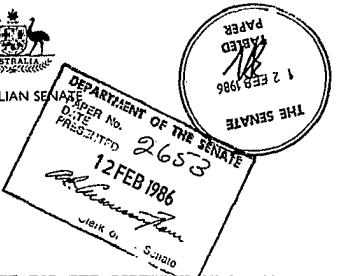
AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1986

12 FEBRUARY 1986

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1986

12 FEBRUARY 1986

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

FIRST REPORT

OF 1986

The Committee has the honour to present its First Report of 1986 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

Trade Practices Amendment Bill 1985

AUSTRALIAN NUCLEAR SCIENCE AND TECHNOLOGY ORGANISATION BILL 1985

The Committee commented on this Bill in its Sixteenth Report of 1985 (27 November 1985). The Senior Private Secretary to the Minister for Resources and Energy 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 40 - Delegation

The Committee drew attention to clause 40 which would have permitted 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 noted that it had expressed concern on a number of occasions in relation to unrestricted powers of delegation and questioned whether it was really intended that the Minister would delegate powers such as:

- the power to appoint an acting Deputy Chairperson (clause 17);
- the power to approve estimates of expenditure (clause 26);
- the power to approve entry into contracts for amounts exceeding $200,000 (clause 29);
- the power to appoint the members of the Australian Nuclear Science and Technology Advisory Council (clause 38); and

- the power to determine the constitution and functions of the Joint Consultative Committee to be established under clause 43.

The Minister's Senior Private Secretary has responded:

> 'In preparing this Bill it was not envisaged that the powers referred to by the Committee in clauses 17, 26, 29, 38 and 43 would have been delegated. The Minister has therefore agreed that sub-clause 40(1)(b) should be amended during the Committee Stage of consideration of this Bill, to include these powers in those that may not be delegated. In addition to the powers noted by the Committee, it is proposed that the power to give directions, contained in sub-clause 5(1)(a)(iii), will also be included in those that may not be delegated.'

The Committee thanks the Minister for his agreement to amend the Bill in this fashion.

TRADE PRACTICES AMENDMENT BILL 1985

The Committee commented on this Bill in its Seventeenth Report of 1985 (4 December 1985) but it indicated at that time that it was examining submissions which had been made to Senators in relation to the Bill by the Business Council of Australia and the Law Council of Australia and that it might make a further Report to the Senate on the Bill. Following its consideration of those submissions the Committee now draws the attention of the Senate to the following clauses of the Bill in addition to those previously commented upon:

Clause 16 - Burden of proof

Clause 16 would amend section 46 of the Principal Act to prohibit a corporation which has a substantial degree of power in a market from taking advantage of that power to eliminate or substantially damage competitors, to exclude potential competitors or to prevent a person from engaging in competitive conduct. New sub-section 46(7) to be inserted by the clause would provide that a corporation may be taken to have taken advantage of its power for a purpose referred to above notwithstanding that the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances. The effect of the new sub-section would be that proof of particular conduct - for example pricing at below average cost - might give rise to a need for the corporation concerned to adduce evidence in order to rebut an inference which the court might otherwise draw that it had the purpose of destroying actual or potential competition.

While a breach of section 46 may only result in a liability to pay a pecuniary penalty to the Commonwealth (section 76) and not in criminal proceedings (section 78), the Committee is concerned that, in circumstances where a corporation may be liable to a substantial penalty (up to $250,000), it should bear the onus of adducing evidence that it did not have the special purpose required rather than the onus of establishing this purpose resting on the Minister or the Commission. In this connection the Committee draws attention to the recommendation 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) that provisions imposing an evidential burden of proof on defendants should be kept to a minimum.

Accordingly the Committee draws clause 16 to the attention of the Senate under principle 1(a)(i) in that it considers that provisions imposing the evidential burden of proof on defendants should be kept to a minimum.

Clause 34 -
New section 65R - Lack of definition of 'recall'

Clause 34 inserts a new Division 1A in Part V of the Act dealing with product safety and product information. Under new section 65R it would be an offence for a supplier to fail to notify the Minister within two days where the supplier voluntarily takes action to recall goods. No definition is given of what constitutes a 'recall' of goods for the purposes of this provision.

The Committee is concerned that there may be some uncertainty as to the obligation placed upon suppliers by new section 65R. It therefore draws the new section to the attention of the Senate under principle 1(a)(i) in that it may be considered, by virtue of its uncertain application, to trespass unduly on personal rights and liberties.

Michael Tate
Chairman

12 February 1986

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN

MR PRESIDENT,

I PRESENT THE FIRST REPORT OF 1986 OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

AUSTRALIAN NUCLEAR SCIENCE AND TECHNOLOGY ORGANISATION BILL 1985
TRADE PRACTICES AMENDMENT BILL 1985

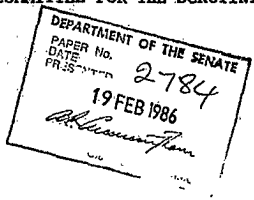
I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 1 DATED 12 FEBRUARY 1986.

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.

AUSTRALIAN SENATE
CANBERRA, A.C.T.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS



SECOND REPORT

OF 1986

19 FEBRUARY 1986

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF 1986

19 FEBRUARY 1986

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

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(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 1986

The Committee has the honour to present its Second Report of 1986 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:

Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1985

Federal Airports Corporation Bill 1985

Nuclear Weapons (Research and Testing) Prohibition Bill 1985

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL (NO. 2) 1985

This Bill was introduced into the Senate on 2 December 1985 by Senator Kilgariff.

The Bill would amend the Aboriginal Land Rights (Northern Territory) Act 1976 to establish a new regulatory regime for mining on aboriginal land, to set 1 July 1986 as a cut-off date for aboriginal land claims under the Act and to prevent land claims being made in respect of unalienated Crown Land which has been set aside for public purposes (e.g. stock routes).

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

Sub-clause 3(1) - 'Henry VIII' clause

Sub-clause 3(1) would insert a new paragraph (aa) in the definition of 'Crown land' in the Principal Act which would exclude from that definition land set aside for various public purposes other than land 'which, by proclamation, is declared to be Crown Land'. Because it would permit the content of the definition to be determined by proclamation by the Governor-General without any opportunity for parliamentary scrutiny the sub-clause may be characterized as a 'Henry VIII' clause, that is a clause which permits the effect of the legislation in which it appears to be altered by regulations, by proclamation or by some other form of Executive discretion not subject to full parliamentary scrutiny.

The Committee follows the practice of drawing attention to all 'Henry VIII' clauses and it therefore draws sub-clause 3(1) to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

Clause 16 - 'Henry VIII' clause

Clause 16 would enable the Governor-General to make regulations amending the new Schedule 5 to be inserted by the Bill which excludes certain coastal land, river beds and banks and estuaries from claim. As with sub-clause 3(1), because it permits the content of the legislation to be varied by regulations it may be characterized as a 'Henry VIII' clause.

The Committee draws clause 16 to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

FEDERAL AIRPORTS CORPORATION BILL 1985

This Bill was introduced into the House of Representatives on 13 November 1985 by the Minister for Aviation.

The purpose of the Bill is to establish the Federal Airports Corporation as a Commonwealth statutory authority charged with developing, operating and maintaining selected airports.

The Committee notes that in this case it is reporting for the information of the Senate on a Bill which has already passed both houses. The Committee draws the attention of the Senate to the following clauses of the Bill:

Sub-clause 4(2) - Henry VIII clause

Sub-clause 4(1) provides that the Act is not to extend to the Territory of Norfolk Island. Under sub-clause 4(2), however, the application of the Act may be extended to Norfolk Island by the Minister by notice in the Gazette. Because it permits the variation of the application of the Act by executive instrument the sub-clause may be characterised as a 'Henry VIII' clause and the Committee therefore draws it to the attention of the Senate under principle 1(a)(iv) in that it may be considered to be an inappropriate delegation of legislative power.

Sub-clause 45(2) - Lack of parliamentary scrutiny

Under sub-clause 45(2) the Minister may declare, by notice in the Gazette, that the Corporation is not liable to pay stamp duty or any similar tax under a Commonwealth, State or Territory law on a specified dealing with a security, on any other document executed by or on behalf of the Corporation for the purposes of raising money or on transactions involving securities or documents which fall within a specified class of transactions or documents.

The Committee has in the past argued that the decision to relieve a statutory authority from the obligation to pay taxes under Commonwealth, State or Territory laws should be subject to parliamentary scrutiny (see, for example, its comment on proposed new section 50 inserted by clause 8 of the Snowy Mountains Engineering Corporation Amendment Bill 1985 in its Eighth Report of 1985). The Committee therefore draws sub-clause 45(2) 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 56 - Lack of parliamentary scrutiny

Clause 56 empowers the Corporation, subject to the approval of the Minister, to make determinations fixing or varying aeronautical charges, that is, charges for the use by aircraft of Federal airports and for services provided by the Corporation such as the handling of cargo. In exercising the power to disapprove of a determination the Minister is required by sub-clause 56(6) to have regard to the duties and responsibilities of the Corporation under the legislation. These include, pursuant to sub-clause 7(2), the requirement that the Corporation endeavour to earn a reasonable return on its assets and to pay reasonable dividends to the Commonwealth. It may be thought, therefore, that the aeronautical charges are to be set on a purely commercial basis and that the determinations fixing or varying such charges should not be subject to any legislative requirement for parliamentary scrutiny. If, however, the charges were not to be merely a fee for service but were to include an element of revenue raising for the other activities of the Corporation some requirement for parliamentary scrutiny might be thought appropriate. Charges for the use of aerodromes are presently set out in the Air Navigation (Charges) Act 1952 and are therefore subject to the fullest degree of parliamentary scrutiny.

The Committee draws clause 56 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.

NUCLEAR WEAPONS (RESEARCH AND TESTING) PROHIBITION BILL 1985

This Bill was introduced into the Senate on 2 December 1985 by Senator Sanders.

The purpose of the Bill is to prohibit research into, and the testing of, tactical nuclear weapons, strategic nuclear weapons, transporting, launching and directional systems for nuclear weapons and anti-ballistic missile systems in Australia.

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

Sub-clause 9(6) - Abrogation of customary right

Sub-clause 9(6) would abrogate the customary right of a defendant against whom an interim injunction is granted to seek an undertaking from the plaintiff as to damages in respect of any loss flowing from the grant of the interim injunction if it turns out that it should not have been made. It is customary for the courts to refuse to grant interim or interlocutory injunctions unless such an undertaking is given.

The Committee draws sub-clause 9(6) to the attention of the Senate under principle 1(a)(i) in that by abrogating this right it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman

19 February 1986

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN

MR PRESIDENT,

I PRESENT THE SECOND REPORT OF 1986 OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL (NO. 2) 1985

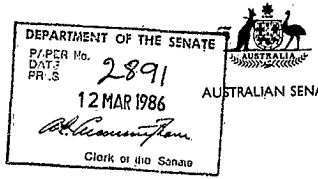
FEDERAL AIRPORTS CORPORATION BILL 1985

NUCLEAR WEAPONS (RESEARCH AND TESTING) PROHIBITION BILL 1985

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 2 DATED 19 FEBRUARY 1986.

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1986

12 MARCH 1986

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1986

12 MARCH 1986

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 -

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(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 1986

The Committee has the honour to present its Third Report of 1986 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:

Federal Airports Corporation Act 1986
Protection of Movable Cultural Heritage Bill 1985
Trade Practices Amendment Bill 1985

FEDERAL AIRPORTS CORPORATION ACT 1986

The Committee commented on this Bill (as it then was) in its Second Report of 1986 (19 February 1986) although it noted at the time that the Bill had already passed both Houses of the Parliament. A response has now been received from the Minister for Aviation, the relevant parts of which are reproduced below for the information of the Senate.

Sub-section 4(2) - 'Henry VIII' clause

Sub-section 4(1) provides that the Act is not to extend to the Territory of Norfolk Island. Under sub-section 4(2), however, the application of the Act may be extended to Norfolk Island by the Minister by notice in the Gazette. Because it permits the variation of the application of the Act by executive instrument the sub-section may be characterised 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 to be an inappropriate delegation of legislative power. The Minister for Aviation has responded:

> 'Undertakings have been given to the Norfolk Island Government that consultation would take place on a Government-to-Government basis, wherever possible, before Acts of the Commonwealth are extended to that Territory. There is no present intention that the Norfolk Island aerodrome should become a responsibility of the Federal Airports Corporation, and no consultations have taken place with the Norfolk Island Government. It would be inappropriate, therefore, for the provisions of the Bill to extend to all Territories, including Norfolk Island.

> Should at some future time it appear desirable that the Corporation should take over the operation of the aerodrome, negotiations would take place with the Norfolk Island Government about how this could best be achieved, and on what terms and conditions. If agreement is reached, notification in the Gazette would be all that should be required to bring this into effect. Review by Parliament would result only in endorsement of the agreement reached between the two Governments, or a contrary stand which would oppose the wishes of the Norfolk Island Government.'

The Committee thanks the Minister for this response. However it considers that the question whether legislation should extend to the external Territories is one for Parliament rather than for the Executive, as the Minister seems to imply. Further, it should not be for the Norfolk Island government, any more than for any other Territory or State government, to determine whether laws made by this Parliament for the whole of Australia should extend to that part of Australia falling under its jurisdiction. Given that the Parliament has provided in sub-section 4(1) of the Act that the Act is not to extend to Norfolk Island it should require an affirmative vote of the Parliament to reverse that decision and extend the application of the Act to Norfolk Island.

Accordingly the Committee continues to draw sub-section 4(2) to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

Sub-section 45(2) - Lack of parliamentary scrutiny

Under sub-section 45(2) the Minister may declare, by notice in the Gazette, that the Corporation is not liable to pay stamp duty or any similar tax under a Commonwealth, State or Territory law on a specified dealing with a security, on any other document executed by or on behalf of the Corporation for the purposes of raising money or on transactions involving securities or documents which fall within a specified class of transactions or documents.

The Committee has in the past argued that the decision to relieve a statutory authority from the obligation to pay taxes under Commonwealth, State or Territory laws should be subject to parliamentary scrutiny (see, for example, its comment on proposed new section 50 inserted by clause 8 of the Snowy Mountains Engineering Corporation Amendment Bill 1985 in its Eighth Report of 1985). The Committee therefore drew sub-section 45(2) 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 for Aviation has responded:

> 'Taxes on securities and other executed documents are typically levied on the instrument itself rather than on the organisation executing the instrument. The provision of sub-clause 45(1) would of itself therefore not preclude such taxation on instruments executed by the FAC. As the Government's policy is that the Corporation be tax exempt the purpose of clause 45(2) is to permit the FAC to be put in the same position as the Commonwealth itself in regard to the execution of certain legal instruments. The discretionary power

provided to the Minister is required to ensure that the tax exemption is only exercised in appropriate cases rather than all cases.'

The Committee thanks the Minister for this response. However the Committee's concern was not with the policy intent of the sub-section or with the discretion afforded to the Minister to determine which cases were 'appropriate cases' for tax exemption but rather that the Minister's exercise of that discretion was not subject to parliamentary scrutiny. Accordingly the Committee continues to draw sub-section 45(2) to the attention of the Senate under principle 1(a)(v).

Section 56 - Lack of parliamentary scrutiny

Section 56 empowers the Corporation, subject to the approval of the Minister, to make determinations fixing or varying aeronautical charges, that is, charges for the use by aircraft of Federal airports and for services provided by the Corporation such as the handling of cargo. The Committee suggested that if such charges were to be set on a purely commercial basis parliamentary scrutiny might be thought unnecessary. If, on the other hand, the charges were not to be merely a fee for service but were to include an element of revenue raising for the other activities of the Corporation then some requirement for parliamentary scrutiny might be thought appropriate. The Committee noted in this regard that charges for the use of aerodromes were presently set out in the Air Navigation (Charges) Act 1952 and were therefore subject to the fullest degree of parliamentary scrutiny.

The Committee therefore drew section 56 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 for Aviation has responded:

'It is usual policy that charges levied by Departments of State on users of Commonwealth services should be set by Acts of Parliament or in subordinate legislation. It is appropriate, therefore, that aeronautical charges levied by the Department of Aviation be the subject of the Air Navigation (Charges) Act 1952.

This policy is not considered an appropriate one to apply to Commonwealth business undertakings which are required to operate on a commercial basis. Other major Commonwealth Transport Business Undertakings are free to set their charges without them being subject to parliamentary scrutiny. Included in this category are Qantas, the Australian National Airlines Commission, the Australian Shipping Commission and the Australian National Railways Commission.

The Federal Airports Corporation will nominate annual financial targets which will be approved by the Minister. Aeronautical charges will be set at a level to obtain the financial target. Even so, the legislation provides the Minister with the power to disapprove charges determined by the Corporation. Sufficient checks and balances will exist to ensure that the charges levied on aviation operators are commensurate with the cost of services provided.'

The Committee thanks the Minister for this response which answers its concerns in relation to section 56.

PROTECTION OF MOVABLE CULTURAL HERITAGE BILL 1985

This Bill was introduced into the House of Representatives on 27 November 1985 by the Minister for Arts, Heritage and Environment.

The purpose of the Bill is to provide for the protection of Australia's heritage of important movable cultural objects by introducing export controls and to extend protection to the cultural heritage of other countries through import controls.

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

Sub-clauses 3(5) and 7(1) - Inappropriate delegation of legislative power

The Bill would establish controls on the import of objects forming part of the 'movable cultural heritage' of a foreign country and on the export of objects that constitute the movable cultural heritage of Australia. Sub-clause 3(5) defines 'movable cultural heritage', in relation to a foreign country, as a reference to objects that are of importance to the country for -

' (a) ethnological, archaeological, historical, literary, artistic, scientific or technological reasons; or

(b) any other prescribed reasons. '

Sub-clause 7(1) defines the movable cultural heritage of Australia by reference to specified categories of objects concluding with -

' (j) any other prescribed categories. '

As the concept of movable cultural heritage lies at the heart of the Bill the Committee suggested that it might be inappropriate to permit the content of this concept to be

enlarged by regulations. It therefore drew paragraphs 3(5)(b) and 7(1)(j) 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 Arts, Heritage and Environment has responded:

> 'As the Committee correctly points out the concept of movable cultural heritage lies at the heart of the Bill. Reasons which assist in identifying the parameters of such a concept are specified in sub-clause 3(5) and 7(1). While these are more than likely to suffice, it is conceivable that with time and experience other categories or reasons may emerge. The proposed provision in the Bill is intended therefore to provide a flexible mechanism, which is subject to Parliamentary scrutiny and disallowance, to include additional categories or reasons should they arise and need to be specified.'

The Committee thanks the Minister for this response. In continuing to draw attention to paragraphs 3(5)(b) and 7(1)(j), 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 24 - Delegation

Clause 24 provides that the Minister may delegate to 'a person' any of the Minister's powers under the Act, other than the power of delegation. The Committee has expressed concern on a number of occasions in relation to such unrestricted powers of delegation. In the present case the Committee noted that the powers to be capable of delegation included -

- the appointment of the National Cultural Heritage Committee;

- the power to make arrangements with State Ministers in relation to the exercise of the powers of inspectors under the Act by officers of the State; and

- the power to give directions as to the disposal of forfeited protected objects.

The Committee suggested that if these powers were to be delegated at all they should be delegated only to the senior officers of the Minister's Department.

The Committee drew the clause to the attention of the Senate under principle 1(a)(ii) in that by permitting such unrestricted delegation of the Minister's powers it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister for Arts, Heritage and Environment has responded:

> 'It is my normal practice when delegating powers to restrict this delegation to senior officers of my portfolio and I expect to be exercising my powers of delegation in the same conservative manner. However, as a result of the Committee's concern close attention will be given in future legislation to legislatively restricting the exercise of the power of delegation.'

The Committee thanks the Minister for this response. However it observes that, if it is not intended that the powers to be capable of delegation under this Bill will be delegated to persons other than senior Departmental officers, there would appear to be no reason why this Bill, as well as future

legislation, should not be amended to impose appropriate restrictions on the power of delegation. The Committee draws attention to the new section 34A inserted by section 12 of the Student Assistance Amendment Act 1985 as an example of the imposition of such restrictions. The Committee therefore continues to draw clause 24 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.

Paragraph 32(1)(b) - Entry and search without warrant

Paragraph 32(1)(b) would permit an inspector to enter without warrant upon any land or upon or into any premises, structure, vessel, aircraft or vehicle on or in which the inspector believes on reasonable grounds that any thing forfeited or connected with an offence against the Act is situated and to seize any such thing found upon the land or in the premises, structure, vessel, aircraft or vehicle if -

' (c) the inspector believes on reasonable grounds that it is necessary to do so in order to prevent the exportation or importation of that thing or the concealment, loss or destruction of any thing forfeited or connected with an offence against this Act; and

(d) the ... entry is made in circumstances of such seriousness and urgency as to require and justify immediate search or entry without the authority of an order of a court or of a warrant issued under this Act.'

The Committee has in the past recognised that whether such a provision for search and entry without warrant in circumstances of seriousness and urgency is justified is a

question of policy: see its comment on clause 60 of the Criminal Investigation Bill 1981 in its First Report of 1982. It drew paragraph 32(1)(b) to the attention of the Senate under principle 1(a)(i) in that such a power of entry and search without warrant might be considered to trespass unduly on personal rights and liberties. The Minister for Arts, Heritage and Environment has responded:

> 'As the Committee noted, it is a question of policy as to whether or not such a provision should be inserted. Breaches of the Act particularly in relation to illegal exports are likely to be discovered at short notice and in circumstances where urgent action may be required. It is therefore desirable, I believe, to have such a provision enabling speed and flexibility for deterrent action.'

The Committee thanks the Minister for this response. In continuing to draw attention to paragraph 32(1)(b), 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.

Clauses 36, 37 and 38 - Forfeiture of protected objects

Clauses 36, 37 and 38 deal with procedures for the forfeiture of protected objects and the disposal of objects so forfeited. Two aspects of these provisions are of concern to the Committee: first, objects may be forfeited by purely administrative procedures without the intervention of a court, and, secondly, the disposal of forfeited objects is left entirely to the discretion of the Minister. The Minister for Arts, Heritage and Environment has provided a substantial response, the relevant parts of which are set out below for the information of the Senate. However although the Minister

gives assurances as to how powers under the Act would be exercised, his response tends to confirm the view of the Committee that in many cases the return of protected objects to their lawful owners may depend on the goodwill of the inspectors and the Minister of the day.

The operation of the provisions may best be illustrated by way of example. Let us suppose that an Australian protected object is stolen from its owner and an attempt is made to export it from Australia. It thereby becomes liable to forfeiture under sub-clause 9(2). The inspector who seizes the object is given a discretion by sub-clause 36(2) to notify the owner or the person who had the possession, custody or control of the object immediately before it was seized (in this case the thief) that the object has been seized and that it will be forfeited unless, within 30 days after the service of the notice, the person on whom the notice is served claims the object or brings an action for recovery of the object. As in this case the thief will have good reasons for not coming forward the object in question may be forfeited to the Commonwealth without any requirement that a court determine that the object is in fact a protected object and without any requirement that a court determine whether in fact the person attempting to export the object was its rightful owner. The owner may, indeed, remain blissfully unaware of the entire proceedings. By virtue of section 38, on forfeiture all title and interest in the object vests in the Commonwealth and the disposal of the object is left to the discretion of the Minister.

By way of a second example let us suppose that the rightful owner is, by good fortune, served with a notice under sub-clause 36(2) and brings an action for the recovery of the object. On this occasion a court intervenes but it is merely permitted to determine whether the object is liable to forfeiture under sub-clause 9(2): that is, whether the

object is a protected object and whether an attempt has been made to export it from Australia otherwise than in accordance with a permit or certificate of exemption. Where a court determines that an object is liable to forfeiture it is required by sub-clause 37(3) to order that the object is forfeited. Once again, title and interest in the object would vest in the Commonwealth and its return to its rightful owner would appear to depend on the Minister's goodwill.

The Minister for Arts, Heritage and Environment has responded:

> 'These provisions are modelled on equivalent provisions in the Wildlife Protection (Regulation of Exports and Imports) Act 1982 and the Customs Act 1901, while reflecting the nature of the major sanction in the Bill - forfeiture or liability to forfeiture depending on whether or not a protected object is exported or attempted to be exported. The Bill makes it mandatory that a protected object which is unlawfully exported is to be forfeited thereby providing Australia with a legal basis internationally to recover that protected object or objects. The need for such a basis has been demonstrated in several international court cases.
>
> A protected object involved in an attempt to export is liable to forfeiture. However, forfeiture only occurs if no course for recovery is followed, if the court so orders, or if a person who has a right to recover cannot readily be identified.

Similar to the equivalent provisions of the Wildlife Protection (Regulation of Exports and Imports) Act 1982, once the object is forfeited it shall be disposed of in accordance with the direction of the Minister. In certain circumstances he may wish to return the object to the owner, in others it is envisaged he will give the object to an appropriate cultural institution. It is anticipated that the provisions relating to seizing, retaining and forfeiture will, in effect, operate once the inspectors receive information that an export of a protected object is being attempted. However, this Bill would not operate in isolation. In the example cited by the Committee of an Australian protected object stolen from its owner, not only would this Bill apply but so would the law body applying to investigations, search and recovery of stolen property. It would therefore be unlikely in this instance that the inspector would serve a notice on the thief (as the Committee suggests) once the object is seized. Given the significance of the object, it is also unlikely that the owner would not be identifiable.

While, by virtue of an attempted export, an Australian protected object is liable to forfeiture it is highly unlikely that the object, where the would-be exporter is a thief, would in fact ever be forfeited. The Minister would exercise his power under sub-clause 35(2) and release the object to the owner or the person who had lawful custody of the object before it was seized.

The purpose of clause 36 is to ensure so far as practicable that the inspector seizing the object advises the owner or, where appropriate, his agent or the responsible person for care of such an object, of the seizure and of the right to institute proceedings for recovery. The proceedings would be against the Crown and it would then be a matter of evidence whether or not an object is protected and an attempt has been made to export it. The provisions reflect equivalent procedures in the Wildlife Protection (Regulation of Exports and Imports) Act 1982 and the Customs Act 1901.

In the second example postulated, the Committee correctly identified that where a Court determines that an object is liable to forfeiture it is forfeited. Such an occurrence would only occur in proceedings for recovery consequential to an inspector seizing the object believing it to be a protected object involved in an attempt to export. If the Court does find that the object is liable to forfeiture then it follows that an offence has been committed involving that object. If, for example, the person committing the offence is a thief and the owner is innocent of the offence, it is envisaged that the Minister would return that object by virtue of exercising his discretion in relation to forfeited objects. If, however, the object is proved to be a protected object but the Court is not satisfied that there has been an attempt to export, then paragraph 37(3)(e) would operate and the Court could order the return of the object.

> Whilst respecting the Committee's concerns, it is my view that given the purposes of the Bill clauses 36, 37 and 38 do not trespass unduly on personal rights and liberties. Indeed, I have been anxious to ensure that personal rights and liberties are safeguarded in conformity with present Government policy concerning such matters.'

The Committee thanks the Minister for this response. It recognizes that the provisions follow those in the Customs Act 1901 and the Wildlife Protection (Regulation of Exports and Imports) Act 1982 dealing with the forfeiture of seized goods and live animals and plants respectively. However the Committee remains concerned in relation to three aspects of the provisions. First, there being a discretion in the inspector seizing a protected object whether to notify the owner or the person who had the possession, custody or control of the object immediately before it was seized, there is no requirement that the inspector notify the owner if the owner is not the person who had the possession, custody or control of the object immediately before it was seized. Secondly, where a protected object is seized and a notice served under sub-section 36(2), the owner or person who had the possession, custody or control of the object has 30 days to claim the object or to bring an action for the recovery of the object. If these steps are not taken the object is forfeited without the inspector's reasonable belief as to the fact that the object is a protected object and that there has been an attempt to export it in contravention of the Act being tested in a court. Thirdly, where a court finds that an offence has been committed in relation to a protected object and that object is forfeited to the Commonwealth, its return to its lawful owner depends on the goodwill of the Minister even though the owner may be entirely innocent of any involvement in the attempt to export the object. While, as the Minister says, 'it is envisaged that the Minister

would return that object by virtue of exercising his discretion in relation to forfeited objects', there is no requirement that the discretion be exercised in favour of the lawful owner. The Minister could, for example, 'give the object to an appropriate cultural institution'.

The Committee suggested in its Alert Digest No. 16 of 1985, first, that an object should only be forfeited on the order of a court and not, as is proposed, on the basis of the belief of an inspector and the failure of the owner or the person who had the possession, custody or control of the object immediately before it was seized to take steps within a limited time to recover the object. The inspector seizing the object should be required to satisfy a court that the object is in fact a protected object and that an attempt has been made to export it (or that, being a protected object of a foreign country the Government of which has requested its return, it has been imported, as the case may be). Secondly, a register should be established of the owners of objects on the National Cultural Heritage Control List so that where such objects are seized in the course of an attempt to export them the owners may be notified as a matter of course and not merely at the discretion of the inspector seizing the object as is proposed under sub-clause 36(2). Thirdly an object so seized should be returned to its owner unless the owner is convicted under sub-clause 9(3) of knowingly exporting or attempting to export the object. The Committee notes that there is already the power to order forfeiture in such circumstances under sub-clause 37(4).

In relation to the second suggestion, the Minister for Arts, Heritage and Environment has responded:

> 'The [National Cultural Heritage] Control List will not be an itemized list of objects. It will consist of a list of categories of cultural

material together with the criteria which will govern the grant of export permits for each category. A person intending to export a cultural object should consult the Control List, which will be widely publicised and available, prior to export to ascertain whether or not the object is an Australian protected object thereby requiring a permit for export. As stated in the Explanatory Memorandum the over-riding criterion which will govern the issue of the permit is whether or not the loss of the object would significantly diminish the cultural heritage of Australia.'

The Committee accepts that it had misconstrued the nature of the Control List. However the fact that the List will merely set out categories of protected material serves to confirm the Committee's fears that it may prove difficult to identify the lawful owners of protected objects which are liable to forfeiture.

The Committee continues to draw sub-clauses 36, 37 and 38 to the attention of the Senate under principle 1(a)(i) in that by permitting protected objects to be forfeited otherwise than by order of a court and by leaving the disposal of such objects to the discretion of the Minister rather than by requiring their return to their lawful owners in appropriate circumstances the clauses may be considered to trespass unduly on personal rights and liberties.

TRADE PRACTICES AMENDMENT BILL 1985

The Committee commented on this Bill in its Seventeenth Report of 1985 (4 December 1985) but it indicated at that time that it was examining submissions which had been made to Senators in relation to the Bill by the Business Council of

Australia and the Law Council of Australia and that it might make a further Report to the Senate on the Bill. Following its consideration of those submissions the Committee drew the attention of the Senate to two further clauses of the Bill in its First Report of 1986. The Committee has now received a response from the Attorney-General to those additional comments the relevant parts of which are reproduced below for the information of the Senate.

Clause 16 - Burden of proof

Clause 16 would amend section 46 of the Principal Act to prohibit a corporation which has a substantial degree of power in a market from taking advantage of that power to eliminate or substantially damage competitors, to exclude potential competitors or to prevent a person from engaging in competitive conduct. New sub-section 46(7) to be inserted by the clause would provide that a corporation may be taken to have taken advantage of its power for a purpose referred to above notwithstanding that the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances. The Committee suggested that the effect of the new sub-section would be that proof of particular conduct - for example pricing at below average cost - might give rise to a need for the corporation concerned to adduce evidence in order to rebut an inference which the court might otherwise draw that it had the purpose of destroying actual or potential competition.

While a breach of section 46 only results in a liability to pay a pecuniary penalty to the Commonwealth (section 76) and not in criminal proceedings (section 78), the Committee expressed concern that, in circumstances where a corporation might be liable to a substantial penalty (up to $250,000), it should bear the onus of adducing evidence that it did not

have the special purpose required rather than the onus of establishing this purpose resting on the Minister or the Commission. In this connection the Committee drew attention to the recommendation 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) that provisions imposing an evidential burden of proof on defendants should be kept to a minimum.

The Attorney-General has responded:

> 'Section 46(7) does not reverse the onus of proof. It merely corrects the possible construction that the absence of direct express evidence of its purpose, from the mouth of the corporation (i.e. through resolutions of the Board of Director's [sic]) is a fatal flaw in any section 46 proceedings. Section 46(7) makes it clear that a court is entitled to infer purpose from conduct, notwithstanding the absence of expressed statements of purpose.
>
> ...
>
> The provision is not unusual; many other Acts contain provisions specifically allowing inferences to be drawn - [e.g.]
>
> - Evidence Act, section 7F(2)
> - Trade Practices Act, section 47(13)
> - Crimes (Aircraft) Act, section 20C(2)
> - Companies Code, section 301

- Taxation (Unpaid Company Tax) Act, section 22

- Evidence Act (N.S.W.), section 14B(5)

The proposed amendment to insert s.46(7) enables the required "taking advantage of" and "purpose" to be inferred from the conduct of the corporation; it does not mean that any conduct which has one of the 3 predatory effects mentioned in s.46(1) has necessarily been engaged in by the corporation for the required predatory purpose.

Proposed s.46(7) accords with the principle that the plaintiff is required to establish a prima facie case (in this case by adducing evidence as to the conduct of the corporation in the context of all the market circumstances) and only after the court has been satisfied that such a case has been made out will the defendant then be put to adducing evidence to rebut that case. It must be noted that the other elements of the contravention viz. "substantial market power" and "take advantage of" must still be established as well.

The example used by the Senate Scrutiny of Bills Committee, where it suggests an inference could be drawn merely from the fact of pricing below average cost, is, with respect, not correct. Below average cost pricing, of itself would not be sufficient to enable an inference as to purpose to be drawn. It would only be where that below average costs pricing is combined with other circumstances or other conduct by the corporation or the target that an inference could be drawn.

> Proposed s.46(7) is a statutory statement in a particular case of the accepted evidentiary principle that inferences may be drawn from conduct. What proposed s.46(7) does is to highlight, especially to potential litigants which have been the victims of abuse of market power, that express statements of predatory purpose by the offending corporation are not necessarily required to prove a contravention.'

The Committee thanks the Attorney-General for this response. While the Committee recognizes that it is always open to a court to draw inferences from conduct it suggests that new sub-section 46(7) goes beyond this accepted principle in permitting inferences to be drawn from the effects of the corporation's conduct. Indeed the Green Paper, The Trade Practices Act: Proposals for Change, suggests that this is the intention underlying the proposed amendment.

In order to establish a contravention of section 46, as proposed to be amended, the plaintiff is required to prove:

(i) that a corporation has a substantial degree of power in a market;
(ii) that it has taken advantage of that power; and
(iii) that in doing so it had one of the purposes set out in paragraphs 46(1)(a), (b) and (c), for example the purpose of preventing the entry of a person into the relevant market.

Sub-section 46(7) would enable the court to draw an inference as to the third point, the purpose of the corporation, from the conduct of the corporation, the conduct of any other

person - for example the person prevented from entering the relevant market - or from other relevant circumstances. The Attorney-General suggests in his response that below average cost pricing would not, of itself, be sufficient to enable an inference as to purpose to be drawn. However the Explanatory Memorandum states that -

> 'where a corporation with the requisite market power is, in the absence of countervailing evidence that its pricing was not aimed at destroying actual or potential competition, selling at below average cost there may be grounds for inferring that it is taking advantage of its power for a prescribed purpose.'

The Committee's point is that the burden will probably be cast upon the corporation concerned to provide the 'countervailing evidence' referred to above.

The Committee concedes that there have been difficulties in establishing that corporations have had the anti-competitive purposes required under section 46 and that this may be an appropriate case for the imposition of an evidentiary burden on the defendant corporation. In this connection the Committee notes that the Senate Standing Committee on Constitutional and Legal Affairs in its Report referred to above was prepared to see an evidential burden imposed on the defendant in criminal proceedings -

> 'where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue.' (Recommendation 6.13(b)(i).)

Nevertheless the Committee feels that some doubt remains whether this is an appropriate case for imposing an evidential burden on the defendant and whether, if it is, the corporation should face the task not merely of rebutting inferences drawn from its own conduct but also of adducing evidence to counter inferences drawn from the conduct of others.

Accordingly the Committee continues to draw clause 16 to the attention of the Senate in the hope of promoting a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

Effect of an amendment to omit sub-section 46(7)

In his response the Attorney-General also argued that to amend clause 16 at this stage to omit proposed new sub-section 46(7) might have -

> 'particularly serious consequences, since an amendment to remove from the Bill provisions already introduced into Parliament would almost certainly lead courts to the construction that the omissions were deliberately designed to negate what they would have provided for. The courts would, because of this, hold that 'corporate purpose' could not be inferred and could only be proved by direct unequivocal evidence emanating from the highest level of management. This would make s.46 unworkable for all practical purposes....'

On one level, the Attorney-General's initial proposition is a simple truism. If the Government were, for example, to introduce a Bill containing a clause stating 'Thou shalt not murder' and the Bill were to be amended in the course of its passage to omit the clause, it would be appropriate for a court to conclude that the Parliament did not wish murder to

be made the subject of a penal sanction. However in the present case the mere omission of new sub-section 46(7) should leave the common law, and the power of the courts to draw inferences from conduct, untouched, rather than having the positive and contrary effect argued for by the Attorney-General of negating all possibility of drawing such inferences.

If the Attorney-General were correct as to the effect of the omission of proposed new sub-section 46(7) this would, as a general proposition, enable the Executive to fetter to a considerable extent the Parliament's freedom of action in relation to legislation. In a case where a court did consider it appropriate to refer to the legislative history of a Bill under section 15AB of the Acts Interpretation Act 1901 one would imagine that all that would be necessary to prevent the court adopting the construction advanced by the Attorney-General would be a clear statement in the course of debate by the parties opposing the amendment of their reasons for doing so. The rejection of an amendment which is, for example, considered unnecessary given the current state of the law could hardly be construed as an attempt to alter that current state of the law in the contrary direction.

Clause 34 -
New section 65R - Lack of definition of 'recall'

Clause 34 inserts a new Division 1A in Part V of the Act dealing with product safety and product information. Under new section 65R it would be an offence for a supplier to fail to notify the Minister within two days where the supplier voluntarily takes action to recall goods. No definition is given of what constitutes a 'recall' of goods for the purposes of this provision.

The Committee was concerned that there might be some uncertainty as to the obligation placed upon suppliers by new section 65R. It therefore drew the new section to the attention of the Senate under principle 1(a)(i) in that it might be considered, by virtue of its uncertain application, to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'The Government is proposing an amendment to new section 65R in the Senate, to clarify that suppliers need only notify the Minister of voluntary recalls of goods where the goods are recalled because they will or may cause injury, that is where they contain some health or safety related defect. For example, the section will not require a paint manufacturer to inform the Minister of a recall of paints that were wrongly tinted.
>
> As there is no definition of "recall" in the Act, the ordinary meaning of the word applies. The Concise Oxford Dictionary defines "recall" as "summon to return from a place".'

The Committee thanks the Attorney-General for this response. However it suggests that the dictionary meaning cited by the Attorney-General is not as clear as is desirable in a provision imposing an obligation enforced by a penal sanction. The dictionary meaning would not appear to encompass, for example, the publication of a notice by a motor car or motor bike manufacturer informing persons who may have purchased a particular model of car or bike that there is a potential defect in the machine and that they should see their nearest service agent in order to have it rectified. Nevertheless such notices are regarded as 'recalls' by the consumer movement.

A similar confusion is apparent in the terms of Division 1A itself. Notices under section 65F are referred to as 'product recall orders' yet sub-section 65F(1) itself would appear to draw a distinction between a requirement to 'recall' goods - paragraph 65F(1)(d) - and a requirement that, for example, the supplier undertake to repair or replace goods: paragraph 65F(1)(f).

In view of the potential uncertainty as to what may constitute a 'recall' the Committee continues to draw new section 65R 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.

Alan Missen
Deputy Chairman

12 March 1986

AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF 1986

9 APRIL 1986

THE SENATE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, 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

FOURTH REPORT

OF 1986

The Committee has the honour to present its Fourth Report of 1986 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:

Air Navigation Amendment Bill 1986

AIR NAVIGATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 March 1986 by the Minister for Aviation.

The Bill amends the Air Navigation Act 1920 to enable ratification by Australia of the Protocol relating to an amendment to the Chicago Convention on International Civil Aviation signed at Montreal on 10 May 1984. The Protocol amends the Chicago Convention through the inclusion of a new Article (Article 3 bis) which prohibits the use of force against civil aircraft and provides for the regulation and interception of civil aircraft flying above the territory of a foreign country without authorisation or for any purpose inconsistent with the aims of the Chicago Convention.

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

Clause 5 -
New sub-section 21A(2) - Uncertain scope of offence

New sub-section 21A(2) would make it an offence where a pilot in command of an Australian owned or operated aircraft in flight over a foreign country operates the aircraft 'for a purpose that is prejudicial to the security or public order of ... the foreign country'. The offence carries a penalty of a fine of $5,000 or 2 years imprisonment or both.

The Committee is concerned that it is by no means clear what would constitute the operation of an aircraft for a purpose that is prejudicial to the security or public order of a foreign country. The Committee has expressed the view on a number of occasions that penal provisions should be certain

in their application. In the present case pilots should be able to ascertain what conduct is intended to be prohibited. The Committee suggests that this may not be possible.

Accordingly, the Committee draws new sub-section 21A(2) to the attention of the Senate under principle 1(a)(i) in that by reason of its uncertain scope it may be considered to trespass unduly on personal rights and liberties.

New sub-paragraph 21A(3)(b)(ii) -Uncertain scope of offence

New sub-section 21A(3) would require a pilot in command of an Australian owned or operated aircraft to comply with the directions of an authorised official of a foreign country if the aircraft is in flight over that foreign country and 'there are reasonable grounds for believing that the aircraft is being operated for a purpose that is prejudicial to the security or public order of, or to the safety of air navigation in relation to, the foreign country': sub-paragraph 21A(3)(b)(ii).

It is not clear who is required to have reasonable grounds for this belief and once again the Committee suggests that this results in the proposed offence provision being uncertain in its application. The Committee therefore draws new sub-paragraph 21A(3)(b)(ii) 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.

New sub-section 21A(4) - Reversal of onus of proof

New sub-section 21A(3) would create an offence where a pilot in command of an Australian owned or operated aircraft fails to comply with any direction given by an authorised official of a foreign country. Proposed new sub-section 21A(4) would provide a defence if the pilot proves that he or she believed

on reasonable grounds that compliance with the direction would be more likely to endanger the safety of the aircraft or of the persons on board the aircraft than would a failure to comply with the direction.

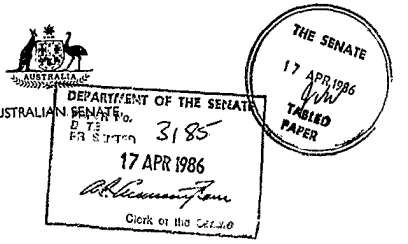
The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings but rather that they should merely be required to bear the 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 pilot might be required to adduce evidence that he or she had the required belief rather than to prove the defence on the balance of probabilities.

The Committee is aware that it is the view of the Attorney-General that a reversal of the persuasive onus is permissible where a matter is peculiarly within the knowledge of the defendant or where the Crown would be put to great expense or difficulty in establishing a particular matter in issue which could be readily and cheaply proved by the defendant (see the response of the Attorney-General in relation to clause 21 of the Trade Practices Amendment Bill 1985 in the Committee's Seventeenth Report of 1985). However the Committee continues to press the view - which was the view of the Senate Standing Committee on Constitutional and Legal Affairs after lengthy inquiry - that in such cases the evidential onus alone should be imposed on the defendant. In all but the most exceptional circumstances the principle should be preserved, which has been called the 'golden thread' of English criminal law, that the prosecution must

prove the guilt of the defendant rather than the defendant being required to exculpate himself or herself by establishing some statutory defence.

The Committee therefore draws new sub-section 21A(4) 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
9 April 1986



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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF 1986

The Committee has the honour to present its Fifth Report of 1986 to the Senate.

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

Air Navigation Amendment Bill 1986
Australian Citizenship Amendment Bill 1986
Builders Labourers' Federation (Cancellation of Registration) Act 1986
Trade Practices Revision Bill 1986

AIR NAVIGATION AMENDMENT BILL

The Committee commented on this Bill in its Fourth Report of 1986 (9 April 1986). The Minister for Aviation 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 -
New sub-section 21A(2) - Uncertain scope of offence

The Committee drew attention to new sub-section 21A(2) which would make it an offence where a pilot in command of an Australian owned or operated aircraft in flight over a foreign country operates the aircraft 'for a purpose that is prejudicial to the security or public order of ... the foreign country'. The offence carries a penalty of a fine of $5,000 or 2 years imprisonment or both.

The Committee was concerned that it was by no means clear what would constitute the operation of an aircraft for a purpose that is prejudicial to the security or public order of a foreign country. The Committee suggested that pilots might not be able to ascertain what conduct was intended to be prohibited.

Accordingly, the Committee drew new sub-section 21A(2) to the attention of the Senate under principle 1(a)(i) in that by reason of its uncertain scope it might be considered to trespass unduly on personal rights and liberties. The Minister for Aviation has responded:

> 'When Article 3 bis was being drafted during the 25th Extraordinary ICAO Assembly in Montreal in May 1984, many states argued that if they were going to be required to refrain from the use of weapons against civil aircraft which might be intercepted in their territorial airspace, there needed to be some off-setting guarantee that states would not permit their aircraft to be used for illegal

purposes. Some of states' major concerns related to the use of civil aircraft for carriage of drugs, gun-running and illegal immigration. These concerns were ultimately embodied in the phrase "inconsistent with the aims of the Convention".

The proposed legislation gives meaning to the intent of Article 3 bis (d) through reference to the security and public order of, and safety of air navigation in, a foreign country. References to the aims of 'security' and 'safety' are to be found in the preamble to the Convention. The law of the foreign country overflown would also cover the specific circumstances envisaged by this expression, and any offence would be subject to prosecution by the country concerned. Where it is not possible for the prosecution to be undertaken by the foriegn country (eg. because the aircraft has not landed there), the proposed legislation will permit the action to be taken in Australia in relation to Australian aircraft or aircraft operated by an operator whose principal place of business or permanent residence is in Australian territory. This is consistent with the requirement of Article 3 bis and Australia's existing obligation under Article 12 of the Convention "to adopt measures to insure.... that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to flight and manoeuvre of aircraft there in force". In this context it should be noted that the legislation also precludes a person being convicted for the same offence in both the foreign country and Australia.'

The Committee thanks the Minister for this response. However, it remains concerned with regard to the generality of the offence. While the laws of the foreign country overflown might provide some guidance to pilots they could not be regarded as affording an exhaustive definition of the content of the offence. Moreover such laws may be difficult to ascertain. Accordingly the

Committee continues to draw new sub-section 21A(2) to the attention of the Senate under principle 1(a)(i) in that by reason of its uncertain content it may be considered to trespass unduly on personal rights and liberties.

New sub-paragraph 21A(3)(b)(ii) - Uncertain scope of offence

The Committee drew attention to new sub-section 21A(3) which would require a pilot in command of an Australian owned or operated aircraft to comply with the directions of an authorised official of a foreign country if the aircraft is in flight over that foreign country and 'there are reasonable grounds for believing that the aircraft is being operated for a purpose that is prejudicial to the security or public order of, or to the safety of air navigation in relation to, the foreign country': sub-paragraph 21A(3)(b)(ii).

The Committee commented that it was not clear who was required to have reasonable grounds for this belief and once again the Committee suggested that this resulted in the proposed offence provision being uncertain in its application. The Committee therefore drew new sub-paragraph 21A(3)(b)(ii) 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 Aviation has responded:

> 'The intent of the Article and the legislation is to confirm a country's existing sovereign right to require an aircraft to land or to obey some other lawful direction if that country's officials have reasonable grounds for believing the aircraft is being used for purposes inconsistent with the aims of the Convention. The test of reasonableness is an objective one i.e. were there reasonable grounds for the country being overflown to believe...? In this respect the wording of sub-section 21A(3)(b)(ii) reflects the wording of Article 3 bis (b).'

The Committee thanks the Minister for his response. It appears to the Committee that in establishing a contravention of new sub-section 21A(3) as drafted a court will have regard not to the state of mind of the authorised official giving the direction with which the pilot failed to comply but to whether there were objective grounds for the belief required under sub-paragraph 21A(3)(b)(ii). In other words a pilot could be convicted of an offence against the sub-section even though the authorised official did not hold the required belief provided there were reasonable grounds on which the official could have held such a belief. This would seem to run contrary to the Minister's explanation of the intention of the provision: namely that the country overflown or its officials should have reasonable grounds for holding the required belief in order for the pilot to be required to comply with the direction of the authorised official.

While the Committee accepts that on either interpretation the offence is not uncertain in its content (subject to the comments of the Committee above on the potential uncertainty of the reference to purposes prejudicial to the security or public order of a country) the Committee nonetheless suggests that the provision as drafted may not achieve what the Minister indicates is the desired intention.

New sub-section 21A(4) - Reversal of onus of proof

New sub-section 21A(3) would create an offence where a pilot in command of an Australian owned or operated aircraft fails to comply with any direction given by an authorised official of a foreign country. Proposed new sub-section 21A(4) would provide a defence if the pilot proves that he or she believed on reasonable grounds that compliance with the direction would be more likely to endanger the safety of the aircraft or of the persons on board the aircraft than would a failure to comply with the direction.

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 the 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 pilot might be required to adduce evidence that he or she had the required belief rather than to prove the defence on the balance of probabilities.

The Committee noted that it was aware that it was the view of the Attorney-General that a reversal of the persuasive onus is permissible where a matter is peculiarly within the knowledge of the defendant or where the Crown would be put to great expense or difficulty in establishing a particular matter in issue which could be readily and cheaply proved by the defendant (see the response of the Attorney-General in relation to clause 21 of the Trade Practices Amendment Bill 1985 in the Committee's Seventeenth Report of 1985). However the Committee continued to press the view - which was the view of the Senate Standing Committee on Constitutional and Legal Affairs after lengthy inquiry - that in such cases the evidential onus alone should be imposed on the defendant.

The Committee therefore drew new sub-section 21A(4) 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 Aviation has responded:

> 'The defence created by sub-section 21A(4) relates to the state of mind of the pilot in command of the aircraft at the time of failure to comply with the direction. The belief which leads to the pilot's action and the factors giving rise to that belief are solely within the knowledge of the pilot and are not capable of objective proof by the prosecution. For example, in the case where a civil aircraft is intercepted by a military aircraft, the

manoeuvre which the civil aircraft might be instructed to take could be considered by the pilot in command to be unsafe and he/she might decline to obey the instruction. Such instruction could be conveyed through internationally accepted signalling techniques and there may be no record of radio communication between the intercepted and intercepting aircraft.

In the absence of admission by the pilot, the Crown would not be able to prove beyond reasonable doubt that the pilot did not have the requisite belief at the time in question. However, if the pilot perceives that by not obeying the instruction the safety of the aircraft and its passengers will be enhanced, then it is in the interests of aviation safety that he/she be protected from liability.'

The Committee thanks the Minister for this response. It accepts that there is a need for the pilot to be protected from liability if the pilot's failure to comply with directions is prompted by safety considerations and that it would be difficult for the prosecution to negative in every case the possibility that a failure to comply with a direction was prompted by such considerations. However, the Minister's response does not take up the suggestion put by the Committee that an evidential onus, rather than the persuasive onus, might be imposed on the pilot: that is, that the pilot be required only to adduce evidence that he or she failed to comply by reason of safety considerations (evidence the burden of rebutting which would then fall on the prosecution) rather than being required to prove this defence on the balance of probabilities.

The Committee continues to draw new sub-section 21A(4) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant (rather than an evidential onus) it may be considered to trespass unduly on personal rights and liberties.

AUSTRALIAN CITIZENSHIP AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 February 1986 by the Minister for Immigration and Ethnic Affairs.

The Australian Citizenship Amendment Bill 1986, which amends the Australian Citizenship Act 1948 (the Act), has four purposes:

(1) to exclude children born in Australia to visitors, temporary entrants and prohibited non-citizens from automatically acquiring Australian citizenship by birth;

(2) to amend the oath and affirmation of allegiance to remove the following requirements for persons taking such oath or affirmation:

- the requirement to announce one's name;
- the requirement to renounce all other allegiances;

(3) to allow resumption of citizenship for persons who lost it under section 17 at any time subject to a continuing commitment to Australia;

(4) to effect other minor and formal amendments to the Act, to remove sexist language and anomalies and to make the legislation more specific.

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

Clause 9 - Right of review

Paragraph 9(b) would have amended section 52A of the Principal Act so as to provide that application might be made to the Administrative Appeals Tribunal for review of -

'(e) decisions of the Minister under sub-section 23AA(1) or (2) refusing to register a declaration.'

While decisions under sub-section (1) of the new section 23AA to be inserted by sub-clause 7(1) may correctly be described as decisions 'refusing to register a declaration', the Committee suggested that decisions under sub-section (2) of the new section 23AA would be more appropriately described as decisions 'refusing to include the name of a child in a declaration'.

Accordingly the Committee drew the paragraph 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 Committee is pleased to record that the paragraph was amended in the House of Representatives on 13 March 1986 to make plain that a right of review is accorded in respect of decisions refusing to include the name of a child in a declaration as well as decisions refusing to register a declaration.

BUILDERS LABOURERS' FEDERATION (CANCELLATION OF REGISTRATION) ACT 1986

This Act was introduced into the House of Representatives on 8 April 1986 by the Minister for Employment and Industrial Relations. It passed the House of Representatives on 9 April and the Senate on 11 April, and received the Royal Assent on 14 April.

The purpose of the Act is to cancel the registration of The Australian Building Construction Employees' and Builders Labourers' Federation under the Conciliation and Arbitration Act 1904.

The Committee drew the attention of the Senate to the following section of the Act (then a Bill) in its Alert Digest No. 5 of 1986:

Section 3 - Trespass on personal rights and liberties

Section 3 provides that the registration of the Australian Building Construction Employees' and Builders Labourers' Federation ('the Federation') under the Conciliation and Arbitration Act 1904 is cancelled. By virtue of this section, taken together with section 4 of the Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Act 1986 ('the Consequential Provisions Act'), the Federation will be deprived of the right to participate in Australia's highly structured Federal industrial relations system. The definition of "non-registered association" in section 3 of the Consequential Provisions Act extends this penalty to any other non-registered association formed in connection with the building industry, a majority of the members of which are or have been members of the Federation. The intention of the two Acts is thus plainly not merely to restrict the right of the Federation to participate in the Federal

industrial relations system but also to restrict the right of the present membership of the Federation to participate in that system except through those organizations to which coverage of those members is awarded by way of regulations made pursuant to sub-section 7(2) of the Consequential Provisions Act.

The Committee recognized that the Conciliation and Arbitration Commission already had broad powers to deregister organizations. However it suggested that while it might be thought appropriate for a person or organization to be deprived of rights by a court in accordance with due process of law, it might not be considered appropriate for the Parliament to deprive a person or organization of rights in this fashion. A court may, for example, declare a person guilty of murder and impose on that person a sentence of imprisonment but it would not be considered appropriate in this day and age, questions of constitutional power aside, for the Parliament to pass a law making such a declaration and imposing such a sentence. Likewise it would not be considered appropriate, for example, for the Parliament to pass a law depriving a political party of the right to participate in Federal elections and depriving the members of that party of the right to form another association for the purpose of participating in Federal elections.

In the present case the Committee suggested that it might not be considered appropriate for the Parliament to pass a law depriving a particular organization of the right to participate in the Federal industrial relations system and depriving the members of that organization of the right to participate in that system except through other registered organizations. In depriving the organization and its members of this right the Act goes to the heart of the rationale for the existence of industrial organizations. In the view of the Committee, therefore, the Act may be said to trespass both on the right of freedom of association and on the right to organise. While the Federation will retain the right to exist as a non-registered organization and to organise outside the confines of the Federal industrial

system, it will be deprived of its rationale for existence, namely the right to participate in the Federal industrial relations system.

Accordingly the Committee draws the attention of the Senate to the section under principle 1(a)(i) in that by depriving the Federation and its members of their rights in this fashion it may be considered to trespass unduly on personal rights and liberties. The Committee notes that its concerns were drawn to the attention of the Senate by its Chairman, Senator Tate, in the course of the Second Reading debate on the Act in the Senate on 11 April 1986.

TRADE PRACTICES REVISION BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Attorney-General.

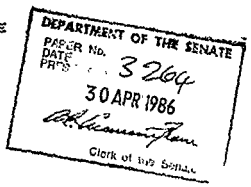
The purpose of this Bill is to amend the Trade Practices Act 1974. The principal amendments are designed to effect significant improvements to the restrictive trade practices provisions and the consumer protection provisions of the Act. The other amendments contained in the Bill form two broad categories - amendments of a technical character necessary to close loopholes, and amendments bringing up to date provisions relating to the administration and functioning of the Trade Practices Commission and the Trade Practices Tribunal.

The Bill is in substantially the same form as the Trade Practices Amendment Bill 1985 apart from the amendment to insert a new sub-section 50(2C) which now forms the subject of the Trade Practices (Transfer of Market Dominance) Amendment Bill 1986. However the Trade Practices Revision Bill 1986 includes amendments made to the Trade Practices Amendment Bill 1985 in the House of Representatives and amendments made or which the Government proposed to move in the Senate.

The Committee's comments on clause 21 (section 51A) and clauses 16 and 34 (new section 65R) of the Trade Practices Amendment Bill 1985 in its Seventeenth Report of 1985 and its First Report of 1986 respectively apply also to clauses 21, 17 and 35 respectively of the Trade Practices Revision Bill 1986.

Michael Tate
Chairman
16 April 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1986

30 APRIL 1986

THE SENATE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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 1986

The Committee has the honour to present its Sixth Report of 1986 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:

Affirmative Action (Equal Employment Opportunity for Women) Bill 1986
Australian Capital Territory Council Bill 1986
Australian Capital Territory Council (Consequential Provisions) Bill 1986
Grape Research Levy Bill 1986
Grape Research Levy Collection Bill 1986

AFFIRMATIVE ACTION (EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN) BILL 1986

This Bill was introduced into the House of Representatives on 19 February 1986 by the Prime Minister.

The purpose of the Affirmative Action (Equal Employment Opportunity for Women) Bill 1986 is to require certain employers to promote equal opportunity for women in employment by developing and implementing an affirmative action program. All private sector employers with 100 staff or more and all higher education institutions will be required to comply with the legislation.

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

Clause 4 - 'Henry VIII' clause

Clause 4 provides for the Act to extend to Norfolk Island if, and so long as, the regulations so prescribe. Because it permits the application of the Act to be varied by Executive instrument the clause may be characterized as a 'Henry VIII' clause.

The Committee observed that this form of such a clause, requiring the application of the Act to be extended by regulations (subject to tabling in Parliament and potential disallowance), was preferable to similar clauses enabling the application of an Act to be determined by proclamation or by Ministerial notice in the Gazette without any parliamentary

scrutiny: see, for example, sub-section 4(2) of the Federal Airports Corporation Act 1986. However the Committee considered that the question of the application of an Act to Australia's external Territories was one for the Parliament rather than for the Executive. The Parliament having determined in the first instance that an Act should not extend to those Territories it should then be for the whole of the Parliament to determine that the same Act should so extend.

In connection with the present provision the Committee noted that whereas the Sex Discrimination Act 1984 extended to all the external Territories it was apparently proposed that the present Bill would not extend to any of those Territories other than Norfolk Island and to that Territory only if so prescribed. The Committee drew clause 4 to the attention of the Senate under principle 1(a)(iv) in that, as a 'Henry VIII' clause, it might be considered an inappropriate delegation of legislative power. The Minister Assisting the Prime Minister on the Status of Women has responded:

> 'Inclusion of this clause indicates the Government's intention that the legislation extend to Norfolk Island. However, successive Ministers for Territories and Local Government have undertaken to consult the Norfolk Island Government before Commonwealth Legislation is extended to Norfolk Island. Accordingly, the Government does not propose that the legislation be extended to Norfolk Island until sufficient time has been allowed for consultations with the Norfolk Island Government.
>
> As the Committee has noted, Clause 4 requires the application of the Act to be extended by regulations, subject to tabling in Parliament and Parliamentary scrutiny.'

The Committee thanks the Minister for this response. In continuing to draw attention to clause 4, 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.

Paragraph 7(1)(a) - 'Henry VIII' clause

Paragraph 7(1)(a) provides that the day on which the development and implementation of affirmative action programmes is to commence in the case of higher education institutions is to be 1 August 1986 'or such later day as is prescribed'. Because it permits the effect of the Bill to be varied by Executive instrument it may be characterized as a 'Henry VIII' clause. While regulations prescribing a later date would be subject to tabling and disallowance this latter sanction could be rendered ineffective if 1 August 1986 were already past before the relevant regulations were tabled.

The Committee drew the paragraph to the attention of the Senate under principle 1(a)(iv) in that, as a 'Henry VIII' clause, it might be considered an inappropriate delegation of legislative power. The Minister Assisting the Prime Minister on the Status of Women has responded:

> 'It is the Government's firm intention that the legislation will apply to higher education institutions from 1 August 1986. The provision enables a later date to be prescribed to provide for the eventuality of some unforeseen situation arising which would prevent application of the legislation from that date. As noted by the Committee prescription of a later date would allow Parliamentary scrutiny of the date set.'

The Committee thanks the Minister for this response. However it reiterates the point made above that parliamentary scrutiny of regulations made, for example, during the winter recess, and prescribing a date later than 1 August 1986 would be less than effective. Accordingly it continues to draw the paragraph to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of administrative power.

Clause 18 - Failure to stipulate minimum period for furnishing information

Clause 18 provides that the Director may, by notice in writing, request an employer to provide further information 'within such period as is specified in the notice'. No minimum period is stipulated nor is it required that the period specified be reasonable.

While the only sanction for a failure to comply with a notice under clause 18 is that the Director may name the employer in a report tabled in Parliament, 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 Assisting the Prime Minister on the Status of Women has responded:

> 'The legislation is designed to ensure the maximum flexibility between employer and Director. The Government's approach is not a punitive one. Rather it seeks to foster the development of affirmative action programs in an atmosphere of consensus and co-operation between the Government and employers.

> As the Prime Minister indicated in his Second Reading Speech this approach is reflected in the only sanction provided in the Bill: the Director's power to name in a report to Parliament any employer who fails to lodge either a report or who fails to provide further information on request.
>
> The Director must specify in the notice a period for the employer's response to the request for further information. If the employer fails to provide the requested information in the time specified then clause 19 may apply.'

The Committee thanks the Minister for this response. However given the atmosphere of consensus and co-operation which it is intended should prevail it is not clear to the Committee why a minimum time period for furnishing information (for example 14 days) should not be stipulated or a requirement inserted that the period specified by the Director be reasonable. 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.

AUSTRALIAN CAPITAL TERRITORY COUNCIL BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Territories.

The purpose of the Bill is to establish an Australian Capital Territory Council with the function of governing the Australian Capital Territory with respect to specified municipal and territorial matters. The Council will have formal legislative and executive powers over these matters. The Council will also administer other functions that are conferred on it by the Commonwealth. The Jervis Bay Territory is a separate Commonwealth territory and is not affected by this Bill.

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

Sub-clause 6(2) - Inappropriate delegation of legislative power

Sub-clause 6(2) would confer on the proposed A.C.T. Council such other functions in addition to governing the A.C.T. with respect to prescribed matters as are vested in it by, inter alia, 'an arrangement with the Commonwealth'. The sub-clause would thus permit the functions of a statutory corporation to be increased by agreement without parliamentary scrutiny or, indeed, any form of legislative process.

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

Sub-clauses 9(1) and 12(1) and clause 19 - 'Henry VIII' clauses

Sub-clauses 9(1) and 12(1) and clause 19 would permit the number of members of the Council, the quorum at meetings of the Council and the part-time nature of members of the Council respectively to be varied by regulations. Because they would permit the terms of the Act to be varied by delegated legislation they may be characterised as 'Henry VIII' clauses.

As such, the Committee draws the provisions to the attention of the Senate under principle 1(a)(iv) in that they may be considered to constitute inappropriate delegations of legislative power.

Sub-clause 37(4) and clause 41 - 'Henry VIII' clauses

Sub-clause 37(4) and clause 41 would permit the making of regulations empowering the Council to make laws with respect to the planning of land use or the development of land and laws binding the Crown in right of the Commonwealth respectively. Once again because the provisions permit the terms of the Act to be varied by delegated legislation they may be characterized as 'Henry VIII' clauses.

Accordingly the Committee draws the provisions to the attention of the Senate under principle 1(a)(iv) in that thay may be considered to constitute inappropriate delegations of legislative power.

Sub-clauses 38(2) and 47(1) - Inappropriate delegation of legislative power

Sub-clause 38(2) would empower the Attorney-General to veto a proposed law passed by the Council if, 'in the opinion of the Attorney-General, the Council does not have power to make the proposed law'. Sub-clause 47(1) would empower the Governor-General to disallow a Council law within 6 months after the law is made. This latter discretion is totally unfettered.

While the Attorney-General's exercise of the discretion under sub-clause 38(2) could be challenged in the courts if it were considered that, for example, the Attorney General had been actuated by ulterior motives or that no reasonable person could have formed the required opinion, it would not be possible to seek review of the Attorney-General's opinion on its merits. The decision whether an exercise of power by a statutory corporation

is ultra vires the corporation is usually one left to the courts. The Committee raises the question whether it is appropriate that such a power should be vested in the Attorney-General for exercise upon the Attorney-General's subjective opinion and not upon objective grounds.

With regard to the power of disallowance vested in the Governor-General by sub-clause 47(1) the Committee recognizes that it is appropriate that this power - presumably to be exercised in the national interest - should not be reviewable by the courts on its merits. However once again the Committee questions whether the power has been vested in the appropriate person, in this case the Governor-General acting with the advice of the Federal Executive Council. The Committee is aware that both section 23 of the Norfolk Island Act 1979 and section 9 of the Northern Territory (Self-Government) Act 1978 make provision in similar terms for the disallowance of laws made by the Norfolk Island and Northern Territory Legislative Assemblies. However the Committee remarks that in both cases, as in this case, a power has been transferred to the Federal Executive which was previously exercised by the Federal Parliament. If it is considered necessary that a power of disallowance should be retained over the laws made by the proposed A.C.T. Council - and it should be remembered that the Federal Parliament will always retain the power to make overriding laws for the Territories under section 122 of the Constitution - the Committee notes that this power has hitherto been vested in the Federal Parliament rather than the Federal Executive. To the extent that legislation made by such bodies remains delegated legislation it may be argued that Parliament should retain the oversight of the exercise of the legislative power which it has delegated.

Accordingly the Committee draws sub-clauses 38(2) and 47(1) to the attention of the Senate under principle 1(a)(iv) in that by, in the case of the former, granting to the Attorney-General a power to veto proposed Council laws and, in the case of the latter, granting to the Governor-General rather than the Parliament the power to disallow such laws, they may be considered to constitute inappropriate delegations of legislative power.

Sub-clause 77(1) - Delegation

Under sub-clause 77(1) the Chairperson of the Council will be empowered to delegate to 'a person' all or any of the Chairperson's functions under the Act, other than the power of delegation or the power to make by-laws. As the Chairperson is the chief executive officer of the Council and may, subject to Council law, exercise the powers of the Council in its name and on its behalf (clause 50), and as the Council has the function of governing the Territory with respect to prescribed matters (sub-clause 6(1)), this power of delegation may be considered undesirably broad. The Committee has drawn attention on a number of occasions to similar provisions which impose no limitation on the powers or functions to be delegated and give no guidance as to the attributes of the persons to whom a delegation may be made.

The Committee draws sub-clause 77(1) to the attention of the Senate under principle 1(a)(ii) in that by providing such an unrestricted power of delegation it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Paragraph 78(1)(b) - 'Henry VIII' clause

Paragraph 78(1)(b) empowers the making of regulations amending Schedules 1 and 2 of the Bill. Matters specified in Schedule 1 and the subject-matter of laws specified in Schedule 2 constitute the 'prescribed matters' with respect to which the Council has legislative power and governmental functions. Paragraph 78(1)(b) would thus enable the Government by regulation to increase (or reduce) the areas over which the Council has power. It is a classic example of a 'Henry VIII' clause, permitting the amendment of the Act by delegated legislation.

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

AUSTRALIAN CAPITAL TERRITORY COUNCIL (CONSEQUENTIAL PROVISIONS) BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Territories.

The purpose of the Bill is to make essential transitional and consequential amendments relating to the establishment of the Australian Capital Territory Council. This Bill is to be read in conjunction with the Australian Capital Territory Council Bill 1986.

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

Sub-clauses 7(1), 11(3), 12(2), and 13(3) - 'Henry VIII' clauses

Sub-clauses 7(1), 11(3), 12(2) and 13(3) each provide that sections of the Act are to cease to have effect on a day to be fixed by Proclamation. Such provisions may be characterised as 'Henry VIII' clauses in that they permit the executive to determine that sections of an Act are no longer in effect without the necessity for Parliament to agree to the repeal of those sections.

The Committee draws the clauses to the attention of the Senate under principle 1(a)(iv) in that they may be considered to constitute inappropriate delegations of legislative power.

Sub-clause 11(1) - 'Henry VIII' clause

Sub-clause 11(1) would permit the Minister, by notice in writing in the Gazette, to exempt from stamp duty under the Australian Capital Territory Stamp Duty Act 1969 specified instruments, or classes of instruments, relating to a transfer by the Commonwealth to the Council of an interest in land. Because it would permit the Minister, by executive instrument, to alter the effect of the Act, the sub-clause may be characterised as a 'Henry VIII' clause.

Accordingly the Committee draws the sub-clause 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 13(1) - 'Henry VIII' clause

Sub-clause 13(1) would enable the making of regulations providing for the application of any Commonwealth Act with such exceptions, and subject to such modifications, as may be necessary or convenient in consequence of the enactment of the Australian Capital Territory Council Bill 1986. The clause is so broad as to constitute a virtual abdication of legislative power.

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

GRAPE RESEARCH LEVY BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Primary Industry.

The purpose of this Bill is to provide for the imposition of a levy on grapes and grape juice delivered to wineries and to other processing establishments, the proceeds of which will be used to finance research on wine grapes and other processed grapes. Administrative and organisational arrangements for the scheme, including establishment of a Trust Fund and Research Council, will be in accordance with the provisions of the Rural Industries Research Act 1985. Specifically excluded from the scheme are those dried grapes in respect of which levy is payable under the Dried Fruits Levy Act 1971.

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

Sub-clause 9(3) - Inappropriate delegation of legislative power

Levy is imposed on 'prescribed goods' as defined in the Grape Research Levy Collection Act 1986, being fresh grapes, dried grapes and grape juice. Sub-clause 9(3) provides that the regulations may exempt from levy prescribed goods included in a class of prescribed goods.

The Committee draws the sub-clause to the attention of the Senate under principle 1(a)(iv) in that, by permitting the exemption by regulation of certain goods from the levy, it may be considered an inappropriate delegation of legislative power.

GRAPE RESEARCH LEVY COLLECTION BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Primary Industry.

The purpose of this Bill is to provide the machinery necessary for collecting the levy to be imposed by the Grape Research Levy Bill 1986.

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

Sub-clause 12(2) - Self incrimination

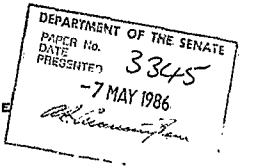
Sub-clause 12(2) provides that a person is not excused from submitting a return or providing information that the person is required by or under the Act or the regulations to submit or provide on the ground that the return or the information might tend to incriminate the person. The sub-clause also contains the usual proviso that any return or information so submitted or provided is not to be admissible against the person in criminal proceedings (other than proceedings relating to the refusal or failure to furnish a return or the provision of false or misleading returns) or proceedings for the recovery of a penalty for non-payment of the levy.

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.

Michael Tate
Chairman

30 April 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF 1986

7 MAY 1986

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

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ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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 COMMITTE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF 1986

The Committee has the honour to present its Seventh Report of 1986 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:

Excise Tariff Amendment Bill 1986.

EXCISE TARIFF AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister Representing the Minister for Industry, Technology and Commerce.

The main purpose of this Bill is to incorporate into the Excise Tariff Act 1921 a number of excise tariff proposals requiring enactment following tabling in the Parliament.

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

Sub-clause 2(2) - Retrospectivity

Sub-clause 2(2) provides that the amendments made by clause 3 abolishing the excise duty on wine produced with added sugar and introducing restructured tariff items dealing with brandy, whisky, rum and liqueurs shall be deemed to have come into operation on 23 May 1985, the day after the relevant Excise Tariff Proposals were tabled in the House of Representatives.

The Committee recognises the convention that changes to items of a Custom Tariff and an Excise Tariff are made by way of changes introduced into the House of Representatives and that retrospective legislation implementing a number of such changes is subsequently introduced into the Parliament making the changes with effect from the day after the relevant Proposals were tabled. However the Committee is critical of the degree of retrospectivity involved in this case. It suggests that it should not be considered acceptable for the Parliament to wait almost 11 months before legislation giving effect to Excise Tariff Proposals is introduced.

Accordingly the Committee draws sub-clause 2(2) to the attention of the Senate under principle 1(a)(i) in that the degree of retrospectivity involved may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman

7 May 1986

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN

MR PRESIDENT,

I PRESENT THE SEVENTH REPORT OF 1986 OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

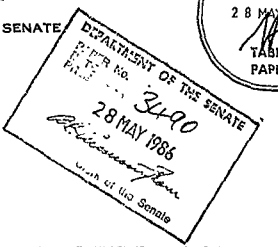
EXCISE TARIFF AMENDMENT BILL 1986

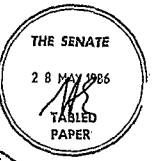
I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 7 DATED 7 MAY 1986.

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.

AUSTRALIAN SENATE





SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF 1986

28 MAY 1986

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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(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 -

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

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(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 1986

The Committee has the honour to present its Eighth Report of 1986 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 and Subsidy Legislation Amendment Bill 1986
Customs Tariff Amendment Bill 1986
Departure Tax Collection Amendment Bill 1986
Excise Tariff Amendment Bill 1986
Fringe Benefits Tax Assessment Bill 1986
Futures Industry Bill 1986
Grape Research Levy Bill 1986
Grape Research Levy Collection Bill 1986
Parliamentary Commission of Inquiry Act 1986
Superannuation Legislation Amendment Bill 1986
Taxation Laws Amendment Bill 1986
Tobacco Charge (Nos.1 to 3) Amendment Bills 1986

BOUNTY AND SUBSIDY LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister Representing the Minister for Industry , Technology and Commerce.

This Bill proposes a number of amendments to certain bounty and subsidy Acts administered by the Comptroller-General of Customs. In particular the Bill will amend -

- the Bounty (Computers) Act 1984 to enable bounty to be paid on modems and multiplexers;

- the Bounty (High Alloy Steel Products) Act 1983 to introduce separate bounty schedules for high alloy steel bar products and stainless steel flat products; and

- the Bounty (Ships) Act 1980 to enable bounty to be paid on certain hovercraft.

The Bill also gives effect to certain undertakings given by the Minister to the Senate Standing Committee for the Scrutiny of Bills relating to rights of review in respect of certain decisions.

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

Clause 15 - 'Henry VIII' clause

Clause 15 would substitute new sections 9 and 9A for the existing section 9 of the Bounty (High Alloy Steel Products) Act 1983. Sub-sections 9(1) and 9A(1) would set an amount available for payment of bounty in a given year. Sub-sections 9(2) and 9A(2) provide that the regulations may prescribe a factor by which the amount available for the payment of bounty is to be multiplied, thus decreasing or increasing the total amount available.

The new sub-sections are in the same form as the existing sub-section 9(2) of the Act to which the Committee drew attention in its Seventeenth Report of 1983. The Minister responded at the time that the sub-clause was necessary to take into account any alteration to the price of raw material inputs. The Committee remarked that while it could see the need for some flexibility in establishing the amount available for payment of bounty it was nevertheless concerned that the sub-section placed no restriction on the magnitude of the changes that could be made.

The Committee commented that it remained concerned that it should be possible to make substantial variations to the amount available for the payment of bounty by delegated legislation. Accordingly it drew new sub-sections 9(2) and 9A(2) to the attention of the Senate under principle 1(a)(iv) in that they might be considered to constitute inappropriate delegations of legislative power. The Minister for Industry, Technology and Commerce has responded:

> 'It is submitted there are indeed several controls on the magnitude of the changes that can be made to the bounty ceilings applicable for bountiable steel products under the Act.
>
> From a practical point of view, ceilings on bounty payments would only be adjusted in accordance with movements in steel prices under the Steel Industry Plan, following a recommendation from the Steel Industry Authority. It is worth mentioning that there has been no adjustment to date because payments of the bounty entitlement have been significantly below the ceiling provided.
>
> From a legislative point of view, changes to bounty ceilings are required to be made by regulation, which of course exposes such changes to parliamentary scrutiny, and disallowance, under the usual tabling and disallowance provisions applicable to regulations.'

The Committee thanks the Minister for this response. The crux of the Committee's concern is whether it is appropriate that, in respect of a matter as important as the variation of ceilings on bounty payments to the steel industry, the Parliament should have available to it only the negative action of disallowance of the amending regulations or whether such a matter should be dealt with by substantive legislation which the Parliament may amend. In continuing to draw attention to clause 15, 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.

CUSTOMS TARIFF AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 30 April 1986 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Customs Tariff Amendment Bill 1986 contains significant amendments to the Customs Tariff Act 1982. The Bill contains 10 Schedules which incorporate changes -

(i) initially introduced by Gazette notice and subsequently proposed in this House as Customs Tariff Proposals;

(ii) introduced directly by Customs Tariff Proposals; or

(iii) which are being introduced by the Bill.

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

Clause 2 - Retrospectivity

Clause 2 gives various provisions of this Bill retrospective operation. Sub-clauses 2(2) and 2(3) would give the amendments made by clauses 3 and 4 effect from 1 July 1985 and 2 August 1985 respectively. The amendment made by clause 3 would restore duty free entry of certain parts used in the construction and modification of bountiable vessels and the amendment made by clause 4 would reduce the required wool content in the pile of carpets from New Zealand eligible for duty free entry from 80% to 78% by weight.

While the Committee recognises that in both cases this retrospectivity is beneficial it questions the length of time which it has taken to bring the necessary legislation before the Parliament. Accordingly the Committee draws sub-clauses 2(2) and (3) to the attention of the Senate under principle 1(a)(i) in that the degree of retrospectivity involved may be considered to trespass unduly on personal rights and liberties by reason of the climate of uncertainty which may have been created.

DEPARTURE TAX COLLECTION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Minister for Aviation.

The purpose of this Bill is to amend the Departure Tax Collection Act 1978 to transfer the responsibility for the collection of departure tax to air operators.

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

Paragraphs 3(a) and (c) - Inappropriate delegation of legislative power

Paragraphs 3(a) and (c) insert in section 3 of the Principal Act new definitions of "aerial work operation", "charter operation" and "private operation" which incorporate by reference definitions of these expressions in paragraphs 191(b), (c) and (a) respectively of the Air Navigation Regulations "as in force from time to time". By virtue of new sections 11A, 11B and 11C to be inserted by clause 5 an international air operator will not be required to make tax stamps or exemption stamps available for supply to passengers on flights that are private operations or aerial work operations or charter operations in respect of which there is an exemption in force under section 11C.

The Committee has in the past expressed concern that the adoption by reference of regulations "as in force from time to time" may impede the proper processes of parliamentary scrutiny (see its comment on clause 13 of the Health Legislation Amendment Bill 1985 in its Eighth Report of 1985). In the present case the Parliament when examining amendments to regulation 191 of the Air Navigation Regulations may not be aware, unless it is specifically called to its attention, of the effect those amendments will have on the arrangements for the collection of departure tax.

Accordingly the Committee draws the new definitions to the attention of the Senate under principle 1(a)(iv) in that by adopting by reference regulations "as in force from time to time" they may be considered to constitute an inappropriate delegation of legislative power.

Clause 5 - New section 11C - Non-reviewable discretion

Clause 5 would insert a new section 11C empowering the Minister to exempt an international air operator from the requirement to make tax stamps and exemption stamps available to passengers on -

- all international flights that are charter operations;
- a specified international flight, being a charter operation; or

- international flights, being charter operations, of a specified kind.

In deciding whether to exempt an international air operator the Minister is required by new sub-section 11C(3) to have regard to the scale of operations involved and "such other matters as the Minister considers relevant".

There is no provision for review of the Minister's decisions under new section 11C. Because criteria for the exercise of the discretion vested in the Minister are not set out in the legislation the scope for review pursuant to the Administrative Decisions (Judicial Review) Act 1977 is accordingly limited. It would be possible, for example, to challenge the Minister's decision on the ground that he or she had failed to have regard to the scale of operations involved but not on the ground that the Minister had wrongly classified an operator as a large, rather than a small, charter operator and had therefore declined to grant an exemption.

The Committee draws new section 11C 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.

EXCISE TARIFF AMENDMENT ACT 1986

The Committee commented on this Act in its Seventh Report of 1986 (7 May 1986). 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-section 2(2) - Retrospectivity

The Committee drew sub-section 2(2) to the attention of the Senate under principle 1(a)(i) in that, by giving section 3 (which made changes to tariff items dealing with spirits) retrospective effect to 23 May 1985 (the day after the relevant Excise Tariff Proposals were tabled in the House of Representatives), it might be considered to trespass unduly on personal rights and liberties. The Committee stated that it recognised the convention that legislation validating Excise Tariff Proposals was made retrospective to the date of tabling but it suggested that the 11 months retrospectivity in this case should not be considered acceptable. The Minister for Industry, Technology and Commerce has responded:

> 'The Committee will of course be aware that the requirement for the validation of excise tariff proposals, as set out in Section 114 of the Excise Act 1901, permits a period of 12 months within which such validation is to occur. Where no validation is made within that period, an action to recover any duty paid as a result of the proposal may be commenced from the date of the proposal. Given the permitted 12 month period, I do not agree that any validation within that period, albeit towards the end, can be justifiably criticised as unduly trespassing on personal rights and liberties.
>
> Indeed, it is worth mentioning that the proposals which have attracted the Committee's concerns in this instance are in fact revenue neutral and the rights of persons would not by virtue of the proposals be affected in a prejudicial manner.
>
> Given the 12 month lead time within which a validating Bill has to be introduced, Excise Tariff Amendment Bills are sometimes held over to a subsequent sittings, to allow for the inclusion of a greater number of proposals in the one Bill. Such a process is

consistent with the Government's aim to reduce the number of non-essential Bills each sittings, while at the same time, keeping within the particular requirements of the Excise Act 1901.'

The Committee thanks the Minister for this response, which answers its concerns in relation to the sub-section.

FRINGE BENEFITS TAX ASSESSMENT BILL 1986

This Bill was introduced into the House of Representatives on 2 May 1986 by the Treasurer.

This Bill provides for the assessment and collection of fringe benefits tax payable by employers. Its provisions contain specific rules for valuing the following kinds of fringe benefits provided by employers to employees on and after 1 July 1986:

- private use of motor cars;
- interest-free or low interest loans;
- release of debts;
- payment of private expenses;
- free or subsidised residential accommodation;
- excessive living-away-from-home allowances;
- free or subsidised board;
- concessional fares for airline transport;

- entertainment (tax-exempt bodies only);
- free or discounted goods or other property; and
- free or discounted services or other benefits.

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

Substantiation requirements - Trespass on rights and liberties

Paragraphs 10(3)(b) and (c), 19(1)(c) and (d), 21(d), 24(1)(c), (d), (e) and (f), 34(1)(c) and (d), 44(1)(c), (d) and (e), 47(5)(d), 52(1)(c), (d) and (e), 61(1)(b) and 63(d) and the definitions of "exempt accomodation component" and "exempt food component" in sub-section 136(1) require certain matters to be proved in particular ways - by particular documents or declarations in a form approved by the Commissioner - in order for an employer to be entitled to a reduction in the taxable value of a fringe benefit or an exemption from liability in respect of a fringe benefit. The employer does not have the opportunity to prove these matters by other evidence admissible in a court of law.

Furthermore, if the particular evidence is lost or destroyed within the six year statutory period in which it is required to be retained, clause 123 provides that the employer is to be deprived of the benefit of that evidence unless he or she has an adequate substitute document (being a copy of the relevant document or a document that records all the matters set out in the original document) or can satisfy the Commissioner that the document was lost or destroyed because of circumstances beyond the employer's control. If the employer has no such substitute document or cannot so satisfy the Commissioner, the Commissioner may issue an amended assessment on the basis that the employer is no longer entitled to the reduction in the taxable value of the fringe benefit or the exemption in respect of the fringe benefit, as the case may be.

The Committee is aware that Subdivision F of Division 3 of Part III of the Income Tax Assessment Act 1936 already requires certain matters to be proved by particular documentary evidence and that it did not comment on that Subdivision when it was inserted by the Taxation Laws Amendment Act (No.4) 1985. However the Committee is concerned that such substantiation requirements modify the character and width of evidence which can normally be taken into account in a court of law. Accordingly the Committee draws this aspect of the Bill to the attention of the Senate under principle 1(a)(i) in that, by so confining the entitlement of employers to make use of evidence which would otherwise be admissible, it may be considered to trespass unduly on personal rights and liberties.

Clause 69 - Failure to stipulate reasonable time

Clause 69 would empower the Commissioner, by notice in writing, to require a person to furnish a return in relation to a year of tax to the Commissioner 'in the manner and within the time specified in the notice'. Failure to furnish such a return would attract either a fine of up to $2,000 (or more in the case of repeated offences) or a liability to pay penalty tax equal to double the amount of tax otherwise payable by the employer in respect of the year of tax (clause 114). There is no stipulation that the time within which a person is required to furnish a return must be reasonable or must be not less than some minimum period, for example 14 days.

The Committee recognises that this clause mirrors sub-section 162(1) of the Income Tax Assessment Act 1936. Nevertheless it draws the clause to the attention of the Senate under principle 1(a)(i) in that, by reason of the failure to stipulate that the time within which a person is required to furnish a return must be reasonable, it may be considered to trespass unduly on personal rights and liberties.

Clause 127 - Entry and inspection without warrant

Sub-clause 127(1) would permit an officer authorised in writing by the Commissioner to enter and remain on any land or premises at all reasonable times and to inspect and examine documents. The only constraint placed upon this power is that, under sub-clause 127(2), an officer may be required to produce an authority in writing signed by the Commissioner to the occupier of the land or premises in question. No judicial authorisation in the form of a warrant is required.

The Committee notes that a similarly unrestricted right of access to buildings, places and documents is presently provided for in section 263 of the Income Tax Assessment Act 1936. Nevertheless the Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that by permitting entry on land or premises and inspection 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.

Clause 133 - Non-reviewable decisions

Sub-clause 133(1) provides that a Board constituted by the Commissioner, the Secretary to the Department of Finance and the Comptroller-General of Customs or 'such substitutes for all or any of them as the Minister appoints from time to time' may release an employer or the dependants of a deceased employer from the whole or part of any liability to tax under the Act in cases of serious hardship. Sub-clause 133(3) provides that an application for release in respect of an amount of less than $10,000 may be referred to a Board of Review constituted under the Income Tax Assessment Act 1936 for report and that an application for release in respect of an amount of $10,000 or more shall be so referred. However by virtue of sub-clause 133(4) for the purposes of the clause the Board of Review is to be constituted by a single person designated by the Chairman of

the Board being either a member (including the Chairman) of the Board or an officer of the Department of Treasury who performs administrative duties for the Board.

While the Committee recognises that this clause mirrors section 265 of the Income Tax Assessment Act 1936 it notes that the clause does not provide for independent review of decisions under the clause releasing persons from liability to pay tax in cases of serious hardship. The Board of Review to which applications may be referred for investigation and report is to be constituted by a single person who may be an administrative officer. The new Board which would be constituted under the clause to make decisions may consist of substitutes for the named officers appointed by the Minister responsible for the administration of the Act and may thus lack the independence required for impartial decision-making. While the proposed Board would be sufficient as an internal review mechanism it is not proposed that its decisions be reviewable on their merits by an independent tribunal like the Administrative Appeals Tribunal. Rather, its decisions would only be reviewable as to their legality pursuant to the Administrative Decisions (Judicial Review) Act 1977.

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.

FUTURES INDUSTRY BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Attorney-General.

The purpose of the Futures Industry Bill 1986 is to regulate the futures industry in the Australian Capital Territory.

General comment

The Committee notes that this Bill forms part of the national uniform companies and securities scheme. That scheme was established by a Formal Agreement executed on behalf of the Commonwealth and the six States on 22 December 1978 which is set out as a Schedule to the National Companies and Securities Commission Act 1979. A third amending agreement is presently being executed which will give the Futures Industry Bill 1986 the same status in the scheme as the initial legislation relating to companies and securities.

The Formal Agreement establishes a Ministerial Council for Companies and Securities consisting of representatives of the Commonwealth and each of the six States. Under the Formal Agreement the Commonwealth Government is required to submit to the Commonwealth Parliament such initial legislation as has been unanimously approved by the Ministerial Council for Companies and Securities and to take such steps as are appropriate to secure the passage of that legislation (paragraph 8(1)(a)). Each State undertakes to apply in the relevant State the Commonwealth legislation including such amendments as may be made from time to time in accordance with the Agreement (clause 9).

Amendments to the initial legislation may be agreed to by the Ministerial Council by majority vote. The Commonwealth is then required to submit the amending Bill to the Commonwealth Parliament and to take such steps as are necessary to secure the passage of the Bill. If the Bill is not passed within 6 months any State may legislate in terms of the Bill (clause 44). If the Commonwealth Government submits to the Commonwealth Parliament any Bill to amend the Commonwealth legislation which has not been agreed to by the Ministerial Council any State may withdraw from the Agreement with immediate effect (sub-clause 51(3)).

The Committee understands that it is the view of the Attorney-General's Department that, once a Bill has been agreed to by the Ministerial Council, acceptance by the Commonwealth Government of an amendment to that Bill without going back to

the Ministerial Council to seek approval of the amendment would amount to a breach of the Formal Agreement entitling the States to withdraw from the scheme. Approval of such an amendment to initial legislation, such as the Futures Industry Bill 1986, would have to be unanimous. Approval of an amendment to a Bill amending the initial legislaton - eg. the Companies and Securities Legislation Amendment Bill 1986 - would require only a simple majority of the members of the Ministerial Council.

The power of the Commonwealth Parliament to amend Bills forming part of the national uniform companies and securities scheme is thus conditional upon the willingness of the Commonwealth Attorney-General to take any amendment back to the Ministerial Council and the unanimous approval of that Council in relation to initial legislation or the approval of a majority in the case of subsequent amending Bills. Failing such approval the national uniform scheme would be placed in jeopardy.

In the view of the Committee the operation of this aspect of the uniform scheme places the Parliament in an invidious position. If it amends a piece of legislation forming part of the uniform scheme or rejects such a piece of legislation it may bring the national uniform scheme to an end. If, on the other hand, it fails to amend or reject such legislation, however compelling the grounds for action, it may be said, in effect, to have delegated its legislative power to the Ministerial Council without even retaining the equivalent of a power of disallowance. Indeed, to the extent that it is possible for parliamentary amendments to be taken back to the Ministerial Council for approval, it may be said that it is the Ministerial Council which has a power of veto over the legislative action of the Parliament. Accordingly the Committee draws this aspect of the national uniform scheme, and of the Futures Industry Bill as an element in that scheme, to the attention of the Senate in that it may be considered to constitute an inappropriate delegation of legislative power.

The Committee further notes that, while certain of the clauses to which it draws attention below differ from the current form of such provisions in Commonwealth legislation, they are not novel

in the context of the national uniform companies and securities scheme. The Table below sets out in summary form the clauses commented upon in the Futures Industry Bill 1986 together with their direct equivalents in the Securities Industry Act 1980 and the Companies Act 1981:

TABLE

FUTURES INDUSTRY BILL - clauses		SECURITIES INDUSTRY ACT - sections	COMPANIES ACT - sections
13(3), (4)	lack of limitation as to reasonableness of time and place	8(1), (2)	12(2), (3)
15(3)	reversal of onus of proof: false or misleading statements	10(2A)	14(3)
15(6)	self incrimination	10(5)	14(6)
18(5), (6)	self incrimination	12(3C), (3CA)	-
18(10)	as for 15(3)	12(6)	-
25(6), (7)	strict liability: false or misleading statements	19(5), (6)	296(3), (4)
25(10)	self incrimination	19(9)	296(7)
129(10)	reversal of onus of proof: insider dealing	128(10)	-

133(2)	reversal of onus of proof: inducing persons to contract by storage of false or misleading information	-	-
144(2), 145(2)	reversal of onus of proof: destruction, mutilation or alteration of books and falsification of stored matter	137(2), 138(2)	560(3)
157(7)	abrogation of right to undertaking as to damages where interim injunction granted	149(5)	574(7)

Bearing these considerations in mind, the Committee draws the attention of the Senate to the following clauses of the Bill:

Sub-clauses 13(3) and (4) - Lack of limitation as to reasonableness of time and place

Sub-clauses 13(3) and (4) empower the Commission or a person authorised by the Commission to require various persons to produce books relating to dealings in futures contracts and like matters at a time and place specified in the direction of the Commission or by the authorised person as the case may be. Failure to comply with a requirement without reasonable excuse is an offence punishable by a fine of $10,000 or imprisonment for 2 years or both. It is not, however, stipulated that the time and place specified by the Commission or the authorised person be reasonable.

When the Committee commented to similar effect on sub-clauses 31(1) and (5) and 33(1) of the Australian Bill of Rights Bill 1985 the Attorney-General responded that it would be possible to challenge a requirement under the Administrative Decisions (Judicial Review) Act 1977 on the ground that it was so unreasonable that no reasonable person could have specified such a time and place (see the Committee's Seventeenth Report of 1985). The Committee suggested, however, that it was not desirable that a person should be required to challenge the reasonableness of a requirement under the Administrative Decisions (Judicial Review) Act 1977 when he or she would be liable to heavy penalties for a failure to comply with the requirement. Rather, it should be stipulated that the time and place specified be reasonable so that the court hearing a charge relating to the failure to comply with a requirement may take into account any alleged unreasonableness affecting the legality of the requirement.

The Committee therefore draws sub-clauses 13(3) and (4) to the attention of the Senate under principle 1(a)(i) in that, by failing to stipulate that the times and places at which books are to be required to be produced be reasonable, they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 15(3) - Reversal of the onus of proof

Sub-clause 15(3) provides that it is a defence in a prosecution for an offence against sub-clause 15(2) relating to furnishing information or making a statement which is false or misleading in a material particular if it is established that the defendant believed on reasonable grounds that the information or statement was true and was not misleading. The effect of the sub-clause is thus to place upon the defendant the burden of exculpating himself or herself by establishing a defence on the balance of probabilities.

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 the 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. In the present case the Committee notes that the usual form of provisions relating to false or misleading statements in Commonwealth legislation requires the prosecution to establish that the defendant made the false statement knowingly or knowing that the statement was false or misleading: see, for example, sub-clause 127(5) of the Veterans' Entitlements Bill 1985 and clause 25 of the Human Rights and Equal Opportunity Commission Bill 1985.

The Committee questions why in this case it has been considered necessary to reverse the onus of proof and, given that decision, why it has been considered necessary to impose on the defendant the persuasive onus of proof rather than merely an evidential onus. Accordingly, the Committee draws the sub-clause to the attention of the Senate under the 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.

Sub-clause 15(6) - Self incrimination

Sub-clause 15(6) provides that a person is not excused from making a statement relating to the compilation of books required to be produced under section 13 or 14 or as to any matter to which any such books relate on the ground that the statement might incriminate the person. The sub-clause also contains the usual proviso that any such statement is not to be admissible in evidence against the person in any criminal proceedings other than proceedings relating to the refusal or failure to make a statement or the furnishing of information that is false or misleading in a material particular.

The sub-clause departs from the usual form of such provisions in Commonwealth legislation, however, in that it stipulates that the proviso only applies where the person required to make a

statement claims before making the statement that it may tend to incriminate the person. The Committee suggests that the requirement that a person claim the privilege is better suited to situations where a person is being examined before a court or a quasi-judicial tribunal rather than to administrative contexts like the present. If persons are to be required to claim the privilege when a statement is sought by a person authorised by the Commission then the Committee suggests that the authorised person should be required to caution the person to that effect before seeking the statement. The Committee notes that, for example, sub-clause 25(2) requires that an inspector carrying out an investigation under clause 25 inform a person whom he proposes to examine that the person must claim the privilege against self incrimination in order to obtain the limited protection accorded by sub-clause 25(10).

The Committee draws sub-clause 15(6) to the attention of the Senate under principle 1(a)(i) in that by removing the privilege against self incrimination in the first instance and by requiring that the privilege be claimed in order for the resulting self incriminating statements not to be generally available for use against the person in criminal or civil proceedings it may be considered to trespass unduly on personal rights and liberties.

Sub-clauses 18(5) and (6) - Self incrimination

Sub-clauses 18(5) and (6) are, taken together, in similar form to sub-clause 15(6) and the Committee's comments on that provision apply equally to these sub-clauses.

Sub-clause 18(10) - Reversal of onus of proof

Sub-clause 18(10) is in similar form to sub-clause 15(3) and the Committee's comments on that provision apply equally to this sub-clause.

Sub-clauses 25(6) and (7) - Strict liability

Sub-clauses 25(6) and (7) each create offences where a person in purported compliance with a requirement of an inspector or appearing before an inspector for examination furnishes information that is false or misleading in a material particular. Neither provision contains the usual requirement that the defendant know that the information is false or misleading with the result that a person might be liable even if he or she quite innocently provided wrong information.

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

Sub-clause 25(10) - Self incrimination

Sub-clause 25(10) is in similar form to sub-clause 15(6) although, as noted in the comment on the latter provision, sub-clause 25(2) requires that the effect of sub-clause 25(10) be drawn to the attention of persons who are to be examined under that clause. Nevertheless the Committee draws 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.

Sub-clause 129(10) - Reversal of the onus of proof

Clause 129 prohibits insider dealing in futures contracts concerning bodies corporate. Sub-clause 129(10) provides that, where a prosecution is instituted against a person for an offence because the person was in possession of inside information and dealt in a futures contract, it is a defence if it is established that the other party to the dealing also knew, or ought reasonably to have known, the relevant information before entering the dealing. The effect of the sub-clause is to place upon the defendant the burden of exculpating himself or herself by establishing this defence on the balance of probabilities.

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 and that provisions requiring the defendant to adduce evidence of the existence of a defence - provisions imposing an evidential onus on the defendant - should be kept to a minimum. In particular the Committee recommended that an evidential onus should only be imposed on defendants -

- where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue; or

- where proof by the prosecution of a particular matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence.

The Committee suggests that the matter dealt with in the defence provided for in sub-clause 129(10) does not fall within either of these two categories. It deals not with the state of mind of the defendant but with the state of mind of the other party to the transaction. Accordingly the Committee is of the view that it is not an appropriate case for the imposition of an evidential onus on the defendant, and still less an appropriate case for the reversal of the persuasive burden of proof.

The Committee draws the sub-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.

Sub-clause 133(2) - Reversal of the onus of proof

Paragraph 133(1)(d) creates an offence where a person induces or attempts to induce another person to deal in futures contracts by recording or storing in any mechanical, electronic or other device information that the person knows to be false or

misleading in a material particular. Sub-clause 133(2) provides a defence where it is established that, at the time when the defendant so recorded or stored the information, the defendant had no reasonable grounds for expecting that the information would be available to any person.

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), the 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 the 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 defendant might be required to adduce evidence that he or she had no reasonable grounds for expecting that the information would be available to any person rather than being required to establish the defence on the balance of probabilities.

The Committee draws sub-clause 133(2) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on defendants it may be considered to trespass unduly on personal rights and liberties.

Sub-clauses 144(2) and 145(2) - Reversal of the onus of proof

Sub-clauses 144(1) and 145(1) create offences with regard to the destruction, mutilation or alteration of books, the sending of books out of the Territory or out of Australia, the storage of false or misleading matter in mechanical or electronic devices and the falsification of matter recorded or stored in such devices. Sub-clauses 144(2) and 145(2) provide defences where it is established -

- in the case of clause 144, that the defendant did not act with intent to defraud, to defeat the purposes of the Act or to prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power or authority, under the Act; and

- in the case of clause 145, that the defendant acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

As suggested above in relation to sub-clause 133(2), the Committee would argue that, in accordance with the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs, sub-clauses 144(2) and 145(2) should only impose an evidential onus on defendants rather than requiring proof of the defence on the balance of probabilities.

Accordingly the Committee draws sub-clauses 144(2) and 145(2) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on defendants they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 157(7) - Abrogation of customary right

Sub-clause 157(7) would abrogate the customary right of a defendant against whom an interim injunction is granted to seek an undertaking from the plaintiff as to damages in respect of any loss flowing from the grant of the interim injunction if it turns out that it should not have been made. It is customary for the courts to refuse to grant interim or interlocutory injunctions unless such an undertaking is given.

The Committee draws sub-clause 157(7) to the attention of the Senate under principle 1(a)(i) in that by abrogating this right it may be considered to trespass unduly on personal rights and liberties.

GRAPE RESEARCH LEVY BILL 1986

The Committee commented on this Bill in its Sixth Report of 1986 (30 April 1986). 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.

Sub-clause 9(3) - Inappropriate delegation of legislative power

The Committee drew sub-clause 9(3) to the attention of the Senate under principle 1(a)(iv) in that, by permitting the regulations to exempt certain goods from the levy to be imposed by the Bill, it might be considered an inappropriate delegation of legislative power. The Minister for Primary Industry has responded:

> 'The provision is included in recognition of the possibility that circumstances may arise where it may be unreasonable or inappropriate to impose the levy on a specified class of prescribed goods. Similar provisions occur in some other levy legislation for which I am responsible.
>
> An example of relevant circumstances could be where an adjustment of the levy base is required commensurate with the scope of research which may be conducted under the scheme. Experience with the scheme may demonstrate that little or no research relevant to certain end-use products is conducted and in such circumstances there may be a case to exempt from levy goods associated with this end-use. This example is illustrative only and it is not possible to determine in advance all circumstances and ad hoc cases that might justifiably be considered to warrant exemption from the levy. Power to exempt by regulation is a more desirable course than attempting to frame the Bill to cater for a variety of circumstances that cannot all be foreseen.

> Clearly a balance needs to be struck between delegating the authority to exempt certain goods from levy and taking up the valuable time of the Parliament to amend the legislation. I am satisfied that the Parliament's power to review any proposed exemptions (which would be by regulations) is sufficient safeguard in this case.'

The Committee thanks the Minister for this response. In the view of the Committee, Parliament should not lightly delegate its power to impose a tax or its power to exempt persons from the payment of such a tax. The Committee therefore continues to draw attention to sub-clause 9(3), together with the Minister's response, in the hope of promoting a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

GRAPE RESEARCH LEVY COLLECTION BILL 1986

The Committee commented on this Bill in its Sixth Report of 1986 (30 April 1986). 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.

Sub-clause 12(2) - Self incrimination

The Committee drew sub-clause 12(2) to the attention of the Senate under principle 1(a)(i) in that, although the provision was in a standard form for such legislation, it abrogated the privilege against self incrimination and therefore might be considered to trespass unduly on personal rights and liberties.

The Minister for Primary Industry has responded noting that equivalent provisions already appear in a wide range of Commonwealth laws and that he is aware that the Committee has written to the Attorney-General asking him to consider revising the customary form of such provisions with a view to strengthening the protection against self incrimination. The

Minister has undertaken that the Committee's view of sub-clause 12(2) will be taken into account in the context of the consideration of the general revision of such provisions. The Committee thanks the Minister for this undertaking.

PARLIAMENTARY COMMISSION OF INQUIRY ACT 1986

This Act was introduced into the House of Representatives on 8 May 1986 by the Attorney-General. It passed the House of Representatives at 9.30 p.m. on 8 May and the Senate shortly before 1 a.m. on 9 May. It received the Royal Assent and came into operation on 13 May.

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 the 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 Act provides for the establishment of a Parliamentary Commission of Inquiry constituted by three Judges to inquire, and advise the Parliament, whether any conduct of Mr Justice Murphy has been such as to amount, it its opinion, to proved misbehaviour within the meaning of section 72 of the Constitution.

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

<u>Sub-section 11(1) - Failure to stipulate reasonable time and place</u>

Sub-section 11(1) provides that a member of the Parliamentary Commission may summon a person to appear before the Commission at a hearing to give evidence and to produce such documents or other things (if any) as are referred to in the summons. Failure without reasonable excuse to attend as required by a summons is an offence carrying a penalty of a fine of up to $1,000 or 6 months imprisonment: sub-section 24(1). Sub-section 11(1) does not stipulate, however, that a person should only be summoned to attend at a reasonable time and place.

On previous occasions when the Committee has raised this issue it has been in connection with powers to be exercised by quasi-judicial bodies such as the Human Rights and Equal Opportunity Commission or by administrative officials. The Committee recognises that a body constituted by three former judges of superior courts may be expected to exercise the power to summon witnesses in a reasonable manner. It is aware that sub-section 28(1) of the National Crime Authority Act 1984 is in similar form to sub-section 11(1) and that the Senate Standing Committee on Constitutional and Legal Affairs in its Report on The National Crime Authority Bill 1983 (Parliamentary Paper No.30/1984) did not comment on this aspect of the Bill. Nevertheless the Committee considers that where persons are to be summoned to appear before an inquisitorial body it should be stipulated that the time and place specified in the summons for that appearance be reasonable. The Committee can see no detriment arising from the inclusion of such a requirement and believes it would provide a valuable safeguard against any potential abuse of the power.

The Committee therefore draws sub-section 11(1) to the attention of the Senate under principle 1(a)(i) in that the failure to stipulate that a person should only be summoned to attend at a reasonable time and place may be considered to trespass unduly on personal rights and liberties.

Section 16 - Restriction on use of statements etc.

Section 16 provides that a statement or disclosure made, or a document produced, by a witness in giving evidence before the Commission, or any information, document or thing obtained as a direct or indirect consequence of the statement or disclosure or the production of the document is not (except in proceedings for an offence against the Act) admissible in evidence in any civil or criminal proceedings in any court.

The Committee welcomes the fact that the section provides a 'use-derivative use' indemnity in respect of self-incriminating statements and documents: that is, it provides protection not only in respect of the use of such statements and documents in subsequent proceedings but also in respect of the use of any information, documents or other things which may have come to light as a result of the witness being required to make the initial statement or produce the original document. However the Committee notes that the section would impose a blanket prohibition on the use of all evidence given to the Commission rather than merely prohibiting its use 'against the witness' making the statement or producing the document (compare, for example, section 6DD of the Royal Commissions Act 1902). It is unclear to the Committee whether the omission of the words 'against the witness' was deliberate or inadvertent since the Explanatory Memorandum in fact refers to statements and disclosures not being admissible 'against the witness'. However the omission is an important one. A person could, for example, be prevented from relying on a document in civil proceedings because he or she had been required to produce that document to the Commission. Equally a person might be prevented from relying on a statement made to the Commission as a previous consistent statement which may be used in certain circumstances to corroborate the testimony of a witness.

The Committee therefore draws the section to the attention of the Senate under principle 1(a)(i) in that by so preventing litigants from utilising evidence which would otherwise be available to them it may be considered to trespass unduly on personal rights and liberties.

Sub-section 24(3) - Reversal of the onus of proof

Sub-section 24(2) creates an offence where a person fails, without reasonable excuse, to produce a document or other thing as required by a summons. Sub-section 24(3) provides a defence if it is established by the defendant that the document or other thing was not relevant to the matter into which the Commission was inquiring.

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 the 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 defendant might be required to adduce evidence that the document or other thing was not relevant to the matter into which the Commission was inquiring.

The Committee therefore draws sub-section 24(3) to the attention of the Senate under principle 1(a)(i) in that by reversing the persuasive onus of proof it may be considered to trespass unduly on personal rights and liberties.

Sub-section 30(3) - Reversal of onus of proof

Sub-sections 30(1) and (2) create offences where a person suffers harm, loss or disadvantage or is dismissed from employment because the person has appeared before the Commission as a witness. Both sub-sections carry a penalty of a fine of up to $20,000 or 5 years imprisonment. Sub-section 30(3) provides that

in proceedings under either sub-section it shall lie upon an employer to prove that an employee shown to have been dismissed or prejudiced in employment was so dismissed or prejudiced for some reason other than the employee's appearance as a witness before the Commission.

In other words once the prosecution has established -

(i) that an employee of the defendant appeared before the Commission as a witness; and

(ii) that the employee was dismissed by his or her employer,

it can rest its case. The employer will be liable to a very heavy penalty unless the employer is able to establish, on the balance of probabilities, that the employee was dismissed for some reason other than the employee's appearance as a witness.

Once again the Committee draws the attention of the Senate to the recommendation of the Standing Committee on Constitutional and Legal Affairs that defendants in criminal proceedings should not be required to establish some statutory defence in order to exculpate themselves but rather that they should merely be required to adduce evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution. It has been argued to the Committee - for example in relation to clause 63 of the Radiocommunications Bill 1983: see its Eleventh Report of 1983 - that the reversal of the onus of proof in cases like the present is necessary for the effective protection of witnesses and that without it the protection offered would lack credibility. However the Committee urges the view that the protection afforded would not be significantly diminished if the burden placed on the employer were an evidential one only, rather than a persuasive onus.

Accordingly the Committee draws sub-section 30(3) 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.

Section 34 - Communication of information

Section 29 provides that self incrimination is not an excuse for a refusal or failure to answer a question or produce a document or other thing if required to do so by the Commission. Section 16, however, provides a 'use-derivative use' indemnity in respect of statements made or documents or things produced by witnesses before the Commission. That is, it provides that such statements, documents or things, or any information, document or thing obtained as a direct or indirect consequence of the statement or the production of the relevant document or thing, is not (except in proceedings for an offence against the Act) admissible in evidence in any civil or criminal proceedings in any court.

Section 34, however, provides that where the Commission obtains information that relates, or may relate, to the commission of an offence, or evidence of the commission of an offence, against a law of the Commonwealth, a State or a Territory, it may communicate that information, or furnish that evidence, to the Attorney-General or Commissioner of Police of the Commonwealth or the relevant State or Territory or the authority or person responsible for the enforcement of the relevant law. This provision would appear to cut across the protection afforded by section 16, in that it appears to be contemplated by section 34 that prosecutions may result from information obtained by the Commission. The Explanatory Memorandum notes that section 34 is modelled on section 6P of the Royal Commissions Act 1902. However section 6DD of that Act provides only a 'use' indemnity in respect of self-incriminating evidence, not the 'use-derivative use' indemnity which section 16 of the present Act purports to provide.

The Committee draws section 34 to the attention of the Senate under principle 1(a)(i) in that the communication of information by the Commission to prosecuting authorities may cut across the protection afforded to witnesses by section 16 and may therefore be considered to trespass unduly on personal rights and liberties.

SUPERANNUATION LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister Representing the Minister for Finance.

The main purpose of this Bill is to amend the Superannuation Act 1976 in respect of the responsibilities and operations of the Superannuation Fund Investment Trust. Changes relating to the Trust are directed at:

- placing the Trust on a more independent footing with the freedom and flexibility to manage and invest the Superannuation Fund in a commercial manner;

- enhancing the accountability of the Trust, both to the Parliament and to contributors to the Commonwealth Superannuation Scheme; and

- defining the role, objective and duties of the Trust.

The Bill re-introduces into the Parliament the bulk of the provisions of the Superannuation Legislation Amendment Bill 1985, the motion for a Third Reading of which was amended in the Senate to dispose of the Bill on 8 October 1985. It does not, however, contain those provisions concerning the composition of the Superannuation Fund Investment Trust which gave rise to opposition to that Bill.

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

Clause 6 - Retrospectivity

Section 16 of the Superannuation Act 1976 requires the Commissioner to issue a benefit classification certificate in respect of an eligible employee if, following a medical examination, the Commissioner is of the opinion that the employee

'is not likely', by reason of a physical or mental condition, to continue to be an eligible employee until retiring age. Where a benefit classification certificate is in force in respect of a person the person may not be entitled to the full rate of invalidity benefit if the person retires on grounds of invalidity and the Commissioner is of opinion that the incapacity which was the ground for retirement was caused, or was substantially contributed to, by a physical or mental condition specified in the benefit classification certificate.

Clause 6 would alter the test in section 16 so that the Commissioner would be required to issue a benefit classification certificate if, in the opinion of the Commissioner, 'there is a real risk' that the person in question will not continue to be an eligible employee until retiring age. By virtue of sub-clause 2 (1) this change will be deemed to have had effect from the commencement of the Act on 1 July 1976. Sub-clause 6(2) will preserve the effect of decisions of the Administrative Appeals Tribunal with respect to the issue of benefit classification certificates made before the day on which the amending Bill receives the Royal Assent.

The reasons for this retrospectivity are fully set out in the Explanatory Memorandum. Briefly, the Commissioner has always interpreted the 'is not likely' test in section 16 as meaning that 'there is a real risk' that the person will not continue to be an eligible employee until retiring age. In 1985, however, the Administrative Appeals Tribunal held in Re Bewley that the correct test was whether it was not 'more probable than not' that the person would not continue to be an eligible employee until retiring age. The Explanatory Memorandum indicates that the new test is considered much more severe than is appropriate for the issue of benefit classification certificates and that it would render section 16 'almost unworkable'.

Nevertheless the effect of the amendments is to change the law as determined by the Administrative Appeals Tribunal with retrospective effect, thus disadvantaging contributors in respect of whom a benefit classification certificate has been issued

since the inception of the scheme. Accordingly the Committee drew the clause to the attention of the Senate under principle 1(a)(i) in that it might be considered by reason of its retrospective effect to trespass unduly on personal rights and liberties. The Minister for Finance has responded:

> 'The amendments to section 16 contained in sub-clause 6(1) of the Bill will ensure that the "real risk" approach is used in the future. The retrospective application of the amendments to 1 July 1976 clarifies that the "real risk" approach was also the appropriate and intended approach for past cases. It will also ensure that past and future cases are treated on a common basis. Clearly, it would be quite wrong in principle if contributors currently subject to benefit classification certificates were now able to take advantage of the alternative and unintended interpretation of "likely" and have their benefit classification certificates cancelled. Clause 6(2) of the Bill would, however, protect Mr Bewley against the effects of the retrospective application of the amendments.
>
> Apart from questions of principle, ... the application of the "more probable than not" approach in past cases would have serious cost implications. As an indication of the likely costs, it has been estimated that, if no benefit classification certificates had been in force in relation to contributors who retired on invalidity grounds in 1984/85, the capitalised cost of the benefits payable would have increased by $35 million.'

The Committee thanks the Minister for this response. In continuing to draw attention to clause 6, 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 19 - Delegation

Clause 19 is in the same form as clause 17 of the Superannuation Legislation Amendment Bill 1985 to which the Committee drew attention in its Fourth Report of 1985. The clause would insert 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'. In its comment on clause 17 the Committee expressed concern that the new section 39 imposed no limitation, and gave no guidance, as to the attributes of the person to whom a delegation might be made.

In its Seventh Report of 1985 the Committee recorded a response from the Minister for Finance undertaking to consider the comments made by the Committee in the context of an examination of all of the delegation provisions in the Superannuation Act 1976 with any necessary amendments being made when the Act was next amended. While noting that it assumed that this examination of delegation provisions had not yet been completed, the Committee reaffirmed its concern in relation to clause 19. The Committee suggested that it might be appropriate in this case, for example, to restrict the scope of delegation to another member of the Trust or an officer or employee of the Trust as was done in the not dissimilar case of sub-section 90(2) of the Australian Trade Commission Act 1985.

The Minister for Finance has responded confirming that the Committee's comments on proposed new section 39 are still under examination. In light of the Committee's comments, the provisions of sections 25 and 38 of the Act, relating to the delegation powers of the Commissioner for Superannuation and the Trust respectively, are also being examined. The Committee thanks the Minister for this response and looks forward to the early conclusion of this examination.

Clause 25 - 'Henry VIII' clause

Clause 25 would insert a new section 126A enabling the making of regulations modifying the application of the Act in relation to former contributors who become members of another superannuation scheme. Because it would permit the form of the Act to be altered by delegated legislation the new section may be characterized as a 'Henry VIII' clause. As such, the Committee drew it to the attention of the Senate under principle 1(a)(i) in that it might be considered an inappropriate delegation of legislative power. The Minister for Finance has responded:

> 'Regarding clause 25 of the Bill, there is a number of provisions in the Act that enable the Act to be modified by regulations in relation to specific classes of persons. These provisions enable action to be taken quickly to vary the arrangements under the Act in appropriate circumstances.
>
> As noted in the Explanatory Memorandum the existing section 126 of the Act enables the Act to be modified by regulations in relation to persons who transfer from another superannuation scheme to the Commonwealth Superannuation Scheme without changing their employment. The proposed new section 126A would complement the existing section by enabling the Act to be modified in relation to persons who transfer to another scheme without changing their employment. With the two provisions transfers to and from other schemes could take place on terms appropriate to the circumstances.'

The Committee thanks the Minister for this response which answers its concern in relation to the clause.

TAXATION LAWS AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Acting Treasurer.

This Bill will give effect to a further two of the Government's tax reform measures:

(a) it will provide rules limiting tax deductions for interest incurred in borrowing money to finance rental property investments - so called "negative gearing"; and

(b) it provides a depreciation allowance of 4 per cent per annum in respect of residential income-producing buildings.

This Bill also contains amendments to overcome a decision of the Federal Court that sanctioned arrangements under which future income rights could be disposed of for a non-taxable capital sum.

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

Clause 25 - Retrospectivity

By virtue of sub-clauses 25(4) and (5) the amendments made by clause 11 limiting deductions for interest on money borrowed to finance rental property investments and the amendments made by clauses 12, 13, 14 and 15 deeming consideration received for the transfer of rights to receive income from property to be assessable income (rather than a capital receipt) will have effect from 17 July 1985 and 9 October 1985 respectively. The Explanatory Memorandum indicates that these were the dates on which these changes were first announced. In neither case was this announcement made to the Parliament.

The Committee is critical of the practice, which is becoming increasingly prevalent in the field of taxation law, whereby changes to the law are made retrospective to the date of a Ministerial announcement. The Committee recognises the special conventions associated with changes to the taxation laws announced in the Budget or in similar statements to the Parliament and the practical necessity that changes to taxation laws be made retrospective to the date of the introduction of the amending Bill into the Parliament. However, these conventions aside, the Committee deplores the practice of making changes to the law retrospective to the date of a Ministerial announcement, for example to a press conference, which carries with it the assumption that people should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. The practice treats the passage of the necessary retrospective legislation 'ratifying' the Minister's announcement, in the present case 9 months and 6 months respectively after the event, as a pure formality.

The Committee draws sub-clauses 25(4) and (5) to the attention of the Senate under principle 1(a)(i) in that the retrospectivity involved may be considered to trespass unduly on personal rights and liberties.

TOBACCO CHARGE (NOS.1 TO 3) AMENDMENT BILLS 1986

These Bills were introduced into the House of Representatives on 17 April 1986 by the Acting Treasurer.

The Bills will amend the Tobacco Charge Acts (Nos.1 to 3) 1955 to restore, with effect from 1 April 1986, the rate of charge that applied immediately before that date.

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

Clause 4 - Retrospectivity

Clause 3 of each Bill imposes new rates of charge on the sale of Australian tobacco leaf to manufacturers of tobacco products for smoking, on the purchase of Australian tobacco leaf by such manufacturers and on Australian tobacco leaf grown by such manufacturers and appropriated for manufacturing purposes. Clause 4 of each Bill will apply the new rates of charge with effect from 1 April 1986.

The Explanatory Memorandum explains that this retrospectivity arises from an oversight which has led to there being no rate of tobacco charge prescribed since 1 April 1986. Sub-section 48(2) of the Acts Interpretation Act 1901 prevents retrospective regulations being made in these circumstances.

While the degree of retrospectivity is small and the regulations will not result in any increase in liability to tobacco charge beyond that applying prior to 1 April 1986, the Committee nevertheless drew the clause to the attention of the Senate under principle 1(a)(i) in that the retrospective imposition of a tax might be considered to trespass unduly on personal rights and liberties.

The Minister for Primary Industry has responded noting that although the levies imposed by the Tobacco Charge Acts finance activities which come under his portfolio - namely the operations of the Australian Tobacco Board and tobacco research - the Charge Acts themselves are the responsibility of the Treasurer. The oversight referred to in the Explanatory Memorandum thus occurred in the Australian Taxation Office. The Minister continues:

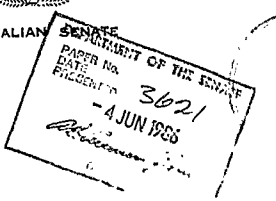
> 'Nevertheless, I would like to give my support to the legislation as proposed. The degree of retrospectivity, as the Committee has noted, is small and the retrospective imposition of these special purpose industry levies would not, in my opinion, impinge unduly on personal rights and liberties.

> The Charges are paid jointly by, and with the full agreement of, both tobacco growers and manufacturers. The process of collection and expenditure is fully accounted for and reported on in the Annual Report of the Australian Tobacco Board and the Tobacco Industry (Research) Trust Account.'

The Committee thanks the Minister for this response. While the Committee always draws attention to clauses retrospectively imposing a tax, charge or other burden, the Committee recognises that in certain circumstances restrospective legislation may be necessary to correct an oversight. The Committee agrees that in the present case the retrospectivity involved would not appear to trespass unduly on personal rights and liberties.

Michael Tate
Chairman
28 May 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF 1986

4 JUNE 1986

THE SENATE

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ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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 1986

The Committee has the honour to present its Ninth Report of 1986 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 Institute of Sport Bill 1986
Bounties Bill 1986
Copyright Amendment Bill 1986
Customs Tariff Amendment Bill 1986
Dairy Produce Bill 1986
Dairy Produce Levy (No.1) Bill 1986
Health Legislation Amendment Bill 1986
Industry Research and Development Bill 1986
Taxation Laws Amendment Bill (No.2) 1986
Taxation Laws Amendment (Foreign Tax Credits) Bill 1986
Wildlife Protection (Regulation of Exports and Imports) Amendment Bill 1986

AUSTRALIAN INSTITUTE OF SPORT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister for Sport, Recreation and Tourism.

The purpose of the Bill is to establish the Australian Institute of Sport as a Commonwealth statutory authority.

Major features of the Bill outline the Institute's role in providing resources, services and facilities to enable Australians to pursue and achieve excellence in sport, to improve the sporting abilities of Australians generally through the improvement of the standard of sports coaches, and to foster co-operation in sport between Australia and other countries.

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

Sub-clause 39(3) - 'Henry VIII' clause

Sub-clauses 39(1) and (2) provide that the income, property and transactions of the Institute are not subject to taxation and that transactions of the Institute in respect of goods are not subject to sales tax. Sub-clause 39(3) provides that the regulations may make the Institute subject to taxation or sales tax under a specified law. Because it permits the effect of sub-clauses 39(1) and (2) to be varied by delegated legislation sub-clause 39(3) may 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 to constitute an inappropriate delegation of legislative power.

The Minister for Sport, Recreation and Tourism has responded drawing attention to his reply to similar comments which the Committee made in relation to sub-section 36(3) and 37(3) of the Australian Sports Commission Act 1985. Those provisions permit

the Australian Sports Commission and the Sports Aid Foundation to be subjected by regulations to taxation under specified Commonwealth, State or Territory laws, contrary to the general exemption from taxation contained in the preceding parts of those sections. The Committee drew attention to the sub-sections as 'Henry VIII' clauses and the Minister responded arguing that they made 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'. With regard to the present case the Minister has stated:

> 'I see no reason to adopt a different approach in relation to the AIS Bill, which I understand accords with current drafting practice for comparable authorities.'

The Committee thanks the Minister for this response. In continuing to draw attention to sub-clause 39(3), 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.

Sub-clause 42(1) - Delegation

Sub-clause 42(1) provides that the Minister may delegate to any person all or any of the Minister's powers under the Act other than the power of delegation, the power to give directions to the Board and the power to approve entry into contracts involving payment or receipt of amounts in excess of $500,000 and entry into leases of longer than 10 years duration.

The Committee recognised that efforts had been made in clauses 43 and 44 to accomodate its concerns in relation to unrestricted powers of delegation. However it noted that under sub-clause 42(1) the Minister would be able, for example, to delegate to any person -

- the power to approve strategic plans and variations to such plans (clauses 13 and 14);

- the power to permit a Board member with a pecuniary interest to be present during deliberations of the Board with respect to the matter in which the member has that interest and to take part in decisions on that matter (clause 20);

- the power to approve the terms and conditions on which the Director of the Institute holds office (sub-clause 24(4)); and

- the power to approve estimates of expenditure by the Institute (sub-clause 34(3)).

The Committee suggested, at least in respect of these powers vested in the Minister, that it could not have been the intention that they be delegated to 'any person'. Such powers should only be delegated to senior Departmental officers, if delegated at all.

The Committee therefore drew the sub-clause to the attention of the Senate under principle 1(a)(ii) in that, by imposing no limitation, and giving no guidance, as to the attributes of the persons to whom a delegation may be made, 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 has responded:

> 'As a matter of principle, I would have some reservations about amending the AIS provision to specifically envisage delegation to a Departmental officer to act in relation to a statutory authority - as that could be seen as encouraging the Minister's Department to see itself as "controlling" the authority, as distinct from advising the Minister as required on matters related to the authority.

> In the absence of any general change in policy in that area, I have reviewed the need for a provision to allow the Minister to delegate his powers. As it is not essential, I am proposing deletion of clause 42.'

The Committee thanks the Minister for this response and notes with pleasure that clause 42 was omitted from the Bill in the House of Representatives on 22 May 1986.

BOUNTIES BILL 1986

This Bill was introduced into the House of Representatives on 8 May 1986 by the Minister Representing the Minister for Industry, Technology and Commerce.

This Bill proposes new arrangements for the introduction and implementation of bounty assistance whenever such assistance is proposed following the Government's consideration of appropriate Industries Assistance Commission reports.

General comment - Inappropriate delegation of legislative power

The intention of this Bill is to introduce standing legislation permitting the Minister to promulgate schemes for the payment of bounty by notice in the Gazette. Notices setting out bounty schemes will be subject to disallowance as if they were regulations except that only 7 sitting days, rather than 15 sitting days, will be allowed both for the giving of notice of a motion of disallowance and for the subsequent disposal of that motion. Part III of the Bill sets out standard provisions relating to all bounty schemes but some of these provisions merely impose certain requirements as to the content of bounty schemes (eg. clauses 15, 16, 17, 18 and 19) and others contain the saving provision 'unless the scheme otherwise provides' (eg. sub-clauses 22(2) and (5), 23(2) and 24(2)). Despite the

flexibility inherent in the system to be established by the Bill it has been considered necessary to provide for the content of the definition of the factory cost in sub-clause 22(5) - which may in any case be varied by the provisions of a particular scheme - to be added to by regulations: see paragraph 22(5)(zc).

While the Committee appreciates the reasons given by the Government for the proposed introduction of this standing legislation - in particular the pressures put upon parliamentary time by an ever-increasing volume of legislation - it cannot agree that the solution proposed is an appropriate one. It will take away from the Parliament the ability to consider the detail of each Bill providing for the payment of bounty on particular products and will leave the Parliament with only the blunt instrument of disallowance: in effect, the ability to say yes or no to the bounty scheme as a whole. While the threat of disallowance may give the Parliament leverage to require amendments to a scheme, the time normally available for negotiation in relation to such amendments would be halved to 7 sitting days under the Bill.

The Committee therefore draws this aspect of the Bill to the attention of the Senate under principle 1(a)(iv) in that the proposed system for promulgating bounty schemes by Ministerial notice may be considered an inappropriate delegation of legislative power.

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

Sub-clauses 11(2) and (3) - Retrospective resolutions

Sub-clauses 11(2) and (3) would permit the Parliament, by resolution of both Houses within 3 sitting days of the disallowance of a bounty scheme, to declare that any amount of bounty payable in accordance with the disallowed scheme shall not be paid and that persons who have received any payment of bounty in accordance with the disallowed scheme are liable to repay the

whole or a part of that amount to the Commonwealth. While such a provision may be considered a necessary adjunct of a system which permits the Executive to promulgate bounty schemes without the need for the prior agreement of the Parliament it is obvious that it may operate harshly in individual cases. Where, for example, a company adjusts the prices of its products in reliance on a duly gazetted bounty scheme, it may be required to repay the amount of any bounty payments it has already received and it may not receive bounty payments to which it would otherwise have been entitled in respect of production occurring before the date of disallowance.

The Committee draws sub-clauses 11(2) and (3) to the attention of the Senate under principle 1(a)(i) in that by giving resolutions of the Parliament such retrospective effect they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 43(1) - Powers of officers

Sub-clause 43(1) provides that a Collector or an officer appointed by the Comptroller may, by notice in writing, require a person whom he or she believes on reasonable grounds to be capable of giving 'information relevant to the operation of a bounty scheme in relation to the production (including the cost of production) of bountiable goods' to attend before him or her at a time and place specified in the notice and there to answer question and produce documents.

The Committee has two concerns with this provision. First, the class of persons who may be required to give information is very broad and may, for example, depending upon the nature of the bountiable product, include a retail purchaser or private user of bountiable goods. The Committee suggested in its Second Report of 1983 that sub-section 16(1) of the Bounty (Room Air Conditioners) Act 1983, a similar provision, might have permitted a member of the public who had merely purchased a bountiable room air conditioner to be required to answer questions. A new sub-section 16(1A) was subsequently inserted by the Bounty (Room

Air Conditioners) Amendment Act 1983 to make plain that persons purchasing room air conditioners for private use should not be required to answer questions. However the Committee commented in its Fourth Report of 1984 that sub-section 16(1) of the Bounty (Two-Stroke Engines) Act 1984 had reverted to the earlier, unsatisfactory form of such provisions and could allow virtually any person having a role in the manufacture, sale or use of bountiable engines - including retail purchasers of lawnmowers fitted with bountiable engines - to be required to attend before a Collector and answer questions. Now it would appear that it is intended to entrench this broad provision in standing legislation.

Secondly, there is no requirement that the time or place specified by the Collector or authorised person be reasonable. Failure without reasonable excuse to attend before a Collector or authorised person, to answer questions and to produce documents as required carries a penalty of a fine of up to $5,000 in the case of a body corporate or $1,000 or 6 months imprisonment, or both, in the case of a natural person.

The Committee therefore draws the sub-clause to the attention of the Senate under principle 1(a)(i) in that, by reason of the broad class of persons who may be required to answer questions and produce documents and the failure to stipulate that the time and place specified for attendance before the Collector or authorised person must be reasonable, it may be considered to trespass unduly on personal rights and liberties.

Sub-clause 43(5) - Self incrimination

Sub-clause 43(5) provides that a person is not excused from answering a question or producing any documents when required to do so on the ground that the answer to the question or the production of the documents might tend to incriminate the person. The sub-clause also contains the usual proviso that any such answer or the production of any such document is not to be

admissible against the person in criminal proceedings other than proceedings relating to the making of false or misleading statements or the production of false or misleading documents.

Although the sub-clause is in standard form it is the Committee's practice to draw all such provisions removing the privilege against self incrimination to the attention of the Senate under principle 1(a)(i) in that they may be considered to trespass unduly on personal rights and liberties.

COPYRIGHT AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 21 May 1986 by the Attorney-General.

The purpose of the Bill is to amend the Copyright Act 1986 to -

- strengthen significantly the 'anti-piracy' provisions of the Act;
- increase access to copyright materials for the handicapped and for libraries, archives and their clients;
- extend fair dealing; and
- make clear that broadcasts via satellite are subject to the Act.

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

Clause 6 - New sub-section 47A(4) - Reversal of onus of proof

New sub-section 47A(3) would create an offence where the holder of a print-handicapped radio licence fails to retain records of a sound broadcast of a literary or dramatic work for the prescribed period. New sub-section 47A(4) would provide a defence if the person satisfies the court that he or she took all reasonable precautions, and exercised due diligence, to ensure the retention of the records.

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 the 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 licence-holder might be required to adduce evidence that he or she took all reasonable precautions, and exercised due diligence, to ensure the retention of the records rather than being required to prove this defence on the balance of probabilities.

The Committee draws new sub-section 47A(4) 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 17 - Retrospectivity

Clause 17 would substitute a new sub-section 133A(1), sub-paragraph (c)(ii) of which specifies a new penalty if the offender against the sub-section is a body corporate. Paragraph (c) applies the new penalty to the sub-section as it was in force before the coming into operation of clause 17. Thus a body corporate which would have been liable to a penalty of $1,500 for

a first offence may now be liable to a fine of up to $7,500 even if the offence was committed before the commencement of the new sub-section.

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

CUSTOMS TARIFF AMENDMENT BILL 1986

The Committee commented on this Bill in its Eighth Report of 1986 (28 May 1986). 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 2 - Retrospectivity

The Committee drew sub-clauses 2(2) and (3) to the attention of the Senate under principle 1(a)(i) because they would give the amendments made by clauses 3 and 4 effect from 1 July 1985 and 2 August 1985 respectively. The amendment made by clause 3 would restore duty free entry of certain parts used in the construction and modification of bountiable vessels and the amendment made by clause 4 would reduce the required wool content in the pile of carpets from New Zealand eligible for duty free entry from 80% to 78% by weight. While the Committee recognised that in both cases the retrospectivity involved was beneficial it suggested that the delay in bringing the necessary legislation before the Parliament might have created uncertainty in the minds of those who benefited from the changes. The Minister for Industry, Technology and Commerce has responded:

'The change on wool carpets from New Zealand was originally introduced by a Customs Tariff Proposal. By their very nature changes introduced by Customs Tariff Proposals have retrospective effect when included in a Customs Tariff Amendment Bill. This aspect of such Bills was canvassed in my response to Scrutiny of Bills Alert Digest No. 3 of 1985 on the Customs Tariff Amendment Bill 1985 [see the Committee's Eighth Report of 1985].

The Australian Minister for Trade and the New Zealand Minister of Overseas Trade and Marketing agreed to the reduction in the percentage of wool in the pile of carpets entitled to duty free entry. Their agreement required that the necessary tariff change take effect on and from 2 August 1985.

The formal request to amend the Customs Tariff Act 1982 was not received by the Australian Customs Service in time for the relevant amendment to be included in the Customs Tariff Amendment Bill (No.2) 1985 which was passed in the 1985 Budget Sittings. The amendment was however introduced as Customs Tariff Proposals No. 11 (1985) into the House of Representatives on 21 November 1985. In practical terms this has meant that any importers entitled to refunds of duty have been able to claim such refunds from that date for imports made on and from the date of the agreement between the relevant Australian and New Zealand Ministers. In accordance with normal practice the relevant Customs Tariff Proposal has been incorporated as soon as possible in a Customs Tariff Amendment Bill.

In contrast to the wool carpets amendment the change in relation to the duty free entry of certain parts used in the construction or modification of bountiable vessels was not originally introduced by a Customs Tariff Proposal. Such action could not be undertaken

because of the provisions of the Industries Assistance Commission Act 1973. The operative date of 1 July 1985 for this amendment is necessary to provide continuity in the Government's assistance package for the Australian shipbuilding industry.

Prior to 1 July 1985 the relevant parts were entitled to entry at a General Tariff rate of 2% under a Customs by-law made under Item 19 in Part I of Schedule 4 to the Customs Tariff Act 1982. Entitlement to this by-law enabled a further duty reduction to a rate of Free by the application of Item 56 in Part I of Schedule 4 of that Act.

Item 19 was removed from the Customs Tariff Act on 1 July 1985 as part of the Government's decision on the Industries Assistance Commission's report on the Commercial By-law System. The removal of Item 19 created the anomaly that by ceasing to be eligible for the 2% duty rate the relevant parts also ceased to be eligible for the Free rate determined by the Government.

This anomaly was first brought to the Government's attention in May 1985. The Tariff Concessions Branch of the Australian Customs Service undertook an extensive inquiry into the many items covered by the by-law to determine whether conversion to a Commercial Tariff Concession Order was possible. The investigation concluded that due to the wide variety of uses of many of the goods involved the criteria for conversion to a Commercial Tariff Concession Order could not be met.

The matter was then referred to the Department of Industry, Technology and Commerce to seek a solution. After further consideration and in recognition of the fact that the original decision to grant duty free entry to the parts post-dated the Government's decision

on the IAC report on the Commercial By-law System I approved the insertion of a new item in Part I of Schedule 4 to the Customs Tariff Act to cover those parts previously admissible under the Item 19 by-law reference. My approval was given in February 1986.

The new item has been included in the first available Customs Tariff Amendment Bill. When the legislation is enacted importers will be able to claim refunds for eligible imports made on and from 1 July 1985.'

The Committee thanks the Minister for this response. While it cannot regard the degree of retrospectivity as desirable it accepts that in all the circumstances as outlined by the Minister it was not possible to introduce the relevant legislation earlier.

DAIRY PRODUCE BILL 1986

This Bill was introduced into the House of Representatives on 7 May 1986 by the Minister for Primary Industry.

The purpose of this Bill and five other related Bills is to enhance the capacity of the Australian dairy industry to market its produce. Measures are proposed to make the industry more market responsive. Government regulation of marketing is to be reduced. Assistance presently provided to export sales by stabilization payments funded by a levy on domestic sales is to be replaced by market support payments funded by a levy on all milk production and supplementary market support payments funded by levies on domestic sales of certain dairy products. The Dairy Produce Bill 1986 includes provisions to reform the Australian Dairy Corporation, to control the export of Australian dairy

products, to enable the collection of the levies referred to above, to establish Funds for market support and promotion purposes and to reform the Dairying Industry Stabilization Fund.

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

Clause 111 - Power to call for returns

Clause 111 empowers a person appointed by the Minister to require, by notice in writing, returns or information to be furnished within a time specified in the notice. There is no stipulation that the time set be reasonable or that it be not less than a statutory minimum period, for example 14 days. Failure to comply with such a requirement without reasonable excuse carries a penalty of a fine of up to $10,000 in the case of a body corporate or $2,000 or imprisonment for 12 months, or both, in the case of a natural person.

The Committee drew the clause to the attention of the Senate under principle 1(a)(i) in that the failure to stipulate that the time set be reasonable or that it be not less than a statutory minimum might be considered to trespass unduly on personal rights and liberties. The Minister for Primary Industry has responded:

> 'In practice, such notices in writing conform to an established administrative procedure established by the Department for debt recovery. Under these procedures no action is undertaken unless the levy payer has been contacted by the Department after the levy has become due and payable, first by phone or visit and then after 7 days, by Final Notice requiring lodgement within 14 days of issue of Final Notice. Thus, in practice the levy payer is given at least 21 days to provide the necessary returns before further action is undertaken'.

The Committee thanks the Minister for this response. However rather than relying on the goodwill of administrators the Committee would prefer that a statutory minimum period within which a person may be required to furnish returns be specified in the legislation. Accordingly the Committee continues to draw clause 111 to the attention of the Senate in that the failure to set a statutory minimum period or to require that the time set be reasonable may be considered to trespass unduly on personal rights and liberties.

Sub-clause 113(2) - Self incrimination

Sub-clause 113(2) provides that a person is not excused from submitting a return or providing information that the person is required to submit or provide on the ground that the return or information might tend to incriminate the person. The sub-clause also contains the usual proviso that any return or information so submitted or provided is not to be admissible against the person in criminal proceedings (other than proceedings relating to the refusal or failure to submit a return or provide information or the provision of false or misleading returns or information) or proceedings for the recovery of a penalty for non-payment of a levy.

Although the sub-clause is in standard form it is the Committee's practice to draw all such provisions removing the privilege against self incrimination to the attention of the Senate under principle 1(a)(i) in that they may be considered to trespass unduly on personal rights and liberties. The Minister for Primary Industry has responded noting that equivalent provisions already appear in a wide range of Commonwealth laws and that he is aware that the Committee has written to the Attorney-General asking him to consider revising the customary form of such provisions with a view to strengthening the protection against self incrimination. The Minister has undertaken that the Committee's view of sub-clause 113(2) will be taken into account in the context of the consideration of the general revision of such provisions. The Committee thanks the Minister for this undertaking.

DAIRY PRODUCE LEVY (NO.1) BILL 1986

This Bill was introduced into the House of Representatives on 7 May 1986 by the Minister for Primary Industry.

The purpose of this Bill and the complementary Dairy Produce Levy (No.2) Bill 1986 is to impose various levies. These levies are required to finance the operations of the Australian Dairy Corporation including its activities in promoting dairy produce, to finance new market support arrangements and to raise moneys from the dairy industry for dairy research. The Dairy Produce Levy (No.1) Bill 1986 imposes two types of levies: levies on milk fat produced on or after 1 July 1986, and levies on certain types of dairy products produced on or after 1 July 1986.

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

Sub-clause 4(1) -
Definition of 'dairy product' - Inappropriate delegation of legislative power

Clause 9 imposes a levy on 'dairy products'. Under sub-clause 4(1) 'dairy products' are defined as butter, butteroil, cheese and -

> '(d) any other product that is declared by the regulations to be a dairy product for the purpose of this Act, being a product that is produced from milk or from a constituent part of milk'.

By enabling the class of products on which the levy is imposed to be extended by regulations the definition may be seen as an indirect means of imposing taxation by such regulations. The Committee takes the view that Parliament should not lightly delegate its taxing powers and accordingly drew paragraph (d) of the definition of 'dairy product' in sub-clause 4(1) 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 for Primary Industry has responded:

> 'The current dairy marketing arrangements provide for stabilization levies on the domestic sale of major dairy products (Dairy Industry Stabilization Levy Act 1977). Government policy is to continue certain product levies on a reducing basis only where required to maintain the same price support in the first year of the new arrangements compared to the current arrangements.
>
> However, the level of domestic price support to be provided to major products varies with the international price of dairy products, which can be volatile. It is therefore not administratively feasible to specify in legislation now the products that could require levies in the future. Accordingly, only those products which are now known to require levies have been specified - butter, butteroil and cheddar type cheeses. Other products, which at present are levied, would be prescribed if required in the future.'

The Committee thanks the Minister for this response. In continuing to draw paragraph (d) of the definition of 'dairy product' 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.

Paragraph 5(2)(b) - Inappropriate delegation of legislative power

Paragraph 5(2)(b) provides that the Minister may, by notice in the Gazette, extend the period during which the market support levy is imposed on the milk fat content of relevant dairy produce beyond 1 July 1992. Sub-clause 5(3) provides that the Minister

may only act under this provision if the Minister is of the opinion that the amount of money that is likely to be standing to the credit of the Market Support Fund on 1 July 1992 will not meet all of the payments that, under the proposed Dairy Produce Act 1986, are to be paid from that Fund.

Despite the limitation imposed by sub-clause 5(3) the Committee expressed concern that the Minister should be able to extend the period during which a levy is imposed by Gazette notice with no form of parliamentary scrutiny. Because it would permit the Minister, in effect, to impose a tax by Executive instrument the Committee drew the paragraph 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 for Primary Industry has responded:

> 'This provision is an administrative convenience to ensure that at the end of the current arrangements the Market Support Fund will be provided with sufficient funds to meet all payments which, under the proposed Dairy Produce Act 1986, are required to be paid from that Fund.
>
> It is unlikely that accurate reconciliation of Market Support Funds and Market Support payments would occur much before the expiry date of the marketing arrangements and accordingly it is desirable in these circumstances that provision be made for an administrative mechanism whereby all required payments under the Dairy Produce Act 1986 can be met without undue delay.'

The Committee thanks the Minister for this response. Once again the Committee continues to draw the paragraph to the attention of the Senate, together with the Minister's response, in the hope of promoting a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

Clause 6 - Inappropriate delegation of legislative power

Sub-clause 6(1) requires the Minister, by notice in the Gazette, to suspend the imposition of the market support levy on the milk fat content of relevant dairy produce at the request of any member of the Australian Agricultural Council unless a majority of the members of that Council determine that the request should not be complied with. Sub-clause 6(3) provides that the Minister may at any time, by notice in the Gazette, revoke a notice under sub-clause 6(1), thus reimposing the levy with effect from a day specified in the notice, not being a day earlier than the day on which the notice is published.

As with paragraph 5(2)(b), there is no form of parliamentary scrutiny of Gazette notices under sub-clauses 6(1) and (3). Because the sub-clauses would permit the Minister to remove and reimpose a form of tax by Executive instrument the Committee drew them to the attention of the Senate under principle 1(a)(iv) in that they might be considered to constitute an inappropriate delegation of legislative power. The Minister for Primary Industry has responded:

> 'This provision is designed to provide the so-called "comfort clause" requested by industry which will involve the Minister suspending the market support levy system (within 60 days) should he be so requested by a State or Territory Minister unless the Australian Agricultural Council (AAC) determines otherwise by majority decision.
>
> If a request for suspension of levy is received, the Minister will need to convene a special meeting of the Agricultural Council unless there is already a meeting scheduled that would meet the timing requirement. In addition, the Government intends to seek advice, in the event of receiving a request to suspend the levy, from the Executive Council of the Australian Dairy Industry Conference for consideration by the Australian

> Agricultural Council. It is therefore highly desirable that the administrative mechanism used by the Minister to suspend the levy be speedy and allow the Minister to comply with the 60 day deadline. Similar considerations apply to the revocation of any notice under sub-clause 6(1).'

The Committee thanks the Minister for this response. In continuing to draw clause 6 to the attention of the Senate, together with 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 10 - Inappropriate delegation of legislative power

Clause 10 provides that the rate of levy imposed on dairy products by clause 9 is to be the rate prescribed by the regulations from time to time. The Committee has consistently drawn attention to such open-ended provisions permitting the rate of a levy or similar tax to be fixed by regulations without fixing a statutory maximum rate: see, for example, its comment on clause 7 of the Dairy Industry Stabilization Levy Amendment Bill 1985 in its Seventh Report of 1985.

Accordingly the Committee drew clause 10 to the attention of the Senate under principle 1(a)(iv) in that by leaving the rate of levy to be prescribed in regulations it might be considered to constitute an inappropriate delegation of legislative power. The Minister for Primary Industry has responded:

> 'It is common for rates of levy to be set by regulation insofar as primary industry legislation is concerned [because] this mechanism provides a flexible means for establishing, from time to time, operative rates of levy. The rate which can be set is usualy subject to a maximum imposed by the Parliament. However, maximum rates have never been specified in the Dairy Industry Stabilization Levy Act 1977, primarily because the

maximum size of the levy cannot be determined in advance. Effectively the levy level determines the minimum domestic price of the product concerned.

The Government has already publicly announced that the levies on butter and cheese will be set in 1986/87 so as to raise the level of the theoretical domestic price support for these products by 5% and 8% respectively. The Government having agreed to this, the determination of the actual levy level is a calculation based on estimates [and] to ensure that the best estimates are used it is necessary to calculate the rates of levy as close as possible to the commencement of the year. To have specified the rates in the legislation would have committed the Government to figures which may have been inappropriate nearer to the date of implementation [and which] could have been, for example, too low to provide the desired domestic price support level.

Also the legislation provides for dairy products other than butter and cheese to be declared by regulations to be leviable products. In such a case it is necessary to have the facility to establish a rate of levy for that product immediately rather than having to await, perhaps, a Parliamentary Session some months away.

For these reasons the Government is firmly of the view that the mechanism for establishing the rate of levy is appropriate.'

The Committee thanks the Minister for this response. In continuing to draw clause 10, together with the Minister's response, to the attention of the Senate, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of the debate on the Bill.

HEALTH LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 8 May 1986 by the Minister for Health.

The purpose of this Bill is to amend several Acts, being the Health Insurance Act 1973, the Health Insurance Commission Act 1973, the National Health Act 1953, the States Grants (Nurse Education Transfer Assistance) Act 1985 and the Tuberculosis Act 1948. The major amendments proposed by this Bill relate to the provision of pathology services. These amendments are designed to improve arrangements for the payment of Medicare benefits for pathology services. They flow from the findings by the Joint Parliamentary Committee on Public Accounts in its Report (No. 236) on Medical Fraud and Overservicing - Pathology, and are designed to introduce significant new controls over the provision of pathology services and thus greatly to reduce the capacity for fraud and overservicing in the pathology industry.

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

Sub-clause 19(1) -
New paragraphs 23DC(6)(j) and 23DF(7)(h) - Open-ended discretion

New paragraphs 23DC(6)(j) and 23DF(7)(h) permit the Minister, in determining whether a person is a fit and proper person to be an approved pathology practitioner or authority, to have regard to 'such other matters as the Minister considers relevant'. While the Minister's decision to refuse an undertaking under section 23DC or 23DF is reviewable by the Administrative Appeals Tribunal and while in such a review the Tribunal would have all the powers and discretions which the Minister had in making the original decision, the Committee suggested that the Tribunal would have difficulty in determining how the discretion afforded by paragraphs 23DC(6)(j) and 23DF(7)(h) should be exercised in the absence of any statutory guidelines. Moreover, given that

paragraphs 23DC(6)(h) and 23DF(7)(g) permit the matters to which the Minister is to have regard to be added to by regulations, it was difficult to see the need for an additional, open-ended discretion in the Minister to have regard to 'such other matters as the Minister considers relevant'.

Accordingly the Committee drew new paragraphs 23DC(6)(j) and 23DF(7)(h) to the attention of the Senate under principle 1(a)(ii) in that by affording the Minister such an open-ended discretion they might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister for Health has responded:

> 'You would, of course, be aware that it is not unusual to include provisions such as paragraphs 23DC(6)(j) and 23DF(7)(h) in legislation which provides a list of matters to be taken into account in a decision-making process. The existence of these paragraphs demonstrates that the criteria listed in the earlier paragraphs are not intended to be exhaustive of the matters which can be considered. There is the possibility that there would be other matters which may be brought to the Minister's attention in individual cases which are not already covered in the specific criteria listed in sub-sections 23DC(6) and 23DF(7). The reason why a regulation-making power is also included in the sub-sections is because, given the nature of the decisions being made, I consider it appropriate that if it appears that a matter other than the specific criteria listed has arisen, or is going to arise for consideration, on a regular basis, then that matter should be included in regulations so that affected members of the public can be made aware of this new criterion.
>
> If the Minister makes a decision, after having regard to a matter of the type covered by paragraph 23DC(6)(j) or 23DF(7)(h), the statement made for the purposes of

section 37 of the Administrative Appeals Tribunal Act would explain what that matter was. The Tribunal could then decide whether or not it was appropriate for the Minister to have taken that matter into account.

As the Committee has observed, the Tribunal, having the same powers as the Minister, would decide whether there were additional relevant matters to consider or it could decide to consider only the specific listed criteria. I do not agree that this would pose difficulties for the Tribunal. Consistent with what appears to be the Tribunal's usual practice, I would expect that over the course of time the Tribunal would establish its own ground rules on matters that it would be appropriate or inappropriate to take into account. I remind the Committee that one of the benefits of Administrative Appeals Tribunal review is that the Tribunal provides guidance to decision-makers on the appropriate exercise of discretionary powers.'

The Committee thanks the Minister for this response which answers its concerns in relation to the provisions.

New paragraph 23DN(1)(d) - Non-reviewable decision

New paragraph 23DN(1)(d) provides that the Minister, in approving premises as an accredited pathology laboratory, shall specify the period for which the approval has effect, being a period not exceeding three years. While a decision by the Minister under sub-section 23DN(1) approving or refusing to approve premises would be reviewable pursuant to paragraph 23DO(5)(a), the Committee suggested that it did not appear that this review would extend to the period of effect of the approval. By contrast the period for which an undertaking under section 23DC or 23DF is to have effect was to be reviewable pursuant to paragraph 23DO(5)(c).

The Committee therefore drew new paragraph 23DN(1)(d) 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 Health has responded:

> 'The right of review under paragraph 23DO(5)(a) covers a decision by the Minister under sub-section 23DN(1) approving or refusing to approve premises as an accredited pathology laboratory. The only reason why an applicant would seek review of the Minister's decision to approve such premises would be because the applicant is dissatisfied as to one or both of the matters required by paragraphs 23DN(1)(c) and (d) to be specified in the approval. The Minister is bound by paragraph 23DN(1)(d) to specify the period of the approval. On review the Administrative Appeals Tribunal would be similarly bound to specify the period of approval.'

The Committee thanks the Minister for this response which answers its concerns in relation to the provision.

INDUSTRY RESEARCH AND DEVELOPMENT BILL 1986

This Bill was introduced into the Senate on 8 May 1986 by the Minister for Industry, Technology and Commerce.

This Bill proposes a new scheme to encourage research and development (R&D) in industry. The Government's main scheme for assistance to R&D in industry is the 150 per cent tax concession to be provided under section 73B of the Income Tax Assessment Act 1936. However, the tax concession will not assist all worthwhile R&D. This Bill is designed to support worthwhile R&D which would not be assisted by the tax concession. There are three main elements in the new scheme which will become effective on 1 July 1986:

- Discretionary grants for R&D, providing a similar level of support as the tax scheme provides. These grants would be aimed at firms such as new innovative companies or firms wishing to restructure their activities which have insufficient tax liability to benefit from the tax scheme;

- Generic technology grants to support R&D on technologies of fundamental and wide-ranging significance for industry competitiveness in the 1990s, eg. biotechnology, new materials. These grants would bridge the gap between research centres and industry by funding the development of research in collaboration with industry to a stage where the private sector would take up further development;

- National interest agreements to be awarded for projects with significant national benefits which would not be undertaken by industry on a commercial basis.

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

Clause 5 - Inappropriate delegation of legislative power

Clause 5 provided that the Minister might, by notice in writing published in the Gazette, declare that the Act extended to a specified external Territory. The clause was amended in the Senate on 3 June 1986 to provide that the Act extends to all the external Territories other than Norfolk Island and to Norfolk Island if the regulations so provide.

The Committee has previously observed (see its comment on clause 4 of the Affirmative Action (Equal Employment Opportunity for Women) Bill 1986 in its Sixth Report of 1986) that extension of legislation to the external Territories by regulations (subject to tabling and disallowance) is preferable to extension of legislation by Ministerial notices which are not subject to parliamentary scrutiny. The amendment answers the concerns of the Committee in relation to the clause.

TAXATION LAWS AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Treasurer.

The Bill will amend the Income Tax Assessment Act 1936 to give effect to two major proposals announced in December 1984, namely -

- to tax each year the income accruing to resident taxpayers from discounted, deferred interest and capital indexed securities issued after 16 December 1984; and

- to strengthen the application of the interest withholding tax provisions in relation to such securities held by non-residents and other non-traditional financing arrangements.

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

Sub-clause 30(4) - Retrospectivity

Sub-clause 30(4) would give the amendment made by clause 16, introducing a new Division 16E in Part III of the Income Tax Assessment Act 1936, retrospective effect to 17 December 1984, apparently the day after the relevant proposal to change the law was announced. The Explanatory Memorandum further records that some modifications to the original proposal to change the law were announced on 20 December 1985.

The Committee has now drawn attention on a number of occasions to clauses making changes to the law retrospective to the date of their announcement, usually at a press conference or by way of as press release: see, for example, its comments on sub-clause 34(6) of the Taxation Laws Amendment Bill (No.2) 1985 in its

Thirteenth Report of 1985 and on clause 25 of the Taxation Laws Amendment Bill 1986 in its Eighth Report of 1986. The Committee's criticism of such provisions is that the retrospectivity involved carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. This criticism is especially pertinent in the present case since there have apparently been two relevant announcements, the second modifying the first, even though the relevant legislation is to be retrospective to the day following the first announcement. The Committee questions how persons may be expected to know the content of a law when the terms of that law are not publicly available but may only be ascertained from a reading of Ministerial announcements and when the Minister himself makes a further announcement modifying the terms of the original announcement.

The Committee draws sub-clause 30(4) to the attention of the Senate under principle 1(a)(i) in that the retrospectivity involved may be considered to trespass unduly on personal rights and liberties.

TAXATION LAWS AMENDMENT (FOREIGN TAX CREDITS) BILL 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Treasurer.

The Bill will give effect to the proposal announced in the September 1985 Tax Reform statement to replace the present double taxation relief provisions of the Income Tax Assessment Amendment Act 1936 with a general foreign tax credit system.

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

Clause 24 - New section 160AFF - Inappropriate delegation of legislative power

Clause 24 would insert a new Division 18 in Part III of the Income Tax Assessment Act 1936. New section 160AFF would enable the terms of the foreign tax credits system to be introduced by that Division to be modified by regulations in relation to income derived from sources in a particular foreign country. In so permitting the terms of the Act to be modified by delegated legislation the clause may be characterised as a 'Henry VIII' clause. Further, new sub-section 160AFF(4) would permit regulations made under the section to modify the legislation with retrospective effect.

The Explanatory Memorandum indicates that such provision for modification of the tax credits system is considered necessary because many developing countries offer tax incentives for foreign investors and the tax credits system would effectively cancel out these incentives for Australian investors in the absence of 'tax sparing' provisions of the sort contemplated by new section 160AFF. While the aim is laudable the Committee questions whether issues of such importance should be dealt with by delegated legislation. Accordingly the Committee draws new sub-section 160AFF to the attention of the Senate under principle 1(a)(iv) in that it may be considered to constitute an inappropriate delegation of legislative power.

WILDLIFE PROTECTION (REGULATION OF EXPORTS AND IMPORTS) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 March 1986 by the Minister for Arts, Heritage and Environment.

The purpose of the Bill is to amend certain provisions of the Wildlife Protection (Regulation of Exports and Imports) Act 1982 to address certain legal and administrative constraints which have surfaced in the course of administering the Act and, in particular -

(a) to make controls on the export and import of certain specimens more appropriate to their status and the circumstances under which they enter trade;

(b) to simplify and improve administrative procedures;

(c) to clarify certain enforcement provisions; and

(d) to provide for increased protection for informants in proceedings under the Act.

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

Clause 16 -
New sub-sections 42A(2) and 42B(2) - Lack of parliamentary scrutiny

New sub-sections 42A(2) and 42B(2) would permit the Minister, on the recommendation of the Designated Authority, to notify a class of specimens as a 'prescribed class', permission to import or export which may be granted for multiple shipments. Notifications are to be entered on a register to be maintained by the Designated Authority.

Although notifications under new sub-sections 42A(2) and 42B(2) are quasi-legislative in character they are not to be subject to any form of parliamentary scrutiny and the Committee therefore drew the provisions to the attention of the Senate under principle 1(a)(v) in that they might be

considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister for Arts, Heritage and Environment has responded:

> 'Proposed section 42A allows multiple transactions on a permit in respect of certain specimens. The specimens for which a multiple transaction permit may be issued will be notified by the Minister to the Designated Authority. The provision would not allow "multiple transactions" in respect of CITES specimens other than artificially propagated plants.
>
> It is the intention that such a multiple transaction permit would be issued only where the specimen would qualify for a permit under existing provisions. The proposed provision provides a level of administrative flexibility designed to benefit various users of the Act in respect of certain specimens without reducing the existing level of regulatory control of trade in those specimens. It allows the Minister to issue one permit instead of several with respect to certain specimens that are identified in the provision. The Minister's actions therefore are not legislative as such but purely administrative within the confines of issuing a permit.
>
> Proposed sub-section 42B is even more narrow in application than proposed section 42A. This section will only apply to non-CITES specimens for the purpose of scientific research. In this context the action of the Minister in notifying the Designated Authority as to the specimens to which this provision shall apply is purely administrative. This section is designed to reduce the repetitive issue of identical permits in respect of research programs dependant on the

repeated importation of a single category of specimens (e.g. research leading to the development of biological control agents).'

The Committee thanks the Minister for this response. However it appears to confuse the action of the Minister in giving the Designated Authority notice that a class of specimens is a prescribed class in respect of which authorities to export or import may be granted - action which the Committee would describe as quasi-legislative in character - and the action of the Minister in actually giving an authority to export or import specimens falling within such a prescribed class to a particular person, action which the Committee concedes is administrative in character. It may be that the first step in the process is superfluous and could have been subsumed in the Minister's decision to grant an authority in particular cases. However given the fact that sub-sections 42A(2) and 42B(2) require the Minister to notify certain classes of specimens as prescribed classes in respect of which authorities to export or import may be granted the Committee continues to draw the sub-sections to the attention of the Senate under principle 1(a)(v) in that they may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 26 -
New sub-section 69A(3) - Avoidance of liability

Clause 26 would insert a new section 69A permitting an inspector, at the request of the owner of an article, to separate out from that article any specimen or specimens attracting the operation of the Act thus permitting the return of the remainder of the article to the owner. New sub-section 69A(3) provides that no action or other proceeding shall be instituted in any court to recover damages in respect of any loss alleged to have been incurred, or any damage alleged to have been suffered, because of any action taken by an inspector under the section.

The Committee is concerned that this provision would protect the inspector from liability even if the inspector wilfully causes damage or is negligent in carrying out the separation of the specimen or specimens from the article. There would seem to be no policy justification for such an avoidance of liability and accordingly the Committee drew new sub-section 69A(3) 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 Arts, Heritage and Environment has responded:

> 'The action authorised by the section is not the separation of the specimen from the article by the inspector but the allowing by the inspector for the specimen to be separated from the article. The inspector can only allow for that separation at the request of the would-be importer so long as it is practicable to comply with that request without the article leaving the control of an inspector. The inspector could do the separation under the section. However, in practice the physical separation would be carried out by a third person, in most cases the would-be importer or his agent. Sub-section 69A(3) protects the inspector from any complaint by the would-be importer that the inspector is in some way liable for any damage caused by the separation by virtue of the constraint that the article containing the specimens does not leave the inspector's control. It also protects the inspector where a third person making the separation with the inspector's compliance makes a bad job of it.'

The Committee thanks the Minister for this response, which answers its concerns in relation to the clause. However it suggests that it should perhaps be made clear on the face of the clause that the inspector is not to carry out the

separation or that, if the inspector does, the actions of the inspector should not attract the protection from liability afforded by new sub-section 69A(3).

Clause 27 -
New sub-section 71(4) - Unqualified power to seize goods

Clause 27 substitutes for the existing sub-section 71(4) a new sub-section which is differently worded although similar in effect. The Committee recognises that it did not comment on this aspect of the original sub-sections 71(2) and (4) when it reported on the Wildlife Protection (Regulation of Exports and Imports) Bill 1982 in its Twelfth Report of 1982. However it raises the question whether the sub-sections are to be read as subject to the powers to enter on premises, search goods and so forth in sections 63 and 67 or whether the power to seize goods may be construed as standing on its own and therefore permitting entry onto premises, vehicles and vessels without warrant if the inspector has the belief required by sub-section 71(2) or (4) respectively. The Committee notes that the various sections are not expressly related to each other in any way and that, indeed, the power to enter premises under section 63 is expressly restricted by reference to the exercise of the functions of an inspector under section 64 (which do not include the seizure of goods pursuant to section 71).

The Committee suggested that, if sub-sections 71(2) and (4) were to be read as authorising, for example, entry on premises without warrant, then new sub-section 71(4) could be considered to trespass unduly on personal rights and liberties even though the Committee recognised that in this respect it did not differ from existing sub-section 71(4). The Minister for Arts, Heritage and Environment has responded:

'As the Committee recognises, proposed sub-section 71(4) is a rewording of an existing provision. Notwithstanding the comments of the Committee, section 71 must be read in conjunction with section 63 and 64 for its full purpose in respect of seizure from premises to be understood. The power to seize items from premises is logically consequent upon the power, contained in existing provisions, of access to premises for the purpose of searching.

The only means by which an inspector can gain access to premises is specified in section 63. Section 64 provides the inspector with power to search. Where, on searching, the inspector finds goods he believes on reasonable grounds to have been used or otherwise involved in the commission of an offence, he may then seize by virtue of sub-section 71(2).

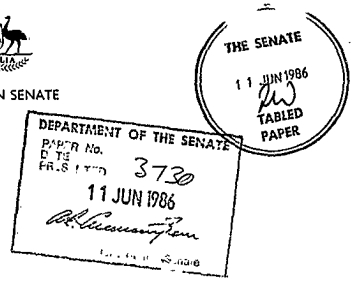
Section 71 is written to provide also for seizure at the Customs barrier.

Proposed sub-section 71(4) specifies the material the inspector may seize which, in essence, is material which might be evidence in proceedings.'

The Committee thanks the Minister for this response which allays it concerns in relation to new sub-section 71(4).

Michael Tate
Chairman
4 June 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF 1986

11 JUNE 1986

THE SENATE

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MEMBERS OF THE COMMITTEE

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

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 1986

The Committee has the honour to present its Tenth Report of 1986 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:

Bounties Bill 1986
Copyright Amendment Bill 1986
Departure Tax Collection Amendment Bill 1986
Hazardous Goods Bill 1986
Income Tax Assessment Amendment (Research and Development) Bill 1986
Inspector-General of Intelligence and Security Bill 1986

BOUNTIES BILL 1986

The Committee commented on this Bill in its Ninth Report of 1986 (4 June 1986). 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.

General comment - Inappropriate delegation of legislative power

The intention of the Bill is to introduce standing legislation permitting the Minister to promulgate schemes for the payment of bounty by notice in the Gazette. Such schemes would be subject to tabling in parliament and disallowance, but the Committee noted that only 7 sitting days, rather than the usual 15, would be allowed both for the giving of notice of a motion of disallowance and for the subsequent disposal of that notice. The Committee drew attention to the fact that the Bill would take away from the Parliament the ability to consider the detail of each Bill providing for the payment of bounty on particular products and would leave the Parliament with only the blunt instrument of disallowance: in effect, the ability to say yes or no to the bounty scheme as a whole.

Accordingly the Committee drew this aspect of the Bill 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 for Industry, Technology and Commerce has responded indicating that the Government proposes to move an amendment to the Bill to permit modification of bounty schemes by resolution of both Houses of the Parliament. The Government also proposes to allow the usual 15 sitting days for disallowance. The Minister concludes:

> 'In essence, the amendment is proposed to provide the Parliament with the ability to consider the detail of bounty schemes, and amend them in the same manner as is

currently the case with principal legislation, without derogating unnecessarily from the Parliament's time in those situations where the bounty schemes have bi-partisan support.'

The Committee thanks the Minister for this response, which answers its concerns in relation to this aspect of the Bill.

Sub-clauses 11(2) and (3) - Retrospective resolutions

The Committee drew sub-clauses 11(2) and (3) to the attention of the Senate under principle 1(a)(i) because they would have permitted the Parliament, by resolution of both Houses within 3 sitting days of the disallowance of a bounty scheme, to declare that any amount of bounty payable in accordance with the disallowed scheme should not be paid and that persons who had received any payment of bounty in accordance with the disallowed scheme were to be liable to repay the whole or a part of that amount. The Committee suggested that by retrospectively altering entitlements the sub-clauses might be considered to trespass unduly on personal rights and liberties.

The Minister for Industry, Technology and Commerce has responded indicating that the Government proposes to amend the Bill to remove the sub-clauses. The Committee thanks the Minister for this response which answers its concerns.

Sub-clause 43(1) - Powers of officers

Sub-clause 43(1) provides that a Collector or an officer appointed by the Comptroller may, by notice in writing, require a person whom he or she believes on reasonable grounds to be capable of giving 'information relevant to the operation of a bounty scheme in relation to the production (including the cost of production) of bountiable goods' to attend before him or her at a time and place specified in the notice and there to answer questions and produce documents.

The Committee raised two concerns in relation to this provision. First, it suggested that the class of person who might be required to give information was very broad and might, for example, include a retail purchaser or private user of bountiable products. Secondly, there was no requirement that the time or place specified by the Collector or authorised person be reasonable. The Committee therefore drew the sub-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 for Industry, Technology and Commerce has responded:

> 'It is submitted that the potential reach of this provision is restricted to an acceptable class of persons by the terms of the provision itself. The first control against an overly broad application of the power is the requirement that the holder of the power must believe on reasonable grounds that the person whom it is intended to question is capable of giving information relevant to the operation of the bounty scheme. Secondly, the information which it is believed the person is capable of providing, is itself restricted to information in relation to the production (including the cost of production) of the bountiable goods covered by the scheme. Against these two restrictions it would be most unlikely that the power could extend to ordinary private purchasers of a bountiable product, as in normal arms length transactions a purchaser would have no knowledge of the production, and production costs, of the product. It is considered that the wording of the provision 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 its operation.

...

> I am advised that this power to require attendance is in standard legislative drafting style, and it is implicit in the exercise of this power that the time and place specified for the attendance be reasonable. Further, where the time and/or place is unreasonable, it is arguable that a specific defence to the offence for failure to attend is available; ie. the failure to attend is not without reasonable excuse.'

The Committee thanks the Minister for this response, which answers its concerns in relation to the sub-clause. While the Committee recognises that the specification of an unreasonable time or place may give rise to a 'reasonable excuse' for failure to attend before an officer it would prefer to see the requirement that the time and place be reasonable specified in the standard form of such provisions.

Sub-clause 43(5) - Self incrimination

Sub-clause 43(5) is a provision in standard form removing the privilege against self incrimination in respect of a requirement by a Collector or authorised officer to answer questions or produce documents. The Committee drew the provision to the attention of the Senate under principle 1(a)(i), as it does all such provisions, 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 provision 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. As has been noted in recent Reports of the Committee, the Committee has written to the Attorney-General asking him to consider revising the customary form of such provisions with a view to strengthening the protection accorded to persons who may be required to incriminate themselves. While awaiting the Attorney-General's response on this issue the Committee will continue to draw the attention of the Senate to provisions such as sub-clause 43(5) under principle 1(a)(i) of its Terms of Reference in that by removing the privilege against self incrimination they may be considered to trespass unduly on personal rights and liberties.

The Committee takes this opportunity to place on record its gratitude to the Minister for Industry, Technology and Commerce both for the speed with which he customarily responds to the Committee and for the nature of his responses. In the Committee's experience it is all too rare to find a Minister who is prepared to view the Committee's comments as positive contributions to the improvement of Commonwealth legislation rather than carping criticism to be met defensively, if at all. Whether agreeing with the Committee's comments or putting forward reasoned arguments for his disagreement, the Minister's responses have always been constructive and it is only by drawing forth such responses from Ministers that the Committee can fulfil its role in promoting more informed debate on legislation in the Senate.

COPYRIGHT AMENDMENT BILL 1986

The Committee commented on this Bill in its Ninth Report of 1986 (4 June 1986). The Attorney-General 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 6 - New sub-section 47A(4) - Reversal of the onus of proof

New sub-section 47A(4) would provide a defence in respect of the failure to retain records for a prescribed period if the defendant satisfies the court that he or she took all reasonable precautions, and exercised due diligence, to ensure the retention of the records. The Committee drew the new sub-section to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant in criminal proceedings it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'Taking into account the fact that the matters which the defence entails are peculiarly within the knowledge of the defendant, the regulatory nature of the offence created by sub-section 47A(3) and the comparatively low level of the fine ($500), sub-section 47A(4) falls squarely within the policy enunciated in my correspondence of October 1985, to you concerning circumstances in which reversal of the persuasive onus is permissible [see the Committee's Seventeenth Report of 1985 in relation to clause 21 of the Trade Practices Amendment Bill 1985].'

The Committee thanks the Attorney-General for this response. However the Committee remains unpersuaded that the task of the prosecution would be made significantly more difficult if, as proposed by the Committee, an evidential onus were imposed on the defendant rather than a persuasive onus: that is, if the

defendant bore the burden only of adducing evidence that he or she took all reasonable precautions to ensure the retention of the records rather than being required to exculpate himself or herself by establishing this defence on the balance of probabilities.

The Committee therefore continues to draw new sub-section 47A(4) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus on the defendant it may be considered to trespass unduly on personal rights and liberties.

Clause 17 - Retrospectivity

Clause 17 would substitute a new sub-section 133A(1), sub-paragraph (c)(ii) of which specifies a new penalty if the offender against the sub-section is a body corporate. Paragraph (c) would appear to apply the new penalty to the sub-section as it was in force before the coming into operation of clause 17. Thus a body corporate which would have been liable to a penalty of $1,500 for a first offence might now be liable to a fine of up to $7,500 even if the offence was committed before the commencement of the new section. The Committee drew the clause to the attention of the Senate under principle 1(a)(i) in that by retrospectively increasing the penalty for an offence it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'There seems to have been some misunderstanding in relation to proposed new paragraph 133A(1)(c).
>
> Sub-section 45A of the Acts Interpretation Act 1901 makes clear that where an amending Act increases the penalty for an offence, the increase applies only to offences committed after the commencement of the amending provision (sub-section 45A(1)). There does not appear to be expressed in paragraph 133A(1)(c) any contrary intention to sub-section 45A(1) of the Acts Interpretation Act.

> Paragraph 133A(1)(c) is intended only to clarify 'first conviction', so as to prevent a defendant, convicted of an offence under section 133A prior to the commencement of the amendment in section 17, from arguing that a subsequent conviction under section 133A after the commencement of section 17 was his or her 'first' conviction. Paragraph 52 of the Explanatory Memorandum sets out the intended meaning of the provision.'

The Committee thanks the Attorney-General for this response. However it cannot agree with his view of the provision. While it may have been the intention only to give a particular meaning to the expression 'first conviction' (as set out in the Explanatory Memorandum) it appears to the Committee that the words used are sufficiently clear to displace the effect of sub-section 45A(1) of the Acts Interpretation Act 1901 and to accomplish a retrospective increase in the penalty imposed for a contravention of sub-section 133A(1).

By way of example suppose a company today breaches sub-section 133A(1) as presently in force but does not come before a court until clause 17 of the Copyright Amendment Bill 1986 has come into effect. It appears to the Committee that the wording of paragraph 133A(1)(c) - 'where it is the first conviction of the person of an offence against this sub-section (including this sub-section as in force before the commencement of section 17 of the Copyright Amendment Act 1986)' [emphasis added] - is sufficient to manifest an intention that the new penalty set out in that paragraph is to be applied by a court convicting a person for an offence even though that offence may have been committed before clause 17 comes into effect.

Accordingly the Committee continues to draw clause 17 to the attention of the Senate under principle 1(a)(i) in that by retrospectively increasing the penalty for an offence it may be considered to trespass unduly on personal rights and liberties.

DEPARTURE TAX COLLECTION BILL 1986

The Committee commented on this Bill in its Eighth Report of 1986 (28 May 1986). The Minister for Aviation has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Paragraphs 3(a) and (c) - Inappropriate delegation of legislative power

Paragraphs 3(a) and (c) insert in section 3 of the Principal Act new definitions of "aerial work operation", "charter operation" and "private operation" which incorporate by reference definitions of these expressions in paragraphs 191(b), (c) and (a) respectively of the Air Navigation Regulations "as in force from time to time". An international air operator will not be required to make tax stamps or exemption stamps available for supply to passengers on flights that are private operations or aerial work operations or certain charter operations, so defined.

The Committee suggested that the adoption by reference of the Air Navigation Regulations as in force from time to time might have the effect that the Parliament, when examining amendments to those regulations, would not be aware, unless it were specifically called to its attention, of the implications of those changes for the collection of departure tax. Accordingly the Committee drew the new definitions to the attention of the Senate under principle 1(a)(iv) in that they might be considered to constitute an inappropriate delegation of legislative power. The Minister for Aviation has responded:

> 'Because a small operator may undertake at various times private, aerial work or charter operations, it is desirable in defining the three categories of exemption to refer to standard definitions as determined in Air Navigation Regulation 191. This will clearly identify

to the aviation industry those categories of operations that are relieved of the obligation of having to supply departure tax stamps or exemption stamps to passengers.

It is considered preferable to have a definition in the Air Navigation Regulations which can be referred to in other legislation, without the need for the relevant definitions to be amended in each legislation whenever a change is made in the definitions in the Air Navigation Regulations. For example, the Air Navigation (Charges) Act 1952 also refers to the definitions specified in the Air Navigation Regulations, and the present Bill follows this pattern. If the approach currently adopted is not followed, then any change to Air Navigation Regulations can thus involve changes in a number of Acts.'

The Committee thanks the Minister for this response. In continuing to draw the definitions to the attention of the Senate, together with the Minister's response, the Committee hopes to promote a fuller consideration of the issue involved at the Committee stage of the debate on the Bill.

Clause 5 - New section 11C - Non-reviewable discretion

Clause 5 would insert a new section 11C empowering the Minister to exempt an international air operator from the requirement to make tax stamps and exemption stamps available to passengers on -

- all international flights that are charter operations;
- a specified international flight, being a charter operation; or
- international flights, being charter operations of a specified kind.

In deciding whether to exempt an international air operator the Minister is required by new sub-section 11C(3) to have regard to the scale of operations involved and 'such other matters as the Minister considers relevant'.

There is no provision for review of the Minister's decisions under new section 11C. Because criteria for the exercise of the discretion vested in the Minister are not set out in the legislation the scope for review of such decisions as to their legality pursuant to the Administrative Decisions (Judicial Review) Act 1977 is limited. The Committee therefore drew new section 11C 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 Aviation has responded:

> 'The purpose of the new section 11C is to relieve certain categories of international charter operations of the obligation to supply departure tax or exemption stamps to passengers. As charter operations cover a wide variety of purposes and operate from diverse locations, it is not possible to specify exact circumstances for exemption in the legislation.
>
> The general principle underlying the proposed arrangements provided for in the Bill is that operators will be required to make stamps available to their passengers before departure, and the passengers' departure tax stamps will be checked and cancelled by Customs officers at the time passengers board their aircraft. Thus large charter operations with their own ground handling agents at international terminals will be required to make stamps available to their passengers.

In other cases, the situation is not so straightforward. At smaller airports, where few or no international services are operated, departure tax is collected from passengers on small charter flights by Customs officials, without issuing departure tax stamps. The same situation can also apply at other airports where charter flights can depart from areas away from the international terminal or at times when the terminal is closed.

It is not considered desirable to change these current arrangements, which work efficiently, by requiring small charter operators to make stamps available to their passengers. The charter operations involved are operated from a range of airports other than where the operator is based, and often at short notice. For these reasons, it is considered highly desirable that the Minister be given considerable flexibility to exempt small charter operations from the operation of sections 11(A) and 11(B). By these means the Minister will be able to avoid situations where individual charter operators are faced with undue hardship in respect of the obligation to have departure tax and exemption stamps available for supply to passengers.

It is considered that this flexibility and its attendant benefits would outweigh any disadvantages that might flow from any restriction of the grounds on which an operator could call for review of a decision by the Minister under the Administrative Decisions (Judicial Review) Act 1977.'

The Committee thanks the Minister for this response. However the Committee was not suggesting that the flexibility of the proposed arrangements be reduced. Rather it was advocating the inclusion of a right of review of the Minister's decision on its merits so that if, for example, the Minister refuses an exemption to an operator and the operator believes that this will cause undue

hardship the operator will be able to have that decision reconsidered by an independent tribunal on its merits and not merely on grounds of legality.

The Committee therefore continues to draw new section 11C 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.

HAZARDOUS GOODS BILL 1986

This Bill was introduced into the Senate on 5 May 1986 by Senator Vigor.

The purpose of this Bill is to provide for the protection of consumers from the sale of hazardous goods.

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

Paragraph 3(3)(c) - Inappropriate delegation of legislative power

Paragraph 3(3)(c) permits the content of the definition of 'hazardous goods' for the purposes of the Bill to be enlarged by regulations. As the concept of 'hazardous goods' is central to the scheme of the Bill, and in particular to the various clauses carrying heavy penal consequences, it may be suggested that the content of the concept should not be capable of being enlarged by delegated legislation.

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

Sub-clause 17(1) - Delegation

Sub-clause 17(1) 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'. Since the only powers of the Minister under the Act relate to the appointment of the Registrar and Deputy Registrars and the determination of the location of the office of the Registrar and branch offices throughout Australia this power would appear to be unnecessarily broad. If these powers are to be delegated at all it is suggested that they should only be delegated to senior officers of the Minister's Department.

The Committee therefore draws sub-clause 17(1) to the attention of the Senate under principle 1(a)(ii) in that by imposing no limitation and giving no guidance as to the attributes of the persons to whom powers may be delegated it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Clause 24 - Non-reviewable administrative decisions

Clause 24 requires the Registrar to register goods if the Registrar is satisfied that the goods are hazardous goods. Paragraph 3(3)(b) provides that a reference to hazardous goods includes a reference to goods the supply of which is prohibited by or under an enactment of a State or Territory, being an enactment that provides for prohibiting the supply of goods likely to cause the death of, or injury to, any person.

Paragraph 36(a) provides for review on the merits by the Administrative Appeals Tribunal of decisions of the Registrar registering goods as hazardous goods. While this would enable the Tribunal to examine whether the supply of particular goods is in fact prohibited under a relevant State or Territory enactment it would not enable the review on the merits of the decision by the State or Territory authorities to prohibit the supply of the goods concerned. However doubtful this decision may have been,

the Registrar, once satisfied that the supply of goods of a particular kind is prohibited in any State or Territory, would be required to register those goods and the Tribunal would not be able to go behind the initial decision to examine it on its merits.

Accordingly the Committee draws clause 24 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 30 - Seizure of goods

Clause 30 provides for the seizure of goods by an officer of police where a person or corporation has been charged with an offence against the Act in relation to the goods or where the officer has reasonable grounds for believing that such an offence has been committed in relation to the goods. Clauses 32 and 33 set out a procedure for the owner or the person who had the possession, custody or control of the goods to request the return of the goods provided that the person gives security to keep the goods safely and to produce them in court whenever necessary. Clause 35 provides for the forfeiture by order of a court of goods in respect of which an offence has been committed.

The Bill is silent, however, on the length of time for which goods which have been seized under clause 30 may be retained if proceedings are not instituted for an offence against the Act in respect of the goods or if such proceedings are instituted but do not result in a conviction or an order for the forfeiture of the goods (compare sub-sections 69(2), 71(2) and 71(4) of the Wildlife Protection (Regulation of Exports and Imports) Act 1982). In the absence of any provision dealing with this matter it would appear that goods seized under clause 30 could be retained indefinitely and that the owner of the goods would be forced to bring a civil action for their return. Accordingly the Committee draws clause 30 to the attention of the Senate under

principle 1(a)(i) in that by failing to impose limits on the retention of seized goods it may be considered to trespass unduly on personal rights and liberties.

Clause 34 - Destruction of goods

Clause 34 provides that goods which have been seized under clause 30 may be destroyed 'where the Commissioner of Police or a Deputy Commissioner of Police is satisfied that the holding at an approved place of any goods in accordance with sub-section 31(3) would be likely to involve the risk of the death of, or injury to, persons at that place'.

In the view of the Committee it would be preferable if the test were to be stated in objective terms - if the Commissioner or Deputy Commissioner were required to be satisfied 'on reasonable grounds', for example - rather than in subjective terms as presently drafted. Whereas at present a person challenging the Commissioner's decision would have to show, for example, that no reasonable person could have been so satisfied, if the test were stated in objective terms it would be sufficient to show that there were no reasonable grounds for concluding that death or injury was likely to result.

The Committee therefore draws clause 34 to the attention of the Senate under principle 1(a)(i) in that by failing to state the test for the destruction of goods in objective terms it may be considered to trespass unduly on personal rights and liberties.

INCOME TAX ASSESSMENT AMENDMENT (RESEARCH AND DEVELOPMENT) BILL 1986

This Bill was introduced into the Senate on 30 May 1986 by the Minister for Industry, Technology and Commerce.

The Bill will implement the proposal, announced on 29 May 1985, to provide an income tax deduction of up to 150% of expenditure incurred on or after 1 July 1985 and before 1 July 1991 in respect of research and development activities carried on in Australia that do not otherwise attract government assistance.

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

Clause 7

General comment - Retrospectivity

Clause 7 would insert a new section 73B in the Principal Act which would provide eligible companies with a deduction from their assessable income in respect of certain expenditure on research and development incurred on or after 1 July 1985. This implements a proposal announced by way of press release on 29 May 1985.

The Committee is critical of the increasing practice whereby changes to the law, especially taxation law, are backdated to the time when the proposal to change the law was first announced, usually by way of a press release. The practice assumes that people should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. To act in this way treats the passage of the necessary retrospective legislation 'ratifying' the Minister's announcement, in this case some 12 months after the date of the original announcement, as a pure formality.

The present clause differs from provisions to which the Committee has previously drawn attention on this basis in that new section 73B provides a deduction rather than imposing additional tax liabilities and the retrospectivity may thus be seen as beneficial to the eligible companies involved. However the Committee remains concerned that for almost the whole of the first financial year during which the relevant deduction may be

claimed companies attempting to bring their expenditure within the terms of the Government's proposals have had only the press release of 29 May 1985 to guide them. In the view of the Committee this 12 month hiatus with all its attendant uncertainties for the companies involved tends to support the Committee's contention that reliance on retrospective legislation validating an announcement to the press of a proposal to change the law is inherently undesirable.

The Committee therefore draws the clause to the attention of the Senate under principle 1(a)(i) in that the retrospectivity involved may be considered to trespass unduly on personal rights and liberties because of the uncertainty which may have been created in the minds of companies during the twelve months which elapsed between the announcement of the proposal and the introduction of the Bill.

New sub-section 73B(12) - Non-reviewable decision

New sub-section 73B(12) provides that the Industry Research and Development Board to be established by the Industry Research and Development Bill 1986 shall register an eligible company which applies to the Board for registration and provides such information relating to the research and development activities of the company as the Board reasonably requires. The Board is, however, given a discretion as to the year or years of income in relation to which a company is registered. Pursuant to sub-section 73B(10) a deduction is not allowable under the section from the assessable income of an eligible company in a year of income unless the company is registered under sub-section (12) in relation to that year of income.

Review of the decision of the Board is limited to review as to the legality of the decision pursuant to the Administrative Decisions (Judicial Review) Act 1977. It would not extend, for example, to a review on the merits of a decision of the Board not to register a company in relation to a year of income in respect of which the company had applied for registration. Since

registration is central to the entitlement to the deduction under new section 73B the Committee draws new sub-section 73B(12) 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.

New sub-sections 73B(34) and (35) - Non-reviewable decision

New sub-section 73B(34) provides that the Commissioner may request the Industry Research and Development Board to determine in writing whether particular activities carried on by or on behalf of a company during a year of income were research and development activities. New sub-section 73B(35) provides that a determination by the Board under sub-section (34) is binding on the Commissioner and therefore, it would appear, on any person standing in the shoes of the Commissioner for the purpose of a review on the merits of the Commissioner's assessment. Thus a decision of the Board under sub-section 73B(34) would be reviewable only as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977 and not on its merits.

Given, once again, that a decision under sub-section 73B(34) may affect the entitlement of an eligible company to a deduction under new sub-section 73B, the Committee draws the 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.

INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY BILL 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Acting Prime Minister.

The purpose of the Bill is to create an office of Inspector-General of Intelligence and Security. The Inspector-General's principal role will be to assist Ministers in ensuring that the public interest in the proper functioning of Australia's intelligence and security agencies is adequately safeguarded.

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

Sub-clause 18(6) - Self incrimination

Sub-clause 18(6) provides that a person is not excused from answering questions or producing documents when required to do so by the Inspector-General on the ground that the answer or the production of the document might tend to incriminate the person. The sub-clause contains the usual proviso that the answer or the production of the document is not to be admissible in evidence against the person in any court except in a prosecution arising out of a refusal or failure to comply with a requirement of the Inspector-General to furnish information or the furnishing of information pursuant to such a requirement that is false or misleading in a material particular.

Although the sub-clause is in standard form the Committee drew it 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 Prime Minister has responded:

'The Government's view is that the removal of the privilege against self incrimination in sub-clause 18(6) is not an undue trespass on personal rights and liberties. The provision is essential if the Inspector-General is to be permitted to function properly and if his private inquiries into the activities of intelligence and security agencies are to be sufficiently wide ranging to be meaningful. Protection for the individual against prosecution based on self incriminating evidence is provided in the Bill. Sub-clause 18(6) stipulates that self incriminating evidence is not admissible evidence against a person in any court except in a prosecution arising out of or related to an offence against clause 18. These offences involve a refusal or failure to comply with a requirement of the Inspector-General to furnish information or the furnishing to the Inspector-General of information that is false or misleading in a material particular.

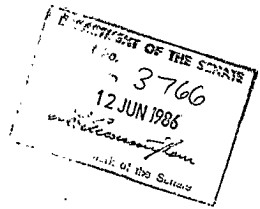
As the Committee itself has acknowledged, sub-clause 18(6) of the Inspector-General Bill is a standard provision, identical to the provisions on self incrimination in a number of Acts including the Royal Commissions Act 1902, the Ombudsman Act 1976, the Australian Security Intelligence Organization Act 1979 (as it relates to the procedures of the Security Appeals Tribunal), and the National Crime Authority Act 1984. A similar provision is proposed in the Human Rights and Equal Opportunity Commission Bill presently before the Senate.'

The Committee thanks the Prime Minister for this response. As has already been noted in previous Reports of the Committee, the Committee has written to the Attorney-General asking him to consider revising the standard form of provisions abrogating the privilege against self incrimination with a view to strengthening the protection accorded to persons who may be required to

incriminate themselves. While this matter is under consideration the Committee will continue to draw provisions such as sub-clause 18(6) to the attention of the Senate under principle 1(a)(i) in that by removing the privilege against self incrimination they may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman
11 June 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF 1986

12 JUNE 1986

THE SENATE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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

ELEVENTH REPORT

OF 1986

The Committee has the honour to present its Eleventh Report of 1986 to the Senate.

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

Futures Industry Bill 1986

FUTURES INDUSTRY BILL 1986

The Committee commented on this Bill in its Eighth Report of 1986 (28 May 1986). The Attorney-General has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

General comment

The Committee noted that the Bill formed part of the national uniform companies and securities scheme and that the power of the Commonwealth Parliament to amend Bills forming part of that scheme was conditional upon the willingness of the Commonwealth Attorney-General to take any amendment back to the Ministerial Council and the unanimous approval of that Council in relation to initial legislation (such as the present Bill) or the approval of a majority in the case of subsequent amending Bills. Failing such approval the national uniform scheme would be placed in jeopardy.

The Committee observed that in its view the operation of this aspect of the uniform scheme placed the Parliament in an invidious position. If it amends a piece of legislation forming part of the uniform scheme or rejects such a piece of legislation it may bring the national uniform scheme to an end. If, on the other hand, it fails to amend or reject such legislation, however compelling the grounds for action, it may be said, in effect, to have delegated its legislative power to the Ministerial Council without even retaining the equivalent of a power of disallowance. Indeed, to the extent that it is possible for parliamentary amendments to be taken back to the Ministerial Council for approval, it may be said that it is the Ministerial Council which has a power of veto over the legislative action of the Parliament. Accordingly the Committee drew this aspect of the national uniform scheme, and of the Futures Industry Bill as an element in that scheme, 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 Attorney-General has responded:

> 'The futures industry in Australia strongly supports the Bill and has called for its enactment as soon as possible in the public interest. In its submission on the Bill the Sydney Futures Exchange stated: "The Exchange strongly supports the implementation of the Bill at an early date and would not wish enactment of the Bill to be delayed. The Exchange believes that it is important that the industry is, and is seen to be, appropriately regulated, and the Exchange is ready to perform its own role in the co-regulatory process". Experience with the administration of the N.S.W. Futures Markets Act, the manner in which some members of the Sydney Futures Exchange have promoted and conducted their business, and the failure of some futures brokers, have indicated the need for Australia-wide legislation in this area.
>
> An important aspect of the prudential controls in the Bill, is to ensure, in the public interest, the full investigation of matters peculiarly within the knowledge of one party. To this extent, the Bill corresponds with the Securities Industry Act 1980. Many of its provisions derive of course, from that piece of legislation.
>
> To enable the National Companies and Securities Commission ('NCSC') properly to discharge its functions under the proposed legislation, and to ensure public confidence in the securities and futures markets, it is essential that the NCSC has adequate powers of investigation.

> Uniformity in State and Territory law and administration relating to companies and the securities and futures industries is a major goal of the co-operative companies and securities scheme. The goal of uniformity is expressly referred to in Preamble (A) to the Formal Agreement between the Commonwealth and the States establishing the co-operative scheme.
>
> Most of the provisions in the Bill that your Committee has drawn to the attention of Senators are based on the corresponding provisions in the Companies Act 1981 and the Securities Industry Act 1980. To amend any of the provisions in the Bill would require the unanimous agreement of all the parties to the co-operative scheme. Not only would any attempt to amend the Bill result in a serious delay in its enactment, I am also not confident that all the States and the Northern Territory would agree to the amendments, particularly as it would be undesirable to have disuniformity between corresponding provisions in the companies, securities industry and futures industry legislation.'

The Committee thanks the Attorney-General for this response. In continuing to draw this aspect of the Bill, together with the Attorney-General's response, to the attention of the Senate, the Committee wishes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

Sub-clauses 13(3) and (4) - Lack of limitation as to reasonableness of time and place

Sub-clauses 13(3) and (4) empower the Commission or a person authorised by the Commission to require various persons to produce books relating to dealings in futures contracts and like matters at a time and place specified in the direction of the Commission or by the authorised person as the case may be. Failure to comply with a requirement without reasonable excuse is an offence punishable by a fine of $10,000 or imprisonment for 2

years or both. It is not, however, stipulated that the time and place specified by the Commission or the authorised person be reasonable.

The Committee therefore drew sub-clauses 13(3) and (4) to the attention of the Senate under principle 1(a)(i) in that, by failing to stipulate that the times and places at which books are to be required to be produced be reasonable, they might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'The NCSC power to require the production of various books relating to the futures industry under clause 13, is based on section 8 of the Securities Industry Act.
>
> It is not considered that sub-clauses 13(3) and (4) trespass unduly on personal rights and duties: although it is not specifically stated in these sub-clauses that the requirement to produce must be reasonable, it would appear to be an implicit requirement.
>
> Sub-clauses 13(3) and (4) should be read, moreover, in conjunction with clause 15 of the Bill.
>
> This requires compliance with a request made under sub-clauses 13(3) or (4) unless with 'reasonable excuse'. There would be little doubt that 'reasonable excuse' would include 'an unreasonable requirement to produce'.
>
> It follows that these sub-clauses do not restrict the court's power, when hearing a charge arising out of non-compliance, to take into account any alleged unreasonableness affecting the legality of the requirement.'

The Committee thanks the Attorney-General for this response, which answers its concerns in relation to sub-clauses 13(3) and (4). While the Committee recognises that the specification of an unreasonable time and place may give rise to a 'reasonable excuse' for failure to attend and produce books, it would prefer to see the requirement that the time and place be reasonable specified in the standard form of such provisions.

Sub-clauses 15(3) and 18(10) - Reversal of the onus of proof

Sub-clause 15(3) provides that it is a defence in a prosecution for an offence against sub-clause 15(2) relating to furnishing information or making a statement which is false or misleading in a material particular if it is established that the defendant believed on reasonable grounds that the information or statement was true and was not misleading. The effect of the sub-clause is thus to place upon the defendant the burden of exculpating himself or herself by establishing a defence on the balance of probabilities.

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 the 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. In the present case the Committee noted that the usual form of provisions relating to false or misleading statements in Commonwealth legislation requires the prosecution to establish that the defendant made the false statement knowingly or knowing that the statement was false or misleading: see, for example, sub-clause 127(5) of the Veterans' Entitlements Bill 1985 and clause 25 of the Human Rights and Equal Opportunity Commission Bill 1985.

The Committee questioned why in this case it had been considered necessary to reverse the onus of proof and, given that decision, why it had been considered necessary to impose on the defendant the persuasive onus of proof rather than merely an evidential onus. Accordingly, the Committee drew the sub-clause and sub-clause 18(10) - which is in similar form - to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant they might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'The approach adopted in these provisions is derived from similar provisions contained in the Securities Industry Act 1980: it is an approach attributable to and justified by the complex nature of the industry which it is sought to regulate. There are dangers in comparing provisions of this proposed legislation with clauses contained in Bills as diverse as the Veterans' Entitlements and Human Rights and Equal Opportunities Bills.
>
> More specifically, the element of intent or lack thereof in both these sub-clauses is more appropriately established by the person from whom production of documents is sought. The production of books and other documents and the provision of information about their compilation is a vital aspect to the enforcement of the prudential controls under the legislation. This could be placed in jeopardy if too great a burden were to be placed on the prosecution.'

The Committee thanks the Attorney-General for this response. However it observes that its concern is that too great a burden should not be placed on the accused, thus reversing the presumption that a defendant is innocent until proven guilty. Even if it were considered that these were appropriate cases for the reversal of the onus of proof, the Attorney-General's response does not explain why the imposition of an evidential

onus on the defendant, as suggested by the Committee, would not suffice in place of the imposition of the persuasive onus on the defendant. Accordingly the Committee continues to draw sub-clauses 15(3) and 18(10) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant they may be considered to trespass unduly on personal rights and liberties.

Sub-clauses 15(6) and 18(5) and (6) - Self incrimination

Sub-clause 15(6) provides that a person is not excused from making a statement relating to the compilation of books required to be produced under section 13 or 14 or as to any matter to which any such books relate on the ground that the statement might incriminate the person. The sub-clause also contains the usual proviso that any such statement is not to be admissible in evidence against the person in any criminal proceedings other than proceedings relating to the refusal or failure to make a statement or the furnishing of information that is false or misleading in a material particular.

The sub-clause departs from the usual form of such provisions in Commonwealth legislation, however, in that it stipulates that the proviso only applies where the person required to make a statement claims before making the statement that it may tend to incriminate the person. The Committee suggested that the requirement that a person claim the privilege is better suited to situations where a person is being examined before a court or a quasi-judicial tribunal rather than to administrative contexts like the present. If persons were to be required to claim the privilege when a statement is sought by a person authorised by the Commission then the Committee suggested that the authorised person should be required to caution the person to that effect before seeking the statement. The Committee noted that, for example, sub-clause 25(2) requires that an inspector carrying out an investigation under clause 25 inform a person whom he proposes

to examine that the person must claim the privilege against self incrimination in order to obtain the limited protection accorded by sub-clause 25(10).

The Committee drew sub-clauses 15(6) and 18(5) and (6) - which are in similar form - to the attention of the Senate under principle 1(a)(i) in that by removing the privilege against self incrimination in the first instance and by requiring that the privilege be claimed in order for the resulting self incriminating statements not to be generally available for use against the person in criminal or civil proceedings they might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'These sub-clauses provide that questions must be answered notwithstanding the fact that they may tend to incriminate. It is further provided, however, that where, prior to answering the question, the person claims that the answer might tend to incriminate, then the answer is only admissible in proceedings under the relevant clause. Similar provisions exist in the Securities Industry Act 1980.
>
> The Committee claims that the effect of the provisions is to trespass unduly on personal rights and duties: it compares the approach with that adopted in sub-clause 25(2). There, formal notice must be given of the above.
>
> The distinction may be attributable to the fact that the exercise of the powers of the Commission and its agents is less formal under Division 1 than under Division 2: action under Division 1 is initiated by the NCSC whereas Ministerial involvement is required under Division 2. Clauses 15 and 18 are concerned with comparatively limited and clearly defined areas. The implications of investigations under clause 25 are far-reaching and arise from considerations of public or national interest. Experience with similar provisions

in State companies and securities legislation suggests that special investigations are likely to result from recommendations arising out of investigations under the general powers of discovery contained in Division 1.

Although sub-clauses 15(6) and 18(5) and (6) abrogate the privilege against self-incrimination in so far as it might be available to avoid making a statement concerning books seized or information disclosed, they provide a safeguard against indiscriminate use of any incriminating statement or disclosure against the person making or providing it. Where a person claims that making a statement might tend to incriminate the person, the statement is not admissible as evidence in criminal proceedings other than in proceedings in respect of false or misleading information given by the person.'

The Committee thanks the Attorney-General for this response. As has been noted in recent Reports of the Committee, the Committee has written to the Attorney-General asking him to consider revising the customary form of such provisions with a view to strengthening the protection accorded to persons who may be required to incriminate themselves. While awaiting the Attorney-General's response on the general issue the Committee will continue to draw the attention of the Senate to provisions such as sub-clauses 15(6) and 18(5) and (6) under principle 1(a)(i) in that by removing the privilege against self incrimination they may be considered to trespass unduly on personal rights and liberties.

Sub-clauses 25(6) and (7) - Strict liability

Sub-clauses 25(6) and (7) each create offences where a person in purported compliance with a requirement of an inspector or appearing before an inspector for examination furnishes information that is false or misleading in a material particular. Neither provision contains the usual requirement that the

defendant know that the information is false or misleading with the result that a person might be liable even if he or she quite innocently provided wrong information.

The Committee therefore drew the sub-clauses to the attention of the Senate under principle 1(a)(i) in that they might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'The Committee claims that neither of these provisions contains the usual requirement that the defendant know that the information furnished to an inspector upon examination, is false or misleading.
>
> Sub-clauses 25(6) and (7) should be examined in the context of Division II as a whole.
>
> Clause 22 clearly indicates that investigations are matters of some gravity: sub-clauses (1) and (2) refer to "public" and "national" interest respectively. The Bill clearly anticipates that Division 2 proceedings will be quasi-judicial in nature: clause 26 provides that investigations will be deemed proceedings for the purpose of the application of the laws of evidence, and under clause 27, a record of examinations may be made.
>
> Investigations are confined, by clause 23, to the matters specified in the instrument directing that they be held. Further, the persons required to assist with an investigation belong to a limited class: the persons considered to be in the best position to furnish the information required.
>
> Having regard to the above, it is not considered that the obligation cast on a prescribed person under these two sub-clauses is inappropriate.

> Furthermore, the construction of the clause may not support the strict liability interpretation cast upon it by the Committee. In both sub-clauses, the word 'furnish', suggests an active participation by a prescribed person: the word 'purports', used in sub-clause 25(6) suggests an element of pretence or deception in the context of criminal proceedings, and section 36 of the Crimes Act 1914, applicable by virtue of sub-clause 25(3), supports the inclusion of an element of 'intent' or responsibility.
>
> These clauses are couched in language similar to sub-section 19(5) of the Securities Industry Act 1980.'

The Committee thanks the Attorney-General for his response but finds it unnecessarily negative and defensive. It cannot concede that the provisions are not ones of strict liability. Indeed, it considers that the interpretation advanced by the Attorney-General is quite fanciful. It would mean that in the usual form of provisions relating to the furnishing of false or misleading information in Commonwealth legislation the words 'knowingly' or 'knowing that the information is false or misleading' are entirely superfluous. If it is not intended that the offences be ones of strict liability the Committee can see no reason - other than uniformity with the Securities Industry Act 1980 - why it should not be made an express element of the offences that the defendant know that the information furnished is false or misleading.

The Committee therefore continues to draw sub-clauses 25(6) and (7) to the attention of the Senate under principle 1(a)(i) in that they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 25(10) - Self incrimination

Sub-clause 25(10) is in similar form to sub-clause 15(6) although, as noted in the comment on the latter provision, sub-clause 25(2) requires that the effect of sub-clause 25(10) be drawn to the attention of persons who are to be examined under that clause. Nevertheless the Committee drew the sub-clause 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 rights of the individual must be weighed, however, against those of the public at large: if material is not disclosed because it may be incriminating, an investigator will not be in possession of all relevant information. It would be undesirable if attempts to regulate the futures industry were endangered by claims of privilege against self-incrimination.
>
> The area in which privilege is abrogated is clearly defined: it does not affect the claiming of privilege in any other area. Furthermore, as mentioned by the Committee, sub-clause 25(2) ensures that sub-clause (10) is drawn to the attention of potential examinees. Sub-clause (10) ensures that any evidence given to an inspector which is claimed to be self-incriminating will be confined in its consequences to proceedings under clause 25.'

The Committee thanks the Attorney-General for this response. Because sub-clause 25(2) requires that the effect of sub-clause 25(10) be drawn to the attention of persons who are to be examined under that clause, the Committee considers the clause to be preferable in form to sub-clauses 15(6) and 18(5) and (6) commented on above. However, as indicated in the comments on those sub-clauses, the Committee has raised with the Attorney-General the general issue of the form of provisions

removing the privilege against self incrimination and while awaiting his response on that general issue will continue to draw provisions such as sub-clause 25(10) to the attention of the Senate in that by removing the privilege against self incrimination they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 129(10) - Reversal of the onus of proof

Clause 129 prohibits insider dealing in futures contracts concerning bodies corporate. Sub-clause 129(10) provides that, where a prosecution is instituted against a person for an offence because the person was in possession of inside information and dealt in a futures contract, it is a defence if it is established that the other party to the dealing also knew, or ought reasonably to have known, the relevant information before entering the dealing. The effect of the sub-clause is to place upon the defendant the burden of exculpating himself or herself by establishing this defence on the balance of probabilities.

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 and that provisions requiring the defendant to adduce evidence of the existence of a defence - provisions imposing an evidential onus on the defendant - *should be kept to a minimum.* In particular the Committee recommended that an evidential onus should only be imposed on defendants -

- where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue; or

- where proof by the prosecution of a particular matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence.

The Committee suggested that the matter dealt with in the defence provided for in sub-clause 129(10) did not fall within either of these two categories. It dealt not with the state of mind of the defendant but with the state of mind of the other party to the transaction. Accordingly the Committee was of the view that it was not an appropriate case for the imposition of an evidential onus on the defendant, and still less an appropriate case for the reversal of the persuasive burden of proof.

The Committee drew the sub-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 and liberties. The Attorney-General has responded:

> 'The prosecution must prove all elements of the insider trading offence to secure a prosecution, including the fact that the defendant had possession of price sensitive information that is not generally available. It would be too difficult in the context of futures trading if the prosecution had to go further and prove that the other party to the dealing did not know about the information before entering into the dealing. Insider trading offences are notoriously difficult to prove - in fact in Australia there have been very few successful prosecutions to date under the corresponding provisions of the Securities Industry Act 1980.'

The Committee thanks the Attorney-General for this response. However the Committee is left in some uncertainty as to why it would be 'too difficult' for the prosecution to prove that the other party to an insider trading offence did not know the relevant inside information at the time of entering the deal. The fact that there have been few successful prosecutions to date should not, in itself, be regarded as an argument for imposing the persuasive onus of proof on defendants and requiring them to exculpate themselves. The Committee therefore continues to draw sub-clause 129(10) 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.

Sub-clause 133(2) - Reversal of the onus of proof

Paragraph 133(1)(d) creates an offence where a person induces or attempts to induce another person to deal in futures contracts by recording or storing in any mechanical, electronic or other device information that the person knows to be false or misleading in a material particular. Sub-clause 133(2) provides a defence where it is established that, at the time when the defendant so recorded or stored the information, the defendant had no reasonable grounds for expecting that the information would be available to any person.

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 the 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 defendant might be required to adduce evidence that he or she had no reasonable grounds for expecting that the information would be available to any person rather than being required to establish the defence on the balance of probabilities.

The Committee drew sub-clause 133(2) to the attention of the Senate under principle 1(a)(i) 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:

'Paragraph 133(1)(d), to which this sub-clause refers, involves the recording or storing of information that the person knows to be misleading in a material particular, that results in inducing or attempting to induce a person to deal in a futures contract or class thereof. The provision is couched in similar terms to section 126 of the Securities Industry Act 1980.

The defence to an offence under paragraph 133(1)(d) rests on establishing that at the time when the defendant recorded or stored information, he or she had no reasonable grounds for expecting that the information would be available to anyone.

The offence therefore already contains an element of 'intent' to be established by the prosecution; it would be unreasonable to impose upon the prosecution the further obligation to establish that the person charged ought to have had reasonable grounds for expecting that the informtion would be available to any person. That person is clearly in the best position to establish whether or not this was so.'

The Committee thanks the Attorney-General for this response. It agrees that the matter dealt with in this defence is one peculiarly within the knowledge of the defendant. On that basis however, it urges that, in accordance with the recommendations of the Constitutional and Legal Affairs Committee, only an evidential onus should be placed on the defendant. The Attorney-General's response does not address this proposition and the Committee therefore continues to draw sub-clause 133(2) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on defendants it may be considered to trespass unduly on personal rights and liberties.

Sub-clauses 144(2) and 145(2) - Reversal of the onus of proof

Sub-clauses 144(1) and 145(1) create offences with regard to the destruction, mutilation or alteration of books, the sending of books out of the Territory or out of Australia, the storage of false or misleading matter in mechanical or electronic devices and the falsification of matter recorded or stored in such devices. Sub-clauses 144(2) and 145(2) provide defences where it is established -

- in the case of clause 144, that the defendant did not act with intent to defraud, to defeat the purposes of the Act or to prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power or authority, under the Act; and

- in the case of clause 145, that the defendant acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

As suggested above in relation to sub-clause 133(2), the Committee would argue that, in accordance with the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs, sub-clauses 144(2) and 145(2) should only impose an evidential onus on defendants rather than requiring proof of the defence on the balance of probabilities.

The Attorney-General has again responded suggesting that the defendant is the best person to explain his or her actions. Once again the Committee does not contest this conclusion but argues that the defendant should merely be required to adduce evidence explaining those actions rather than being required to exculpate himself or herself by establishing a defence on the balance of probabilities. Once again the Attorney-General's response fails to address this argument and the Committee continues to draw sub-clauses 144(2) and 145(2) to the attention of the Senate

under principle 1(a)(i) in that by imposing the persuasive onus of proof on defendants they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 157(7) - Abrogation of customary right

Sub-clause 157(7) would abrogate the customary right of a defendant against whom an interim injunction is granted to seek an undertaking from the plaintiff as to damages in respect of any loss flowing from the grant of the interim injunction if it turns out that it should not have been made. It is customary for the courts to refuse to grant interim or interlocutory injunctions unless such an undertaking is given.

The Committee drew sub-clause 157(7) to the attention of the Senate under principle 1(a)(i) in that by abrogating this right it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

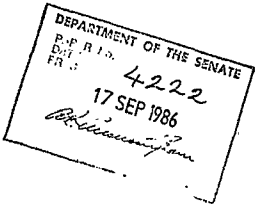
> 'In fact, in cases involving the Crown or its representatives the granting of damages remains discretionary at common law: it is not an absolute privilege.
>
> Actions taken under this proposed legislation have no counterpart in ordinary litigation between subject and subject: here, breach of the law is harmful to the public at large, or at least, to a component thereof. The NCSC moreover, is not seeking to promote its own schemes, but to properly discharge its responsibilities under the legislation.'

The Committee thanks the Attorney-General for this response. The Committee accepts that the requirement that the NCSC give an undertaking as to damages would be a matter for the discretion of the Court. So, for that matter, would be the grant of the interim injunction and Meagher, Gummow and Lehane observe in their Equity - Doctrines and Remedies (Second Edition, Butterworths, Sydney,

1984) at page 572 that the inability to obtain an undertaking as to damages from the Crown or its representatives may result in a court declining to grant an interim injunction since the giving of an undertaking is a major factor in determining the balance of convenience. The Committee's concern is that the courts should not be prevented, in appropriate cases, from requiring an undertaking as to damages as they would be by sub-clause 157(7). Accordingly the Committee continues to draw sub-clause 157(7) to the attention of the Senate under principle 1(a)(i) in that by abrogating the customary right to such an undertaking it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman
12 June 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1986

17 SEPTEMBER 1986

THE SENATE

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MEMBERS OF THE COMMITTEE

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

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 1986

The Committee has the honour to present its Twelfth Report of 1986 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:

Aboriginal Land Grant (Jervis Bay Territory) Bill 1986
Environment Protection (Sea Dumping) Bill 1986
Income Tax Assessment (Research and Development) Bill 1986
Nuclear Non-Proliferation (Safeguards) Bill 1986
Superannuation Act 1976

ABORIGINAL LAND GRANT (JERVIS BAY TERRITORY) BILL 1986

This Bill was introduced into the House of Representatives on 29 May 1986 by the Minister for Aboriginal Affairs.

The purpose of the Bill is to provide for the grant of inalienable freehold title to the Wreck Bay Aboriginal Community over an area of some 403 hectares in the Jervis Bay Territory. The Wreck Bay Aboriginal Community is an established community comprising mainly descendants of the Jervis Bay and other tribes who once inhabited the general area. The land concerned at one time was gazetted as an Aboriginal reserve and administered by arrangement with the New South Wales Aborigines Protection Board. The land has always been regarded as a distinct Aboriginal area separate from other land in the Jervis Bay Territory.

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

Clause 9 - Lack of parliamentary scrutiny or review

Clause 9 would permit the Minister, by notice in writing published in the Gazette, to declare that vacant Crown land in the Jervis Bay Territory shall become Aboriginal Land vested in the Wreck Bay Aboriginal Community Council if the Minister is satisfied that the land is of significance to Aboriginals who are members of the Community and that it would be appropriate to grant the land to the Council. There is no provision for such a declaration to be subject to parliamentary scrutiny nor is the Minister's decision to be reviewable on its merits by a body such as the Administrative Appeals Tribunal. While it would be open to a person aggrieved by a decision of the Minister to make or to refuse to make a declaration under the clause to seek review of that decision under the Administrative Decisions (Judicial Review) Act 1977, such review would be limited to the legality of the decision only: that is, it would extend to allegations that, for example, the Minister took into account an irrelevant

consideration or acted with an ulterior motive but not to allegations that the land in question is or is not in fact of significance to the Wreck Bay Aboriginal Community.

The Committee drew the clause to the attention of the Senate under principles 1(a)(iii) and (v) in that it might be considered either to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions or to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister for Aboriginal Affairs has responded drawing attention to the amendment made to the clause in the House of Representatives on 5 June 1986 which would make declarations of land under the clause subject to tabling in the Parliament and potential disallowance. Declarations would not enter into force until the period of time allowed for disallowance has expired. The Committee thanks the Minister for this amendment.

The Committee has in the past (see its comments on clauses 10 and 12 of the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 in its Fifth Report of 1984) raised the question whether Parliament is the appropriate body to review the making of such declarations by the Minister or whether this power of review might more appropriately be conferred on an independent, quasi-judicial body like the Administrative Appeals Tribunal. The Committee intends to examine in the near future the question of the appropriate limits of review of Ministerial decisions by the Administrative Appeals Tribunal where the accountability of the Minister to the Parliament may be considered an adequate avenue for review in itself. The Committee is concerned that Ministers may be losing control of decision-making powers vested in them and for which they are, and should be, politically responsible.

Sub-clause 17(2) - Non-reviewable decision

Sub-clause 17(2) provides that the initial Register of Members of the Wreck Bay Aboriginal Community Council is to be comprised of persons who the Department is satisfied are Aboriginals who resided in the Territory on 24 May 1986 and who have attained the age of 18 years. Once again there is no review of this decision on its merits and, while the decision would be reviewable pursuant to the Administrative Decisions (Judicial Review) Act 1977, such review is limited to grounds going to the legality of the decision.

Accordingly the Committee drew sub-clause 17(2) 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 Aboriginal Affairs has responded:

> 'This clause provides for the initial Register of members to be established by the Registrar based on a list of residents prepared by my Department. Once that list has been prepared, the Registrar pursuant to sub-clause 20(1) must convene the first annual general meeting of the Council and from then on the Register is maintained by the Secretary of the Council (see sub-clause 17(4)). The members of the Council may then vote to add or remove names from the Register as they deem fit in accordance with sub-clause 26(2).
>
> The ongoing maintenance of the Register would be in the hands of the Community. I have been assured by my Department that all Aboriginal residents of the Jervis Bay Territory on 24 May 1986 will be included on that list.'

The Committee thanks the Minister for this explanation which allays its concerns in relation to the clause.

Sub-clause 48(1) - Lack of parliamentary scrutiny or review

Sub-clause 48(1) would permit the Minister, by notice in writing published in the Gazette, to declare a place on Aboriginal land to be a significant place (and so one entry into which by persons other than members of the Wreck Bay Aboriginal Community is prohibited) if the Minister is satisfied that the place is of special significance to members of the Community. As with clause 9 there is no provision for such a declaration to be subject to parliamentary scrutiny nor is there provision for a person aggrieved by a decision of the Minister making or refusing to make such a declaration to seek review of the Minister's decision on its merits.

The Committee therefore drew sub-clause 48(1) to the attention of the Senate under principles 1(a)(iii) and (v) in that it might be considered either to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions or to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister for Aboriginal Affairs has responded:

> 'The power of the Minister to declare a place on Aboriginal land to be a significant place is restricted to that land. The initial grant is of an area of only 403 hectares out of the entire Jervis Bay Territory, a very small area of land.
>
> The Minister must be satisfied that the place is a significant place to the members of the community. This would involve the Minister in extensive consultation with the Wreck Bay community. The likely number of such declarations would be small and is in line with the general scheme of comparable provisions in the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 in respect of the lack of appeal provisions.

> I would also refer to the provisions relating to Sacred Sites in the Aboriginal Land Rights (Northern Territory) Act 1976 where no gazettal by the Minister is required.'

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

Sub-clause 49(1) - Non-reviewable decision

Sub-clause 49(1) empowers the Minister to declare that a place on Aboriginal Land is one to which the public shall have a right of access if the Minister is satisfied that the public had access to the place immediately before it became Aboriginal Land and that it is desirable that the public should continue to have access to the land. Once again there is no review of this decision on its merits and a person aggrieved by a decision of the Minister making or refusing to make a declaration would be limited to challenging the legality of the decision pursuant to the Administrative Decisions (Judicial Review) Act 1977.

Accordingly the Committee drew sub-clause 49(1) 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 Aboriginal Affairs has responded:

> 'The areas of public access in the Wreck Bay region are well known both to the local, non-Aboriginal community and to the community at Wreck Bay. These include the picnic area, the walking trails and Summercloud Bay Beach. It is not envisaged that there will be any dispute about what land the general public has had access to in the past.

The Wreck Bay Aboriginal Community has expressed the view that they wish the public to continue to have access to those areas to which they have had access for some time, and may also extend that access to other areas.

This Bill does not create any specific offence of entering Aboriginal land, as opposed to the provisions in the Aboriginal Land Rights (Northern Territory) Act 1976 relating to entering on Aboriginal land.'

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

ENVIRONMENT PROTECTION (SEA DUMPING) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 27 May 1986 by the Acting Minister for Arts, Heritage and Environment.

The primary purpose of the Bill is to amend certain provisions of the Environment Protection (Sea Dumping) Act 1981 to prohibit the dumping at sea of radioactive material. By this amendment the existing legislation for the regulation of sea dumping will be made to reflect the Government's policy of vigorous opposition to the dumping of radioactive material at sea, and further to conform with international obligations Australia will assume under the South Pacific Nuclear Free Zone Treaty and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.

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

Clause 5 - Strict liability offences

Clause 5 would insert new sections 9A, 9B and 9C creating offences where radioactive material is dumped, incinerated or loaded for dumping or incineration, at sea. In each case it would appear that the owner and the person in charge of the vessel, aircraft or platform and the owner of the radioactive material in question may be liable notwithstanding that they did not cause or permit the dumping, loading or incineration and that they had no knowledge of it. Moreover it appears that they would be liable even if they had no reason to believe that the material being loaded, dumped or incinerated was radioactive.

The Committee acknowledged that the existing offences in the Principal Act were similarly constructed. Nevertheless it drew the clause to the attention of the Senate under principle 1(a)(i) in that by creating offences of strict liability with such heavy penalties (fines of up to $50,000 in the case of a natural person and $100,000 in the case of a body corporate) it might be considered to trespass unduly on personal rights and liberties. The Minister for Arts, Heritage and Environment has responded:

> 'In my view the amendment does not amount to an undue trespass on personal rights and liberties as the amendment must be read in the context of the operation of the Principal Act.
>
> Before any material can be dumped or incinerated at sea, or loaded for these purposes, a permit is required. One of the necessary steps in obtaining such a permit is for the intending applicant to ascertain what the material is and whether or not it is radioactive. If the material is radioactive no permit would be given because of the prohibition in Clause 5. Given these procedures, applicable for any material, it seems unlikely that the three parties concerned, (the owner of the waste, the carrier and the person in charge of the vessel) who are required to be named on

any application for the granting of a dumping permit, would be ignorant of the nature of the material to be dumped.

The specific penalties reflect the seriousness of the Government's international commitment to prohibit the dumping of radioactive waste at sea.'

The Committee thanks the Minister for this response. In continuing to draw the clause to the attention of the Senate together with the Minister's helpful response, the Committee hopes to promote a fuller consideration of the issue involved at the Committee stage of debate on the Bill.

INCOME TAX ASSESSMENT AMENDMENT (RESEARCH AND DEVELOPMENT) BILL 1986

The Committee commented on this Bill in its Tenth Report of 1986 (11 June 1986). 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 7

General comment - Retrospectivity

Clause 7 inserts a new section 73B in the Principal Act which provides eligible companies with a deduction from their assessable income in respect of certain expenditure on research and development incurred on or after 1 July 1985. This implements a proposal announced by way of press release on 29 May 1985.

The Committee has been critical of the increasing practice whereby changes to the law, especially taxation law, are backdated to the time when the proposal to change the law was first announced, usually by way of a press release. The practice assumes that people should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. To act in this way treats the passage of the necessary retrospective legislation 'ratifying' the Minister's announcement, in this case some 12 months after the date of the original announcement, as a pure formality.

The present clause differs from provisions to which the Committee had previously drawn attention on this basis in that new section 73B provides a deduction rather than imposing additional tax liabilities and the retrospectivity may thus be seen as beneficial to the eligible companies involved. However the Committee remained concerned that for almost the whole of the first financial year during which the relevant deduction might be claimed companies attempting to bring their expenditure within the terms of the Government's proposals might have had only the press release of 29 May 1985 to guide them. In the view of the Committee this 12 month hiatus with all its attendant uncertainties for the companies involved tended to support the Committee's contention that reliance on retrospective legislation validating an announcement to the press of a proposal to change the law was inherently undesirable.

The Committee therefore drew the clause to the attention of the Senate under principle 1(a)(i) in that the retrospectivity involved might be considered to trespass unduly on personal rights and liberties because of the uncertainty which might have been created in the minds of companies during the twelve months which elapsed between the announcement of the proposal and the introduction of the Bill. The Minister for Industry, Technology and Commerce has responded:

'I share the concerns expressed by the Committee in relation to retrospective legislation. However, there was difficulty in having the Australian Taxation Office and the Office of Parliamentary Counsel allocate any greater priority to this legislation given the pressure of preparing legislation to institute the Government's taxation reform measures and other important initiatives.

My Department undertook a widespread publicity campaign to ensure that industry and the academic community were aware of the intended operation of the R&D tax concession scheme and how they might benefit from it. Elements of the publicity campaign included:

- direct mailing of an information package to approximately 6000 companies and other organisations in the private sector.

- all relevant faculties in research institutes were also informed about the scheme by this direct mail campaign.

- approximately 30 seminars were held across the country to explain the working of the scheme to industry and industry associations.

- articles were written for publication in various journals.

- the press received regular briefing on progress with the scheme.

Information provided through these avenues on the operation and eligibility requirements of the scheme was quite detailed and represented a very accurate statement of the Government's intent in respect of this legislation.'

The Committee thanks the Minister for this response. It recognises that in this case every effort was made to alleviate the undesirable effects of retrospective legislation. The Committee is aware of the considerable pressures imposed upon the legislation areas of the Australian Taxation Office during the past year through the need to implement the Government's taxation reform package. However it believes that the aim in future should be to ensure that legislation implementing changes in the taxation field is prepared and introduced at the time the change to the law is announced in the Parliament. While the Committee recognises special exceptions, such as that relating to changes to taxation laws announced in the Budget, it believes that changes to the law in this field should not generally be backdated to the time of their announcement. To do so inevitably creates uncertainty as to the state of the law and treats the Parliament with less respect than it deserves.

New sub-section 73B(12) - Non-reviewable decision

New sub-section 73B(12) provides that the Industry Research and Development Board to be established by the Industry Research and Development Bill 1986 shall register an eligible company which applies to the Board for registration and provides such information relating to the research and development activities of the company as the Board reasonably requires. The Board is, however, given a discretion as to the year or years of income in relation to which a company is registered. Pursuant to sub-section 73B(10) a deduction is not allowable under the section from the assessable income of an eligible company in a year of income unless the company is registered under sub-section (12) in relation to that year of income.

Review of the decision of the Board is limited to review as to the legality of the decision pursuant to the Administrative Decisions (Judicial Review) Act 1977. It would not extend, for example, to a review on the merits of a decision of the Board not to register a company in relation to a year of income in respect of which the company had applied for registration. Since

registration is central to the entitlement to the deduction under new section 73B the Committee drew new sub-section 73B(12) 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 Industry, Technology and Commerce has responded:

> 'Section 73B(12) of the Bill requires the Industry Research and Development Board to register any eligible company that makes an application for registration. The Board can determine the information it "reasonably requires" for this registration procedure to occur. A copy of the current registration form is enclosed. You will note that the information is provided on a confidential basis and that registration covers both the 1985-86 and 1986-87 fiscal years. The document is essentially a statement of intent by companies together with some information on resources devoted to research and development.
>
> In practical terms, it is expected that the Board will not refuse registration if companies do not provide all the information requested. Rather, the Board may advise the Australian Taxation Office that a particular company has not provided complete information. It would then be a matter for the Tax Office to decide whether to audit the company's subsequent taxation return.
>
> I have, as the Minister for Industry, Technology and Commerce, the power to direct the Board under its enabling legislation, the Industry Research and Development Bill 1986, and will use that power as necessary to ensure the Board acts fairly and equitably toward all companies wishing to register for the tax concession.'

The Committee thanks the Minister for this assurance in relation to the manner in which the Board's discretion will be exercised.

New sub-sections 73B(34) and (35) - Non-reviewable decision

New sub-section 73B(34) provides that the Commissioner may request the Industry Research and Development Board to determine in writing whether particular activities carried on by or on behalf of a company during a year of income were research and development activities. New sub-section 73B(35) provides that a determination by the Board under sub-section (34) is binding on the Commissioner and therefore, it would appear, on any person standing in the shoes of the Commissioner for the purpose of a review on the merits of the Commissioner's assessment. Thus a decision of the Board under sub-section 73B(34) would be reviewable only as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977 and not on its merits.

Given, once again, that a decision under sub-section 73B(34) might affect the entitlement of an eligible company to a deduction under new sub-section 73B, the Committee drew the sub-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 Minister for Industry, Technology and Commerce has responded:

> 'As to the Committee's comments on Sections 73B(34) and (35), I understand that the Taxation Office wished to proceed with the new Section of the Act without provision for appeals against the determinations of the Board. However, I have written to the Treasurer advising that should the current appeals conditions be considered inappropriate, the legislation could be amended so that determinations by the IR&D Board will be held to be determinations by the Commissioner. This would allow all of the ordinary appeals arrangements of the taxation system to operate. Since the legislation will be primarily administered by the Commissioner of Taxation, it may be appropriate to take up this matter with the Treasurer.'

The Committee thanks the Minister for this response. It has already written to the Treasurer, as is its usual custom, drawing his attention to the comments made by the Committee and inviting any response he may care to make. However given that it is the practice of the Treasurer not to respond to comments made by the Committee (see page 9 of the Committee's Annual Report 1985-86) the Committee is not unduly hopeful of receiving any response from the Treasurer in relation to its comments on this Bill.

As the lack of review of determinations made by the Board is apparently the result of a deliberate policy decision on the part of the Australian Taxation Office the Committee continues to draw new sub-sections 73B(34) and (35) 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.

NUCLEAR NON-PROLIFERATION (SAFEGUARDS) BILL 1986

This Bill was introduced into the Senate on 4 June 1986 by the Minister for Resources and Energy.

The Bill gives effect to Australia's international non-proliferation obligations requiring domestic legislation. These obligations arise under the Nuclear Non-Proliferation Treaty, Australia's safeguards agreement with the International Atomic Energy Agency, Australia's bilateral nuclear safeguards agreements with other countries and Euratom, and the Physical Protection Convention (not yet ratified). The Bill also provides the legislative basis for the operation of the Australian Safeguards Office in administering Australia's safeguards system.

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

Clause 4 - 'Henry VIII' clauses

Clause 4 is the definition clause of the Bill. The definitions of "Agency Agreement", "Agency Statute", "Non-Proliferation Treaty", "Physical Protection Convention" and "prescribed international agreement" each permit the variation by regulations of the terms of the Schedules of the Bill setting out these international agreements where the agreements in question are amended. The last of the five definitions also permits additional international agreements to be prescribed for the purposes of that definition. Sub-clause 4(4) permits the definition of "nuclear material" - defined by reference to the 'Agency Agreement' which in turn refers to the definitions of 'source material' and 'special fissionable material' in Article XX of the 'Agency Statute' - to be varied by the adoption by regulations of determinations by the Board of Governors of the International Atomic Energy Agency adding new material to the content of the definitions of 'special fissionable material' and 'source material' in Article XX of the 'Agency Statute'.

The definition of "associated item" refers to the definitions of "associated equipment", "associated material" and "associated technology". The first two of these refer to equipment or plant and material respectively included in a class of equipment or plant or material declared by the Minister to be associated equipment or associated material, as the case may be. "Associated technology" is defined as any document containing certain information applicable primarily to the design, production, operation, testing or use of nuclear weapons or information 'to which a prescribed international agreement applies and that is of a kind declared by the Minister to be information to which this definition applies'. It will be recalled that the definition of "prescribed international agreement" is itself capable of extension by regulations. Declarations made by the Minister under each of these definitions are subject to tabling and disallowance as if they were regulations.

The definitions identified above are central to the Bill. Indeed it purports to rely on giving effect to obligations under the various international agreements for part of its constitutional validity: see clause 8. It imposes controls on 'nuclear material' and 'associated items'. Because each of the definitions identified above permits the variation of the terms of the Bill, and in some cases the content of the relevant definition, by delegated legislation they may be characterised as 'Henry VIII' clauses. As such, the Committee drew the definitions 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 Resources and Energy has responded:

> 'The definitions of "Agency Agreement", "Agency Statute", "Non-Proliferation Treaty", "Physical Protection Convention" and "prescribed international agreement" define those instruments (which are set out or referred to in Schedules to the Bill) as including those instruments "as amended from time to time". However, any amendment is to have effect only if regulations are made for that purpose (see sub-clause 4(3)). The definition of "prescribed international agreement" also enables regulations to be made to add new agreements to the list in the Schedule. Any new agreement must be such that its terms can be implemented by this legislation.
>
> I suggest that the above provisions do not involve an inappropriate delegation of legislative power. The action in question must be taken by way of regulations which must be laid before both Houses of Parliament and are subject to disallowance and are accordingly subject to Parliamentary scrutiny.
>
> Moreover, the proposed provisions provide certainty as to whether and when an amendment has effect for the purposes of the legislation. Sub-clause 4(3) is designed to cover two contingencies. The first is where

an amendment is made to a treaty and Australia does not accept the amendment. Where this happens, the regulations necessary to bring the amendment into effect for the purposes of Australian domestic law would simply not be made. The second is where an amendment is made to a treaty and Australia accepts the amendment. Where this happens, it will be necessary to determine the precise point in time when the amendment takes effect for the purpose of Australian domestic law. Regulations give the necessary certainty and publicity.

The same comments apply to sub-clause 4(4) which enables the definition of "nuclear material" to be varied by regulations adopting determinations of the Board of Governors of the International Atomic Energy Agency (IAEA) amending the definitions of "source material" and "special fissionable material" in Article XX of the IAEA Statute.

Paragraph (b) of the definitions of "associated equipment", "associated material" and "associated technology" refer to a declaration by the Minister which would specify the class of equipment or material, or the kind of information, which would fall within the definitions. The reason for this approach is the technical complexity, continual development and multiple use of items to be covered by these definitions. A specific narrow definition could exclude items that should be controlled by the legislation, a wide definition could include items intended for legitimate non-nuclear use. The definitions in the Bill are intended to provide flexibility and the ability to respond quickly to a changing situation.

The power of the Minister to make a declaration is constrained by the language used in the definitions. With respect to the terms "associated equipment" and

"associated material", before the Minister can make a declaration the equipment or material must be equipment or material of the kind referred to in paragraph (a) of the definition of each of those terms. So too, under paragraph (b) of the definition of "associated technology" the Minister cannot make a declaration unless the technology is technology to which a prescribed international agreement applies. Having regard to the fact that the legislation is designed to ensure that nuclear material is used only for peaceful purposes and not for nuclear weapons, the power of the Minister to make a declaration does not appear to be inappropriate. Further, any declaration must be laid before each House of Parliament and is subject to disallowance.'

The Committee thanks the Minister for this response. In continuing to draw the definitions to the attention of the Senate, together with the Minister's helpful response, the Committee hopes to promote a fuller consideration of the issue involved at the Committee stage of debate on the Bill.

Clauses 9, 10 and 11 - 'Henry VIII' clauses

Paragraphs 9(c) and 10(b) provide that the regulations may specify nuclear material and associated items to which Part II of the Bill is not to apply. Paragraphs 9(a) and (b) and 10(a), in conjunction with sub-clauses 11(1), (3) and (7), provide that the Minister may, by declaration, exempt specified nuclear material or associated items from the application of Part II of the Bill. Sub-clauses 11(5) and (9) provide that the Minister may also vary or revoke such declarations, which are to be subject to tabling and disallowance as if they were regulations. Although the exemptions are expressed to be from the application of Part II they will affect the application of other clauses of the Bill such as the offence provisions in Part III: see, for example, paragraphs 23(1)(a) and 27(2)(a).

Because these provisions enable the application of the Bill to 'nuclear material' and 'associated items' to be varied by regulations or by Ministerial declarations they may be characterised as 'Henry VIII' clauses. As such, the Committee drew them to the attention of the Senate under principle 1(a)(iv) in that they might be considered to constitute an inappropriate delegation of legislative power. The Minister for Resources and Energy has responded:

> 'Clauses 9, 10 and 11 contain provisions allowing the exemption of nuclear material and associated items by regulations and in specified circumstances exemption and termination by Ministerial declaration. These provisions are designed to allow implementation of provisions in the Agency Agreement which allow exemption from or termination of safeguards, and provisions in prescribed international agreements which set out the circumstances in which nuclear material or an associated item are not to be subject to the particular agreement. As an example, safeguards on nuclear material may be terminated if the material has been consumed, or diluted in such a way that it is no longer usable for a nuclear activity, or has become practically irrecoverable.
>
> I would point out that the regulation-making powers must be read subject to clause 70 and therefore have to be exercised in accordance with Australia's international obligations.
>
> As far as declarations under clause 11 are concerned, the Minister may make declarations under sub-clause 11(1) and 11(3) only if the IAEA has exempted or terminated the application of safeguards with respect to the nuclear material in question under the Agency Agreement and if the exemption or termination is not inconsistent with Australia's obligations under a prescribed international agreement. Similarly the

Minister can make a declaration under sub-clause 11(7) to exempt an associated item only if such action is not inconsistent with Australia's obligations under a prescribed international agreement. The power in sub-clause 11(5) and (9) is, in my view, a necessary and appropriate adjunct to the declaration-making power in sub-clauses 11(1), (3) and (7).

Any regulations or declarations will be subject to Parliamentary scrutiny, since they must be laid before each House of Parliament and are subject to disallowance. In the circumstances, I suggest that these provisions are not an inappropriate delegation of legislative power.'

The Committee thanks the Minister for this response. In continuing to draw the provisions to the attention of the Senate, together with the Minister's helpful response, the Committee hopes to promote a fuller consideration of the issue involved at the Committee stage of debate on the Bill.

Sub-clause 22(3) - Notification of decisions

Sub-clause 22(1) provides for the notification of decisions relating to the granting or variation of permits or authorities and sub-clause 22(2) provides that such notice shall include a statement that application may be made to the Administrative Appeals Tribunal for review of the relevant decision. Sub-clause 22(3) states that a failure to comply with the requirements of sub-clauses 22(1) and (2) shall not be taken to affect the validity of a decision.

The Committee expressed concern that sub-clause 22(3) provided that the failure to notify a person of a decision affecting that person should not affect the validity of the relevant decision. For example, failure to notify the holder of a permit to possess nuclear materials of a decision varying the permit might have serious consequences for the permit holder. While the Committee

has accepted in the past that failure to include in the notification of a decision a statement relating to rights of appeal should not affect the validity of the decision in question, it does not believe that the failure to notify persons of decisions affecting them should be treated in the same way.

Accordingly the Committee drew sub-clause 22(3) to the attention of the Senate under principle 1(a)(ii) in that by providing that the failure to notify a decision in accordance with sub-clause 22(1) is not to affect the validity of that decision it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister for Resources and Energy has responded accepting the point made by the Committee and undertaking to move an amendment to take account of the point. The Committee thanks the Minister for this undertaking.

Paragraph 24(1)(b) - 'Henry VIII' clause

Clause 23 creates an offence in respect of the possession of nuclear material or an associated item without a permit. Paragraph 24(1)(b) provides an exemption from this offence if a person is in possession of the material or item solely as a carrier and 'the material or item is of a kind prescribed by the regulations' for the purposes of the provision.

In so permitting the application of an offence provision to be varied by regulations the provision may be characterised as a 'Henry VIII' clause. As such, the Committee drew the paragraph 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 Resources and Energy has responded:

> 'The provision is designed to cover items which are carried frequently by public carriers but are of very low proliferation significance, such as radioisotope container boxes with depleted uranium shielding used

for transporting medical radioisotopes. The possessors of the containers, rather than the carriers, would be required to have permits to possess them.

I suggest that this provision is not an inappropriate delegation of legislative power. Any regulations made under this provision will have to be consistent with Australian international obligations by virtue of clause 70 and the regulations will be subject to Parliamentary scrutiny.'

The Committee thanks the Minister for this response. In continuing to draw paragraph 24(1)(b) to the attention of the Senate, together with the Minister's response, the Committee hopes to promote a fuller consideration of the issue involved at the Committee stage of debate on the Bill.

SUPERANNUATION ACT 1976

In its Fourth Report of 1985 and its Eighth Report of 1986 the Committee drew attention to clause 17 of the Superannuation Legislation Amendment Bill 1985 (which failed to pass) and clause 19 of the Superannuation Legislation Amendment Bill 1986, both of which were in similar form. The clauses inserted a new section 39 in the Superannuation Act 1976 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 39 imposed no limitation, and gave no guidance, as to the attributes of the person to whom a delegation might be made.

In responding to these comments the Minister for Finance undertook to examine all of the delegation provisions in the Act with any necessary amendments being made when the Act was next amended (see the Committee's Seventh Report of 1985 and Eighth

Report of 1986). The Minister has now written further to the Committee reporting the result of that examination and the relevant part of that letter is reproduced below for the information of the Senate. The Minister writes:

> 'As foreshadowed, the Committee's comments have been considered in the context of an examination of the three sections of the Act (sections 25, 38, and 39) which provide for delegations to "a person". On the basis of that examination, I believe that the power of delegation of the Superannuation Fund Investment Trust (SFIT) contained in section 38 and the power of delegation of the principal member contained in section 39 should be restricted to members of SFIT and its officers and employees.
>
> With respect to section 25, it is necessary for the Commissioner for Superannuation to be able to delegate his powers to a wide range of persons including:
>
> - persons within the Australian Government Retirement Benefits Office;
> - persons within Departments, including most State Offices; and
> - persons within approved authorities.
>
> In addition, it may be necessary for the Commissioner to delegate powers to State employees as a result of the transfer of former Commonwealth Legal Aid Office staff to the States, because some of those staff have remained members of the Commonwealth Superannuation Scheme (CSS). Similarly, it may be necessary for the Commissioner to delegate powers to employees of bodies (not covered by the Act) employing persons covered by the mobility provisions of the Public Service Act who have also remained CSS contributors.

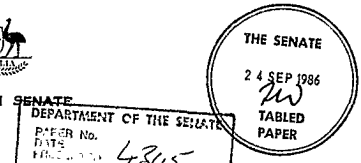
It is apparent, therefore, that a person required to be a delegate under section 25 may not be an eligible employee (contributor) for the purposes of the Act or, indeed, even a Commonwealth sector employee. Consequently, I do not believe that there is any alternative to the existing wording of that section.

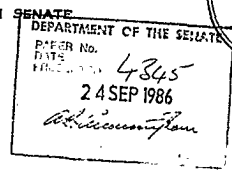
I have asked that amendments to sections 38 and 39, along the lines outlined above, be included in the Superannuation Legislation Amendment Bill which I have foreshadowed for the Budget sittings.'

The Committee thanks the Minister for honouring his undertaking in this fashion and for the promised amendments which answer the Committee's concerns in relation to section 39 in particular.

Michael Tate
Chairman
17 September 1986

AUSTRALIAN SENATE





SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1986

24 SEPTEMBER 1986

THE SENATE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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 1986

The Committee has the honour to present its Thirteenth Report of 1986 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 Council Bill 1986

Australian Capital Territory Council (Consequential Provisions) Bill 1986

Parliamentary Commission of Inquiry Act 1986

AUSTRALIAN CAPITAL TERRITORY COUNCIL BILL 1986

The Committee commented on this Bill in its Sixth Report of 1986 (30 April 1986). The Minister for Territories 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 6(2) - Inappropriate delegation of legislative power

Sub-clause 6(2) would confer on the proposed A.C.T. Council such other functions in addition to governing the A.C.T. with respect to prescribed matters as are vested in it by, inter alia, 'an arrangement with the Commonwealth'. The sub-clause would thus permit the functions of a statutory corporation to be increased by agreement without parliamentary scrutiny or, indeed, any form of legislative process.

The Committee drew the sub-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 has responded:

> 'The Committee's concerns are based on the view that the Council has been constituted as a statutory authority of the Commonwealth. However, the intention was to establish a governmental body and to make this clear, the Government has proposed amendments to clause 5 of the Council Bill to remove the words "body corporate" and to rename the Council "House of Assembly". Thus sub-clause 6(2) would allow the Commonwealth to enter into arrangements with the ACT Assembly in much the same way as it enters into arrangements with the States and the Northern Territory.'

The Committee thanks the Minister for this response. While an attempt has been made to clarify the nature and status of the proposed A.C.T. House of Assembly, the Committee notes that the functions of the Assembly are still to be delimited by legislation and it is these functions which may be added to by arrangement with the Commonwealth. It is in this respect that such arrangements differ from inter-governmental agreements with the States and the Northern Territory. Such agreements are entered into by the governments concerned in pursuance of their existing powers rather than purporting to confer additional functions on those governments. Despite the amendments proposed by the Government, the effect of sub-clause 6(2) remains to extend the functions of the Assembly as set out in the Bill by arrangement with the Commonwealth. Such arrangements will not be subject to parliamentary scrutiny and accordingly the Committee continues to draw sub-clause 6(2) to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

Sub-clauses 9(1) and 12(1) and clause 19 - 'Henry VIII' clauses

Sub-clauses 9(1) and 12(1) and clause 19 would permit the number of members of the Council, the quorum at meetings of the Council and the part-time nature of members of the Council respectively to be varied by regulations. Because they would permit the terms of the Act to be varied by delegated legislation they may be characterised as 'Henry VIII' clauses.

As such, the Committee drew the provisions to the attention of the Senate under principle 1(a)(iv) in that they might be considered to constitute inappropriate delegations of legislative power. The Minister has responded:

> 'It is essential that there are suitably flexible arrangements to vary numbers and it is entirely appropriate for this to be done by the regulations. Any regulations made will be subject to parliamentary scrutiny and disallowance.'

The Committee thanks the Minister for this response. It accepts that in this case the use of delegated legislation is justifiable in light of the need for flexibility.

Sub-clause 37(4) and clause 41 - 'Henry VIII' clauses

Sub-clause 37(4) and clause 41 would permit the making of regulations empowering the Council to make laws with respect to the planning of land use or the development of land and laws binding the Crown in right of the Commonwealth respectively. Once again because the provisions permit the terms of the Act to be varied by delegated legislation they may be characterized as 'Henry VIII' clauses.

Accordingly the Committee drew the provisions to the attention of the Senate under principle 1(a)(iv) in that they might be considered to constitute inappropriate delegations of legislative power. The Minister has responded:

> 'As set out in the Minister's tabling statement "Planning, Development, Lease Marketing and Lease Management", the establishment of the Assembly would result in major changes to the planning and development process in the ACT. Amongst other things, it would be the Government's intention to provide the ACT community, through the Assembly, with a formal role in the planning and development process. Until experience is gained in the new process it would not be possible to define the detailed authority, if any, the Assembly could require, recognising that its responsibility for legislative and executive matters (e.g. environment protection and conservation, road transport, and roads, bridges and tunnels) could be expected to interact with planning and development arrangements. The regulation making power would enable the Commonwealth to move quickly to avoid any emerging difficulties from becoming permanent problems.

> As regards clause 41, it would be inappropriate for the Commonwealth to submit itself to all laws of the Assembly in advance of examining those laws. Equally, it is clear that the Commonwealth should be bound by certain laws. For example, it is now bound by such Ordinances as those dealing with motor traffic, public safety and environmental protection. As presently drafted, clause 41 would allow a careful assessment of individual Assembly laws on a case by case basis and is the most appropriate way of dealing with this matter.'

The Committee thanks the Minister for this response. In continuing to draw the provisions to the attention of the Senate, together with the Minister's helpful response, the Committee hopes to promote a fuller consideration of the issues involved at the Committee stage of the debate on the Bill.

Sub-clauses 38(2) and 47(1) - Inappropriate delegation of legislative power

Sub-clause 38(2) would empower the Attorney-General to veto a proposed law passed by the Council if, 'in the opinion of the Attorney-General, the Council does not have power to make the proposed law'. Sub-clause 47(1) would empower the Governor-General to disallow a Council law within 6 months after the law is made. This latter discretion is totally unfettered.

While the Attorney-General's exercise of the discretion under sub-clause 38(2) could be challenged in the courts if it were considered that, for example, the Attorney General had been actuated by ulterior motives or that no reasonable person could have formed the required opinion, it would not be possible to seek review of the Attorney-General's opinion on its merits. The decision whether an exercise of power by a statutory corporation is ultra vires the corporation is usually one left to the courts. The Committee raised the question whether it was appropriate that

such a power should be vested in the Attorney-General for exercise upon the Attorney-General's subjective opinion and not upon objective grounds. The Minister has responded:

> 'As regards sub-clause 38(2), the Government has proposed deletion of existing clause 38 and its replacement with a provision requiring the Chairperson, or another person authorised by Assembly Law, to notify a proposed law in the Gazette once the proposed law has been passed by the Assembly. The law would take effect upon such notification or as provided in the law.'

The Committee thanks the Minister for undertaking to make this proposed amendment, which removes from the Bill the proposed power of veto to be conferred on the Attorney-General.

With regard to the power of disallowance vested in the Governor-General by sub-clause 47(1) the Committee recognizes that it is appropriate that this power - presumably to be exercised in the national interest - should not be reviewable by the courts on its merits. However once again the Committee questions whether the power has been vested in the appropriate person, in this case the Governor-General acting with the advice of the Federal Executive Council. The Committee is aware that both section 23 of the Norfolk Island Act 1979 and section 9 of the Northern Territory (Self-Government) Act 1978 make provision in similar terms for the disallowance of laws made by the Norfolk Island and Northern Territory Legislative Assemblies. However the Committee remarks that in both cases, as in this case, a power has been transferred to the Federal Executive which was previously exercised by the Federal Parliament. If it is considered necessary that a power of disallowance should be retained over the laws made by the proposed A.C.T. Council - and it should be remembered that the Federal Parliament will always retain the power to make overriding laws for the Territories under section 122 of the Constitution - the Committee notes that this power has hitherto been vested in the Federal Parliament rather than the Federal Executive. To the extent that

legislation made by such bodies remains delegated legislation it may be argued that Parliament should retain the oversight of the exercise of the legislative power which it has delegated.

Accordingly the Committee drew sub-clause 47(1) to the attention of the Senate under principle 1(a)(iv) in that, by granting to the Governor-General rather than the Parliament the power to disallow Council laws, it might be considered to constitute an inappropriate delegation of legislative power. The Minister has responded:

> 'Regarding sub-clause 47(1), the Government's intention is to establish a local representative government which would work in partnership with the Commonwealth in the government of the ACT. For this purpose the Bill empowers the Assembly to make laws and by-laws for the peace, order and good government of the Territory with respect to prescribed matters.
>
> It is intended that, in respect of matters for which the Assembly has legislative power, the Assembly would operate free from Commonwealth control. Nevertheless, the Commonwealth recognises that exceptional circumstances could arise where it would be in the national interest for it to intervene.
>
> For these reasons and, in particular in recognition of the independence of the Assembly, the Government has opted to follow the Northern Territory and Norfolk Island model in providing for disallowance of Assembly laws by the Governor-General rather than the Parliament. To provide for scrutiny of the Assembly's legislative actions by the Parliament would be quite inconsistent with the form of government proposed and would deny the citizens of Canberra the right to hold their representatives solely accountable to them.

> Of course, in relation to the ACT matters for which the Commonwealth would retain full legislative responsibility, the role of the Parliament would be unaffected.'

The Committee thanks the Minister for this response. The Committee recognises the considerations which have prompted the Minister (in accordance with the Northern Territory and Norfolk Island models) to vest the power of disallowance in the Governor-General rather than in the Parliament. However, the Committee questions whether it is accurate to suggest, as the Minister does, that to vest the power of disallowance in the Parliament would deny the right of the citizens of Canberra to hold their representatives solely accountable to them in a way in which the retention of a power of disallowance by the Governor-General will not. Accordingly the Committee continues to draw clause 11 to the attention of the Senate, together with the Minister's response, in the hope of promoting a fuller consideration of the issues involved at the Committee stage of the debate on the Bill.

Sub-clause 77(1) - Delegation

Under sub-clause 77(1) the Chairperson of the Council will be empowered to delegate to 'a person' all or any of the Chairperson's functions under the Act, other than the power of delegation or the power to make by-laws. As the Chairperson is the chief executive officer of the Council and may, subject to Council law, exercise the powers of the Council in its name and on its behalf (clause 50), and as the Council has the function of governing the Territory with respect to prescribed matters (sub-clause 6(1)), this power of delegation may be considered undesirably broad. The Committee has drawn attention on a number of occasions to similar provisions which impose no limitation on the powers or functions to be delegated and give no guidance as to the attributes of the persons to whom a delegation may be made.

The Committee drew sub-clause 77(1) to the attention of the Senate under principle 1(a)(ii) in that by providing such an unrestricted power of delegation it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister has responded:

> 'The Chairperson's power to delegate is necessarily wide to ensure continuing effective administration on a day to day basis. Further, it provides the Assembly with the flexibility to determine its own delegations policy. Under clause 50, the Assembly would be able to place limits on the extent to which the Chairperson could exercise the Assembly's powers and functions.
>
> In considering this arrangement it should be borne in mind that the Assembly has governmental status and that its internal operations would primarily be the responsibility of the Assembly.'

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

Paragraph 78(1)(b) - 'Henry VIII' clause

Paragraph 78(1)(b) empowers the making of regulations amending Schedules 1 and 2 of the Bill. Matters specified in Schedule 1 and the subject-matter of laws specified in Schedule 2 constitute the 'prescribed matters' with respect to which the Council has legislative power and governmental functions. Paragraph 78(1)(b) would thus enable the Government by regulation to increase (or reduce) the areas over which the Council has power. It is a classic example of a 'Henry VIII' clause, permitting the amendment of the Act by delegated legislation.

The Committee drew the paragraph to the attention of the Senate under principle 1(a)(iv) in that, as a 'Henry VIII' clause, it might be considered an inappropriate delegation of legislative power. The Minister has responded:

> 'Paragraph 78(1)(b) allows for Schedules 1 and 2 to be amended by regulation. These Schedules set out the legislative powers and governmental functions of the Assembly. Careful consideration would need to be given to the question of additional transfers of functions and the timing of those transfers. Given this and the fact that it is impossible to be certain that the matters in the Schedules are neither too wide nor too narrow in terms of the intended transfer of functions, it is essential that the Government be able to respond quickly to meet emerging needs and problems. A similar approach was found necessary in establishing the Northern Territory and Norfolk Island governments (see section 36 of the Northern Territory (Self-Government) Act 1978 and section 67 of the Norfolk Island Act 1979).
>
> Any regulations so made will be subject to Parliamentary scrutiny and disallowance.'

The Committee thanks the Minister for this response. However it notes that in respect of future transfers of power the Parliament will only have available to it the negative action of disallowance rather than, as it has in relation to Schedules 1 and 2, the power of amendment. Accordingly the Committee continues to draw paragraph 78(1)(b) to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

AUSTRALIAN CAPITAL TERRITORY COUNCIL (CONSEQUENTIAL PROVISIONS) BILL 1986

The Committee commented on this Bill in its Sixth Report of 1986 (30 April 1986). The Minister for Territories 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-clauses 7(1), 11(3), 12(2), and 13(3) - 'Henry VIII' clauses

Sub-clauses 7(1), 11(3), 12(2) and 13(3) each provide that sections of the Act are to cease to have effect on a day to be fixed by Proclamation. Such provisions may be characterised as 'Henry VIII' clauses in that they permit the executive to determine that sections of an Act are no longer in effect without the necessity for Parliament to agree to the repeal of those sections.

The Committee drew the clauses to the attention of the Senate under principle 1(a)(iv) in that they might be considered to constitute inappropriate delegations of legislative power. The Minister has responded:

> 'Clause 7 sets out interim staffing arrangements for the Assembly's Administration. It provides that, unless staff are employed under Assembly law, staff required to assist the Assembly are to be employed under the *Public Service Act 1922*. It is envisaged that initially all Assembly staff (other than its top executives) would be employed under the Public Service Act. Once the Assembly is established it would consult with the Commonwealth and staff organizations about its long term staffing arrangements. These consultations could lead to the Assembly employing its staff under Assembly law in accordance with clause 56 of the Council Bill. It is intended that once this Assembly law is brought into effect, sub-clause 7(5) would be used to terminate

the interim arrangements. In addition, the repeal of clause 7 would bring into operation sub-clause 57(1) of the Council Bill which would enable the Assembly to arrange for the secondment of Australian Public Service Staff thereafter - see sub-clause 2(3) of the Council Bill.

The intention of clause 11 is to enable the Minister to exempt from stamp duty instruments relating to transfers of interests in land from the Commonwealth to the Assembly where the transfer relates to the transfer of a function to the Assembly. Upon the transfers to the Assembly being completed, it would be appropriate for the section to cease to have effect - this would be effected on a day to be fixed by proclamation pursuant to sub-clause 11(3).

The purpose of clause 12 is to ensure that, until the Assembly enacts its own audit and financial laws pursuant to clauses 60 and 69 of the Council Bill, the provisions of the Audit Act 1901 apply to the Assembly and Assembly authorities. Once the Assembly determined to bring its own laws into effect it would be necessary for clause 12 to cease to apply, otherwise its laws would be inoperative. Accordingly sub-clause 12(2) provides for the section to cease to apply on a day to be fixed by Proclamation.

Clause 13 provides that regulations may modify the application of Acts in consequence of the enactment of the Assembly Bill. This provision would be necessary for a limited period only while the complex task of examining all relevant legislation was undertaken and necessary modifications made. Accordingly sub-clause 13(3) provides that regulations shall not be made on or after a day to be fixed by Proclamation.'

The Committee thanks the Minister for this response. In continuing to draw the clauses to the attention of the Senate under principle 1(a)(iv), together with the Minister's helpful response, the Committee hopes to promote a fuller consideration of the issues involved at the Committee stage of the debate on the Bill.

Sub-clause 11(1) - 'Henry VIII' clause

Sub-clause 11(1) would permit the Minister, by notice in writing in the Gazette, to exempt from stamp duty under the Australian Capital Territory Stamp Duty Act 1969 specified instruments, or classes of instruments, relating to a transfer by the Commonwealth to the Council of an interest in land. Because it would permit the Minister, by executive instrument, to alter the effect of the Act, the sub-clause may be characterised as a 'Henry VIII' clause.

Accordingly the Committee drew the sub-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 has responded:

> 'This clause allows the Minister to exempt from stamp duty instruments relating to a transfer by the Commonwealth to the Assembly of an interest in land. The transfers in question would be transfers that arise out of a function being conferred on the Assembly. Accordingly, Parliament is being asked to agree in principle to the exemption of those classes of instrument from stamp duty while allowing the Minister to specify individual instruments'.

The Committee thanks the Minister for this response. However it suggests that it would be preferable if the Minister's power of exemption were to be exercised by regulations, thus permitting the Parliament to scrutinize the classes of instruments which have been exempted. Accordingly the Committee continues to draw

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 13(1) - 'Henry VIII' clause

Sub-clause 13(1) would enable the making of regulations providing for the application of any Commonwealth Act with such exceptions, and subject to such modifications, as may be necessary or convenient in consequence of the enactment of the Australian Capital Territory Council Bill 1986. The clause is so broad as to constitute a virtual abdication of legislative power.

The Committee drew the sub-clause to the attention of the Senate under principle 1(a)(iv) in that, as a 'Henry VIII' clause, it might be considered an inappropriate delegation of legislative power. The Minister has responded:

> 'This provision has been included because experience has shown that the establishment of new governmental bodies necessitates a major review of relevant legislation. The clause is similar in effect to section 6 of the Papua New Guinea Independence Act 1975 and to section 75 of the Northern Territory (Self-Government) Act 1978.
>
> It would be impossible, given the magnitude of the task, to effect all the necessary amendments by Act of Parliament within the time-scale which has been proposed by the Government for the transfer of functions to the Assembly. It is an interim measure only and, in any event, any regulations made will be subject to Parliamentary scrutiny and disallowance.'

The Committee thanks the Minister for this response. However, despite the precedents cited by the Minister, the Committee remains concerned about the breadth of the delegation of legislative power involved. By way of example it would be

possible to make regulations under the sub-clause establishing new arrangements for the planning and development of the national capital instead of introducing a Bill to amend the National Capital Development Commission Act 1957 consequential upon the creation of the proposed House of Assembly. While the Parliament could, of course, disallow such regulations, considerable administrative inconvenience might arise from such disallowance. The Committee regrets that it has not proved possible for the major review of relevant legislation referred to by the Minister to be undertaken prior to the introduction into Parliament of the Bills establishing the new governmental body. Accordingly the Committee continues to draw sub-clause 13(1) to the attention of the Senate in that it may be considered an inappropriate delegation of legislative power.

PARLIAMENTARY COMMISSION OF INQUIRY ACT 1986

The Committee commented on this Act in its Eighth Report of 1986 (28 May 1986) notwithstanding that it had already been agreed to by both Houses of the Parliament and had become law. The Committee noted that it did so, as permitted by its Terms of Reference, in the belief that the matters to which it was drawing attention were important and were worthy of attention despite the fact that the legislation had been passed by the Parliament. The Committee has now received a joint response to its comments from the Attorney-General and the Special Minister of State. Although a Bill has passed the Parliament which would repeal the Act the Committee considers that the issues raised remain of interest and accordingly the relevant parts of the response are reproduced here for the information of the Senate.

Sub-section 11(1) - Failure to stipulate reasonable time and place

Sub-section 11(1) provides that a member of the Parliamentary Commission may summon a person to appear before the Commission at a hearing to give evidence and to produce such documents or other things (if any) as are referred to in the summons. Failure without reasonable excuse to attend as required by a summons is an offence carrying a penalty of a fine of up to $1,000 or 6 months imprisonment: sub-section 24(1). Sub-section 11(1) does not stipulate, however, that a person should only be summoned to attend at a reasonable time and place.

On previous occasions when the Committee has raised this issue it has been in connection with powers to be exercised by quasi-judicial bodies such as the Human Rights and Equal Opportunity Commission or by administrative officials. The Committee recognised that a body constituted by three former judges of superior courts might be expected to exercise the power to summon witnesses in a reasonable manner. It was aware that sub-section 28(1) of the National Crime Authority Act 1984 was in similar form to sub-section 11(1) and that the Senate Standing Committee on Constitutional and Legal Affairs in its Report on The National Crime Authority Bill 1983 (Parliamentary Paper No.30/1984) did not comment on this aspect of the Bill. Nevertheless the Committee considered that where persons were to be summoned to appear before an inquisitorial body it should be stipulated that the time and place specified in the summons for that appearance be reasonable. The Committee could see no detriment arising from the inclusion of such a requirement and believed it would provide a valuable safeguard against any potential abuse of the power.

The Committee therefore drew sub-section 11(1) to the attention of the Senate under principle 1(a)(i) in that the failure to stipulate that a person should only be summoned to attend at a

reasonable time and place might be considered to trespass unduly on personal rights and liberties. The Attorney-General and the Special Minister of State have responded:

> 'The offence is stated in section 24(1) of the Act in terms which contain the qualification "without reasonable excuse". These words seem to provide proper protection of personal rights and liberties.
>
> No doubt the Commission would follow the example of courts in such matters and set aside a summons which imposed unreasonable demands upon application by the person summoned.'

The Committee thanks the Ministers for this response. However it cannot agree that the inclusion in the relevant offence provision of the words 'without reasonable excuse' provides protection for personal rights and liberties. These words only come into play once a person has committed an offence by failing to attend as required by the summons. A person should not be forced to commit an offence in order to test the validity of the summons. While the Committee recognises that the Commission, like the courts, would have a discretion to set aside a summons, it notes that the exercise of this discretion would not be subject to review unless, for example, it were manifestly unreasonable. The Committee can still see no obstacle to the inclusion of a requirement that the time and place specified in a summons should be reasonable.

The Committee therefore continues to draw sub-section 11(1) 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.

Section 16 - Restriction on use of statements etc.

Section 16 provides that a statement or disclosure made, or a document produced, by a witness in giving evidence before the Commission, or any information, document or thing obtained as a direct or indirect consequence of the statement or disclosure or the production of the document is not (except in proceedings for an offence against the Act) admissible in evidence in any civil or criminal proceedings in any court.

The Committee welcomed the fact that the section provides a 'use-derivative use' indemnity in respect of self-incriminating statements and documents: that is, it provides protection not only in respect of the use of such statements and documents in subsequent proceedings but also in respect of the use of any information, documents or other things which may have come to light as a result of the witness being required to make the initial statement or produce the original document. However the Committee noted that the section would impose a blanket prohibition on the use of all evidence given to the Commission rather than merely prohibiting its use 'against the witness' making the statement or producing the document (compare, for example, section 6DD of the Royal Commissions Act 1902). It was unclear to the Committee whether the omission of the words 'against the witness' was deliberate or inadvertent since the Explanatory Memorandum in fact referred to statements and disclosures not being admissible 'against the witness'. However in the view of the Committee the omission was an important one. A person could, for example, be prevented from relying on a document in civil proceedings because he or she had been required to produce that document to the Commission. Equally a person might be prevented from relying on a statement made to the Commission as a previous consistent statement which may be used in certain circumstances to corroborate the testimony of a witness.

The Committee therefore drew the section to the attention of the Senate under principle 1(a)(i) in that by so preventing litigants from utilising evidence which would otherwise be available to them it might be considered to trespass unduly on personal rights and liberties. The Attorney-General and the Special Minister of State have responded:

> 'The original draft of this section, based on section 6DD of the Royal Commissions Act 1902, had included after "admissible in evidence" the words "against that witness" but these words were omitted to accommodate what was understood to be a Parliamentary wish that the protection afforded in respect of evidence should be as wide as possible having regard to the protection afforded in respect of evidence before Parliamentary inquiries. A consequential amendment to the explanatory memorandum was inadvertently not made.
>
> It is thought that difficulties with the section are unlikely to arise in practice. As regards the first example provided by the Committee in its Report, it seems likely that a court would allow a copy of a document to be proved in evidence notwithstanding that the original, being a document which was not brought into existence for the purposes of the Commission, was produced to the Commission. As regards the second of the Committee's examples, the person concerned would be in no different position had that person not given evidence before the Commission.'

The Committee thanks the Minister for this response. It concedes that the difficulty envisaged in its first example is unlikely to arise in practice provided witnesses retain copies of documents produced to the Commission (which would no doubt be the prudent course). With regard to its second example it concedes that the person concerned would be in no different position had he or she not given evidence before the Commission. However such a person would be in a different position had he or she given similar

evidence before, for example, a Royal Commission, and the question arises as to the policy justification for this difference. It appears that the intent of the section is not so much to provide protection for witnesses as to prevent evidence given to the Commission being examined in any court. While such an exclusion may be considered justified in respect of parliamentary proceedings by the greater good of freedom of speech in parliament it would seem to be more difficult to justify in the case of an inquisitorial body like the Parliamentary Commission.

Though the question at this stage is purely academic, the Commission having taken no evidence, the Committee is not persuaded that the words 'against that witness' should have been omitted, converting the section from a protection for witnesses into a more general prohibition. Accordingly the Committee continues to draw section 16 to the attention of the Senate under principle 1(a)(i) in that by preventing witnesses from using their own evidence (which would otherwise be available to them) it may be considered to trespass unduly on personal rights and liberties.

Sub-section 24(3) - Reversal of the onus of proof

Sub-section 24(2) creates an offence where a person fails, without reasonable excuse, to produce a document or other thing as required by a summons. Sub-section 24(3) provides a defence if it is established by the defendant that the document or other thing was not relevant to the matter into which the Commission was inquiring.

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 the 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 defendant might be required to adduce evidence that the document or other thing was not relevant to the matter into which the Commission was inquiring.

The Committee therefore drew sub-section 24(3) to the attention of the Senate under principle 1(a)(i) in that by reversing the persuasive onus of proof it might be considered to trespass unduly on personal rights and liberties. The Attorney-General and the Special Minister of State have responded:

> 'There could not be imposed on the prosecution a positive duty to establish the link between the document and the subject-matter of the Commission because the Commission ex hypothesi, not having the document, could never discharge the duty. It was for this reason that the onus was reversed. The only alternative was to exclude the exculpatory provision entirely and this we would see as undesirable.'

The Committee thanks the Minister for this response. However the response does not address the alternative advanced by the Committee, namely that the defendant be required to bear an evidential onus. If such were the case, the defendant would be obliged to adduce evidence that the document was not relevant to the inquiry and the prosecution would then bear the onus of rebutting that evidence. While the Committee can see that it would be difficult to require the prosecution to prove beyond reasonable doubt that a document which it has not seen was relevant to the Commission's inquiry (although it is to be hoped that the Commission would at least have reasonable grounds for believing the document to be relevant before requiring its production) it can see no obstacle to the course it proposed, under which the prosecution would merely be required to rebut evidence adduced by the defence.

Accordingly the Committee continues to draw sub-section 24(3) to the attention of the Senate under principle 1(a)(i) in that by reversing the persuasive onus of proof it may be considered to trespass unduly on personal rights and liberties.

Sub-section 30(3) - Reversal of onus of proof

Sub-sections 30(1) and (2) create offences where a person suffers harm, loss or disadvantage or is dismissed from employment because the person has appeared before the Commission as a witness. Both sub-sections carry a penalty of a fine of up to $20,000 or 5 years imprisonment. Sub-section 30(3) provides that in proceedings under either sub-section it shall lie upon an employer to prove that an employee shown to have been dismissed or prejudiced in employment was so dismissed or prejudiced for some reason other than the employee's appearance as a witness before the Commission.

In other words once the prosecution has established -

(i) that an employee of the defendant appeared before the Commission as a witness; and

(ii) that the employee was dismissed by his or her employer,

it can rest its case. The employer will be liable to a very heavy penalty unless the employer is able to establish, on the balance of probabilities, that the employee was dismissed for some reason other than the employee's appearance as a witness.

Once again the Committee drew the attention of the Senate to the recommendation of the Standing Committee on Constitutional and Legal Affairs that defendants in criminal proceedings should not be required to establish some statutory defence in order to exculpate themselves but rather that they should merely be required to adduce evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution. It has been argued to the Committee - for example in relation to

clause 63 of the Radiocommunications Bill 1983: see its Eleventh Report of 1983 - that the reversal of the onus of proof in cases like the present is necessary for the effective protection of witnesses and that without it the protection offered would lack credibility. However the Committee urges the view that the protection afforded would not be significantly diminished if the burden placed on the employer were an evidential one only, rather than a persuasive onus.

Accordingly the Committee drew sub-section 30(3) to the attention of the Senate under principle 1(a)(i) in that the reversal of the persuasive onus of proof might be considered to trespass unduly on personal rights and liberties. The Attorney-General and the Special Minister of State have responded:

> 'An innocent employer will have had some genuine reason for the dismissal which he can readily establish. If he has such a reason, and advances it in the investigatory stage, it is difficult to imagine that proceedings would ever commence. If they do commence, by giving evidence of his reason, the employer would shift the tactical burden to the prosecution.
>
> The prospect of the prosecution being able to prove, by direct evidence, the existence in the mind of the defendant of the impermissible reason must be remote. The alternative would have been to impose on the prosecution the well nigh impossible burden of proving a negative i.e. that the employer had no valid reason for dismissal and must therefore have dismissed for the impermissible reason. In these circumstances, alternative and practicable means of deterring wholly unacceptable conduct are not perceived.'

The Committee thanks the Ministers for this response. Once again, however, it fails to address the alternative offered by the Committee. Indeed the concluding sentence of the first paragraph of the response is disingenuous in that it seeks to imply that

the provision only imposes an evidential burden on the defendant. If the views of the Committee were to be followed it would indeed be the case that the defendant, by giving evidence of his or her reasons for dismissing the employee, would shift the tactical burden to the prosecution (for the correct usage of these terms see paragraph 2.6 of the Constitutional and Legal Affairs Committee's Report, The Burden of Proof in Criminal Proceedings, Parliamentary Paper No. 319/1982). However sub-section 30(3) places the persuasive burden on the defendant by requiring him or her to prove on the balance of probabilities that an employee shown to have been dismissed or prejudiced in employment was so dismissed or prejudiced for some reason other than the employee's appearance as a witness before the Commission. The response appears to confuse the evidential and persuasive burdens of proof before insisting that there is no alternative and practicable means to imposing the persuasive burden on the defendant.

In the circumstances the Committee cannot do other than continue to draw sub-section 30(3) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive burden of proof on the defendant it may be considered to trespass unduly on personal rights and liberties.

Section 34 - Communication of information

Section 29 provides that self incrimination is not an excuse for a refusal or failure to answer a question or produce a document or other thing if required to do so by the Commission. Section 16, however, provides a 'use-derivative use' indemnity in respect of statements made or documents or things produced by witnesses before the Commission. That is, it provides that such statements, documents or things, or any information, document or thing obtained as a direct or indirect consequence of the statement or the production of the relevant document or thing, is not (except in proceedings for an offence against the Act) admissible in evidence in any civil or criminal proceedings in any court.

Section 34, however, provides that where the Commission obtains information that relates, or may relate, to the commission of an offence, or evidence of the commission of an offence, against a law of the Commonwealth, a State or a Territory, it may communicate that information, or furnish that evidence, to the Attorney-General or Commissioner of Police of the Commonwealth or the relevant State or Territory or the authority or person responsible for the enforcement of the relevant law. The Committee suggested that this provision would appear to cut across the protection afforded by section 16, in that it appeared to be contemplated by section 34 that prosecutions might result from information obtained by the Commission. The Explanatory Memorandum noted that section 34 was modelled on section 6P of the Royal Commissions Act 1902. However section 6DD of that Act provided only a 'use' indemnity in respect of self-incriminating evidence, not the 'use-derivative use' indemnity which section 16 of the present Act purported to provide.

The Committee drew section 34 to the attention of the Senate under principle 1(a)(i) in that the communication of information by the Commission to prosecuting authorities might cut across the protection afforded to witnesses by section 16 and might therefore be considered to trespass unduly on personal rights and liberties. The Attorney-General and the Special Minister of State have responded:

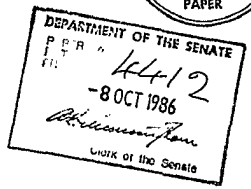
> 'Clearly section 34 is to be read in the light of section 16 and the position is that the use-derivative-use indemnity conferred by section 16 is not cut down by section 34 and information gained as a result of evidence given before the Commission could not itself be put in evidence.
>
> Also it is considered that there is a valid analogy between section 34 and section 6P of the Royal Commissions Act 1902 in that the material protected by indemnity (however wide or narrow) may nevertheless properly be used for intelligence purposes.'

The Committee thanks the Ministers for this response which answers its concerns in relation to the section.

Michael Tate
Chairman

24 September 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1986

8 OCTOBER 1986

THE SENATE

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ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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 1986

The Committee has the honour to present its Fourteenth Report of 1986 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 Effective Self-Government Bill 1986
Freedom of Information Laws Amendment Bill 1986
Hazardous Goods Bill 1986
Health Legislation Amendment Bill (No.2) 1986

AUSTRALIAN CAPITAL TERRITORY EFFECTIVE SELF-GOVERNMENT BILL 1986

This Bill was introduced into the Senate on 22 August 1986 by Senator Vigor.

The Bill makes provision for the self-government of the Australian Capital Territory by the establishment of a 21-member House of Assembly elected by the Hare-Clark method of proportional representation. The Assembly will take on municipal responsibilities immediately, responsibility for health, education and land planning and development in 1990 and the remainder of Territorial functions in 1992. The Bill proposes a guarantee of Commonwealth funding to the Territory at a level no less than that determined by the Commonwealth Grants Commission to be fair and equitable.

Sub-clauses 5(2) and 78(1) and paragraph 79(1)(b) of this Bill are in the same form as sub-clauses 6(2) and 77(1) and paragraph 78(1)(b) of the Australian Capital Territory Council Bill 1986 to which the Committee drew attention in its Sixth Report of 1986 (and see now the response of the Minister for Territories in the Thirteenth Report). The Committee also drew the attention of the Senate to the following clause of the Bill:

Clause 51 - Trespass on personal rights and liberties

Clause 51 provides that all laws in force in the Territory at the commmencement of the Act (other than Commonwealth Acts) are to cease to have effect 5 years after that date. While the intention of the provision is that the existing law of the Territory should be reviewed and replaced within that period, if this intention is not fulfilled the Territory may, at the expiration of 5 years, be suddenly deprived of a large part of its legislation (including, for example, Magna Carta).

The Committee suggested that it was unsatisfactory for the Parliament to be asked, in effect, to repeal a large number of laws without knowing what those laws were. Such a course might also place in jeopardy rights and liberties which the citizens of the Territory had enjoyed in the past under such laws. Accordingly the Committee drew clause 51 to the attention of the Senate under principle 1(a)(i) in that it might be considered, by its arbitrary effect, to trespass unduly on personal rights and liberties. Senator Vigor has responded:

> 'The Committee has correctly surmised that this provision is intended to enforce a complete review of the law of the Territory. The clause does not ask Parliament to repeal the law of the Territory, but to make a provision which will ensure that the review is undertaken with expedition. If it is concluded that the time limit is unrealistic, the Parliament should be asked to extend the deadline, and may then determine whether its intention has been faithfully carried into effect. Similarly, if there is any danger of rights being extinguished by an unintended repeal of some laws, it is open to the Parliament to provide a remedy.
>
> We have already seen in the New South Wales Acts Application Ordinance the government using this technique to clean the statute books of obscure and sometimes vexatious legislation which does not relate to our times. I argued strongly that legislation being repealed should be listed so that any side-effects of removing certain Ordinances could be taken into account. The Department was unable to give any indication of what laws are currently in force in the A.C.T. The provision in this Bill gives them five years to get their house in order.
>
> I view with whimsy the Committee's reference to Magna Carta, which I take to be somewhat facetious. I point out that the A.C.T. Law Reform Commission in 1973 made

a report concerning imperial statutes which should be retained in force in the Territory, and it was not until June of this year that the first legislative fruit of that review appeared in the shape of an ordinance. It is to avoid this kind of sloth and lethargy on the part of the notoriously somnolent Department of Territories that I propose the clause in question.

Moreover, the Law Reform Commission's report stated that there was only one provision of Magna Carta which was worth keeping in force, the famous article concerning due process of law, and it speculated that this provision might provide a remedy against unreasonable delay on the part of the executive government. I note, however, that the fact that Magna Carta has been in force in the Territory since the Territory was established has not prevented such unreasonable delay. Perhaps, therefore, it would be no bad thing if Magna Carta were repealed and replaced by some more effective law.'

The Committee thanks the Senator for this response. In continuing to draw attention to the clause, together with the Senator's helpful response, the Committee hopes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

FREEDOM OF INFORMATION LAWS AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Attorney-General.

The purpose of the Bill is to amend the Freedom of Information Act 1982 and the Freedom of Information (Charges) Regulations to reduce administrative costs and increase revenues. The main amendments are:

- to introduce application fees for requests for access to documents and for internal review of decisions;
- to increase the hourly charge for search and retrieval of documents;
- to introduce an hourly charge for decision-making time;
- to exempt persons seeking personal income maintenance documents from all charges and fees;
- to maintain after 1 December 1986 the present 45 day time limit for processing requests;
- to strengthen provisions for refusal of requests on workload grounds;
- to reduce the grounds for remission of charges; and
- to reduce the obligations on agencies to publish s.8 and s.9 statements and to report statistics.

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

Clause 11 - Retrospectivity; lack of administrative review

Clause 11 would amend section 24 of the Principal Act to expand the class of requests which may be refused on the grounds that to satisfy the request would substantially divert the resources of the agency involved. The class of requests is to be known as 'multi-document requests', defined in new sub-section 24(1A) to mean, inter alia, a request that is one of a series of related

requests. By virtue of paragraph 24(1A)(b) a request may be taken to be one of a series of related requests if it is one of a number made by the same person or by persons whom the agency or Minister to whom the request is made believes on reasonable grounds to be acting in concert.

The Committee is concerned that these amendments may have retrospective effect in that requests made prior to the commencement of the Act may be grouped with requests made after that date to form a 'multi-document request' and so to be refused. Given that section 11 of the Act provides that, subject to the Act, every person has a legally enforceable right to obtain access to documents in accordance with the Act, it appears to the Committee that the refusal of requests made prior to the commencement of the amendments on this basis may be considered to infringe an existing statutory right. Accordingly the Committee draws new paragraph 24(1A)(b) to the attention of the Senate under principle 1(a)(i) in that, by reason of its potential retrospective effect, it may be considered to trespass unduly on personal rights and liberties.

Although a decision to refuse to grant access to a document is subject to review by the Administrative Appeals Tribunal, the Committee is also concerned that such review may not extend to a decision under paragraph 24(1A)(b) that a request is one of a series of related requests and so a 'multi-document request' for the purposes of sub-section 24(1). While it may be argued that the decision that the request is a 'multi-document request' is an essential step in the decision to refuse to grant access it may be desirable that this aspect of the operation of the rights of review under the legislation should be clarified. Accordingly the Committee also draws new paragraph 24(1A)(b) 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.

HAZARDOUS GOODS BILL 1986

The Committee commented on this Bill in its Tenth Report of 1986 (11 June 1986). Senator Vigor has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Paragraph 3(3)(c) - Inappropriate delegation of legislative power

Paragraph 3(3)(c) permits the content of the definition of 'hazardous goods' for the purposes of the Bill to be enlarged by regulations. As the concept of 'hazardous goods' is central to the scheme of the Bill, and in particular to the various clauses carrying heavy penal consequences, it may be suggested that the content of the concept should not be capable of being enlarged by delegated legislation.

Accordingly the Committee drew the paragraph 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. Senator Vigor has responded:

> 'I consider it desirable that, for the proper protection of the public, swift action should be able to be taken in relation to dangerous products as they appear on the market, without the necessity to wait for parliamentary legislative action. I consider that the power of either House of the Parliament to disallow regulations is a sufficient safeguard.'

The Committee thanks the Senator for this response. However it is not persuaded that the need for swift action justifies the enlargement of the concept of 'hazardous goods' by regulations. Other mechanisms are provided for swift action in respect of unsafe goods in new Division 1A of Part V of the Trade Practices Act 1974, inserted by the Trade Practices Revision Act 1986, and in State legislation, both of which are adopted by reference in

paragraphs 3(3)(a) and (b) of the Bill. While the sanction of disallowance is available if the power to prescribe new categories of hazardous goods is abused, disallowance does not affect any action taken under regulations while they have been in force. In view of the heavy penalties attaching to dealing in 'hazardous goods' as defined in the Bill the Committee continues to draw paragraph 3(3)(c) to the attention of the Senate under principle 1(a)(iv) in that it may be considered to constitute an inappropriate delegation of legislative power.

Sub-clause 17(1) - Delegation

Sub-clause 17(1) 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'. The Committee commented that, since the only powers of the Minister under the Act related to the appointment of the Registrar and Deputy Registrars and the determination of the location of the office of the Registrar and branch offices throughout Australia this power appeared to be unnecessarily broad. Senator Vigor has responded accepting the point made by the Committee and undertaking to move an amendment at the Committee stage of debate to remove the delegation power. The Committee thanks the Senator for this undertaking.

Clause 24 - Non-reviewable administrative decisions

Clause 24 requires the Registrar to register goods if the Registrar is satisfied that the goods are hazardous goods. Paragraph 3(3)(b) provides that a reference to hazardous goods includes a reference to goods the supply of which is prohibited by or under an enactment of a State or Territory, being an enactment that provides for prohibiting the supply of goods likely to cause the death of, or injury to, any person.

Paragraph 36(a) provides for review on the merits by the Administrative Appeals Tribunal of decisions of the Registrar registering goods as hazardous goods. While this would enable the Tribunal to examine whether the supply of particular goods is

in fact prohibited under a relevant State or Territory enactment it would not enable the review on the merits of the decision by the State or Territory authorities to prohibit the supply of the goods concerned. However doubtful this decision may have been, the Registrar, once satisfied that the supply of goods of a particular kind is prohibited in any State or Territory, would be required to register those goods and the Tribunal would not be able to go behind the initial decision to examine it on its merits.

Accordingly the Committee drew clause 24 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 Vigor has responded:

> 'I consider it desirable that where the sale of goods is prohibited in any State or Territory the goods should not be sold anywhere in Australia. Any review by the Administrative Appeals Tribunal of the original decision by the State or Territory could undermine this policy. I realise that this means that we must rely on State and Territory governments making responsible decisions, but those governments make many decisions profoundly affecting the rights of their citizens, and it is a question of those citizens and the various parliaments ensuring that their governments do act responsibly and that proper provisions are made for the review of administrative decisions. It should not be open to a manufacturer whose goods are considered dangerous by one State to unload them in other States.'

The Committee thanks the Senator for this response. However it is still concerned insofar as only one State has so far followed the lead of the Commonwealth in establishing a tribunal for the review of administrative decisions on their merits. The effect of clause 24 is to leave persons adversely affected by the registration of goods as hazardous goods under a Commonwealth Act

without an effective avenue for the review of that decision on its merits. Accordingly the Committee continues to draw 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 30 - Seizure of goods

Clause 30 provides for the seizure of goods by an officer of police where a person or corporation has been charged with an offence against the Act in relation to the goods or where the officer has reasonable grounds for believing that such an offence has been committed in relation to the goods. Clauses 32 and 33 set out a procedure for the owner or the person who had the possession, custody or control of the goods to request the return of the goods provided that the person gives security to keep the goods safely and to produce them in court whenever necessary. Clause 35 provides for the forfeiture by order of a court of goods in respect of which an offence has been committed.

The Bill is silent, however, on the length of time for which goods which have been seized under clause 30 may be retained if proceedings are not instituted for an offence against the Act in respect of the goods or if such proceedings are instituted but do not result in a conviction or an order for the forfeiture of the goods (compare sub-sections 69(2), 71(2) and 71(4) of the Wildlife Protection (Regulation of Exports and Imports) Act 1982). The Committee suggested that, in the absence of any provision dealing with this matter it would appear that goods seized under clause 30 could be retained indefinitely and that the owner of the goods would be forced to bring a civil action for their return. Accordingly the Committee drew clause 30 to the attention of the Senate under principle 1(a)(iii) in that by failing to impose limits on the retention of seized goods it might be considered to trespass unduly on personal rights and liberties.

Senator Vigor has responded accepting the point made by the Committee and undertaking to move an amendment at the Committee stage of debate to ensure that seized goods are returned if proceedings are not brought within a specified time. The Committee thanks the Senator for this undertaking.

Clause 34 - Destruction of goods

Clause 34 provides that goods which have been seized under clause 30 may be destroyed 'where the Commissioner of Police or a Deputy Commissioner of Police is satisfied that the holding at an approved place of any goods in accordance with sub-section 31(3) would be likely to involve the risk of the death of, or injury to, persons at that place'.

The Committee expressed the view that it would be preferable if the test were to be stated in objective terms - if the Commissioner or Deputy Commissioner were required to be satisfied 'on reasonable grounds', for example - rather than in subjective terms as presently drafted. Whereas at present a person challenging the Commissioner's decision would have to show, for example, that no reasonable person could have been so satisfied, if the test were stated in objective terms it would be sufficient to show that there were no reasonable grounds for concluding that death or injury was likely to result.

The Committee therefore drew clause 34 to the attention of the Senate under principle 1(a)(iii) in that by failing to state the test for the destruction of goods in objective terms it might be considered to trespass unduly on personal rights and liberties. Senator Vigor has responded accepting the point made by the Committee and undertaking to move an amendment at the Committee stage of debate to provide that the decision to destroy goods must be taken on reasonable grounds. The Committee thanks the Senator for this undertaking.

HEALTH LEGISLATION AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 17 September 1986 by the Minister for Health. As permitted by its Terms of Reference the Committee is commenting on the Bill even though it has passed both Houses of the Parliament.

The purpose of the Bill is to:

1. Amend the Health Insurance Act 1973 to:

   (a) increase the maximum gap payment between the Medicare rebate and the schedule of fees from $10 to $20; and

   (b) provide for the deregulation of Commonwealth controls over private hospitals and the abolition of bed day payments to private hospitals.

2. Amend the National Health Act 1953 to:

   (a) abolish the present Isolated Patients' Travel and Accommodation Assistance Scheme; and

   (b) provide for new arrangements under the Pharmaceutical Benefits Scheme.

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

Clauses 41 and 42 - Ill-defined administrative powers

Clauses 41 and 42 insert new sections 23DA and 23EA respectively in the Therapeutic Goods Act 1966. The new sections provide that the Secretary to the Department of Health 'may', by notice in writing, require a manufacturing corporation to give notice in writing to the Secretary of each batch of a biological product produced or to be produced in Australia by the corporation and to

furnish samples of such batches of biological products respectively. 'Biological products' are goods for therapeutic use produced from organisms or the tissue or body fluids of organisms (including vaccines).

Although the new sections are both cast in the form of a discretion conferred on the Secretary, neither sets out any criteria for the exercise of the power and no provision has been made for review of the exercise of the discretion by the Administrative Appeals Tribunal. This raises two questions. First, is it intended that all manufacturing corporations will be required to furnish information and samples in accordance with the new sections (in which case the new sections might be better cast in a form which does not leave the Secretary a discretion in making requirements)? Secondly, if it is intended that some, but not all, manufacturing corporations will be required to furnish information and samples, on what basis is this discretion to be exercised?

The latter question could be of importance in two ways. A corporation which is required to furnish information and samples may consider the requirement onerous and may be justifiably dismayed if it discovers that similar requirements are not being imposed on its competitors. Equally, a consumer group which discovers that a particular corporation is not being required to furnish samples of its biological products to the Secretary for testing may consider that the Department of Health is shirking its responsibilities. In either case, in the absence of provision for review by the Administrative Appeals Tribunal or criteria for the exercise of the discretion it would be difficult to challenge the Secretary's use of the power conferred by the two new sections.

Accordingly the Committee drew clauses 41 and 42 to the attention of the Senate under principle 1(a)(ii) in that they might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. In

closing the Second Reading debate in the Senate on 25 September 1986, Senator Grimes, representing the Minister for Health, responded to these comments as follows:

> 'The Standing Committee for the Scrutiny of Bills raised some problems with this legislation. It apparently was under the impression - I suppose this was because of the pressure of work - that, under the changes to section 29A contained in clause 46 of the Bill, the decision of the Secretary not to revoke a notice prohibiting the release of a batch of a sample, not to accept the company's application for release for sale of a batch which has been the subject of a notice, will not be subject to review. In fact, under section 29A it will be subject to review by the Administrative Appeals Tribunal. Clauses 41 and 42, which insert proposed new sections 23DA and 23EA in fact may give the appearance, if looked at by themselves, that there is no review to the AAT. If we turn then to clause 46, which deals with section 29A, we find that in fact there is provision for a review by the AAT. The provisions ensure that decisions taken by the Secretary that could adversely affect a company's operation are subject to this external review. The requirement merely to provide information or samples is considered not to require [review] because of the later safeguards.'

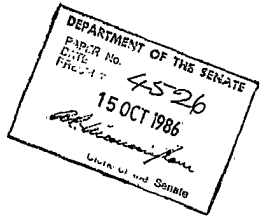
The Committee was, however, quite well aware that provision was made in the Bill for review of decisions of the Secretary under new sub-sections 23EA(4) and (5) affecting the right of corporations to supply particular batches of their biological products in Australia. Its concern was quite specifically with the discretion vested in the Secretary under new sub-sections 23DA(1) and 23EA(1) to require corporations to provide information and furnish samples. The Committee does not believe that the later safeguards in relation to bans imposed on the actual supply of biological products are pertinent to the concerns which it raised. Further, the Committee was not

specifically advocating review by the AAT of the Secretary's decision. It suggested that if all corporations were to be required to furnish information and samples then the sections might be re-cast in a form which did not leave the Secretary a discretion. However at present the Committee cannot be assured that the Secretary's discretion will not be exercised in a manner which may discriminate between different corporations.

The Committee therefore continues to draw clauses 41 and 42 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.

Michael Tate
Chairman
8 October 1986

AUSTRALIAN SENATE



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(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;

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(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 1986

The Committee has the honour to present its Fifteenth Report of 1986 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:

Freedom of Information Laws Amendment Bill 1986
Taxation Administration Amendment (Recovery of Tax Debts) Bill 1986

FREEDOM OF INFORMATION LAWS AMENDMENT BILL 1986

The Committee commented on this Bill in its Fourteenth Report of 1986 (8 October 1986). The Attorney-General 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 11 - Retrospectivity; lack of administrative review

Clause 11 would amend section 24 of the Principal Act to expand the class of requests which may be refused on the grounds that to satisfy the request would substantially divert the resources of the agency involved. The class of requests is to be known as 'multi-document requests', defined in new sub-section 24(1A) to mean, inter alia, a request that is one of a series of related requests. By virtue of paragraph 24(1A)(b) a request may be taken to be one of a series of related requests if it is one of a number made by the same person or by persons whom the agency or Minister to whom the request is made believes on reasonable grounds to be acting in concert.

The Committee was concerned, first, that these amendments might have retrospective effect in that requests made prior to the commencement of the Act might be grouped with requests made after that date to form a 'multi-document request' and so to be refused. Given that section 11 of the Act provides that, subject to the Act, every person has a legally enforceable right to obtain access to documents in accordance with the Act, it appeared to the Committee that the refusal of requests made prior to the commencement of the amendments on this basis might be considered to infringe an existing statutory right. Accordingly the Committee drew new paragraph 24(1A)(b) to the attention of the Senate under principle 1(a)(i) in that, by reason of its potential retrospective effect, it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

'The first concern is that a request made before the new s.24 comes into force might be able to be rejected by reason of its aggregation with other post-amendment requests for the purpose of applying the "multi-document request" ground for refusal of access. The effect of s.8 of the Acts Interpretation Act in relation to the proposal to replace s.24 with a new provision is that existing rights under the present s.24 will not be affected except to the extent that express provision is made to the contrary. Such express provision is, in my view, made in proposed new s.24 to the limited extent that undecided requests extant at the date of commencement of that section will be able to be dealt with under that provision where they are part of a series of related requests which is not completed before commencement. Other requests extant at that date will continue to fall to be considered under existing s.24 to the extent that that section was applicable before commencement to that request.

I am able to confirm that it is the Government's intention that new s.24 should so apply. However, I do not consider that the new s.24, in giving effect to that intention, will unduly trespass on existing rights because:

- experience indicates that only a small number of requests will be affected;

- those requests are, in the main, in the nature of ambit claims, "fishing expeditions" and the like which make disproportionate demands on the limited resources available to meet requests made under the Act;

- the diversion of resources caused by these requests impacts chiefly on other FOI applicants whose requests are considerate of resources requirements;

- for these reasons the amendment is being proposed at a time of Budget constraints in order to meet a resources problem in handling a few exceptionally large and costly requests;

- the s.24(3) obligation on agencies to consult with an applicant and provide an opportunity to remove grounds for refusal will continue unaffected;

- the Administrative Appeals Tribunal has already recognised that agencies are entitled to aggregate related requests for the purpose of applying existing s.24(1): see Re Shewcroft and Australian Broadcasting Corporation (1985) 7 ALN N307; and

- where a series of related requests is not completed until after commencement the total workload will not be clear until then and, moreover, there would be difficulty in dealing with different requests in the series on different criteria;

- the s.24 provision is discretionary and agencies will be instructed to apply it to existing requests in only the clearest cases (e.g. not where an applicant has already been advised that a request will be processed).'

The Committee thanks the Attorney-General for this response. However while the sorts of considerations raised by the Attorney-General may support a change to the law, they do not, in the Committee's view, support the retrospective application of that change to persons' rights which the Attorney-General acknowledges. Accordingly the Committee continues to draw new paragraph 24(1A)(b) to the attention of the Senate under principle 1(a)(i) in that, by reason of its retrospective application, it may be considered to trespass unduly on personal rights and liberties.

The Committee was also concerned that, although a decision to refuse to grant access to a document was subject to review by the Administrative Appeals Tribunal, such review might not extend to a decision under paragraph 24(1A)(b) that a request was one of a series of related requests and so a 'multi-document request' for the purposes of sub-section 24(1). While it might be argued that the decision that the request was a 'multi-document request' was an essential step in the decision to refuse to grant access the Committee suggested that it might be desirable that this aspect of the operation of the rights of review under the legislation should be clarified. Accordingly the Committee also drew new paragraph 24(1A)(b) 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:

> 'The Committee's second concern is that some aspects of the decision to refuse access under new s.24 may involve unreviewable administrative decisions. There is no basis for this concern. Sub-section 58(1) of the Act supplements s.43 of the Administrative Appeals Tribunal Act to confer on the Administrative Appeals Tribunal very broad powers to review any decision that has been made in respect of a request and to decide any matter in relation to the request that could have been or could be decided under the Act by the agency or

Minister concerned. The terms of these provisions are sufficiently broad to embrace all relevant aspects of a decision to refuse access under new s.24.'

The Committee thanks the Attorney-General for this response which answers its concerns in relation to this aspect of the new paragraph.

TAXATION ADMINISTRATION AMENDMENT (RECOVERY OF TAX DEBTS) BILL 1986

This Bill was introduced into the House of Representatives on 24 September 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to amend the Taxation Administration Act 1953 to modify, in relation to the recovery of unpaid tax, any application of the law of a State or Territory dealing with the limitation of actions to recover debts.

The modification of State and Territory limitation laws will enable an action for the recovery of a taxation debt to be commenced within the appropriate period specified in the relevant limitation law measured not from the due date of the debt, but from the date on which all proceedings arising out of the lodgment of an objection disputing the debt are finalised. In so modifying State and Territory limitation laws, the Bill overcomes the decision of the Queensland Full Supreme Court in Deputy Commissioner of Taxation v Moorebank Pty Ltd.

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

Clause 3 - New section 14ZKA - Retrospectivity

New paragraph 14ZKA (2)(a) provides that, if a State or Territory statute of limitations applies to an action by the Commissioner of Taxation for the recovery of a taxation debt (a matter which the Commonwealth does not concede), the relevant limitation period shall run from the conclusion of the determination of any objection lodged against the assessment or the decision of the Commissioner rather than from the time at which the assessment or decision was initially made. New paragraph 14ZKA(2)(b) provides that tax debts payable under provisions imposing additional tax for the making of false or misleading statements, the late lodgment of returns or for participation in tax avoidance schemes shall be taken to be ordinary debts rather than penalties, thus attracting a longer limitation period than would otherwise apply (assuming, once again, that State or Territory statutes of limitations apply, a point which the Commonwealth does not concede). The new provisions will apply to all causes of action, whether accruing before or after the commencement of the new section 14ZKA, other than those which, before the introduction of the Bill into Parliament, had been determined on the basis of the application of a State or Territory statute of limitations.

As is explained in the Second Reading speech, the view has previously been held that taxation debts (whether in the nature of penalties or otherwise) may, by virtue of Crown prerogative, be recovered at any time. In Deputy Commissioner of Taxation v Moorebank Pty Ltd, however, the Full Court of the Supreme Court of Queensland held that the relevant limitation periods applicable under State or Territory statutes of limitations applied to actions for the recovery of taxation debts. The Commissioner of Taxation has sought special leave to appeal this decision to the High Court but, in the meanwhile, it has been considered necessary to introduce this Bill to prevent the revenue from being endangered by a failure to recover outstanding taxation debts. In other words the retrospectivity involved is fully intended and the new section may trespass on person's rights to the extent that taxation debts which would otherwise

be barred from recovery - supposing the decision in DCT v Moorebank Pty Ltd to be upheld by the High Court - may now be able to be recovered.

The Committee recognises that the new section 14ZKA deals only with the time at which a claim for recovery of a tax debt may be lodged and that it does not alter in any way the substance of the taxation law. It also recognises that the new section cannot be said to work any injustice insofar as it merely restores the law to what it was thought to be prior to the decision in DCT v. Moorebank Pty Ltd. However the new section would, assuming that case to be rightly decided, retrospectively alter the rights of taxpayers by enabling the recovery of taxation debts which would otherwise be barred by the expiry of limitation periods prior to the commencement of the new section. Accordingly the Committee draws new section 14ZKA to the attention of the Senate under principle 1(a)(i) in that by reason of this retrospective effect it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman
15 October 1986

AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF 1986

22 OCTOBER 1986

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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 1986

The Committee has the honour to present its Sixteenth Report of 1986 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:

Health Legislation Amendment Bill (No.2) 1986
Social Security and Veterans' Affairs (Miscellaneous Amendments) Bill 1986
Student Assistance Amendment Bill 1986

HEALTH LEGISLATION AMENDMENT BILL (NO.2) 1986

The Committee commented on this Bill in its Fourteenth Report of 1986 (8 October 1986). Although the Bill has now become law, the Minister for Health has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Clauses 41 and 42 - Ill-defined administrative powers

Clauses 41 and 42 insert new sections 23DA and 23EA respectively in the Therapeutic Goods Act 1966. The new sections provide that the Secretary to the Department of Health 'may', by notice in writing, require a manufacturing corporation to give notice in writing to the Secretary of each batch of a biological product produced or to be produced in Australia by the corporation and to furnish samples of such batches of biological products respectively. 'Biological products' are goods for therapeutic use produced from organisms or the tissue or body fluids of organisms (including vaccines).

The Committee commented that although both sections were cast in the form of discretions conferred on the Secretary, neither set out criteria for the exercise of the power and no provision had been made for review by the Administrative Appeals Tribunal. The Committee questioned whether all manufacturing corporations would be required to furnish information (in which case the discretion afforded the Secretary would be unnecessary) or, if only some would be so required, whether this might be regarded as onerous in the absence of any provision for review. The Minister for Health has responded:

> 'The Secretary's powers would not be applied universally but only when it was considered that there was good reason to do so. This would be, for example, when the results of routine surveillance testing by an

official analyst or of investigation by an official analyst or inspector of a specific complaint revealed a serious or continuing failure of a particular product to meet acceptable standards of safety or effectiveness. In such a case the powers would be exercised on a continuing basis until it was clear that the problem had been identified and solved.

Section 23DA is not subject to review by the AAT. The Section enables the Secretary to identify a particular batch or batches and to prohibit the trading of the batch or batches until the information is supplied. This is not regarded as onerous as it would not seriously interrupt a manufacturer's business.

Similarly Sub-Sections 23EA (1) - (3) are not subject to review. These enable the Secretary to obtain samples of a particular batch or batches and prohibit the trading of the batch or batches until the samples are supplied. Again this would not seriously interrupt a manufacturer's business.'

The Committee thanks the Minister for this response. It suggests that, had the basis on which it is in fact intended that the Secretary will exercise the discretion been set out in new sections 23DA and 23EA, then that would have materially assisted review of the Secretary's exercise of the powers conferred by those sections as to legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. As the matter stands, however, a manufacturing corporation which feels that it has been singled out unfairly or a consumer group which feels that there has been a failure by the Secretary to exercise the power conferred by those sections will have little opportunity to challenge the Secretary's decision. Accordingly the Committee continues to draw sections 23DA and 23EA to the attention of the Senate under principle 1(a)(ii) in that, by failing to set out the criteria on the basis of which the Secretary's powers are to

be exercised, they may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

SOCIAL SECURITY AND VETERANS' AFFAIRS (MISCELLANEOUS AMENDMENTS) BILL 1986

This Bill was introduced into the House of Representatives on 10 October 1986 by the Minister for Social Security.

The Bill amends the Social Security Act 1947 and the Veterans' Entitlements Act 1986 to implement decisions made in the Budget affecting pensions and benefits payable under those Acts including the deferral for six weeks of the indexation increases in those pensions and benefits. The Bill will also defer from 1 November 1986 to 1 July 1987 the changes contained in the Social Security (Poverty Traps Reduction) Act 1985 and will correct various errors and omissions in the Veterans' Entitlements Act 1986.

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

Paragraph 34(d) and clause 35 -
New sub-sections 107(6) and 108(1C) - Lack of parliamentary scrutiny

Paragraph 34(d) and clause 35 would insert new sub-sections 107(6) and 108(1C) respectively in the Social Security Act 1947. The new sub-sections provide that where, on or after 1 November 1986, the Secretary is satisfied that a person who is included in a class of persons specified by the Minister by notice in writing published in the Gazette may reasonably be expected to fulfil, or has fulfilled, the requirements of the preceding provisions of the respective sections (relating to

qualifications to receive unemployment and sickness benefits respectively) in respect of a period, the person is to be qualified to receive unemployment benefit or sickness benefit, as the case requires, in respect of that period. Such a person will be able to be paid in advance for the relevant period, rather than in arrears, as is customary.

The Explanatory Memorandum indicates that one class of persons which the Minister might specify by notice under new sub-section 107(6) would be 'suitable persons over 55 years of age who have been in receipt of an income security payment for at least one year'. The Committee expressed concern, however, that no provision had been made for parliamentary scrutiny of notices published by the Minister under either of the two new sub-sections. Such notices clearly have legislative effect and, prima facie, should be subject to tabling and disallowance as if they were regulations. Accordingly the Committee drew the new sub-sections to the attention of the Senate under principle 1(a)(v) in that they might be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister for Social Security has responded:

> 'Paragraphs 34(d) and clause 35 would amend the Social Security Act 1947 to substitute new sub-sections 107(6) and 108(1C). The current sub-sections enable payment in advance of unemployment benefit and sickness benefit, respectively, as compared to the normal situation where payment is in arrears. In practice, the power to pay in advance is exercised by delegates of the Secretary of the Department of Social Security according to guidelines laid down by the Secretary. These guidelines are administrative in nature.
>
> There has been some uncertainty within the Department as to whether the legislation and the guidelines are being applied as intended. This is a reflection of the

difficulties inherent in the delivery of programs affecting large numbers of people throughout Australia by a large and decentralised administration.

In order to give more certainty and greater control over this particular aspect of payment of unemployment and sickness benefits, it was considered desirable to provide within the legislation key elements of the current guidelines concerning the categories of people who could be considered appropriate for payment in advance. It is necessary to do this with some care so as to avoid disadvantaging people, which imposes the requirement for a quick change in these guidelines, especially in the early stages.

Accordingly, the mechanism of a Ministerial notice in writing was chosen for this purpose. Apart from giving more certainty and control over administration, the notice would be published in the Gazette, so enabling public awareness of administrative change.

While I accept that these notices have a legislative effect, it seems to me inappropriate that they should be subject to tabling and disallowance as if they were regulations.

Having said that, I take the view the Social Security Act 1947 should be as clear and self-contained as possible. It is my intention that, after there has been some experience in this area and satisfactory criteria have been developed, the content of the notices would be incorporated in the Act. I would expect that this could be achieved during 1987.'

The Committee thanks the Minister for this response. However it remains concerned that the proposed notices will not be subject to parliamentary scrutiny even if they are to be regarded only as an interim step to future enactment of the relevant guidelines.

The Committee believes that it is important for the Parliament to maintain its oversight of delegated legislation in all its forms and not merely regulations. Accordingly the Committee continues to draw new sub-sections 107(6) and 108(1C) to the attention of the Senate under principle 1(a)(v) in that they may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 62 - Lack of parliamentary scrutiny

Clause 62 would insert a new sub-section 5(13) in the Veterans' Entitlements Act 1986 which would empower the Minister, by notice in writing in the Gazette, to determine that the Act, or specified provisions of the Act, apply to and in relation to a person, or a person included in a class of persons, as if -

(a) the person was, while rendering service of a kind specified in the notice, a member of the Defence Force who was rendering continuous full-time service;

(b) the person, being a member of the Defence Force, was, while rendering service of a kind specified in the notice, rendering continuous full-time service; or

(c) the person was, while rendering service of a kind specified in the notice, a member of a specified unit of the Defence Force.

The new sub-section would thus enable the Minister by determination to extend the ambit of the Act to cover persons who would not otherwise be eligible to receive pensions, benefits and allowances and treatment under the Act.

The Committee expressed concern, once again, that no provision had been made for parliamentary scrutiny by way of tabling and potential disallowance of notices published by the Minister under the new sub-section. The Committee therefore drew the clause 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 for Veterans' Affairs has responded:

> 'I do not see any need for express provision relating to Parliamentary scrutiny. New sub-section 5(13) is intended to overcome a gap in the Veterans' Entitlements Act which could have led to denial of repatriation benefits to groups or individuals who were previously entitled under the Repatriation Act. New sub-section 5(13) will do no more than this. It should not be regarded as a broad new discretion which will be used to give eligibility to new recipients. It does not affect the eligibility of Veterans generally whose entitlement is to continue to be determined under the Veterans' Entitlements Act itself.
>
> Determinations to be made under the provision will relate to those groups who, while not members of the Defence Force serving on continuous full-time service, were exposed to the risk of injury or death through their involvement with the Defence Force in World War II or later conflicts.
>
> These groups include: -
>
> - employees of the Commonwealth such as civilian telegraphists and camoufleurs and certain cameramen, photographers and war correspondents; and
>
> - accredited representatives of philanthropic organisations who were approved by the Department of Defence to provide welfare services to the Defence Force during World War II or the Korean, Malaysian or Vietnam conflicts.

> Further information regarding these groups is set out in the Explanatory Memorandum to the Bill, commencing at page 64.
>
> Given the Government's intentions regarding the use of new sub-section 5(13), I cannot envisage a situation where there might be need for a power to disallow a Notice that had been issued. To do so, would be to deny groups or individuals repatriation benefits.'

The Committee thanks the Minister for this response. Although it is the Government's intention that the power to be conferred on the Minister by new sub-section 5(13) will only be used for very limited purposes it is not so restricted in its terms. Parliamentary scrutiny would enable the Parliament to continue to be responsible for the scope of the entitlement to pensions and benefits under the Veterans' Entitlements Act 1986. The power to disallow delegated legislation is used very rarely but it is important for the Parliament to retain this power. Accordingly the Committee continues to draw clause 62 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.

STUDENT ASSISTANCE AMENDMENT BILL 1986

This Bill was introduced into the Senate on 8 October 1986 by the Minister for Education.

The Bill amends the Student Assistance Act 1973 to provide for the granting of assistance to students in secondary education.

The Principal Act and its regulations currently cover the granting of assistance to tertiary and postgraduate students only, under the Tertiary Education Assistance Scheme (TEAS) and

the Postgraduate Awards Scheme (PGA). The Bill will not affect PGA but will allow the introduction of a single scheme of assistance covering both secondary and tertiary students. This new scheme, to be known as AUSTUDY, will replace TEAS, the Adult Secondary Education Assistance Scheme (ASEAS) and the Secondary Allowances Scheme (SAS). ASEAS and SAS are not currently covered by legislation.

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

Paragraphs 4(a), (c) and (e) - 'Henry VIII' clauses

Paragraphs 4(a), (c) and (e) insert new definitions of 'education institution', 'secondary school' and 'university' in section 5 of the Principal Act. The term 'education institution' is defined to include any educational institution or any other institution, authority or body in Australia that, under the regulations, is to be treated as an education institution for the purposes of the Act. The terms 'secondary school' and 'university' are similarly defined to mean secondary schools and universities respectively that, under the regulations, are to be treated as secondary schools or universities for the purposes of the Act. Education assistance is only available to persons undertaking a course of study or instruction at an education institution (which includes a university and a secondary school).

By so leaving the content of definitions which are central to the Bill to be filled in by regulations the relevant paragraphs may be characterised as 'Henry VIII' clauses. The Committee is aware that in this respect the new definitions do not differ from the existing definitions in the Act. Nevertheless it draws the paragraphs to the attention of the Senate under principle 1(a)(iv) in that the new definitions may be considered to constitute an inappropriate delegation of legislative power.

Clause 5 - New section 10 - 'Henry VIII' clause

Clause 5 would insert a new Part III in the Principal Act relating to Education Assistance. New section 10 in that part would provide that such assistance is only available to a person undertaking a course, or part of a course, which the Minister has determined in writing to be a secondary or tertiary course for the purposes of the section. Once again, because it leaves the entire effect of the statutory provision to be determined by the Minister, the new section may be characterised as a 'Henry VIII' clause although, as before, the Committee recognises that in this respect it does not differ from the previous scheme of the Act. The Committee draws the new section to the attention of the Senate under principle 1(a)(iv) in that, as a 'Henry VIII' clause, it may be considered to constitute an inappropriate delegation of legislative power.

Michael Tate
Chairman
22 October 1986

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN

MR PRESIDENT,

I PRESENT THE SEVENTEENTH REPORT OF 1986 OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

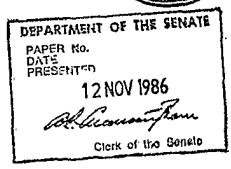
NURSING HOMES AND HOSTELS LEGISLATION AMENDMENT BILL 1986
AND
STATES GRANTS (TERTIARY EDUCATION ASSISTANCE) AMENDMENT BILL (NO.2) 1986

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO. 17 DATED 12 NOVEMBER 1986.

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1986

12 NOVEMBER 1986

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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 -

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(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 1986

The Committee has the honour to present its Seventeenth Report of 1986 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:

Nursing Homes and Hostels Legislation Amendment Bill 1986
States Grants (Tertiary Education Assistance) Amendment Bill (No.2) 1986

NURSING HOMES AND HOSTELS LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Representing the Minister for Community Services.

The Bill implements Budget measures requiring amendments to nursing homes and hostels legislation administered by the Minister for Community Services, namely the Aged or Disabled Persons Homes Act 1954, the National Health Act 1953 and the Nursing Homes Assistance Act 1974. In particular the Bill would -

- enable grants to be made up to the amount of the full capital cost of a home for aged or disabled people where the home is to be used exclusively for the accommodation of members of financially disadvantaged groups; and

- introduce new growth control arrangements over the approval mechanisms for new nursing homes and new nursing home beds in existing nursing homes.

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

Paragraph 4(a) - Non-reviewable decision

Paragraph 4(a) substitutes a new sub-section 9(1) in the Aged or Disabled Persons Homes Act 1954 which would permit the Secretary to the Department of Community Services to make grants to eligible organisations up to the full capital cost of an approved home 'in a case where the Secretary is satisfied that the approved home is intended to be used exclusively or almost exclusively for the accommodation of financially disadvantaged persons'. No provision has been made for review on the merits of

the exercise of this discretion conferred on the Secretary so that it could only be challenged as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977.

The Committee recognised that this lack of review was consistent with the present structure of the Act which left the making of capital grants to the discretion of the Secretary. However the Committee nevertheless drew paragraph 4(a) 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 Community Services has responded:

> 'As the Committee recognizes, this lack of review is consistent with the present structure of the Act. Under the Act, capital grants are made from a limited resource determined in the Budget context. The Secretary is given the discretion to make grants so that the resource can be distributed equitably according to policy considerations.
>
> As a result, no criteria are, or should be specified under the Act which can establish entitlement to a capital grant. Review on the merits is, in my view, appropriate where statutory criteria exist establishing entitlement. However, where a finite resource is being apportioned, it is not appropriate to provide for review on the merits, as in assessing the merits of an individual applicant's case, it would be necessary to consider the relative merits of all applicants. This approach is entirely consistent with that recently adopted by the President of the AAT, the Honourable Mr Justice J D Davies in the nursing homes context. I address this matter in more detail in my response to the Committee's comments in relation to Clauses 19 and 32 of the Bill.

> Under sub-section 7(1) of the Act, the Secretary may make capital grants. The new sub-section 9(1) is an ancillary provision, under which the amount of the grant is determined. I would consider it most inappropriate to make this ancillary decision subject to review on the merits when the decision to make a grant is not subject to such review.'

The Committee thanks the Minister for this response. However the Committee considers it important to distinguish between the making of grants - which the Committee accepts will be determined by Budgetary considerations in any given year - and the conditions of eligibility for grants. New sub-section 9(1) determines the maximum amount of any grant but it does not determine whether a grant will be made. Review of the Secretary's decision under sub-section 9(1) would thus not involve review of any grants or the apportionment of finite resources. The Committee therefore continues to draw paragraph 4(a) 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 4(b) - Lack of parliamentary scrutiny

Paragraph 4(b) inserts a new sub-section 9(3) in the Aged or Disabled Persons Homes Act 1954 which defines the term 'financially disadvantaged person' for the purposes of the new paragraph 9(1) relating to capital grants to approved homes. New sub-section 9(3) would provide that the term means an aged or disabled person included in a class of persons determined by the Secretary, in writing, to be a class of financially disadvantaged persons. No provision has been made for such determinations by the Secretary to be subject to parliamentary scrutiny by way of tabling and disallowance.

Accordingly the Committee drew paragraph 4(b) 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 for Community Services has responded:

> 'It ... seems to me inappropriate that such a determination should be subject to tabling and disallowance. The provision has been included to provide the flexibility necessary to make a quick response where groups with real and pressing needs are identified. Making these determinations subject to Parliamentary disallowance would simply remove a flexible and timely method of helping a group of persons identified as being in real need. In such circumstances, I do not consider it appropriate to provide for Parliamentary scrutiny of the determination.'

The Committee thanks the Minister for this response. It cannot agree, however, that provision for parliamentary oversight of the power which the Parliament has delegated to the Secretary would remove the necessary flexibility inherent in that power. It would, however, ensure that that power is used only as the Parliament intended. The Committee therefore continues to draw paragraph 4(b) 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 7(2) and paragraph 25(1)(a) - Lack of parliamentary scrutiny

Sub-clause 7(2) and paragraph 25(1)(a) amend the definitions of 'nursing home care' in section 4 of the National Health Act 1953 and section 3 of the Nursing Homes Assistance Act 1974 respectively with the effect that new services previously included in those definitions by way of regulations will now be able to be included by the publication of a Ministerial notice in

the Gazette. No provision has been made for these notices to be subject to tabling and disallowance although such provision has been made in relation to notices specifying 'Government nursing homes' for the purposes of the two Acts where Ministerial notices have similarly been substituted for regulations: see clauses 22 and 38.

The Committee drew sub-clause 7(2) and paragraph 25(1)(a) to the attention of the Senate under principle 1(a)(v) in that they might be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister for Community Services has responded:

> 'The Bill provides for a Gazette notice mechanism to be substituted wherever possible for regulations under the National Health Act 1953 and the Nursing Homes Assistance Act 1974. The amendments are being made to simplify the mechanism for making changes to the matters prescribed under these Acts.
>
> In a number of cases, the matters currently prescribed under these Acts affect individual rights and are significant enough to require Parliamentary scrutiny. For example, notices under the following provisions of the National Health Act 1953 would be made subject to tabling and disallowance by this Bill -
>
> - sub-section 4(1), definition of "Government nursing home", which affects the rate of benefit payable under the Act to the proprietor of a nursing home;
>
> - sub-section 47(1), which provides the basic benefit payable in respect of nursing home care;

- sub-section 47(2) which provides the minimum rate of daily patient contribution in non-Government nursing homes; and

- section 49 which provides the amount of extensive care benefit payable in respect of nursing home care.

However, upon close consideration, several matters required to be prescribed under each Act appeared to be of an administrative nature and to not be significant enough to require Parliamentary scrutiny.

Sub-clause 7(2) and paragraph 25(1)(a) of the Bill would amend the definitions of "nursing home care" in section 4 of the National Health Act 1953 and section 3 of the Nursing Homes Assistance Act 1974 respectively to simplify the mechanism for approving services of a kind provided in a nursing home.

I consider these provisions to be of minor significance. No services have ever been prescribed under them and I have no intention to specify any in the future. The amendment is being made to maintain consistency in these Acts by providing for a Gazette notice mechanism wherever possible throughout both Acts.'

The Committee thanks the Minister for this response. Despite the Minister's opinion to the contrary it appears to the Committee that the definitions of 'nursing home care' in the two Acts are of central importance since benefits are payable under the former Act in respect of patients receiving 'nursing home care' and the term 'nursing home' is defined under the latter Act as premises in which patients are received for the purpose of 'nursing home care'. The power to prescribe new services for the purposes of these two definitions is clearly legislative in character and the fact that the power has not yet been used does not constitute an

argument for removing its future exercise from parliamentary scrutiny. The Committee therefore continues to draw sub-clause 7(2) and paragraph 25(1)(a) to the attention of the Senate under principle 1(a)(v) in that they may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 18 - Lack of parliamentary scrutiny

Clause 18 removes from parliamentary scrutiny the qualifications which nurses on Christmas Island and the Cocos (Keeling) Islands are required to have in order to be 'registered nurses' for the purposes of the supervision and certification of domiciliary nursing care for which benefits are payable. Such qualifications, previously prescribed by regulations, are now to be determined by the Minister by notice in the Gazette.

The Committee drew clause 18 to the attention of the Senate under principle 1(a)(v) in that, once again, it might be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister for Community Services has responded:

> 'I consider this provision to be of minor significance. No qualifications have ever been prescribed and I have no intention to specify any in the future. This matter is, in my view, more properly an administrative matter and is not significant enough to require Parliamentary scrutiny.'

The Committee thanks the Minister for this response. Once again it notes that the power in question is legislative rather than administrative, and that it is important that the Parliament retain some oversight of any legislative power which it delegates. The Committee therefore continues to draw clause 18 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 19 and 32 - Non-reviewable decisions

Clauses 19 and 32 substitute a new sub-section 105AAB(1) in the National Health Act 1953 and a new definition of 'reviewable decision' in sub-section 11A(1) of the Nursing Homes Assistance Act 1974 respectively, withdrawing from review by the Administrative Appeals Tribunal certain decisions of the Minister relating to the approval of nursing homes. The Explanatory Memorandum justifies the withdrawal of these decisions from review on the basis that, following the proposed introduction of *maximum bed numbers, such decisions will involve the* apportionment of a limited resource among a number of claimants and are therefore inappropriate for review by the Administrative Appeals Tribunal.

The Committee noted that it recognised that it was the view of the Administrative Review Council that decisions which involved apportioning a finite resource were not appropriate for review on the merits because in assessing the merits of an individual applicant's case it would be necessary also to assess the relative merits of all successful applicants who received a portion of the limited resource (see paragraph 41 of the Council's Eighth Annual Report 1983-84). Nevertheless the Committee drew clauses 19 and 32 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 Committee stated that, in so doing, it hoped to promote a fuller consideration of this aspect of policy in relation to the review of administrative decisions at the relevant stage of debate in the Parliament. The Minister for Community Services has responded:

> 'Clauses 19 and 32 substitute a new sub-section 105AAB(1) in the National Health Act 1953 and a new definition of "reviewable decision" in sub-section 11A(1) of the Nursing Homes Assistance Act 1974 respectively, which withdraw certain decisions relating

to the approval in principle and approval of nursing homes and the numbers of beds therein from review by the Administrative Appeals Tribunal (AAT).

In my view, it is not appropriate for the provision of review on the merits in relation to these matters. The decision to approve new nursing home beds for which recurrent funding is provided involves a decision to apportion a limited resource determined in the Budget context. The provision for review on the merits is not appropriate in such a case, as in assessing the merits of an individual applicant's case, it would be necessary to consider the relative merits of all applicants.

The provision for review on the merits of decisions to approve beds becomes even more inappropriate under the new growth control arrangements, where the maximum number of beds in each region is specified, and where any review decision to allocate additional resources in a particular area will necessarily involve the withdrawal of resources already allocated elsewhere.

In specifying these maximum bed numbers, I will be taking into account factors of the following kind -

- the characteristics of the community in a particular area;
- the needs of the community for community care services generally; and
- the nature and extent of existing provision for community care.

The AAT is an adjudicative review body which makes decisions or determinations on the basis of the material before it. In my view, the AAT's hearing processes are not well suited for the consideration of matters of these kinds.

The President of the AAT, the Honourable Mr Justice J D Davies, wrote to the Chairman of the Administrative Review Council (ARC), Mr E J L Tucker, in a letter dated 29 August 1986, concerning the current jurisdiction of the AAT in relation to section 39A of the National Health Act 1953....

From the letter, it is clear that the President of the AAT considers the current jurisdiction of the AAT in relation to section 39A of the National Health Act 1953 infringes the policy adopted by the Administrative Review Council that it is inappropriate for the AAT to have jurisdiction in a circumstance where it is necessary for the Tribunal to apportion a limited resource among a number of claimants. The letter also refers to the problems the AAT has in efficiently handling matters of this type.

I understand that a sub-committee recently set up by the ARC to look at the matter of the jurisdiction of the AAT in relation to nursing home approvals has also raised concerns that the AAT's jurisdiction to review decisions made under section 39A(1), (2), (3) or (4) which relate to the nursing home needs of an area is not appropriate. It has further raised concerns that, as a consequence, the AAT's jurisdiction to review decisions made under sections 40AA, 40AD and 41(2) which relate to the nursing home needs of an area is also inappropriate.

> With the introduction of the new growth control arrangements, the opportunity has been taken to meet these concerns by withdrawing those provisions that come under the new arrangements from AAT jurisdiction.'

The Committee thanks the Minister for this response. In continuing to draw clauses 19 and 32 to the attention of the Senate, together with the Minister's helpful response, the Committee hopes to promote a fuller consideration of the issues involved at the appropriate stage of debate on the Bill.

STATES GRANTS (TERTIARY EDUCATION ASSISTANCE) AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Education.

The purpose of the Bill is to amend the States Grants (Tertiary Education Assistance) Act 1984 to require institutions which receive Commonwealth funds for higher education places to impose the higher education administration charge announced in the Budget.

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

Paragraph 3(c) - Lack of parliamentary scrutiny

Paragraph 3(c) inserts in section 3 a definition of 'relevant enrolment', paragraph (d) of which excludes from the definition the enrolment of a person who is in receipt of a pension, benefit or allowance from the Commonwealth, being a person included in a class of persons specified by the Minister for the purposes of the paragraph by notice in writing published in the Gazette. The

States and the Northern Territory are required to ensure that relevant institutions impose the new $250 administration charge in respect of each 'relevant enrolment' and the exclusion in paragraph (d) is also incorporated by reference in the Australian National University Amendment Bill 1986, the Canberra College of Advanced Education Amendment Bill 1986 and the Maritime College Amendment Bill 1986 which deal with the imposition of the new administration charge by those institutions.

Notices specifying classes of persons to be excluded under paragraph (d) are not subject to tabling and disallowance as they would be, for example, if the Minister were required to specify the classes of persons excluded in regulations. The Committee therefore drew paragraph (d) of the definition of 'relevant enrolment' 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 for Education has responded:

> 'The gazettal provision in paragraph 3(c) is the process of formally notifying exemptions from payment of the Higher Education Administration Charge. This course is proposed because:
>
> - the exemptions from the charge are provided to the same pensioner/beneficiary categories who are eligible for the special $15 a week education allowance under AUSTUDY. The enabling legislation for AUSTUDY does not yet exist and formal cross referencing is therefore not possible;
>
> - if determinations of exempt groups were subject to tabling and disallowance as suggested, the situation could arise in which persons exempted from the charge and subsequently enrolled could become liable for the charge some substantial time after the public notification of their exemption and their subsequent enrolment in courses; and

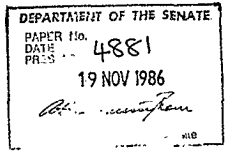
- similar notification provisions occur in other legislation. Two examples are Section 84(4) and 85(4) of the Social Security Act 1947. These were added to the Principal Act in the Social Security Legislation Amendment Act - No.98 of 1982 and relate to the gazettal of declarations by the Minister for Social Security on the status of certain pensions, benefits or allowances for Family Income Supplement purposes.'

The Committee thanks the Minister for this response. However the fact that the exemptions from the charge are to be provided to the same pensioner/beneficiary categories who are to be eligible for the special $15 a week education allowance under 'AUSTUDY' would not appear to be a reason for preferring Ministerial notices to regulations. Similarly the possibility of inconvenience arising from any subsequent disallowance of regulations is no doubt a matter which would weigh with the Parliament in determining whether to exercise the power of disallowance in an appropriate case, but it cannot be regarded as an argument against making provision for parliamentary scrutiny. With regard to sub-sections 84(4) and 85(4) of the Social Security Act 1947, the Committee drew attention to these provisions when they were added by the Social Security Legislation Amendment Bill 1982 as examples of 'Henry VIII' clauses permitting the Minister to vary the application of the Act by Gazette notice (see the Committee's Fourteenth Report of 1982).

The Committee continues to draw paragraph (d) of the definition of 'relevant enrolment' 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.

Michael Tate
Chairman
12 November 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1986

19 NOVEMBER 1986

THE SENATE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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

EIGHTEENTH REPORT

OF 1986

The Committee has the honour to present its Eighteenth Report of 1986 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:

Australia Card Bill 1986
Australian Capital Territory Tax (Transfers of Marketable Securities) Bill 1986
Overseas Students Charge Amendment Bill 1986
Overseas Students Charge Collection Amendment Bill 1986
Parliamentary Privileges Bill 1986
Protection of the Sea Legislation Amendment Bill 1986
Science and Industry Research Legislation Amendment Bill 1986
Subsidy (Cultivation Machines and Equipment) Bill 1986
Taxation Laws Amendment Bill (No.4) 1986

AUSTRALIA CARD BILL 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Minister for Health.

The purpose of the Bill is to create a national system of identification to facilitate the administration and operation of Commonwealth laws relating to taxation, social security, medical and hospital benefits and immigration.

The Bill provides for the operation of the national system of identification by the establishment of the Australia Card Register and the issue of an Australia Card. The Health Insurance Commission will be the administering authority for the Australia Card program.

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

Sub-clause 12(15) - Lack of parliamentary scrutiny

Sub-clause 12(15) provides that persons included in a class of persons specified by the Minister by notice in the Gazette are not to be obliged to comply with requirements made by an issuing agency with respect to the making of photographs, the provision of specimen signatures and attendance at interviews. No provision has been made for parliamentary scrutiny of such notices and they are therefore not subject to tabling and disallowance as would be the case if the classes of persons to be exempted were to be prescribed by regulations.

The Committee drew sub-clause 12(15) 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 for Health has responded:

> 'I appreciate the Committee's concern in this matter. Although the provision was devised as a method for the Minister to exempt a person, included in a class of persons specified in the notice, from one or more of the requirements in clause 12, in the event that it appears unreasonable for the person to have to comply with the requirements, I agree that there should be Parliamentary scrutiny of such notices and that they should be subject to tabling and disallowance provisions.'

The Minister further indicates that the necessary amendments will be made through the Statute Law (Miscellaneous Provisions) Bill in the Autumn Session of 1987. The Committee thanks the Minister for this undertaking, which answers its concerns in relation to the sub-clause. While the Committee would prefer to see the amendments made to the Bill while the Bill is before the Parliament the Committee can see the difficulty the Minister would be placed in were the Senate to agree to the amendments only after the House of Representatives had risen for the summer recess.

Sub-clause 25(6) - Availability of personal information for public access

Sub-clause 25(6) provides that the provisions of the Act, other than, inter alia, sub-sections 55(1) and (3), apply in relation to applications and requests made to the Authority and documents given to the Authority to verify the identity and eligibility of persons as if those documents formed part of the Australia Card Register. Such applications and documents will contain personal information to be included on the Register and it is therefore important that they be given the same protection with regard to unauthorised access and improper disclosure as is given to the Register itself. However sub-sections 55(1) and (3) are the provisions which exempt the Register from the application of the Freedom of Information Act 1982 and (except to the extent that the Register contains information that relates only to persons

who are dead) the Archives Act 1983. It is therefore apparently intended that, subject to the exemptions specified in those Acts, access will be available to the applications and documents referred to above pursuant to those Acts even though the Register itself will be exempt.

The Committee stated that it seemed clear that the relevant applications and documents, to the extent that they contained personal information, would be exempt from disclosure under the two Acts on the ground that to make them available would involve an unreasonable disclosure of information relating to the personal affairs of a person (see section 41 of the Freedom of Information Act 1982 and paragraph 33(1)(g) of the Archives Act 1983). However the Committee raised the question why it had been chosen to rely on these exemptions, which might be uncertain in their application, rather than to include the applications and other documents in the blanket exception to be provided by sub-clauses 55(1) and (3). Such applications and other documents by their very nature could only contain personal information required to be entered on the Register, information relevant to such information or to the verification of such information and information relating to the identity of a person or the eligibility of a person for the issue of a Card. The Committee therefore drew sub-clause 25(6) to the attention of the Senate under principle 1(a)(i) in that by leaving open the possibility that such personal information might be made available for public access it might be considered to trespass unduly on personal rights and liberties. The Minister for Health has responded:

> 'The Freedom of Information Act and the Archives Act were excluded from applying to the Register because Part V of the Bill provides a system of access to the Register for Card-subjects. It would have been unnecessary and unproductive to duplicate those provisions by allowing the Freedom of Information Act and the Archives Act to apply to the Register.

> The documents covered by sub-clause 25(6) are not formally part of the Register and it was not considered appropriate to attempt to modify the system devised for access to the Register in Part V of the Bill to those documents. Any personal information in the documents will be given the same degree of protection as any similar documents to which access is sought under the Freedom of Information Act or the Archives Act. The degree of protection given to personal information under those Acts is considered to be no less than that provided to information on the Australia Card Register under the Australia Card legislation.'

The Committee thanks the Minister for this response. While in practice the protection accorded to personal information by the Freedom of Information Act 1982 ('FOI Act') and the Archives Act 1983 ('Archives Act') may be no less than that provided for information on the Australia Card Register under the Australia Card Bill 1986, the Committee notes that it is structured differently. Whereas under the Bill only the Card-subject or the prescribed representative of the Card-subject (apart from officials of the Department of Social Security, the Taxation Office and the Health Insurance Commission) are to be entitled to access to the Register, under the FOI Act and the Archives Act there is a prima facie right of public access. The question whether access should be refused on the ground that the document contains information relating to the personal affairs of a person rests to be determined in respect of the FOI Act by the agency or Minister to which the request for access is made (having regard to any submissions which may be made by the person whose personal affairs are in issue under new section 27A to be inserted in the FOI Act by the Privacy (Consequential Amendments) Bill 1986) and in respect of the Archives Act by the Director-General of the Archives in consultation with the responsible Minister. In both cases an appeal from the refusal to grant access lies to the Administrative Appeals Tribunal. Thus the protection accorded by

the FOI Act and the Archives Act may be said at least to be less certain than that provided to information on the Australia Card Register by the Bill.

In continuing to draw sub-clause 25(6) to the attention of the Senate, together with the Minister's response, the Committee hopes to promote a fuller consideration of the issue involved at the Committee stage of debate on the Bill.

Sub-clauses 121(1), 145(1) and 147(1) - Lack of limitation as to *reasonableness of time or place*

Sub-clauses 121(1) and 145(1) provide that a member of the Data Protection Agency or an Associate Commissioner conducting an inquiry in relation to a reviewable decision or an investigation into a complaint may require a person, by notice in writing, to furnish information and produce documents or records relevant to the inquiry or investigation 'at such place, and within such period or on such day and at such time, as are specified in the notice'. Sub-clause 147(1) provides that the Agency may, by notice in writing, require a complainant, the body about which a complaint has been made and any other person who, in the opinion of the Agency, is likely to be able to provide information relevant to the matter to which the complaint relates to attend a compulsory conference 'at a time and place specified in the notice'. Failure to comply with a notice under sub-clause 121(1) or 145(1) without reasonable excuse is an offence punishable by a fine of $2,000 or imprisonment for 12 months or both in the case of a natural person and by a fine of $10,000 in the case of a body corporate. Failure to attend a compulsory conference as required under sub-clause 147(1) without reasonable excuse is an offence punishable by a fine of $1,000 or imprisonment for 6 months or both in the case of a natural person and by a fine of $5,000 in the case of a body corporate.

In none of the three sub-clauses is it specified that the times and places at which persons may be required to attend or to furnish information or produce documents must be reasonable. As

the Committee has stated previously in regard to similar provisions, it does not consider that the defence of reasonable excuse for non-compliance is a sufficient safeguard and it does not believe that such powers should be read as subject to an implicit requirement of reasonableness. The highest that this latter argument can be put in the Committee's view is that relief could be granted if the power were to be exercised in such a manner that no reasonable person could have exercised the power in that fashion. This is rather different from a positive stipulation in the legislation that the times and places at which persons may be required to attend should be reasonable. The Committee therefore drew sub-clauses 121(1), 145(1) and 147(1) to the attention of the Senate under principle 1(a)(i) in that by failing to contain such a stipulation they might be considered to trespass unduly on personal rights and liberties. The Minister for Health has responded:

> 'My view is that exercise of the powers referred to in these sub-clauses would be subject to an implicit requirement of reasonableness and if the powers were exercised unreasonably they would be subject to challenge in the courts. The defence of reasonable excuse would also assist persons who having received a notice to attend an Agency inquiry or to provide information to the Agency were unable rather than unwilling to attend an inquiry or investigation or produce the information.
>
> However I appreciate the viewpoint expressed by the Committee that the provisions specified should include a proviso that the times and places referred to in notices should be reasonable - and I undertake that this test of reasonableness will be made explicit on the face of the legislation.'

Once again the Minister indicates that the necessary amendments will be made through the Statute Law (Miscellaneous Provisions) Bill in the Autumn Session of 1987. The Committee thanks the Minister for this undertaking, which answers its concerns in relation to the sub-clauses.

Clause 186 - Delegation

Sub-clause 186(1) provides that the chief executive officer of the administering Authority and the President of the Agency may *each delegate to 'a person' all or any of their powers under the* Act, other than the power of delegation. The Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. Given the nature of the powers to be delegated in the present case, the Committee stated that it thought it unlikely that it would be necessary for the scope of the delegation to extend beyond the confines of the staff of the Authority and office-holders and staff of the Agency respectively.

The Committee therefore drew sub-clause 186(1) 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 Health has responded:

> 'I did not envisage that this clause would be used by the chief executive officer of the Authority or President of the Agency to delegate powers to anyone other than the staff of the Authority or the office-holders and staff of the Agency. The word 'person' is used in the clause to encapsulate in one word those to whom the powers can be delegated, namely the staff of the Authority and the Agency and the office-holders of the Agency. I am willing to undertake

that the legislation should be amended so that the intention to restrict the scope of the delegation in this way appears on the face of the legislation.'

Once again the Minister indicates that the necessary amendment will be made through the Statute Law (Miscellaneous Provisions) Bill in the Autumn Session of 1987. The Committee thanks the Minister for this undertaking which answers its concerns in relation to the clause.

AUSTRALIAN CAPITAL TERRITORY TAX (TRANSFERS OF MARKETABLE SECURITIES) BILL 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Assisting the Treasurer.

The Bill will impose Australian Capital Territory tax on the registration, by a company incorporated in the ACT, of transfers of marketable securities listed on a register kept outside the ACT.

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

Clause 2 - Retrospectivity

Clause 2 provides that the Act is to be deemed to have come into operation on 10 June 1986, that being, according to the Explanatory Memorandum, the date on which the proposed imposition of this new tax was announced. Certain associated provisions of the Australian Capital Territory Stamp Duty Amendment Bill 1986 and amendments to the Australian Capital Territory Taxation (Administration) Act 1969 contained in the Taxation Laws Amendment Bill (No.4) 1986 will also be retrospective to 10 June 1986.

The Committee has now criticised on a number of occasions the practice whereby changes to the law are made retrospective to the date on which they were 'announced', not to the Parliament, but presumably by way of a press release or at a press conference: see most recently its comments on the Taxation Laws Amendment Bill (No.2) 1986 in its Ninth Report of 1986 (4 June 1986). This practice carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. It treats the passsage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality.

Accordingly the Committee draws clause 2 to the attention of the Senate under principle 1(a)(i) in that the retrospectivity involved may be considered to trespass unduly on personal rights and liberties.

Paragraph 6(1)(a) - 'Henry VIII' clause

Paragraph 6(1)(a) provides that tax is not to be imposed on the registration of a transfer of a marketable security that is a transfer of a kind prescribed for the purposes of the paragraph. Because it enables the Executive, by regulations, to alter the incidence of the tax imposed by the Act, the paragraph may be characterised as a 'Henry VIII' clause. Although the Explanatory Memorandum indicates that the paragraph is intended to be used to provide an exemption for marketable security transfers which are subject to a broadly equivalent tax in the jurisdiction of registration, the paragraph is not so restricted in its terms.

The Committee therefore draws paragraph 6(1)(a) to the attention of the Senate under principle 1(a)(iv) in that, as a 'Henry VIII' clause, it may be considered to constitute an inappropriate delegation of legislative power.

OVERSEAS STUDENTS CHARGE AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Education.

The purpose of the Bill is to amend the Overseas Students Charge Act 1979 to: -

- extend charge liability to diplomatic and consular representatives, their staff and dependants, undertaking tertiary studies;

- impose charges on overseas students who enrol in Government and private secondary schools;

- impose charges on overseas students who undertake courses at technical and further education institutions (TAFEs) and all other TAFE level institutions for which Commonwealth funding is received; and

- fix the charge rates for the 1987 academic year.

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

Paragraph 4(d) - Lack of parliamentary scrutiny

Paragraph 4(d) inserts a new definition of a technical and further education institution as a technical and further education institution within the meaning of the Commonwealth Tertiary Education Commission Act 1977 or -

> '(b) an institution declared by the Minister in writing to be a technical and further education institution for the purposes of this Act;'.

Declaration of such an institution will result in overseas students undertaking courses at the institution becoming liable to pay an annual charge of up to $740 a year. There is no provision for parliamentary scrutiny of such declarations by the Minister as there would be, for example, if the declarations were required to be made by regulations, subject to tabling and potential disallowance. The Committee noted that declarations of courses as university or advanced education courses under section 4A of the Act for the purposes of paragraph (d) of the definition of such courses are required to be made by regulations.

Accordingly the Committee drew paragraph 4(d) to the attention of the Senate under principle 1(a)(v) in that paragraph (b) of the new definition of a 'technical and further education institution' might be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister for Education has responded:

> 'The provision for the Minister for Education to declare an institution to be a technical and further education institution is in line with powers already available to me under present provisions in the Commonwealth Tertiary Education Commission (CTEC) Act 1977, Section 5. Under Section 5A of that Act I also hold authority to declare an institution to be an institute of tertiary education.
>
> The current provision in this amending Bill enables a declaration to be made where there is no cause for any declaration under the CTEC Act but where there may be cause under the Overseas Students Charge Act 1979.
>
> No new authority is granted through this clause.'

The Committee thanks the Minister for this response. It recognises that the provision for Ministerial declaration is in line with section 5 of the CTEC Act and with section 5A of that Act (on which the Committee did not comment when it was added by

the Commonwealth Tertiary Education Commission Amendment Act 1986). However those provisions merely operate to define the functions of the Commission in providing advice to the Minister with regard to the provision of financial assistance to relevant institutions by the Commonwealth whereas the declaration of an institution under paragraph (b) of the new definition of a 'technical and further education institution' will affect the incidence of the overseas students charge. Moreover the Minister may only declare an institution to be a technical and further education institution under section 5 of the CTEC Act if the institution provides 'technical and further education' as defined in that Act. No similar constraint is imposed on the Minister by new paragraph (b). The Committee therefore continues to draw the new paragraph 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.

OVERSEAS STUDENTS CHARGE COLLECTION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Education.

The purpose of the Bill is to amend the Overseas Students Charge Collection Act 1979 to: -

- insert in the Principal Act those categories of students exempt from the charge;

- restrict the application of the provision for the discharge of liability to the charge.

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

Clause 3 - Non-reviewable decisions

Clause 3 inserts a new section 4A dealing with exemptions from payment of the overseas students charge. Paragraph 4A(1)(e) provides that a student in respect of whom an officer of the Department of Immigration and Ethnic Affairs authorised by the Minister for Education for the purpose has issued a certificate stating that the student is a refugee or stateless person is exempt. Paragraph 4A(1)(j) provides that a student who undertakes a course for which the institution at which the course is undertaken charges a fee the amount of which is, in the opinion of the Minister, greater than or equal to the whole of the cost of the course is likewise exempt.

In neither case is the decision of the Departmental officer or the Minister subject to review otherwise than as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. Accordingly the Committee drew new paragraphs 4A(1)(e) and (j) 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 for Education has responded:

> 'The provision in paragraph 4A(1)(e) of the new Section 4A for me to authorise an officer of the Department of Immigration and Ethnic Affairs to issue a certificate stating that a student is a refugee or stateless person for the purpose of exempting that student from the overseas students charge, is currently included in the Overseas Students Charge Collection (OSCC) Regulations in sub-regulation 4(1)(f).
>
> Likewise, the provision in paragraph 4A(1)(j), for the exemption from the charge of students undertaking full fee studies is currently included in OSCC Regulations in sub-regulation 4(1)(p).

> There is no new authority involved in the transfer of this clause from regulations to the Bill. It is the intention to withdraw both sub-regulations when the Regulations are amended later this year.'

The Committee thanks the Minister for this response. It notes that the lack of review of decisions under the Overseas Students Charge Regulations was a cause of concern to the Senate Standing Committee on Regulations and Ordinances (see the Committee's 69th Report) and that the Administrative Review Council recommended in its Report No.25, Review of Migration Decisions, that decisions under regulation 4 of the Overseas Students Charge Collection Regulations that a student is not exempt from the charge should be subject to review (paragraph 418). The Committee therefore continues to draw new paragraphs 4A(1)(e) and (j) 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.

PARLIAMENTARY PRIVILEGES BILL 1986

This Bill was introduced into the Senate on 7 October 1986 by the President of the Senate, Senator the Hon. D. McClelland.

The main purpose of the Bill is to overcome the consequences of the narrow interpretation of Article 9 of the Bill of Rights, 1688, dealing with the freedom of speech in Parliament, contained in the judgments of Mr Justice Cantor and Mr Justice Hunt in the successive trials of Mr Justice Murphy before the N.S.W. Supreme Court. The Bill would also make a number of changes to the law arising out of the Final Report of the Joint Select Committee on Parliamentary Privilege (Parliamentary Paper No.219/1984).

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

Clause 7 - Lack of definition of offences

Clause 7 sets out to codify the power of a House to impose a penalty by way of a fine or imprisonment where it determines that a person has committed an offence against that House. At the same time, however, clause 5 leaves the powers, privileges and immunities of each House undefined. Thus in determining whether an offence against a House has been committed the House concerned may determine not only whether, as a matter of fact, acts constituting such an offence have been committed, but also whether, as a matter of law, such acts in fact constitute an offence. The Committee does not challenge the established right of each House to be prosecutor, judge and jury in its own cause where offences against a House are concerned. It does however raise the issue of the lack of definition of such offences and the resultant uncertainty which this creates in the criminal law.

The Committee recognises that in so codifying the power to punish for offences by way of fines or imprisonment while leaving those offences undefined the Bill is in accordance with the views of the Joint Select Committee on Parliamentary Privilege (see its Final Report, Parliamentary Paper No.219/1984, at paragraphs 6.1 to 6.10). That Committee adopted the statement of the House of Commons Select Committee on Parliamentary Privilege in 1967 that:

> 'The very definition of "contempt" which [your Committee] have proposed for the future guidance of the House clearly indicates that new forms of obstruction, new functions and new duties may all contribute to new forms of contempt. They are convinced therefore that the House ought not to attempt by codification to inhibit its powers.'

The Joint Select Committee drew an analogy with the power of superior courts to punish for contempt. However, as that Committee noted, the lack of definition of what constitutes contempt of court and the consequent latitude afforded individual judges has been the subject of considerable criticism. Contempt of court has been given some statutory definition in the United Kingdom by the Contempt of Court Act 1981 but not to the extent recommended by the Phillimore Committee. Similar proposals have been made by the Canadian Law Reform Commission and the question is, of course, under consideration by the Australian Law Reform Commission.

The Committee raised this same issue in relation to Mr Spender's Parliament (Powers, Privileges and Immunities) Bill 1985 (see its Alert Digest No.7 of 1985) and in relation to Senator Macklin's Parliamentary Powers, Privileges and Immunities Bill 1985 (see its Twelfth Report of 1985). In response to these comments both Mr Spender and Senator Macklin stressed that their Bills did not propose any alteration to the law in respect of offences against the Houses. They merely set out to make certain worthwhile reforms to the power of the Houses to imprison and to place beyond doubt the powers of the Houses to impose fines. In addition Senator Macklin observed that many common law and statutory offences, such as attempting to pervert the course of justice, give no guidance as to the acts covered by such offences. This is true only in the sense that neither the common law nor statute law set out to provide exhaustive definitions of all the factual situations which may come within the ambit of an offence. The law does not attempt, for example, an exhaustive catalogue of all the ways in which the offence of murder may be committed. The content of the offence itself is certain, however, and it would not be open to a court, for example, to find as a matter of fact that a person has committed an unlawful killing but to convict that person of attempting to pervert the course of justice. It is this which distinguishes the function of a court in determining whether the specific fact situation before it constitutes a particular offence as a matter of law and the function of a House of the Parliament in determining whether

specific acts constitute an offence against that House since, as the Joint Select Committee recognised, the House in question 'is the ultimate arbiter of what constitutes contempt and is bound neither by the courts nor by precedent'.

The Committee noted that it recognised the force of the argument that the Houses must always have the power to deal with new forms of contempt as they arise. However it was concerned that the lack of any authoritative statement of the content of offences against the House left the law in a state of uncertainty. The Committee expressed the belief that it was a principle of fundamental importance that the criminal law should be certain. Accordingly the Committee drew clause 7 to the attention of the Senate under principle 1(a)(i) in that by codifying the power to punish for offences against a House by way of fines or imprisonment while leaving those offences undefined it might be considered to trespass unduly on personal rights and liberties. The President of the Senate has responded:

> 'Before commenting on [the] specific point [raised by the Committee], I wish to clarify two matters referred to by the Committee. First, the Digest states that the Bill leaves the powers, privileges and immunities of each House undefined. The Bill would make certain changes to the powers, privileges and immunities of the Houses, and, apart from those changes, leave those powers, privileges and immunities unchanged, and it also seeks to clarify the scope of the privilege of freedom of speech. The powers, privileges and immunities of the Houses are, in fact, fairly well defined, leaving aside the doubts about the scope of freedom of speech raised by Cantor and Hunt J.J. What is not defined are the acts which constitute contempts. There is not necessarily a connection between the two. For example, while intimidation of a member might be thought to be a breach of the privilege of freedom of speech, the destruction by a witness of documents required by a committee is not a breach of any privilege. The power of the Houses to

treat acts as contempts is not limited or defined by the privileges and immunities of the Houses: it is an independently existing power. It is important to maintain this distinction between the powers, privileges and immunities on the one hand and the content of contempts on the other, because it is a source of much confusion about parliamentary privilege.

Secondly, the Digest states that clause 7 codifies the power of a House to impose a penalty. The Clause does not in fact codify the power. It adds to the existing power to commit a person for a period not extending beyond the end of a session a statutory power to commit for a fixed period. It also adds to the power to impose a fine, which has been regarded as doubtful, a definite statutory power to impose a fine not exceeding a specified amount. This is explained in the explanatory memorandum.

As to the substantive point raised by the Committee, I offer the following comment. While it is true that the Bill does not attempt to define the acts constituting contempts, it contains in clause 4 a significant restriction of the kinds of acts which may be treated as contempts. This clause, which is not adverted to in the Digest, and which has no equivalent in the Bills introduced by Mr Spender or Senator Macklin, provides that an act does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise of the authority or functions of a House or a committee or the free performance of a member's duty. The clause makes it clear that a House may not treat an act as an offence unless it constitutes improper interference, and it would allow a person punished by a House to contest in the courts the question of whether

the act committed by the person met the criteria contained in the clause. This is explained in the explanatory memorandum.

It seems to me that this clause significantly restricts and opens to judicial review any penalty imposed by a House, and goes a long way towards meeting the criticism of the contempt jurisdiction of the Houses. It certainly goes much further than the recommendations of the Joint Committee.'

The Committee thanks the President for this response. It accepts that clause 4 is a significant restriction on the power of the Houses to punish contempts against the Houses. However, while clause 9 ensures judicial review where a House imposes on a person a penalty of imprisonment for an offence against that House by requiring that particulars of the matters determined by the House to constitute that offence be set out in the warrant committing the person to custody, judicial review will not be available where a House merely imposes a fine unless the resolution of the House imposing the fine states particulars of the matters considered by the House to constitute the relevant offence. While judicial review is a separate issue from the lack of definition of offences against the Houses, it is important to note that, where the House imposes a fine, clause 4 amounts to a self-imposed restraint on the power of the House rather than a restriction capable of review by the courts.

With regard to the second point made by the President, the Committee notes that it is apparently the President's intention that the existing power of the Houses to commit persons to prison for offences against the Houses for a period not extending beyond the end of a session should remain on foot. The Joint Select Committee on Parliamentary Privilege recommended in its Final Report (supra, at paragraphs 7.24 to 7.26) that this power should be abolished and expressed the opinion that it was 'anomalous and absurd' that the maximum term of imprisonment which might be imposed by a House in respect of offences against that House

should depend on when an offence was committed and the likelihood or unlikelihood of a newly constituted House taking action to recommit a person who had been committed in the dying days of the old Parliament. This Committee believes that it is arguable that clause 7 leaves this power on foot. The Committee notes in this connection the importance of the distinction between the power to imprison for offences against the Houses and the coercive power to commit persons for contempt until they purge their contempt or until the end of the current session of the House concerned, a power analogous to the power of the courts to commit to custody persons who fail to comply with their orders.

In continuing to draw attention to clause 7, together with the President's helpful response, the Committee hopes to promote a fuller consideration of these aspects of the clause at the appropriate stage of debate in the Senate.

PROTECTION OF THE SEA LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 8 October 1986 by the Minister for Transport.

The purpose of the Bill is to amend four Commonwealth Acts to facilitate the implementation of a number of anti-pollution incentives which have been incorporated in international conventions. Those Acts are the Navigation Act 1912, the Protection of the Sea (Civil Liability) Act 1981, the Protection of the Sea (Shipping Levy Collection) Act 1981 and the Protection of the Sea (Prevention of Pollution from Ships) Act 1983.

In addition, the Bill contains amendments to penalties provided for in the Navigation Act 1912 and the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. The amendments form part of a general review of penalties contained in Commonwealth legislation.

General comment

The Committee noted that new sub-section 267ZQ(5), to be inserted in the Navigation Act 1912 by clause 11, and new sub-sections 26B(4) and (6), 26AB(7), 26D(10) and 26F(12), to be inserted in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 by clauses 25, 26 and 28, all impose the persuasive onus of proof on defendants in criminal proceedings. Ordinarily the Committee would have drawn such clauses reversing the persuasive onus of proof to the attention of the Senate under principle 1(a)(i) in that they might be considered to trespass unduly on personal rights and liberties. However the Committee accepted in its Sixteenth Report of 1985 in relation to sub-sections 11(2) and (4) and 22(2) and (4) of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (which were inserted in that Act by the Statute Law (Miscellaneous Provisions) Act (No.1) 1985) that the reversal of the persuasive onus of proof was necessary in this legislation for Australia to comply with its obligations under the International Convention for the Prevention of Pollution from Ships, 1973 (the MARPOL Convention). For the same reason the Committee accepted that the reversals of the persuasive onus of proof noted above were appropriate in light of the need to ensure Australia's compliance with the MARPOL Convention.

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

Clause 11 - New sub-section 267ZM(3) - 'Henry VIII' clause

Clause 11 would insert new Divisions 12B and 12C in Part IV of the Navigation Act 1912. New section 267ZM in Division 12C creates offences where the master or the owner of an Australian ship to which the Division applies takes the ship to sea or permits the ship to be taken to sea if a sewage certificate is not in force in respect of the ship. New sub-section 267ZM(3)

provides, however, that the regulations may exempt ships included in a prescribed class of ships from the application of these offences, either absolutely or subject to conditions.

As the new sub-section would permit the application of the offences in section 267ZM to be varied by regulations, it may 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 to constitute an inappropriate delegation of legislative power. The Minister for Transport has responded:

> 'Clause 11 contains a proposed new section 267ZM which is constructed on similar lines to existing sections 267G and 267V of the Navigation (Protection of the Sea) Amendment Act 1983 (the Navigation Act).
>
> As you are aware the Navigation Act, which will be amended by the clause in question and the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (the Prevention Act) will, together, give effect to the 1973 International Convention for the Prevention of Pollution from Ships and its 1978 Protocol (MARPOL 73/78). The MARPOL Convention and its Annexes I and II and Protocol I have also been the subject of significant amendments in 1984 and 1985.
>
> The Convention is a quite intricate and detailed instrument designed to prevent pollution of the sea by adopting a range of measures.
>
> The Convention divides into jurisdiction over ships (construction, survey, certification, operational procedures etc) and sea (environmental protection, special areas, discharge controls, etc). The pollution prevention aim is achieved by adopting rules for construction and operation of ships which effectively

minimise and, in many cases, completely eliminate ship sourced pollution and where this fails, provides sanctions for breaches of the Convention.

In the light of this background the legislative regime adopted for the implementation of MARPOL has taken account of the basic thrust of the Convention while attempting to leave a degree of flexibility to accommodate the changes in the Convention which are occasioned by the improvements being achieved in maritime and pollution prevention technology.

New section 267ZM is located in new Division 12C of Part IV which deals with Annex IV of the MARPOL Convention (Sewage). Regulation 2 of Annex IV, which can be found on page 66 of the Bill, sets out the ships to which the Annex applies. This application is modified by Article 3 of the Convention which states that warships, naval auxiliaries, and ships engaged on government non-commercial service are exempt. However the Article goes on to state that where practicable and reasonable such ships should be covered by the law of a contracting State.

This poses a problem in framing legislation to give effect to the Convention. It has been solved by applying the law generally to all Australian ships and allowing the regulations to exempt those vessels from time to time exempted by the Convention. The construction adopted in the existing Act, and the Bill, also allows for selective application of the Convention to Australian ships not at present covered by the Convention but which, for environmental or other reasons, could be brought under the MARPOL regime.

> Rather than constituting an inappropriate delegation of legislative power, I consider that the provision is the most effective available way of giving effect to the Convention requirements and retaining the flexibility encouraged in Article 3 of the Convention.'

The Committee thanks the Minister for this response. Although new sub-section 267ZM(3) is a 'Henry VIII' clause, the Committee accepts that in the context outlined by the Minister it does not constitute an inappropriate delegation of legislative power.

Clause 25 - New sub-section 26B(10) - Strict liability

Clause 25 would insert a new Part IIIA in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. New sub-section 26B(10) in that Part would create an offence where a person notifying or reporting an incident involving the discharge of harmful substances makes a statement that is false or misleading in a material particular. The sub-section departs from the normal form of such provisions in Commonwealth legislation in that it does not require that the statement be false or misleading to the knowledge of the person making it. In so doing it creates an offence of strict liability: that is, a person may be convicted of the offence even though he or she lacked any guilty intent.

The Committee recognised that the new sub-section did not differ in this respect from the existing sub-sections 11(9) and 22(10) of the Act on which the Committee did not comment in its Alert Digest No.2 of 1983. Nevertheless it drew the new sub-section to the attention of the Senate under principle 1(a)(i) in that by creating an offence of strict liability it might be considered to trespass unduly on personal rights and liberties. The Minister for Transport has responded:

'The purpose of the clause is to ensure that any notice or report is a considered response containing the facts according to the situation. This is necessary as the information given will generally be acted upon by the relevant Authority.

I should point out that the MARPOL Convention will be applied by Australia not only in respect of Australian and foreign flag ships within the territorial sea, but also to Australian ships on the high seas anywhere in the world. In addition, as I mentioned above, the Convention is concerned with environmental protection and the purpose of the reporting requirements which are given particular prominence in Article 8 and Protocol I of the Convention, is to ensure that appropriate and timely combat action can be undertaken.

It is therefore most important that accurate information be provided which will facilitate effective and prompt pollution combat planning and action to be undertaken.

You will be aware that a ship is in a unique situation from the point of view of the master having complete responsibility and control. It is not unreasonable to expect the master of a vessel to have total and accurate information or to be able to ascertain the facts of any situation. Further, in an incident anticipated by the Convention and this legislation, I would expect the master to go out of his way to ensure that the information provided is accurate.

In those cicumstances where the master or a ship owner or agent is required to report on matters for which they do not have all the facts, the practice is to clearly state in the report that the statement is an

estimate or that the information is provided as an approximation. In these circumstances the information could not be held to be inaccurate.

The Attorney-General's Department has advised that on the basis of Cameron v Holt 28 ALR 490 the provision as presently drafted could be interpreted as requiring that a person accused of an offence against the provision either had knowledge that the statement made was false or misleading, or, when making the statement, was reckless as to whether it was false or misleading. On this interpretation of the provision there is a mental element, "mens rea", to the offence.

In the light of this advice, I consider that the provision has the effect that I intended, that is, every effort should be taken by a person making a report to ensure that the information given is accurate, but that such a person would not be penalised if he made an honest mistake.'

The Committee thanks the Minister for this response. The Committee accepts that on the basis of Cameron v. Holt sub-section 26B(10) could be interpreted as requiring that the person charged with making a false or misleading statement must be shown to have known of the falsity of the relevant statement or to have made the statement with reckless indifference to its truth or falsehood. However the High Court was led to that conclusion in Cameron v. Holt by the context in which the offence dealt with in that case was found - among other offences of which mens rea was clearly an element - and by the fact that the class of persons who might commit the offence was not confined to the person making the relevant statement but extended to any person presenting the document containing the false statement, even though such a person might be totally unaware of the contents of the document. Similar considerations do not apply here.

The Committee suggests that if it is intended that guilty intent or mens rea be an element of the offence in new sub-section 26B(10) then there can be no objection to the insertion of the requirement that the false or misleading statement be made 'knowingly or recklessly': compare, for example, sub-clause 28(3) of the Bounty (Ship Repair) Bill 1986. The balance of the Minister's response suggests, however, that the offence is intended to be one of strict liability. The Committee accepts that, if this is the case, the accused could still raise an honest and reasonable mistake of fact as a defence. In continuing to draw sub-section 26B(10) to the attention of the Senate, together with the Minister's helpful response, the Committee therefore hopes to promote a fuller consideration at the Committee stage of debate in the Senate of whether, in light of the matters referred to by the Minister, the offence is an appropriate one for the imposition of strict liability.

SCIENCE AND INDUSTRY RESEARCH LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 September 1986 by the Minister for Science.

The purpose of the Bill is to amend the Science and Industry Research Act 1949 and Science and Industry Endowment Act 1926. The Bill will implement the Government's response to recommendations contained in the Australian Science and Technology Council report on Future Directions for the Commonwealth Scientific and Industrial Research Organization.

The Bill provides for the Organization's primary function to be applications oriented research in support of major industry sectors and selected areas of community interest, with a commitment to the effective transfer of its results to users. The Bill also extends the Organization's functions to include

encouraging the application of the results of scientific research whenever conducted and making the Organization's facilities and services available to other bodies or persons.

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

Clause 10 -

News section 10J - Delegation

Clause 10 adds a new Part IIA to the Science and Industry Research Act 1949 dealing with the Chief Executive of the Commonwealth Scientific and Industrial Research Organisation. New section 10J in that Part provided that the Chief Executive might delegate to a person or a committee of persons all or any of the Chief Executive's powers under the Act or the regulations other than the power of delegation. The Committee therefore drew new section 10J to the attention of the Senate under principle 1(a)(ii) in that by so permitting the unrestricted delegation of administrative powers it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

The Committee is pleased to note that, following correspondence with the Committee, the Minister for Science amended new section 10J in the House of Representatives on 13 November 1986 to restrict the scope of the power of delegation to officers of the Organisation and directors or employees of companies which are partners of the Organisation or in which the Organisation holds a controlling interest. The Committee thanks the Minister for making this amendment which answers the Committee's concerns in relation to new section 10J.

SUBSIDY (CULTIVATION MACHINES AND EQUIPMENT) BILL 1986

This Bill was introduced into the Senate on 22 October 1986 by the Minister for Industry, Technology and Commerce.

This Bill proposes the introduction of new assistance arrangements for certain farm machinery, by replacing the current tariff protection with a subsidy to local producers of soil preparation and cultivation machinery and parts and a subsidy equivalent to the net Customs duty payable on such imported machines and parts, imported prior to 15 April 1986 and sold on or after that date. The Bill seeks to implement the Government's undertaking in the Rural Economic Policy Statement of 15 April 1986 that the tariffs on certain cultivation machinery would be replaced with direct assistance to local producers from that date until 31 December 1990, and gives effect, in the main, to the Industries Assistance Commission's recommendations on this industry, contained in its report of 16 June 1986.

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

Sub-clause 6(1) - 'Henry VIII' clause

The subsidy payable on relevant equipment will be determined on the basis of the sales value of the equipment. Sub-clause 6(1) sets out the formula for determining the sales value being A-(B+C), where A is the price charged for the equipment, B is the amount included in that price in respect of a freight charge for delivery and C is 'such cost or amount (if any) as is prescribed'. Because it permits the variation by regulations of the factor C in the formula on which the determination of the sales value of equipment and, in turn, the subsidy payable in respect of that equipment, is based, the sub-clause may be characterised as a 'Henry VIII' clause. As such, the Committee drew it 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 for Industry, Technology and Commerce has responded:

> 'The Committee has in the past made similar comments on similar type provisions in other bounty and subsidy schemes; see for example, Scrutiny of Bills Alert Digest No.16 of 4 December 1985 on the Subsidy (Grain Harvesters and Equipment) Act 1985, and Scrutiny of Bills Alert Digest No.6 of 30 April 1986 on the Bounty and Subsidy Legislation Amendment Act (No.1) 1986. On the one hand, the Committee has acknowledged and recognised the need for some flexibility in the administration of these schemes to keep them abreast of increasingly rapid technological changes and market movements. On the other hand however, it has opined that any flexibility could be considered either an inappropriate delegation of legislative power or an inappropriate exercise of legislative power by executive instrument.
>
> The Committee's concern in these matters is appreciated, as it could be argued that the line between acceptable executive administration of such schemes and unacceptable usurpation of Parliament's legislative role in the schemes is perhaps a fine one.
>
> It is suggested that what makes the flexilibity provided in this and other recent bounty schemes palatable is the fact that Parliament retains an ability to scrutinise, and disallow, such amendments. In this particular scheme, amendments by regulation to the formula in clause 6 would be subject to the usual tabling and disallowance provisions applicable to regulations.'

The Committee thanks the Minister for this response. It concedes that the line between an appropriate delegation of legislative power and an inappropriate one is a fine one and that in this case the necessary flexibility in the bounty scheme could not have been achieved in any other way.

TAXATION LAWS AMENDMENT BILL (NO.4) 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Assisting the Treasurer.

The Bill will amend various taxation and other laws to give effect to decisions of the Government announced in the Budget. In particular it will advance the due dates for payment of instalments of company tax by early balancing companies and introduce measures to overcome arrangements to avoid provisional tax by the manipulation of income distributions of closely-held partnerships and trust estates.

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

Clause 25 - Retrospectivity

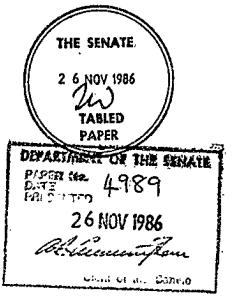
Clause 25 would insert a new section 6CA in the Income Tax Assessment Act 1936 dealing with the source of certain natural resource income derived by a non-resident. Sub-section 6CA(1) defines 'natural resource income' as income calculated, in whole or in part, by reference to the value or quantity of natural resources produced, recovered or produced and recovered in Australia after 7 April 1986. Sub-section 6CA(3) deems such income to have an Australian source and so to be subject to Australian tax. Once again the Committee observes that a change to the taxation law is being made retrospective the date of an announcement, not to the Parliament but presumably by way of a

press release or press conference. As it commented in its Ninth Report of 1986 in relation to the Taxation Laws Amendment Bill (No.2) 1986 this practice carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. Such retrospectivity might be considered justifiable if it were feared that otherwise the revenue would suffer a significant haemorrhage but no such justification is advanced here. Reliance on a series of 'announcements' to support retrospective legislation can only add to the very considerable problems already attendant upon the interpretation of the taxation laws because of their complexity and the many amendments which have recently been made to them as part of the Government's programme of reform.

The Committee therefore draws new section 6CA to the attention of the Senate under principle 1(a)(i) in that by reason of its retrospective effect it may be considered to trespass unduly on personal rights and liberties.

Michael Tate
Chairman
19 November 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINETEENTH REPORT

OF 1986

26 NOVEMBER 1986

THE SENATE

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MEMBERS OF THE COMMITTEE

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

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

NINETEENTH REPORT

OF 1986

The Committee has the honour to present its Nineteenth Report of 1986 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*:

ABC/SBS Amalgamation Bill 1986
Bounty (Ship Repair) Bill 1986
Fertilisers Subsidy Bill 1986
Navigation Amendment Bill 1986
Pig Industry Bill 1986
Public Service Legislation (Streamlining) Bill 1986
Statute Law (Miscellaneous Provisions) Bill (No.2) 1986
Superannuation Legislation Amendment Bill (No.2) 1986
Taxation Administration Amendment (Recovery of Tax Debts) Bill 1986
Television Licence Fees Amendment Bill 1986

ABC/SBS AMALGAMATION BILL 1986

This Bill was introduced into the House of Representatives on 12 November 1986 by the Minister for Communications.

The purpose of this Bill is to implement the Government's decision to amalgamate the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). Amongst other things it makes significant amendments to the Australian Broadcasting Corporation Act 1983 and repeals Part IIIA of the Broadcasting Act 1942 under which the SBS is constituted.

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

Clause 29 - Termination of office of staff-elected Director

Clause 29 provides for members of the ABC Board, other than the Managing Director, to cease to hold office on 1 January 1987 or, in the case of the staff-elected Director, on the election of a person to that office at elections to be held by the Board as soon as practicable after 1 January 1987. In the ordinary course of affairs the Committee would not see such a provision as objectionable, since all the members of the present Board would be eligible for re-appointment. However in the present case the *person currently holding office as the staff-elected Director*, Mr Thomas Molomby, will, by virtue of sub-sections 4(4) and 5(4) of the Broadcasting and Television Legislation Amendment Act 1986, be ineligible for election for a further term.

Sub-sections 4(4) and 5(4) are transitional provisions linked to amendments limiting a person to no more than two 2-year terms as staff-elected Director. The Committee understands that Mr Molomby was elected for his second 2-year term on 15 December 1985 and therefore could have expected to hold office until 15 December 1987. Because the effect of the clause, taken together with the provisions of existing legislation, is to halve

Mr Molomby's term of office as staff-elected Director while leaving him ineligible to stand again for that office the Committee draws clause 29 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.

BOUNTY (SHIP REPAIR) BILL 1986

This Bill was introduced into the Senate on 12 November 1986 by the Minister for Community Services at the request of the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to introduce new assistance arrangements for certain repair work carried out in Australia on international trading vessels, whether Australian or foreign owned. The Bill is part of a new ship repair assistance package announced by the Government on 10 October 1986, the major elements of which are a bounty payable to registered ship repairers for 3 years, and the clarification of the Government's ship safety inspection powers via amendments to the Navigation Act 1912.

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

Clause 2 - Retrospectivity

Clause 2 provides that the Act is to be deemed to have commenced on 10 October 1986, the date on which the new ship repair assistance package was announced by the Government. However the Committee noted that the Bill did not contain the usual saving provision to the effect that the offence provisions are not to operate so as to render unlawful anything done, or omitted to be done, before the day on which the Act receives the Royal Assent (compare, for example, section 38 of the Bounty (Agricultural

Tractors and Equipment) Act 1985). The Committee therefore drew clause 2 to the attention of the Senate under principle 1(a)(i) in that by reason of giving potential retrospective operation to the offence provisions it might be considered to trespass unduly on personal rights and liberties. The Minister for Industry, Technology and Commerce has responded undertaking to move an amendment to insert the normal transitional provision to take account of the retrospective commencement of the Bill. The Committee thanks the Minister for this undertaking, which answers its concerns in relation to the clause.

Clause 4 - Definition of 'eligible repair' - 'Henry VIII' clause

Paragraph (c) of the definition of 'eligible repair' in clause 4 provides that the expression may mean 'a repair of the ship included in a class of repairs declared by the regulations to be a class of eligible repairs'. Bounty is payable in respect of the carrying out of 'eligible repairs' on bountiable ships.

The Committee has in the past recognised the need for flexibility in legislation providing financial assistance to industry to take account of technological advances and changing market conditions. However in the present case the Committee noted that the concept of 'eligible repair', which is central to the legislation, would be capable of indefinite enlargement by regulations. In so permitting the effect of the Act to be varied by delegated legislation the definition 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. The Minister for Industry, Technology and Commerce has responded:

> 'The Committee in its last report reproduced the reply I provided in respect of the Subsidy (Cultivation Machines and Equipment) Bill, in which a similar mechanism for prescribing elements in the particular formula for determining the amount of subsidy payable under the Bill was in issue. The same reasons expressed

on that occasion apply equally in my opinion to this situation. The fact that that subsidy bill was concerned with the possible prescription of elements which form part of the formula for determining the amount of subsidy payable, and this Bill is concerned with the possible prescription of new categories of repairs on which bounty is payable, does not alter the rationale for accepting the need for flexibility in both instances.

In order for this bounty package to remain relevant to changing practices and technological advances in the ship repair industry over its 3 year life, necessary adjustments must be accommodated quickly. The mechanism of regulatory change in these circumstances ensures this result, without however derogating completely from the Parliament's role in the scrutiny of the process via the tabling and disallowance power it has with respect to regulations. Finally I make the point that the regulations will only prescribe additional repairs to be bountiable and will therefore in all cases have the effect of conferring a benefit upon eligible bounty recipients.'

The Committee thanks the Minister for this response. As in the case of the Subsidy (Cultivation Machines and Equipment) Bill 1986 the Committee acknowledges that, although paragraph (c) of the definition of 'eligible repair' in clause 4 is technically a 'Henry VIII' clause, the necessary flexibility in the bounty scheme could not have been achieved in any other way.

Clause 11 - Declaration that bounty not payable

Clause 11 provides that the Minister may declare that bounty is to cease to be payable to ship repairers if the Minister becomes satisfied that a voyage of a ship is being prevented by trade union activity. The Explanatory Memorandum indicates that the clause has been included to ensure that the ship repair and

maritime unions uphold their agreement not to recommence their ship repair detention campaign (which agreement was a pre-condition to the implementation of the package of assistance for ship repair).

However the Committee expressed concern that the clause might penalize ship repairers - who would be deprived of bounty payments while a declaration was in force - even though they might have no part in, and no control over, the relevant industrial action. The Committee therefore drew clause 11 to the attention of the Senate under principle 1(a)(i) in that by reason of its potentially capricious application to ship repairers it might be considered to trespass unduly on personal rights and liberties. The Minister for Industry, Technology and Commerce has responded:

> 'The Government acknowledges and accepts the Committee's criticism of the overly broad application of the provision, and will be moving an amendment in the Committee Stages of the Bill to effectively provide for a savings provision for work in progress at the date of a declaration suspending the bounty. This will ensure that ship repairers will not be deprived of bounty while a declaration is in force, if the relevant repair work was commenced prior to the date of the declaration. This should address the legitimate concerns of the Committee, while at the same time preserve the Government's intent that any work commenced by any repairer while a declaration is in force should not be eligible for bounty.'

The Committe thanks the Minister for undertaking to make this amendment which answers its concerns in relation to the clause.

FERTILISERS SUBSIDY BILL 1986

This Bill was introduced into the Senate on 12 November 1986 by the Minister for Community Services at the request of the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to make new assistance arrangements for fertilisers by giving effect to the Government's decision to remove the subsidies payable on imported fertilisers and reallocating those savings by increased subsidy payments on locally produced phosphatic fertilisers. The Bill amalgamates the Phosphate Fertilizers Subsidy Act 1963 and the Nitrogenous Fertilizers Subsidy Act 1966 into one composite Act.

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

Clause 2 - Retrospectivity

Clause 2 provides that the Act is to be deemed to have come into operation on 20 August 1986, the day after the Budget. However the Committee noted that the Bill did not contain the usual saving provision to the effect that the offence provisions are not to operate so as to render unlawful anything done, or omitted to be done, before the day on which the Act receives the Royal Assent (compare, for example, section 38 of the Bounty (Agricultural Tractors and Equipment) Act 1985). The Committee therefore drew clause 2 to the attention of the Senate under principle 1(a)(i) in that by reason of giving retrospective operation to the offence provisions it might be considered to trespass unduly on personal rights and liberties. The Minister for Industry, Technology and Commerce has responded undertaking to move an amendment to insert the normal transitional provision to take account of the retrospective commencement of the Bill. The Committee thanks the Minister for this undertaking, which answers its concerns in relation to the clause.

NAVIGATION AMENDMENT BILL 1986

This Bill was introduced into the Senate on 12 November 1986 by the Minister for Community Services at the request of the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to extend the Minister for Transport's power of detention of ships which are, or which appear to the Minister to be, unseaworthy, to 'substandard' ships which present clear hazards to safety or health but are 'seaworthy' as defined.

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

Clause 4 - New sub-section 207A(2) - 'Henry VIII' clause

New sub-section 207A(2), to be inserted by clause 4, would provide that in determining whether a ship is substandard regard is to be had to 'such matters as are prescribed'. While new sub-section 207A(1) provides that a ship is substandard if conditions on board the ship are 'clearly hazardous to safety or health' the lack of any more detailed definition contrasts markedly with the definition of a seaworthy ship in sub-section 207(1). A mariner may claim discharge from a 'substandard' ship and the Minister may detain such ships.

Because the new sub-section would leave the content of the term 'substandard' to be delimited by regulations it may be characterised as a 'Henry VIII' clause. In respect of the matters to which regard is to be had in determining whether a ship is 'substandard' the Parliament would have available to it only the negative action of disallowance rather than the positive power of amendment. Accordingly the Committee draws new sub-section 207A(2) to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

PIG INDUSTRY BILL

This Bill was introduced into the House of Representatives on 23 October 1986 by the Minister for Primary Industry.

The Bill provides the basis for the restructuring of statutory pig industry organisations. It replaces the present Pork Promotion Committee with an Australian Pork Corporation and at the same time expands the functions of the new body. The new Corporation, as well as having all the present functions of the Pork Promotion Committee, will have the additional functions of improving the production and sale of pork and pigs in Australia and encouraging, assisting and promoting the export of pork and pigs from Australia. It will consult and co-operate with other persons and organisations in connection with the industry to achieve these objectives.

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

Clause 32 - Delegation

Sub-clause 32(1) provides that the proposed Australian Pork Corporation may delegate to 'a person' all or any of its powers under the Act or the regulations, other than the power of delegation. The Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. The Committee stated that, if the powers to be conferred on the proposed Corporation were to be delegated away from that body, the Committee would suggest that the persons to whom those powers were to be delegated should be specified with a reasonable degree of particularity.

The Committee therefore drew sub-clause 32(1) 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 Primary Industry has responded:

> 'It is the Government's policy to make Primary Industry Statutory Marketing Authorities as independent and responsible for their actions as possible. I believe decisions regarding the delegation of powers in order to facilitate performance should be made by the Corporation without unnecessary legislative limitation.
>
> In considering this matter it must be remembered that the Corporation is fully accountable for its actions to both the Parliament and to the industry. I believe the accountability arrangements provided for in the legislation give adequate protection against misuse or careless use of delegated powers.'

The Committee thanks the Minister for this response. In Chapter 4 of its Annual Report 1985-86, tabled on 17 September 1986, the Committee set out its reasons for drawing attention to such clauses making provision for the unrestricted delegation of administrative powers and drew attention to a number of examples of amendments to such clauses following comments made by the Committee. A further example may be found in the comment on the Science and Industry Research Legislation Amendment Bill 1986 in the Committee's Eighteenth Report of 1986 (19 November 1986).

The Committee's point is that it is for the Parliament, in conferring administrative powers, to determine by whom those powers are to be exercised. If the powers are to be delegated, it is for the Parliament to determine the scope of such delegation. The Committee has accepted that in some cases it may not be possible to specify in advance the persons to whom powers are to be delegated with any particularity - see, for example, the response of the Minister for Territories in relation to the

Ashmore and Cartier Islands Acceptance Amendment Bill 1985 in the Committee's Ninth Report of 1985 - but in general it believes that, with thought, it is possible to arrive at appropriate restrictions. The Committee does not accept that the accountability to Parliament of the person upon whom the power is conferred, whether that person is a Minister, a public servant, a statutory office-holder or a statutory authority, provides a sufficient answer to its concerns in this regard. The Committee therefore continues to draw sub-clause 32(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.

PUBLIC SERVICE LEGISLATION (STREAMLINING) BILL 1986

This Bill was introduced into the House of Representatives on 23 October 1986 by the Minister Assisting the Prime Minister for Public Service Industrial Matters.

The principal purpose of this Bill is to implement the decisions that the Government has taken to streamline the Australian Public Service. The most significant amendments relate to revised redeployment and retirement arrangements, and revised provisions relating to promotions and promotion appeals. In addition, a number of other amendments are made to streamline the administration of the Service.

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

Paragraph 11(1)(a) - Delegation

Paragraph 11(1)(a) would insert in the Public Service Act 1922 new sub-sections 16(1A) and (1B) permitting a Secretary to whom the Board had delegated a power or function to sub-delegate that

power or function to 'a person' who may, with the approval in writing of the Board, be a person other than an officer or employee or a statutory office-holder. In other words the Board through the agency of a Secretary may delegate its powers or functions to unspecified persons.

The Committee recognises that in this regard the new sub-sections do not differ in effect from existing sub-section 16(1) which provides that the Board may delegate all or any of its powers and functions to 'a person'. Sub-section 26(1), relating to the powers of delegation of Secretaries is in similar form. However the Committee has been critical of such unrestricted powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. In the present case the Committee expressed the opinion that it was clearly not the intention that the powers of the Public Service Board with respect to public service employment would be delegated to persons generally but the terms in which the legislation had been drafted would permit this.

The Committee therefore drew paragraph 11(1)(a) 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 Assisting the Prime Minister for Public Service Matters has responded:

> 'As the Committee is aware the present amendments do not differ in effect from the existing provisions which permit delegation to "a person". By way of background, I should point out that the ability to delegate to persons generally, as distinct from, say "officers or employees of the APS" was included in the Public Service Reform Act 1984. The 1984 amendments followed careful consideration and were made in response to problems previously experienced with the earlier more limited drafting.

The reasons for broadening the delegation power so that delegations could be made to persons were outlined in the Explanatory Memorandum for the Public Service Reform Act as follows:

> **"Clause 8 - Delegations by Board**
>
> This clause amends the Board's delegation power (section 16) to enable the Board's executive powers and functions to be delegated to persons who are not officers, employees or statutory office-holders. This amendment will overcome problems that have arisen from recent administrative developments. It will, for example, enable participants in the Interchange Program, who officially remain members of their private sector organisations and who are neither officers or employees of the Australian Public Service, to exercise certain statutory powers that are a necessary part of the positions in which they are placed. In addition, the amendment will overcome problems where staff of the Service may, for various reasons, be supervised by Commonwealth employees who are not officers or employees of the Service, for example in the Commonwealth Teaching Service, the Capital Territory Health Commission and in the Australian Electoral Commission as a result of recent amendments to Electoral Legislation. Provision is included to ensure that consultants engaged under the proposed Members of Parliament (Staff) Act do not exercise management powers.

Clause 15

This clause inserts proposed section 26 and 26(a) relating to the management powers of Secretaries and Chief Officers.

Proposed section 26 - delegation by Secretaries to Departments - will empower Secretaries to delegate all or any of their powers and functions under the Public Service Act, the proposed Merit Protection (Australian Government Employees) Act, regulations made under those acts, *determinations or awards to persons...The* amendment will allow delegations to be held by persons who are not officers, employees or statutory officers, but who are performing services for the Department, eg. private sector participants in the Interchange Program.

Proposed sub-section 26(4) will provide that no delegation may be made to persons who are not officers, employees or statutory office-holders without the written approval of the Public Service Board. The Board will *ensure that Secretaries' powers are not* inappropriately delegated to persons who are not officers or employees or statutory office-holders. Provision is included to ensure that consultants engaged under the proposed Members of Parliament (Staff) Act do not exercise management powers."

It is still the case that statutory powers and functions under the Public Service Act, regulations and determinations may need to be exercised by persons who are not in fact officers or employees of the Service.

> As indicated in the extract quoted from the Explanatory Memorandum for the Public Service Reform Act, this is particularly important in the case of people on the Interchange Program and also where there are "dual-streams" of employment. The Government considers it desirable that the existing flexibility should be retained. As a general comment, a more significant problem is in encouraging sufficient delegation so that decision-making is not restricted to the senior positions in the Service. The making of delegations either by the Board or, with the approval of the Board, by Secretaries to inappropriate persons who are not officers or employees of the Service has not been a problem in practice.'

The Committee thanks the Minister for this response. It accepts that in this instance it would not be possible to restrict the scope of potential delegation with any degree of particularity.

Sub-clauses 33(2) and (3) - Retrospectivity

Clause 33 would insert a new section 47 in the Public Service Act 1922 dealing with the appointment of officers to the Australian Public Service on probation. Sub-clauses 33(2) and (3) will deem the new section 47 to apply, and to have applied at all times, to persons appointed on probation before the commencement of the new section and to persons engaged as fixed-term employees pending their obtaining Australian citizenship who are now to be deemed to have been appointed on probation on a similar basis.

While the terms of the new section 47 might be considered to be advantageous to some of those persons affected by its retrospective application, the Committee expressed concern that some disadvantage might be suffered by others. In particular, whereas the old section 47 did not set out the grounds on which the appointment of a person might be annulled while that person was on probation, new sub-section 47(11) would set out with some specificity the grounds upon which an appointment might now be

terminated. The Committee considered that Secretaries might be more ready to exercise this power now that the criteria had been spelled out. Even in the case of persons engaged as fixed-term employees who were now to be deemed to have been appointed on probation and who might thereby be considered to have been advantaged there would be the possibility, for example, that their appointment might be terminated if the Secretary were satisfied that they were not seeking a grant of Australian citizenship 'with appropriate diligence'.

The Committee therefore drew sub-clauses 33(2) and (3) to the attention of the Senate under principle 1(a)(i) in that by retrospectively applying the new section 47 to persons appointed or engaged prior to its commencement the sub-clauses might, to the extent that this resulted in any disadvantage to those persons, be considered to trespass unduly on personal rights and liberties. The Minister Assisting the Prime Minister for Public Service Matters has responded:

> 'The Government does not agree that officers on probation at the commencement of the new provision will be disadvantaged by the application of the new provision to them.
>
> The Committee comments that it considers that Secretaries may be more ready to exercise the power to terminate probationary appointments now that the criteria for termination have been spelt out. The Government considers that this is a matter of judgement and that there is a contrary argument that the spelling out of the criteria on which the power to terminate appointments is to be exercised may cause Secretaries to be careful to ensure that only relevant considerations are taken into account.
>
> The Committee also comments that even fixed-term employees employed on the understanding that they would be appointed when granted citizenship and who are

deemed by the legislation to be appointed may be disadvantaged as there will be the possibility, for example, that their appointment may be terminated if the Secretary is satisfied that they are not seeking a grant of Australian citizenship "with appropriate diligence". The Government cannot agree that the retrospective application of the new section 47 to such fixed-term employees can be seen as disadvantageous to them as section 82AH of the Act at present permits the termination of their fixed-term employment at any time. It would be expected under the **present** provisions that a fixed-term employee, engaged on the basis of appointment on obtaining citizenship would have his or her employment terminated if he or she was not seeking Australian citizenship with appropriate diligence.

The further point should be made that the application of the new section 47 to existing probationers will provide a far cleaner transfer to the new provisions and will avoid the necessity of having dual systems apply in the Service for those appointed before and after the commencement of the new section. Such a dual system would be confusing for personnel areas to administer and would lead to additional administrative costs.

I note that it is possible for officers whose probationary appointments are terminated to take any grievances they may have about the process associated with the termination of their appointments to the Merit Protection Review Agency and that their unions may make representations for the reconsideration of any cases that would appear to warrant it.'

The Committee thanks the Minister for this response. In continuing to draw sub-clauses 33(2) and (3) to the attention of the Senate, together with the Minister's helpful response, the Committee hopes to promote more informed consideration of the issues involved at the Committee stage of debate in the Senate.

Sub-clause 50(2) - Retrospectivity

Sub-clause 50(2) provides that Subdivision C of Division 6 of Part III of the Public Service Act 1922 - dealing with disciplinary action against officers other than Secretaries of Departments - applies after the commencement of the amendments to be made by the Bill as if a reference to a charge included a reference to a charge made before the commencement of the amendments unless that charge had been finally disposed of. In other words charges still being dealt with at the time the amendments take effect are to be dealt with under the amended provisions.

Transitional provisions relating to certain of the amendments to be made to Subdivision C - for example sub-clause 55(2) which retains certain pre-existing appeal rights in respect of directions given before the commencement of sub-clause 55(1) - ameliorate this retrospective effect to some extent. However it appears that officers charged before the commencement of the amendments and whose charges have not been finally disposed of before that commencement will be significantly disadvantaged by the application of significantly higher penalties - $500 as against $40 - and reduced rights of appeal. Ordinarily section 45A of the Acts Interpretation Act 1901 would have the effect that any increase in a penalty would apply only to offences committed after the commencement of the provision in the amending Act increasing the relevant penalty. However the Committee doubted that section 45A applied here, since disciplinary charges were not strictly speaking 'offences' and the deduction of salary was not strictly speaking a 'penalty'. Moreover sub-clause 50(2) might be sufficient to displace the effect of section 45A.

The Committee therefore drew sub-clause 50(2) to the attention of the Senate under principle 1(a)(i) in that by reason of its retrospective effect it might be considered to trespass unduly on personal rights and liberties. The Minister Assisting the Prime Minister for Public Service Matters has responded:

> 'So far as the rights of appeal are concerned I draw the Committee's attention to the fact that existing rights of appeal will be retained for any officer in respect of whom any disciplinary action has been directed at the time the new provisions commence. The appeal rights being removed relate to disciplinary action of a very minor order, (ie., admonition, transfer at the same level and same location, and deductions from salary up to $50).
>
> So far as the increase in the maximum deduction of salary that may be made is concerned, whilst I appreciate the parallel being drawn with offences under the criminal law, I should point out that there is a very significant distinction: under the criminal law any particular charge attracts a specific maximum penalty; in the domestic disciplinary provisions relating to the Public Service, deduction from salary is only one of a range of possible disciplinary actions that may be taken from admonition to dismissal in respect of any charge of misconduct. In this context, an officer charged with misconduct may, in any case, be liable to more serious disciplinary action than even the maximum deduction from salary, for example the deferral of an increment, demotion, or even dismissal. As such, the increase in maximum deduction from salary to $500 merely provides a more appropriately graduated range of disciplinary action and may indeed, in appropriate cases, have the effect of lessening the disciplinary action that might otherwise be taken. (For example, a Chief Officer or Disciplinary Appeal Committee, at present faced with a choice of a fine of

> $40 or a deferral of an increment worth $750 to the officer may in future, rather than impose the latter harsher penalty, impose an appropriate deduction from salary.)'

The Committee thanks the Minister for this response. While it recognises the distinction to be drawn between disciplinary action and the criminal law it does not believe that this distinction provides a sufficient answer to the concern which it raised. The trend in modern sentencing practice is to make available as many options as possible to the judge or magistrate and it is customary not to make increases in relevant penalties operate retrospectively even though it may be argued, for example, that an increase in the maximum fine for an offence may make that option more attractive than a term of imprisonment. The Committee therefore continues to draw sub-clause 50(2) to the attention of the Senate under principle 1(a)(i) in that by removing certain rights of appeal in respect of charges which have not yet been dealt with at the commencement of the new provisions and by increasing the maximum deduction from salary which may be imposed in respect of such charges it may be considered to trespass unduly on personal rights and liberties.

Clauses 111 and 114 - Trespass on personal rights

Clauses 111 and 114 amend sections 19 and 25, respectively, of the Merit Protection (Australian Government Employees) Act 1984. These sections presently provide for the reconstitution of a Disciplinary Appeal Committee or a Redeployment and Retirement Appeal Committee where, in the course of determining an appeal, one of the members of the Committee is, for any reason, unable to take part. The sections presently provide that 'with the consent of the parties' the two remaining members may constitute the Committee for the purpose of determining the appeal. Clauses 111 and 114 would substitute for this requirement the consent of the Agency only.

The proposed amendments would mark a significant departure from similar provisions in other Commonwealth legislation relating to judicial and quasi-judicial bodies which require the agreement of the parties for the 2 remaining members of a 3 person tribunal to continue the hearing of any proceeding: see for example section 23 of the Administrative Appeals Tribunal Act 1975 and sub-section 14(3) of the Federal Court of Australia Act 1976. Moreover, given that the relevant committees are both constituted on a tripartite basis - the Convenor being appointed by the Agency, one member representing the Board or the Secretary whose action is appealed against and one member representing an appropriate staff organisation - it would seem important that the consent of the parties should be required for any two of these members to continue to determine an appeal.

The Committee therefore drew clauses 111 and 114 to the attention of the Senate under principle 1(a)(i) in that by removing the requirement for the consent of the parties to the reconstitution of appeal committees it might be considered to trespass unduly on personal rights and liberties. The Minister Assisting the Prime Minister for Public Service Matters has responded:

> 'The proposed amendments will bring the arrangements applying to Disciplinary Appeal Committees and Redeployment Appeal Committees into line with provisions applying where members of Promotion Appeal Committees cease to take part in Committee proceedings, but with the additional safeguard that agreement of the Agency will be necessary. The Government considers these amendments to be essential to avoid the deliberate and costly frustration of appeal proceedings by the withdrawal of a union nominee in circumstances where it is in the interests of the appellant for the proceedings to be delayed as long as possible. The Merit Protection and Review Agency, whose agreement will be necessary for proceedings to continue with only two members, is an independent statutory authority (whose members were appointed following consultation

with the ACTU) well placed to take decisions in such cases, properly balancing the interests of efficient administration and those of the staff concerned.'

The Committee thanks the Minister for this response which answers its concerns in relation to the clauses.

Clause 128 - Delegation

Clause 128 would insert a new section 32 in the Members of Parliament (Staff) Act 1984 enabling Ministers, parliamentary office-holders, Senators and Members to authorise some other person to exercise, on their behalf, the powers to employ officers under Parts III and IV of the Act. Although the power is not expressed as such it amounts to a power of delegation and the Committee has been critical of such powers which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. In the present case the Committee would think it unlikely that the staffing power would be delegated beyond the personal staff of the Minister, office-holder, Senator or Member.

The Committee therefore drew clause 128 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 Assisting the Prime Minister for Public Service Matters has responded:

'The Government would certainly not envisage the wide spread devolution of the staffing power under the Act. It is envisaged that the arrangements that are required to be approved by the Prime Minister under sub-sections 13(2) and 20(2) of the Act, in accordance with which staff may be employed, would set down guidelines on the circumstances when the employment powers might be exercised by persons other than the Minister, office-holder, Senator or Member concerned.'

The Committee thanks the Minister for this response. However if it is practicable to do so the Committee would prefer to see appropriate restrictions imposed in the relevant statutory provision rather than leaving this to be done administratively (see Chapter 4 of the Committee's Annual Report 1985-86, tabled on 17 September 1986). Accordingly the Committee continues to draw clause 128 to the attention of the Senate under principle 1(a)(ii) in that by providing such an unrestricted power of delegation 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) 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Attorney-General.

The amendments made by this Bill have a number of purposes such as the tidying up, correction or updating 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 - Delegation

Clause 3 would amend various Acts as set out in Schedule 1. In particular, that Schedule would amend paragraph 12(2)(d) of the Bankruptcy Act 1966 to enable the Inspector-General in Bankruptcy to appoint a Registrar, a Deputy Registrar 'or any other person' to conduct an inquiry or investigation on behalf of the Inspector-General. Although it is expressed as a power of appointment the power may be characterised as a power of

delegation and the Committee has been critical of such powers which impose no limitation, and give no guidance, as to the attributes of the person to whom a delegation may be made.

The Committee therefore drew the amendment to paragraph 12(2)(d) to the attention of the Senate in that it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Attorney-General has responded:

> 'Section 11 of the Act establishes the office of Inspector-General in Bankruptcy and section 12 of the Act defines certain functions of the Inspector-General. Broadly speaking, the powers of the Inspector-General are to make inquiries and investigations into the conduct and administration of bankruptcies by trustees in bankruptcy and into the conduct, trade dealings, property and affairs of bankrupts and debtors. The Inspector-General is also obliged to make such inquiries and investigations as the responsible Minister, presently myself as Attorney-General, directs. The Inspector-General is obliged to file in Court reports setting out the results of any inquiry or investigation which he or she conducts.
>
> The Inspector-General presently has power to appoint an Official Receiver to conduct an inquiry or investigation on his or her behalf. The Official Receiver must report to the Inspector-General who alone may prepare and file a report on the outcome of an investigation or inquiry. This position will remain the same after the proposed amendment. The Committee is therefore not strictly correct in characterising the Inspector-General's power of appointment under the proposed amendments as a power of delegation. The real power of the Inspector-General under section 12 of the Act is the power to report on the outcome of the inquiry or investigation, a power which is not

conferred on the appointees. The conduct of the inquiry or investigation itself is merely a fact gathering exercise, which does not prejudice rights, liberties or obligations. Further, only the Inspector-General has the power to apply to the Court for enforcement of a requirement or direction that may be made or given during the course of an investigation or inquiry. This power is conferred specifically on the Inspector-General by section 30 of the Act, and may not be exercised by any person appointed under section 12.

The Inspector-General is only one Commonwealth officer and has no deputies. In practical terms, it is simply not possible for the Inspector-General to carry out the functions of the office without being able to appoint agents as fact gatherers. Official Receivers, Registrars and Deputy Registrars, whilst being Commonwealth officers are centralised in the various capital cities of Australia. In practice, the Inspector-General is sometimes called upon to make an inquiry into a bankruptcy where the bankrupt or trustee resides in a remote country area or indeed overseas. It is more efficient and less costly if the Inspector-General can engage an agent as fact gatherer who also resides in the same area as the bankrupt or trustee.'

The Committee thanks the Attorney-General for this response. While it accepts the need for the Inspector-General to have a power of appointment, it understands that the class of persons whom the Inspector-General appoints to conduct inquiries on the Inspector-General's behalf is limited in practice to lawyers or accountants and public servants holding those qualifications. That being so, it would appear that there is no obstacle to the power of appointment being so restricted in its terms. The Committee therefore continues to draw the amendment to paragraph

12(2)(d) to the attention of the Senate in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

SUPERANNUATION LEGISLATION AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 23 October 1986 by the Minister Representing the Minister for Finance.

The Bill contains provisions which will require invalidity pensioners under the Commonwealth Superannuation Scheme to report any employment. Invalidity pensions will be adjusted where annual earnings exceed a prescribed limit. In addition the Bill contains a large number of essentially technical provisions intended to update and clarify the operation of the Superannuation Acts 1922 and 1976 and to improve the administration of the scheme. In particular the Bill will amend two delegation provisions (sections 38 and 39 of the Superannuation Act 1976: see clauses 15 and 16) in accordance with an undertaking given by the Minister for Finance to this Committee (see the Committee's Twelfth Report of 1986).

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

Clause 32 - New sub-section 73A(1) -
Definition of 'prescribed maximum rate' - 'Henry VIII' clause

Clause 32 would insert a new section 73A in the Superannuation Act 1976 providing for the rate of invalidity pensions to be reduced in relation to the amount of any earnings of the pensioner. New sub-section 73A(4) would have provided for pensions to be reduced at any time at which the sum of the pension rate and the personal earnings of the pensioner exceeds

the 'prescribed maximum rate'. New sub-section 73A(1) defined the 'prescribed maximum rate' as an amount specified in, or ascertained in accordance with, the regulations as in force from time to time.

Because it permitted the variation by regulations of this threshold figure, the definition 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 to constitute an inappropriate delegation of legislative power. The Minister for Finance has responded drawing attention to amendments made in the House of Representatives on 19 November 1986 which remove the facility to set the 'prescribed maximum rate' by regulations and provide for the maximum rate of earnings to be ascertained in accordance with a formula set out in the Act. The Committee thanks the Minister for these amendments, which answer its concerns in relation to the clause.

Clause 74 - Retrospective regulation-making powers

Clause 74 would insert new sub-sections 168(4), (5), (6), (7) and (8) enabling the making of retrospective regulations. New sub-section 168(4) would enable the making of regulations under section 14A expressed to take effect from 15 March 1981 and by virtue of sub-section 14A(3) such regulations would be able to modify the application of the Act in respect of certain classes of persons re-appointed to the Service. Similarly new sub-section 168(6) would enable the making of regulations under sub-section 126(2) retrospective to 31 March 1977 and that sub-section permits such regulations to modify the application of the Act, in this case in relation to certain teachers in the Commonwealth Teaching Service.

The Committee drew new sub-sections 168(4) and (6) to the attention of the Senate under principle 1(a)(iv) in that, because they would enable the making of retrospective regulations which might have substantive effects on the rights of superannuants,

the sub-clauses might be considered to constitute an inappropriate delegation of legislative power. The Minister for Finance has responded:

> 'Regarding the new sub-section 168(4) to be inserted into the Superannuation Act 1976 by clause 74 of the Bill, persons eligible to contribute under the Act are generally referred to in the Act as eligible employees. Paragraph (ea) of the definition of "eligible employee" in sub-section 3(1) of the Act includes within the scope of the term a person to whom section 14A applies. Sub-section 14A(1) provides that the section applies to certain specified persons other than those included in a class of persons specified in regulations under the Act. Sub-section 14A(3) enables the provisions of the Act to be modified by regulations in relation to persons to whom the section applies.
>
> Sections 63F, 63G, 66B and 87Q were inserted into the Public Service Act 1922 with effect from 15 March 1981 by the Public Service Amendment Act 1978. Those sections enable a person to be re-appointed to the Australian Public Service in certain circumstances, eg, where the person has been dismissed from the Service following a conviction for a criminal offence and the conviction is subsequently quashed. The Public Service Amendment Act 1978 also amended section 14A of the Superannuation Act 1976 with effect from 15 March 1981 to include, as persons to whom the section applies, persons re-appointed to the Australian Public Service under sections 63F, 63G and 66B.
>
> Regulations made pursuant to section 14A are contained in the Superannuation (Continuing Contributions for Benefits) Regulations (SR 1981/36). Paragraph 3(g) of the Regulations provides that section 14A does not apply to a person re-appointed under section 63F, 63G or 66B of the Public Service Act who was not an

eligible employee (contributor) for the purposes of the Superannuation Act immediately before the earlier termination of employment. The Schedule to the Regulations modifies the Act in relation to persons re-appointed under section 63F, 63G or 66B and who ceased to be eligible employees on the earlier termination of employment so that such persons are deemed to have been on leave without pay during the period from cessation to re-appointment. This ensures that the person's period of contributory service prior to cessation and after re-appointment are aggregated for future benefit purposes. The Regulations also modify the Act to provide for the amount of any benefits paid on cessation to be repaid by the person and to then be repaid to the Consolidated Revenue Fund and the Superannuation Fund as appropriate. The provisions of the Regulations apply in relation to persons re-appointed on or after 15 March 1981.

The intention of these provisions is to protect persons re-appointed under section 63F, 63G or 66B against disadvantage under the Superannuation Act 1976 arising from the earlier termination of employment.

When reference to persons re-appointed to the Australian Public Service under section 63F, 63G and 66B of the Public Service Act was inserted in section 14A it was overlooked that reference should also have been included, and the Regulations made to apply, to:

(a) persons deemed to be re-appointed to the Australian Public Service under section 87Q of the Public Service Act; and

(b) persons re-appointed or re-employed otherwise than under the Public Service Act in situations like those covered by sections 63F, 63G, 66B and 87Q.

The amendments to section 14A by sub-clause 9(1) of the Bill would remedy that omission with effect from 15 March 1981 while the new sub-section 168(4) inserted by paragraph 74(b) of the Bill would enable the Regulations to be made to apply to the persons concerned with effect from 15 March 1981 in the same way as for persons re-appointed under sections 63F, 63G and 66B.

Regarding the new sub-section 168(6) to be inserted into the Superannuation Act 1976 by paragraph 74(b) of the Bill, certain New South Wales technical and further education teachers employed in the Australian Capital Territory were transferred to Commonwealth employment on 31 March 1977. As part of the arrangements for the transfers the transferees became contributors under the Superannuation Act 1976 and it was agreed that special arrangements apply to them under the Act that would have regard to their entitlements under the New South Wales State superannuation scheme and protect them against disadvantage in relation to those entitlements.

It was intended that those special arrangements be provided for in regulations made pursuant to sub-section 126(2) of the Act modifying the provisions of the Act in their application to the transferees. Section 168(2) of the Act provides that regulations made before 1 January 1979 may be expressed to have taken effect from and including a day not earlier than 1 July 1976, the date of commencement of the Act, while sub-section 168(3) enables regulations made on or after 1 January 1979 by virtue of sub-section 126(2) to take effect from a day not earlier than 12 months before the making of the regulations. It was not practicable for the regulations in relation to the transferees to be made with effect from 31 March 1977 in time to meet the constraints contained in section 168. The new sub-section 168(6) would enable the regulations to be

made with the necessary degree of retrospectivity but there is a time limit of 2 years within which the regulations may be made with retrospective effect.'

The Committee thanks the Minister for this response. While the Committee regards the time taken to remedy the omissions and oversights which have led to the need to make retrospective regulations as undesirable, the Committee accepts that the retrospectivity is necessary to protect persons from disadvantage.

TAXATION ADMINISTRATION AMENDMENT (RECOVERY OF TAX DEBTS) BILL 1986

The Committee commented on this Bill in its Fifteenth Report of 1986 (15 October 1986). The Treasurer 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 3 - New section 14ZKA - Retrospectivity

New paragraph 14ZKA (2)(a) provides that, if a State or Territory statute of limitations applies to an action by the Commissioner of Taxation for the recovery of a taxation debt (a matter which the Commonwealth does not concede), the relevant limitation period shall run from the conclusion of the determination of any objection lodged against the assessment or the decision of the Commissioner rather than from the time at which the assessment or decision was initially made. New paragraph 14ZKA(2)(b) provides that tax debts payable under provisions imposing additional tax for the making of false or misleading statements, the late lodgment of returns or for participation in tax avoidance schemes shall be taken to be ordinary debts rather than penalties, thus attracting a longer limitation period than would otherwise apply (assuming, once again, that State or Territory statutes of limitations apply, a point which the Commonwealth does not

concede). The new provisions will apply to all causes of action, whether accruing before or after the commencement of the new section 14ZKA, other than those which, before the introduction of the Bill into Parliament, had been determined on the basis of the application of a State or Territory statute of limitations.

As is explained in the Second Reading speech, the view has previously been held that taxation debts (whether in the nature of penalties or otherwise) may, by virtue of Crown prerogative, be recovered at any time. In Deputy Commissioner of Taxation v Moorebank Pty Ltd, however, the Full Court of the Supreme Court of Queensland held that the relevant limitation periods applicable under State or Territory statutes of limitations applied to actions for the recovery of taxation debts. The Commissioner of Taxation has been granted special leave to appeal this decision to the High Court but, in the meanwhile, it has been considered necessary to introduce this Bill to prevent the revenue from being endangered by a failure to recover outstanding taxation debts.

The Committee recognised that the new section 14ZKA deals only with the time at which a claim for recovery of a tax debt may be lodged and that it does not alter in any way the substance of the taxation law. It also recognised that the new section cannot be said to work any injustice insofar as it merely restores the law to what it was thought to be prior to the decision in DCT v. Moorebank Pty. Ltd. However the new section would, assuming that case to be rightly decided, retrospectively alter the rights of taxpayers by enabling the recovery of taxation debts which would otherwise be barred by the expiry of limitation periods prior to the commencement of the new section. Accordingly the Committee drew new section 14ZKA to the attention of the Senate under principle 1(a)(i) in that by reason of this retrospective effect it might be considered to trespass unduly on personal rights and liberties. The Treasurer has responded:

'The amendments proposed by the Bill apply to actions for the recovery of tax debts whether incurred before or after the Bill becomes law and are therefore as pointed out in the Digest technically retrospective in their application.

However, it is important to consider the nature of that retrospectivity. Importantly, the amendments do not retrospectively impose any new or increased tax liability. Nor do they make unlawful any conduct previously lawful or create any offence punishable by the courts.

The amendments are directed simply at the collection of tax debts which have already lawfully been imposed by law. In the vast majority of cases these are tax debts resulting from non-acceptance by the Commissioner of Taxation of tax avoidance arrangements of the most artificial kind. The taxpayers concerned have disputed the debts and the ensuing litigation has dragged on for years.

The potential loss to the revenue ($200 million in 1986-87 and $700 million in later years) of not proceeding in the manner proposed by this Bill is such that the Government has no real alternative other than to proceed with the legislation.'

The Committee thanks the Treasurer for this response. In continuing to draw attention to new section 14ZKA, together with the Treasurer's response, the Committee hopes to promote a fuller consideration of the issues involved at the appropriate stage of debate on the Bill.

TELEVISION LICENCE FEES AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 November 1986 by the Minister for Communications.

The purpose of the Bill is to make amendments to the Television Licence Fees Act 1964 to support provisions contained in the Broadcasting Amendment Bill 1986 dealing with equalisation of commercial television services.

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

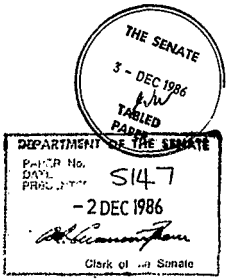
Paragraph 4(b) - New sub-section 5(2) - 'Henry VIII' clause

New sub-section 5(2), to be inserted by paragraph 4(b), would permit the regulations to make provision for rebates of fees payable by licensees. The Explanatory Memorandum indicates that this is intended to allow for financial incentives proposed to be offered to licensees moving towards aggregation.

Because it permits the variation by regulations of the incidence of the fees imposed by the Act, the new sub-section 5(2) may be characterised as a 'Henry VIII' clause. The Committee has consistently drawn attention to such clauses permitting the remission by regulations of fees and charges imposed by Acts. Accordingly the Committee draws new sub-section 5(2) 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
26 November 1986

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWENTIETH REPORT

OF 1986

3 DECEMBER 1986

THE SENATE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

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

TWENTIETH REPORT

OF 1986

The Committee has the honour to present its Twentieth Report of 1986 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 (Books) Bill 1986
Human Rights and Equal Opportunity Commission Bill 1985
Plant Variety Rights Bill 1986

BOUNTY (BOOKS) BILL 1986

This Bill was introduced into the Senate on 20 November 1986 by the Minister for Community Services at the request of the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to introduce new assistance arrangements for the book printing industry in Australia for the period 1 January 1987 to 30 June 1989 to give effect to the Government's decision to continue bounty assistance to that industry.

The major proposed changes to the scheme operating under the existing Bounty (Books) Act 1969, which terminates on 31 December 1986, are:

- the extension of bounty to Australian guides and directories (other than telephone, trade, business, professional and other accommodation directories and timetables);

- the exclusion from eligibility for bounty of books published by the Australian Government Publishing Service, books published by State and Territory Government Printers, and books which, if imported, would be classifiable to tariff items on which Customs duty is payable;

- the limitation of applications for bounty to one claim per production run, with a minimum claim of $200 per title; and

- the provision that imported typesetting in any pre-printed plate form will not disqualify an otherwise eligible publication.

The Committee notes that in this case it is reporting for the information of the Senate on a Bill which has already passed both Houses. The Committee drew the attention of the Senate to the following clauses of the Bill:

Sub-clause 4(1)
Definition of 'recognised educational institution' - 'Henry VIII' clause

Sub-clause 4(1) defines a 'recognised educational institution' as an education institution for the purposes of the Student Assistance Act 1973, a school for the purposes of the Commonwealth Schools Commission Act 1973 or 'any other educational institution, authority or body that the Comptroller declares in writing to be a recognised educational institution for the purposes of this Act'. A book that is intended for use solely or principally in connection with education provided at a 'recognised educational institution' is defined as a 'textbook' for the purposes of the Act and bounty is not payable in relation to a 'textbook' that is not casebound and that has fewer than 16 printed pages or the printed material in which could, without altering the character of the book, be published in a book of fewer than 16 pages.

Because it would permit the substance of the definition of 'recognised educational institution' to be extended by declaration by the Comptroller, the definition may be characterized 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 to constitute an inappropriate delegation of legislative power. The Minister for Industry, Technology and Commerce has responded:

> 'The Committee's concern is noted. The definition proposed continues the style which previously existed in the Bounty (Books) Act 1969, and has been adopted to provide the Comptroller with some needed flexibility to

recognise quickly educational institutions which are not listed in the two Acts for which the Minister for Education is responsible.

The Committee has previously acknowledged the need for a degree of flexibility in the administration of bounty schemes, so that they might remain relevant to market movements and technological changes over their statutory period. The effect of the proposed mechanism in this bounty will provide a facility to make otherwise ineligible books bountiable as textbooks. As such, it will in all cases have the effect of conferring a benefit upon eligible bountiable recipients. The Government will however, be proposing an amendment next Sittings to the Act, to effectively treat any declaration under the definition as if it were a regulation, so that the Parliament's ability to scrutinise and disallow the "extension" is preserved.'

The Committee thanks the Minister for this undertaking, which answers its concerns in relation to the definition. The Committee recognises that, insofar as it may enable books having more than 16 pages but fewer than 50 pages which would not otherwise be eligible for bounty to be treated as 'textbooks' and so to be bountiable, the mechanism for extension of the definition is beneficial in effect.

Paragraph 4(2)(f) - 'Henry VIII' clause

For the purposes of the Act, 'book' means a publication in book form. Sub-clause 4(2) provides that a publication shall not be taken to be in book form unless it is bound by various specified methods or -

'(f) other means approved by the Comptroller for the purposes of this sub-section, not being the use of flexible adhesive affixed to one edge of the publication.'

Once again, because it would permit the effect of the provision to be extended by approval by the Comptroller, paragraph 4(2)(f) may be characterized 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 to constitute an inappropriate delegation of legislative power. The Minister for Industry, Technology and Commerce has responded indicating that the sub-clause was intended to provide the capability to accommodate advances in the industry with some speed. He has undertaken, however, to have the provision amended to treat the Comptroller's approval as if it were a regulation, thus preserving parliamentary scrutiny of this mechanism. The Committee thanks the Minister for this undertaking, which answers its concerns in relation to the provision.

Paragraph 5(7)(b) - Non-reviewable decision

By virtue of paragraph 5(1)(s) bounty is not payable on a book that is a 'prohibited import'. Sub-clause 5(7) defines a book as a 'prohibited import' if, in the event of its being outside Australia, its importation would be prohibited absolutely by a law of the Commonwealth or -

> '(b) its importation into Australia would be prohibited by a law of the Commonwealth unless permission for the purposes of that law were obtained and the Comptroller is satisfied that unconditional permission to import an unlimited number of copies of the book would not be granted for the purposes of that law.'

Sub-clause 5(8) provides that the regulations may provide that the Comptroller may obtain a report in relation to a book from any board or other body established under a law of the Commonwealth for the purpose of giving advice in relation to the importation of books and that provision may be made by the regulations for the review of any report so furnished.

No provision has been made for review of a decision by the Comptroller under paragraph 5(7)(b) and the absence of any reference to such decisions in sub-clause 33(2) may be taken to indicate that such a decision is not regarded as an integral part of the process of approving or refusing to approve a payment of bounty and so reviewable under paragraph 33(1)(a) or (b). The Committee suggested that it would be preferable for provision to be made in the Act for review of such decisions, which directly affect the entitlement to bounty, rather than for provision to be made in the regulations for review of a report by an advisory body the advice of which the Comptroller might accept or reject. Accordingly the Committee drew paragraph 5(7)(b) 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 Industry, Technology and Commerce has responded:

> 'The Committee is advised that Regulation 4A of the (Prohibited Imports) Regulations provides publications that fall into certain categories are prohibited imports, unless permission to import the publications is granted by the Attorney-General, or an authorised person. An aggrieved person only has the rights of review given by general administrative law, as the Attorney-General's decision is not directly reviewable by the AAT.
>
> As there is no AAT review available to an importer of a publication that is a prohibited import, it is considered inappropriate for a printer or publisher in Australia of any publication that would, if imported, be a prohibited import, to have any greater rights.'

The Committee thanks the Minister for this response. However the Committee notes that in its Report No.24, Review of Customs and Excise Decisions: Stage Four: Censorship, the Administrative Review Council recommended that decisions relating to applications for permission to import prohibited goods under

regulation 4A of the Customs (Prohibited Imports) Regulations should, in general, be reviewable by the Administrative Appeals Tribunal. The Committee believes that decisions affecting entitlement to bounty should be reviewable on their merits and accordingly the Committee continues to draw paragraph 5(7)(b) 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 19(4) - Non-reviewable decision

Sub-clause 19(4) provides that the registration of a person for the purposes of the Act has effect from the day on which the notice registering the person is signed or 'such earlier day, not being a day earlier than the first day of the bounty period, as is specified for the purpose in the notice'.

No provision had been made for review of a decision of the Comptroller refusing to register a person from a day earlier than the day on which the notice registering a person is signed although such provision is customary in bounty legislation (compare, for example, paragraph 34(1)(h) of the Bounty (Ship Repair) Bill 1986). Bounty would not be payable to a person unless the person were registered. The Committee therefore drew sub-clause 19(4) 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 Industry, Technology and Commerce has responded noting that the Bill was amended in the Senate on 28 November 1986 on the motion of Senator Grimes to make decisions under sub-clause 19(4) subject to review. The Committee thanks the Minister for this amendment which answers its concerns in relation to the sub-clause.

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION BILL 1985

The Committee commented on this Bill in its Seventeenth Report of 1985 (4 December 1985). Although the Bill was agreed to by the Senate with amendments in March 1986 it remained in the Senate because it was tied up with the Australian Bill of Rights Bill package. The Government moved on 26 November 1986 for the reconsideration of the Human Rights and Equal Opportunity Commission Bill 1985 and moved certain further amendments to that Bill. The attention of the Committee was drawn to a clause of the Bill on which it did not comment in its Seventeenth Report of 1985 which fell within its Terms of Reference and the Committee also identified a clause in the Government amendments as falling within its Terms of Reference.

Once again the Committee notes that in this case it is reporting for the information of the Senate on a Bill which has now passed both Houses. The Committee draws the attention of the Senate to the following clauses of the Bill:

Sub-clause 3(1) -
Definition of 'discrimination' - 'Henry VIII' clause

Sub-clause 3(1) provided that 'discrimination' meant any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation and -

'(b) any other distinction, exclusion or preference that -

(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(ii) has been determined by the Minister under sub-section 31(2) to constitute discrimination for the purposes of this Act,'

but did not include any distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job. Sub-clause 31(2) provided that the Minister might, by notice in the Gazette, determine that a distinction, exclusion or preference that had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation constituted discrimination for the purposes of the Act. Under paragraph 31(1)(b) the proposed Human Rights and Equal Opportunity Commission is to have the function of inquiring into any act or practice that may constitute 'discrimination' as defined.

The Explanatory Memorandum indicated that grounds for discrimination which had been developed by the previously existing Employment Discrimination Committees and which might be promulgated in determinations by the Minister under sub-clause 31(2) included criminal record, age, marital status, medical record, personal attributes, nationality, trade union activities, physical disability and sexual preference. Because paragraph (b) of the definition of discrimination, taken together with sub-clause 31(2), permitted the content of the definition to be extended by Ministerial determination, the provision could be characterized 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. The Committee notes that the Bill was amended in the Senate on 28 November 1986 on the motion of Senator Macklin to substitute for sub-paragraph (b)(ii) a new provision enabling the content of the definition of 'discrimination' to be extended by regulations rather than by Ministerial determination. The amendment answers the Committee's concerns in relation to the provision.

Proposed new clause 19 - Delegation

The Government substituted by amendment a new clause 19 providing that the Commission may delegate all or any of its powers (other than the power of delegation) to a member of the Commission, a member of the staff of the Commission or 'another person or body of persons' and that a member of the Commission may likewise delegate all or any of the powers exercisable by the member to a member of the staff of the Commission or 'any other person or body of persons' approved by the Commission.

The Committee recognised that, as it relates to the power of delegation conferred on the Commission, the new clause 19 does not differ from the previously existing clause 19 on which it did not comment in its Seventeenth Report of 1985. However the Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. The Committee therefore draws new clause 19 to the attention of the Senate under principle 1(a)(ii) in that by providing for such unrestricted delegation of administrative powers it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

PLANT VARIETY RIGHTS BILL 1986

This Bill was introduced into the House of Representatives on 8 October 1986 by the Minister for Primary Industry.

The purpose of the Bill is to establish a national scheme which would allow plant breeders to apply for a grant of proprietary rights over any new variety which they may develop.

The Bill is based on the following principles:

- Participation of breeders is to be voluntary.

- The grant of a right would only be given where a new variety can be clearly distinguished by one or more important characteristics from any other known plant variety.

- All plant species are to be potentially eligible for inclusion in the scheme but species or genera to which the scheme is to apply at any time are to be declared by regulation after receipt by the Minister of advice from a broad based Advisory Committee.

- Ownership rights are to include the right to collect royalties including those from other persons who grow and sell protected varieties under licence, for commercial purposes.

- Nothing in the Bill will prevent the retention of seed of protected varieties for sowing of crops or sale for human and animal consumption. Protected varieties will also be freely available for research purposes and to plant breeders for use in breeding programmes.

- Protection of a right, once granted, will be the responsibility of the owner of the new variety, through the normal legal process.

- Appeals against decisions of the registration authority will be able to be made to the Administrative Appeals Tribunal.

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

Sub-clause 34(1) - Insufficiently defined administrative powers

Sub-clause 34(1) provides that the Minister may impose on a grant of plant variety rights conditions restricting the assignment of those rights, conditions requiring, or relating to, the licensing of persons to sell, or produce for sale, plants, or reproductive material of plants, of that variety or other conditions if 'the Minister considers it necessary, in the public interest'. A decision by the Minister to impose conditions under this sub-clause is to be subject to review by the Administrative Appeals Tribunal: see paragraph 53(1)(m). However if the Minister decides on a case by case basis what is or is not in the public interest it may be difficult to challenge his or her opinion. If, on the other hand, the Minister develops guidelines for the exercise of this discretion - guidelines to which the A.A.T. may also refer in reviewing the initial decision - there would seem to be no good reason why such guidelines should not be set out in the legislation as criteria for the exercise of the discretion.

The Committee's fundamental concern is that what is in the public interest is, in essence, a matter for the Parliament to determine. It should not, in a scheme of legislation such as that under consideration, abdicate its responsibility in this regard to a judicial or quasi-judicial body like the A.A.T. simply because it is unable itself to arrive at any clear conception of the meaning of 'the public interest' in this context. Consideration must have been given in the development of this legislation to the way in which the discretion in sub-clause 34(1) would be administered in practice and it should not therefore be impossible to specify appropriate criteria even if provision is made for further criteria to be prescribed or for the Minister to have regard to other matters if the Minister considers them to be relevant.

The Committee is aware that there are precedents for the grant of very broad discretions to Ministers which are reviewable by the A.A.T. It is also aware, however, that the Tribunal has been critical of the failure by bodies upon which such discretions

have been conferred to develop more detailed criteria to guide them in the exercise of their discretion. It suggests that similar criticism may apply to the Parliament if it has resort in this case to a criterion as vague as 'the public interest'. Accordingly the Committee drew sub-clause 34(1) 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 Primary Industry has responded:

> 'The legislation establishes a plant variety rights (PVR) scheme and, as you know, we have no direct experience in operation of such a scheme. However, overseas experience is that while it is essential to have public interest provisions in PVR legislation, the necessity for issue of a compulsory licence on the grounds of public interest has been rare.
>
> I expect the principal criterion will be where a PVR holder is considered to have failed to provide a reasonable supply of the variety to the public at reasonable prices. The consideration of this question contains a significant element of judgement, tempered by circumstances at the time. Given the rapidity of change that might be expected in the plant breeding/varietal marketing field and in particular areas such as the emerging technologies of tissue culture, biotechnology and genetic engineering, I believe the development of guidelines, at this stage, has the potential to create more problems than by adopting a case by case discretionary decision making approach.
>
> I consider the appeal provisions under the AAT are adequate and at this stage, I am not persuaded that the absence of guidelines would make it difficult to challenge a decision of the Minister. It is my view that the Bill should remain in its present form and

that the development of guidelines for the exercise of this discretion be examined in the light of hands-on experience.'

The Committee thanks the Minister for this response. In continuing to draw attention to sub-clause 34(1), together with the Minister's response, the Committee suggests that this provision should be examined after it has been in operation for some time to ascertain whether it has given rise to any problems in its practical application. The Committee notes that it is the Minister's intention that the scheme be reviewed after 5 years in accordance with the recommendations of the Senate Standing Committee on National Resources.

Michael Tate
Chairman
3 December 1986