the exception.

The Committee does not deny this rule, which dictates which party bears the onus of proving certain matters in criminal proceedings. The Senator's response does not, however, meet the issue of principle raised by the Committee which is whether the defendant should bear the persuasive onus. The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report on 'The Burden of Proof in Criminal Proceedings' (Parliamentary Paper No. 319/1982) that statutes should not impose on the defendant the burden of establishing statutory defences such as that in sub-clause 6(6). To do so was a reversal of the general rule that the prosecution bears the burden of proving the accused's guilt beyond reasonable doubt. Where, as here, the defendant may be presumed to have peculiar knowledge of the facts in issue it recommended that the defendant should bear the burden of adducing evidence sufficient to raise the issue - the evidential onus - leaving the prosecution then to negative the defence.

The Committee continues to draw sub-clause 6(6) to the attention of the Senate under principle 1(a)(i) in that the reversal of the persuasive onus of proof may be considered to trespass unduly on personal rights and liberties.

The Committee also drew attention to the fact that sub-clause 6(2) appeared to impose liability on a corporation which made a contribution to medical research which was subsequently misused for "prohibited experimenting". Senator Harradine has responded:

> The Report does not accurately set out the effect of clause 6. Sub-clause 6(2) makes it an offence to make a contribution towards prohibited experimenting. But the Bill recognises that it might be difficult for corporations to ascertain in sufficient detail whether the research they are contributing to includes prohibited experimenting. A corporation can protect itself against committing an unintended offence by obtaining an agreement from the donee not to use the contribution towards prohibited experimenting. It is not correct to say the donor is being punished for acts of the donor [sic] over which it has no control. It has three choices - just make a donation and accept the risk; make enquiries and satisfy itself that no prohibited experimenting will be involved or obtain an agreement.

With respect, the Committee believes that the Senator misstates the effect of clause 6. In the first place the corporation does not have 'three choices': if it makes a contribution towards medical research it must enter into an agreement on pain of a penalty of $50,000. In the second place, entry into an agreement that the contribution will not be used in "prohibited experimenting" is not a defence to prosecution for

having made a contribution which has in fact been used for "prohibited experimenting". The only defence is that in sub-clause 6(6) which requires that the corporation take reasonable steps to recover the misused contribution. It is apparent that unless the corporation takes steps to recover the contribution and so avail itself of the defence in sub-clause 6(6) it may be guilty of an offence under sub-clause 6(2) because its contribution has been misused, even though it may have no knowledge of that misuse which results from acts of the donee beyond its control.

The Committee continues to draw attention to this aspect of clause 6 also under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

Clause 12 - Liability of officers or employees

The Committee drew attention to the fact that clause 12, in making officers or employees of a corporation or an authority liable for offences against clause 6 committed by a corporation in which they are knowingly concerned, did not make available a defence in terms of sub-clause 6(6), dealt with above. Senator Harradine has responded:

> Clause 12 only makes it an offence where officers are parties to offences by the corporation. If the defence in 6(6) applies to the corporation, there is no offence to which the officer can be party to.

The Committee thanks the Minister for this response. However it remains the Committee's view that an officer or employee prosecuted under clause 12 would not be able to avail him or herself of the defence which a corporation is provided with by sub-clause 6(6). In a prosecution under clause 12 it will be necessary merely

to prove that the corporation contravened sub-section 6(2) - for example - and that the officer involved was knowingly concerned in or a party to that contravention. As sub-clause 6(6) only provides a defence to a prosecution of a corporation under sub-clause 6(2) it will not be available to the officer prosecuted under clause 12. The corporation will not be a party to the proceedings and it does not appear to be precondition to a prosecution under clause 12 that the corporation must first have been prosecuted successfully under sub-section 6(2).

The Committee therefore continues to draw attention to clause 12 under principle 1(a)(i) in that the lack of the defence made available to corporations by sub-clause 6(6) may be considered to trespass unduly on personal rights and liberties.

NATIONAL OCCUPATIONAL HEALTH AND SAFETY COMMISSION BILL 1985

This Bill was introduced into the House of Representatives on 23 April 1985 by the Minister for Employment and Industrial Relations.

The purpose of this Bill is to establish a statutory corporation, the National Occupational Health and Safety Commission, with the objects of developing community awareness of occupational health and safety issues; providing a forum for Commonwealth, State and Territory Governments, and peak councils of employees and employers to consult together and to participate in the

development of occupational health and safety policies and strategies; and providing a national focus for occupational health and safety activities.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 52 - Reversal of onus of proof

Sub-clause 52(2) makes it an offence for an employer to dismiss, or to threaten to dismiss, an employee from his or her employment, or to prejudice, or to threaten to prejudice, an employee in his or her employment, because the employee has given evidence, or proposes to give evidence, at an inquiry. By virtue of sub-clause 52(4) an employer charged with this offence is to bear the burden of proving that the employee in question was not dismissed, prejudiced or threatened because he or she gave evidence or proposed to give evidence if it is established that the employee was dismissed, prejudiced or threatened with dismissal or prejudice and that before that occurred he or she gave evidence or proposed to give evidence at an inquiry.

The Committee has commented in the past on similar provisions (see comments on clause 51 of the Biological Control Bill 1984 in its Seventh Report of 1984 and on clause 63 of the Radiocommunications Bill 1983 in its Eleventh Report of 1983) and has accepted the argument that the reversal of the onus of proof is necessary for the proper protection of witnesses since it is very difficult to prove that a person has been dismissed for a particular reason. However the Committee notes the recommendation of the Senate Standing Committee on Constitutional and Legal Affairs in its Report on 'The Burden of Proof in Criminal Proceedings' (PP319/1982) that all persuasive burdens on defendants should be

reduced to evidential ones and poses the question whether the protection accorded to witnesses would be significantly diminished if the burden placed on the employer in sub-clause 52(4) were an evidential one only, rather than a persuasive one, that is, if the employer bore the burden of adducing evidence that the employee was not dismissed, prejudiced or threatened because he or she gave evidence or proposed to do so rather than being required to establish that fact on the balance of probabilities in order to exculpate himself or herself.

The Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that the reversal of the persuasive onus of proof may be considered to trespass unduly on personal rights and liberties.

Clause 63 - Objection to dissemination of information

Pursuant to clause 62 the Commission is to be empowered to require persons to furnish information and produce documents to the Commission. Sub-clause 63(1) requires the Commission, if it proposes to disseminate or publish any information so furnished or contained in a document so produced, to notify -

- the person who furnished the information or produced the document;

- if the information is of a personal, domestic or business nature, any person who could reasonably be expected to be identified by the dissemination or publication of the information;

- if the information contains a trade secret, any person who could reasonably be expected to be adversely affected by the disclosure of that trade secret; and

- any person who could reasonably be expected to be adversely affected by the dissemination or publication of information in respect of the lawful business, commercial or financial affairs of the person,

and to invite the person to object to the dissemination or publication of the information. However the only ground of objection permitted is that to disseminate or publish the information would be contrary to the public interest. One may imagine that a person who has provided information may strenuously object, for purely private and personal reasons, to his identity or views being disclosed even though it would be difficult to say that such disclosure would be contrary to the public interest. Equally the dissemination of trade secrets may not be contrary to the public interest but may have a very serious effect on the holder of those particular secrets. In the absence of some special definition of the public interest it is suggested that the right to object to publication or dissemination of information provided by clause 53 is somewhat illusory.

The Committee draws attention to the clause under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

Clause 64 - Delegation

Clause 64 permits the Commission to delegate all or any of its powers under the Act or any other law (other than the power of delegation) to 'a person' or to the Executive.

The Committee is concerned that this provision imposes no limitation, and gives no guidance, as to the attributes of the person to whom a delegation may be made and accordingly draws the clause to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

PETROLEUM (SUBMERGED LANDS) (CASH BIDDING) AMENDMENT BILL 1985

The Committee commented on this Bill in its Fourth Report of 1985 (8 May 1985). The Minister for Resources and Energy has now provided a response to the Committee's comments and the relevant parts of that response are reproduced here for the information of the Senate.

Clause 5 - Proposed section 22B

Proposed sub-sections 22B(1) and (2) would give the Joint Authority (comprising the Commonwealth Minister and the relevant State Minister) a discretion to reject *applications for permits to explore for petroleum. No* mechanism for review of the exercise of this discretion is provided for. The Committee drew the attention of the Senate to the fact that, as the criteria for

rejecting an application were not specified, the scope for review under the Administrative Decisions (Judicial Review) Act 1977 was limited.

The Committee drew attention to the proposed provisions under principle 1(a)(iii) in that such an unfettered discretion might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions. The Minister responded:

> While the criteria for rejecting an application are *not specified in the legislation*, I draw your attention to sub-section 22A(3) of the Bill. This sub-section places an obligation on the Joint Authority to publish in the Gazette, at the time applications are invited, certain information including the matters that the Joint Authority will take into account in determining whether to reject an application. Should the Joint Authority reject an application under sub-section 22B(1) or (2) on grounds other than those that were published in the Gazette, then that decision is open to challenge, and any decision to award the permit to another applicant would also be liable to be set aside if challenged.

The Committee thanks the Minister for his response. While sub-section 22A(3) would require the Joint Authority to publish in the Gazette an instrument specifying, inter alia, the matters the Joint Authority will take into account in determining whether to reject an application, sub-sections 22B(1) and (2) do not require the Joint Authority to make its decision on the basis of those matters specified and only those matters. Rather, the Joint Authority is given an unfettered discretion. The Committee is of the view that, if the Joint Authority were to reject an application under sub-section 22B(1) or (2) having taken into account

matters other than those specified in the Gazette under sub-section 22A(3), the decision of the Authority would not for that reason alone be open to challenge under the Administrative Decisions (Judicial Review) Act 1977.

Accordingly, the Committee continues to draw the attention of the Senate to the proposed sub-sections under principle 1(a)(iii) in that they may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Michael Tate
Chairman

15 May 1985

EXTRACT OF RESPONSE FROM
MINISTER FOR INDUSTRY, TECHNOLOGY
& COMMERCE

APPENDIX

The proposed new section 257, if enacted, will be inserted into Part XIV of the Customs Act 1901, which relates to and makes provision for the prosecution of offences under the Act and the recovery of the penalties prescribed for such offences. Pursuant to section 244 of the Customs Act 1901, such prosecutions are defined as 'Customs Prosecutions'.

It is clear by the terms of the provisions of section 247 of the Customs Act 1901, which stipulates that Customs Prosecutions are to be commenced, prosecuted and proceeded with in accordance with any rules of practice, if any, established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases or in accordance with the directions of the Court or Judge, that Customs Prosecutions are not criminal proceedings.

In the recent case of Button v Evans [1984] 2 NSWLR 333, at p 352, Carruthers J. of the Common Law Division of the Supreme Court of New South Wales made the following statements

> "...it could be seen from the series of the cases to which I have referred earlier that it has been authoritatively established that proceedings under s.245 [of the Customs Act 1901] are not criminal in nature. They have been clearly categorized by high authority as civil proceedings" (brackets added)

The cases to which Carruthers J. referred and relied upon were Jackson v Butterworth [1946] VLR 330 and McGovern v Hillman Tobacco Pty Ltd (1949) 4 AITR 272 where it was held that prosecutions under section 237 of the Income Tax Assessment Act 1936, which provides identically to section 245 of the Customs Act 1901, are not in the nature of criminal proceedings.

It is noted that when Customs Prosecutions are instituted in courts of summary jurisdiction they are proceeded in the manner appropriate for criminal proceedings. This apparently had long been the established practice: Button v Evans (supra), at p. 352. It does not follow, of course, that this renders Customs Prosecutions as being criminal prosecutions.

Accordingly, it is considered that the proposed section 257, if enacted, will not make a person criminally liable for the acts of a servant or agent where such acts do constitute an offence under the Customs Act 1901 and a Customs Prosecution is instituted under Part XIV of the Customs Act 1901 for the pecuniary penalty prescribed in relation to that offence.

I would also draw attention to the fact that the proposed section 257 is based upon section 84 of the Trade Practices Act 1974 as proposed to be amended according to a Green Paper titled "The Trade Practices Act, Proposals for Change", which was released for public comment in February 1984 by the then Attorney-General, Senator the Hon. Gareth Evans Q.C., the then Minister for Home Affairs and Environment, the Hon. Barry Cohen M.P. and the Minister for Employment and Industrial Relations, the Hon. Ralph Willis M.P.

Sub-section 84(1) of the Trade Practices Act 1974, which has existed in that Act since that Act's enactment, is an evidentiary provision which imputes to a corporation the intention of its servants and agents in circumstances where, either in civil proceedings or in criminal proceedings under Part V, it is necessary to establish the corporation's intention. Section 84(2) of the Trade Practices Act 1974 deems any conduct engaged in on behalf of a body corporate by a director, servant or agent or by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent to be engaged in by the body corporate. These provisions, which extend the common law on the responsibility of corporations for the acts of their directors, servants or agents, is generally regarded as playing an important role in setting minimum standards of corporate responsibility in the trade practices field for the acts of directors, servants and agents.

The proposed amendment to section 84 of the Trade Practices Act 1974, as set out in the Green Paper, is to repeal the existing section and substitute a new section.

In this regard the proposed new sub-section 84(1) is proposed to provide that where it is necessary to establish the state of mind of a body corporate in relation to conduct engaged in by the body corporate, the state of mind of a director, servant or agent acting within the scope of his actual or apparent authority will be sufficient, while the proposed new sub-section 84(2) would deem the conduct engaged in on behalf of a body corporate by a director, servant or agent acting within the scope of his actual or apparent authority or by any other person at the director, or with the consent or agreement of a director, servant or agent given within the scope of actual or apparent authority to be also conduct engaged in by the body corporate.

These amendments are perceived as being necessary in order to overcome the limitations of the existing provision as identified in Barton v Westpac Banking Corporation (1983) ATPR 40-388 and in Universal Telecasters v Guthrie (1978) ATPR 40-062. Also, the introduction of the concept of "apparent authority" is to overcome the constitutional doubts remaining in relation to the words "on behalf of" in the existing section 84 in consequence of Mason J.'s judgement in Fencott v Muller (1983) 57 ALJR 317.

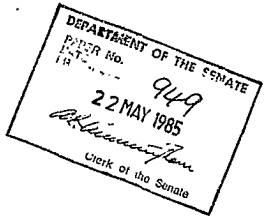
The amendments proposed in the Green Paper to the existing section 84 also include the insertion of two new sub-sections, sub-sections (3) and (4), which will provide similarly to sub-sections (1) and (2) except in relation to non-corporate bodies. This amendment has been proposed on the basis that it is inequitable for bodies corporate to have a greater standard of responsibility for the acts of their servants or agents than non-corporate bodies.

In response to the amendments proposed to the Trade Practices Act 1974, the Government has received in the vicinity of 100 submissions from both public and private bodies throughout Australia and in less than 10% of these submissions has there been any, let alone substantive, adverse comments on the amendments proposed to be made to section 84. It would appear clear that the general view on the basis of the submissions received is that these proposed amendments to section 84 are not contentious even though it is to be applicable to both criminal and civil proceedings.

It is also to be noted that a small number of submissions expressed the view that the proposed amendments to section 84 were too narrow.

For reasons similar to those which gave rise to the enactment of section 84 of the Trade Practices Act 1974, namely, that the common law principles relied upon by the High Court in R v Australian Films Ltd (1921) 29 CLR 155 are deficient in that they enable a body corporate to avoid the consequences of a breach of the law by utilising the corporate veil (Tesco Supermarkets Ltd v Nattrass [1971] 2 All ER 127 and Universal Telecasters v Guthrie (supra)), it is considered appropriate that provisions similar to section 84 of the Trade Practices Act 1974 should be inserted into the Customs Act 1901. It is also considered unrealistic to expect that a person will in every instance give express authorisation for every act that a servant or agent is to perform for that person in relation to, for example, Customs matters: Universal Telecasters v Guthrie (supra).

Moreover, it is worthy to note that under the proposed new section 257 it will still be incumbent upon the prosecution in a Customs Prosecution to prove that the director, servant or agent, as the case may be, was acting within the scope of his actual or apparent authority in order to take advantage of the proposed provision. There has been no placing of the onus of proof upon directors, servants or agents similar to that that has occurred in analogous statutory provisions in both domestics and overseas legislation: see, for example, section 8Y of the Taxation Administration Act 1953 and sub-section 17(4) of the Business Practices Act, 1974 (Canada).



AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT
OF 1985

22 MAY 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF 1985

22 MAY 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines
Senator the Hon. D.B. Scott

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT
OF 1985

The Committee has the honour to present its Seventh Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bill, which contain provisions that the Committee considers may fall within principles 1(a) (i) to (v) of the Resolution of the Senate of 22 February 1985:

Australian Land Transport (Financial Assistance) Bill 1985

Australian Sports Commission Bill 1985

Dairy Industry Stabilization Levy Amendment Bill 1985

Dairy Legislation Amendment Bill 1985

Director of Public Prosecutions Amendment Bill 1985

Petroleum (Submerged Lands) Amendment Bill 1985

Sales Tax Laws Amendment Bill 1985

Snowy Mountains Engineering Corporation Amendment Bill 1985

States Grants (Tertiary Education Assistance) Amendment Bill 1985

Superannuation Legislation Amendment Bill 1985

Taxation Laws Amendment Bill 1985

Telecommunications (Interception) Amendment Bill (No.2) 1985

AUSTRALIAN LAND TRANSPORT (FINANCIAL ASSISTANCE) BILL 1985

This Bill was introduced into the House of Representatives on 8 May 1985 by the Minister for Transport.

This Bill provides for the establishment of an Australian Land Transport Fund into which is to be paid a specified share of customs and excise duty on motor spirit and diesel fuel for the purpose of funding a program of financial assistance for land transport over the five year period 1985/86 to 1989/90.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clauses 19,20,21 and 22 Henry VIII clauses

Clauses 19, 20, 21 and 22 permit the Minister to direct that percentages set out in sub-sections 17(1) or (2) or 18(1) or (2) or Schedules 1, 2 or 3 be varied so as to allocate the undistributed balance of the proposed Australian Land Transport Trust Fund after 30 June 1987 and to transfer funds from one category to another (eg. from urban arterial roads to national roads or vice versa).

The nature of the percentages set out in the Schedule is such that ease of variation may be desirable and the Committee recognises that the Minister's power is subject to strict limitations. Nevertheless as the clauses permit the variation of the terms of the Act by executive instrument they may be characterised as "Henry VIII" clauses and as such the Committee draws the

clauses to the attention of the Senate under principle 1(a)(iv) in that they may be considered to be an inappropriate delegation of legislative power.

AUSTRALIAN SPORTS COMMISSION BILL 1985

This Bill was introduced into the House of Representatives on 9 May 1985 by the Minister for Sport, Recreation and Tourism.

This Bill is for an Act to establish the Australian Sports Commission as a Commonwealth statutory authority. The Bill sets out the objectives, functions and powers of the Commission. It also covers a wide range of issues relating to its management and operation. The Bill defines the relationship between the Commission and the Government within which the Commission will undertake its tasks. It also authorises the establishment of an Australian Sports Aid Foundation.

The Committee drew the attention of the Senate to the following clauses of the Bill:

Clause 11 - Delegation

Clause 11 permits the proposed Australian Sports Commission to delegate any of its powers under the Act (other than the power of delegation) to "a person" or to "a committee".

The Committee expressed concern that the clause imposed no limitation as to the persons or committees to whom or to which powers might be delegated. The Committee

indicated its belief that, if the power of delegation to committees, for example, were intended to be restricted to committees of members of the Commission constituted under clause 19 of the Bill then this should be stipulated. The Committee drew the clause to the attention of the Senate under principle 1(a)(ii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

The Minister for Sport, Recreation and Tourism responded to the Committee indicating his intention to move an amendment to the clause in the House of Representatives. The clause was indeed amended there to stipulate that the delegation to a committee should be to a committee "established under sub-section 19(1)" and the Committee thanks the Minister for this amendment. However the clause still permits the Australian Sports Commission to delegate any of its powers to "a person" without any restriction and the Committee therefore continues to draw attention to the clause under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Clause 34 - Henry VIII clause

Clause 34 provided that the Commission should not, except with the written approval of the Minister, enter into a contract involving payment or receipt by the Commission of more than $500,000 "or, if a higher amount is prescribed, that higher amount". Because the clause permitted the variation of the amount specified by regulations it could be characterised as a "Henry VIII" clause and as such the Committee drew it to the attention of the Senate under principle 1(a)(iv) in that it might be considered an inappropriate delegation of legislative power.

On the motion of the Minister for Sport, Recreation and Tourism the clause was amended in the House of Representatives to omit the words "or, if a higher amount is prescribed, that higher amount". The Committee thanks the Minister for this amendment.

Clauses 36 and 37 - Henry VIII clauses

Clauses 36 and 37 provide that the income, property and transactions of the proposed Australian Sports Commission and Sports Aid Foundation are not to be subject to Commonwealth, State or Territory taxes. Sub-clauses 36(3) and 37(3), however, provide that the regulations may subject the Commission or Foundation to taxation under a specified law. The sub-clauses may be regarded as "Henry VIII" clauses in that they permit the effect of clauses 36 and 37 to be varied by regulations. The Committee drew attention to a similar provision in the Snowy Mountains Engineering Corporation Bill 1985 in its Alert Digest No. 3 of 1985.

The Committee drew sub-clauses 36(3) and 37(3) to the attention of the Senate under principle 1(a)(iv) in that they might be considered an inappropriate delegation of legislative power.

The Minister for Sport, Recreation and Tourism has responded suggesting that sub-clauses 36(3) and 37(3) 'make provision for future possibilities where it may not be appropriate for these bodies to be totally exempt from taxation. As a matter of prudence in taxation policy this appears to me to be desirable.'

The Committee accepts that, while the sub-clauses are technically "Henry VIII" clauses, they may represent the most appropriate way to subject the Commission and Foundation to taxation under specified Commonwealth, State or Territory laws. In continuing to draw the

sub-clauses to the attention of the Senate, together with the Minister's helpful response, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

Clause 40 -- *Delegation*

Clause 40 permitted the Minister to delegate to "a person" certain of his powers under the Act including, for example, the power to give directions to the Commission with respect to the policies and practices to be followed by it and the power to approve the entry by the Commission into contracts involving payment of more than $500,000. The Committee questioned whether these powers would not more appropriately be exercisable only by the Minister and suggested that, if they were to be delegated, some qualification should be imposed on the persons to whom they might be delegated.

The Committee drew the clause to the attention of the Senate under principle 1(a)(ii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

The Minister for Sport, Recreation and Tourism responded to the Committee indicating his intention to move an amendment to the clause in the House of Representatives. The clause was amended there so as to reserve to the Minister exclusively the power to give directions to the Commission with respect to the policies and practices to be followed by it and the power to approve the entry by the Commission into contracts involving payment of more than $500,000.

However, it will still be possible for the Minister to delegate to "a person" the power, for example, to approve strategic plans formulated by the Commission. The Committee has drawn attention to a number of powers

of delegation in various Bills which impose no limitation, and give no guidance, as to the attributes of the person to whom a delegation may be made (see for example comments in its Sixth Report of 1985 (15 May 1985) on clause 7 of the Ashmore and Cartier Islands Acceptance Amendment Bill 1985 and clause 40 of the National Occupational Health and Safety Commission Bill 1985). The Committee continues to draw attention to clause 40 under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

DAIRY INDUSTRY STABILIZATION LEVY AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 9 May 1985 by the Minister for Primary Industry.

This Bill amends the Dairy Industry Stabilization Levy Act 1977 and is an integral element in the overall package of marketing arrangements. The Bill imposes a levy on certain dairy products produced at a factory, with butter, butteroil and cheddar cheeses likely to be the only products to, in practice, attract a significant levy. The rate of the levy will be determined by regulation in the first year and for subsequent years by a formula which is detailed in the legislation.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 7 - Rate of levy

Clause 7 substitutes a new section 7 in the Principal Act providing that the base rate of levy imposed on dairy products is to be fixed by regulations. The Committee considers that provisions fixing rates of taxes, levies or similar imposts are not appropriate for inclusion in delegated legislation. It has drawn attention to similar provisions previously (see for example its comments on the Radiocommunications (Frequency Reservation Certificate Tax) Bill 1983 in its Eleventh Report of 1983).

The Committee draws the clause to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

DAIRY LEGISLATION AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 9 May 1985 by the Minister for Primary Industry.

This Bill contains amendments to the Dairy Produce Act 1924 and the Dairy Produce Sales Promotion Act 1958. The most significant provision is that which discontinues export pooling for production on or after 1 July 1985. Since existing export pools will continue until finalised, appropriate savings provisions have been provided in the Bill.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 17 - Henry VIII clause

Clause 17 substitutes a new section 25 in the Dairy Produce Act 1924 providing that the Australian Dairy Corporation shall not, except with the approval of the Minister, enter into a contract for an amount exceeding $500,000 'or, if a higher amount is prescribed, that higher amount'.

Because the clause permits the variation of the amount specified in the Act by way of regulations it may be characterised as a "Henry VIII" clause and as such the Committee draws it to the attention of the Senate under principle 1(a)(iv) in that it may be regarded as an inappropriate delegation of legislative power.

Clause 20 - Determinations by Corporation

Clause 20 inserts a new section 27 in the Dairy Produce Act 1924 relating to the making of determinations by the Corporation that a product is dairy produce for the purposes of the Act. Paragraph 27(1)(c) will authorize the making of determinations which are retrospective in their effect. The Committee is concerned that power should be vested in the Corporation to make determinations with retrospective effect, the only sanction for the Parliament being the disallowance of the determination.

The Committee draws the clause to the attention of the Senate under principle 1(a)(iv) in that, by permitting the making of executive instruments with retrospective effect, it may be considered to constitute an inappropriate delegation of legislative power.

DIRECTOR OF PUBLIC PROSECUTIONS AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 8 May 1985 by the Attorney-General.

This is a Bill to amend the Director of Public Prosecutions Act 1983 (the Principal Act) so as to confer additional functions on the Director of Public Prosecutions. In particular, the Bill will permit the Director of Public Prosecutions to pursue, where appropriate, civil remedies on behalf of the Commonwealth and its authorities at the stage when he is considering or proposing to prosecute.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 3 - Unreviewable discretion

Paragraph 3(1)(d) inserts a new sub-section 6(7) in the Principal Act providing that the taking by the Director of a civil remedy shall not be challenged or called in question in any court on grounds which relate to the Director's power, under the Act, to take that remedy.

The provision is similar in effect to the existing sub-section 6(7) on which the Committee commented in its Fourteenth Report of 1983 (30 November 1983). The effect of the sub-section is to oust the jurisdiction of the courts to examine the power of the Director to take certain proceedings. The Committee appreciates that this ousting of jurisdiction would appear to flow from the policy of the Bill but it would appreciate more detailed explanation of the reasons for so ousting the jurisdiction of the courts.

PETROLEUM (SUBMERGED LANDS) AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 23 April 1985 by the Minister Representing the Minister for Resources and Energy.

The purpose of this Bill is to amend the Petroleum (Submerged Lands) Act 1967 so as to:

(a) provide for the granting of retention leases over currently non-commercial discoveries;

(b) revise the registration provisions of the Act and improve the administrative processes for the making of Regulations and Directions and related matters; and

(c) enable review by the Administrative Appeals Tribunal of discretionary decisions made by the Commonwealth Minister (or his delegate) as designated authority in areas adjacent to Commonwealth Territories, or in exercise of other specified powers.

General comment

The Committee noted that although the Bill would confer on the Administrative Appeals Tribunal a review jurisdiction in respect of decisions of the Minister exercising the powers of the Joint Authority in relation to the adjacent area in respect of the Territory of Ashmore and Cartier Islands, Norfolk Island and the Territory of Heard and McDonald Islands (clause 35), no change was to be made to the present state of affairs under which decisions of the Joint Authority (comprising the Commonwealth Minister and the relevant State

Minister) in relation to the adjacent area in respect of a State are not reviewable on their merits but only as to their legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. Indeed the Bill would add a number of non-reviewable discretions to the Act. Specifically -

- clause 5 inserts new sections 38B, 38E and 38G empowering the Joint Authority to grant or to refuse to grant, to cancel and to renew or to refuse to grant the renewal of retention leases, all without substantive review;

- clause 18 substitutes a new section 78 giving the Joint Authority an absolute discretion to approve or to refuse to approve transfers of title and as to any security to be lodged by the transferee or transferees for compliance with the provisions of the Act; and

- clause 20 substitutes new sections 80 and 81 empowering the Joint Authority to approve or to refuse to approve dealings affecting an interest in title and dealings relating to future interests, again without any form of review.

The rationale advanced in the Second Reading Speech for the failure to provide for any review on the merits of decisions of the Joint Authority was that Joint Authority decisions are 'policy decisions' and are therefore 'clearly not a matter for the AAT'. The Committee had difficulty, however, in seeing why a decision to grant or not to grant a retention lease on the basis of the Joint Authority's opinion as to the commercial viability of the lease should be characterised as a 'policy decision' rather than an administrative decision and hence amenable to review on the merits by the Administrative Appeals Tribunal.

The Committee drew this aspect of the Bill, and clauses 5, 18 and 20 in particular, to the attention of the Senate under principle 1(a)(iii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

The Minister for Resources and Energy has responded drawing attention to the policy which the Government has adopted in relation to the review of the exercise of discretionary powers under the Petroleum (Submerged Lands) Act 1967. That policy was set out in a letter from the former Minister, Senator Walsh, to the Chairman of the Committee, part of which was reproduced in the Committee's Twelfth Report of 1984 (17 October 1984). The Minister continues:

> Applying the general principles set out in Senator Walsh's letter, the decision taken by the Commonwealth Minister (or a delegate of the Commonwealth Minister) in respect of the area adjacent to a Commonwealth Territory are reviewable by the Administrative Appeals Tribunal. This would apply in relation to the exercise of the powers provided for in clauses 5, 18 and 20 of the current Bill.
>
> However, in relation to the areas adjacent to the States and the Northern Territory, these decisions would be taken by the relevant Joint Authority and would not be subject to review by the AAT. As the Joint Authorities are policy making bodies comprising Commonwealth and State/NT Ministers, it is not considered appropriate to subject a Joint Authority decision to Commonwealth administrative review.

> The Committee has indicated it has difficulty in seeing why a decision on the grant of a retention lease on the basis of the Joint Authority's opinion as to the potential commercial viability of the lease should be characterised as a "policy decision" rather than an administrative decision. Decisions on the grant of titles under the offshore petroleum legislation are clearly seen by the Commonwealth and the States/NT as being policy matters of the highest importance. This is reflected in the arrangements reached for administration of the offshore resources legislation as part of the offshore constitutional settlement. Decisions on the various criteria which are prerequisites to the granting of a title are an integral part of the overall decision to grant or refuse a title. These decisions are appropriately taken by the policy making bodies, the Joint Authorities.

The Committee thanks the Minister for this response. In continuing to draw this aspect of the Bill, and clauses 5, 18 and 20 in particular, to the attention of the Senate, together with the Minister's helpful response, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

The Committee also drew the attention of the Senate to the following clause of the Bill:

Clause 36 - Regulations

Clause 36 inserts a new sub-section 157(2A) permitting the making of regulations applying, adopting or incorporating a code of practice or standard, whether issued within or outside Australia, 'as in force or existing from time to time'. The proposed sub-section would in effect permit the substance of the regulations to be amended by a variation in a code of practice or standard.

The Committee drew the clause to the attention of the Senate under principle 1(a)(v) in that it might be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny. The Minister has responded:

> The codes of practice and standards all relate to technical aspects of offshore petroleum exploration and development activity, particularly worker health and safety aspects. Revisions of these codes of practice and standards are generally the result of changes in technology or inquiries into accidents and are the subject of security [sic] by the agencies, companies and unions involved in offshore petroleum matters. The substance of the regulations would not be changed by a variation of a code of practice or standard. This provision in the legislation will facilitate control and management of offshore petroleum matters by ensuring application of the most up-to-date standards and codes of practice.

The Committee thanks the Minister for this response. While it is clear that the proposed provision will accord with administrative convenience the Committee does not believe that this amounts to a justification for removing changes to regulations relating to matters such as worker health and safety from parliamentary scrutiny. If the intent of the clause is to keep provisions on such matters up to date in light of changes in technology and so forth then it is apparent that, contrary to the Minister's suggestion, the substance of the regulations will be changed by variation in the codes and standards.

The Committee continues to draw the attention of the Senate to the clause under principle 1(a)(v) in that it may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny.

SALES TAX LAWS AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 8 May 1985 by the Treasurer.

This is the main Bill in a package of 6 Bills that together will amend the sales tax in a number of important respects.

Included in this Bill are measures necesary to counter arrangements under which wholesalers are avoiding sales tax by selling goods by retail under agency and other marketing arrangements.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 2 - Retrospectivity

Sub-clause 2(2) deems section 3, sub-section 4(2), sections 11 and 12 and sections 54 to 56 to have come into operation on 21 August 1981. Sub-section 4(2) substitutes a new definition of 'manufacture' in the Sales Tax Assessment Act (No.1) 1930 to make it clear that the exclusion in respect of the combination of parts that it is customary for users or consumers to undertake applies only to combination customarily undertaken by persons who ultimately use or enjoy the end product. The Explanatory Memorandum states that the present form of the exclusion has been exploited by firms which previously imported fully assembled products at high rates of tax but now import the components and assemble the products in Australia. By virtue of sub-clause 2(2) the re-drafted definition would apply to

goods manufactured after 20 August 1981, the date on which the former Treasurer announced the proposed change in the law.

Sections 11 and 12 and sections 54 to 56 amend transitional provisions inserted in the Sales Tax Assessment Act (No.1) 1930 by the Sales Tax Assessment (No.1) Amendment Act 1978 and transitional provisions in the latter Act. That Act introduced anti-avoidance measures including provisions designed to secure payment of sales tax on the full value of goods manufactured for a person out of exempt materials supplied by that person to the manufacturer. Transitional provisions restricted the operation of these measures to goods manufactured under agreements entered into after 20 September 1978. The Explanatory Memorandum states that the transitional provisions have allowed the continuation of long-standing arrangements between closely associated companies which were in existence prior to 20 September 1978 and are likely to continue indefinitely. By virtue of sub-clause 2(2) the exemption afforded by the transitional provisions to arrangements in existence prior to 20 September 1978 will no longer apply in respect of goods manufactured after 20 August 1981, the date of the announcement by the former Treasurer of this proposal.

It is clear from the Explanatory Memorandum not only that the sub-clause will retrospectively affect the position of persons and companies with respect to their liability to pay sales tax but also that it is intended to do so as a matter of policy. However since the existence of the loopholes has apparently been known since August 1981 it may be considered that the period of retrospective application - by now almost four years - is excessive. The Committee draws the sub-clause to

the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

Clause 59 - Entry and inspection without warrant

Clause 59 inserts a new section 12E in the Sales Tax Procedure Act 1934 providing that for the purposes of a Sales Tax Assessment Act an officer authorized in writing by the Commission may enter any premises at all reasonable times, inspect documents, examine goods and remove or take samples of such goods.

The Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that, by providing for entry and inspection without warrant, it may be considered to trespass unduly on personal rights and liberties.

SNOWY MOUNTAINS ENGINEERING CORPORATION AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 8 May 1985 by the Minister for Housing and Construction.

The purpose of this Bill is to provide for the restructuring and revitalisation of the Snowy Mountains Engineering Corporation so as to create a viable organisation resulting in consequential financial returns to the Commonwealth at levels consistent with sound commercial principles and practices. The Bill replaces the Snowy Mountains Engineering Corporation Bill 1985 introduced on 27 March 1985.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 8 - Proposed sections 23, 50 and 54

Delegation

Clause 8 inserts new Parts IV, V, VI and VII in the Principal Act to provide for the restructuring of the Corporation. Proposed section 23 would enable the Corporation Board to delegate any of its powers under the Act (other than the power of delegation) to "a person". Proposed section 54 would similarly enable the Minister to delegate any of his or her powers under the Act (other than the power of delegation) to "a person".

The Committee is concerned that the proposed sections place no limitation on, and give no indication of, the attributes of persons to whom the powers of the Board or Minister may be delegated. It therefore draws the provisions to the attention of the Senate under principle 1(a)(ii) in that they may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Inapropriate delegation of legislative power

Proposed section 50 would provide that the Corporation is subject to taxation under the laws of the Commonwealth 'and to such other taxation as the Minister specifies'. It appears that the section is a re-wording of clause 40 of the Snowy Mountains Engineering Corporation Bill 1985 to which the Committee drew attention in its Alert Digest No. 3 of 1985 (17 april 1985). That clause provided that the Corporation was not to be subject to State or Territory taxes except as provided by regulations. Proposed section 50 goes even

further by removing the decision to subject the Corporation to State or Territory taxes from parliamentary scrutiny. The Committee draws the provision to the attention of the Senate under principle 1(a)(iv) in that it may be regarded as an inappropriate delegation of legislative power.

STATES GRANTS (TERTIARY EDUCATION ASSISTANCE) AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives by the Minister Representing the Minister for Education.

The primary purpose of this Bill is to supplement tertiary education grants to the States and the Northern Territory for cost increases by amending the States Grants (Tertiary Education Assistance) Act 1984. This Act provides grants to the States and the Northern Territory for financial assistance to universities and colleges of advanced education for the triennium 1985-87 and technical and further education for 1985.

The Committee drew the attention of the Senate to the following clause of the Bill:

Clause 12 - Variation of Schedules

Clause 12 inserts new sub-sections 41 (3A) and (3B) in the Principal Act enabling the Minister to direct that a project or a Commonwealth contribution specified in Schedule 18,19 or 20 to the Act be varied in accordance with the direction.

The Committee noted that directions under the new sub-sections would, unlike directions under existing sub-sections 41(1) and (2), be able to be given with the result that a State may become liable to repay an amount to the Commonwealth, and would not, again unlike directions under sub-sections 41(1) and (2), be subject to tabling and disallowance. Because the sub-sections permit the variation of the terms of the Act by executive direction they may be characterised as "Henry VIII" clauses and as such the Committee drew the new provisions to the attention of the Senate under principle 1(a)(iv) in that they might be regarded as an inappropriate delegation of legislative power. The Minister for Education has responded:

> Schedules 18 and 19 of the States Grants (Tertiary Education Assistance) Act 1984 appropriate funds for building projects in institutions of higher education for the years 1985, 1986 and 1987. Schedule 20 provides for projects in TAFE institutions for 1985. Columns 1, 2 and 3 of these Schedules are descriptive, have no legislative power or effect on the amounts appropriated either for individual years or in total. Appropriation for 1985 under the legislation is as specified in Column 4 in all three Schedules, and in Columns 5 and 6 for 1986 and 1987 in Schedules 18 and 19. The amount payable to a State can only be varied by altering the figure in column 4, 5 or 6. Any variation to the amounts in these columns are subject to the provision of Sections 42(1), (2) and (3).
>
> The amendments proposed in the current Bill will enable descriptions or details of projects to be varied. These changes invariably respond to requests made by the states. Any changes to the appropriated amounts follow consultation with the

States, ensure there is no liability on any State to repay any amounts and are subject to Parliamentary disallowance.

The Committee thanks the Minister for this response which answers the concerns of the Committee in relation to the clause.

SUPERANNUATION LEGISLATION AMENDMENT BILL 1985

The Committee commented on this Bill in its Fourth Report of 1985 (8 May 1985). The Minister for Finance has provided a response to the Committee's comments and as is its usual practice the Committee reproduces the relevant parts of the Minister's response for the information of the Senate.

Clause 17 - Delegation

Clause 17 inserts a new section 39 empowering the principal member to delegate all or any of the principal member's powers under the Act (other than the power of delegation) to 'a person'. The Committee expressed concern that the new section imposes no limitation, and gives no guidance, as to the attributes of the person to whom a delegation may be made. The Committee drew the clause to the attention of the Senate under principle 1(a)(ii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister has responded:

While I appreciate the reasons for the Committee's concern with the delegation provision in the new section 39 inserted by Clause 17 of the Bill, it should be noted

that the provision, as drafted, is consistent with the other delegation provisions in the Superannuation Act 1976, ie., sections 25 and 38 relating to the Commissioner for Superannuation and the Superannuation Fund Investment Trust. I should perhaps mention that the existing provisions of the Act have operated satisfactorily in the past.

I understand that the new section 39 is drafted in a form that is not uncommon in legislation although such provisions are often restricted to empower delegation only to officers or employees of the body concerned.

The primary powers relating to the operations of the Trust, including the management and investment of the Superannuation Fund, clearly rest with the Trust as a whole. The powers of the principal member, though important in themselves are of less significance and would include such matters as the calling of meetings, the direction of staff, the submission of the Trust's Annual Report and the signing of correspondence. It is these powers which the new provision enables the principal member to delegate if he thinks it appropriate.

In view of the Committee's concern, however, the Government is prepared to consider the comments contained in the Report in the context of an examination of all of the delegation provisions in the Act with any amendments deemed necessary being made when next the Act is amended.

The Committee notes this undertaking but reaffirms its concern with such clauses making provision for unrestricted delegation of powers to "a person" which has formed a constant theme in the Committee's reports this session. The Committee will be pressing for a more comprehensive review of all such provisions.

TAXATION LAWS AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 8 May 1985 by the Treasurer.

This Bill will amend the Taxation Law in a number of ways including -

(a) it will abolish the rule, known as the 30/20 rule, that requires Life Assurance companies and certain superannuation funds to hold specified proportions of their assets in public and Commonwealth securities;

(b) it will amend the law to extend existing anti-tax avoidance provisions to counter further variants of avoidance schemes of the expenditure recoupment type;

(c) it also contains the measures necessary for the phased introduction of personal income tax on Christmas Island and the introduction there of full company tax and medicare levy in accordance with the decision to fully integrate the island with mainland Australia; and

(d) the secrecy provisions of the income tax law are to be amended to enable the Commissioner of Taxation to supply further information for statistical purposes to the Australian Statistician.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clauses 12, 14 and 38 - Retrospectivity

Clauses 12,14 and 38 will extend existing provisions of the Principal Act which operate to deny deductions or rebates for expenditure incurred under an agreement entered into on or after 24 September 1978 for the purpose of tax avoidance whereby the taxpayer receives a compensatory benefit the value of which, together with the expected tax saving, is greater than or equal to the initial expenditure. The amendments will extend the operation of these provisions to cover variants of 'expenditure recoupment' schemes such as expenditure incurred in contract fees paid in respect of the growing of cotton and management fees paid in relation to the growing of jojoba beans. The effect of the amendments will be to deny deductions or rebates claimed in respect of expenditure incurred in such schemes from the 1978-79 income year on.

The Explanatory Memorandum justifies this retrospectivity on the basis that 24 September 1978 was the date on which the former Treasurer announced legislative action against such schemes and said that any future legislation dealing with variants of the schemes would be effective from that date. Nevertheless the Committee draws the clauses to the attention of the Senate under principle 1(a)(i) in that such retrospective denial of deductions or rebates to taxpayers may be considered to trespass unduly on personal rights and liberties.

TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL (NO. 2) 1985

This Bill was introduced into the House of Representatives on 8 May 1985 by the Attorney-General.

This Bill amends the Telecommunications (Interception) Act 1979 in two main respects. Firstly it will enable Telecom, in specified emergency situations, to intercept a telephone call in order to establish the location of a caller so that appropriate assistance can be given.

Secondly, it will enable formal evidence of acts done by Telecom employees in enabling members of the Australian Federal Police to execute an interception warrant to be given by certificate in court proceedings.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 6 - Evidentiary certificates

Clause 6 inserts a new section 25A in the Principal Act providing that the Managing Director of Telecom may issue a certificate setting out facts with respect to acts or thing done by or in relation to officers of the Commission in the execution of warrants permitting the interception of communications made to or from a telecommunications service. Such a certificate is to be conclusive evidence of the matters stated in the document in proceedings by way of prosecution for narcotics offences.

The Committee is concerned that in proceedings relating to serious criminal offences evidence should be able to be given by way of conclusive certificate. The Committee acknowledges the weight of the reasons advanced by the Attorney-General in his Second Reading Speech in support of the amendment, in particular the need to protect Telecom employees involved in narcotic interception from public identification because of fears for their safety and the safety of their families.

However, the Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that by permitting the issuing of conclusive certificates in criminal proceedings it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman

22 May 1985

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN:

MR PRESIDENT,

I PRESENT THE SEVENTH REPORT OF 1985 OF THE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

AUSTRALIAN LAND TRANSPORT (FINANCIAL ASSISTANCE) BILL 1985

AUSTRALIAN SPORTS COMMISSION BILL 1985

DAIRY INDUSTRY STABILIZATION LEVY AMENDMENT BILL 1985

DAIRY LEGISLATION AMENDMENT BILL 1985

DIRECTOR OF PUBLIC PROSECUTIONS AMENDMENT BILL 1985

PETROLEUM (SUBMERGED LANDS) AMENDMENT BILL 1985

SALES TAX LAWS AMENDMENT BILL 1985

SNOWY MOUNTAINS ENGINEERING CORPORATION AMENDMENT BILL 1985

STATES GRANTS (TERTIARY EDUCATION ASSISTANCE) AMENDMENT BILL 1985

SUPERANNUATION LEGISLATION AMENDMENT BILL 1985

TAXATION LAWS AMENDMENT BILL 1985

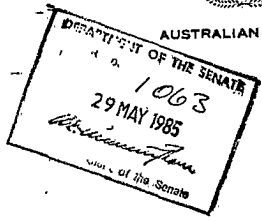
TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL (NO.2) 1985

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 6 DATED 22 MAY 1985

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT
OF 1985

29 MAY 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF 1985

29 MAY 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines
Senator the Hon. D.B. Scott

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT
OF 1985

The Committee has the honour to present its Eighth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bill, which contain provisions that the Committee considers may fall within principles 1(a) (i) to (v) of the Resolution of the Senate of 22 February 1985:

Australian Federal Police Amendment Bill 1985

Broadcasting and Television Amendment Bill 1985

Broadcasting and Television Amendment (Tribunal's Powers) Bill 1985

Communications Legislation Amendment Bill 1985

Conciliation and Arbitration (Electricity Industry) Bill 1985

Environment Protection (Sea Dumping) Amendment Bill 1985

Health Legislation Amendment Bill 1985

Repatriation Legislation Amendment Bill 1985

Snowy Mountains Engineering Corporation Amendment Bill 1985

Statute Law (Miscellaneous Provisions) Bill (No.1) 1985

Wool Tax (Nos. 1 to 5) Amendment Bills 1985

AUSTRALIAN FEDERAL POLICE AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 17 April 1985 by the Special Minister of State.

The principal purpose of the Australian Federal Police Amendment Bill 1985 is to give effect to the Government's decision to ensure the economical and efficient use of Australian Federal Police (AFP) personnel by the enactment of redeployment and retirement provisions directly comparable to those which apply to Commonwealth Public Servants under the Commonwealth Employees (Redeployment and Retirement) Act 1979.

The Committee drew the attention of the Senate to the following clauses of the Bill:

Clause 4 - Delegation

Clause 4 substitutes a new sub-section 15(1) enabling the Commissioner to delegate all or any of his powers under the Principal Act (other than the power of delegation and his powers under new sections 38A-38H) to another member of the Australian Federal Police or a member of the Public Service support staff.

The Committee recognised that the new sub-section 15(1) merely restates the content of the old (with the addition of references to the new sections 38A-38H which would be added by the Bill) but it expressed concern that the provision imposes no limitation, and gives no guidance, as to the rank or level of person to whom a delegation may be made. The

Committee noted that the Principal Act confers powers on the Commissioner such as the power to issue General Orders or General Instructions and the power to appoint officers which it would be quite inappropriate for a junior member of the Australian Federal Police or a junior public servant to exercise. The Committee therefore drew this clause to the attention of the Senate under principle 1(a)(ii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Special Minister of State has responded:

> The variety of powers invested in the Commissioner is, of course, very wide. From a practical point of view, the specification of permissible levels of delegation would be a complex exercise tending to counter the very flexibility which the capacity to delegate is intended to promote. I note that permissible levels of delegation by the Public Service Board and by departmental heads are not specified in legislation.
>
> No organisation can function properly, with due regard to accountability and efficiency, unless delegations are pitched as a matter of course at a level appropriate to the gravity of the power in question. That level is a matter for judgement in each case. Any rank or level specified in the Bill as one below which a delegation could not be made would itself result from the exercise of a judgement, but would not have the inherent flexibility presently available. Accordingly, I see no measurable advantage in such a provision, and would not propose that clause 4 of the Bill be altered.

The Committee thanks the Minister for his response but reaffirms its concern with such clauses making provision for unrestricted delegation of powers. The routine inclusion of such clauses by those responsible for the drafting of legislation would appear to result from an unwillingness on the part of Departments and authorities to determine in advance which powers should not be capable of delegation at all, which should only be capable of being delegated to senior officers and which may be appropriate for general delegation. The Committee concedes that the level at which a delegated power is to be exercised is "a matter for judgement in each case" but suggests that this judgement would be more appropriately made by the legislature in conferring the power rather than by the executive after the power has been conferred.

Accordingly the Committee continues to draw the clause to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Clause 14 - Redeployment provisions

Clause 14 inserts new provisions in the Principal Act relating to the retirement and redeployment of members of the Australian Federal Police.

Parliamentary scrutiny of notices

New sub-section 38A(1) would empower the Commissioner to publish notices in the Australian Federal Police Gazette setting out -

(a) administrative procedures to be followed in facilitating the efficient and economical use of the members of the Australian Federal Police, including criteria by reference to which a member may be identified as a member whose services are not being made use of efficiently and economically; and

(b) principles in accordance with which the functions of the Commissioner in taking action to redeploy members of the Australian Federal Police are to be performed.

The proposed Appeals Board would be required to take into account such criteria and principles in reviewing decisions of the Commissioner declaring a member eligible for redeployment or taking action to redeploy a member. No provision is made for the parliamentary scrutiny of notices published by the Commissioner.

The Committee drew this provision to the attention of the Senate under principle 1(a)(v) in that it might be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister has responded:

> This provision is drawn directly from the model provided in section 8 of the Commonwealth Employees (Redeployment and Retirement) Act 1979 (the CE(RR) Act) under which the Public Service Board may publish notices of similar character in the same manner as is proposed for the Commissioner. Such notices are and would be public documents, and thus open to the scrutiny of any interested party.

The Committee reiterates its view that such notices, setting out criteria and principles which the Commissioner and the proposed Appeals Board are to be required to have regard to, are legislative in character and should be the subject of parliamentary scrutiny.

Notification of appeal rights

While new sections 38B, 38C, 38D and 38E require notice of a decision of the Commissioner and the reasons for the making of that decision to be served on the member of the Australian Federal Police affected by the decision, they do not require that the member be notified of the right of appeal against the decision. The Committee has taken the view in the past that notification of a decision should include a statement of the rights of appeal available to the person affected by the decision.

The Committee drew the attention of the Senate to the lack of provision for notification of appeal rights under principle 1(a)(ii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister has responded indicating that provision for notification of appeal rights is to be made in regulations now being drafted to take effect under the Principal Act as amended by the Bill.

While the Committee would normally wish to see provision for notification of appeal rights included in the Bill conferring those appeal rights it appreciates the difficulty the Minister would have with this course now that the House of Representatives has risen. Accordingly the Committee thanks the Minister for his undertaking to include provision for notification of appeal rights in regulations.

Review power of Appeals Board

New sections 38F and 38G would limit the power of the Appeals Board to the making of recommendations to the Commissioner. It would have no power to substitute its own decision for that of the original decision- maker as does, for example, the Administrative Appeals Tribunal. The Committee noted that the decision that the power of the Board should be recommendatory rather than determinative was apparently taken for reasons of policy, namely the need to preserve the ultimate authority of the Commissioner and to preserve the character of the Australian Federal Police as a disciplined force. The Committee also noted that the decision was in accordance with a recommendation of the Administrative Review Council in its report, 'Australian Federal Police Act 1979, Sections 38 and 39' (Parliamentary Paper No. 267/1982), though it observed that the Council's reasons for this recommendation - in particular that 'it is inappropriate that a Board whose membership is not fixed, and which may on occasions include junior officers, should make a determination binding on the Commissioner' - appeared to flow in part from the Council's initial decision to confer the review jurisdiction on the proposed Appeals Board rather than the Administrative Appeals Tribunal. In this regard the Committee drew attention to the strong dissent of the former Chairman of the Australian Law Reform Commission, Mr Justice Kirby, from this initial decision which appears in paragraph 57 of the Council's report. The Committee expressed the view that the proposed new sections might not make adequate provision for review on the merits of decisions of the Commissioner regarding the redeployment of members of the Australian Federal Police.

The Committee therefore drew the provisions to the attention of the Senate under principle 1(a)(iii) in that they might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions. The Minister has responded:

As the Committee is aware, the character of the appeal authority was the subject of detailed examination by the Administrative Review Council (ARC), which ultimately proposed that the authority be the present Promotion Appeals Board and that its decisions be recommendatory, rejecting the dissenting view of Mr Justice Kirby that the authority should be the Administrative Appeals Tribunal. The Committee has noted the ARC recommendation, that this is consistent with the present nature of the AFP Promotion Appeals Board and with the command structure, disciplined nature and special requirements of the AFP. In these circumstances, I would not propose that clause 14 of the Bill should be altered.

In continuing to draw the proposed new sub-sections to the attention of the Senate, together with the Minister's response, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

Clause 15 - Establishment of Appeals Board

Clause 15 amends section 40 of the Principal Act by inserting a new paragraph 40(ca) enabling the making of regulations providing for the establishment of an Appeals Board to hear appeals in relation to the promotion or redeployment of members of the Australian Federal Police. The Committee considers that where substantial powers of review are to be conferred by an enactment on a new Board or Tribunal provision should be made in that enactment and not in delegated legislation for the constitution and procedures of that Board or Tribunal. In considering the adequacy of the review jurisdiction conferred on the new body the Parliament should have before it the proposed constitution and procedures of that body. The Committee therefore drew the clause to the attention of the Senate under

principle 1(a)(iv) in that it might be considered to constitute an inappropriate delegation of legislative power. The Minister has responded:

> The Bill in effect provides for the renaming of the existing AFP Promotion Appeals Board, and contemplates its exercise of review functions in addition to those it now has. The constitution and procedures of the existing Board are set out in the present AFP Regulations. The amendments to those Regulations now being drafted to accommodate the Board's new functions are based directly on the CE(RR) precedent. Given the amount of detail required, and the need of periodic adjustment to meet changing circumstances, inclusion of these matters in subordinate legislation appears to me a practical and appropriate solution. The regulations in question will, of course, be subject to the scrutiny of the Senate Standing Committee on Regulations and Ordinances.

The Committee thanks the Minister for this response. As the only action available to a House of Parliament in relation to regulations is the negative one of disallowance the Committee remains of the view that it is appropriate for the Parliament, when considering a Bill which confers substantial powers of review on a new Board or Tribunal, to be able to examine the positive requirements which are to be made in relation to the constitution and procedures of the new body at the same time.

The Committee therefore continues to draw attention to the clause under principle 1(a)(iv) in that it may be considered to constitute an inappropriate delegation of legislative power.

BROADCASTING AND TELEVISION AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 15 May 1985 by the Minister for Communications.

The Broadcasting and Television Amendment Bill 1985 amends the Broadcasting and Television Act 1942. The Bill has four main purposes:

- to convert the Act from "station based" to "service based" licensing arrangements;

- to provide for the licensing of commercial radio and television services transmitted to remote areas by the Australian Satellite (AUSSAT);

- to provide uniform procedures for the conduct of Australian Broadcasting Tribunal (Tribunal) inquiries, as well as related amendments; and

- to provide for certain minor amendments.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 26 - Henry VIII clause

Clause 26 substitutes a new section 79ZJ in the Principal Act providing that various sections of the Act apply to the Special Broadcasting Service as they apply to the Australian Broadcasting Corporation "with such exceptions and subject to such modifications as are prescribed".

The clause may be regarded as a "Henry VIII" clause in that it permits the effect of the provision to be altered or negatived by regulations. The Committee draws the clause to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

Clauses 32, 35 and 42 - Henry VIII clauses

Paragraphs 32(m), 35(j) and 42(f) insert new sub-paragraphs 83(6)(da)(vi), 86(11B)(ca)(vii) and 89A(1D)(ca)(v) respectively each permitting the prescription, by regulations, of matters to which the Australian Broadcasting Tribunal is to have regard in granting remote licences, renewing such licences or consenting to the transfer of such licences. The new provisions may be regarded as "Henry VIII" clauses in that they would permit the matters which the legislature has determined the Tribunal should have regard to in making such decisions to be varied by regulations.

The Committee draws the proposed provisions to the attention of the Senate under principle 1(a)(iv) in that they may be regarded as an inappropriate delegation of legislative power.

Clause 62 - Defence of reasonable excuse

Clause 62 would insert a new section 92W in the Principal Act empowering the Tribunal, where it has reason to believe that a person is capable of supplying information, or producing documents, considered by the Tribunal to be necessary for the exercise of its powers, functions or duties under orders made for the purposes of proposed section 92V, to require the person to supply such information or documents. Failure to comply with such a requirement would be an offence.

The Committee is concerned that it would appear that an offence is committed when a person fails to produce a document which the Tribunal had reason to believe the person capable of producing even though the Tribunal's belief might turn out to be quite incorrect and the person might never have been capable of producing the document in question. The more usual form of such a provision would penalise a person who "without reasonable excuse" fails to comply with a requirement (see for example sections 21AA and 21AB of the Principal Act).

The Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

BROADCASTING AND TELEVISION AMENDMENT (TRIBUNAL'S POWERS) BILL 1985

This Bill was introduced into the Senate on 23 May 1985 by Senator Vigor.

The purpose of this Bill is to amend the Broadcasting and Television Act 1942 to clarify the powers of the Australian Broadcasting Tribunal to determine conditions to be observed by licensees under the Act.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 4 - Unrestricted power of censorship

Clause 4 would insert a new sub-section 16(1A) in the Principal Act enabling the Tribunal to determine that particular programmes (other than news and current affairs programmes) and advertisements be submitted to the Tribunal for inspection and not be broadcast or televised without the approval of the Tribunal.

The Committee is concerned that no criteria are to be imposed on the power of the Tribunal to grant or withhold approval and that the scope for review of the actions of the Tribunal pursuant to the Administrative Decisions (Judicial Review) Act 1977 will be accordingly limited. The Tribunal could, for example, censor all television feature programmes on moral or religious grounds without any effective review. The Committee draws the clause to the attention of the Senate under principles 1(a)(i) and (iii) in that by conferring such an unfettered power of censorship on the Tribunal it may be considered both to trespass unduly on personal rights and liberties and to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

COMMUNICATIONS LEGISLATION AMENDMENT BILL 1985

This Bill was introduced into the House of Represenatives on 8 May 1985 by the Minister for Communication.

Provisions of this Bill will allow Telecom and OTC to enter into currency hedging and financial futures contracts. It will also enable Australia Post, Telecom and OTC to lease property for periods longer than 10

years without the need for approval of the Minister for Communications, providing the cost of the lease does not exceed the current prescribed contract threshold - presently $2,000,000 in the case of Telecom and $500,000 in the case of Australia Post and OTC.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clauses 9 and 16 - Henry VIII clauses

Clauses 9 and 16 insert new section 82 and 79 in the Postal Services Act 1975 respectively, providing that the relevant Commission shall not, except with the written approval of the Minister, enter into contracts, for amounts exceeding $500,000 'or, if a higher amount is prescribed by the regulations, that higher amount'. Because each clause permits the variation of the amount specified by regulations, each may be characterised as a "Henry VIII" clause and as such the Committee draws each clause to the attention of the Senate under principle 1(a)(iv) in that the clauses may be considered an inappropriate delegation of legislative power.

CONCILIATION AND ARBITRATION (ELECTRICITY INDUSTRY) BILL 1985

This Bill was introduced into the House of Representatives on 21 May 1985 by the Minister for Employment and Industrial Relations.

The purpose of this Bill is to speed up the processes available under the Conciliation and Arbitration Act 1904 for the Australian Conciliation and Arbitration Commission to hear and determine industrial disputes involving Queensland electricity authorities. Such authorities are defined for the purposes of the Bill to include persons who are performing work other than as employees for or on behalf of Queensland electricity authorities.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Sub-clause 6(4) - Henry VIII clause

Sub-clause 6(3) provides that the Act is not to apply to a dispute between an organisation of employees and an electricity authority of Queensland if there is already a federal award in force establishing the terms and conditions of employment of any of the employees who are members of that organization. By virtue of sub-clause 6(4), however, the Act may be applied to such a dispute by the Governor-General by Proclamation.

Sub-clause 6(4) may be characterised as a "Henry VIII" clause because it permits the operation of sub-clause 6(3) - excluding certain industrial disputes from the ambit of the provisions of the Act - to be varied by executive instrument. As such the Committee draws the sub-clause to the attention of the Senate under principle 1(a)(iv) in that it may be regarded as an inappropriate delegation of legislative power.

Clause 11 - Henry VIII clause

Clause 11 provides that the Act is to cease to be in force 3 years after its commencement or on such earlier day as may be fixed by Proclamation. The clause may be characterised as a "Henry VIII" clause in that it permits the executive to determine that an Act is no longer law without the necessity for Parliament to agree to its repeal.

The Committee draws paragraph 11(b) to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

ENVIRONMENT PROTECTION (SEA DUMPING) AMENDMENT BILL 1985

This Bill was introduced into the Senate on 22 May 1985 by Senator Mason.

The purpose of this Bill is to prohibit the dumping or incineration at sea of any radioactive wastes or other radioactive matter, and the loading of any radioactive wastes or other radioactive matter for the purpose of being dumped at sea or incinerated at sea.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 3 - Strict liability; Double jeopardy

Clause 3 substitutes a new sub-section 22(6) in the Principal Act which states that -

- the owner and the person in charge of a vessel, platform or aircraft on or from which loading, dumping at sea or incineration at sea in contravention of the section is carried out; and

- the owner of the wastes or other matter so loaded, dumped or incinerated,

are each guilty of an offence. It appears that the offence is intended to be one of strict liability in that the owners and the person in charge need not have caused or permitted the loading, dumping or incineration in order to be guilty of an offence.

The Committee acknowledges that the existing offences in the Principal Act are similarly constructed. The Committee also concedes that the question whether an offence should be one of strict liability is to some extent one of policy. Nevertheless the Committee raises for the consideration of the Senate whether it should be a defence in a prosecution under new sub-section 22(6) if the owners or the person in charge adduce evidence that the loading, dumping or incineration was due to the act or default of another person, to an accident or to some other cause beyond their control and that they took reasonable precautions and exercised due diligence to avoid the contravention (compare paragraph 85(1)(b) of the Trade Practices Act 1974). In the absence of such a defence the provision could have the result, for example, that the owner of wastes which are stolen and

subsequently dumped at sea would be liable to prosecution as would a company a vessel belonging to which is used without its knowledge, or, indeed, contrary to its express instructions, for the dumping of wastes at sea.

The Committee is also concerned that a person may be liable to prosecution both under new sub-section 22(6) and under existing section 10, 11 or 12 in respect of the same act or acts. The existing sections prohibit the loading, dumping or incineration of wastes without a permit. While the position is not entirely clear it would appear that, if the Bill were to be enacted, a permit could no longer be granted for the loading, dumping or incineration of radioactive wastes. The owner of a vessel, for example, on which radioactive wastes are then loaded for dumping at sea would therefore be liable to prosecution under new sub-section 22(6) and under section 12. This double jeopardy could easily be avoided by the inclusion of a provision to the effect that a person is not liable to be prosecuted under both sections in respect of the same act or acts.

The Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

HEALTH LEGISLATION AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 15 May 1985 by the Minister for Health.

This Bill proposes to amend the National Health Act and the Health Insurance Act. The amendments to these two Acts are part of the package to settle the doctors' dispute in New South Wales.

The Committee drew the attention of the Senate to the following clauses of the Bill:

Clause 13 - Proposed paragraph 5(2)(a)

Clause 13 inserts a new paragraph 5(2)(a) in the National Health Act 1953 which would permit the Minister to make determinations for the purpose of the definition of 'basic private table' or 'basic table' in sub-section 4(1) which make provision for a matter by adopting or incorporating a provision of any Act or regulation or any other determination "as in force from time to time".

Determinations under the new provision are to be subject to Parliamentary scrutiny and disallowance but new paragraph 5(2)(a) may be considered to impede proper Parliamentary scrutiny in that, if a determination were to provide for a matter by adopting a regulation under another Act as in force from time to time, Parliament might not be aware when examining amendments to those regulations that the determination would also be amended. The Committee drew paragraph 5(2)(a) to the attention of the Senate under principle 1(a)(v) in that

it might be thought to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Acting Minister for Health has responded:

> The purpose of paragraph 5(2)(a) is to enable such determinations to adopt, if necessary, appropriate provisions of other Acts or regulations such as provisions in the Table of Medical Services in the Health Insurance (Variation of Fees and Medical Services) Regulations made under the Health Insurance Act 1973. The legislation allows determinations to be made on the basis of adopting regulations as they exist at any point in time or as they are amended from time to time. Determinations are themselves subject to Parliamentary scrutiny by virtue of new sub-section 5(3) and it will therefore be for Parliament to determine in the circumstances of each individual case whether it will accept or disallow each determination coming before it. The legislation therefore vests in Parliament the final decision as to whether regulations are applied as at a particular date or as amended from time to time.

The Committee thanks the Acting Minister for this response. In continuing to draw attention to paragraph 5(2)(a), together with the response, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

Clause 15 - Henry VIII clause

Clause 15 inserts new sub-sections 68(2B) and (2C) in the National Health Act 1953 permitting the regulations to vary the application of the Act in relation to organizations which were not registered at the commencement of sub-section 68(2A) but which apply for

registration in order that they may conduct health insurance business within 6 months of the commencement of the sub-section.

The clause may be regarded as a "Henry VIII" clause in that it permits the effect of the Act to be modified by regulations. As such, the Committee drew it to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power. The Acting Minister has responded:

> Unfortunately the Insurance Council of Australia did not respond to a request to provide the Department with details of the nature of the wide variety of health insurance contracts in force outside the auspices of the National Health Act. The purpose of new sub-sections 68 (2B) and (2C) is to provide for a legislative mechanism whereby unforeseen problems with the practical implementation of the legislation may be resolved simply and efficiently. It is the Government's intention that commercial insurers compete on the same basis as existing registered insurers and therefore any modification of the Act would be minimal.

In continuing to draw attention to the clause, together with the Acting Minister's helpful response, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

REPATRIATION LEGISLATION AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 16 May 1985 by the Acting Minister for Veterans' Affairs.

The purpose of this Bill is to give effect to certain savings proposals announced by the Treasurer on 14 May

1985 which affect the Repatriation pension system. The Bill now before the House makes amendments to the Repatriation Act 1920, the Interim Forces Benefits Act 1947, the Repatriation (Far East Strategic Reserve) Act 1956, the Repatriation (Special Overseas Service) Act 1962 and the Seamen's War Pensions and Allowances Act 1940.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 25 - Ministerial determination

Clause 25 amends section 107J of the Repatriation Act 1920 so as to define 'hazardous service' as service in the Defence Force of a kind determined by the Minister for Defence to be hazardous service. Whereas veterans of World War I, World War II, Korea, Malaya and Vietnam and persons who have served in a United Nations or internationally sponsored peacekeeping force outside Australia will be entitled to the grant of a pension unless the Repatriation Commission is satisfied beyond reasonable doubt that there are insufficient grounds for granting their claim, regular servicemen or national servicemen whose period of service ended on or after 7 December 1972 will have the advantage of this reverse onus of proof only if they undertook service of a kind determined to be 'hazardous service'. Otherwise they will bear the burden of satisfying the Commission that there are sufficient grounds for granting their claim to a pension.

The Committee considers that the definition of 'hazardous service' is of such significance in the scheme of the legislation that determinations of the Minister under section 107J should at least be tabled. The Committee draws attention to the clause under principle 1(a)(v) in that it may be considered to subject the exercise of legislative power insufficently to parliamentary scrutiny.

Clauses 69, 70 and 71 - Retrospectivity

The Committee did not comment on this aspect of the Bill in its Alert Digest No. 6 of 1985 (22 May 1985). However it has been drawn to the attention of the Committee that clauses 69, 70 and 71, in making provision for the application to claims lodged before 15 May 1985 of the changes made by the Bill as they affect the onus of proof provisions in section 47, are uncertain in their terms and will at the very least impose retrospectively on claimants the onus of establishing a reasonable hypothesis that there exists a connection between the death or incapacity of a member of the Forces and the member's war service.

Sub-clause 69(1) provides that the amendments to be made to section 47 are not to apply to claims lodged before 15 May 1985. However sub-clause 69(2) provides that sub-section 47(2) of the Act as amended by the Bill is to apply to such claims. At the very least this will mean that claimants who lodged their claims prior to 15 May 1985 will be subject to the "reasonable hypothesis" modifications made in an attempt to overcome the effect of O'Brien's case. However because the existing sub-section 47(2) is the provision requiring the Commission to grant a claim unless it is satisfied beyond reasonable doubt that there are insufficient grounds for granting the claim it may be argued that the effect of sub-clause 69(2) is to remove this onus of proof provision without applying the new sub-section 47(3) which preserves the reverse onus in respect of war veterans. It is accepted that on the basis of the Explanatory Memorandum this is not the intention of the legislation but it is difficult to see how sub-clause 69(2) leaves any room for the continued operation of the existing sub-section 47(2).

Sub-clause 70(2) similarly applies the "reasonable hypothesis" modifications to decisions of the Veterans' Review Board in respect of applications made for review of a decision of the Commission before 15 May 1985. Sub-clause 71(3) similarly applies the "reasonable hypothesis" modifications to review by the Administrative Appeals Tribunal otherwise than on application by the Commission of decisions given by the Veterans' Review Board upon application made to that Board before 15 May 1985.

The Committee draws these clauses to the attention of the Senate under principle 1(a)(i) in that such retrospectivity may be considered to trespass unduly on personal rights and liberties.

SNOWY MOUNTAINS ENGINEERING CORPORATION AMENDMENT BILL 1985

The Committee commented on this Bill in its Seventh Report of 1985 (22 May 1985). The Assistant Private Secretary to the Minister for Housing and Construction has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Clause 8 - Proposed sections 23, 50 and 54

Delegation

Clause 8 inserts new Parts IV, V, VI and VIII in the Principal Act to provide for the restructuring of the Corporation. Proposed section 23 would enable the Corporation Board to delegate any of its powers under the Act (other than the power of delegation) to "a person". Proposed section 54 would similarly enable the Minister to delegate any of his or her powers under the Act (other than the power of delegation) to "a person".

The Committee expressed concern that the proposed sections placed no limitation on, and gave no indication of, the attributes of persons to whom the powers of the Board or Minister were able to be delegated. It therefore drew the provisions to the attention of the Senate under principle (a)(ii) in that they might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister's Assistant Private Secretary has responded:

It is not unusual for provision to be made for delegation of powers to either "a person" or a specified category of persons such as "an officer of (an organisation)".

In this case it was not appropriate for the delegation of either Corporation Board powers or Ministerial powers to defined categories of "person". It is not possible to satisfactorily define in advance the categories that could be involved without running the risk of constraining flexibility and possibly limiting the scope for future delegation.

It is not possible, for example, to limit delegation only to "officers of the Corporation" as the Board may wish to delegate some of its powers to individual members of the Board who would not be officers of SMEC. The Board may also need to delegate powers to suit particular business circumstances e.g. Joint Venture partners, or firms engaged for particular tasks. Also the Minister may wish to delegate powers to persons including officers of SMEC, members of the Board, the Secretary and officers of the Department of Housing and Construction. It would therefore be difficult to specify "a person" in this context so that it adequately provided for likely needs.

The Committee thanks the Minister's Assistant Private Secretary for this response. However it is not persuaded that it would not have been possible to identify with some precision the persons to whom various powers were to be able to be delegated. The Committee suggests, for example, that the power of the Minister to give directions to the Corporation as to the exercise of its functions and the performance of its functions would only be appropriately delegated to the Secretary of the Department of Housing and Construction if, indeed, it were to be delegated at all.

Accordingly the Committee continues to draw the proposed sections to the attention of the Senate under principle 1(a)(ii) in that they may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Inappropriate delegation of legislative power

Proposed section 50 would provide that the Corporation is subject to taxation under the laws of the Commonwealth 'and to such other taxation as the Minister specifies'. The Committee noted that the section appeared to be a rewording of clause 40 of the Snowy Mountains Engineering Corporation Bill 1985 to which the Committee drew attention in its Alert Digest No. 3 of 1985 (17 April 1985). That clause provided that the Corporation was not to be subject to State or Territory taxes except as provided by regulations. The Committee expressed concern that the proposed section 50 went even further by removing the decision to subject the Corporation to State or Territory taxes from parliamentary scrutiny. The Committee drew the proposed section to the attention of the Senate under principle 1(a)(iv) in that it might be regarded as an inappropriate delegation of legislative power. The Minister's Assistant Private Secretary has responded:

> The proposed section retains exactly the words from the existing Act. This wording has been retained because the Amendment Bill has been drafted so that existing State legislation affecting SMEC still applies. The Attorney-General's Department advised that specifying tax liability (for State taxes and charges) by regulation would not be an easy task. Each relevant State and Territory law would have to be specified in the regulation and any changes

monitored and included. In these circumstances SMEC could well not be liable for taxes and charges if the regulation was not kept up-to-date.

The purpose of this Section is to ensure that SMEC competes on a fair commercial basis with private sector firms and meets those obligations normally met by commercial organisations - in this case relevant State and Territory taxes and charges.

It is the Government's intention that SMEC not be given unfair subsidies and assistance and it is easier to ensure that SMEC meets all taxes and charges normally met by private firms by the Minister issuing a direction to this effect, as provided for in the proposed Section 50. Such directions have been in force for a number of years covering a range of State and local taxes, including land and payroll taxes.

The Committee thanks the Minister's Assistant Private Secretary for this response but observes that if it is possible to identify the relevant State and Territory taxes and charges for the purpose of directions by the Minister it is surely possible to specify the same State and Territory taxes and charges in regulations which would be subject to parliamentary scrutiny. The Committee continues to draw the proposed section to the attention of the Senate under principle 1(a)(iv) in that it may be regarded as an inappropriate delegation of legislative power.

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO.1) 1985

This Bill was introduced into the House of Representatives by the Attorney-General.

The amendments made by this Bill have a number of purposes such as the tidying up, correction or up-dating of legislation. Other amendments implement changes that are of minor policy significance or are of a routine administrative nature.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 3

Delegation

Clause 3 amends the Acts specified in Schedule 1 to the Bill as set out in that Schedule. The Schedule inserts a new section 12A in the Consular Privileges and Immunities Act 1972 permitting the Minister for Industry, Technology and Commerce to delegate to "a person" all of the Minister's powers under the Act, other than the power of delegation.

The Explanatory Memorandum indicates that it is intended that powers will only be delegated to Departmental officers but the proposed section does not spell this out. The Committee draws the new provision to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

The Schedule also inserts a new section 14A in the Diplomatic Privileges and Immunities Act 1967 similarly permitting the Minister for Industry, Technology and Commerce to delegate to "a person" all of the Minister's powers under the Act, other than the power of delegation.

Once again although the Explanatory Memorandum indicates that it is intended only to delegate to Departmental officers no such limitation is imposed by the proposed section. The Committee draws the new section to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Reversal of onus of proof

The Schedule further inserts new sections 11 and 22 in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. New sub-sections 11(2) and (4) and 22(2) and (4) each impose on the defendant in a prosecution under sub-sections 11(1) or (3) or 22(1) or (3) for failure to notify incidents involving the discharge of oil or other liquid substances the burden of establishing to the satisfaction of the court on the balance of probabilities defences made available under those sub-sections, viz. that the person was unable to comply, that the person was not aware of the incident or was not aware that the master of the ship was unable to comply with the relevant obligation. The Senate Standing Committee on Constitutional and Legal Affairs in its Report, 'The Burden of Proof in Criminal Proceedings' (Parliamentary Paper No. 319/1982) urged that such a persuasive onus should not be placed on defendants but rather that they should merely be required to bear an evidential onus, that is the onus of

adducing evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution.

The Committee drew new sub-sections 11(2) and (4) and 22(2) and (4) to the attention of the Senate under principle 1(a)(i) in that, by imposing a persuasive onus on defendants in criminal proceedings, they might be considered to trespass unduly on personal rights and liberties. The Minister for Transport has responded to the Committee's comments and the relevant parts of his response are reproduced for the information of the Senate:

> The principal object of the proposed amendments is to enable Australia to give legislative effect to various technical amendments to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL). These amendments were adopted on 7 September 1984 by the International Maritime Organization and their inclusion in the Commonwealth legislation is important to maintain consistency with complementary legislation being prepared by State and Territory Governments.
>
> The Department of Transport has received formal advice from the Attorney-General's Department to the effect that the adoption of the amendments suggested by the Committee could have undesirable consequences for the obligation imposed upon Australia to give full legislative effect to the MARPOL Convention.

The Minister has pointed out that, because the House of Representatives has now risen, the making of any amendments to the Bill in the Senate as a result of the Committee's comments would have the effect that the Bill would be held over until the Budget sittings. In order to facilitate the passage of the Bill through the Senate

without amendment the Minister has undertaken to raise the Committee's concerns with the Attorney-General in order to examine the appropriate form of the legislation with a view to including any necessary amendments in the Statute Law (Miscellaneous Provisions) Bill (No.2) 1985.

The Committee thanks the Minister for this undertaking. In continuing to draw the new sub-sections to the attention of the Senate, together with the Minister's undertaking, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

WOOL TAX (NOS. 1 TO 5) AMENDMENT BILLS 1985

These Bills were introduced into the House of Representatives on 8 May 1985 by the Minister for Primary Industry.

These Bills will amend the Wool Tax Acts (Nos. 1-5) 1964 to remove from those Acts provision for apportionment of wool tax receipts between wool market support, wool research and the general purposes of the Australian Wool Corporation, ie wool promotion and market administration.

These amendments complement amendments to the Wool Industry Act 1972 which will bring the apportionment of wool tax receipts under that Act and will also allow greater flexibility in the apportionment of wool tax receipts.

The Committee draws the attention of the Senate to the following clause in each Bill:

Clause 3 - Henry VIII clause

Clause 3 of each Bill substitutes a new section 5 in the relevant Principal Act specifying the rate of tax as 8% of the sale value of the wool or such lower rate as may be prescribed. New sub-section 6(2) added by clause 4 of each Bill provides that the rate of tax prescribed must be greater than 4%. Because clause 3 in each case permits the variation of the rate of tax imposed by the enactment by regulations the clause may be characterised as a "Henry VIII clause".

The Committee draws clause 3 of each Bill to the attention of the Senate under principle 1(a)(iv) in that in each case it may be considered to be an inappropriate delegation of legislative power.

Michael Tate
Chairman

29 May 1985

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN:

MR PRESIDENT,

I PRESENT THE EIGHTH REPORT OF 1985 OF THE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

Australian Federal Police Amendment Bill 1985

Broadcasting and Television Amendment Bill 1985

Broadcasting and Television Amendment (Tribunal's Powers) Bill 1985

Communications Legislation Amendment Bill 1985

Conciliation and Arbitration (Electricity Industry) Bill 1985

Environment Protection (Sea Dumping) Amendment Bill 1985

Health Legislation Amendment Bill 1985

Repatriation Legislation Amendment Bill 1985

Snowy Mountains Engineering Corporation Amendment Bill 1985

Statute Law (Miscellaneous Provisions) Bill (No.1) 1985

Wool Tax (Nos. 1 to 5) Amendment Bills 1985

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 7 DATED 29 MAY 1985

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.

AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT
OF 1985

21 AUGUST 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT
OF 1985

21 AUGUST 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT
OF 1985

The Committee has the honour to present its Ninth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Ashmore and Cartier Islands Acceptance Amendment Bill 1985

Broadcasting and Television Amendment (Tribunal's Powers) Bill 1985

Communications Legislation Amendment Bill 1985

Environment Protection (Sea Dumping) Amendment Bill 1985

ASHMORE AND CARTIER ISLANDS ACCEPTANCE AMENDMENT BILL 1985

The Committee commented on this Bill in its Sixth Report of 1985 (15 May 1985). The Minister for Territories has since provided a response to the Committee's comments and the relevant parts of that response are reproduced here for the information of the Senate.

Clause 7 - Delegation

Clause 7 would insert a new sub-section 11(3) enabling the Minister to delegate any of his powers under the section (other than the power of delegation) to "a person". The powers so enabled to be delegated would include not only the power under new sub-section 11(2) to direct that a power or function vested in a person or authority (other than a court) by a law in force in the Territory be exercised by a specified person or authority but also any powers similarly vested in a person or authority in respect of which no direction under sub-section 11(2) has been made and which are therefore vested in the Minister by the existing sub-section 11(1) of the Principal Act.

The Committee drew this unrestricted power of delegation to the attention of the Senate under principle 1(a)(ii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister for Territories has responded:

> 'Although sub-section 11(3) does not impose a limitation or give guidance as to the attributes of the person to whom the delegation is to be made, the power of delegation will be exercised in the context of the fact that section 11A (to be inserted by clause 8 of the Bill) contemplates the making of arrangements between the Minister and Northern Territory Ministers for officials of the Northern

Territory Government to exercise powers and carry out functions in relation to the laws in force in the Territory of Ashmore and Cartier Islands. It is intended that, where appropriate, Northern Territory officials will be delegated the powers vested in the Minister by section 11(1). At the same time, this may not always be possible or appropriate and under section 11(3) it would remain open to the Minister to delegate his powers to the officials of other Governments (including the Commonwealth Government) or even, in an appropriate case, to a private citizen.

The Territory of Ashmore and Cartier Islands is a very remote locality. The Islands are not populated and receive visitors from Darwin or the north of Western Australia only periodically, although an increase in the frequency of visits is possible with the present high level of oil exploration and development activity in the area. Bearing in mind the large number of laws being applied by the Amendment Bill and the practical limitations on the choice of people to whom powers or functions could be delegated, I believe flexibility in the Minister's power to delegate is essential. For example, it may be appropriate for powers conferred on the Minister under public health legislation to be delegated to a doctor who would in any event be working in the Territory, or its Adjacent Area, on health or medical matters relating to the employees of oil exploration companies operating in the area.'

The Committee draws the Minister's helpful response to the attention of the Senate.

BROADCASTING AND TELEVISION AMENDMENT (TRIBUNAL'S POWERS) BILL 1985

The Committee commented on this Bill in its Eighth Report of 1985 (29 May 1985). Senator Vigor tabled and incorporated in Hansard some brief observations in response to the Committee's comments on 29 May 1985 after the tabling of the Eighth Report.

Clause 4 - Unrestricted power of censorship

Clause 4 would insert a new sub-section 16(1A) in the Principal Act enabling the Tribunal to determine that particular programmes (other than news and current affairs programmes) and advertisements be submitted to the Tribunal for inspection and not be broadcast or televised without the approval of the Tribunal.

The Committee expressed concern that no criteria were to be imposed on the power of the Tribunal to grant or withhold approval and that the scope for review of the actions of the Tribunal pursuant to the Administrative Decisions (Judicial Review) Act 1977 would accordingly be limited. The Tribunal could, for example, censor all television feature programmes on moral or religious grounds without any effective review. The Committee drew the clause to the attention of the Senate under principles 1(a)(i) and (iii) in that by conferring such an unfettered power of censorship on the Tribunal it might be considered both to trespass unduly on personal rights and liberties and to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions. Senator Vigor observed:

'(1) The Tribunal already possesses an unlimited power of censorship over all radio and television material under section 101 of the Act. If the

Tribunal wished to censor programs in the manner envisaged by the Committee it would use that section.

(2) The Bill would merely clarify the powers of the Tribunal under section 16 of the Act to make it clear that the Tribunal can continue to exercise the control over programs under that section which it has been exercising for many years.

(3) Clause 8 of the Bill, which continues in force the standards and conditions already determined by the Tribunal, makes it clear that the purpose of the Bill is to allow the Tribunal to determine standards and conditions of the type which it has already determined.'

Section 101 of the Broadcasting and Television Act 1942 relates to matter 'of an objectionable nature' and the Tribunal's powers under that section would be open to review under the Administrative Decisions (Judicial Review) Act 1977 if they were exercised, for example, for an improper purpose: e.g. to suppress religious or political views with which the Tribunal disagreed but which were not in law 'objectionable'. While the Committee recognizes that the intention of Senator Vigor's Bill is merely to continue in force the Tribunal's existing power to determine standards and conditions in relation to the broadcasting of programmes and advertisements the Committee remains concerned that the power of censorship to be conferred by new sub-section 16(1A) is unrestricted and that the scope for review under the Administrative Decisions (Judicial Review) Act 1977 would therefore be very limited.

The Committee continues to draw attention to the proposed new sub-section under principles 1(a)(i) and (iii) in that it may be considered both to trespass unduly on personal

rights and liberties and to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

COMMUNICATIONS LEGISLATION AMENDMENT BILL 1985

The Committee commented on this Bill in its Eighth Report of 1985 (29 May 1985). The Senior Private Secretary to the Minister for Communications has since provided a response to those comments.

Clauses 9 and 16 - 'Henry VIII' clauses

Clauses 9 and 16 would insert new sections 82 and 79 in the Postal Services Act 1975 and the Telecommunications Act 1975 respectively, providing that the relevant Commission shall not, except with the written approval of the Minister, enter into contracts for amounts exceeding $500,000 'or, if a higher amount is prescribed by the regulations, that higher amount'. Because each clause would permit the variation of the amount specified in the relevant Act by regulations, each may be characterised as a 'Henry VIII' clause and as such the Committee drew each clause to the attention of the Senate under principle 1(a)(iv) in that the clauses might be considered an inappropriate delegation of legislative power. The Minister's Senior Private Secretary responded:

> 'These clauses are identical in nature to provisions found in most Acts establishing statutory authorities ... Provisions [sic] to vary the upper threshold for Ministerial approval of contracts is necessary to ensure that authorities and Ministers are not required to divert resources to approval of contracts because of approval limits rendered inappropriate by passage of time.'

The response does not address the issue raised by the Committee, namely whether the variation in the upper threshold for Ministerial approval of contracts should be carried out by the Parliament or by way of regulations. Given that it has not been found necessary in these amendments to alter the existing threshold of $500,000 set in 1975 it would appear that it would not be unduly onerous to require that future variations of the threshold be made by an amending Act rather than by regulations. Accordingly the Committee continues to draw attention to the clauses under principle 1(a)(iv) in that, as 'Henry VIII' clauses permitting the terms of an Act to be varied by regulation, they may be considered an inappropriate delegation of legislative power.

ENVIRONMENT PROTECTION (SEA DUMPING) AMENDMENT BILL 1985

The Committee commented on this Bill in its Eighth Report of 1985 (29 May 1985). Senator Mason has since provided a response to the Committee's comments.

Clause 3 - Strict liability; Double jeopardy

Clause 3 would substitute a new sub-section 22(6) in the Principal Act penalising the owner and the person in charge of a vessel, platform or aircraft on or from which loading, dumping at sea or incineration at sea in contravention of the section is carried out and the owner of the wastes or other matter so loaded, dumped or incinerated.

The Committee drew attention to the fact that the offence was apparently intended to be one of strict liability: that is, that the owners and the person in charge need not have caused or permitted the loading, dumping or incineration in order to be guilty of the offence. While recognizing that the existing offences in the Principal Act were similarly constructed and that the question whether an offence should

be one of strict liability was to some extent one of policy, the Committee suggested the inclusion of a defence where the owners or the person in charge adduced evidence that the loading, dumping or incineration was due to the act or default of another person, to an accident or to some other cause beyond their control and that they took reasonable precautions and exercised due diligence to avoid the contravention. Senator Mason has undertaken that consideration will be given to the inclusion of such a defence.

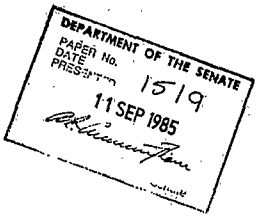
The Committee also expressed concern that a person could be liable to prosecution both under new sub-section 22(6) and under existing section 10, 11 or 12 in respect of the same act or acts. Senator Mason has advised that he will arrange for the inclusion of a provision to the effect that a person is not liable to be prosecuted under both sections in respect of the same act or acts.

The Committee thanks Senator Mason for the undertaking and for the promised amendment.

Michael Tate
Chairman

21 August 1985

AUSTRALIAN SENATE
CANBERRA, A.C.T.



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF 1985

11 SEPTEMBER 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF 1985

11 SEPTEMBER 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF 1985

The Committee has the honour to present its Tenth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Australian Airspace (Nuclear Weapons Prohibition) Bill 1985
Australian Waters (Nuclear-Powered Ships Prohibition) Bill 1985
Australian Waters (Nuclear Weapons Prohibition) Bill 1985
Building Industry Act 1985
Customs (Prohibition of Importation of Nuclear Hardware) Bill 1985

AUSTRALIAN AIRSPACE (NUCLEAR WEAPONS PROHIBITION) BILL 1985

This Bill was introduced into the Senate on 30 May 1985 by Senator Chipp.

The purpose of this Bill is to prohibit the passage of aircraft carrying nuclear weapons through Australian airspace.

The enforcement provisions of this Bill, the Australian Waters (Nuclear-Powered Ships Prohibition) Bill 1985 and the Australian Waters (Nuclear Weapons Prohibition) Bill 1985 are in substantially similar terms and the comments on clauses of this Bill apply also to the relevant clauses of those Bills.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 6 - Review of Ministerial directions

Sub-clause 6(2) would provide that the Minister may direct the taking of such action 'as is, in his opinion, reasonably necessary' to prevent the entry into Australian airspace of an aircraft carrying nuclear weapons. Under sub-clause 6(4) the Commonwealth would only be liable for loss or damage suffered as a result of action taken in accordance with a Ministerial direction if a court were satisfied 'that the action directed to be taken was of such a kind that it could not reasonably have been directed having regard to all the circumstances of the particular case'.

The Committee is gratified that an attempt has been made in this and the other two cognate Bills to overcome the objection which the Committee expressed in its Alert Digest No. 12 of 1984 with regard to the lack of review of the similar Ministerial discretion in clause 6 of the Australian Waters (Nuclear-Powered Ships and Nuclear Weapons Prohibition) Bill 1984. However the Committee is concerned that the wording of sub-clause 6(4) leaves unclear whether a full merits review or only a review as to the

legality of the exercise of the Minister's power of direction is to be afforded: that is, whether it is intended that the court stand in the Minister's shoes and determine whether the action directed to be taken was in fact 'reasonably necessary' or whether the court is restricted to examining whether the action directed to be taken was so unreasonable that a reasonable person could not so have exercised the power of direction. If the latter then the provision does not go beyond the right of review accorded under the Administrative Decisions (Judicial Review) Act 1977 which the Committee criticised as insufficient in its comment on the Australian Waters (Nuclear-Powered Ships and Nuclear Weapons Prohibition) Bill 1984 in its Alert Digest No. 12 of 1984.

The Committee is inclined to the view that sub-clause 6(4) does not afford a full merits review. If such review were intended the sub-clause could merely have required the court to be satisfied that the action directed to be taken was not reasonably necessary having regard to all the circumstances of the case. Instead the court is required to be satisfied that the action directed to be taken 'could not reasonably have been directed'. The Committee draws the clause to the attention of the Senate under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Clause 7 - Entry and search without warrant

Clause 7 provides that a police officer, customs officer or member of the Defence Force may board and search aircraft and require the person in charge of the aircraft to give information and produce books and papers 'for the purpose of ascertaining whether there has occurred a contravention of section 5'. The officers are not required to obtain judicial authorization for such entry and search in the form of a warrant nor are they required to have reasonable grounds for believing that the

aircraft is in fact armed with or carrying nuclear weapons. In other words any aircraft could be entered and searched pursuant to this power.

The Committee draws this clause to the attention of the Senate under principle 1(a)(i) in that such an unrestricted power of entry and search may be considered to trespass unduly on personal rights and liberties.

Clause 8 - Defence of reasonable excuse

Clause 8 would create an offence where a person fails to facilitate the boarding of an aircraft, refuses to allow a search to be made, refuses or neglects to comply with a requirement to give information or to produce books and papers or gives false or misleading information to an officer. The Committee is concerned that in the absence of the usual proviso 'without reasonable excuse' a person may commit this offence even though there may be reasons of safety why an aircraft should not be boarded or the person may be genuinely ignorant of the information which he or she is required to give. The offence of giving false or misleading information also does not follow the usual form of such provisions in that it fails to stipulate that the information provided be false or misleading 'in a material particular'.

The Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that in these two respects it may be considered to trespass unduly on personal rights and liberties.

AUSTRALIAN WATERS (NUCLEAR-POWERED SHIPS PROHIBITION) BILL 1985

This Bill was introduced into the Senate on 30 May 1985 by Senator Chipp.

The purpose of this Bill is to prohibit the passage of nuclear-powered ships through Australian waters.

The comments on clauses 6,7 and 8 of the Australian Airspace (Nuclear Weapons Prohibition) Bill 1985 apply equally to clauses 6,7,and 8 of this Bill.

AUSTRALIAN WATERS (NUCLEAR WEAPONS PROHIBITION) BILL 1985

This Bill was introduced into the Senate on 30 May 1985 by Senator Chipp.

The purpose of this Bill is to prohibit the passage of ships carrying nuclear weapons through Australian waters.

The comments on clauses 6,7,and 8 of the Australian Airspace (Nuclear Weapons Prohibition) Bill 1985 apply equally to clauses 6,7 and 8 of this Bill.

BUILDING INDUSTRY ACT 1985

The Building Industry Bill 1985 was introduced into the House of Representatives on 20 August 1985 by the Minister for Employment and Industrial Relations. It passed the House of Representatives on 21 August and the Senate on 23 August. It received the Royal Assent and came into operation on 26 August.

On this occasion, therefore, the Committee, as permitted by its Terms of Reference, is commenting upon legislation notwithstanding that it has already been agreed to by both Houses of Parliament and has become law. The Committee does so in this case in the belief that the matters to which it draws the attention of the Senate are important and are worthy of attention despite the fact that the legislation has been passed by the Parliament.

The objective of the Act is to provide machinery for the cancellation of the registration of the Builders Labourers' Federation under the Conciliation and Arbitration Act 1904 or the effective equivalent of such deregistration in parts of Australia.

The Committee draws the attention of the Senate to the following sections of the Act:

Section 4 - Reversal of the onus of proof

Under section 4 of the Act the Conciliation and Arbitration Commission may make a declaration that it is satisfied that the Builders Labourers' Federation has contravened undertakings given to the Commission, the Industrial Registrar or the Federal Court, has engaged in conduct that prevented or seriously hindered the achievement of an object under the Conciliation and Arbitration Act 1904 or has engaged in conduct that is inimical to the prevention and settlement of industrial disputes by means of conciliation and arbitration.

Under paragraph 4(3)(b) any industrial action or any conduct that has been engaged in by members of the Federation is to be deemed to have been engaged in by the Federation if (in a case where it is not proved that the Federation instigated or encouraged that industrial action or that conduct) the Federation does not prove that the Federation took all reasonable steps to prevent that industrial action or conduct.

The Committee is concerned that the burden of proof should be cast upon the Federation in this way in proceedings leading to a declaration which may act as a trigger for action including the deregistration of the Federation. In conformity with the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs in its report on The Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319/1982) it is the practice of this Committee to draw attention to all provisions imposing such a persuasive burden of proof on defendants in proceedings which may lead to the imposition of a penalty on the defendant. If it is considered that the matter to be proved is peculiarly within the knowledge of the Federation then the Committee would suggest that only the evidential burden of proof be placed on the Federation: that is that the Federation be required to adduce evidence that it took all reasonable steps to prevent the industrial action or conduct rather than, as at present, being required to prove that it took such steps in order to exculpate itself. Accordingly the Committee draws paragraph 4(3)(b) to the attention of the Senate under principle 1(a)(i) in that such a reversal of the ordinary burden of proof may be considered to trespass unduly on personal rights and liberties.

Sections 5, 8 and 9 - Non-reviewable Ministerial discretions

Where the Commission has made a declaration under section 4 the Minister is given a discretion under sections 5, 8 and 9 to make orders -

- directing the Industrial Registrar to cancel the registration of the Federation under the Conciliation and Arbitration Act 1904;

- terminating or suspending any of the rights, privileges or capacities of the Federation or of all or any of its members, under that Act;

- declaring that the rules of the Federation relating to the industry in or in connection with which the Federation is registered under that Act and to the conditions of eligibility for membership of the Federation shall cease to have effect in relation to work in a part or parts of Australia specified in the order; and

- declaring that it is desirable that another registered organization have coverage of work in an industry in respect of which the Federation is or has been registered under the Act.

The Minister may make any of these orders if he or she 'is of the opinion that it is desirable to make the order having regard to the public interest in securing the prevention and settlement by conciliation and arbitration of industrial disputes extending beyond the limits of any one State or in maintaining peace, order and good government in a Territory'. Where the Minister makes an order directing the Industrial Registrar to cancel the registration of the Federation the Minister is given an unfettered discretion to permit the Federation to apply to be re-registered or to specify conditions with which it must comply before so applying and to declare that these conditions have been complied with.

The Committee is concerned that no provision has been made for review on the merits of the Minister's decision to make an order or orders under section 5, 8 or 9. While the Committee recognizes that the Minister's exercise of the discretion is reviewable as to its legality pursuant to the Administrative

Decisions (Judicial Review) Act 1977 it suggests that, because the Minister's powers are exercisable on the basis of the Minister's subjective opinion or, in the case of the decision to permit re-registration, no statutory criteria at all, the scope for review as to legality is limited. The powers permitted to be exercised by the Minister to deregister the Federation, to suspend its rights, privileges and capacities, to require the Registrar to alter its rules and to award coverage of its members to another registered organization are powers ordinarily exercised only by the Conciliation and Arbitration Commission or the Federal Court. The Committee considers it undesirable that such powers and the power to permit the Federation to apply to be re-registered should be vested in the Minister without effective review by an independent judicial or quasi-judicial tribunal.

The Committee further considers that the vesting of these powers in the Minister calls in question Australia's compliance with its obligations both under Article 22 of the International Covenant on Civil and Political Rights (dealing with freedom of association) and under the International Labour Organisation Convention concerning Freedom of Association and Protection of the Right to Organise. The Committee concurs in the opinion of the Freedom of Association Committee of the Governing Body of the International Labour Office that legislation which accords to a Minister the power to order the cancellation of the registration of a trade union in the Minister's entire discretion and without any right of appeal to the courts is contrary to the principles of freedom of association (see Freedom of Association, 2nd ed., ILO, Geneva, 1976, paragraph 161, p. 60). The Committee does not consider that the requirement that the Minister in this case hold a particular subjective opinion or the existence of a right to challenge the Minister's decision as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977 are sufficient to make the Minister's powers consistent with the principle of freedom of association. Furthermore the power given to the Minister (rather than a court or other independent tribunal) to award coverage of Federation work to other registered organizations opens the way to the suggestion that

workers in the relevant industry are restricted to joining Government-approved trade unions. This once again is at odds with the principle of freedom of association.

Accordingly the Committee draws sections 5, 8 and 9 to the attention of the Senate both under principle 1(a)(iii) in that they may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions and under principle 1(a)(i) in that, having regard to their effect on freedom of association, they may be considered to trespass unduly on personal rights and liberties.

Section 15 - 'Henry VIII' clause

Section 15 provides that the Act is to cease on a day to be fixed by Proclamation. Inasmuch as it permits the Executive to determine that an Act is no longer law without the necessity for the Parliament to agree to its repeal it may be characterised as a 'Henry VIII' clause. The Committee therefore draws the section to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

CUSTOMS (PROHIBITION OF IMPORTATION OF NUCLEAR HARDWARE) BILL 1985

This Bill was introduced into the Senate on 30 May 1985 by Senator Chipp.

The purpose of this Bill is to prohibit the import of nuclear hardware except where such importation is considered essential for the purpose of enabling the 'Australian Atomic Energy Agency' to maintain its capacity to produce isotopes for medical or industrial use.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 6 - Review of Ministerial discretion

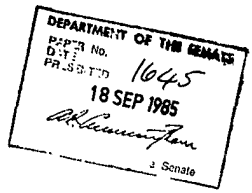
Paragraph 6(2)(b) provides that permission to import nuclear hardware shall not be granted by the Minister unless the Minister is satisfied that the nuclear hardware is essential for the purpose of enabling the 'Australian Atomic Energy Agency' to maintain its capacity to produce isotopes for medical or industrial use. Although sub-clause 6(4) would require the Minister to lay before each House of the Parliament a statement setting out particulars of the nuclear hardware to be imported and the use to which it is to be put where permission is granted, the Minister's discretion to grant or refuse permission would not be reviewable except as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977.

The Committee has argued on previous occasions that neither parliamentary scrutiny nor review under the Administrative Decisions (Judicial Review) Act 1977 provide an adequate path for review on the merits of administrative decisions such as that in question here. One may imagine, for example, that if there were a difference of opinion between the Minister and the 'Agency' as to whether particular nuclear hardware was essential for the

'Agency's' work, review by an independent, quasi-judicial body like the Administrative Appeals Tribunal would provide an appropriate means of resolving that difference. Accordingly the Committee draws the clause to the attention of the Senate under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Michael Tate
Chairman

11 September 1985



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF 1985

18 SEPTEMBER 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF 1985

18 SEPTEMBER 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF 1985

The Committee has the honour to present its Eleventh Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Export Inspection Charges (Miscellaneous Amendments) Bill 1985

Export Inspection (Establishment Registration Charge) Bill 1985

Export Inspection (Service Charge) Bill 1985

Foreign Fishing Boats Levy Amendment Bill 1985

EXPORT INSPECTION CHARGES (MISCELLANEOUS AMENDMENTS) BILL 1985

This Bill was introduced into the House of Representatives on 22 August 1985 by the Minister for Primary Industry.

The purpose of the Bill is to amend the Export Inspection Charge Act 1985 and the Export Inspection Charge Collection Act 1985 so as to provide for collection of charges to be imposed consequential upon passage of the Export Inspection (Service Charge) Bill 1985 and the Export Inspection (Establishment Registration Charge) Bill 1985.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 20 - Self incrimination

Clause 20 would substitute a new sub-section 10(2) in the Export Inspection Charge Collection Act 1985 removing self incrimination as an excuse for not submitting returns or providing information under the Act. The new sub-section includes the usual proviso that returns or information so submitted or provided are not to be admissible in evidence except in proceedings for failing to furnish information or a return or for knowingly furnishing information or a return that is false or misleading in a material particular.

Although the clause is in standard form the Committee draws it to the attention of the Senate under principle 1(a)(i) as is its usual practice with all clauses removing the privilege against self incrimination in that the clause may be considered to trespass unduly on personal rights and liberties.

EXPORT INSPECTION (ESTABLISHMENT REGISTRATION CHARGE) BILL 1985

This Bill was introduced into the House of Representatives on 22 August 1985 by the Minister for Primary Industry.

The purpose of the Bill is to provide for a charge to be made upon the registration of an export registered establishment where this is requested by an industry.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 7 - Inappropriate delegation of legislative power

Clause 7 provides that the rate of charge in respect of the registration of an establishment is to be fixed by regulation. No maximum rate is set. By contrast section 7 of the Export Inspection Charge Act 1985, although leaving the rate of quantity charges to be specified by regulation, imposes a maximum rate of charge.

The Committee has argued in the past that where a charge, levy or tax is left to be fixed by regulation the empowering enactment should at least stipulate a maximum rate. Accordingly the Committee draws the clause to the attention of the Senate under principle 1(a)(iv) in that it may be considered inappropriately to delegate legislative power.

EXPORT INSPECTION (SERVICE CHARGE) BILL 1985

This Bill was introduced into the House of Representatives on 22 August 1985 by the Minister for Primary Industry.

The primary purpose of this Bill is to extend the range of legislative options for imposing charges on industry to recoup part of the costs of inspecting rural produce for export. This

Bill provides for a charge to be imposed for inspection services provided to a registered export establishment on the basis of hours worked.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 7 - Inappropriate delegation of legislative power

Clause 7 provides that the rate of charge in respect of the provision of an export inspection service at an establishment is to be fixed by regulation. As in the case of clause 7 of the *Export Inspection (Establishment Registration Charge) Bill 1985* no maximum rate of charge is set and for similar reasons the Committee draws clause 7 of this Bill to the attention of the Senate under principle 1(a)(iv) in that it may be considered inappropriately to delegate legislative power.

FOREIGN FISHING BOATS LEVY AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 22 August 1985 by the Minister for Primary Industry.

This Bill amends the Foreign Fishing Boats Levy Act 1981:

(i) to provide clear legal authority for collecting the amount specified in an agreement between Australia and a person other than a foreign Government, whereby Australia agrees to license foreign boats for fishing in the Australian fishing zone; and

(ii) to empower the Minister to declare that a foreign fishing boat operated by, for or on the instructions of, an Australian for the benefit of Australia is a boat in respect of which the Act does not impose levy.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 4 - Non-reviewable discretion

Clause 4 would insert new sub-sections 4(4) and (5) providing that the Minister may declare by notice in the Gazette that the levy imposed on foreign fishing boats is not payable in respect of a particular boat if the Minister is satisfied that the boat is operated by, on behalf of, or in accordance with the instructions of, a resident of Australia and that the operations of the boat in the Australian fishing zone will confer benefits on Australia. Declarations by the Minister will be tabled under the new sub-section (5) but will not be subject to disallowance.

The Committee questions whether parliamentary scrutiny is the most appropriate method of review of this type of discretion. Even if Ministerial declarations were to be made subject to disallowance the Parliament would not be particularly well placed to make judgements about whether, for example, the fishing boat in question was being operated in accordance with the instructions of a resident of Australia. Moreover there is no provision for review of a decision of the Minister refusing to make a declaration under the new sub-section. The Committee suggests that this is a case where jurisdiction to review the Minister's decision on its merits should be conferred on an independent, quasi-judicial body like the Administrative Appeals Tribunal. Accordingly the Committee draws the clause to the attention of the Senate under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Clause 5 - Inappropriate delegation of legislative power

Clause 5 would insert a new sub-section 5(2) providing that where the Minister has entered into an agreement with a person other than a foreign government with respect to the granting of licences to foreign fishing boats the amount of the foreign

fishing boats levy is to be the amount specified in that agreement. The effect of this clause, taken together with the Fisheries Agreements (Payments) Act 1981 as amended by the Fisheries Agreements (Payments) Bill 1985, is that the Parliament has delegated to the Minister the power to set, by agreement, the amount of the foreign fishing boat levy in certain cases. By virtue of section 9B of the Fisheries Act 1952 such agreements are tabled in Parliament but they are not subject to disallowance.

The Committee recognizes that a similar regime already applies in respect of amounts in lieu of the foreign fishing boats levy payable under agreements entered into by the Minister and foreign Governments. However the Committee queries whether the effect of these arrangements is that the Parliament delegates its taxation powers in this area without retaining any effective control over the exercise of those powers. The Committee draws the clause to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

Michael Tate
Chairman

18 September 1985

AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1985

9 OCTOBER 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1985

9 OCTOBER 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1985

The Committee has the honour to present its Twelfth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Export Market Development Grants Amendment Bill 1985
Foreign States Immunities Bill 1985
Grain Legumes Levy Collection Bill 1985
Parliamentary Powers, Privileges and Immunities Bill 1985

EXPORT MARKET DEVELOPMENT GRANTS AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 21 August 1985 by the Minister for Trade.

This Bill gives legislative effect to the Government's decision announced to Parliament in the 14 May 1985 Statement by the Treasurer to amend the Export Market Development Grants Act 1974 with effect from 20 May 1985.

The Committee drew the attention of the Senate to the following clauses of the Bill:

Clause 2 - Retrospectivity

Sub-clause 2(2) provides that certain amendments made by the Bill are to be retrospective to 20 May 1985 in accordance with a press release made by the Minister on 14 May 1985. The amendments have the effect of restricting entitlements under the Export Market Development Grants Scheme.

The Committee was critical of this sub-clause as an example of 'legislation by press release' which carried with it the inherent assumption that people should arrange their affairs in accordance with the press release of the Minister rather than in accordance with the law made by Parliament. The Committee drew the sub-clause to the attention of the Senate under principle 1(a)(i) in that such retrospectivity might be considered to trespass unduly on personal rights and liberties. The Minister for Trade has responded:

> 'On 14 May 1985 the Treasurer announced in the House of Representatives as part of the Government's economic strategy a number of measures designed to reduce Commonwealth expenditure in the Budget Year 1985/86.

Mindful of the identified deficiencies in the EMDG scheme the Government decided that the scheme should be included in the program of expenditure savings for 1985/86 and this was done by amending the scheme as from 20 May 1985. The savings for 1985/86 from revising the scheme as from 20 May 1985 are estimated at $20 million.

On the same day, 14 May 1985, I issued a press release which gave details of the changes. I also arranged for the Department of Trade to provide details of the revised scheme to major export associations as well as a number of individual exporters prior to the commencement date of 20 May.

To have provided for the changes to become effective from the date of Royal Assent of the EMDG Amendment Bill 1985 would have meant that the effects of tightening the scheme on Government expenditure were not felt until the 1986/87 fiscal year. In order to achieve a reduction in expenditure for 1985/86 as outlined in the Treasurer's May economic statement, prompt implementation was required. Other factors considered relevant were the long period over which exporters were aware that the Government was reviewing the scheme and the scope for expenditure to increase markedly during any formal period of notice of changes to Government programs.

The Government has accepted that, in some cases, the early termination of the 1984/85 grant year could pose particular problems for those claimants, who were relying on a full 12

months grant year to satisfy the old export performance test, and the Bill makes appropriate provisions for exports between 20 May and 30 June 1985 to be taken into account in such cases.'

The Committee thanks the Minister for his helpful response which makes plain that the sub-clause in this case falls under the convention that budgetary measures are made retrospective to the date of their announcement. This answers the Committee's concerns in relation to the sub-clause.

Clause 9 - Retrospective determination

The Committee drew attention in its Alert Digest No. 9 of 1985 to the fact that the new section 10 to be added by clause 9 would permit the Minister to proscribe countries with retrospective effect. It noted that persons could lose considerable benefits under the Act in respect of expenditure incurred or export income even though, at the time they entered into the relevant agreements, no determination had been published proscribing the particular country.

The Minister for Trade has responded drawing attention to the amendment to clause 9 which he successfully moved in the House of Representatives on 13 September 1985. The amendment substitutes a new section 10 under which the Minister will be restricted to declaring the Republic of South Africa to have been, with effect from 19 August 1985, a proscribed country. Whereas in respect of the generality of persons the Minister will be restricted to making determinations (that expenditure is not eligible expenditure and consideration received is not export earnings for the purposes of the Act) with purely prospective effect, in respect of persons specified under new sub-section 10(6)

such determinations may be made retrospective to 19 August 1985. Under new sub-section 10(6) the persons who may be specified are -

(a) nationals or citizens of the Republic of South Africa;

(b) companies having a share capital the majority of the shares in which are beneficially owned by nationals or citizens of that country;

(c) partnerships a majority of the members of which are nationals or citizens of that country; or

(d) persons, companies or partnerships having some other substantial connection with that country.

The Committee remains concerned that in respect of these classes of persons determinations made under the new section may have retrospective effect. The Committee is also concerned at the discretion afforded the Minister to determine pursuant to paragraph 10(6)(d) whether a person, company or partnership has some 'substantial connection' with the Republic of South Africa and so may be denied benefits under the Act in respect of its trade with that country with effect from 19 August 1985 rather than from the date of the determination. The retrospective application of determinations could operate particularly harshly if firms which did not believe themselves to be included in the Minister for Foreign Affairs' announcement of 19 August find themselves denied benefits on which they had based their commercial calculations.

The Committee therefore draws the clause to the attention of the Senate both under principle 1(a)(i) in that the retrospective application of determinations may be considered to trespass unduly on personal rights and

liberties and under principle 1(a)(ii) in that the uncertain application of paragraph 10(6)(d) may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

FOREIGN STATES IMMUNITIES BILL 1985

This Bill was introduced into the House of Representatives on 21 August 1985 by the Attorney-General.

The purpose of the Foreign States Immunities Bill 1985 is to set out in clear and accessible form the law relating to the jurisdiction of Australian courts over foreign States, their agencies and instrumentalities.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 42 - 'Henry VIII' clause; Retrospectivity

Sub clauses 42(1) and (2) provide that where the Governor-General is satisfied:

- that an immunity or privilege conferred by the Act in relation to a foreign State is not accorded by the law of the foreign State in relation to Australia; or

- that the immunities and privileges conferred by the Act in relation to a foreign State differ from those required by a treaty, convention or other agreement to which the foreign State and Australia are parties,

the Governor-General may make regulations modifying the operation of the Act with respect to those immunities and privileges in relation to the foreign State. Sub-clauses

42(3) and (4) permit regulations made under sub-clauses (1) and (2) to extend to proceedings instituted prior to the making of the relevant regulations and such regulations extending or restricting immunity from action may affect the substantive rights of the parties.

The Committee acknowledges the reasons of policy advanced in the Law Reform Commission's report on Foreign State Immunity for this provision (see paragraph 162, pages 101-2 of ALRC Report No. 24, Parliamentary Paper No. 239/1984). In particular the Committee acknowledges the need in any general regime of foreign state immunity to allow for variations to be negotiated on a bilateral basis with particular countries. It draws attention to the Law Reform Commission's argument that -

> '[I]f only prospective regulations are permitted the ability of the Australian government to negotiate claims settlements agreements with foreign states may be severely hampered. For example, the ability of the United States to negotiate the release of the Tehran hostages in 1981 depended upon its ability to block all litigation then under way against Iran in United States courts.'

However it is the Committee's practice to draw attention to all 'Henry VIII' clauses permitting the modification of the operation of an Act by regulations. The Committee therefore draws clause 42 to the attention of the Senate under principles 1(a)(iv) and (i) in that it may be considered an inappropriate delegation of legislative power and in that by permitting the retrospective alteration of the rights of parties before the courts it may be considered to trespass unduly on personal rights and liberties.

GRAIN LEGUMES LEVY COLLECTION BILL 1985

This Bill was introduced into the House of Representatives on 22 August 1985 by the Minister for Primary Industry.

The purpose of this Bill is to provide the machinery necessary for collecting the levy imposed by the Grain Legumes Levy Bill 1985.

The Committee draws the attention of the Senate to the following clause of the Bill:

Sub-clause 12(2) - Self incrimination

Sub-clause 12(2) provides that a persor is not excused from submitting a return or providing information on the ground that it might tend to incriminate the person but that any return or information so submitted or provided is not admissible in evidence except in proceedings for the failure to submit a return or to provide information or for the furnishing of information or a return that is false or misleading in a material particular.

Although the sub-clause is in standard form it is the Committee's practice to draw to the attention of the Senate under principle 1(a)(i) all such provisions removing the privilege against self incrimination in that they may be considered to trespass unduly on personal rights and liberties.

PARLIAMENTARY POWERS, PRIVILEGES AND IMMUNITIES BILL 1985

This Bill was introduced into the Senate on 22 August 1985 by Senator Macklin.

The purpose of the Bill is to declare the powers, privileges and immunities of each House of the Parliament, its members and committees.

The Committee drew the attention of the Senate to the following clauses of the Bill:

Clause 4 - Definition of privileges

Like the Parliament (Powers, Privileges and Immunities) Bill 1985 introduced into the House of Representatives on 21 May 1985 by Mr. Spender this Bill sets out to make certain changes in the law relating to parliamentary privilege recommended by the Joint Select Committee on Parliamentary Privilege. Two of the comments made by the Committee on Mr. Spender's Bill in its Alert Digest No. 7 of 1985 (29 May 1985) apply also to this Bill.

The Committee commented in its Alert Digest No. 9 of 1985 (11 September 1985) that, while the Bill sets out to codify the powers of the Houses to punish persons guilty of a breach of a privilege of a House by way of a fine or imprisonment it does not attempt to define the privileges for breach of which a person may be punished. Rather, clause 4 simply refers to the powers, privileges and immunities in force under section 49 of the Constitution.

The Committee expressed concern that an offence carrying a penalty of a fine of up to $25,000 in the case of a body corporate or a fine of up to $5,000 or 6 months imprisonment in the case of a natural person should be created without a clear definition of the acts sought to be punished. As with Mr. Spender's Bill the Committee noted that the Joint Select Committee on Parliamentary Privilege recognized this problem in its Final Report (Parliamentary Paper No. 219/1984) but argued (at pages 80-82 of that Report) that it was impossible to define exhaustively in advance the circumstances that may constitute contempt of Parliament. Nevertheless this Committee drew the clause to the attention of the Senate under principle 1(a)(i) in that because of the uncertainty it created as to what constitutes a breach of privilege it might be considered to trespass unduly on personal rights and liberties. Senator Macklin has responded:

> 'The notion that the Houses' powers to punish persons relate to breaches of particular privileges is a misconception, and the term "breach of privilege" is a misnomer ... Under the present law, the Houses have the power to punish any act regarded as a contempt of or offence against a House, and the act so punished does not have to amount to a breach of any particular immunity. Thus even if the immunities of the Houses were statutorily and clearly defined, the Houses would not be limited to punishing only acts which violated those immunities. Because the Bill makes no change to the present law relating to the power of the Houses to deal with contempts, it cannot be said to trespass unduly on personal rights and liberties.'

The Committee accepts that its reference to defining 'privileges for breach of which a person may be punished' was too narrow and that its comment should perhaps more appropriately have drawn attention to clauses 6 and 7 which

provide for the punishment of offences against a House without providing any definition of such offences. However it cannot accept that the Bill cannot be said to trespass unduly on personal rights and liberties merely because it makes no change to the present law. Both this Bill and Mr. Spender's Bill seek to clarify the powers of the Houses to punish offences against them by, on the one hand, substituting a power to imprison for up to six months for the present power to commit for the life of the House and, on the other hand, placing the power to impose fines beyond doubt. At the same time neither Bill attempts to resolve the present uncertainty as to what acts may constitute offences against the Houses. The content of such offences remains arbitrary in the sense that it is left to each House to determine as the occasion requires.

The Committee has indicated in the past that, while it does not see its functions extending to the examination of existing Acts of Parliament or the common law, it will not hesitate to draw attention to provisions in Bills which fall within its terms of reference even though such provisions reflect similar sections in an existing Act or the long-standing policy contained in the present law: see paragraph 19 of its Ninth Report of 1982. The Committee has also stated that it believes it is a fundamental principle that penal statutes should be certain in their application (comment on Human Embryo Experimentation Bill 1985, Sixth Report of 1985). In the present case, therefore, the Committee draws clauses 6 and 7 of Senator Macklin's Bill to the attention of the Senate under principle 1(a)(i) in that by attempting to clarify the powers of each House to punish offences against that House while leaving the content of those offences to the arbitrary determination of the House concerned they may be considered to trespass unduly on personal rights and liberties.

Clause 10 - Rights of Review

Clause 10 would confer on the High Court a limited power of review in respect of penalties imposed by either House for an offence against that House. The power of review would be limited to penalties of imprisonment and the High Court would be restricted to making a declaration that 'the offence of which the applicant was convicted did not amount to an obstruction of or interference with the proper performance of the functions of a House, its members or committees' (sub-clause 10(3)). The jurisdiction conferred on the High Court by this Bill is thus more limited than that which would be conferred by Mr. Spender's Bill (which extends to the making of a declaration as to the legality of the actions of the House in question).

As with Mr. Spender's Bill the Committee acknowledged that the lack of any substantive review on the merits of the action of a House of Parliament in resolving to punish a person for contempt or breach of privilege was clearly intended as a matter of policy. The reasons for this decision were fully canvassed at pages 90-94 of the Joint Select Committee's Final Report (supra). However this Committee emphasized in its Alert Digest No. 9 of 1985 that no review would be accorded in respect of fines imposed by either House (as distinct from penalties of imprisonment) and that the power of review accorded in respect of penalties of imprisonment was limited to the making of a declaration. Any further action was left to the House concerned. The Committee therefore drew the clause to the attention of the Senate under principle 1(a)(i) in that by failing to provide anything more than a very limited power of review of the exercise of its powers by a House it might be considered to trespass unduly on personal rights and liberties.

Senator Macklin has responded that:

> 'As there is no review of penalties imposed by the Houses under the present law, the Bill cannot be said to trespass unduly on personal rights and liberties.'

Once again the Committee stresses that it is not concerned with the existing law but with the Bills coming before the Parliament. If, for example, a Bill seeks to amend an Act providing for a licensing scheme by according a right of review in respect of the grant of some, but not all, licences, the Committee will draw attention to the failure to accord a right of review in respect of the remaining decisions: see for example comment on the Petroleum (Submerged Lands) Amendment Bill 1985 in the Committee's Seventh Report of 1985. So here the Committee draws attention to the fact that, although the Bill seeks to provide a right of review of penalties imposed by the Houses, that right of review is limited to penalties of imprisonment as distinct from fines and the power conferred on the High Court is only a power to make a declaration.

The Committee therefore continues to draw the clause to the attention of the Senate under principle 1(a)(i) in that by failing to provide anything more than a very limited power of review of the exercise of its powers by a House it may be considered to trespass unduly on personal rights and liberties.

Clause 20 - Restriction of use of parliamentary proceedings in evidence.

Sub-clause 20(1) would prevent a proceeding in Parliament from being commented upon, used to draw inferences or conclusions, analysed or made the subject of any examination of witnesses or submission in any proceedings in any court. The Second Reading Speech indicates that the sub-clause is

intended to restore the law 'to what it was thought to be before the judgement of Mr. Justice Cantor', a reference to that judge's decision with regard to the construction of Article 9 of the Bill of Rights of 1689 in R. v. Murphy in the N.S.W. Supreme Court, presently under appeal.

Article 9 of the Bill of Rights of 1689 declares: 'That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.' In certain respects the interpretation of this provision is clear. Thus, for example, it is well established that an action, civil or criminal, does not lie against a member of Parliament for words spoken in parliamentary debate. Similarly it is established that it is not a breach of the provision to tender passages in Hansard merely to prove, as a fact, that certain things have been said in Parliament. There is argument, however, about the use to which such evidence may be put without infringing the prohibition contained in Article 9. It has been held in the United Kingdom, for example, that parliamentary debates may not be relied upon to establish malice in an action for defamation arising out of statements made in a subsequent television interview: Church of Scientology of California v. Johnson-Smith [1972] 1 QB 522. On the other hand Mr. Justice Cantor held that statements made by persons as witnesses before parliamentary Committees could be used as 'prior inconsistent statements' to cast doubt on the credit to be attached to the evidence given by those persons as witnesses in subsequent court proceedings.

The Committee expressed concern that, in attempting to clarify this area, sub-clause 20(1) would in fact significantly extend the existing prohibition contained in Article 9 of the Bill of Rights of 1689, thereby disadvantaging litigants who might seek to rely on evidence of debates or other proceedings in Parliament.

The Committee advanced by way of illustration section 15AB of the Acts Interpretation Act 1901, added in 1984, which presently permits the use of any official record of debates in the Parliament to assist in determining the meaning of a provision of an Act in certain specified circumstances. It suggested that to use proceedings in Parliament in this way was to use them to draw conclusions, an activity which would be prohibited by sub-clause 20(1). Similarly it was arguable that to examine the Journals or Votes and Proceedings to ascertain as a matter of fact whether a particular Act has received the assent of the Parliament in accordance with the Constitution - a fundamental question going to the validity of the Act - would be to 'analyse' proceedings in Parliament, an activity which sub-clause 20(1) would purport to prohibit.

The Committee therefore drew the sub-clause to the attention of the Senate under principle 1(a)(i) in that by going beyond the existing prohibition on the use of proceedings in Parliament in the courts contained in Article 9 of the Bill of Rights of 1689 it might be considered to trespass unduly on personal rights and liberties. Senator Macklin has responded:

> 'In framing sub-section 20(1) I have adopted the language used by the British Attorney-General to describe the scope of the immunity contained in Article 9 of the Bill of Rights in his submissions to the court in the Scientology case. As the scope of the immunity has never been fully determined, I do not think that it can be concluded that this form of words "would in fact significantly extend the existing prohibition". I believe that the British Attorney-General was in fact putting what was widely believed to be the scope of the immunity.'

Senator Macklin adds, however, that he is 'open to persuasion' on the question whether to use a statement in Parliament to confirm an interpretation or to determine a question of interpretation may be 'to draw conclusions' from that statement and so prohibited by sub-clause 20(1). On the other example advanced by the Committee - the examination of the Journals or Votes and Proceedings to ascertain whether a particular Act has received the assent of the Parliament in accordance with the Constitution - Senator Macklin puts the view that to do this would not be to 'analyse' those proceedings but merely to prove material facts by reference to those proceedings. The Committee suggests, however, that to use the proceedings to determine whether, for example, the Senate has failed to pass a law as required under section 57 of the Constitution is to 'analyse' those proceedings within the ordinary dictionary meaning of that word.

The Committee thanks Senator Macklin for his response. However, the Committee remains of the view that sub-clause 20(1), in claiming to define the existing prohibition on the use of proceedings in Parliament in the courts contained in Article 9 of the Bill of Rights of 1689, may disadvantage litigants because in so defining the prohibition it would remove the possibility of a judicial interpretation of that prohibition which might be less conservative than that advanced by Senator Macklin. Accordingly the Committee continues to draw clause 20 to the attention of the Senate under principle 1(a)(i) in that by cutting off this possibility it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman
9 October 1985

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT ETC.

CHAIRMAN:

MR. PRESIDENT,

I PRESENT THE TWELFTH REPORT OF 1985 OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

EXPORT MARKET DEVELOPMENT GRANTS AMENDMENT BILL 1985

FOREIGN STATES IMMUNITIES BILL 1985

GRAIN LEGUMES LEVY COLLECTION BILL 1985

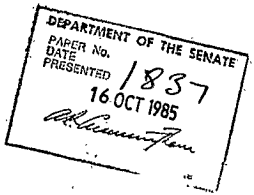
PARLIAMENTARY POWERS, PRIVILEGES AND IMMUNITIES BILL 1985.

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 11 DATED 9 OCTOBER 1985.

MR. PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1985

16 OCTOBER 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1985

16 OCTOBER 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1985

The Committee has the honour to present its Thirteenth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Bounty (Agricultural Tractors and Equipment) Bill 1985
Bounty (Metal Working Machines and Robots) Bill 1985
Export Inspection Charges (Miscellaneous Amendments) Bill 1985
Export Inspection (Establishment Registration Charge) Bill 1985
Export Inspection (Service Charge) Bill 1985
Foreign Fishing Boats Levy Amendment Bill 1985
Grain Legumes Levy Collection Bill 1985
Interstate Road Transport Bill 1985
Interstate Road Transport Charge Bill 1985
Petermann Aboriginal Land Trust (Boundaries) Bill 1985
Taxation Laws Amendment Bill (No. 2) 1985

BOUNTY (AGRICULTURAL TRACTORS AND EQUIPMENT) BILL 1985

This Bill was introduced into the Senate on 11 September 1985 by the Minister for Industry, Technology and Commerce.

The Bill proposes a continuation of the bounty assistance for certain agricultural tractors and tractor cabs from 1 July 1985 until 31 December 1992. Bounty assistance will also be provided on original equipment parts and accessories for tractors.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Sub-clause 23(4) - Non-reviewable decision

Sub-clause 23(4) provides that the registration of premises for the purposes of the bounty scheme is to take effect from the date on which the notice registering those premises is signed 'or such earlier date, not being a date earlier than 1 July 1985, as is determined by the Comptroller-General and specified in that notice'.

While a decision by the Comptroller-General refusing to register premises is reviewable by the Administrative Appeals Tribunal pursuant to paragraph 35(1)(m), it does not appear that a decision by the Comptroller-General refusing to determine a date of effect for registration earlier than the date on which the notice is signed is so reviewable. Bounty is only payable in respect of manufacture carried out at registered premises so the determination may have considerable significance. The Committee therefore draws sub-clause 23(4) to the attention of the Senate

under principle 1(a)(iii) in that it may be considered to make *rights, liberties and/or* obligations unduly dependent upon non-reviewable administrative decisions.

Sub-clause 28(5) - Self incrimination

Sub-clause 28(5) states that a person is not excused from answering a question or producing documents on the ground that the answer or the production of the documents might tend to incriminate the person. The sub-clause includes the usual proviso that such an answer or the production of such a document is not admissible in evidence against the person in criminal proceedings other than proceedings relating to the furnishing of information that is, to the knowledge of the person, false or misleading in a material particular.

Although the sub-clause is in standard form the Committee draws it to the attention of the Senate under principle 1(a)(i) as is its usual practice with all clauses removing the privilege against self incrimination in that the sub-clause may be considered to trespass unduly on personal rights and liberties.

Clause 34 - Delegation

Clause 34 would permit the Minister to delegate to "a person" all or any of his or her powers under the Act, other than the power of delegation. The Committee questions whether it is appropriate that such an unrestricted power of delegation should apply, for example, to the Minister's power under sub-clause 23(9) to inform the Comptroller-General that the registration of premises will not permit the orderly development in Australia of the industry manufacturing bountiable equipment. The Committee notes restrictions imposed in similar delegation powers in other

legislation coming before the Parliament, for example new section 34A to be inserted by clause 12 of the Student Assistance Amendment Bill 1985.

The Committee draws clause 34 to the attention of the Senate under principle 1(a)(ii) in that such an unrestricted power of delegation may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

BOUNTY (METAL WORKING MACHINES AND ROBOTS) BILL 1985

This Bill was introduced into the Senate on 11 September 1985 by the Minister for Industry, Technology and Commerce.

This Bill proposes the introduction of new bounty assistance for the metal working machine tools industry from 1 July 1985 to 30 June 1991 in line with the Industries Assistance Commission's major recommendations on long-term assistance measures to the Australian metal working machine tools and robotics industries.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 4 - Definition of "modification" - Non-reviewable discretion

The definition of "modification" in relation to bountiable equipment B in sub-clause 4(1) would give the Minister an unfettered discretion to determine whether a particular conversion of equipment will substantially increase the capacity and capability of the equipment, thus attracting bounty. It does not appear that the right of review by the Administrative Appeals Tribunal of the Comptroller-General's decisions with regard to the payment of bounty accorded in clause 40 would extend to a review of the Minister's decision under this definition and because the definition turns on the Minister's subjective opinion the scope for review pursuant to the Administrative Decisions (Judicial Review) Act 1977 would be very limited.

Accordingly the Committee draws the clause to the attention of the Senate under principle 1(a)(iii) in that the definition of "modification" may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Clauses 6, 7 and 8 - 'Henry VIII' clauses

Clauses 6, 7 and 8 enable the Minister by notice in writing in the Gazette to vary the content of the definitions of bountiable equipment, the formulae for value added in the manufacture or modification of bountiable equipment and the amount of bounty payable expressed as a percentage of the value added. Notices under these clauses are to be subject to tabling and disallowance as if they were regulations.

The clauses may be characterised as 'Henry VIII' clauses in that they enable the content of legislation to be varied by executive instrument. The explanatory memorandum indicates that such flexibility is necessary to take account of rapid technological change in the metal working tools and robotics industries and to cater for immediate changes in the economic circumstances affecting the industry. While the Committee has in the past recognised the need for flexibility in bounty schemes to take account of technological change and market conditions (see comments on Bounty (High Alloy Steel Products) Bill 1983 and Bounty (Steel Mill Products) Bill 1983, Seventeenth Report of 1983) it adopts the practice of drawing attention to all 'Henry VIII' clauses as a matter of principle leaving the question whether the clause may be considered justifiable in the circumstances to the Parliament. Accordingly the Committee draws clauses 6, 7 and 8 to the attention of the Senate under principle 1(a)(iv) in that the clauses may be considered an inappropriate delegation of legislative power.

Sub-clause 28(4) - Non-reviewable decision

Sub-clause 28(4) is in the same form as sub-clause 23(4) of the Bounty (Agricultural Tractors and Equipment) Bill 1985 and the Committee's comment on that sub-clause applies also to this provision.

Sub-clause 33(5) - Self incrimination

Sub-clause 33(5) is in the same form as sub-clause 28(5) of the Bounty (Agricultural Tractors and Equipment) Bill 1985 and the Committee's comment on that sub-clause applies also to this provision.

Clause 39 - Delegation

Clause 39 is in the same form as clause 34 of the Bounty (Agricultural Tractors and Equipment) Bill 1985 and the Committee's comment on that clause applies also to this provision.

EXPORT INSPECTION CHARGES (MISCELLANEOUS AMENDMENTS) BILL 1985

The Committee commented on this Bill in its Eleventh Report of 1985 (18 September 1985). The Minister for Primary Industry has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Clause 20 - Self incrimination

Clause 20 would substitute a new sub-section 10(2) in the Export Inspection Charge Collection Act 1985 removing self incrimination as an excuse for not submitting returns or providing information under the Act. The new sub-section includes the usual proviso that returns or information so submitted or provided are not to be admissible in evidence except in proceedings for failing to furnish information or a return or for knowingly furnishing information that is false or misleading in a material particular.

Although the clause was in standard form the Committee drew it to the attention of the Senate under principle 1(a)(i) as is its usual practice with all clauses removing the privilege against

self incrimination in that the clause might be considered to trespass unduly on personal rights and liberties. The Minister for Primary Industry has responded:

> '[T]he scheme developed by this and related Bills, in consultation with the relevant industry groups, for the collection of export inspection taxes relies upon the provision by exporters and occupiers of export establishments of returns containing full and frank records of relevant operators. The charges paid are checked against the information contained in these returns. The alternative charging system would require a regular detailed inspection of the records of each operator at a substantially higher cost to the Government and the industry, in order to ascertain the operations being carried on. I prefer that information be derived directly from the exporter or processor. Virtually the entire revenue collection by the Department proceeds on this basis. If incrimination was available as an excuse in not providing the information, operations which infringed some provision of the export control laws might not be recorded and returns would be incomplete. Charge levels could not be ascertained on the basis of the incomplete returns.
>
> To encourage the provision of complete returns, and to provide a safeguard against prosecution on the basis of information required by law to be recorded and handed over to the Government, Clause 20 makes the information inadmissible in evidence except in specified kinds of proceedings relating to the return itself. In my view, this provides a safeguard against prosecution on the basis of information contained in the return which is at least as effective as that contained in the repealed provision,

which, while allowing the revenue collection function to proceed, does not trespass unduly on personal rights and liberties.'

The Committee thanks the Minister for his helpful response. The Committee notes that its concerns and the substance of the Minister's response were drawn to the attention of the Senate by Senator Haines in the course of the Second Reading debate on the Bill on 11 October 1985.

EXPORT INSPECTION (ESTABLISHMENT REGISTRATION CHARGE) BILL 1985
EXPORT INSPECTION (SERVICE CHARGE) BILL 1985

The Committee drew attention to clause 7 of both these Bills in its Eleventh Report of 1985 (18 September 1985). The Minister for Primary Industry has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Clause 7 - Inappropriate delegation of legislative power

Clause 7 of both Bills provides that the rate of charge in respect of the registration of an establishment or the provision of an export inspection service at an establishment is to be fixed by regulation. The Committee noted that, unlike section 7 of the Export Inspection Charge Act 1985, no maximum rate of charge was set, and drew the clause to the attention of the Senate under principle 1(a)(iv) in that it might be considered an inappropriate delegation of legislative power. The Minister for Primary Industry has responded:

'These clauses provide no maximum rates of charge in respect of the registration of an establishment and the provision of export inspection services, because of the range of rates which might be applied. Different rates will be applicable to different classes of establishment (depending on the kinds of operation being carried out and the kinds of products being prepared) and to different kinds of attendances. In addition, the amount of charge under either law will depend on whether it will be imposed in tandem with another charge. This flexibility is central to the export inspection charging system .... Within the overall objective of recovering a proportion of the costs of the inspection service, all the charge could be made as a service charge, as a registration charge, as a quantity charge or as a combination of these. Section 7 of the Export Inspection Charge Act 1985, on the other hand, applies a quantity charge at a standard rate varying only according to the product being prepared - with the result that it was possible to describe a fixed number (13) of maximum charges.

The identification of maximum rates of charge depending upon presently agreed service/operations/product/tax system combinations would probably be short-lived as circumstances change, and would be expected to require frequent amendments. I prefer to leave the burden of this flexibility to regulations.'

The Committee thanks the Minister for this response. While the Committee believes that the Parliament should not lightly delegate its taxing powers without fixing limits on the taxes, levies or charges which may be imposed it concedes that in this case the matter may be more appropriately left to regulations.

FOREIGN FISHING BOATS LEVY AMENDMENT BILL 1985

The Committee commented on this Bill in its Eleventh Report of 1985 (18 September 1985). The Minister for Primary Industry has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Clause 4 - Non-reviewable discretion

Clause 4 would insert new sub-sections 4(4) and (5) providing that the Minister may declare by notice in the Gazette that the levy imposed on foreign fishing boats is not payable in respect of a particular boat if the Minister is satisfied that the boat is operated by, on behalf of, or in accordance with the instructions of, a resident of Australia and that the operations of the boat in the Australian fishing zone will confer benefits on Australia. Declarations by the Minister will be tabled under the new sub-section (5) but will not be subject to disallowance.

The Committee questioned whether parliamentary scrutiny was the most appropriate method of review of this type of discretion. Even if Ministerial declarations were to be made subject to disallowance the Parliament would not be particularly well placed to make judgments about whether, for example, the fishing boat in question was being operated in accordance with the

instructions of a resident of Australia. Moreover there was no provision for review of a decision of the Minister refusing to make a declaration under the new sub-section. The Committee suggested that this was a case where jurisdiction to review the Minister's decision should be conferred on an independent, quasi-judicial body like the Administrative Appeals Tribunal. Accordingly the Committee drew the clause to the attention of the Senate under principle 1(a)(iii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions. The Minister for Primary Industry has responded:

> 'For a foreign boat to qualify for declaration under new sub-section 4(4) of the Principal Act, it would first be necessary for the Minister to approve the use of the boat by, on behalf of or in accordance with the instructions of an Australian resident and the grant of a licence in respect of the boat under s.9 of the Fisheries Act 1952 ....In the past, foreign boats employed for this purpose have been made the subject of agreements of the kind referred to in s.9C of the Fisheries Act 1952, following which the Minister has exercised the power in s.9C(3) to waive levy. The insertion into the Principal Act of sub-section 4(4) has the effect of avoiding the administrative burden of making an agreement simply to provide a basis upon which to exercise the existing power in s.9C(3). Decisions made in exercise of that power are not reviewable in accordance with s.16A of the Fisheries Act 1952. The proposed amendment of the Bill is consistent with that approach.

> Section 16A of the Fisheries Act 1952 contains power to review a decision in respect of the grant of a licence for a foreign boat of the kind to which proposed sub-section 4(4) of the Principal Act refers. The power to waive levy would be exercised in any case where such a licence was granted. A decision to refuse such a licence would be the appropriate decision for quasi-judicial review.... In short, if the licence is granted, there would be no refusal to waive levy; if the licence is refused, the question of waiver of levy does not arise.'

The Committee thanks the Minister for this response. However, it is left in doubt as to why sub-section 4(4) should be expressed in terms which confer a discretion on the Minister if, as is suggested, the waiver of the levy follows automatically upon the granting of a licence to a foreign boat under section 9 of the Fisheries Act 1952. Given that under sub-section 4(4) as it stands the Minister may or may not make a declaration waiving the levy the Committee continues to draw the new sub-section to the attention of the Senate under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Clause 5 - Inappropriate delegation of legislative power

Clause 5 would insert a new sub-section 5(2) providing that where the Minister has entered into an agreement with a person other than a foreign government with respect to the granting of licences to foreign fishing boats the amount of the foreign fishing boats levy is to be the amount specified in that agreement. The effect of this clause, taken together with the

Fisheries Agreements (Payments) Act 1981 as amended by the Fisheries Agreements (Payments) Bill 1985, is that the Parliament has delegated to the Minister the power to set, by agreement, the amount of the foreign fishing boat levy in certain cases. By virtue of section 9B of the Fisheries Act 1952 such agreements are tabled in Parliament but they are not subject to disallowance.

The Committee recognized that a similar regime already applies in respect of amounts in lieu of the foreign fishing boats levy payable under agreements entered into by the Minister and foreign Governments. However the Committee queried whether the effect of these arrangements was that the Parliament delegated its taxation powers in this area without retaining any effective control over the exercise of those powers. The Committee drew the clause to the attention of the Senate under principle 1(a)(iv) in that it might be considered an inappropriate delegation of legislative power. The Minister for Primary Industry has responded:

> 'Since establishment of the Australian fishing zone in 1979, the Minister has annually negotiated agreements specifying the annual access fees for Japanese tuna long-line boats and Taiwanese pair trawlers and gill-netters. The Foreign Fishing Boats Levy Act 1981 and the Fisheries Agreements (Payments) Act 1981 were enacted to put beyond doubt the Commonwealth's power to collect access fees that the persons liable to pay had contracted to pay...

The principle of levy being based on what the Minister has already agreed is well-established. Parliament has power to disallow a provision of any regulation under the Foreign Fishing Boats Levy Act 1984 prescribing the amounts of levy payable on the grant of a licence, calculated on the basis of the agreed access fee and agreed number of licences to be issued. Disallowance would, of course, interfere with the exercise of the Commonwealth's rights under the relevant agreement. The existing arrangement, whereby the Government enters into agreements as an exercise of its executive authority, informs Parliament of what has been done and subsequently makes the necessary regulations to provide legal authority for collection of the access fee, has functioned successfully since 1979.

Clause 5 of the Bill is consistent with that established practice. I consider that the established practice forms a satisfactory basis for efficient administration of a complex matter involving the exercise of Australia's offshore sovereignty, Australia's ability to enter into agreements and the protection of the revenue.'

The Committee thanks the Minister for this response which confirms the view advanced by the Committee that the effect of the clause is to remove from the control of the Parliament the setting of the amount of the foreign fishing boat levy where the Government enters into an agreement specifying such an amount in pursuance of its executive power. The Committee therefore

continues to draw the clause to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

GRAIN LEGUMES LEVY COLLECTION BILL 1985

The Committee drew attention to sub-clause 12(2) of this Bill in its Twelfth Report of 1985 as an example of a clause in standard form removing the privilege against self incrimination. The Minister for Primary Industry responded to this comment in similar terms to his response to the Committee's comment on clause 20 of the Export Inspection Charges (Miscellaneous Amendments) Bill 1985 (above). The Bill has now passed the Senate but the Committee notes that, during debate on the Bill in the Senate on 10 October 1985, Senator Haines drew attention to the Committee's concerns with sub-clause 12(2) and Senator Walsh responded substantially in accordance with the Minister for Primary Industry's response to this Committee.

INTERSTATE ROAD TRANSPORT BILL 1985

This Bill was introduced into the House of Representatives on 11 September 1985 by the Minister for Transport.

The Interstate Road Transport Bill 1985 provides for an interstate vehicle registration scheme and trust fund, and makes provision for a Federal system of licensing operators engaged in interstate trade and commerce.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Sub-clause 45(1) - Power to require information

Sub-clause 45(1) would confer on the Regulatory Authorities a very wide power to require persons by notice in writing to furnish information or produce documents which the Authority has reason to believe may be relevant to the functions of the Authority or may relate to a possible contravention of the Act or the regulations, of a law of a State or Territory with respect to the safety of persons or property arising out of the use of motor vehicles or of a road safety standard made under the Act. Failure to furnish the required information or produce the required documents would attract a fine of up to $1,000 or $5,000 in the case of a corporation.

The Committee has in the past drawn attention to such wide powers to require information in bounty legislation (see comments on the Bounty (Room Air Conditioners) Bill 1983 in its Second Report of 1983 and on the Bounty (Two-Stroke Engines) Bill 1984 in its Fourth Report of 1984). In the present case the Committee would suggest that any motorist (not merely a person involved in the interstate road transport industry) could be required to furnish information relating to a possible contravention of a State or Territory motor vehicle law and that any person consigning goods could be required to produce documents on the ground that they were relevant to the performance of the functions of a Regulatory Authority under the Act. The Committee therefore draws the sub-clause to the attention of the Senate under principle 1(a)(i) in that by conferring such a broad power on the Regulatory Authorities it may be considered to trespass unduly on personal rights and liberties.

Paragraph 45(1)(a) states that the Regulatory Authority may require information to be given 'within the time and in the manner specified in the notice'. Paragraph 45(1)(b) states that the Regulatory Authority may require documents to be produced 'in accordance with the notice'. The Bill contains no indication of a minimum time which may be specified in the notice for furnishing the information or, for example, to attend before an inspector to furnish the relevant information. Very early in its history this Committee obtained acceptance of the principle that a minimum time should be stipulated in such notices (see comment on clause 16 of the Dried Sultana Production Underwriting Bill 1981, Second Report of 1982, and the subsequent amendment to that clause stipulating a minimum period of 14 days notice, Senate Journals, 16 March 1982, p. 789). It is disappointed to see a return to the old form of such provisions and draws this aspect of sub-clause 45(1) to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Sub-clause 45(4) - Self incrimination

Sub-clause 45(4) states that a person is not excused from giving information or producing a document on the ground that the information or the production of the document might tend to incriminate the person. The sub-clause departs from the usual form of such provisions in that, while it states that the information or the production of the document is not to be admissible in evidence in a prosecution of a natural person other than a prosecution for making a false or misleading statement, it permits the use of such self incriminating information or documents in the prosecution of a body corporate

for any offence against the Act or the regulations. In other words a body corporate may be required to produce documents under clause 45 on pain of a fine of $5,000 and may then be prosecuted for contraventions of the Act revealed in those documents.

While the question whether the privilege against self incrimination is one which may be claimed by corporations remains to be decided in Australia (though Murphy J. in the High Court has held that it may not, most recently in Controlled Consultants Pty. Ltd. v. Commissioner for Corporate Affairs (1985) 59 ALJR 254 at 258) it has been so held in England : see Freckleton, I., 'Witnesses and the Privilege Against Self Incrimination' (1985) 59 ALJ 204 at pp 207-8. It is the Committee's practice to draw attention to all clauses removing the privilege against self incrimination but it does so particularly in this case because corporations may be compelled to produce incriminating documents which may then be used against them in prosecutions for offences against the Act. The Committee draws sub-clause 45(4) to the attention of the Senate under principle 1(a)(i) in that such a removal of the privilege against self incrimination may be considered to trespass unduly on personal rights and liberties.

INTERSTATE ROAD TRANSPORT CHARGE BILL 1985

This Bill was introduced into the House of Representatives on 11 September 1985 by the Minister for Transport.

This Bill is an integral part of the Federal Interstate Vehicle Registration Scheme to be established by the Interstate Road Transport Bill 1985. It provides for charges to be paid by

motor vehicles and trailers registered under the Interstate Road Transport Bill. These charges are to recover road maintenance and upkeep costs resulting from damage to roads by motor vehicles and trailers engaged in interstate trade and commerce.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 5 - Inappropriate delegation of legislative power

By virtue of clause 5 the amount of the interstate road transport charge is to be ascertained in accordance with regulations made under clause 6. The Committee has consistently drawn attention to provisions permitting a tax, levy or charge to be fixed by regulation without stipulating a maximum amount (see most recently its comment on the Dairy Industry Stabilization Levy Amendment Bill 1985, Seventh Report of 1985).

The Committee draws the clause to the attention of the Senate under principle 1(a)(iv) in that by leaving the amount of charge to be specified in regulations it may be considered an inappropriate delegation of legislative power.

PETERMANN ABORIGINAL LAND TRUST (BOUNDARIES) BILL 1985

This Bill was introduced into the House of Representatives on 19 September 1985 by the Minister for Aboriginal Affairs.

This Bill is necessary to rectify a discrepancy in the boundaries of an area of Aboriginal land described in Schedule 1 of the Aboriginal Land Rights (Northern Territory) Act 1976 as 'Petermann'.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 5 - No compensation payable

The effect of the Bill is to transfer a small area of land - apparently some 2 square kilometres in all - from the control of the Petermann Aboriginal Land Trust to the control of the Uluru Land Trust. Clause 5 provides that the Commonwealth is not to be liable to pay compensation to any person by reason of the enactment of the Bill.

It is not clear why this clause is considered necessary. The Second Reading Speech suggests that the aboriginal owners have agreed to the transfer of the land. However the inclusion of clause 5 may indicate that it is not certain that all the aboriginal owners have in fact so agreed. The Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that by negating any right to claim compensation in respect of the removal of some 2 square kilometres of land from the Petermann Aboriginal Land Trust it may be considered to trespass unduly on personal rights and liberties.

TAXATION LAWS AMENDMENT BILL (NO. 2) 1985

This Bill was introduced into the House of Representatives on 19 September 1985 by the Minister Assisting the Treasurer.

The Bill proposes amendments to the income tax law to give effect to the Government's decisions to counter the use of non-leveraged finance leases and similar arrangements to achieve

tax benefits. It will also introduce statutory loan-back rules that employer-sponsored superannuation funds will be required to follow to secure relevant tax concessions.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Sub-clause 34(6) - Retrospectivity

Sub-clause 34(6) applies the amendments made by clause 27 to assessments in respect of income of the year of income in which 15 May 1984 occurred. Clause 27 would insert a new Division 16D in Part III of the Income Tax Assessment Act 1936 the effect of which is to deny deductions for depreciation and certain other allowances to the lessors of plant or other articles where the lease is in effect an arrangement under which all the risks and benefits of ownership are transferred to the lessee. Deductions will be denied -

- where the lessee or user is a government or a tax-exempt government authority and the arrangement was entered into after 5.00 p.m. on 15 May 1984; or

- where the plant or other articles are used outside Australia for the purpose of producing income which is exempt from tax in Australia and the arrangment was entered into after 5.00 p.m. on 16 December 1984.

The Explanatory Memorandum indicates that these times and dates are the times and dates at which announcements of the respective changes were made.

The Committee is critical of legislation which makes changes, for example, to taxation law retrospective to the date of a Ministerial announcement that such changes are to be made except where that announcement is made in the course of introducing the legislation into the Parliament or where it falls under the general convention associated with measures announced in the Budget or similar statements. Such retrospectivity carries with it the assumption that persons 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 subsequent retrospective legislation 'ratifying' the Ministerial announcement as a pure formality.

The Committee draws the sub-clause to the attention of the Senate under principle 1(a)(i) in that such a retrospective denial of taxation deductions and other allowances may be considered to trespass unduly on personal rights and liberties.

Clause 45 -
New section 13F - Entry and search without warrant

Clause 45 would insert a new section 13F in the Taxation Administration Act 1953 which would permit Commonwealth public servants or State taxation officers authorised by the Commissioner to enter upon any land in the Australian Capital Territory and to have full and free access to all documents in the Territory for the purpose of investigating a matter arising under a State tax law. No judicial authorisation is required and the only safeguard provided is that, under sub-section 13F(3), an officer is not entitled to remain on land if, on request by the occupier, the officer does not produce a certificate of authorisation from the Commissioner.

The Committee draws the provision to the attention of the Senate under principle 1(a)(i) in that by permitting entry upon land and examination of documents without the need for a warrant issued by a magistrate or a justice of the peace it may be considered to trespass unduly on personal rights and liberties.

New Section 13G - Power to obtain information

Clause 45 would also insert a new section 13G in the Principal Act which would enable the Commissioner (or a delegate of the Commissioner pursuant to section 8 of the Act), by notice in writing, to require any person to attend before the Commissioner or an officer authorised by the Commissioner (or the Commissioner's delegate) at a time and place specified in the notice and there answer questions. The Committee has in the past expressed concern at the conferral of such broad powers without any limitation as to the reasonableness of the time and place at which a person may be required to attend: see for example its comment on the Human Rights and Equal Opportunity Commission Bill 1984, *Eleventh Report* of 1984.

The Committee draws the provision to the attention of the Senate under principle 1(a)(i) in that by conferring such powers without appropriate limitation it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman
16 October 1985

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN

MR PRESIDENT,

I PRESENT THE THIRTEENTH REPORT OF 1985 OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

BOUNTY (AGRICULTURAL TRACTORS AND EQUIPMENT) BILL 1985,

BOUNTY (METAL WORKING MACHINES AND ROBOTS) BILL 1985,

EXPORT INSPECTION CHARGES (MISCELLANEOUS AMENDMENTS) BILL 1985,

EXPORT INSPECTION (ESTABLISHMENT REGISTRATION CHARGE) BILL 1985,

EXPORT INSPECTION (SERVICE CHARGE) BILL 1985,

FOREIGN FISHING BOATS LEVY AMENDMENT BILL 1985,

GRAIN LEGUMES LEVY COLLECTION BILL 1985,

INTERSTATE ROAD TRANSPORT BILL 1985,

INTERSTATE ROAD TRANSPORT CHARGE BILL 1985,

PETERMANN ABORIGINAL LAND TRUST (BOUNDARIES) BILL 1985, AND

.../2

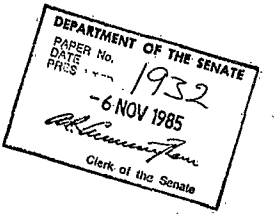
TAXATION LAWS AMENDMENT BILL (NO. 2) 1985.

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 12 DATED 16 OCTOBER 1985.

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1985

6 NOVEMBER 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1985

6 NOVEMBER 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1985

The Committee has the honour to present its Fourteenth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Bounty (Agricultural Tractors and Equipment) Bill 1985

Bounty (Metal Working Machines and Robots) Bill 1985

Interstate Road Transport Bill 1985

Interstate Road Transport Charge Bill 1985

BOUNTY (AGRICULTURAL TRACTORS AND EQUIPMENT) BILL 1985

The Committee commented on this Bill in its Thirteenth Report of 1985 (16 October 1985). The Minister for Industry, Technology and Commerce has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Sub-clause 23(4) - Non-reviewable decision

The Committee drew sub-clause 23(4) to the attention of the Senate under principle 1(a)(iii) in that it did not appear that the decision of the Comptroller-General as to the date of effect of registration of premises under that clause was reviewable. As bounty was only payable in respect of manufacture carried out at registered premises the determination of the date of effect might have considerable significance and so should be reviewable. The Minister for Industry, Technology and Commerce has responded:

> 'To place the reviewability of these types of decisions beyond doubt, I propose to make the decision of the Comptroller-General concerning the effective registration date for particular premises specifically reviewable. Rather than delay the passage of the [Bill] at this time, however, I undertake to include suitable amendments ... in the 1986 Autumn Sittings Statute Law Miscellaneous Provisions Bill.'

The Committee thanks the Minister for this undertaking but suggests that it would be preferable if the amendment were to be made while the Bill is before the Parliament rather than awaiting the passage of a Statute Law (Miscellaneous Provisions) Bill in May or June next year.

Sub-clause 28(5) - Self incrimination

Sub-clause 28(5) is a provision in standard form abrogating the privilege against self incrimination. The Committee drew it to the attention of the Senate under principle 1(a)(i) as is its usual practice with all clauses removing the privilege against self incrimination in that it might be considered to trespass unduly on personal rights and liberties. The Minister for Industry, Technology and Commerce has responded:

> 'As the Committee acknowledged, the provision is in standard form, and includes the usual proviso that the evidence received in such investigations is not admissible in evidence in criminal proceedings against the particular person concerned. It is felt that this adequately safeguards the rights of individuals, while at the same time ensuring that the administrators of a bounty scheme possess adequate power to conduct investigations relevant to the operation of it.'

The Committee thanks the Minister for this response.

Clause 34 - Delegation

The Committee drew clause 34 to the attention of the Senate under principle 1(a)(ii) in that by conferring on the Minister an unrestricted power to delegate all or any of his or her powers under the Act (other than the power of delegation) to "a person" it might be considered to make

rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister for Industry, Technology and Commerce has responded:

> 'The Committee's concern about such an unrestricted power is noted. While it has been the practice in bounties legislation to restrict delegations to officers of, or performing duties in, the Australian Customs Service, I undertake to investigate the matter to ascertain whether, in future, such a [delegation] power should be legislatively restricted to "officers of Customs", or some other more limited class of persons.'

The Committee thanks the Minister for this undertaking.

BOUNTY (METAL WORKING MACHINES AND ROBOTS) BILL 1985

The Committee commented on this Bill also in its Thirteenth Report of 1985 (16 October 1985). The Minister for Industry, Technology and Commerce has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Clause 4 - Definition of "modification" - Non-reviewable discretion

The definition of "modification" in relation to bountiable equipment B in sub-clause 4(1) would give the Minister an unfettered discretion to determine whether a particular conversion of equipment will substantially increase the capacity and capability of the equipment, thus attracting bounty. The Committee commented that the decision of the

Minister did not appear to be reviewable and drew the clause to the attention of the Senate under principle 1(a)(iii) in that the definition of "modification" might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

The Minister for Industry, Technology and Commerce has responded undertaking to amend the legislation to provide expressly for a review of the Minister's determination. In order not to delay the passage of the Bill the Minister proposes that the necessary amendments be included in the 1986 Autumn Sittings Statute Law (Miscellaneous Provisions) Bill. The Committee thanks the Minister for this undertaking but suggests that it would be preferable if the amendment were to be made while the Bill is before the Parliament. The Committee questions what will happen in respect of determinations made by the Minister in the interim if the amendment is left until May or June next year.

Clauses 6, 7 and 8 - 'Henry VIII' clauses

Clauses 6, 7 and 8 enable the Minister by notice in writing in the Gazette to vary the content of the definitions of bountiable equipment, the formulae for value added in the manufacture or modification of bountiable equipment and the amount of bounty payable expressed as a percentage of the value added. Notices under these clauses are to be subject to tabling and disallowance as if they were regulations.

The Committee commented that the clauses could be characterized as 'Henry VIII' clauses in that they enabled the content of the legislation to be varied by executive instrument. While the Committee recognized the need for flexibility in such bounty schemes to take account of

technological change and market conditions it followed its usual practice in drawing the clauses to the attention of the Senate under principle 1(a)(iv) as 'Henry VIII' clauses while leaving the question whether the clauses might be considered justifiable in the circumstances to the Parliament. The Minister for Industry, Technology and Commerce has responded:

> 'The ability in the clauses in question to vary schemes by executive instrument is considered essential to keep the assistance package relevant with the rapidity of such changes. It is noted, as indeed the Committee acknowledged, that the Parliament's ability to scrutinise, and indeed disallow, such variations, is expressly preserved. Further, the rights and entitlements of existing bounty claimants are expressly protected following any such executive amendments.'

The Committee thanks the Minister for this response.

Sub-clauses 28(4) and 33(5) and clause 39

These provisions are in similar form to sub-clauses 23(4) and 28(5) and clause 34, respectively, of the Bounty (Agricultural Tractors and Equipment) Bill 1985, and the comments and responses above in relation to that Bill are equally applicable to these provisions.

INTERSTATE ROAD TRANSPORT BILL 1985

The Committee commented on this Bill in its Thirteenth Report of 1985 (16 October 1985). The Minister for Transport has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Sub-clause 45(1) - Power to require information

Sub-clause 45(1) would confer on the Regulatory Authorities a very wide power to require persons by notice in writing to furnish information or produce documents which the Authority has reason to believe may be relevant to the functions of the Authority or may relate to a possible contravention of the Act or regulations, of a law of a State or Territory with respect to the safety of persons or property arising out of the use of motor vehicles or of a road safety standard made under the Act. Failure to furnish the required information or produce the required documents would attract a fine of up to $1,000 or $5,000 in the case of a corporation.

The Committee suggested that any motorist (not merely a person involved in the interstate road transport industry) could be required to furnish information relating to a possible contravention of a State or Territory motor vehicle law and that any person consigning goods could be required to produce documents on the ground that they were relevant to the performance of the functions of a Regulatory Authority under the Act. The Committee drew sub-clause 45(1) to the attention of the Senate under principle 1(a)(i) in that by conferring such a broad power on the Regulatory

Authorities it might be considered to trespass unduly on personal rights and liberties. The Minister for Transport has responded:

> 'The principal purpose of this provision is to enable licensing authorities to obtain information on the operations of a licensed operator to determine whether the safety of the public is being endangered. For example, it might be alleged that the time given to a driver to deliver goods would require hours of driving and speed limit laws to be exceeded with significant safety implications. Information provided by the consignor of the goods or other road users might well prove critical in determining the factual position.
>
> Similarly, registration authorities seeking to verify the safe condition of registered vehicles might wish to seek information from people other than those directly involved, e.g. independent vehicle repairers etc.'

The Committee thanks the Minister for this response. In continuing to draw attention to the breadth of the power in sub-clause 45(1), together with the response, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

The Committee also drew attention to the fact that information was required to be given within a time specified in the notice and that the Bill stipulated no minimum time. The Committee drew attention to this aspect of sub-clause 45(1) under principle 1(a)(ii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister for Transport has responded:

> 'It is intended that a reasonable time period would be specified in any request for information. It is envisaged that a Ministerial Directive specifying appropriate requirements would be made along these lines under Clause 48. In this connection a minimum period of either 7 or 14 days notice would generally be reasonable depending upon the information required.
>
> However, it is recognized that there may be circumstances where a statutory limit would impede a licensing authority acting in the interests of public safety. To take a hypothetical example, an organisation operating a long distance coach service has a number of major crashes and thus a licensing authority may need to obtain information to determine whether it ought to act immediately to ensure that further lives are not put at risk.

> Any request to provide information within an unreasonably short period would be subject to appeal under the Administrative Decisions (Judicial Review) Act [1977].'

The Committee thanks the Minister for this response. However, it considers that such matters as time limits for furnishing information are more appropriate to be specified in the legislation empowering information to be required rather than left to the goodwill of the Government of the day. It would be a relatively simple matter to specify a minimum time of, say, 14 days, and then to permit it to be dispensed with in circumstances of such seriousness and urgency as would justify this course. The inclusion of such a statutory requirement would materially enhance the right of review accorded under the Administrative Decisions (Judicial Review) Act 1977 as to the legality of the period specified in the notice. The Committee therefore continues to draw this aspect of sub-clause 45(1) to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Sub-clause 45(4) - Self incrimination

Sub-clause 45(4) states that a person is not excused from giving information or producing a document on the ground that the information or the production of the document might

tend to incriminate the person. The sub-clause departs from the usual form of such provisions in that, while it states that the information or the production of the document is not to be admissible in evidence in a prosecution of a natural person other than a prosecution for making a false or misleading statement, it permits the use of such self incriminating information or documents in the prosecution of a body corporate for any offence against the Act or the regulations. In other words a body corporate may be required to produce documents under clause 45 on pain of a fine of $5,000 and may then be prosecuted for contraventions of the Act revealed in those documents.

The Committee commented that, while the question whether the privilege against self incrimination is one which may be claimed by corporations remains to be decided in Australia (though Murphy J. in the High Court has held that it may not, most recently in Controlled Consultants Pty. Ltd. v. Commissioner for Corporate Affairs (1985) 59 ALJR 254 at 258), it has been so held in England: see Freckleton, I., 'Witnesses and the Privilege Against Self Incrimination' (1985) 59 ALJ 204 at pp.207-8. It is the Committee's practice to draw attention to all clauses removing the privilege against self incrimination but it did so particularly in this case because corporations might be compelled to produce incriminating documents which might then be used against them in prosecutions for offences against the Act. The Committee drew sub-clause 45(4) to the attention of the Senate under principle 1(a)(i) in that such

a removal of the privilege against self incrimination might be considered to trespass unduly on personal rights and liberties. The Minister for Transport has responded:

> 'Under the operator licensing arrangement it is envisaged that information relating to the operating practices of the organisation in regard to the observance of road safety standards will effectively only be available from the records of the corporation. Not to require this information to be available to the licensing authority and then a court considering an application for an order for disqualification would in practical terms render the operator licensing scheme ineffective.
>
> The provision is drafted along the lines of section 155 of the Trade Practices Act [1974] and reflects the similar circumstances relating to that area of law.'

The Commission thanks the Minister for this response. The Committee suggests that the rationale for the privilege against self incrimination is not only the preservation of individual liberties but also the public interest in the good administration of justice in that a reliance by the prosecution on compulsory self-disclosure as a source of proof tends to undermine the principle that the Crown must

prove the guilt of an accused person: see Sorby v. Commonwealth of Australia (1983) 46 ALR 237 at 246 per Gibbs CJ. That being so, the privilege should extend equally to corporations and natural persons. The Committee concedes that countervailing considerations may outweigh this principle: see, for example, the recommendation of the Senate Standing Committee on Constitutional and Legal Affairs in paragraph 5.22 of its report on 'The National Crime Authority Bill 1983' (Parliamentary Paper No. 30/1984) that the privilege against self incrimination should extend only to natural persons in that context. Whether such countervailing considerations are present in this case is a matter for the judgment of the Senate and the Committee continues to draw attention to sub-clause 45(4), together with the Minister's response, in the hope that this will result in a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

INTERSTATE ROAD TRANSPORT CHARGE BILL 1985

The Committee commented on this Bill in its Thirteenth Report of 1985 (16 October 1985). The Minister for Transport has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Clause 5 - Inappropriate delegation of legislative power

By virtue of clause 5 the amount of the interstate road transport charge is to be ascertained in accordance with regulations made under clause 6. No maximum amount is specified. The Committee drew the clause to the attention of the Senate under principle 1(a)(iv) in that by leaving the amount of the charge to be specified in regulations it might be considered an inappropriate delegation of legislative power. The Minister for Transport has responded:

> 'It would be inappropriate to specify a maximum charge in the legislation for a number of reasons.
>
> Any charge established under the legislation would need to be valid under Section 92 of the Commonwealth Constitution.
>
> The Bill already limits vehicle registration charges to the amount required to recover the cost of maintenance and upkeep of roads used by registered motor vehicles and trailers. The level of these charges is a factual matter

and is the subject of a review by the Inter-State Commission. The Government has indicated that the initial charge for a 38 tonne vehicle would be around $1,400 per annum.

The Bill also provides that charges are to be made by regulations which provide the Parliament with the opportunity to disallow any level of charges considered to be unreasonable. There is no intention to implement a new or amended level of charges under the regulations until after the period for Parliamentary scrutiny has expired.'

The Committee thanks the Minister for this response.

Michael Tate
Chairman
6 November 1985

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN

MR PRESIDENT,

I PRESENT THE FOURTEENTH REPORT OF 1985 OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

BOUNTY (AGRICULTURAL TRACTORS AND EQUIPMENT) BILL 1985,

BOUNTY (METAL WORKING MACHINES AND ROBOTS) BILL 1985,

INTERSTATE ROAD TRANSPORT BILL 1985, AND

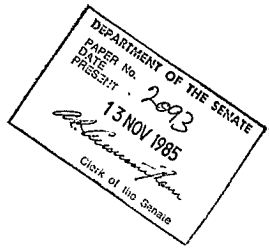
INTERSTATE ROAD TRANSPORT CHARGE BILL 1985.

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 13 DATED 6 NOVEMBER 1985.

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.

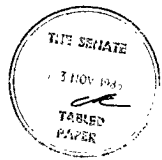
AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF 1985



13 NOVEMBER 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF 1985

13 NOVEMBER 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF 1985

The Committee has the honour to present its Fifteenth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to a clause of the following Bill which contains a provision that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Health Legislation Amendment Bill (No. 2) 1985

HEALTH LEGISLATION AMENDMENT BILL (NO. 2) 1985

This Bill was introduced into the House of Representatives on 9 October 1985 by the Minister for Health.

The Bill seeks to make a number of important changes in a variety of fields relating to the Health portfolio. First, the Bill proposes to increase the competitive ability and the autonomy of the Commonwealth Serum Laboratories. Second, it proposes significant reforms to the medi-fraud provisions of the Health Insurance Act 1973. Third, it provides, under a sunset clause, for the Health Insurance Commission to undertake planning for the establishment of the Australia Card. Finally, it provides for a number of amendments mainly of a technical nature to various aspects of the health function.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 49 - New sub-section 128A(5) - Reversal of onus of proof

New section 128A which would be inserted by clause 49 creates an offence where a person makes a statement that is false or misleading in a material particular and capable of being used in connection with a claim for a benefit or payment under the Health Insurance Act 1973. New sub-section 128A(5) provides that it is a defence if a person charged with an offence under the section in relation to a statement made by the *person did not know, and could not reasonably be expected to* have known, that the statement was -

(a) false or misleading in a material particular; or

(b) capable of being used in connection with a claim for a benefit or payment under the Act.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, 'The Burden of Proof in Criminal Proceedings' (Parliamentary Paper No. 319/1982) that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings but rather that they should merely be required to bear an evidential onus, that is the onus of adducing evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution. Thus, in the present case, rather than requiring persons charged under section 128A to exculpate themselves by establishing their lack of the relevant knowledge, the preferred course would be merely to require them to adduce evidence that they did not have the relevant knowledge, evidence which the prosecution would then be required to rebut to sustain its charge.

The Committee drew new sub-section 128A(5) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant it might be considered to trespass unduly on personal rights and liberties. The Minister for Health has responded:

> 'Firstly, the provision on which your Committee has commented is one of a number of amendments to the Health Insurance Act designed to enhance the equity and effectiveness of the legislative framework dealing with the abuse of Medicare. The statutory defence applies to offences involving the issue of false or misleading accounts or other statements that are capable

of being used as a basis for a claim for Medicare benefits. These provisions together with other amendments concerning Medifraud and the disqualification of practitioners were developed in consultation with the Australian Medical Association which represents the profession most affected by the provisions. Prior to their introduction into the Parliament, the amendments were referred to and received the formal endorsement of the Australian Dental Association and the Australian Optometrical Association as well as the Australian Medical Association.

Secondly, as the Committee will be aware, the proposed sub-section 128A(5) is intended to replace a similar provision that already exists in sub-section 129(3) of the Health Insurance Act. The existing provision applies in relation to an indictable offence punishable by a fine of $10,000 or imprisonment of 5 years. Both the Government and the professional associations involved have been concerned that the defendant should not bear the persuasive burden of proof for an indictable offence. The proposed legislation provides for the existing offences to be separated into summary and indictable offences. In the case of indictable offences, the onus will be on the prosecution to prove all ingredients of the offence; in the case of summary offences, for which the maximum penalty is a fine of $2,000, the statutory defence is retained. Proposed section 129AB, to be inserted by clause 51 of

the Bill, proscribes specifically the punishment of a person under more than one provision in respect of the one offence.

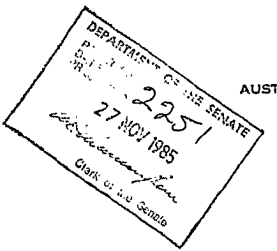
Finally, I consider that evidence as to what a defendant knew or could reasonably be expected to know about the contents or issue of an account or other statement associated with a claim for Medicare benefits is a matter predominantly within the purview of the defendant's knowledge. While it is appropriate for the Crown to bear this burden in indictable offences, I believe that it is not unreasonable in a summary offence to require a defendant to establish on balance of probabilities matters within his or her knowledge. As such, I believe that the provision falls within the class of provisions which the Attorney-General's Department considers justifiable given the need for effective endorcement of Commonwealth legislation - see extract of its submission quoted at paragraph 5.5 of the Report of the Senate Standing Committee on Constitutional and Legal Affairs on "The Burden of Proof in Criminal Proceedings".'

The Committee thanks the Minister for this detailed response. However it remains of the view that, in accordance with the recommendation of the Senate Standing Committee on Constitutional and Legal Affairs in the report referred to above, the persuasive onus should not be imposed on a defendant in criminal proceedings in any circumstances. The Committee repeats its suggestion that in the present case it would be preferable for the defendant to be required merely

to bear an evidential onus in establishing the statutory defence, a suggestion which unfortunately the Minister did not take up in his response.

The Committee therefore continues to draw new sub-section 128A(5) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman
13 November 1985



AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF 1985

27 NOVEMBER 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF 1985

27 NOVEMBER 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF 1985

The Committee has the honour to present its Sixteenth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Australian Nuclear Science and Technology Organisation Bill 1985

Bounty (Commercial Motor Vehicles) Amendment Bill (No. 2) 1985

Customs Tariff (Stand-By Duty) Bill 1985

Judiciary Amendment Bill 1985

Petroleum (Submerged Lands) (Cash Bidding) Amendment Bill 1985 [No. 2]

Postal Services Amendment (Continuance of Postal Services) Bill 1985

Statute Law (Miscellaneous Provisions) Act (No. 1) 1985

Veterans' Entitlements Bill 1985

Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Bill 1985

AUSTRALIAN NUCLEAR SCIENCE AND TECHNOLOGY ORGANISATION BILL 1985

This Bill was introduced into the Senate on 6 November 1985 by the Minister for Resources and Energy.

The purpose of this Bill is to establish a successor organisation to the existing Australian Atomic Energy Commission which was established under the Atomic Energy Act 1953.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 40 - Delegation

Clause 40 permits the Minister to delegate to 'a person' all or any of the Minister's powers under the Act other than the power of delegation and the powers of the Minister to appoint deputies for members of the Executive and to give directions to the Executive.

The Committee has expressed concern on a number of occasions in relation to unrestricted powers of delegation. While some steps have been taken in the present case to restrict the powers which may be delegated the Committee questions whether it is really intended that the Minister will delegate the power to appoint an acting Deputy Chairperson (clause 17) or the power to appoint the members of the Australian Nuclear Science and Technology Advisory Council (clause 38) and if so to whom? The Committee also suggests that if powers such as the power to approve estimates of expenditure (clause 26), the power to approve entry into contracts for amounts exceeding $200,000 (clause 29) and the power to determine the

constitution and functions of the Joint Consultative Committee to be established under clause 43 are to be delegated then they should only be capable of being delegated to senior Departmental officers and not to any person.

The Committee draws the clause to the attention of the Senate under principle 1(a)(ii) in that by permitting such unrestricted delegation it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

BOUNTY (COMMERCIAL MOTOR VEHICLES) AMENDMENT BILL (NO. 2) 1985

This Bill was introduced into the House of Representatives on 18 September 1985 by the Minister Representing the Minister for Industry, Technology and Commerce.

This Bill, which is part of a package of revised assistance arrangements for the commercial motor vehicle industry in Australia, proposes the phasing out over a three year period commencing on 1 January 1986 of the bounty assistance on certain components used in the assembly of general purpose heavy commercial vehicles.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 8 - New sub-section 14N(4) - Non-reviewable discretion

The Committee drew new sub-section 14N(4) which would be inserted by clause 8 to the attention of the Senate under principle 1(a)(iii) in that it did not appear that the

decision of the Comptroller-General as to the date of effect of registration of premises under the new sub-section was reviewable. As bounty was only payable in respect of manufacture carried out at registered premises the determination of the date of effect might have considerable significance and so should be reviewable.

The Minister for Industry, Technology and Commerce responded undertaking to make the decision of the Comptroller-General concerning the effective date of registration for particular premises specifically reviewable. The Minister proposed to include the necessary amendment in the 1986 Autumn Sittings Statute Law (Miscellaneous Provisions) Bill. The Committee thanks the Minister for this undertaking but suggests that it would be preferable if the amendment were to be made while the Bill is before the Parliament rather than awaiting the passage of a Statute Law (Miscellaneous Provisions) Bill in May or June next year.

CUSTOMS TARIFF (STAND-BY DUTY) BILL 1985

This Bill was introduced into the House of Representatives on 11 September 1985 by the Minister Representing the Minister for Industry, Technology and Commerce.

This Bill forms part of the Government's policy on domestic crude oil marketing arrangements. This policy was announced by the former Minister for Resources and Energy, Senator Walsh, on 9 October 1984. The purpose of the Bill is to enable the imposition of a special Customs duty of 3 cents per litre on the importation of certain petroleum oils, should that prove to be necessary in the event of a shortfall or underlifting of indigenous crude oils by local refiners.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clauses 10 and 11 - Retrospectivity

The intention of the Bill is apparently to deter refiners from not taking up their quota of Australian crude oil under the Crude Oil Marketing Partial Allocation Scheme. It seeks to do this by imposing a duty of 3 cents a litre on oil imported by refiners who fail to take up their quota over a period of 3 consecutive months (in the case of Bass Strait oil) or 6 consecutive months (in the case of other oil). Clauses 10 and 11 provide that the failure of refiners to take up their quotas may be measured from 1 July (in the case of Bass Strait oil) or 1 April (in the case of other oil). Thus while duty can only be imposed after the Bill has become law, it may be imposed on the basis of events which took place before the introduction of the Bill into Parliament.

The Second Reading speech explains this retrospectivity on the basis that the Crude Oil Marketing Partial Allocation Scheme came into effect on 1 January 1985 and that it was the 'previously announced and clearly defined government intention' that the Bill should take effect, as far as practicable, from the introduction of that Scheme. The Committee is concerned that a customs duty should be imposed on the basis of events which have occurred prior to the introduction into Parliament of the Bill imposing the duty and draws clauses 10 and 11 to the attention of the Senate under principle 1(a)(i) in that such retrospectivity may be considered to trespass unduly on personal rights and liberties.

JUDICIARY AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 19 September 1985 by the Attorney-General.

The purpose of this Bill is to repeal sub-section 69(3) of the Judiciary Act 1903, which presently permits a person charged with an offence against the laws of the Commonwealth to apply to a judge of the High Court or of a Supreme Court of a State for the appointment of counsel for his or her defence.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 3 - Removal of right to legal aid

Sub-clause 3(1) would repeal sub-section 69(3) of the Judiciary Act 1903. That sub-section provides that a person committed for trial for an offence against the laws of the Commonwealth may apply to a judge of the High Court or of a State Supreme Court for the appointment of counsel for his or her defence. If the judge is satisfied that the applicant is without adequate means to provide for his or her defence and that it is desirable in the interests of justice that counsel should be appointed the judge certifies this to the Attorney-General who then causes arrangements to be made for the defence of the applicant.

The Second Reading Speech argues that sub-section 69(3) is 'out of step with modern developments in the provision of legal aid' and that it is 'ripe for exploitation'. It draws attention to the development in Australia of a comprehensive system of legal aid through State and Territory legal aid commissions and the Australian Legal Aid Office. Legal aid

is provided on the basis of the ability of the applicant to meet the cost of proceedings and 'comprehensive review and appeal procedures' are provided. The Second Reading Speech argues that if legal aid continues to be provided under sub-section 69(3) the costs to the Commonwealth could be substantial.

The Committee notes that Article 14 of the International Covenant on Civil and Political Rights recognises the right of persons charged with criminal offences to have legal assistance in any case where the interests of justice so require and to have such assistance without payment if such persons do not have the means to pay for it. Sub-section 69(3) is one means of according recognition of that right in Australian law. The Committee recognises that whether sub-section 69(3) should be repealed is essentially a question of policy. However it notes that a presently existing form of access to legal aid is being taken away. The right to legal aid under sub-section 69(3) may be distinguished from the provision of legal aid generally where the apportionment of scarce financial resources becomes a consideration.

The Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that by removing the presently existing entitlement to legal aid under sub-section 69(3) it may be considered to trespass unduly on personal rights and liberties.

PETROLEUM (SUBMERGED LANDS) (CASH BIDDING) AMENDMENT BILL 1985 [NO. 2]

This Bill was introduced into the Senate on 6 November 1985 by the Minister for Resources and Energy.

This reintroduced Bill proposes the amendment of the Petroleum (Submerged Lands) Act 1967 to provide for a cash bidding system for the award of petroleum exploration permits in highly prospective offshore areas.

This Bill is in exactly the same form as the similarly titled Bill introduced into the Senate on 28 March 1985. In its Alert Digest No. 3 of 1985 (17 April 1985) the Committee drew the attention of the Senate to the following clause of the Bill:

Clause 5 - Proposed section 22B -Non-reviewable decision

Proposed sub-sections 22B(1) and (2) would give the Joint Authority (comprising the Commonwealth Minister and the relevant State Minister) a discretion to reject applications for permits to explore for petroleum. No mechanism is provided for review of the exercise of this discretion. The Committee drew the attention of the Senate to the fact that, as the criteria for rejecting an application were not specified, the scope for review under the Administrative Decisions (Judicial Review) Act 1977 was limited. The Minister for Resources and Energy responded:

> 'While the criteria for rejecting an application are not specified in the legislation, I draw your attention to sub-section 22A(3) of the Bill. This sub-section places an obligation on the Joint Authority to publish in the Gazette, at the time applications are invited, certain information including the matters that the Joint Authority will take into account in determining whether to reject an application. Should the Joint Authority reject an application under sub-section 22B(1) or (2) on

grounds other than those that were published in the Gazette, then that decision is open to challenge, and any decision to award the permit to another applicant would also be liable to be set aside if challenged.'

The Committee thanks the Minister for this response which answers its concerns in relation to the clause.

POSTAL SERVICES AMENDMENT (CONTINUANCE OF POSTAL SERVICES) BILL 1985

This Bill was introduced into the Senate on 7 November 1985 by Senator Lewis.

This legislation provides that where the Minister, after consultation with the Australian Postal Commission, is satisfied that, by reason of an industrial dispute or for any other reason, the Commission is unable to operate its postal services in such a manner as will meet the social, industrial and commercial needs of the Australian people for postal services, whether throughout Australia or in a particular part of Australia, the Minister may suspend the monopoly provision relating to the carriage of mail applying to Australia Post.

The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 3 - Henry VIII clause

Clause 3 would insert a new sub-section 85(3) in the Principal Act permitting the Minister, by notice in the Gazette, to suspend the operation of the offence provision in sub-section 85(1) if the Minister is satisfied that the Commission, by reason of an industrial dispute or for any other reason, is unable to operate its postal services in such a manner as will meet the social, industrial and commercial needs of the Australian people.

Insofar as it permits the Minister, by Executive instrument, to suspend the operation of a law passed by Parliament, the clause may be characterised as a 'Henry VIII' clause. As is its usual practice with all such clauses the Committee draws the provision to the attention of the Senate under principle 1(a)(i) in that it may be considered an inappropriate delegation of legislative power while leaving the question whether it may be considered justifiable in all the circumstances to the Parliament.

STATUTE LAW (MISCELLANEOUS PROVISIONS) ACT (NO. 1) 1985

In its Eight Report of 1985 the Committee drew attention to the reversal of the persuasive onus of proof contained in new sub-sections 11(2) and (4) and 22(2) and (4) which were to be inserted in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 by the Statute Law (Miscellaneous Provisions) Bill (No. 1) 1985. The Committee reported that it had received a response from the Minister for Transport undertaking, in order to facilitate the passage of the Bill through the Senate without amendment, to raise the Committee's concerns with the Attorney-General in order to examine the appropriate form of the legislation. In the course of debate on the Bill in the Senate on 30 May 1985 the

Minister Representing the Attorney-General, Senator Evans, undertook not to proclaim into effect the relevant amendment until some time into the Budget session in order to enable further consideration to be given to the matters raised by the Committee.

The Committee has now received a lengthy response from the Minister for Transport indicating why, in his view, the present form of the amendments is appropriate. That response is reprinted in full as an appendix to this Report. Briefly, the Minister argues:

(i) that the reversal of the persuasive onus of proof is necessary for Australia to comply with its obligations under the International Convention for the Prevention of Pollution from Ships, 1973; and

(ii) that it is not possible to substitute only an evidential onus - that *is*, the onus of adducing evidence of the existence of a *defence*, the burden of negativing which will then be borne by the prosecution - since in the view of the Director of Public Prosecutions it would be difficult for the prosecution to establish beyond reasonable doubt that the defendant knew that a relevant discharge had occurred in all but a minority of cases.

In other words, if the prosecution were forced to prove knowledge in every case where it became a live issue - the effect of the defendant satisfying an evidential onus - most prosecutions would fail, or would not be brought in the absence of admissions or other circumstantial evidence

establishing that the defendant knew of the relevant discharge. This in turn would cast doubt on Australia's compliance with the Convention.

The Committee thanks the Minister for his lengthy and detailed response. It concedes that in this case the reversal of the persuasive onus of proof may be justified by the particular circumstances, especially the need to comply with the Convention.

VETERANS' ENTITLEMENTS BILL 1985

This Bill was introduced into the House of Representatives on 16 October 1985 by the Minister Representing the Minister for Veterans' Affairs.

The purpose of the Veterans' Entitlements Bill 1985 is to consolidate, rationalise and simplify the entitlements available to members of the veteran community. It represents the most important and comprehensive overhaul of the repatriation system since its establishment over 60 years ago.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 84 - Lack of parliamentary scrutiny

Sub-clause 84(6) provides that the Commission may determine a scale of charges in respect of the treatment at its hospitals and institutions of veterans (otherwise than for war-caused injuries or diseases) or persons other than veterans. Under sub-clause 84(7) the Commission may determine that persons in a specified class of persons are to be exempt from paying the charges fixed under sub-clause 84(6). There is no provision for parliamentary scrutiny of the scale of charges or of the exemptions determined by the Commission.

The Committee draws the clause to the attention of the Senate under principle 1(a)(v) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clauses 97, 99, 100, 101, 102, 103, 104, 106, 107 and 108 - Non-reviewable discretions

Under Part VI of the Bill the Commission may grant to a veteran a clothing allowance (clause 97), an attendant allowance (clause 98), a decoration allowance (clause 102), a Victoria Cross allowance (clause 103), a recreation transport allowance (clause 104), special assistance or benefits (clause 106), a temporary incapacity allowance (clause 107) and a loss of earning allowance (clause 108). The Commission may also grant a benefit towards the funeral expenses of a veteran, a dependant of a deceased veteran, or a service pensioner (clauses 99, 100 and 101). There is a right of review in respect of only one of these allowances and benefits, namely the attendant allowance (see clause 134). In respect of the grant of the other allowances and benefits the Commission's decision would be final, subject only to challenge as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. Because no criteria are given for the exercise by the Commission of its discretion in the grant of these allowances and benefits the scope for such review would be limited.

The Committee draws these clauses to the attention of the Senate under principle 1(a)(iii) in that they may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Clause 105 - Lack of parliamentary scrutiny

Clause 105 empowers the Commission, by instrument in writing, to establish a Vehicle Assistance Scheme for the provision of motor vehicles to veterans and for the payment of allowances towards the cost of running and maintaining the vehicles so

provided. The instruments establishing, varying or revoking the scheme must be approved by the Minister but they are not required to be subjected to any form of parliamentary scrutiny.

The Committee draws the clause to the attention of the Senate under principle 1(a)(v) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 110 - Lack of parliamentary scrutiny

Clause 110 states that a veteran or a dependant of a deceased veteran who travels for the purpose of obtaining treatment and an attendant accompanying such a person are to be entitled to the payment of travelling expenses 'subject ... to such conditions so the Commission determines'. Such determinations by the Commission are not required to be subjected to any form of parliamentary scrutiny.

The Committee draws the clause to the attention of the Senate under principle 1(a)(v) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 116 - Lack of parliamentary scrutiny

Clause 116 empowers the Commission, by instrument in writing, to establish a Veterans' Children Education Scheme to provide education and training for eligible children. As with the Vehicle Assistance Scheme the instruments establishing, varying or revoking the scheme must be approved by the Minister but are not required to be subjected to any form of parliamentary scrutiny.

The Committee draws the clause to the attention of the Senate under principle 1(a)(v) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Paragraph 119(7)(b) - Ministerial determination

Under paragraph 119(7)(b) the Minister for Defence may determine service in the Defence Force of a specified kind to be 'hazardous service'. Where a claim is made in respect of the incapacity from injury or disease of a member of the Forces or the death of such a member which relates to 'hazardous service' rendered by the member the Commission is required to determine that the injury, disease or death was defence-caused unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination. If the service of the member of the Forces is not determined to be 'hazardous service' then the member or the dependant of the member does not have the advantage of this criminal standard of proof: the Commission is merely required to decide the issues relevant to the claim to its reasonable satisfaction.

Despite the importance of determinations of 'hazardous service' to the claimants concerned there is no parliamentary scrutiny of such determinations. The Committee drew attention in its Eighth Report of 1985 to the lack of such scrutiny in respect of similar determinations under section 107J of the Repatriation Act 1920 as amended by clause 25 of the Repatriation Legislation Amendment Bill 1985. The Private Secretary to the Minister for Veterans' Affairs responded to this comment on 16 August 1985 indicating that what might be designated as 'hazardous service' had yet to be decided:

'In some circumstances, it might be possible to define it by a generic description of the service (e.g. parachuting duties), at other times on the basis of service with a specific Defence Force group (e.g. service with the Special Air Services Regiment), or by a description of particular incidents (e.g. neutralising an unexploded device).

The Department of Defence has advised, however, that the Minister for Defence may consider a highly sensitive operation should be declared as 'hazardous service'. In these circumstances, issues of national security could require that such a determination not be made public. Even if there were to be a legislative provision requiring the tabling of determinations, it would need some companion provision whereby the Minister for Defence was enabled to issue a conclusive certificate to avoid tabling specific determinations. This in turn raises the further question whether a conclusive certificate would be required to be tabled. Whether legislative provisions of such complexity can be justified in the present circumstances would require further consideration.'

The Committee assumes that it has been concluded that tabling and disallowance of determinations of what constitutes 'hazardous service' cannot be justified since the provision remains unchanged in the present Bill. However the Committee still takes the view that the determinations are of sufficient significance in the scheme of the legislation that some mechanism should be found whereby the Parliament may be

informed of such determinations (other than those which may concern matters of national security) and may debate the making of a determination or the failure to make a determination in respect of particular service. The Committee also notes that it would be concerned at the use of conclusive certificates if the issue of such certificates were not to be clearly restricted to situations involving considerations of national security.

The Committee draws the provision to the attention of the Senate under principle 1(a)(v) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 122 - Non-reviewable decision

Clause 122 enables the Commission to pay to the legal personal representative of a person who has died or to distribute among the dependants of such a person any accrued amount of pension, allowance or other benefit unpaid at the death of the person or any amount which has become payable after the death in respect of the grant of a claim made before the death of the person. Such an amount may be not insubstantial since the Commission may grant pensions with effect from a date 3 months before the date on which the claim for the pension was lodged with the Department. By virtue of sub-clause 122(4) the Commonwealth is not to be liable to any action, claim or demand in respect of any amount paid or distributed in accordance with the clause. The effect of this clause is to prevent any review of the exercise by the Commission of its discretion under the clause. Thus, for example, if the Commission were to distribute an amount unequally among the dependants of the deceased, a person who felt aggrieved by that decision would not be able to challenge it.

The Committee draws the clause to the attention of the Senate under principle 1(a)(iii)in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Paragraph 127(1)(c) - Reasonableness of time and place

Sub-clause 127(1) empowers the Secretary, by notice in writing, to require persons to furnish information, to produce documents and to appear before a specified officer to give evidence or produce documents. While in each case not less than fourteen days notice must be given for the person to comply with the requirement, there is no limitation as to the reasonableness of the time and place at which a person may be required to appear before an officer. Failure to attend at the time and place notified would constitute an offence carrying a penalty of a fine of up to $1,000 or 6 months imprisonment or both unless the person concerned was incapable of complying with the notice.

The Committee has expressed its concern in relation to a number of similar provisions that the failure to require that the time and place specified be reasonable may result in the provision operating harshly in some cases. Accordingly the Committee draws the provision to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

Clause 128 - Self incrimination

Clause 128 provides that a person is not excused from furnishing information, producing a document or giving evidence on the ground that the information or evidence or the production of the document may tend to incriminate the person. The clause is subject to the usual proviso that any

information so furnished, evidence so given or document so produced is not admissible in evidence against the person except in proceedings for a failure to furnish information, give evidence or produce a document or for furnishing information or giving evidence that is false or misleading.

As is its usual practice the Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that the removal of the privilege against self incrimination may be considered to trespass unduly on personal rights and liberties.

Clause 131 - Lack of parliamentary scrutiny

Clause 131 provides for the payment of travelling expenses to persons attending before the Commission to support claims or as witnesses and to persons accompanying such persons as attendants. As in clause 110 the entitlement to travelling expenses is in each case expressed to be 'subject to such conditions as the Commision determines'. There is no provision for parliamentary scrutiny of such determinations. Furthermore, whereas under sub-clauses 131(1), (3), (5) and (7) the relevant travelling expenses are to be prescribed, the travelling expenses to be paid to attendants under sub-clauses 131(2), (4), (6) and (8) are to be such as the Commission 'considers reasonable'. If it is intended that the Commission will determine these expenses in accordance with a standard scale then it is suggested that any such scale should be subject to parliamentary scrutiny. If, on the other hand, the Commission is to determine such travelling expenses on a case by case basis then it is suggested that its decision should be subject to review by an independent, quasi-judicial body like the Veterans' Review Board.

The Committee draws the clause to the attention of the Senate under principles 1(a)(iii) and (v) both in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny and in that it may make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Clause 206 - Blanket statutory defence

Clause 206 creates statutory defences where a person sues the Commonwealth, the Commission, a medical practitioner working at a hospital or other institution operated by the Commission or an employee of, or a person working for or on behalf of, the Commission claiming that he or she -

(i) contracted Acquired Immune Deficiency Syndrome (AIDS) by reason of having been administered blood supplied by the Commission or the Australian Red Cross Society (the Society);

(ii) contracted AIDS by reason of having been involved in the taking, testing, handling, producing, supplying or administering to a patient of blood so supplied;

(iii) contracted AIDS from a person who contracted the disease in a circumstance specified in paragraph (i) or (ii); or

(iv) is a dependant of a person who has died as a result of contracting AIDS in any of the above circumstances.

In such an action it is to be a defence that -

(a) the blood administered had been tested using equipment and methods approved under the Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance 1985, similar State or Northern Territory legislation or the Regulations and had been certified free of antibodies to the virus HTLV III; or

(b) the Commission or the Society, as the case may be, complied with the requirements prescribed by the Ordinance, similar State or Northern Territory legislation or the Regulations in respect of the taking of the relevant blood and the testing, processing and handling of that blood.

The Committee is concerned about two aspects of this provision. First, it places persons who have contracted AIDS or the dependants of persons who have died as a result of contracting that disease in a different situation from other persons in pursuing an action for negligence because it elevates into a statutory standard a particular method of testing blood and particular procedures to be followed in the taking of blood and the handling of blood. If the blood has been tested in accordance with that method and if the prescribed procedures have been followed then the person is not to have a cause of action even though they have contracted AIDS. Secondly the Committee suggests that the provision as drafted leaves in some obscurity the standard of care to be met in complying with the prescribed requirements in respect of the taking of blood and so forth. To the extent that those requirements are not a simple matter of following a step by step check list but involve matters of judgment - for example in determining whether the statements

made by a blood donor in a declaration that he or she has not engaged in certain sexual activity are true or false - some standard of care would seem to be envisaged but none is specified. The Explanatory Memorandum states that the clause 'will not provide blanket protection where, for example, negligence on the part of the Commonwealth, the Commission or a medical practitioner is shown'. However the Committee is concerned that the clause may provide the Commonwealth, the Commission and medical staff with protection from suit on the basis that the prescribed requirements were carried out even though those requirements may have been carried out in a less than satisfactory manner.

Accordingly the Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that by limiting the scope of an action for negligence brought by a person who has contracted AIDS or the dependant of such a person who has died of the disease it may be considered to trespass unduly on personal rights and liberties.

Paragraph 208(1)(a) - Strict liability

Paragraph 208(1)(a) provides that a person shall not make a false or misleading statement in connection with a claim for a pension, allowance or other benefit under the Act. The more usual form of such a provision would be to create an offence only if a person 'knowingly' makes a false or misleading statement (see, for example, sub-clauses 127(5) and 168(2)). Because the requirement that the person making the statement knows that it is false or misleading has been omitted in paragraph 208(1)(a) it may be thought to create an offence of strict liability: that is, it would be sufficient to secure a conviction if it were proved that the statement was in fact false or misleading even if the person making it believed it to be true.

The Committee draws the provision to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

General Comment

The Committee notes for the information of the Senate that clause 119 continues in force the change in the standard of proof for the determination of veterans' entitlements made by the Repatriation Legislation Amendment Act 1985. By virtue of that change the Commission is required not to grant a claim if it is reasonably satisfied that there is no material before it raising a reasonable hypothesis that the injury, disease or death giving rise to the claim was war-caused. Previously, in order not to grant a claim, the Commission had to be satisfied beyond reasonable doubt that there were insufficient grounds for granting the claim: see Repatriation Commission v. O'Brien (1985) 58 ALR 119 per Gibbs CJ, Wilson and Dawson JJ at 128.

The Committee recognises that this change in the standard of proof for the grant of repatriation benefits is clearly a matter of government policy. The Committee also recognises that in strictly legal terms a claimant bears no onus to prove his or her claim before the Commission. While the Committee therefore takes the view that the change in the standard of proof is not a matter on which it should formally make comment under its Terms of Reference, it draws attention to its concerns with provisions which reverse the traditionally accepted onus of proof in other contexts, most particularly in criminal proceedings: see pages 26 to 32 of the paper on 'The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills 1981-1985', tabled in September, and see also the report of the Senate Standing

Committee on Constitutional and Legal Affairs on The Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319/1982).

VETERANS' ENTITLEMENTS (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1985

This Bill was introduced into the House of Representatives on 16 October 1985 by the Minister Representing the Minister for Veterans' Affairs.

The Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Bill 1985 will provide arrangements for the transition from the existing Repatriation Act 1920 and other supplementary legislation to the Veterans' Entitlements Bill 1985.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clauses 42, 43 and 44 - Retrospectivity

The Repatriation Legislation Amendment Act 1985 altered the standard of proof applicable in respect of claims for pensions by requiring that the Repatriation Commission not grant a claim if it was reasonably satisfied that there was no material before it raising a reasonable hypothesis that the injury, disease or death giving rise to the claim for a pension was war-caused. Previously, in order not to grant a claim, the Commission had to be satisfied beyond reasonable doubt that there were insufficient grounds for granting the claim: see Repatriation Commission v. O'Brien (1985) 58 ALR 119 per Gibbs CJ, Wilson and Dawson JJ at 128.

In its Eighth Report of 1985 the Committee drew attention to the fact that sections 69, 70 and 71 of the amending Bill (as it then was) applied the altered standard of proof to claims made before 15 May 1985, to applications for review by the Veterans' Review Board made before 15 May 1985 and to certain applications for review by the Administrative Appeals Tribunal of decisions made before 15 May 1985. The Committee suggested that such retrospective alteration of entitlements might be considered to trespass unduly on personal rights and liberties. The Private Secretary to the Minister for Veterans' Affairs responded to this comment on 16 August 1985 stating that:

> 'It is a matter of Government policy that the [resonable hypothesis modification intended to overcome the effect of the High Court decision in O'Brien] should be applied in a consistent manner to all decisions made after the date of effect of the Amendment Act. It is the Government's view that personal rights flow from the determination of Commonwealth liability to pay a pension rather than the mere act of lodging a claim.'

Clauses 42, 43 and 44 of the present Bill are similar in effect to sections 69, 70 and 71 of the Repatriation Legislation Amendment Act 1985 although the Committee is pleased to note that the terms of these clauses have been clarified so as to overcome any doubts similar to those which the Committee also raised in its Eighth Report concerning the continued application of the more advantageous criminal standard of proof to claims lodged before 15 May 1985. While it is clear that this provision will put applicants in a new and less advantageous position, the Committee indicates as a matter of record that it accepts the Government's view

that the application of the altered standard of proof in the determination of claims and appeals after the date on which the amending legislation came into operation does not involve any retrospectivity (even though such claims and appeals may have been lodged or initiated prior to the commencement of the amending legislation).

Clause 59

Reasonableness of time and place

Clause 59 amends the Acts set out in the Schedule including the Seamen's War Pensions and Allowances Act 1940. New paragraph 30(1)(c) to be inserted in that Act is in similar form to paragraph 127(1)(c) of the Veterans' Entitlements Bill 1985 and the Committee's comment on that paragraph also applies to this provision.

Self incrimination

New section 31 to be inserted in the Act is in similar form to clause 128 of the Veterans' Entitlements Bill 1985 and the Committee's comment on that clause also applies to this section.

Strict liability

New paragraph 58(1)(a) is in similar form to paragraph 208(1)(a) of the Veterans' Entitlements Bill 1985 and the Committee's comment on that paragraph also applies to this provision.

Michael Tate
Chairman
27 November 1985

APPENDIX

MINISTER FOR TRANSPORT

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

- 7 NOV 1985

Dear Senator Tate

I refer to the consideration by the Senate Standing Committee for the Scrutiny of Bills of the amendments of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 ("the Act") contained in Schedule 1 to the Statute Law (Miscellaneous Provisions) Bill (No. 1) 1985.

The Bill was debated by the Senate on 30 May 1985. During the debate the Minister representing the Attorney-General in the Senate (Senator Gareth Evans) gave an undertaking on my behalf that the amendments of this Act would not be proclaimed to commence until there had been an opportunity for further consideration of this matter and, if necessary, discussions with members of the Scrutiny of Bills Committee.

You will recall that the Committee drew new sub-sections 11(2), 11(4), 22(2) and 22(4) to the attention of the Senate in that, by imposing a persuasive onus on defendants, they might be considered to trespass unduly on personal rights and liberties.

A fundamental issue is the necessity, in this case, for Australia to fully comply with the obligations imposed by the International Convention for the Prevention of Pollution from Ships, 1973. Upon proclamation of the Act Australia will become a party to this Convention which entered into force internationally on 2 October 1983.

I particularly draw your attention to paragraph (1) of Article 6 of the Convention which provides that "Parties to the Convention shall cooperate in the detection of violations and the enforcement of breaches of the present Convention, using all appropriate and practicable measures of detection and environmental monitoring, adequate procedures for reporting and accumulation of evidence".

I also refer you to Article 8 of the Convention which requires that a report of an incident involving harmful

../2

substances shall be made "without delay to the fullest extent possible". Paragraph (1) of Article 1 of Protocol I requires a master of a ship involved in a discharge not permitted by Article III "... to report the particulars of such incident without delay and to the fullest extent possible...".

For the reasons outlined in this letter I consider that it is not possible for Australia to give full effect to the provisions of either Article 6 or Article 8 (a copy of which is attached) unless provisions similar to those under consideration by the Scrutiny of Bills Committee remain in the legislation.

It is clear that Australia will not be in a position to ratify the Convention unless Australian domestic law contains provisions covering all matters stipulated in the Convention. The Protection of the Sea (Prevention of Pollution from Ships) Act 1983 and the associated Navigation (Protection of the Sea) Amendment Act 1983 will play a vital role in the implementation of the Convention.

The Commonwealth, States and Northern Territory have agreed upon a division of responsibility for the implementation of the Convention. In practice this will mean that Commonwealth law will make provision for discharge controls, reporting, etc., of pollution incidents beyond the territorial sea. State and Territory legislation will make similar requirements in relation to territorial and internal waters and model legislation prepared by the Standing Committee of Attorneys-General for enactment by the States and the Northern Territory contains reporting provisions which reproduce the sub-sections in question.

It is important to bear in mind that Australia has limited marine surveillance capacity. The immensity of the area of high seas beyond the Australian territorial sea means that in many cases details of an individual pollution incident will only be known by the prospective defendant. I consider that, having full regard to the realities of the operational situation confronting the Department of Transport in enforcing marine pollution prohibitory legislation, the retention of provisions along the lines of sub-sections 11(2), 11(4), 22(2) and 22(4) in the form substituted by Schedule 1 to the Statute Law (Miscellaneous Provisions) Act (No. 1) 1985 is both justified and essential.

These provisions alleviate the application of the strict liability which otherwise would be imposed upon a person contravening the Act by failing to report a pollution incident. The elimination of these provisions would increase rather than diminish the severity of the Act's application.

../3

The rationale for inclusion of both the requirement to report and a defence is that the Convention and the Australian legislation are both intended to prevent or reduce the likelihood of ship-sourced marine pollution. Early notification of discharges of pollutants is necessary in order to plan an effective and timely response. It is accepted that under certain circumstances the master of a ship will not be able to comply with the strict requirement to report. Accordingly the provisions under review, and sub-sections 11(9) and 22(9) which ensure that compliance with the requirement to report will not be admitted as evidence without the consent of a person charged, are designed to ensure that the defendant is protected and information necessary to combat marine pollution is received.

I accept the advice furnished by the Attorney-General's Department to the Department of Transport that there were three possible alternatives which are neither viable or practicable.

These alternatives were discussed in the summary of the advice which is reproduced at page 2787 of the Senate 'Hansard' of 30 May 1985 as follows:

> Alternative One
>
> Repeal the new sections. This is not viable since it would result in a failure to comply with the reporting of incidents provisions of the International Convention for the Prevention of Pollution from Ships, 1973 (as amended).
>
> Alternative Two
>
> Lay on the prosecution the burden of disproving the defences created in the new sections by making these matters elements of the offence. This is not practicable since the prosecution would face considerable difficulties in disproving the defences created in the new sections since those would be matters known exclusively to the defendant and that compliance with Article 4 of the Convention would be seriously obstructed.
>
> Alternative Three
>
> Amend the new sections so that only the evidential burden of proof is reversed. For reasons similar to the objections to Alternative Two this procedure would also be impracticable.

Further information about this matter is contained in the enclosed copy of memoranda of 20 May and 26 August 1985 from the Attorney-General's Department to the Department of Transport and a memorandum of 7 August 1985 from the Director of Public Prosecutions to the Attorney-General's Department.

.../4

For the reasons stated in this letter, I consider that sections 11 and 22 of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 should remain in the form contained in Schedule 1 to the Statute Law (Miscellaneous Provisions) Act (No. 1) 1985. Consequently I am unable to agree to any amendments.

Yours sincerely,

PETER MORRIS

Senator M C Tate
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

EXTRACTS FROM THE INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS, 1973.

ARTICLE 6

Detection of Violations and Enforcement of the Convention

(1) Parties to the Convention shall co-operate in the detection of violations and the enforcement of the provisions of the present Convention, using all appropriate and practicable measures of detection and environmental monitoring, adequate procedures for reporting and accumulation of evidence.

(2) A ship to which the present Convention applies may, in any port or off-shore terminal of a Party, be subject to inspection by officers appointed or authorized by that Party for the purpose of verifying whether the ship has discharged any harmful substances in violation of the provisions of the Regulations. If an inspection indicates a violation of the Convention, a report shall be forwarded to the Administration for any appropriate action.

(3) Any Party shall furnish to the Administration evidence, if any, that the ship has discharged harmful substances or effluents containing such substances in violation of the provisions of the Regulations. If it is practicable to do so, the competent authority of the former Party shall notify the Master of the ship of the alleged violation.

(4) Upon receiving such evidence, the Administration so informed shall investigate the matter, and may request the other party to furnish further or better evidence of the alleged contravention. If the Administration is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken in accordance with its law as soon as possible. The Administration shall promptly inform the Party which has reported the alleged violation, as well as the Organization, of the action taken.

(5) A Party may also inspect a ship to which the present Convention applies when it enters the ports or off-shore terminals under its jurisdiction, if a request for an investigation is received from any Party together with sufficient evidence that the ship has discharged harmful substances or effluents containing such substances in any place. The report of such investigation shall be sent to the Party requesting it and to the Administration so that the appropriate action may be taken under the present Convention.

ARTICLE 8

Reports on Incidents Involving Harmful Substances

(1) A report of an incident shall be made without delay to the fullest extent possible in accordance with the provisions of Protocol I to the present Convention.

(2) Each Party to the Convention shall:

(a) make all arrangements necessary for an appropriate officer or agency to receive and process all reports on incidents; and

(b) notify the Organization with complete details of such arrangements for circulation to other Parties and Member States of the Organization.

(3) Whenever a Party receives a report under the provisions of the present Article, that Party shall relay the report without delay to:

(a) the Administration of the ship involved; and

(b) any other State which may be affected.

(4) Each Party to the Convention undertakes to issue instructions to its maritime inspection vessels and aircraft and to other appropriate services, to report to its authorities any incident referred to in Protocol I to the present Convention. That Party shall, if it considers it appropriate, report accordingly to the Organization and to any other party concerned.

243 GIC

ATTORNEY-GENERAL'S DEPARTMENT

TEL: 7' 3111

ROBERT GARRAN OFFICES
NATIONAL CIRCUIT
BARTON A.C.T. 2600

PLEASE QUOTE.
YOUR REF

20 May 1985

The Secretary,
Deparment of Transport,
P.O. Box 594,
CIVIC SQUARE A.C.T. 2608

Attention: Mr Ross Wilson

Statute Law (Miscellaneous Provisions) Bill (No. 1) 1985, Sch. 1 - Insertion of new ss.11 & 22 in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 ('the 1983 Act') - Comments by the Senate Standing Committee for the Scrutiny of Bills ('the Committee').

I refer to the discussions with your Mr Wilson on 17.5.85 and confirm the oral advice given:

2. The Committee notes that the proposed new ss.11(2), (4) and 22(2), (4) of the 1983 Act reverse the normal persuasive burden of proof and that thus "they may be considered to trespass unduly on personal rights and liberties."

3. In the view of this Department the relevant amendments of the 1983 Act are justified because the alternatives are not. The alternatives are to:

(i) repeal the new ss. 11(2), (4) & 22(2), (4) of the 1983 Act;

(ii) put on the prosecution the burden of disproving the defences created in the new ss. 11(2), (4) & 22 (2), (4) of the 1983 Act by making these matters elements of the offence; or

(iii) amend the new ss. 11(2), (4) & 22(2), (4) of the 1983 Act so that only the evidential burden of proof is reversed.

Alternative 3(i)

4. This is, in my opinion, clearly not a viable option since to do so would result in not complying with the International Convention for the Prevention of Pollution from Ships, 1973 (as amended) ('the Convention'). Article 8(1) of the Convention in conjunction with Article I of Protocol I to the Convention states that a report of an incident must be made "without delay and to the fullest extent possible" (my emphasis) in accordance with the provisions of Protocol I. The phrase 'fullest extent possible' cannot, in my opinion, be read so as to restrict its operation merely to matters of methodology, but must on any reasonable reading encompass the notion of 'capacity' to comply with the duty to report the incident. This reading is supported by the fact that the other Articles of Protocol I to the Convention all address aspects of the methodology to be used for making reports of the incidents. Thus, if 'capacity' is an essential element of complying with the duty to report an incident under the Convention, then the matters address in the new ss. 11(2), (4) & 22(2), (4) of the 1983 Act (which are all concerned with the notion of 'capacity' to report) cannot be merely deleted from the 1983 Act, but must, in some form, remain in the legislation.

Alternative 3(ii)

5. Whilst this would overcome the problems raised in Alternative 3(i), it is also not acceptable because in its practical operation it would result in the 1983 Act becoming unenforceable in this respect. The prosecution would be faced with (in most instances) an insurmountable obstacle in attempting to negative the defences in the new ss. 11(2), (4) & 22(2), (4) of the 1983 Act, because they are all basically concerned with matters that are peculiarly within the knowledge of the defendant. The practical ramifications of this alternative would be such that compliance with Article 4 of the Convention would be severely hampered.

Alternative 3(iii)

6. Similar considerations apply to this alternative as to Alternative 3(ii). This is so since if the defendants were able to satisfy the evidential burden in respect of the matters in the new ss.11(2), (4) & 22(2), (4) of the 1983 Act, the prosecution would then be required to negative the matters beyond reasonable doubt. In practice, this would mean, of course, that the prosecution would need to approach any case on the same basis as if alternative 3(ii) were, in fact, in existence.

7. Apart from these matters, it is difficult to understand why the Committee finds objections with the new ss. 11(2), (4) & 22(2), (4) of the 1983 Act, since they are, as far as the issue of the burden of proof is concerned, identical to the present ss.11(2), (4) & 22(3), (5) of the 1983 Act, in respect of which the Committee had no comments to make (see the Scrutiny of Bills Alert Digest, No. 2 of 11 May 1983).

8. A copy of this memorandum has been forwarded to Mr John Leahy of the Office of Parliamentary Counsel.

9. The contact officer in respect of this matter is the author who can be contacted on Ph. 71 9211.

George J. Kriz

(GEORGE J. KRIZ)
for Secretary

cc: Ms John Butler
Special Projects Division
Attorney-Generals Dpt.

ATTORNEY-GENERAL'S DEPARTMENT

TEL: 71 9111

ROBERT GARRAN OFFICES
NATIONAL CIRCUIT
BARTON A.C.T. 2600

PLEASE QUOTE: 85/6795:GC
YOUR REF:

28 August 1985

The Secretary,
Department of Transport,
P.O. Box 594,
CIVIC SQUARE A.C.T. 2608

Attention: Mr Wayne Stuart

Amendments to Protection of the Sea (Prevention of Pollution from Ships) Act 1983 ('the Act') : Senate Standing Committee for Scrutiny of Bills.

I refer to your memorandum dated 5.7.1985 and subsequent discussions with your Mr Stuart.

2. As I understand it, you wish me to review my advice of 20 May 1985 and you seek my advice on the methodology to be adopted to satisfy the undertaking given by Senator Evans in the Senate on 30 May 1985.

Review of this Department's advice of 20 May 1985

3. I have sought the advice of the Director of Public Prosecutions ('the DPP') on the implications for the prosecution of not proceeding with the proposed amendments to the Act and adopting instead one of the alternatives mentioned in my memorandum to your Department dated 20 May 1985. The DPP's reply is attached for your information - I especially refer you to paragraphs 6-7 thereof.

4. After taking into account the DPP's advice, I remain of the view, expressed in my memorandum of 20 May 1985, that the proposed amendments to ss.11(2), (4) and 22(2), (4) of the Act are justified.

Methodology to satisfy Senator Gareth Evans' undertaking

5. Taking into account the fact that Senator Evans' undertaking was made on behalf of your Minister only (Senate Hansard, 30 May 1985, p.2787), I do not think that it would be appropriate for the Attorney-General to be involved directly at

this stage. Furthermore, it seems to me that the appropriate course would be for your Minister to reply, in the first instance, to the Senate Standing Committee for the Scrutiny of Bills, with his reconsideration of this matter.

6. If you wish to discuss any aspect of this memorandum I may be contacted on phone 71-9211.

(GEORGE J. KRIZ)
for Secretary

DPP

Head Office

Director of
Public Prosecutions

PO Box E370
Queen Victoria Terrace
Canberra ACT 2600

Telephone 062 705 666
Vocadex 062 73 1411
Telex AA61702

Your reference:
CL85/6795:GJK

Our reference:
85/44

August 1985

The Secretary,
Attorney-General's Department

Attention: Mr G. Kriz

Amendments to Protection of the Sea (Prevention of Pollution from Ships) Act 1983

I refer to your memorandum of 23 July 1985.

2. There is not a great deal we can usefully add to comments you have already provided to the Department of Transport.

3. If subsections 11(2), 11(4), 22(2) and 22(4) are not enacted, it will be necessary for the prosecution in proceedings for an offence against section 11 or 22 to prove beyond reasonable doubt that the defendant knew that a relevant discharge had occurred. While the matter is not free from doubt, the better view is that if the subsections are enacted the prosecution will not need to prove knowledge. The defendant would, however, be entitled to acquittal if he could establish, on the balance of probabilities, that he did not know of the relevant discharge.

4. It cannot be said that the prosecution would never be able to prove knowledge in these matters. The defendant may have made statements or taken action at the time of the discharge from which it can be inferred that he was aware of it, or he may have subsequently made admissions to an investigating officer.

5. However, given the nature of the relevant offences such evidence will probably only be available in a minority of cases. Offences against sections 11 and 22 are most likely to be committed by those who choose to deliberately ignore a discharge or pretend that it did not occur. In such cases, it is unlikely that there will be objective evidence from which knowledge can be inferred and it is equally unlikely that the potential defendant will make admissions when questioned, under caution, some time after the discharge.

6. The probable practical consequence of not enacting the sub-sections will be that prosecutions will rarely be brought for offences against sections 11 and 22. The cases, if any, in which they will be brought are likely to be those where an offence occurred through inadvertance or ignorance, and a defendant has unwittingly provided evidence of knowledge, rather than those where the provisions have been deliberately breached.

7. In our view, if the legislature considers it necessary to enact sections 11 and 22 it must accept that effective enforcement requires appropriate measures to facilitate proof. In these circumstances we do not consider that the sub-sections in question unreasonably trespass upon personal rights and liberties.

8. I note the suggestion that the persuasive burden imposed on defendants by the subsections could be replaced by an evidential burden. I presume that it is envisaged that knowledge of a relevant discharge would be taken to have been proven unless the defendant denied knowledge, in which case the prosecution would be required to prove knowledge byond reasonable doubt.

9. Such a provision could achieve substantial savings in time and costs when matters come on for hearing, but it would not overcome the particular difficulties facing the prosecution in proceeding under sections 11 and 12. It would not be feasible to proceed against a defendant if there was no evidence of knowledge on his part in the hope that the defence would not take the point.

10. Please advise me if we can be of further assistance.

(G. Gray)
for Director

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN

MR PRESIDENT,

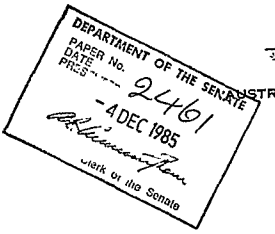
I PRESENT THE SIXTEENTH REPORT OF 1985 OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

AUSTRALIAN NUCLEAR SCIENCE AND TECHNOLOGY ORGANISATION BILL 1985
BOUNTY (COMMERCIAL MOTOR VEHICLES) AMENDMENT BILL (NO. 2) 1985
CUSTOMS TARIFF (STAND-BY DUTY) BILL 1985
JUDICIARY AMENDMENT BILL 1985
PETROLEUM (SUBMERGED LANDS) (CASH BIDDING) AMENDMENT BILL 1985 [NO. 2]
POSTAL SERVICES AMENDMENT (CONTINUANCE OF POSTAL SERVICES) BILL 1985
STATUTE LAW (MISCELLANEOUS PROVISIONS) ACT (NO. 1) 1985
VETERANS' ENTITLEMENTS BILL 1985
VETERANS' ENTITLEMENTS (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1985

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 15 DATED 27 NOVEMBER 1985.

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.



AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1985

4 DECEMBER 1985

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1985

4 DECEMBER 1985

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1985

The Committee has the honour to present its Seventeenth Report of 1985 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of the Resolution of the Senate of 22 February 1985:

Australian Bill of Rights Bill 1985
Australian Trade Commission Bill 1985 [No. 2]
Child Care Amendment Bill 1985
Human Rights and Equal Opportunity Commission Bill 1985
Quarantine (Validation of Fees) Bill 1985
States Grants (Nurse Education Transfer Assistance) Bill 1985
Statute Law (Miscellaneous Provisions) Bill (No. 2) 1985
Trade Practices Amendment Bill 1985

AUSTRALIAN BILL OF RIGHTS BILL 1985

This Bill was introduced into the House of Representatives on 9 October 1985 by the Attorney-General.

The purpose of the Bill is to implement the International Covenant on Civil and Political Rights by enacting an Australian Bill of Rights. The Bill of Rights declares fundamental rights but does not itself give rise to any cause of action or render any person liable to criminal proceedings. It is to operate as a guide to the judicial interpretation of Commonwealth and Territory (other than Northern Territory) laws and is to prevail over inconsistent future Commonwealth and Territory (other than Northern Territory) laws in the absence of express intention to the contrary and over existing Commonwealth or Territory (other than Northern Territory) laws after 5 years. The Human Rights and Equal Opportunity Commission is to be empowered to investigate complaints about governmental practices and to report on Commonwealth, State and Territory laws (or proposed laws) which may infringe the Bill of Rights.

General Comment

The Bill will require Commonwealth laws (including laws of the Australian Capital Territory and the external Territories) to be interpreted in a way that is not in conflict with the Bill of Rights set out in clause 8 of the Bill. Laws enacted after the Bill comes into force are not to have any force to the extent that they are in conflict with the Bill of Rights unless such laws provide expressly to the contrary. Five years from the date on which the Bill comes into force any inconsistent laws enacted prior to its commencement are to be deemed to be repealed to the extent of any inconsistency.

The Committee expressed concern that the operation of the Bill might give rise to considerable uncertainty as to the proper interpretation of Commonwealth laws and, at least after the five year period of grace, as to their validity. This was particularly so since the terms of the Bill of Rights itself were far from certain in their application. Whereas the International Covenant on Civil and Political Rights specified permissible restrictions in the Articles dealing with particular rights the Bill of Rights relied on a general reservation set out in paragraph 1 of Article 3:

> 'The rights and freedoms set out in this Bill of Rights are subject only to such reasonable limitations as can be demonstrably justified in a free and democratic society.'

The Committee suggested that the meaning of this reservation was far from clear. For example Article 19 of the International Covenant provides that the right to freedom of expression shall be subject only to such restrictions as are provided by law and are necessary:

> '(a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

This reservation is clearly intended to cover laws such as laws relating to defamation, official secrets, obscenity and censorship on moral grounds. The ambit of paragraph 1 of Article 3 of the Australian Bill of Rights is, however, less certain. Are such laws 'reasonable limitations' which can be 'demonstrably justified in a free and democratic society'

within the terms of that Article? Would, for example, a power granted to a tribunal to censor all television programmes without specifying the grounds for such censorship be held to be demonstrably justified? Are all defamation laws justified or, perhaps, only those which provide that truth alone is a defence? At what point does an official secrets law go beyond what can be 'demonstrably justified in a free and democratic society'?

The Committee argued that these were the types of questions which the Bill would leave to the courts to answer. In consequence, following the passage of the Bill there was every reason to believe that wide areas of the law would be placed in question as particular statutory provisions came under challenge for alleged inconsistency with the Bill of Rights. Such uncertainty pending judicial interpretation might be an inevitable concomitant of a Bill of Rights but the Committee drew this aspect of the Bill to the attention of the Senate under principle 1(a)(i) in that it might be considered to trespass unduly on personal rights and liberties.

The Committee also questioned whether it was appropriate that the determination of what limitations on fundamental rights are justifiable in a free and democratic society should be left, at least initially, to the judiciary. The courts are not accustomed to dealing with such broad questions of policy and the judges themselves might not welcome the conferral of this jurisdiction. The Committee suggested that such matters, involving the application of changing community standards and the desirable levels of controls on rights and freedoms in our society, might more appropriately be left to the Parliament. Accordingly the Committee drew this aspect of the Bill also to the attention of the Senate under

principle 1(a)(iv) in that it might be considered to remove what is in effect an exercise of legislative power from the Parliament. The Attorney-General responded:

> 'The language of Article 3:1 is adopted from the Canadian Charter of Rights and Freedoms. There is, accordingly, a body of law developing to which the Australian courts can refer for assistance in interpreting the terms contained in Article 3:1. What is reasonable in a free and democratic society is to be found by looking at those societies which are free and democratic. The attributes which identify a free and democratic society are, of course, contained in the Bill of Rights itself. In this regard reference might be had to Re Federal Republic of Germany and Rauca (1982) 70 C.C.C. (2d) 416 and Re Southam Inc and The Queen (No. 1) (1983) 3 C.C.C. (3d) 515.
>
> The importance of Article 3:1 is that it allows the various limitations contained throughout the International Covenant on Civil and Political Rights to be picked-up by the Bill of Rights in one Article. This, in turn, allows the Bill of Rights to be an inspirational document, easily separated from the overall Act for educational use, without being unduly complex or burdened with detailed qualifications.
>
> The further advantage of the approach taken in Article 3 is that where a limit on a fundamental right or freedom is identified the burden is on the party claiming the benefit of the exception or

limitation to establish that it is a reasonable limit which can be demonstrably justified in a free and democratic society.

The Government does not anticipate that much Commonwealth legislation will be found to be in breach of the Bill of Rights. Accordingly, the matters we are considering relate to the application of the fundamental standards established by the Bill of Rights at the margin where the application of any legislation to particular cases has the potential to create difficult problems which the Parliament cannot anticipate. It is the traditional role of the courts to deal with such cases. The strength of the common law, and the judiciary's role in its development, has been the judiciary's ability to work within fundamental principles without allowing the law to stultify and create injustice in particular cases.

To expect this of the courts is not to abdicate to them the legislative function. In enacting the Bill of Rights the Parliament will be establishing clear fundamental principles to be applied by the courts. The Bill contains guidance to the courts in resolving conflicts between rights (clause 4(4)) and directs the courts on matters of interpretation (clause 10).

I also draw your attention to the advantage of the "sunrise" period built into the Australian Bill of Rights Bill in respect of Commonwealth legislation in force before the Bill of Rights legislation comes into force. Whilst such legislation may be

> deemed to be repealed, when properly construed by the courts in accordance with the requirements of the Bill, that will not happen for five years. In that period, the Government intends that existing legislation should be reviewed for consistency with the Bill of Rights. Such a review will lead to amendments, where necessary, either to bring the legislation into line with the Bill of Rights or to continue its application notwithstanding the Bill of Rights.'

The Committee thanks the Attorney-General for his helpful response. In continuing to draw attention to the potential problems it initially identified, along with the Attorney-General's response, the Committee wishes to promote a fuller consideration of these aspects of the Bill at the appropriate time. The Committee also notes the consideration of such matters contained in the report of the Constitutional and Legal Affairs Committee on 'A Bill of Rights for Australia?', tabled on 5 November 1985 (especially at paragraphs 1.29 - 1.36, 3.48 - 3.59, and 4.1 - 4.21).

The Committee also drew the attention of the Senate to the following clauses of the Bill:

Sub-clause 14(4) - Unequal treatment of litigants.

Under clause 14 a court will be able to make a declaration that a Commonwealth law is to be deemed to have been in force notwithstanding any inconsistency with the Bill of Rights if it is satisfied that grave public inconvenience or hardship would be caused by the relevant law being deemed to be repealed or held to have no operation to the extent of any conflict with the Bill of Rights. The law will then remain in force for a further 3 months from the date of the

declaration, allowing the Parliament to take action to remedy the defect in the law. By virtue of sub-clause 14(4) a declaration under clause 14 will deem the relevant law to have been in force 'for all purposes except the purposes of the proceedings in which the declaration in relation to the enactment was made'. This means that where a declaration is made by a court under clause 14 only the litigant who first successfully draws attention to the inconsistency of a law with the Bill of Rights is to have the benefit of the operation of the Bill: other litigants are to be bound by that law notwithstanding its inconsistency with the Bill of Rights.

The Committee drew the sub-clause to the attention of the Senate under principle 1(a)(i) in that it might be considered in a quite arbitrary and fortuitous fashion to advantage some litigants and disadvantage others. The Attorney-General has responded:

> 'The Committee suggests in respect of the operation of clause 14(4) of the Australian Bill of Rights Bill that only the litigant who first successfully draws attention to the inconsistency of the law with the Bill of Rights is to have the benefit of the operation of the Bill. This is correct, and, whilst I do not regard the solution as ideal, I consider it to be the only practical solution in what I expect to be a fairly rare occurrence.
>
> Article 14 is intended to offer the courts an alternative to adopting a narrow construction of the Bill of Rights in those circumstances where a finding that the law under challenge was inconsistent with the Bill of Rights would result in major disruption. It was recognised, however,

> that to deny "the fruits of victory" to a successful litigant would be unfair. Accordingly, the sub-clause 14(4) exception (repeated also in sub-clause 14(8)) was made.'

The Committee thanks the Attorney-General for this response. While recognising that the problem is a difficult one the Committee remains concerned that some litigants may be denied the benefit of the operation of the Bill of Rights purely on the basis of the time at which their cases come up for decision. The Committee therefore continues to draw the sub-clause to the attention of the Senate under principle 1(a)(i) in that by reason of its fortuitous operation it may be considered to trespass unduly on personal rights and liberties.

Sub-clause 24(6) - Payment of costs of adjournment

Clause 24 provides that the courts may not proceed in certain causes involving matters arising under the Bill of Rights unless notice of the matter has been given to the Attorney-General and a reasonable time has elapsed for the Attorney-General to consider intervening in the proceedings. Under sub-clause 24(6) the Attorney-General may authorise the payment by the Commonwealth to a party of an amount in respect of costs arising out of the adjournment of a case in compliance with the clause. It appears that the determination of any amount to be paid under the sub-clause is to be left solely to the discretion of Attorney-General, rather than to the courts as is usual with matters of costs.

The Committee suggested that parties should be entitled to the fair and reasonable costs of an adjournment under clause 24 as determined by the court in which the cause is heard. Accordingly it drew sub-clause 24(6) to the attention of the

Senate under principle 1(a)(iii) in that by leaving the payment of costs entirely to the discretion of the Attorney-General it might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions. The Attorney-General has responded:

> 'Clause 24 in substance mirrors section 78B of the Judiciary Act 1903. The power to make an award of costs is vested in the court which orders the adjournment (clause 24(4)(a), section 78B(2)(a)).
>
> Where the Attorney-General does intervene as the result of a clause 24 notice, the Commonwealth may be ordered to pay such costs as the court thinks fit (including the adjournment costs) under sub-clause 23(2). Where the Attorney-General has had a matter removed to the Full Court of the Federal Court as the result of a clause 24 notice, it is within the general jurisdiction of that court to make an order as to costs, which could include the costs of the adjournment.
>
> Sub-clause 24(6), and section 78B(4), are essentially indemnification provisions for the situation where the adjournment does not result in the Attorney-General becoming a party to the proceedings and not being amenable to an order for costs. It is appropriate, however, that such indemnification be at the discretion of the Attorney-General so that the indemnity is not available in underriding cases. For example, in the quest for a tactical advantage in proceedings parties may use the clause 24 notice process (as parties have used the section 78B notice process)

> in what they see as their interests and not genuinely for the purpose of bringing the Attorney-General into the proceedings.
>
> [A]n Attorney-General's decision under sub-clause 24(6) would be subject to review under the Administrative Decisions (Judicial Review) Act 1977. If the comment is directed to review on the merits, then, if the discretion is to remain with the Attorney-General, I do not regard a review on the merits as appropriate.'

The Committee thanks the Attorney-General for this response. The Committee concedes that, in view of the limited application of sub-clause 24(6), review on the merits of the Attorney-General's discretion under that provision may be inappropriate.

Sub-clauses 31(1) and (5) and 33(1) - Power to require information

Sub-clauses 31(1) and (5) and 33(1) empower the Commission, by notice in writing, to require persons to give information, to produce documents, to attend to answer questions or to attend a compulsory conference at a time and place specified in the relevant notice. No limitation is imposed as to the reasonableness of the time within which a person may be required to furnish information or the time or place at which a person may be required to attend although 'reasonable excuse' is a defence in a prosecution for a failure to comply.

The Committee noted that it had drawn attention to a similarly unrestricted provision in clause 21 of the Human Rights and Equal Opportunity Commission Bill 1984 in its

Eleventh Report of 1984. It drew sub-clauses 31(1) and (5) and 33(1) to the attention of the Senate under principle 1(a)(i) in that the failure to require that times and places specified be reasonable might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'In my view the addition of reasonableness as a limitation would add little, if anything, to the provisions. A decision to require a person to furnish information or to attend is a decision which is subject to review under the Administrative Decisions (Judicial Review) Act 1977. As such it would be subject to review for being so unreasonable that no reasonable person could have so decided. Accordingly, any decision to require a person to furnish information or to attend must be one that is not manifestly unreasonable in respect of the time within which a person is required to furnish information or time or place at which a person is required to attend.'

The Committee thanks the Attorney-General for his response. However the Committee cannot agree that it is desirable that the person upon whom a notice is served should be required to challenge the reasonableness of the time or the time and place specified in that notice under the Administrative Decisions (Judicial Review) Act 1977 while that person is also liable to prosecution for a failure to comply with the notice under clause 35. It would surely be preferable for the legislation to stipulate that the times and places specified must be reasonable so that any alleged unreasonableness might be taken into account by the court

hearing a charge under clause 35 in determining whether the requirement to furnish information, produce documents and so forth was lawfully made.

The Committee therefore continues to draw sub-clauses 31(1) and (5) and 33(1) to the attention of the Senate under principle 1(a)(i) in that the failure to require that times and places specified be reasonable may be considered to trespass unduly on personal rights and liberties.

Sub-clause 36(4) - Self incrimination

Sub-clause 36(4) provides that a person is not excused from giving any information, producing a document or answering a question on the ground that the information, the production of the document or the answer to the question might tend to incriminate the person but the information, the production of the document or the answer to the question is not admissible in evidence except in proceedings for the provision of false or misleading information.

Although the sub-clause is in standard form it is the Committee's practice to draw to the attention of the Senate under principle 1(a)(i) all such provisions removing the privilege against self incrimination in that they may be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'It is, I think, important to understand that the primary functions of the Human Rights and Equal Opportunity Commission are to investigate complaints, to attempt conciliation between the parties and to report. In this context, where the emphasis is on conciliation rather than enforced solutions, the Commission has wide investigative

powers so that these functions can be carried out with as comprehensive information as possible. The Commission is not a court; it cannot impose a penalty on any person. The Commission does not have dispute settling powers involving compulsory orders; it merely recommends.

What sub-clause 36(4) in effect does is to preclude a person from refusing to provide information to the Commission on the ground of self-incrimination whilst at the same time (in the tail-piece of the sub-clause) restoring the protection provided by the privilege in respect of other proceedings.

In the context of the Commission's function, and in light of the protection given in sub-clause 36(4), I consider the provisions of the sub-clause appropriate.'

The Committee thanks the Attorney-General for this response. While appreciating the reasons advanced for the inclusion of the sub-clause, the Committee as is its usual practice continues to draw the sub-clause to the attention of the Senate under principle 1(a)(i) in that by removing the privilege against self incrimination it may be considered to trespass unduly on personal rights and liberties.

AUSTRALIAN TRADE COMMISSION BILL 1985 [No. 2]

This Bill was introduced into the House of Representatives on 12 November 1985 by the Minister for Trade.

The purpose of the Bill is to establish the Australian Trade Commission as a statutory authority. It provides for the drawing together and integration of the various operational arms of the Trade portfolio into a single statutory authority. The Bill is in the same form as the Australian Trade Commission Bill 1985 introduced into the House of Representatives on 11 October 1985 and on which the Committee commented in its Alert Digest No. 12 of 1985 (16 October 1985). It has been withdrawn and reintroduced owing to a procedural error.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Sub-clause 4(2) - Extension to Territories

By virtue of sub-clause 4(2) the Minister may, by notice published in the Gazette, declare that, on a specified day, the Act will cease to extend to an external Territory and after that day the specified Territory will be deemed to be a foreign country for the purposes of the Act. Notices under the sub-clause are not required to be tabled in Parliament and will not be subject to disallowance. Because the sub-clause would permit theMinister by executive instrument to vary the application of the Act it may be characterized as a 'Henry VIII' clause.

The Committee draws the sub-clause to the attention of the Senate under principles 1(a)(iv) and (v) both in that, as a 'Henry VIII' clause, it may be considered an inapproriate

delegation of legislative power and in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Sub-clause 33(3) - Definition of 'capital goods'

Under Division 4 of Part V of the Bill the Commission may finance 'eligible export transactions'. By virtue of sub-clause 33(2) such transactions are defined as transactions related to the export of 'capital goods' from Australia. In sub-clause 33(3) the expression 'capital goods' is defined as:

> '(a) machinery; or
>
> (b) any goods declared by the Minister, in writing, to be capital goods for the purposes of sub-section (2) or goods included in a class of goods declared by the Minister, in writing, to be a class of capital goods for the purposes of that sub-section.'

Declarations by the Minister under the sub-clause are not required to be tabled in Parliament and will not be subject to disallowance (as would be the case, for example, if the remaining content of the definition of 'capital goods' were to be left to be prescribed by regulations).

The Committee draws the sub-clause to the attention of the Senate under principle 1(a)(v) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Sub-clause 83(3) - 'Henry VIII' clause

By virtue of sub-clause 83(1) the Commission is not to be subject to taxation under any law of the Commonwealth or of a State or Territory. However, regulations under sub-clause 83(3) may provide that sub-clause 83(1) does not apply in relation to a specified law of the Commonwealth or of a State or Territory: that is, that the Commission is to be subject to taxation under that law.

Because the sub-clause would permit the variation of sub-clause 83(1) by means of regulations it may be characterized as a 'Henry VIII' clause. The Committee draws it to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

Sub-clause 91(1) - Delegation

The Committee drew attention to sub-clause 91(1) because it gave the Commission an unrestricted authority to delegate all or any of its powers or functions under the Act (other than the power of delegation) to any person. The Committee is pleased to record that the sub-clause was amended in the House of Representatives on 18 November 1985 to restrict the scope of the delegation to employees of the Commission.

CHILD CARE AMENDMENT BILL 1985

This Bill was introduced into the Senate on 14 November 1985 by the Minister for Community Services.

This Bill proposes to amend the Child Care Act 1972 to alter the nature of operational assistance to child care centres funded under the Act. It would change the basis on which such assistance is paid, the method of calculating grants payable and the rates of payment.

The Committee drew the attention of the Senate to the following clause of the Bill:

Clause 3 -
New sub-section 11(7) - Henry VIII clause

Under new sub-section 11(7) the amount of grant payable to eligible organisations in respect of child care centres is to be determined on the basis of a rate of $16 per week for each place at the centre for children under 3 years or $11 per week for children over 3 years or, in each case, 'such greater amount per week as is determined by the Minister from time to time by notice in writing published in the Gazette'.

Because it permits the rate set by the legislation to be varied by executive instrument the sub-section may be characterized as a 'Henry VIII' clause and the Committee therefore drew it to the attention of the Senate under principle 1(a)(iv) in that it might be considered an inappropriate delegation of legislative power.

The Committee notes that its concerns in relation to this clause were raised in the Senate on 28 November 1985 by Senator Haines. Senator Grimes responded on behalf of the Government stressing that the amount of grant payable could only be increased, not decreased. He also indicated, however, that the Government would take into account the views expressed by this Committee and might consider indexation in some way.

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION BILL 1985

This Bill was introduced into the House of Representatives on 9 October 1985 by the Attorney-General.

The Bill provides for the establishment of a new Human Rights and Equal Opportunity Commission to replace the existing Human Rights Commission. The new Commission will administer the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984. It will also be the vehicle under which Australia's obligations under the Discrimination (Employment and Occupation) Convention, 1958 (ILO Convention No. 111) will be implemented. The proposed Australian Bill of Rights Act and any future legislation in the human rights area will also be administered through the new Commission.

The Committee drew the attention of the Senate to the following clauses of the Bill:

Sub-clauses 21(1) and (5) - Powers to require information

Sub-clauses 21(1) and (5) empower the Commission, by notice in writing, to require persons at a place and at a time specified in the notice to give information, produce documents or attend before a member of the Commission and answer questions. No limitation is imposed as to the reasonableness of time or place although 'reasonable excuse' is a defence in a prosecution for a failure to comply.

The Committee expressed concern that the power of the Commission was not limited to requiring persons to give information or produce documents within a reasonable time and to requiring persons to attend at a reasonable time and place. It noted that it had drawn attention in its Eleventh Report of 1984 to clause 21 of the Human Rights and Equal Opportunity Commission Bill 1984 which was in similar form. The Committee drew attention to sub-clauses 21(1) and (5) in that the failure to stipulate that times and places specified be reasonable may be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded drawing attention to his comments on sub-clauses 31(1) and (5) and 33(1) of the Australian Bill of Rights Bill 1985, quoted above in the part of this Report dealing with that Bill. For reasons given above the Committee remains of the view that provisions enabling information to be required within a specified time or documents to be produced at a specified time and place should stipulate that the times and places so specified be reasonable. Accordingly, while the Committee recognizes that the new provisions are in similar form to the existing sub-section 15(1) of the Human Rights Commission Act 1981, the Committee continues to draw

sub-clauses 21(1) and (5) to the attention of the Senate in that they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 24(3) - Self incrimination

Sub-clause 24(3) provides that a person is not excused from giving any information, producing a document or answering a question on the ground that the information, the production of the document or the answer to the question might tend to incriminate the person but the information, the production of the document or the answer to the question is not admissible in evidence except in proceedings for the provision of false or misleading information.

Although the sub-clause is in standard form it is the Committee's practice to draw to the attention of the Senate all such provisions removing the privilege against self incrimination in that they may be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded drawing attention to his comments in relation to sub-clause 36(4) of the Australian Bill of Rights Bill 1985, quoted above in the part of this Report dealing with that Bill. For reasons given above the Committee continues to draw attention to sub-clause 24(3) in that by removing the privilege against self incrimination it may be considered to trespass unduly on personal rights and liberties.

Sub-clause 26(3) - Reversal of the onus of proof

Sub-clause 26(2) creates an offence where a person (A) dismisses or refuses to employ a person (B), prejudices a person (B) in his or her employment or intimidates a person (B) because, inter alia, the person (B) has alleged that a person (C) has done an act or engaged in a practice that is inconsistent with or contrary to any human right. By virtue of sub-clause 26(3) it is a defence to a prosecution of A for an offence under sub-clause (2) if it is proved by A that the relevant allegation by B was false and was not made in good faith.

The Senate Standing Committee for Constitutional and Legal Affairs recommended in its Report, 'The Burden of Proof in Criminal Proceedings' (Parliamentary Paper No. 319/1982) that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings. It also recommended that provisions imposing an evidential onus on the defendant - that is, the burden of adducing evidence of the existence of some fact constituting a defence - should be kept to a minimum. It suggested that such provisions should be used only where the defendant may be presumed to have peculiar knowledge of the facts in issue or where proof by the prosecution of a particular matter would be extremely difficult or expensive but could be readily or cheaply provided by the defence. Neither of these considerations apply in the present case. Accordingly this Committee expressed the view that, if it was desired that a person (A) should not be prosecuted for discriminating against a person (B) who has made baseless and malicious allegations, the fact that the allegations made by B giving rise to the

discrimination in question were true and were made in good faith should be made elements of the offence, proof of which would lie on the prosecution.

The Committee drew sub-clause 26(3) to the attention of Senators in that by imposing the persuasive onus of proof on defendants it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded, arguing that both of the considerations referred to above as supporting the imposition of an evidential onus on the defendant have application to the situation contemplated by the provision:

> 'It will be extremely difficult for the prosecution to establish beyond reasonable doubt that the allegation was true and in good faith, whereas the accused should fairly readily be able to show by way of defence on a balance of probabilities that the allegation was false and not in good faith. The alternative to sub-clause 26(3) of requiring the prosecution to prove the allegation was true and in good faith is effectively requiring proof beyond reasonable doubt of something that the complaint [sic] does not have to prove in the process of the conciliation of his [sic] complaint. Accordingly, because the protection of the conciliation process from interference by victimisation is important and because the balance between the interests of the prosecution and the accused is appropriate to the circumstances, I do not think it necessary to amend sub-clause 26(3).'

The Committee thanks the Attorney-General for this response. However it is far from clear to the Committtee why it is considered that 'the accused should fairly readily be able to show ... that the allegation was false and not in good faith'. The person making the allegation (B) will presumably be called by the prosecution and so will be able to be cross-examined as to his or her good faith in making the allegations but it may still be necessary for the accused to call a number of witnesses to establish both that the allegation was false and that the complainant was, for example, actuated by malice in making the allegation. The fact that the complainant is not required to establish the truth of an allegation or his or her bona fides in the course of the conciliation process is not really relevant: the Committee's concerns relate to the imposition of the burden of proof on the accused in criminal proceedings which may result in the imposition of a penalty of a fine of up to $2,500 or 3 months imprisonment, or both, in the case of a natural person and a fine of up to $10,000 in the case of a body corporate.

The Committee takes the view - as did the Senate Standing Committee on Constitutional and Legal Affairs in its Report, 'The Burden of Proof in Criminal Proceedings', referred to above - that it is not justifiable in any other than exceptional circumstances to impose on the accused in criminal proceedings the burden of exculpating himself or herself by establishing some statutory defence on the balance of probabilities. Sub-clause 26(3) imposes on the accused such a burden. However even if the provision were merely to impose on the accused the burden of adducing evidence of the relevant defence - that is, an evidentiary burden - it would still be unacceptable to the Committee since in the Committee's view the considerations which the Constitutional and Legal Affairs Committee suggested should be taken into

account in imposing such a burden are not present in this case. The matters required to be proved - that the allegations made by the person allegedly victimised were false and were not made in good faith - are neither matters peculiarly within the knowledge of the defendant nor matters which the defence could be expected to prove readily and cheaply. It seems to the Committee that it would be no more difficult to require the prosecution to negative these defences than to require the defence to establish them on the balance of probabilities.

The Committee therefore continues to draw the sub-clause to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus on defendants it may be considered to trespass unduly on personal rights and liberties.

QUARANTINE (VALIDATION OF FEES) BILL 1985

This Bill was introduced into the House of Representatives on 20 November 1985 by the Minister for Primary Industry.

The purpose of this Bill is to validate the collection of certain human, animal and plant quarantine fees for which there has been no authority under the Quarantine Act 1908.

The Committee drew the attention of the Senate to the following clauses of the Bill:

Clauses 4, 5 and 7 - Retrospectivity

Clauses 4, 5 and 7 each set out to validate certain fees which have been levied by the Commonwealth without proper authority. The lack of authority dealt with by clauses 4 and 5 arose because of -

(a) the failure on the part of the Department of Health to table a determination of fees (referred to in the Bill as 'Notice A') in Parliament as required by paragraph 48(1)(c) of the Acts Interpretation Act 1901 with the result that the determination was void and of no effect;

(b) defects in determinations made earlier this year by the Minister for Primary Industry; and

(c) in the case of clause 5, the fact that 'Notice A' had the unintended effect of revoking all previously existing fees.

The lack of authority dealt with by clause 7 arose because the Department of Health believed it had authority to collect certain fees pursuant to section 64 of the Quarantine Act 1908 but the Department of Primary Industry, which now has the administration of that Act as it relates to plant and animal quarantine, has decided with the benefit of closer scrutiny that there was no legislative authority for the collection of those fees.

Because some $2.5 million worth of fees were said to be at stake in relation to the absence of proper authority dealt with by clause 4 alone the Committee stated that it was clear that there was no alternative in this case but to pass retrospective validating legislation. However the Committee observed that the requirement that delegated legislation be tabled and thus subject to parliamentary scrutiny should not be taken lightly. It should not be assumed that the Parliament will readily pass validating legislation to overcome a failure to comply with the statutory requirements such as occurred with "Notice A'. In this connection the Committee also suggested that clause 5 proceeded from a misconception as to the effect of a failure to comply with the tabling requirement. Sub-section 48(3) of the Acts Interpretation Act 1901 states that if delegated legislation is not laid before each House of Parliament it is to be 'void and of no effect'. The Committee suggested that this meant void ab initio, not, as the author of the Explanatory Memorandum appeared to believe, void from the last sitting day on which the determination could have been tabled. This latter interpretation would severely diminish the power of the Parliament to scrutinise delegated legislation since it would enable the Executive to make an iniquitous measure with no intention of tabling it but holding the view that it would at least be in force from the day of making until the last sitting day on which it could be tabled in compliance with

the law. This would be a matter of months in some cases. The Committee raised this aspect of the Bill with the Minister for Primary Industry. In the absence of the Minister overseas his Senior Private Secretary has responded as follows:

> 'The requirement to table instruments is not taken lightly and neither is the need to introduce validating legislation. However in the interests of equity and of the revenue involved it is necessary to seek passage of the Bill.
>
> With regard to comments on clause 5, the Committee's attention is drawn to sub-section 48(6) of the Acts Interpretation Act 1901 that was amended in 1982 to provide that where a regulation becomes void and of no effect by virtue of the operation of sub-section 48(3), that operation has the same effect as a repeal of the regulation. This is dealt with by section 50 of the Act which provides that rights, duties and penalties that accrue or are incurred under a regulation are not affected by repeal, unless the contrary intention appears. In this respect the position in regard to a regulation that becomes void and of no effect by operation of sub-section 48(3) is thus the same as where a regulation is disallowed or is deemed to be disallowed under section 48.
>
> Prior to the 1982 amendment of sub-section 48(6), failure to table a regulation rendered it void ab initio notwithstanding the fact that in the period between notification and the expiration of the period for tabling they had effect.

> This had obvious complications for rights and duties that had accrued or been incurred during that period.'

The Committee thanks the Minister's Senior Private Secretary for this response and acknowledges that the view it had formed of the effect of a failure to table an instrument of delegated legislation was incorrect. It remains concerned, however, about the possibility of the Government of the day using this provision to make delegated legislation with no intention of tabling it and the Committee proposes to raise this matter with the Standing Committee on Regulations and Ordinances since it clearly impacts upon the powers of that Committee.

STATES GRANTS (NURSE EDUCATION TRANSFER ASSISTANCE) BILL 1985

This Bill was introduced into the House of Representatives on 15 May 1985 by the Minister for Health.

The purpose of this Bill is to provide financial assistance to the States and the Northern Territory for the transfer of basic nurse education from hospitals to Colleges of Advanced Education.

The Committee draws the attention of the Senate to the following cluase of the Bill:

Clause 8 - Delegation

Clause 8 provides that the Minister may delegate all or any of the Minister's powers under the Act (other than the power of delegation) to "a person". In view of the very extensive

powers which would be conferred on the Minister by the Bill - in particular the power to enter into agreements with the States in respect of the making of grants by the Commonwealth under clause 4 - this power of delegation would apppear to be unnecessarily wide.

The Committee draws the clause to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO. 2) 1985

This Bill was introduced into the House of Representatives on 16 October 1985 by the Attorney-General.

The amendments made by this Bill have a number of purposes such as the tidying up, correction or up-dating of legislation. Other amendments implement changes that are of minor policy significance or are of a routine administrative nature.

The Committee drew the attention of the Senate to the following clause of the Bill:

Clause 3 - Self incrimination

Clause 3 amends the Acts specified in Schedule 1 to the Bill as set out in that Schedule. The Schedule substitutes a new section 9 in the Live-stock Slaughter (Export Inspection Charge) Collection Act 1979 dealing with the refusal or failure to furnish information or returns as required under the Act. New sub-section 9(2) provides that a person is not excused from furnishing a return or information on the ground that it might incriminate the person. The sub-section is subject to the usual proviso that any return or information so furnished is not admissible in evidence against the person except in proceedings for the refusal or failure to furnish information or the provision of false or misleading information.

The Committee commented on similar provisions in the Export Inspection Charges (Miscellaneous Amendments) Bill 1985 and the Grain Legumes Levy Collection Bill 1985 in its Thirteenth

Report of 1985 and it drew attention to the justification advanced by the Minister for Primary Industry for such provisions which was reproduced in that Report.

However in accordance with its usual practice the Committee drew the new sub-section 9(2) to the attention of the Senate under principle 1(a)(i) in that by removing the privilege against self incrimination it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'The reason for denying self-incrimination as an excuse is that the scheme devloped by this and similar legislation, in consultation with the relevant industry groups, for the collection of export inspection taxes relies upon the provision by exporters and occupiers of export establishments of returns containing full and frank records of relevant operations. The charges paid are checked against the information contained in these returns. The alternative charging system would require a regular detailed inspection of the records of each operator at a substantially higher cost to the Government and the industry, in order to ascertain the operations being carried on. It is seen as preferable that information be derived directly from the exporter or processor. Virtually the entire revenue collection by the Department of Primary Industry proceeds on this basis. If incrimination was available as an excuse in not providing the information, operations which infringed some provision of the export control laws might not be recorded and returns would be incomplete. Charge levels could not be ascertained on the basis of the incomplete returns.

> To encourage the provision of complete returns, and to provide a safeguard against prosecution on the basis of information required by law to be recorded and handed over to the Government, the new section 9 would make the information inadmissible in evidence except in specified kinds of proceedings relating to the return itself. This provides a safeguard which has no equivalent in the present section 9. Thus the new provision, while allowing the revenue collection function to proceed, does so in a way that does not trespass unduly on personal rights and liberties.'

The Committee thanks the Attorney-General for this helpful response. In continuing to draw attention to new sub-section 9(2), together with the response, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

TRADE PRACTICES AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 9 October 1985 by the Attorney-General.

This Bill is to strengthen and improve the working of the Trade Practices Act 1974 in significant respects. It provides for the amendment of key provisions directed at restrictive trade practices in order to increase their effectiveness. It includes important new provisions to extend the protection afforded to consumers by the Act. The Bill also clarifies the intended meaning of a number of provisions and effects other changes for which experience with the legislation has shown a need.

The Committee draws the attention of the Senate to the following clauses of the Bill:

Clause 21 - Reversal of onus of proof

Clause 21 would insert a new section 51A providing that, for the purposes of Division 1 of Part V of the Act, where a corporation makes a representation with respect to any future matter and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading. By virtue of sub-section 51A(2) the onus of establishing that a corporation had reasonable grounds for making a representation is to rest on the corporation. The making of misleading representations in contravention of Division 1 of Part V of the Act (other than sections 52 and 52A) is a criminal offence under section 79 of the Act.

The Senate Standing Committee for Constitutional and Legal Affairs recommended in its Report, 'The Burden of Proof in Criminal Proceedings' (Parliamentary Paper No. 319/1982) that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings but rather that they should merely be required to bear an evidential onus, that is the onus of adducing evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution. Thus, in the present case, the corporation might be required to adduce evidence that it had reasonable grounds for making the representation in question, evidence which the prosecution would then be required to rebut to sustain its charge.

The Committee drew the clause to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant it might be considered to trespass unduly on personal rights.

The Attorney-General has responded to this comment quoting in the first instance from a letter he wrote on 16 October 1985 to the Senate Standing Committee on Constitutional and Legal Affairs setting out the Commonwealth's policy on the reversal of onus of proof:

> 'While the recommendations made by the Committee form part of the Terms of Reference of Mr. Justice Watson in his review of Commonwealth Criminal Law, pending his Report the Government's policy is to scrutinize carefully all proposals to reverse the burden of proof in criminal cases. In cases where it is clear that offence provisions would be ineffective were the persuasive onus of proof not reversed in relation to an aspect of the offence, it is in my view contrary to the public interest in

effective law enforcement to deny such a reversal. Accordingly where a matter is peculiarly within the knowledge of the defendant, or, alternatively, the Crown would have great expense or difficulty in establishing the issue which could readily and cheaply be proved by the defendant, a reversal of the persuasive onus is permissible.'

With regard to the particular instance raised by this Committee the Attorney-General continues:

'The new section 51A inserted by clause 21 deals solely with representations about the future. In Thompson v Mastertouch TV Services (1977) 29 FLR 270 Franki J. held that:-

"... a prediction or statement as to the future is not false within the words of section 59(1) if it proves to be incorrect unless it is a false statement as to an existing or past fact which may include the state of mind of the person making the statement or of a person whose state of mind may be imputed to the person making the statement."

His Honour also held that a promoter's promise or prediction about the future performance or profitability of a business opportunity is not caught by section 59(1) unless it can be shown that the defendant "did not believe that the forecast or prediction would be satisfied or was recklessly indifferent concerning the forecast or prediction." While these statements were confined to the operation of section 59, they have been applied to

other sections in Division 1, Part V, including section 52: see eg Brown v Jam Factory Pty Ltd (1980) 35 ALR 79, and Lyons v Kern Konstructions (Townsville) Pty Ltd (1983) 5 TPR 98. Indeed, in Miller v Sullivan Sprinklers Pty Ltd (Unreported, 18 April 1984) where charges brought by the Trade Practices Commission under section 59(2) failed because the Court was not satisfied that the defendant did not believe the statements he made Keely J. considered that even if the defendant was an incurable optimist who believed that incomes could be earned in circumstances where most other people, with the same knowledge, would not have had the same belief, then in his opinion the statements do not contravene section 59(2).

It is virtually impossible in most cases to obtain conclusive proof of lack of belief or recklessness from surrounding circumstances and without an admission of guilt from the defendant. This is because the circumstances surrounding the prediction or forecast (ie the grounds on which the defendant makes the statement) are matters peculiarly within the knowledge of the defendant. In the Mastertouch case, the information was dismissed because the informant had not satisfied the Court that the defendant did not believe the forecast or prediction was true. The defendant did not go into evidence, so there was no evidence as to the state of mind of its manager.

Hence, matters going to the state of mind of the defendant at the time that the alleged false promise was made, and the circumstances surrounding the making of that promise, are clearly matters

upon which a defendant would be best able to comment. Mastertouch provides a clear example - it was impossible for the prosecution to prove its case. The Trade Practices Commission advised that it received about 150 complaints last year about predictions and forecasts, upon which it was unable to act because of lack of evidence as to the state of mind of the defendant.

In my opinion, it is clear that, without reversing the persuasive onus of proof, the Act is ineffective to deal with predictions and forecasts. Therefore, consistent with the Commonwealth's policy stated above, as the state of mind of the defendant when making the prediction is a matter peculiarly within the knowledge of the defendant, I consider the reversal of the persuasive onus of proof is permissible in this case.'

The Committee thanks the Attorney-General for his response and in particular for the clear statement of Commonwealth policy on the reversal of the persuasive onus of proof. However, while the Committee is prepared to concede that in some instances the reversal of the persuasive onus of proof may be justified by the particular circumstances of the case (see its comment in its Sixteenth Report of 1985 on the response of the Minister for Transport in relation to the Statute Law (Miscellaneous Provisions) Act (No. 1) 1985), the Committee does not believe that this is such a case. In most criminal proceedings the prosecution is required to prove the state of mind of the accused and it is difficult to see why belief as to the correctness of promises or predictions should be in any different position. The Committee suggests that in this case a reasonable balance would be struck by placing on the defendant an evidential burden, since the

basis upon which it makes its predictions is peculiarly within its knowledge, but then requiring the prosecution to rebut the evidence so advanced.

The Committee therefore continues to draw the clause to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant it may be considered to trespass unduly on personal rights and liberties.

Clause 35 -
New sub-sections 65C(5) and (7) - Lack of parliamentary scrutiny or review

Clause 35 inserts a new Division 1A in Part V of the Act dealing with product safety matters. Under new sub-section 65C(5) the Minister may, by notice in writing in the Gazette, declare goods to be unsafe where it appears to the Minister that the goods will or may cause injury to any person. Under new sub-section 65C(7), where 18 months have elapsed since the publication of a notice under sub-section 65C(5) and regulations have not been made prescribing a consumer product safety standard in respect of the relevant goods, the Minister may, by notice in writing published in the Gazette, impose a permanent ban on the goods. The supply of goods in contravention of a notice under either sub-section 65C(6) or (7) is an offence under section 79 of the Act carrying penalties of up to $20,000 in the case of a natural person or up to $100,000 in the case of a corporation.

Notices under sub-sections 65C(5) and (7) are not required to be tabled in Parliament and are not subject to disallowance. There is no effective form of review by an independent, quasi-judicial tribunal of the Minister's decisions to declare goods unsafe or to ban them. The only avenue of

review afforded is that, under new section 65J, a draft of a notice under either sub-section must be prepared and suppliers of the goods in question invited by notice in the Gazette to request a conference with the Commission. Suppliers are, however, given only 10 days to respond and the recommendation of the Commission at the conclusion of a conference with the supplier or suppliers is not binding on the Minister. Where the Minister decides to act otherwise than in accordance with the Commission's recommendation the Minister is required by new section 65P to set out reasons for that decision by notice in writing in the Gazette.

The Committee stated that it was unclear to it whether parliamentary review by way of tabling and disallowance or review by an independent quasi-judicial tribunal would be more appropriate in this case. The answer would depend to a great degree on how it was envisaged the new provisions might operate. However the Committee considered that the Minister should not be given an unfettered discretion to declare goods unsafe or to impose a permanent ban without some form of review. Accordingly the Committee drew the new sub-sections to the attention of the Senate under principles 1(a)(iii) and (v) either in that they might be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny or in that they might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions. The Attorney-General has responded:

> 'The power to declare goods unsafe and thereby to ban their sale was included in the Act as a result of the Report of the Trade Practices Act Review Committee (the Swanson Committee) in 1976. That Committee was of the view that the absence of a power whereby the Government can act quickly to

prevent the sale of hazardous products was a substantial legislative defect. Section 62(2D), which was inserted in the Act in 1977 to provide this power, contained no review mechanism whatsoever.

However, the Government now considers that a review mechanism can be built in provided there is an appropriate balance between the rights of suppliers and the wider interests of public safety. For this reason, under new section 65J a draft of a notice banning unsafe goods and the reasons for it must be published in the Gazette and suppliers given the opportunity to request a conference before the Trade Practices Commission. Following any such hearing, the Commission then makes a recommendation as to whether a final notice should be gazetted and in what form. The Administrative Review Council has been consulted in the development of this review procedure. I consider that this procedure strikes an appropriate balance between the rights of suppliers and the interests of the general public in ensuring unsafe goods are not put on the market.

The Committee suggests that there is no effective form of review by an independent, quasi-judicial tribunal of the Minister's decisions to declare goods unsafe or to ban them. However, as noted above, suppliers can request a conference before the Commission before the unsafe goods notice is issued. In this context it should be noted that section 29 has been amended (by Clause 13) so that the Minister cannot direct the Commission as to the

performance of its functions or exercise of its powers in this area, so for this purpose the Commission is an independent, quasi-judicial body.

Under section 65P, the Minister is required to have regard to the Commission's recommendation, and it is unlikely that the Minister would refuse to follow that recommendation unless there were extraordinary circumstances (eg where evidence comes to light after the Commission has made its recommendation that the supplier has remedied the defect in the goods, or alternatively that injuries caused by a latent defect in the goods are reported).

In such a case, the Minister is still required to publish a notice of his reasons for not following the Commission's recommendation, and in all cases the Minister's decision is reviewable under the Administrative Decisions (Judicial Review) Act 1977. I therefore consider that the Minister does not have an unfettered and unreviewable discretion in this area.

The short time limit (10 days) for suppliers to indicate whether they wish a conference to be held is prescribed because of the need to act quickly where allegedly unsafe goods are about to enter or have already entered the market. However, it is not unusual where the Minister proposes to make an unsafe goods declaration for the supplier to have been approached to withdraw the goods from sale voluntarily, and so, often the supplier will have greater warning than just the 10 days prescribed. It should also be noted that the 10 day limit

begins to run from a date specified in the notice, being a date not earlier than the date of publication of the notice. Hence, it is open for the notice to specify that the 10 day time limit only begins some time after the notice is published. Further, there is provision in section 65J(3) for the Commission to extend this time limit if appropriate. I therefore consider that the 10 day minimum time limit is not unduly harsh on suppliers.

The Committee is uncertain whether Parliamentary review by way of tabling and disallowance would be appropriate in this case. Again, given the need to act quickly in the area of unsafe goods, such Parliamentary review is considered inappropriate. For example, if an unsafe goods notice was issued outside Parliamentary Sittings (eg unsafe toys banned near Christmas), the order could not be tabled until the following Parliamentary Sittings. The prospect of the order being disallowed some months after it was issued would cause considerable confusion among suppliers and the buying public.'

The Committee thanks the Attorney-General for this response. It concedes that in this case parliamentary review is clearly inappropriate given the way in which it is envisaged that the new provisions will operate and it has decided not to pursue its concerns in relation to the adequacy of the proposed review mechanism at this stage. However it is examining submissions which have been made to Senators by the Law Council of Australia and it may make a further Report to the Senate on the Bill.

New section 65F - Non-reviewable decision

Under new section 65F the Minister may, if it appears to the Minister that goods are goods of a kind which will or may cause injury to any person, by notice in writing in the Gazette require the supplier -

(i) to recall the goods;

(ii) to publish notices disclosing defects in the goods, circumstances in which they are dangerous or procedures for their disposal; and/or

(iii) to inform the public that the supplier undertakes to repair or replace the goods or to refund the price of the goods.

The only avenue of review afforded in respect of a notice under section 65F is that, under new section 65J, a draft of the notice must be prepared and suppliers of the goods in question invited by notice in the Gazette to request a conference with the Commission. Suppliers are, however, given only 10 days to respond and the recommendation of the Commission at the conclusion of a conference with the supplier or suppliers is not binding on the Minister. Where the Minister decides to act otherwise than in accordance with the Commission's recommendation the Minister is required by new section 65P to set out reasons for that decision by notice in writing in the Gazette.

The Committee suggested that the decision of the Minister under new section 65F to require the recall of goods should be reviewable by an independent, quasi-judicial tribunal like the Administrative Appeals Tribunal. It drew the new section to the attention of the Senate under principle 1(a)(iii) in

that it might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

The Attorney-General has responded in similar terms to his response set out above in relation to new sub-sections 65C(5) and (7), advancing the view that the review mechanism provided by new section 65J, new section 65P and the Administrative Decisions (Judicial Review) Act 1977 is adequate and balances the interests of suppliers and the interests of the general public in ensuring that unsafe goods are recalled from circulation or use. In particular the Attorney-General states:

> 'In my view, it would be inappropriate to confer on the Administrative Appeals Tribunal jurisdiction to review a decision based on considerations of public health or safety which needs to be made with speed and certainty. It is for these reasons that the Administrative Review Council has previously recommended that a range of decisions under the Quarantine Act 1908 should not be reviewable by the Administrative Appeals Tribunal.'

As with new sub-sections 65C(5) and (7) above the Committee does not pursue its concerns in relation to the proposed review mechanism at this time. However it is examining submissions which have been made to Senators by the Law Council of Australia and it may make a further Report to the Senate on the Bill.

New sub-section 65Q(1) - Lack of limitation as to reasonableness of time or place

Under new sub-section 65Q(1) the Minister or an officer authorised by the Minister may require a corporation by notice in writing to furnish information within a time and in a manner specified in the notice, to produce documents in accordance with the notice or to appear before the Minister or authorised officer at a time or place specified in the notice. The Committee drew the sub-section to the attention of the Senate because it was not stipulated that the times or places specified in such notices be reasonable. The Committee is pleased to record that paragraphs 65Q(1)(a), (b) and (c) were amended in the House of Representatives on 19 November 1985 to stipulate that the times, places and other requirements set out in such notices be reasonable.

New sub-section 65Q(2) - Entry and search without warrant

New sub-section 65Q(2) would empower an officer authorised by the Minister to enter premises, inspect goods, equipment and documents and take samples of goods if the Minister has reason to believe that a corporation supplies goods which will or may cause injury to any person in or from those premises. The Committee drew the sub-section to the attention of the Senate because authorisation for such entry and inspection from an independent judicial officer in the form of a warrant was not required.

The Committee is pleased to record that new section 65Q was amended in the House of Representatives on 19 November 1985 to provide that the powers of an authorised officer under sub-section 65Q(2) are only to be exercised pursuant to a warrant or in circumstances where the exercise of those powers is required without delay in order to protect life or public safety. The new section was further amended to provide for the issue of warrants by a judge of the Federal Court or a State or Territory Supreme Court.

Michael Tate
Chairman
4 December 1985