SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

1998

4 March 1998

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT OF 1998

The committee presents its First Report of 1998 to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Judiciary Amendment Bill 1997

Taxation Laws Amendment Bill (No. 6) 1997

Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997

Judiciary Amendment Bill 1997

This bill was introduced into the House of Representatives on 20 November 1997 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Judiciary Act 1903* to:

- establish the Australian Government Solicitor (AGS) as a separate statutory authority to provide legal and related services for government purposes;
- set out the rights, duties and obligations of lawyers in the Attorney-General's Department and the AGS;
- provide for the appointment and terms and conditions of a CEO and staff for the AGS;
- provide for the position regarding taxation and corporate governance of the AGS;
- confer on the Attorney-General the power to issue Legal Services Directions relating to the performance of Commonwealth legal work;

and amends 10 portfolio Acts to make consequential and transitional amendments.

The committee dealt with this bill in Alert Digest No. 17 of 1997, in which it made various comments. The Attorney-General has responded to those comments in a letter received on 3 March 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Insufficient Parliamentary scrutiny
Proposed new Part VIIIC

In Alert Digest No. 17 of 1997, the committee noted that under proposed new Part VIIIC, the Attorney-General may issue Legal Services Directions which must be complied with by a variety of persons or bodies, not all of whom are otherwise under the control of the Commonwealth.

It appeared that these Directions may be legislative in character but there is no provision for them to be disallowable instruments for the purposes of the *Acts Interpretation Act 1901*. The committee, therefore, sought the advice of the Attorney-General on whether these Directions should be subject to review by Parliament.

Pending the Attorney-General's advice, the committee drew Senators' attention to the provisions, as they may be considered insufficiently to subject the exercise of

legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

On this issue, the Attorney-General has responded as follows:

> *PARLIAMENTARY SCRUTINY OF LEGAL SERVICES DIRECTIONS*
>
> Legal Services Directions will be capable of applying either generally to Commonwealth legal work, or to specific legal work being performed in relation to a particular matter (Bill clause 55ZF(1)).
>
> The Government considers it appropriate for Legal Services Directions that are legislative in character (these are most likely to be the Directions of general application) to be subject to Parliamentary scrutiny. When the Bill was drafted it was expected that Directions of a legislative character would be subject to Parliamentary scrutiny under the Legislative Instruments Bill. The Government remains of the view that this would be the most effective process for subjecting Directions of a legislative character to effective Parliamentary scrutiny.

The committee thanks the Attorney-General for this response. However, the committee is concerned that the process favoured by the Government for effective scrutiny of Legal Service Directions is dependent on a bill, the Legislative Instruments Bill, which has been in existence in one form or another since 1994 but has not yet passed into law. Until the Legislative Instruments Bill is passed into law, the committee favours, at least as an interim measure, provision for parliamentary scrutiny of these Directions in the Judiciary Amendment Bill 1997.

The committee, therefore, continues to draw Senators' attention to the provisions, as they may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Legal professional privilege
Clause 55ZH

In Alert Digest No. 17 of 1997, the committee noted that clause 55ZH of this bill, if enacted, would enable a Legal Services Direction to require a person to give information or documents to another person in circumstances that, apart from that clause, would be in breach of legal professional privilege.

The committee was concerned that this may prejudice the operation of the legal system and result in unfairness to clients.

Clause 55ZF enables the Attorney-General to issue Legal Services Directions that are to apply, *inter alia*, to Commonwealth legal work being performed in relation to

a particular matter. That clause has a definition of Commonwealth legal work which, in part, includes 'any legal work performed by a person for ... a company in which the Commonwealth has a controlling interest'.

It seemed to the committee that unfairness could result for, say, a group of private shareholders in Telstra where they have given confidential information to the solicitor acting for Telstra (either AGS or a private solicitor) and clause 55ZH is used to force the disclosure of that otherwise privileged information to the Commonwealth where there is litigation, either then or later, in which the Commonwealth and Telstra (or those private shareholders) are opposed.

The committee noted that subclauses (3) and (4) deem that no breach of legal professional privilege has occurred nor the privilege waived. The question arose as to what use the information obtained may be put.

The committee, accordingly, sought further clarification from the Attorney-General on the purpose of clause 55ZH and on whether there may be implications which may trespass unduly on the rights and liberties of individuals.

Pending the Attorney-General's advice, the committee drew Senators' attention to the provisions, as they may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

On this issue, the Attorney-General has responded as follows:

> *LEGAL PROFESSIONAL PRIVILEGE*
>
> The Committee was also concerned that the proposed compulsory disclosure power could prejudice the operation of the legal system and result in unfairness to clients. The Committee gave the hypothetical example of a group of private shareholders in Telstra who gave confidential information to the solicitor acting for Telstra and clause 55ZH being used to force disclosure of that information to the Commonwealth in circumstances where there could be litigation, either then or later, in which the Commonwealth is opposed to Telstra (or those private shareholders). The Committee has also asked a related question as to what use the information obtained may be put.
>
> Statutory displacement of legal professional privilege is not unique to the Bill, and examples of a legislature displacing legal professional privilege in favour of an overriding public interest can be found both in Commonwealth legislation (for example, sections 70 and 85 of the *Seafarers Rehabilitation and Compensation Act 1992* and section 9(4) of the *Ombudsman Act 1976*) as well as in State legislation (for example, sections 83, 189 and 194 of the *Legal Practice Act 1996* (Victoria) and section 29 of the *Legal Aid Act 1997* (Queensland)).
>
> The proposed power to issue Legal Services Directions requiring disclosure of information is necessary to maintain and protect the public interest in relation to the legal work undertaken for the Commonwealth, its Ministers, officers, authorities and companies (see the Explanatory Memorandum and Second Reading Speech for the Bill). This need arises from the Government's decision to open the conduct of Commonwealth litigation to private lawyers in competition with the AGS and to create the AGS as a separate statutory authority. Specifically, the proposed

compulsory disclosure power is designed to enable the Attorney-General to discharge his First Law Officer functions. Examples of public interest factors that Legal Services Directions are intended to protect include:

- the requirement to observe the model litigant principle,
- the need to take account of whole-of-government factors,
- the need to ensure proper coordination of litigation involving common issues across government,
- the need to maintain consistency in the conduct of litigation by the Commonwealth, especially in relation to the observance of proper criteria for settling claims,
- the need to keep Commonwealth litigation costs to a minimum (for example, by ensuring compliance with controls over counsel's fees), and
- the need to maintain consistency in the observance of proper criteria for financial assistance to officials who are the subject of litigation arising out of their employment.

It is necessary for the Attorney-General (or his authorised officer) to have relevant information in order to ensure that:

- Directions are issued when needed and are amended as appropriate,
- Directions are observed, and
- the Attorney-General is able to intervene in particular cases to ensure that the public interest is protected in those cases,

The purpose of clause 55ZH is to ensure that the Attorney-General is able to obtain all relevant information.

While it is envisaged that Legal Services Directions will provide a framework for the conduct of Commonwealth litigation, the prime responsibility for conducting this litigation will rest with Departments and agencies. It is therefore expected that the need for the Attorney-General to intervene in the conduct of litigation would only occur where sensitive or strategically important matters arose.

In addition, a purported use of the power to obtain information for an ulterior purpose (for example, to obtain an advantage in particular proceedings) would be invalid and could be successfully challenged in court. This is because of the well-established legal principle that statutory powers can only be used bona fide for the purposes for which they are conferred by the statute (see, for example, the High Court of Australia's decision in *O'Reilly* v *State Bank of Victoria Commissioners* (1982-83) 153 CLR 1, at 48). As noted above, the power in clause 55ZH is linked to the need to maintain and protect the public interest in relation to the legal work undertaken for the Commonwealth, its Ministers, officers, authorities and companies.

Further, if information has been obtained pursuant to the compulsory power, its use or disclosure for an ulterior purpose would be unlawful and could be restrained or be the subject of a damages award. It is an established legal principle that information obtained pursuant to a statutory power is subject to a legal obligation of confidence, in that the information can only be used or disclosed for the purpose for which the statutory power is conferred (*Johns* v *Australian Securities Commission* (1992-93) 178 CLR 408, at 424 and 436).

In relation to the specific Telstra example given by the Committee, it should be noted that no decision has been made regarding the appropriateness or otherwise of issuing Legal Service Directions in relation to Telstra. However, the main purpose of the power to issue Directions is to facilitate regulation of legal services to the Commonwealth, and not to regulate Commonwealth-controlled corporations.

In relation to Commonwealth litigation generally, clause 55ZH is part of a scheme designed to ensure that Commonwealth Departments and agencies conduct their litigation in accordance with the public interest. Accordingly, clause 55ZH contains the following safeguards:

- any information supplied to Departments or agencies or their solicitors could be obtained and used under clause 55ZH only for legitimate purposes, and
- disclosure and use of information under, and for the purposes of, clause 55ZH would not result in the loss of any legal professional privilege that exists in relation to the information, thus constituting an additional bar to the information being disclosed in legal proceedings (clause 55ZH(4)).

The committee thanks the Minister for this very full response.

Taxation Laws Amendment Bill (No. 6) 1997

This bill was introduced into the House of Representatives on 29 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
  - deny the ability to offset against capital gains certain capital losses created by an arrangement entered into before 3pm on 29 April 1997 and to prevent companies using capital losses artificially created through an arrangement entered into after that time;
  - allow instalment taxpayers classified as small to pay their likely tax on 15 December following their income year and the balance, if any, of their tax liability on the following 15 March, and make consequential amendments;
  - prevent franking credits or debits arising from the payment or refund of tax where those amounts are attributable to the retirement savings account business of a life assurance company;
  - ensure that taxpayers must reduce the cost base or indexed cost base of an asset to the extent of any net deductions allowable for expenditures included in the cost base;
  - replace the formulae used to determine the passive income of the controlled foreign companies of life and general insurance companies;
  - require life companies to use average calculated liabilities, rather than calculated liabilities at the end of the year of income as the basis for determining exempt income that relates to immediate annuity business and apportioning income and capital gains; and
  - clarify the operation of the depreciation provisions in circumstances when an entity the income of which is exempt becomes, for any reason, subject to tax on any part of its income under the provisions of the Act;
- *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend to companies two concessional tracing rules which are available to trusts under trust loss measures;

- *Fringe Benefits Tax Assessment Act* 1986, *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend the existing exemption for taxi travel beginning or ending at an employee's place of work and to introduce a new exemption from FBT for car parking benefits for certain small business owners; and

- *Sales Tax Assessment Act 1992* to ensure that goods imported into Australia under a temporary importation exemption, used in Australia, exported and then re-imported are subject to sales tax at the time of the later importation.

The committee dealt with this bill in Alert Digest No. 16 of 1997, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 3 December 1997. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospective application
Item 3 of Schedule 10

In Alert Digest No. 16 of 1997, the committee noted that item 3 of Schedule 10 to this bill, if enacted, would provide that the amendments made by this Schedule would apply to entities which became taxable earlier than 3 July 1995 but not earlier than the start of the year of income in which 1 July 1998 occurs.

The committee noted that paragraph 10.9 of the explanatory memorandum suggests that the Commissioner's interpretation and administration of section 61 has been subject to challenge and that the purpose of these amendments is to retrospectively change the law to avert further challenge.

Accordingly, the committee sought the Treasurer's advice on whether personal rights may be adversely affected by this change.

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

The Assistant Treasurer has responded as follows:

> Schedule 10 introduces a new section 61A into the *Income Tax Assessment Act 1936* (ITAA). The measure was announced in the 1997-98 Budget to ensure that the depreciable assets of tax exempt entities which became taxable prior to 3 July 1995 are brought into the tax system at their notional written down values using the "NWDV including section 57AG loadings basis", as explained at paragraph 10.7 of the Explanatory Memorandum.
>
> The new section 61A accords with the Commissioner of Taxation's long standing view of the way the depreciation provisions of the ITAA operate in such circumstances. As there was general acceptance of this view, usual practice was not to include specific provisions requiring the use of the NWDV including section

57AG loadings basis into the transitional legislation of particular transition taxpayers. See, for example, the explanation contained in the Explanatory Memorandum to the transitional legislation (*Act No. 105 of 1989*) for complying superannuation funds which became taxable at the start of their year of income in which 1 July 1988 occurred.

In recent years a limited number of opportunistic challenges to the Commissioner's view have emerged. Schedule 2D, Division 57 of the *ITAA* was enacted by the Government to ensure that entities which become taxable on or after 3 July 1995 are required to use the NWDV including section 57AG loadings basis. Schedule 10 is intended to provide this same clarity and certainty for entities which became taxable prior to 3 July 1995. Schedule 10 is, therefore, an entirely retrospective measure - it does not have any prospective application. Its earliest application date is designed to correspond with the transition time of complying superannuation funds.

The direct risk to the revenue presented by these challenges to the Commissioner's view is substantial. The potential flow on effect to other taxpayers who have complied with the Commissioner's interpretation increases that already considerable revenue risk. For example, in one particular challenge [which has now progressed to the stage of an appeal to the Administrative Appeals Tribunal under Part IVC of the *Taxation Administration Act 1953 (TAA)*] the transition taxpayer is contending for an interpretation of section 61 of the *ITAA* which produces the anomalous result that its depreciable assets would be brought into the tax system at their original acquisition costs. This interpretation totally ignores the taxpayer's prior use of those assets for the purposes of producing exempt income. The Commissioner has repeatedly advised this taxpayer, commencing well before its transition time, of his view that it is required to sue the NWDV including section 57AG loadings basis.

Following the introduction of Schedule 10 into Parliament, the commissioner became aware of an isolated instance of a taxpayer that had received a private binding ruling under Pt IVAA of the *TAA* which is, to some extent, different from the new section 61A. In the interests of fairness and equity, the Government amended TLAB 6 in the House of Representatives to insert a savings clause to protect any such taxpayers who may have previously received a private binding ruling.

The Government believes that the risk to the revenue warrants the retrospective measure contained in Schedule 10. The Government does not believe that the measure will trespass unduly on personal rights having regard to the widespread acceptance and compliance with the Commissioner's interpretation of section 61 of the *ITAA*, the opportunistic nature of the limited challenges to his view, and the protection that the savings clause will afford to any taxpayer who may have previously received a private binding ruling.

In addition, during debate in the House of Representatives the Opposition has indicated that it will support this amendment.

I trust that the above has been of assistance.

The committee thanks the Assistant Treasurer for this response, noting the amendment with regard to private binding rulings which has been introduced into the bill.

Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1936* and three other Acts to set out rules that have to be satisfied by trusts before a deduction is allowed for prior year and current year losses and certain debt deductions.

The committee dealt with this bill in Alert Digest No. 14 of 1997, in which it made various comments. The Treasurer has responded to those comments in a letter dated 27 February 1997. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Retrospectivity- legislation by public announcement

In Alert Digest No. 14 of 1997, the committee noted that the measures contained in this bill will generally take effect from 9 May 1995 the date they were announced in the 1995 budget.

The committee noted that the present Government announced in the 1996 budget that it intended to proceed with the previous Government's 1995 budget announcement that trust loss rules would be introduced into income tax law. At the same time, the Government made it clear that several significant changes would be made to the previous Government's draft legislation. Further modifications of the proposals were contained in the 1997 Budget.

With respect to measures stemming from budget announcements the committee is usually prepared to accept some retrospectivity. The committee has previously indicated that, in relation to retrospectivity, budget measures are something of a special case. In a paper titled *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-85*, the then Chairman of the Committee, Senator Tate, said:

> It is customary ... for budgetary measures to be made retrospective to the date of their announcement on Budget night and for changes to taxes, levies, fees to be given effect from the date of their introduction into Parliament.

On the other hand, the present bill has been introduced more than twelve months after its original announcement. As it relates to the imposition of a tax, the committee bears in mind the resolution of the Senate of 8 November 1989. That resolution states:

> That, where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill.

While a distinction may be able to be drawn between a budget announcement and a press release, the principle behind the resolution remains: that legislation amending taxation law retrospectively from a date so announced should be introduced quickly after it is announced.

The committee has consistently opposed legislation by press release. In its 1986-87 Annual Report the committee stated:

> ...the practice of 'legislation by press release' carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement.

The committee went on to say:

> Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty. Persons such as lawyers and accountants who must advise their clients on the law are compelled to study the terms of the press release in an attempt to ascertain what the law is. As the Committee has noted on two occasions, one press release may be modified by subsequent press releases before the Minister's announcement is translated into law. The legislation when introduced may differ in significant details from the terms of the announcement. The Government may be unable to command a majority in the Senate to pass the legislation giving effect to the announcement or it may lose office before it has introduced the relevant legislation, leaving the new Government to decide whether to proceed with the proposed change to the law.

The history of the present bill demonstrates what the committee warned about as long ago as 1987.

Given the delay, the committee sought the advice of the Treasurer whether the provisions of the bill should apply only from the current financial year.

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

The Treasurer has responded as follows:

> The Committee has sought my advice whether the provisions of the Bill should apply only from the current financial year.

In its comments, the Committee noted that the trust losses Bill, which was introduced into the Parliament on 1 October 1997, may not comply with the principle behind the resolution of the Senate of 8 November 1989. This resolution broadly states that if tax legislation is not introduced into the Parliament (or made available by way of publication of a draft Bill) within six months of its announcement, then the commencement date should be no earlier than the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill.

The trust loss measures were announced by the previous Government on 9 May 1995. Legislation was introduced into the Parliament in September 1995 as part of the *Taxation Laws Amendment Bill (No. 4) 1995* (within six months of the announcement). However, the measures were excised from that Bill by the Senate and were referred to the Senate Economics Legislation Committee. Because of the 1996 Federal election, the Senate committee did not complete its inquiry and did not conduct hearings.

In the 1996-97 Budget, the Government announced that it would proceed with the trust loss measures, with a number of changes, with general effect from 9 May 1995. An exposure draft of the proposed trust loss measures was released on 10 February 1997 for public consultation (within six months of the Government's Budget announcement on 20 August 1996). As a result of the consultative process, the Government announced further changes in the 1997-98 Budget, and the legislation was introduced into the parliament on 1 October 1997 (within six months of the Government's Budget announcement on 13 May 1997).

In the circumstances, I do not believe that the trust losses Bill breaches the principle behind the Senate resolution of 8 November 1989. Taxpayers have had the benefit of draft legislation since September 1995. Even though the detail of the legislation introduced into the Parliament by this Government on 1 October 1997 differs some respects to the previous Government's legislation, the changes are generally beneficial to taxpayers. Any changes that are disadvantageous to taxpayers do not commence prior to the date they were announced by this Government.

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

The committee thanks the Treasurer for this response. The committee, however, is not persuaded that the proposed date of effect of 9 May 1995 for the measures contained in this bill is within the spirit of its previously expressed views on when retrospectivity might be acceptable. The committee is concerned at the great uncertainty that the delay in implementing these measures has created.

The committee continues to draw Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

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Extract from **Standing Order 24**

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 1998

The committee presents its Second Report of 1998 to the Senate.

The committee draws the attention of the Senate to clauses of the following which contains provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Health Insurance Amendment Act (No. 1) 1997

Insurance Laws Amendment Bill 1997

Health Insurance Amendment Act (No. 1) 1997
Act No. 146, 1997

The Health Insurance Amendment Bill (No. 1) 1997 was agreed to by the Senate with one Government amendment on 4 September 1997 and received the Royal Assent on 9 October 1997. Clause 2 of the bill provided for the Act to commence on the 28th day after it received the Royal Assent. [Portfolio responsibility: Health and Family Services]

The Act amends the *Health Insurance Act 1973* in relation to the Professional Services Review Scheme. Particularly, it:

- ensures that there is no doubt that judicial power is not being exercised by the executive under the Scheme;
- brings the class of practitioners in Parts VAA and VA of the Act into line with definitions contained elsewhere in the Act;
- clarifies the test under which a Committee reports on the conduct of a practitioner;
- provides a clearer approach to calculating the amounts of Medicare benefits to be repaid; and
- repeals sampling provisions.

In this report, the committee takes the opportunity, conferred by paragraph (1)(a) of its terms of reference, to report on the provisions of an Act of the Parliament.

The committee commented on the bill in Alert Digest No. 6 of 1997 where it noted that proposed subsection 105A(6), to be inserted by item 9 of Schedule 1 of the bill, contained an abrogation of the right to silence in that a person, other than a person under review, was not excused from producing a document prior to a hearing under the Professional Services Review Scheme on the ground that production of the document may incriminate him or her. The committee noted, however, that proposed subsection 105A(7) would make inadmissible in evidence against the person, in any criminal proceedings or proceedings for recovery of a pecuniary penalty, the document and any information obtained as a direct or indirect result of producing the document. Such inadmissibility was subject to an exception in respect of a proceeding for an offence under subsection (5) (creating an offence of knowingly producing a document that contains a statement that is false or misleading in a material particular without identifying the false or misleading material). The committee has commented on many such provisions in the past and, in this case, had no concern with the provision.

Retrospectivity—increased sanctions

At the end of January 1998, the committee received representations from a firm of solicitors drawing the committee's attention to a possible element of retrospectivity in the Act. The firm of solicitors noted that section 4 of the Act specifies that the amendments made by certain items in Schedule 1 of the Act do not apply to matters referred under section 86 of the *Health Insurance Act 1973* (referral by the Health Insurance Commission to the Director of Professional Services Review of conduct by medical practitioners) before the commencement of the Act. As several items in the Act increased sanctions for professional misconduct but were not the subject of a similar application provision, the firm of solicitors sought the committee's view on whether the Act implied that the increased penalties applied to matters that had been referred under section 86 of the *Health Insurance Act 1973* but which had not been finalised before the commencement of the amending Act.

Items 9, 10, 21 and 22 of Schedule 1 of the Act affect sanctions for overservicing. In particular, items 21 and 22 increase the maximum period of partial or full disqualification from access to Medicare of a medical practitioner, in respect of whom a determination has been made that the practitioner engaged in inappropriate service, from 12 months and 6 months, respectively, to a maximum period of 3 years for both partial and full disqualification.

The Act contains no explicit direction that the increased sanctions contained in items 21 and 22 are to apply retrospectively; that is, to matters which have been referred for investigation before the commencement of the Act but which are determined subsequently to the Act's commencement. While noting that any particular dispute as to the application of penalties under the Act is ultimately a matter for resolution by the courts, the committee nonetheless makes the following observations.

Various authorities have written on the subject of the application of penalties that have been increased after the commission of the relevant offence.

Kate Warner in chapter 12.3 of *The Laws of Australia* (ed J A Riordan, The Law Book Company Limited, Sydney 1996) describes three grounds by virtue of which a new penalty provision that increases a penalty may not apply to an offence committed before its commencement. The first of these is an *Interpretation Act* provision which has the effect of preserving the old penalty. The second is a statutory provision that expressly states that increases in penalty do not apply to offences committed but untried, while the third is the common law presumption against retrospectivity (pages 19-20). The Commonwealth *Acts Interpretation Act 1901* provides for the preservation of penalties where Acts or parts of Acts are repealed (section 8) but does not expressly provide for the effect of **amendment** of penalty provisions. The *Crimes Act 1914*, however, provides as follows:

4F Effect of alterations in penalties

(1) Where a provision of a law of the Commonwealth increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of that provision.

(2) Where a provision of a law of the Commonwealth reduces the penalty or maximum penalty for an offence, the penalty or maximum penalty as reduced extends to offences committed before the commencement of that provision, but the reduction does not affect any penalty imposed before that commencement.

Of the common law presumption against retrospectivity, Warner says:

> The common law presumption that legislation is not to be construed as having retrospective effect unless such a construction appears clearly from its terms or arises by necessary implication has been applied to prevent an increased penalty applying to an offence committed prior to the increase. However, there appears to be some difference of opinion as to the strength and effect of the presumption. ...The reasoning in cases where an increased penalty has been held to apply, based on the wording of the statute or the premise that since the legislation relates to future convictions it is not retrospective, is not convincing. To rebut the presumption against retrospectivity of laws increasing penalties very clear words are needed, and the presumption is not to be avoided by adopting a narrow view of retrospectivity. (page 21)

In *Statutory Interpretation in Australia* (3rd ed 1988), D C Pearce and R S Geddes write:

> The courts generally assume that legislation is not intended to operate retrospectively.... This presumption is most strictly applied in relation to Acts creating an offence because of the manifest injustice that the alternative approach would bring about ... A particular problem in regard to the application of the presumption against retrospectivity has arisen where a person is charged with an offence and after that date, but before the hearing of the charge, the penalty for the offence is increased. Is the person liable to the penalty applicable at the date of the offence or at the date of conviction? [cases discussed, including *Samuels v Songaila* (1977) 16 SASR 397] ...In essence, the court considered that to apply the increased penalty would subject the person retrospectively to an increased liability. Without clear legislative intention this should not be done. ...Lush J in *Bakker v Stewart* [1980] VR 17 had no doubt that an increased penalty was not applicable to offences committed before its enactment. (pages 171-72)

Andrew Palmer and Charles Sampford express the following view:

> There is a general presumption of statutory interpretation that, in the absence of a clear intention to the contrary, statutes do not have retrospective operation. Procedural statutes, however, are applied retrospectively to all actions or proceedings which are not completed at the time of enactment, no matter when the right to the action accrued. ...On several occasions the courts have held that a statute conferring on a court a new power to grant a remedy or make an order is procedural. This is perhaps surprising as the granting of such a remedy or the making of such an order could drastically alter the outcome of an action. This is even more obvious where the penalty for a criminal offence is increased: the cases are divided as to whether the penalty to be imposed on a convicted person is that which existed at the date of the offence or that which exists at the date of conviction. ("Retrospective Legislation in Australia—Looking back at the 1980s", (1994) 22 F L Rev, pages 272 and 274)

The committee notes that while the authorities differ, the common ground between all views is the presumption against retrospectivity in the absence of a clear intention to the contrary. In the absence of any such explicit intention to the contrary in respect of the increased sanctions in the Act, the committee seeks confirmation from the Attorney-General that the presumption against retrospectivity would be expected to operate in this case.

Insurance Laws Amendment Bill 1997

This bill was introduced into the House of Representatives on 4 December 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Insurance Act 1973* to streamline the processes for form setting and lodgement of accounts and statements within the Insurance and Superannuation Commissioner by authorised insurers in Australia;
- *Insurance (Agents and Brokers) Act 1984* to:
    - make certain technical amendments;
    - insert additional definitions; and
    - strengthen broker disclosure notification requirements;
- *Insurance Contracts Act 1984* to:
    - place contracts of insurance over non-commercial marine pleasure craft owned by individuals within the scope of the *Insurance Contracts Act 1984* and removing them from the ambit of the *Marine Insurance Act 1909*;
    - amend provisions relating to information flows between contracting parties; and
    - amend provisions relating to the insured's duty of disclosure; and
- *Insurance Act 1973*, *Insurance (Agents and Brokers) Act 1984* and *Insurance Supervisory Levies Collection Act 1989* to amend the prudential supervisory arrangements for Lloyd's of London to improve the security arrangements for Lloyd's underwriters' Australian policyholders.

The committee dealt with this bill in Alert Digest No. 1 of 1998, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 10 March 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Power of entry and search without warrant
Item 5 of Schedule 2 - proposed subsection 80(1)

In Alert Digest No. 1 of 1998, the committee noted that proposed subsection 80(1), to be inserted in the *Insurance Act 1973* by item 5 of Schedule 2 to this bill provides:

> **Entry on premises**
>
> (1) If the Commissioner or the inspector, while investigating the whole or a part of the affairs of a designated security trust fund, believes on reasonable grounds that it is necessary for the purposes of the investigation to enter land or premises occupied by:
>
> (a) the trustee, or a former trustee, of the fund; or
>
> (b) the custodian, or a former custodian, of the fund; or
>
> (c) the investment manager, or a former investment manager, of the fund;
>
> the Commissioner or the inspector may, at all reasonable times, enter the land or premises and may:
>
> (d) examine books on the land or premises that relate to the affairs of the trust fund or that the Commissioner or inspector believes on reasonable grounds relate to those affairs; and
>
> (e) take possession of any of those books for such period as the Commissioner or inspector thinks necessary for the purposes of the investigation; and
>
> (f) make copies of, or take extracts from, any of those books.

This power of entry and search is not subject to any requirement that the officer obtain a judicially sanctioned search warrant before entering the premises.

The committee recognised that, in this respect, subclause 31(1) does not differ from similar provisions in taxation laws. For example, the *Income Tax Assessment Act 1936* contains a provision (section 263) of similar effect. Another example occurs in the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*.

There would appear, however, to be no basis in principle for giving officers enforcing insurance laws greater powers than officers enforcing criminal law where a judicially sanctioned warrant is generally required. The committee was also interested to receive advice on what might constitute "reasonable grounds" for exercising the power of entry.

Accordingly, the committee sought the advice of the Treasurer on this issue.

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

The Assistant Treasurer has responded as follows:

> I understand the Committee has concerns that proposals contained in Item 5 of Schedule 2 of the ILAB, in particular proposed subsection 80(1) which contains a power for entry onto premises without a search warrant, may be considered to trespass unduly on personal rights and liberties. In response to the Committee's concerns, I draw your attention to the following.
>
> The main purpose of the ILAB is to amend the prudential supervisory arrangements under the *Insurance Act 1973* for Lloyd's of London (Lloyd's) to improve the security arrangements for Lloyd's underwriters' Australian policyholders. The amendments set out in this Bill will change the regulatory requirements for Lloyd's underwriters in Australia so as to accommodate the initiatives in Lloyd's 'reconstruction and renewal' plan while at the same time substantially enhancing the regulatory protection for Lloyd's underwriters' Australian policyholders and bringing the supervision of Lloyd's more into line with that of corporate insurers in Australia. A key element of the new arrangements is the proposed creation of a series of designated security trust funds (DSTFs) which will be funded to the extent of outstanding Australian policyholder liabilities.
>
> Proposed subsection 80(1) allows the Insurance and Superannuation Commissioner (the Commissioner), or an inspector appointed by the Commissioner, a power of search and entry over the premises of a trustee, custodian or investment manager (or former trustee, custodian or investment manager) of a DSTF when undertaking an investigation of the affairs of such a fund. The proposed subsection is not subject to a requirement that the Commissioner, or the duly appointed investigator, obtain a search warrant before entering such premises.
>
> The proposed subsection 80(1) is consistent with similar powers of the Commissioner under subsection 54(1) of the *Insurance Act 1973,* relating to the investigation of corporate insurers. Moreover, section 140 of the *Life Insurance Act 1995* and section 268 of the *Superannuation (Industry) Supervision Act 1993* also give the Commissioner similar powers. These powers underpin the prudential regulation role of the ISC, which sometimes requires swift and decisive intervention into the affairs of insurance companies and superannuation entities in order to safeguard policyholder or member entitlements. In this regard, proposed subsection 80(1) is consistent with the objective of the Bill to more closely align the supervision of Lloyd's with that of corporate insurers in Australia and is consistent with other ISC administered prudential regulation more generally.
>
> Further, under proposed subsection 68(1), Item 5 of Schedule 2 of ILAB the Commissioner may, by written instrument, require Lloyd's to ensure that there are such security trust funds arrangements in existence as are specified in, or ascertained in accordance with, the instrument. This instrument is currently being drafted and will require, among other things, that the Commissioner may only approve a trustee if that trustee is a corporation. In addition, as a matter of policy, it is likely that the role of custodian and investment manager (who will only be able to be engaged with the prior consent of the Commissioner) will be fulfilled only by corporate entities. Accordingly, the powers of search and entry will be exercised only upon a limited class of corporations and will not affect the personal rights and liberties of individuals.

I note that the Committee has also sought information as to what would constitute 'reasonable grounds' for the purposes of entering onto premises under proposed subsection 80(1). These powers of entry can only be used in the most serious of circumstances. In particular, only a DSTF which is under investigation by the Commissioner or by a duly appointed inspector can be subjected to the power. Proposed section 79 sets out the circumstances and procedures for instigating an investigation of a DSTF and under this section, the Commissioner or investigator would need to be satisfied that the DSTF did not constitute, or is unlikely to constitute, an adequate security for the class of insurance liabilities secured by the fund, or that Lloyd's, or the trustee of a DSTF, has contravened a provision of Part VII of the *Insurance Act 1973*.

In summary, effective prudential supervision demands an appropriate balance between the capacity for the prudential regulator to intervene quickly, and procedural considerations which protect the rights and liberties of the companies/directors concerned. In an environment of rapid capital mobility and electronic funds transfers, the need for the Commissioner to formally apply for a search warrant could delay or unduly impede critical stages of an investigatory process, and thereby potentially jeopardise the security of policyholder/member interests. When balanced against the threshold checks and balances for instigating an investigation in proposed section 79, the imperatives of prudential supervision and the requirements that the basis and timing of any entry onto premises or land be 'reasonable', the Government considers that proposed section 80(1) is appropriate.

I trust that the above information is useful in the Committee's deliberations regarding concerns over specific provisions of the ILAB.

The committee thanks the Assistant Treasurer for this comprehensive response and notes that several precedents for this type of provision are listed. The fact that there is precedent for a course of action is a weighy factor in deciding whether or not the Senate's attention should be drawn to a matter. But it is not a conclusive factor and other considerations may lead the committee to comment on a particular piece of legislation.

The committee notes the Assistant Treasurer's comments on how the legislation is intended to operate and, in particular, the expectation that the roles of trustee, custodian and investment manager will be filled only by corporate entities. The committee is concerned, however, that there is no express limitation in the bill confining the exercise of these powers to corporate entities. The committee requests the Treasurer to consider the possibility of an amendment to the bill to limit the exercise of search and seizure powers to premises other than residential premises, and **seeks a response from the Treasurer** on this issue.

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

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) Inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 1998

The committee presents its Third Report of 1998 to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Classification (Publications, Films and Computer Games) Charges Bill 1997

Higher Education Legislation Amendment Bill 1997

Insurance Laws Amendment Bill 1997

Taxation Laws Amendment Bill (No. 6) 1997

Classification (Publications, Films and Computer Games) Charges Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to impose charges for the classification of publications, films and computer games and for related services.

The committee dealt with this bill in Alert Digest No. 18 of 1997, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 13 March 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Setting a charge by regulation
Clause 13

In Alert Digest No. 18 of 1997, the committee noted that Clause 13 of this bill, if enacted, would provide for the various charges set out in the Schedules to this bill to be amended by regulation with no limit on such charges being prescribed by the bill. This raised the question of whether this clause may be considered to delegate the legislative power of Parliament inappropriately.

An inappropriate delegation enables the executive, by regulation, to make laws that ought be made by Parliament.

For this reason, the committee has consistently drawn attention to legislation which provides for the level of a 'charge' to be set by regulation. This creates a risk that the charge may in fact become a tax. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so. Where the level of a charge needs to be changed frequently and expeditiously the question arises as to whether this can best be done by regulation rather than by statute. If a compelling case can be made out for the level to be set by subordinate legislation the committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the charge or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is taxation by non-primary legislation.

Accordingly, the committee sought the advice of the Attorney-General on these issues.

Pending the advice of the Attorney-General, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Attorney-General has responded as follows:

> The Committee seeks my advice on clause 13 of the Classification (Publications, Films and Computer Games) Charges Bill 1997 ('the Charges Bill') which allows the charges in the Schedules to the Bill to be amended by regulation. In particular, the Committee is concerned that it is for the Parliament to set a tax rate and not for the makers of subordinate legislation to do so.
>
> As I said in my Second Reading Speech on the Bills, the Charges Bill gives effect to the Government's decision, in the May 1997 budget context, that from 1 July 1998 full cost recovery would be introduced for the Office of Film and Literature Classification ('OFLC') by changes to the charging structure for those using its services.
>
> As the Speech made clear, implementation of the Government's decision requires the charges for classification and related services provided by OFLC to be imposed as a tax. The charges are therefore included in a separate Bill as required by the Constitution. The collection of the charges is provided for in the complementary Classification (Publications, Films and Computer Games) Amendment Bill 1997.
>
> The approach reflected in the Charges Bill was only arrived at after careful consideration. This included paying due regard to the proposition that the level of the charges should be set in primary legislation. It was for this reason that the initial charges were included in Schedules to the Bill, so that they could be imposed by the Parliament.
>
> The charges reflected in the Charges Bill are not a general Government revenue raising measure. As the accompanying documentation makes clear, the sole purpose of the Charges Bill is to generate sufficient revenue to pay for the full operating cost in any one year of the OFLC.
>
> The services provided by the OFLC are application based. As will be noted from the Schedules to the Charges Bill there is a very wide range of charges to be imposed for the services provided.
>
> The requirement that the revenue from classification and related services cover the full operational cost of the OFLC in any one year will mean that the charges, or some of them, will need to be varied from time to time. Although the costs associated with running the OFLC have remained fairly constant over recent years and, in fact, are estimated to fall slightly for the coming financial year, there is no assurance as to the revenue to be generated from classification services in any one year. Indeed, the experience has been that when charges rise the number of applications drop and thus the revenue gained from them falls. It will therefore be necessary to adjust the charges to make up for the shortfall. A small organisation like the OFLC has very limited capacity to reduce its cost base at short notice to accommodate reductions in workload.
>
> It would have been the preference of the Government to set the initial charges in regulations made under the enabling Act with some formula or ceiling placed on the charges in the primary legislation. However, given that the revenue to fund the operations of the OFLC must be obtained from a broad range of application based charges, no satisfactory formula could be devised to set the tax rate nor could any realistic figures be arrived at to put a ceiling on that tax. The position of OFLC does not lend itself to the approach reflected in other Commonwealth taxes such as a levy on production of particular goods or a percentage tax on income.

Consideration was given to inserting a formula in the primary legislation (in the context of setting the charges by regulation) along the lines of 'the charges to be prescribed by regulation shall not exceed the estimated cost of the operations of the OFLC in any one year'. However, this was considered too imprecise to provide a satisfactory solution to the problem raised by the Committee. Further, to remove any doubt about the validity of the charges a provision would need to have been included to the effect that notwithstanding that the formula was breached, for example if revenue unexpectedly exceeded estimates in a particular year, the charges prescribed were still valid.

An alternative also considered was to include in the Bill an upper level charge beyond which the regulations could not prescribe a charge. However, this would involve including an artificially high figure and would send quite the wrong message to the industry. It was also recognised that the figure for certain media might vary quite significantly depending on the proposed review of the structure of the charges which I subsequently announced.

It is, I think, not realistic to expect the Government to have to return to Parliament every time any of the myriad of charges in the Schedules need to be amended to take account of changed circumstances. In my view the approach reflected in the Charges Bill is appropriate in light of the circumstances I have outlined.

With the initial charges set by Parliament in the Schedules it is, of course, open to Parliament to disallow in the future any regulations altering those charges. In so saying, I acknowledge that disallowance of regulations is not the same for Parliament as being able to deal with the passage of primary legislation. I am also aware that disallowance of regulations leaves intact any action taken under those regulations, including the payment of higher charges, before the disallowance takes effect. However, this period need not be long and Parliament still retains the ultimate control over the level of the tax to be imposed.

I appreciate and support the underlying philosophy reflected in the Committee's report on this Bill but in the absence of any viable alternative I consider that the approach reflected in the Charges Bill represents, in the circumstance of this case, an appropriate compromise.

I would, of course, welcome any further comments the Committee may wish to make on this important issue.

The committee thanks the Attorney-General for this comprehensive response.

Higher Education Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Minister for Employment, Education, Training and Youth Affairs. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the following Acts:

- *Higher Education Funding Act 1988* to:
    - set the maximum grant amount for operating purposes for higher education institutions for the funding years 1999 and 2000;
    - vary the maximum total financial assistance payable for the funding year 1998 and set the maximum total amount of financial assistance for the funding years 1999 and 2000 to higher education institutions for superannuation expenditure and for their teaching hospitals;
    - set the maximum aggregate amount of financial assistance which may be granted to open learning organisations for the funding years 1999 and 2000;
    - vary the limit on total funds available for higher education institutions for certain grants under the Act in respect of the funding years 1998 and 1999 and set the limit on total funds for the funding year 2000;
    - vary the maximum aggregate which may be granted to higher education institutions for approved special capital projects for the 1998 funding year and set the maximum aggregate amount for the funding years 1999 and 2000;
    - specify how a notice of decision by the Secretary in relation to an application to remit either an HEC semester debt or an Open Learning study period debt is to be given; and
    - make minor technical amendments to vary the limit on total funds available to higher education institutions for certain grants under the Act in respect of the 1998 funding year; and
- *Maritime College Act 1978* to link the College's ability to charge fees to the conditions of grants specified in the *Higher Education Funding Act 1988*.

The committee dealt with this bill in Alert Digest No. 18 of 1997, in which it made various comments. The Minister for Employment, Education, Training and Youth Affairs has responded to those comments in a letter dated 4 March 1998. A copy of

that letter is attached to this report, and relevant parts of the response are discussed below.

Insufficient parliamentary scrutiny
Item 1 of Schedule 2

In Alert Digest No. 18 of 1997, the committee noted that item 1 of Schedule 2 to this bill, if enacted, would enable the Minister to issue guidelines in relation to courses to be offered at the Maritime College without, however, any provision for these guidelines to be subject to parliamentary scrutiny.

The committee noted that the explanatory memorandum points out that the amendment proposed by this item would bring the Maritime College legislation into conformity with that for all other tertiary education institutions. In respect of these, section 13 of the *Higher Education Funding Act 1988* enables the Minister to issue guidelines but although the guidelines are apparently legislative in character, they are not subject to disallowance by Parliament.

Accordingly, the committee sought the advice of the Minister on whether consideration should be given to making the guidelines proposed in this item and the guidelines issued under section 13 of the *Higher Education Funding Act 1988* subject to disallowance by Parliament.

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

The Minister has responded as follows:

> I understand that the Committee is concerned that, in my capacity as responsible Minister, I could issue guidelines relating to fee charging at universities that may be legislative in character without their being subject to disallowance by Parliament.
>
> Item 1 of Schedule 2 of HELAB proposes to amend section 32 of the *Maritime College Act 1978*, by inserting a new section 32. New subsection 32(2) provides a power to issue guidelines in respect of vocational education and training courses. New subsection 32(1)(a) makes reference to fees in section 13 of the *Higher Education Funding Act 1988* (HEFA).
>
> It appears that there are two sets of guidelines in question. One set is issued under section 13 of the *Higher Education Funding Act 1988* (HEFA) in relation to undergraduate and postgraduate fee charging. The second set, specifically mentioned in HELAB, relate to the charging of fees for the provision by the College of courses of technical and further education.
>
> In response to the committee’s question as to the appropriateness of these guidelines becoming disallowable instruments, I do not consider that either of the guidelines are sufficiently legislative in character to be deemed as disallowable.

Higher Education Funding Act 1988

I note that section 13 of HEFA is not presently the subject of consideration by the Parliament. However, previously there has been lengthy discussion in the Senate with regard to guidelines issued under section 13 of HEFA. These undergraduate fee charging provisions were included in HEFA via the *Higher Education Legislation Amendment Act 1996* (HELA). During the parliamentary debate, Senators examined the appropriate content of the legislation, these guidelines and whether the guidelines should be disallowable. It was agreed by the Senate that specific details would be included in the legislation (HEFA), rather than the guidelines as was originally proposed, to provide adequate Parliamentary scrutiny if ever the circumstances were to be changed. It was then agreed that if this level of detail was contained in the legislation it was not necessary to make the guidelines disallowable.

As a result, the legislation is very prescriptive about the charging of fees, particularly undergraduate fees. For instance, the legislation states that the guidelines issued must:

- ensure that the number of domestic students who may be charged fees for a particular undergraduate course does not exceed 25% of the total number of places;

- require an institution not to charge a domestic student any fee for an undergraduate course in a year unless the undergraduate target is met first; and

- specify the amount payable by an institution if an institution breaches this requirement.

The legislation gives higher education institutions the flexibility to enrol domestic fee-paying undergraduate students in award courses while, at the same time, protecting undergraduate course provision for HECS-liable students. The guidelines issued under section 13 are instruments merely affecting the application of the legal rule, in a way contemplated by the law, rather than an instrument affecting the substantive content of the rule.

The guidelines issued by the minister, under section 13, do not set fee levels. Currently the market determines the level of undergraduate and postgraduate fees. On some occasions, for instance in the case of overseas students, an indicative minimum course fee is prescribed but it remains the responsibility of the institution to set the actual fee.

Maritime College Act 1978

Schedule 2 of HELAB, aligns the Australian Maritime College (AMC) undergraduate and postgraduate fee charging arrangements with all other Australian universities. Currently, the *Maritime College Act 1978* (MCA) mirrors the provisions in HEFA but it is preferable to cross reference the fee charging provisions in the MCA to those in HEFA as is the case in other university legislation. The amendment will ensure that all public universities refer to the same legislative provisions and guidelines relating to university undergraduate and postgraduate fee charging.

The second set of guidelines in question by the committee relate to the charging of fees for the provision by the College of courses of technical further education. The power to issue these guidelines is not a new power and is restated as it appears currently in the legislation. Again, the guidelines implement the law contained in the

MCA. The legislation allows the College to charge fees in relation to courses of vocational education and training under the proviso that the person has earned a living and that it is not their initial vocational qualification. The guidelines provide clarification regarding which vocational courses are recognised within the meaning of this provision.

All guidelines issued under HEFA are notified in the gazette ensuring public access. In addition to this my Department publishes annually an *Administrative guidelines manual for higher education institutions on HECS and FEES.* Attached for your information is a copy of the current guidelines for the charging of undergraduate and postgraduate fees.

The committee thanks the Minister for this response.

Insurance Laws Amendment Bill 1997

This bill was introduced into the House of Representatives on 4 December 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Insurance Act 1973* to streamline the processes for form setting and lodgement of accounts and statements within the Insurance and Superannuation Commissioner by authorised insurers in Australia;
- *Insurance (Agents and Brokers) Act 1984* to:
    - make certain technical amendments;
    - insert additional definitions; and
    - strengthen broker disclosure notification requirements;
- *Insurance Contracts Act 1984* to:
    - place contracts of insurance over non-commercial marine pleasure craft owned by individuals within the scope of the *Insurance Contracts Act 1984* and removing them from the ambit of the *Marine Insurance Act 1909*;
    - amend provisions relating to information flows between contracting parties; and
    - amend provisions relating to the insured's duty of disclosure; and
- *Insurance Act 1973*, *Insurance (Agents and Brokers) Act 1984* and *Insurance Supervisory Levies Collection Act 1989* to amend the prudential supervisory arrangements for Lloyd's of London to improve the security arrangements for Lloyd's underwriters' Australian policyholders.

The committee dealt with this bill in Alert Digest No. 1 of 1998, in which it made various comments. The Assistant Treasurer responded to those comments in a letter dated 10 March 1998. The committee discussed this response in its Second Report of 1998 and made further comments concerning the inclusion of possible limitations on the exercise of search and entry powers. The Assistant Treasurer responded to those comments in a letter dated 22 March 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Extract from Second Report of 1998

Power of entry and search without warrant
Item 5 of Schedule 2 - proposed subsection 80(1)

In Alert Digest No. 1 of 1998, the committee noted that proposed subsection 80(1), to be inserted in the *Insurance Act 1973* by item 5 of Schedule 2 to this bill provides:

> **Entry on premises**
>
> (1) If the Commissioner or the inspector, while investigating the whole or a part of the affairs of a designated security trust fund, believes on reasonable grounds that it is necessary for the purposes of the investigation to enter land or premises occupied by:
>
> (a) the trustee, or a former trustee, of the fund; or
>
> (b) the custodian, or a former custodian, of the fund; or
>
> (c) the investment manager, or a former investment manager, of the fund;
>
> the Commissioner or the inspector may, at all reasonable times, enter the land or premises and may:
>
> (d) examine books on the land or premises that relate to the affairs of the trust fund or that the Commissioner or inspector believes on reasonable grounds relate to those affairs; and
>
> (e) take possession of any of those books for such period as the Commissioner or inspector thinks necessary for the purposes of the investigation; and
>
> (f) make copies of, or take extracts from, any of those books.

This power of entry and search is not subject to any requirement that the officer obtain a judicially sanctioned search warrant before entering the premises.

The committee recognised that, in this respect, subclause 31(1) does not differ from similar provisions in taxation laws. For example, the *Income Tax Assessment Act 1936* contains a provision (section 263) of similar effect. Another example occurs in the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*.

There would appear, however, to be no basis in principle for giving officers enforcing insurance laws greater powers than officers enforcing criminal law where a judicially sanctioned warrant is generally required. The committee was also interested to receive advice on what might constitute "reasonable grounds" for exercising the power of entry.

Accordingly, the committee sought the advice of the Treasurer on this issue.

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

On 10 March 1998, the Assistant Treasurer responded as follows:

> I understand the Committee has concerns that proposals contained in Item 5 of Schedule 2 of the ILAB, in particular proposed subsection 80(1) which contains a power for entry onto premises without a search warrant, may be considered to trespass unduly on personal rights and liberties. In response to the Committee's concerns, I draw your attention to the following.
>
> The main purpose of the ILAB is to amend the prudential supervisory arrangements under the *Insurance Act 1973* for Lloyd's of London (Lloyd's) to improve the security arrangements for Lloyd's underwriters' Australian policyholders. The amendments set out in this Bill will change the regulatory requirements for Lloyd's underwriters in Australia so as to accommodate the initiatives in Lloyd's 'reconstruction and renewal' plan while at the same time substantially enhancing the regulatory protection for Lloyd's underwriters' Australian policyholders and bringing the supervision of Lloyd's more into line with that of corporate insurers in Australia. A key element of the new arrangements is the proposed creation of a series of designated security trust funds (DSTFs) which will be funded to the extent of outstanding Australian policyholder liabilities.
>
> Proposed subsection 80(1) allows the Insurance and Superannuation Commissioner (the Commissioner), or an inspector appointed by the Commissioner, a power of search and entry over the premises of a trustee, custodian or investment manager (or former trustee, custodian or investment manager) of a DSTF when undertaking an investigation of the affairs of such a fund. The proposed subsection is not subject to a requirement that the Commissioner, or the duly appointed investigator, obtain a search warrant before entering such premises.
>
> The proposed subsection 80(1) is consistent with similar powers of the Commissioner under subsection 54(1) of the *Insurance Act 1973*, relating to the investigation of corporate insurers. Moreover, section 140 of the *Life Insurance Act 1995* and section 268 of the *Superannuation (Industry) Supervision Act 1993* also give the Commissioner similar powers. These powers underpin the prudential regulation role of the ISC, which sometimes requires swift and decisive intervention into the affairs of insurance companies and superannuation entities in order to safeguard policyholder or member entitlements. In this regard, proposed subsection 80(1) is consistent with the objective of the Bill to more closely align the supervision of Lloyd's with that of corporate insurers in Australia and is consistent with other ISC administered prudential regulation more generally.
>
> Further, under proposed subsection 68(1), Item 5 of Schedule 2 of ILAB the Commissioner may, by written instrument, require Lloyd's to ensure that there are such security trust funds arrangements in existence as are specified in, or ascertained in accordance with, the instrument. This instrument is currently being drafted and will require, among other things, that the Commissioner may only approve a trustee if that trustee is a corporation. In addition, as a matter of policy, it is likely that the role of custodian and investment manager (who will only be able to be engaged with the prior consent of the Commissioner) will be fulfilled only by corporate entities. Accordingly, the powers of search and entry will be exercised only upon a limited class of corporations and will not affect the personal rights and liberties of individuals.

> I note that the Committee has also sought information as to what would constitute 'reasonable grounds' for the purposes of entering onto premises under proposed subsection 80(1). These powers of entry can only be used in the most serious of circumstances. In particular, only a DSTF which is under investigation by the Commissioner or by a duly appointed inspector can be subjected to the power. Proposed section 79 sets out the circumstances and procedures for instigating an investigation of a DSTF and under this section, the Commissioner or investigator would need to be satisfied that the DSTF did not constitute, or is unlikely to constitute, an adequate security for the class of insurance liabilities secured by the fund, or that Lloyd's, or the trustee of a DSTF, has contravened a provision of Part VII of the *Insurance Act 1973*.
>
> In summary, effective prudential supervision demands an appropriate balance between the capacity for the prudential regulator to intervene quickly, and procedural considerations which protect the rights and liberties of the companies/directors concerned. In an environment of rapid capital mobility and electronic funds transfers, the need for the Commissioner to formally apply for a search warrant could delay or unduly impede critical stages of an investigatory process, and thereby potentially jeopardise the security of policyholder/member interests. When balanced against the threshold checks and balances for instigating an investigation in proposed section 79, the imperatives of prudential supervision and the requirements that the basis and timing of any entry onto premises or land be 'reasonable', the Government considers that proposed section 80(1) is appropriate.
>
> I trust that the above information is useful in the Committee's deliberations regarding concerns over specific provisions of the ILAB.

The committee thanked the Assistant Treasurer for this comprehensive response and noted that several precedents for this type of provision were listed. The fact that there are precedents for a course of action is a weighty factor in deciding whether or not the Senate's attention should be drawn to a matter. But it is not a conclusive factor and other considerations may lead the committee to comment on a particular piece of legislation.

The committee noted the Assistant Treasurer's comments on how the legislation is intended to operate and, in particular, the expectation that the roles of trustee, custodian and investment manager will be filled only by corporate entities. The committee was concerned, however, that there is no express limitation in the bill confining the exercise of these powers to corporate entities. The committee, therefore, requested the Treasurer to consider the possibility of an amendment to the bill to limit the exercise of search and seizure powers to premises other than residential premises.

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

On 22 March 1998, the Assistant Treasurer responded as follows:

> I note that the Senate Standing committee for the Scrutiny of Bills (the Committee) has continuing concerns over proposals contained in Item 5 of Schedule 2 of the

ILAB. In particular, the Committee is concerned that proposed subsection 80(1), which contains a power of entry onto premises without a search warrant, may be considered to trespass unduly on personal rights and liberties. I note further, that the Committee has requested the consideration of an amendment to the ILAB in the Senate. The proposed amendment will provide that the Commissioner, or an inspector appointed by the Commissioner, must not use the powers under proposed subsection 80(1) to enter onto residential premises without the consent of the occupier.

I trust that the above information now addresses the Committee's concerns.

The committee thanks the Assistant Treasurer for the proposed amendment.

Taxation Laws Amendment Bill (No. 6) 1997

This bill was introduced into the House of Representatives on 29 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
  - deny the ability to offset against capital gains certain capital losses created by an arrangement entered into before 3pm on 29 April 1997 and to prevent companies using capital losses artificially created through an arrangement entered into after that time;
  - allow instalment taxpayers classified as small to pay their likely tax on 15 December following their income year and the balance, if any, of their tax liability on the following 15 March, and make consequential amendments;
  - prevent franking credits or debits arising from the payment or refund of tax where those amounts are attributable to the retirement savings account business of a life assurance company;
  - ensure that taxpayers must reduce the cost base or indexed cost base of an asset to the extent of any net deductions allowable for expenditures included in the cost base;
  - replace the formulae used to determine the passive income of the controlled foreign companies of life and general insurance companies;
  - require life companies to use average calculated liabilities, rather than calculated liabilities at the end of the year of income as the basis for determining exempt income that relates to immediate annuity business and apportioning income and capital gains; and
  - clarify the operation of the depreciation provisions in circumstances when an entity the income of which is exempt becomes, for any reason, subject to tax on any part of its income under the provisions of the Act;
- *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend to companies two concessional tracing rules which are available to trusts under trust loss measures;

- *Fringe Benefits Tax Assessment Act* 1986, *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend the existing exemption for taxi travel beginning or ending at an employee's place of work and to introduce a new exemption from FBT for car parking benefits for certain small business owners; and

- *Sales Tax Assessment Act 1992* to ensure that goods imported into Australia under a temporary importation exemption, used in Australia, exported and then re-imported are subject to sales tax at the time of the later importation.

The committee dealt with this bill in Alert Digests Nos. 16 and 17 of 1997. A letter was forwarded to the Treasurer on 13 November 1997 inviting a response to concerns the committee had with regard to retrospectivity. A letter dated 3 December 1997 was received from the Assistant Treasurer in response to this issue. A further letter was forwarded to the Treasurer on 27 November 1997 inviting a response in relation to a submission received from KPMG, Chartered Accountants which expressed concerns about certain aspects of the bill. A letter dated 6 February 1998 has been received from the Assistant Treasurer in response to these concerns. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Extract from Alert Digest No. 17 of 1997

Retrospectivity
KPMG submission

In Alert Digest No. 16 of 1997, the committee made various comments. The committee noted the retrospectivity associated with the press release of the Treasurer but was under the impression that the retrospectivity was limited to the date of the press release, 29 April 1997.

The KPMG submission, however, raises issues in relation to the retrospective effect of the legislation which escaped the committee's notice. In particular, the submission suggests that :

- the bill would deny the use of certain capital losses that were incurred, but not utilised, at any time after 19 September 1995;
- the circumstances differ from 'the bottom of the harbour schemes' in that there has been no illegal evasion of tax;
- early balancing companies may be unfairly treated

The committee notes that the KPMG submission has been forwarded to the Treasurer. Nevertheless, the committee **seeks the Treasurer's advice** on the issues raised in this submission.

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

The Assistant Treasurer has responded to the KPMG submission as follows:

> You sought the Treasurer's advice in relation to a submission given to you by KPMG concerning the proposed measures contained in the Taxation Laws Amendment Bill (No 6) dealing with artificially created capital losses.
>
> The KPMG submission claimed that the measures are retrospective, that such an effect is unjustified and that their retrospective application to early balancing companies is unfair. As a result, you were concerned that the provisions may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.
>
> The proposed legislation is not retrospective and will not unduly trespass upon the personal rights and liberties of taxpayers. The legislation is designed to close a loophole under which corporate groups could use the capital gains tax (CGT) roll over provisions to obtain capital losses far in excess of the actual economic loss suffered by the group. The legislation is designed to allow the corporate group the benefit of the actual economic loss while denying the use of any excess loss. For losses created prior to 3pm 29 April 1997 (the time of announcement of the measures), the legislation does this by identifying the amount by which the capital losses created by a company, as a result of the roll over, exceeds the losses that would have been available to that company if the roll over had not occurred. Consequently, the proposed legislation does not reverse any offsetting of a capital gain with an artificial loss which occurred in a previous income year.
>
> The measures do not apply to losses already offset by a company with a 30 June balancing date against capital gains in the 1995-96 or an earlier year of income. Contrary to being unfair to early balancing companies, the proposed legislation contains a concession for early balancing companies. Such companies are able to offset capital losses created prior to 3pm 29 April 1997 against capital gains in the 1996-97 income year as well, provided they have lodged their tax returns for that year before 3pm 29 April 1997. The legislation thereby gives companies in this category an additional income year, compared to ordinary balancing companies, in which to offset the artificial losses, provided that the returns have been furnished before the announcement of these measures.
>
> I should point out that while the schemes used to create these capital losses may not be as objectionable as the 'bottom of the harbour schemes', they will in most cases involve a deliberate tax avoidance motive. The creation of artificial capital losses of this type involves a deliberate series of steps and would not, ordinarily, be an innocent occurrence. Even if the additional capital losses, over and above the actual economic loss, were innocently created, the fact remains that they are not genuine economic losses.
>
> Moreover, the amount of losses artificially created by these schemes pose a serious and continuing risk to the integrity of the revenue base. They allow corporate groups to artificially avoid their fair share of the tax burden.

The committee thanks the Assistant Treasurer for this response and for his assistance with the Bill.

The committee notes from the Assistant Treasurer's response that, rather than being unfair to early balancing companies, the proposed legislation contains a concession for such companies. Early balancing companies are additionally able to offset capital losses created prior to 3pm 29 April 1997 against capital gains in the 1996-97 income year, provided that they have lodged their tax returns for that year before 3pm on 29 April 1997.

However, the committee understands from the KPMG submission that some early balancing companies may not have lodged their tax returns so soon after the end of their substituted tax year.

Therefore the committee continues to draw Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, including those of shareholders, in breach of principle 1(a)(i) of the committee's terms of reference.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 1998

The committee presents its Fourth Report of 1998 to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Genetic Privacy and Non-discrimination Bill 1998

Intellectual Property Laws Amendment Bill 1998

Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997

National Residue Survey Administration Amendment Bill 1998

National Residue Survey (Customs) Levy Bill 1998

National Residue Survey (Excise) Levy Bill 1998

Native Title Amendment Bill 1997 [No. 2]

Genetic Privacy and Non-discrimination Bill 1998

This bill was introduced into the Senate on 11 March 1998 by Senator Stott Despoja as a Private Senator's bill.

The bill proposes to:

- protect the genetic privacy of individuals and makes genetic discrimination unlawful;
- define the circumstances in which genetic information and DNA samples may be collected, stored, analysed and disclosed;
- outlines the rights and responsibilities of individuals and persons with respect to genetic information; and
- establishes mechanisms to enforce these rights and responsibilities.

The committee dealt with this bill in Alert Digest No. 3 of 1998, in which it made various comments. Senator Stott Despoja has responded to those comments in a letter dated 25 March 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Commencement
Clause 2

In Alert Digest No. 3 of 1998, the committee noted that Clause 2 of this Bill would permit the whole Bill to commence on Proclamation. No provision is made for automatic commencement or repeal at a particular time.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No 2 of 1989. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The committee noted that paragraph 6 of Drafting Instruction No. 2 of 1989 suggests that clauses providing for commencement by Proclamation, with no other restrictions as to time of commencement, should be used only in unusual circumstances, where commencement depends on an event whose timing is uncertain. The committee further noted that there is no indication in the explanatory memorandum of the reason for adopting a provision in this form.

Accordingly, the Committee sought the advice of the Senator on the reason for choosing the mechanism in clause 2.

Pending the Senator's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Senator has responded as follows:

> This was an oversight in the drafting of this Bill. I would be happy to include an amendment to set a date for commencement after Royal Assent (the 'fixed time'), according to the Office of Parliamentary Counsel Drafting Instructions No. 2 of 1989.
>
> If you require further information, please do not hesitate to contact my office.

The committee thanks the Senator for the proposed amendment.

Intellectual Property Laws Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Minister for Customs and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the following Acts:

- *Patents Act 1990* to:
  - provide for an extension (of up to five years) of term scheme for pharmaceutical patents;
  - make arrangements relating to Patent Office employees and record keeping and access;
  - revise procedures for the payment of certain fees; and
- *Copyright Act 1968*, *Designs Act 1906*, *Patents Act 1990* and the *Trade Marks Act 1995* to create the Professional Standards Board for Patent and Trade Marks Attorneys and allows for changes to the registration system.

The committee dealt with this bill in Alert Digest No. 18 of 1997, in which it made various comments. The Minister for Industry, Science and Tourism responded to those comments in a letter dated 22 December 1997. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Non-reviewable decision
Item 3 of Schedule 1 - proposed new section 74

In Alert Digest No. 18 of 1997, the committee noted that item 3 of Schedule 1 to this bill, if enacted, would insert proposed new section 74 in the *Patents Act 1990*. The proposed new section would provide for the Commissioner to accept or refuse an application for an extension of a patent. Acceptance or refusal is to depend on whether the Commissioner is satisfied that the requirements of proposed new sections 70 and 71 have been complied with in relation to the application.

It appeared to the committee that, as proposed in the bill, the Commissioner's decision to refuse the application is non-reviewable.

Where, however, the Commissioner accepts the application, the process of granting the extension is reviewable. The Commissioner, before deciding to grant the extension, must ascertain whether there is opposition to the grant and, if so, give reasonable opportunity to the applicant and the opponent(s) to be heard. Appeal to

the Federal Court will lie against the Commissioner's subsequent decision to grant or refuse the extension.

As it seemed to the committee that the proposed legislation did not grant any avenue of appeal should the Commissioner make an initial decision not to accept the application, the committee sought the Minister's advice on whether that initial decision to refuse the application should also be subject to review.

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

The Minister responded as follows:

> The Committee commented that a decision by the Commissioner of Patents (the Commissioner) to refuse an application for an extension of a patent under new section 74 of the *Patents Act 1990* (the Act) (introduced by item 3 of Schedule 1) is non-reviewable. This decision is actually reviewable.
>
> I would draw the Committee's attention to item 5 of Schedule 1 to the Bill which amends paragraph 224(1)(a) of the Act to include a reference to subsection 74(3). Section 224 of the Act, *inter alia*, makes provision for applications to review certain decisions of the Commissioner to be made to the Administrative Appeals Tribunal (AAT). The effect of including reference to subsection 74(3) of the Act in section 224 is that the Commissioner's decision under section 74 of the Act to refuse an application for an extension of a patent will be subject to review by the AAT.

The committee thanks the Minister for this response.

Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997

This bill was introduced into the House of Representatives on 30 October 1997 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

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

The committee dealt with this bill in Alert Digest No. 16 of 1997, in which it made various comments. The Minister for Immigration and Multicultural Affairs has responded to those comments in a letter dated 5 January 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Commencement
Clause 2

In Alert Digest No. 16 of 1997, the committee noted that Clause 2 of this bill provides that the substantive provisions of the bill would commence on Proclamation, with no date being specified within which such a Proclamation must be made.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The committee noted that the explanatory memorandum did not appear to give any reasons for not imposing some restriction on the open ended power to bring the legislation into force.

The committee, therefore, sought the advice of the Minister on the reasons for this.

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

On this issue, the Minister has responded as follows:

The Committee has noted that the Bill does not contain a specified date or time limit within which the bill must be proclaimed. The Committee believes that this omission may be a breach of principle 1(a)(iv) of the Committee's terms of reference in that it may be considered to delegate legislative power inappropriately.

As a general rule, legislation in the Immigration and Multicultural Affairs portfolio is designed to commence either on Royal Assent or by proclamation. It is also usual to include a clause providing that commencement will take place 6 months after Royal Assent if the legislation has not already been proclaimed. The Bill does not contain any such provision because:

. it is highly desirable for reasons of administrative efficiency and public convenience that the Bill should commence at the same time as the amendments made by the Migration Legislation Amendment Bill (No. 4) 1997 (MLAB4) and the Migration Legislation Amendment Bill (No. 5) 1997 (MLAB5) both of which were already before Parliament when the Bill was introduced. However, the measures contained in the Bill are sufficiently important to justify an earlier commencement date if the Bill is passed first. Accordingly, commencement was not made conditional on the commencement of either of the other bills; and

. the new administrative procedures which are required by the Bill will significantly affect the operations of the relevant areas of my Department and of the Administrative Appeals Tribunal (AAT). The best possible level of service to the public will not be possible unless these new procedures are fully developed and in place when the legislation commences.

Insufficiently defined administrative powers
Items 12 and 13 of Schedule 1 - proposed section 339 and proposed subsection 411(3)

In Alert Digest No. 16 of 1997, the committee noted that in Alert Digest No. 10 of 1997, the committee had commented on a proposal in Migration Legislation Amendment Bill (No. 4) 1997 to substitute a new section 339. The committee noted that, if enacted, this amendment would give the Minister a wide power to certify that some decisions not be reviewable by the Migration Review Tribunal. The proposed grounds upon which the Minister could issue such a certificate were:

> if the Minister thinks that:
>
> (a) it would be contrary to the public interest to change the decision, because any change in the decision would prejudice the security, defence or international relations of Australia; or
>
> (b) it would be contrary to the public interest for the decision to be reviewed because such review would require consideration by the Tribunal of deliberations or decisions of the Cabinet or of a committee of the Cabinet.

The committee noted that proposed section 339 appeared to limit to some extent the type of decisions which may be so certified. The committee noted that several issues arose among which was whether the characteristics of the Minister's power to issue a certificate resulted in rights and liberties becoming unduly dependent upon an insufficiently defined administrative power. Consequently the committee sought the advice of the Minister on this matter.

The Minister responded as follows:

> *Insufficiently defined administrative powers*
>
> Whilst the power in section 339 is discretionary, its exercise is limited in two broad areas. First, to the circumstances outlined in subsections 339(a) and (b) and secondly, by its susceptibility to judicial review.
>
> The current power has been used infrequently and I expect this will continue to be the case. There have been no situations where submissions have been made to Cabinet in an attempt to justify use of the power.
>
> Were a Minister to attempt to use this power by putting the matter to Cabinet, judicial review of the bona fides of such decision under section 339 would be available: privative clauses have been interpreted by the High Court as not excluding acting in bad faith as a ground of judicial review.

In its Thirteenth Report of 1997 the committee thanked the Minister for explaining the limiting and inhibiting factors on the exercise of this administrative power.

The present bill, however, will reduce the range of factors which may inform the Minister's decision to issue a conclusive certificate and thereby prevent merits review of the decision the subject of the certificate. In place of the relatively precise grounds of prejudicing the security, defence or international relations of Australia and the possibility of exposing Cabinet deliberations to review, items 12 and 13 of the 'Character and Conduct Bill' will allow the Minister to issue a certificate merely because he or she believes that it would be contrary to the national interest that a decision be changed or reviewed. In the committee's view, this reduction of grounds widens the discretion in the use of this administrative power and the issue of whether it constitutes an insufficiently defined administrative power arises. Accordingly, the committee sought the Minister's advice on this matter.

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

Insufficiently defined administrative powers
Item 23 of Schedule 1 - proposed subsections 501(3) to (5) and 501A (3) and (4)

In Alert Digest No. 16 of 1997, the proposed subsections 501(3) to (5), if enacted, would allow the Minister, acting personally, either to refuse to grant a visa or to cancel one that had been granted without hearing any representations which the affected person may wish to make and therefore in derogation of the rules on natural justice and the codes of procedure set out in the Act. The Minister may use this power where he or she reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the national interest.

As noted above, the use of this power solely on the grounds of 'the national interest' raises the issue of an insufficiently defined administrative power.

Further, the same issue arises with respect to proposed new subsections 501A(3) and (4) which allow the Minister to overturn a favourable decision of his delegate or the Administrative Appeals Tribunal on the character test.

Accordingly, the committee sought the Minister's advice on these matters and, within that context, whether there would be grounds for judicial review.

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

On these last two issues, the Minister has responded as follows:

> The Committee seeks my advice on whether the introduction of a "national interest" test is in breach of principle 1(a)(ii) of the Committee's terms of reference in that the proposed provisions are legislation which makes rights, liberties or obligations unduly dependent upon insufficiently defined legislative powers.
>
> In particular, the "national interest" test is used in both my powers:
>
> . to issue a conclusive certificate to prevent review of a decision by the Migration Review Tribunal (the MRT is established by MLAB4) (item 12) and by the Refugee Review Tribunal (RRT) (item 13); and
>
> . of personal intervention, to make decisions without prior natural justice to:
>
> - cancel a visa or refuse a visa application under proposed subsection 501(3). Proposed subsections 501(4) and (5), to which the Committee has also referred, are purely supplementary to proposed subsection 501(3); or
>
> - substitute a cancellation or refusal decision under proposed subsection 501A(3). Proposed subsection 501A(4), to which the Committee has also referred, is purely supplementary to proposed subsection 501A(3).
>
> These amendments are designed to ensure that my personal power to intervene in the review process will be controlled by consistent and uniform criteria (that is, the national interest) across the entire Migration Act. I believe that Australia's national interest is a better test than the existing public interest test for direct Ministerial intervention in the review process because Australia's national interest encompasses a broader range of conduct and considerations than does the public interest.
>
> **Judicial review issues**
>
> The Committee has also sought my view on whether there would be grounds for judicial review in relation to my powers under proposed subsections 501(3) or 501A(3).
>
> Pending the passage of MLAB5, decisions may be reviewed by:
>
> . the Federal Court under the grounds set out in Part 8 of the Migration Act. The applicability of those grounds depends on what the judicial review applicant is contending; and
>
> . the High Court of Australia in its original jurisdiction under section 75(v) of the Commonwealth Constitution, which in essence means the common law grounds for judicial review of administrative decisions. The applicability of those grounds depends on what the judicial review applicant is contending.
>
> Under the judicial review scheme embodied in MLAB5, review by the Federal Court would be under section 39B of the *Judiciary Act 1903* and by the High Court under section 75(v) of the Constitution, but the grounds of review would be confined to: whether there has been a bona fide attempt by the Minister to exercise a power conferred by the legislation; whether the exercise of the power related to the subject

matter of the legislation; and whether the decision was reasonably capable of reference to that power.

Possible denial of natural justice
Item 23 of Schedule 1 - proposed subsections 501(3) to (5) and 501A (3) and (4) and subsection 501C(4) and (11)

In Alert Digest No. 16 of 1997, the committee noted that with respect to the same provisions the issue of natural justice arises. The committee noted, however, that proposed new section 501C provides that the Minister must invite the person affected by the decision to make representations showing why the Minister should revoke the earlier decision. This appears to restore a right to be heard. On the other hand, allowing a right to be heard only after the initial decision or after the initial overturning of an earlier decision may not sufficiently safeguard natural justice. Accordingly, the committee sought the Minister's advice on this issue.

Subsections 501C(4) and (11) add a further factor to these considerations. Subsection (4) provides that the Minister may revoke the original decision if the representations satisfy the Minister that the person passes the character test. Subsection (11), however, raises the possibility that the Minister may decide not to exercise the power conferred by subsection (4). This may mean that the Minister must take the representations into account but still decide not to revoke his decision. If, however, it means that the Minister is not required to consider the representations, natural justice is completely denied. Accordingly, the committee sought the Minister's advice on the meaning of subsection (11).

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

On this issue, the Minister has responded as follows:

> The Committee has queried whether natural justice is sufficiently protected by:
>
> . proposed subsection 501(3) by which the Minister of the day acting in person may cancel a visa or refuse a visa application without natural justice; and
>
> . proposed subsection 501A(3) by which the Minister acting personally may substitute a cancellation or refusal decision without natural justice.
>
> The power to act without prior natural justice is restricted to proposed subsections 501(3) and 501A(3) and will only apply to the Minister of the day acting personally, and only then if it is in Australia's national interest.
>
> A Minister will only intervene in such character cases in those rare emergency situations where he or she believes that the national interest demands a prompt response involving the immediate detention of the non-citizen involved. An example of such a situation would be a suspected terrorist who has entered Australia as a tourist for the Sydney Olympic Games. Where the Minister uses these special powers, the freedom to act without natural justice is carefully circumscribed by the

requirement that the relevant powers may only be exercised by the Minister personally (that is, the power cannot be delegated), the decision must be made in the national interest, and that the outcome of all such cases must be reported to both Houses of Parliament.

In addition, the Bill includes important procedural safeguards that ensure that where the Minister makes a decision without prior natural justice, the *spirit* of natural justice is preserved by giving the person the right to make subsequent representations to the Minister that the decision should be revoked. This procedure was modelled on an existing provision for emergency visa cancellations that were included in section 128 of the Migration Act in 1994. Proposed subsection 198(2A) also ensures that the person cannot be removed from Australia during the period allowed for making representations, nor can a person who makes representations in accordance with the regulations be removed from Australia until the Minister has decided whether the original decision should be revoked.

The Committee has also sought my advice on the purpose of proposed subsection 501C(11) which provides that decisions made under section 501C are not reviewable under Parts 5 or 7 of the Migration Act.

The reference in subsection 501C(11) to the Minister not making a decision under subsection 501C(4) is a reference to the Minister making a decision not to revoke a decision. Subsection 501C(11) is not intended to imply that I would not be obliged to consider representations to revoke decisions made without natural justice under proposed subsections 501(3) or 501A(3). In fact, proposed paragraph 198(2A)(c) ensures that a non-citizen whose visa has been cancelled or refused without natural justice cannot be removed from Australia before the time allowed for making representations and, if representations are made, removal is further delayed until after the Minister has decided whether to revoke the original decision.

Inappropriate delegation of legislative power
Proposed new subsection 501C(10)

In Alert Digest No. 16 of 1997, the committee noted that proposed new subsection 501C(10) would allow the making of regulations which would deny any right to be heard in relation to a decision of the Minister under the provisions discussed above to refuse to grant or to cancel a visa on the grounds of failing to pass the character test.

Proposed new subsection 501C(10) provides:

> The regulations may provide that, for the purposes of this section:
>
> (a) a person; or
>
> (b) a person included in a specified class of persons;
>
> is not entitled to make representations about revocation of an original decision unless the person is a detainee.

The committee noted that although the regulations would be disallowable by either House of the Parliament, they could come into force as soon as they were gazetted and might not be considered for disallowance for a considerable time later.

The committee also noted paragraph 81 of the explanatory memorandum which states:

> New subsection 501C(10) provides that regulations may be made, for the purposes of section 501C, which prevent a person, or a person within a specified class of persons, from making representations about revocation of the original decision, unless the person is a detainee. This amendment enables the Minister to exercise greater control over unlawful non-citizens who would, if the regulation making power was exercised, have to become detainees before they are able to make representations to the Minister to have the original decision revoked.

The committee could not follow this reasoning and sought further clarification from the Minister on the purpose of the subsection and on whether this is an appropriate delegation of legislative power.

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

On this issue, the Minister has responded as follows:

> The Committee has requested further clarification on the purpose of proposed new subsection 501C(10), which confers a new regulation making power, and has queried whether it is an appropriate delegation of legislative power.
>
> As the Committee will be aware, the Migration Act has a number of provisions dealing with unlawful non-citizens (that is, persons who are not Australian citizens, who are in Australia and who do not hold a current visa). In particular, section 189 of the Act requires that all unlawful non-citizens must be detained, and section 198 imposes a mandatory requirement that they be removed from Australia as soon as practicable. In addition, new section 501F ensures that, with the exception of the some holders of protection visas, a non-citizen who is in Australia will immediately become an unlawful non-citizen if their visa is cancelled or their visa application is refused on character grounds.
>
> There is a real risk that a person will be unlawfully at liberty in cases where the decision has been made by the Minister personally in the national interest without natural justice. The intention of proposed subsection 501C(10) is to offer the person a real incentive to submit to detention by only permitting detainees to make representations concerning possible revocation. However, because the loss of personal liberty is involved, I believe that the appropriate mechanism is to proceed by way of regulation which will provide the appropriate flexibility to modify and refine the classes of people in the light of operational experience.
>
> I trust that these comments will be of assistance to the Committee.

The committee thanks the Minister for this detailed response which generally addresses its concerns. The committee notes the minister's observation that Australia's national interest is a better test than the existing public interest test for direct Ministerial intervention in the review process.

The Committee seeks clarification from the Minister of the differences between these two terms and, in particular, whether the definition of public interest in section 339 might be expanded to include considerations of the national interest.

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

National Residue Survey Administration Amendment Bill 1998

This bill was introduced into the House of Representatives on 4 March 1998 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the *National Residue Survey Administration Act 1992* and related legislation to:

- clarify that national residue survey (NRS) levies are "stand alone" levies, levied separately from other primary industry levies;
- validate the imposition of the NRS levy on onions;

and repeals the 22 NRS levy imposition Acts to enable their consolidation into two Acts.

The committee dealt with this bill in Alert Digest No. 2 of 1998, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in a letter dated 24 March 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 2 of 1998, the committee noted that Subclause 2(2) of the bill, if enacted, would provide for the amendments contained in Schedule 1 to take effect retrospectively from 1 February 1994 in order to validate levies on onions that have already been collected.

The bill is said to be necessary to overcome technical faults in the *National Residue Survey Administration Act 1992* which made liability for payment of National Residue Survey (NRS) levies dependent upon liability for the payment of another primary industry levy. According to the explanatory memorandum, the original intention had been that the liabilities for payment of both levies would arise at the same point in the process and would be collected at the same time, not that one should depend on the other. In the case of onions, the other primary industry levy is set at $0.00 and there is some question whether a zero rate triggers an NRS levy liability. As the levy on onions has been collected since 1 February 1994, the retrospective application of Schedule 1 is regarded as necessary to validate the imposition of NRS levy on onions.

Although the proposal is said to be supported by the industry, such retrospectivity is of concern to the committee as it may have the effect of trespassing unduly on personal rights and liberties. The committee, therefore, sought the Minister's advice on the circumstances which have given rise to the bill and whether the rights of any person may be adversely affected by its retrospective operation.

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

The Minister has responded as follows:

> In the Alert your Committee raised concerns that Subclause 2(2) of the proposed **National Residue Survey Administration Amendment Bill 1998**, if enacted, would trespass unduly on a person's rights and liberties by the retrospective operation of a levy on the export onion industry. You also requested information on the circumstances that gave rise to the bill.
>
> These circumstances occurred during the restructure of the Meat and Livestock Industry. In making amendments to the Primary Industries and Energy portfolio legislation that covers this industry it became necessary to make consequential amendments to the National Residue Survey (NRS) package of legislation. Legal advice received from the Attorney-General's Department during this process indicated the statutory mechanism used to collect the levy from the export sector of the onion industry was ineffective in law. This also meant that onion exporters paying the NRS export charge had a common law right to a refund.
>
> This advice was circulated to all onion exporters prior to the industry's Annual General Meeting (AGM) held in Adelaide on 9-12 November 1997. This particular AGM, held in conjunction with the World Onion Conference, had present a larger number of onion exporters than usually occurs.
>
> The AGM moved that the Minister for Primary Industries and energy be petitioned to validate the levies already collected as the industry is fully committed to its chemical residue monitoring program and the monies collected had already been spent, in good faith, in the delivery of this program. This proposal was unanimously accepted by those attending the AGM, which included all the major onion exporters.
>
> The validation of the levy does not impose any further cost on individual levy payers and is in accordance with the industry's commitment to a national chemical residue monitoring program under full cost recovery.
>
> I trust that this information allays the concerns of your Committee and I am happy to provide any further information that the Committee may require.

The committee thanks the Minister for this response.

National Residue Survey (Customs) Levy Bill 1998

This bill was introduced into the House of Representatives on 4 March 1998 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to impose levies that are duties of customs on five commodity groups to replace the relevant imposition Acts proposed to be repealed by the National Residue Survey Administration Amendment Bill 1998.

The committee dealt with this bill in Alert Digest No. 2 of 1998, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in letters dated 24 March 1998 and 31 March 1998. Copies of those letters are attached to this report, and relevant parts of the responses are discussed below.

Imposing levy by regulation
Clause 3 of Schedule 4

In Alert Digest No. 2 of 1998, the committee noted that Clause 3 of Schedule 4 sets the rate of levy on onions at 40 cents per tonne, with provision for amendment by regulation and a maximum rate of levy of $5.00. The committee has consistently drawn attention to provisions which allow that rate of a levy to be set by regulation, largely on the basis that a rate of a levy could be prescribed which would amount to a tax. Generally, the committee has taken the view that setting taxes is more appropriately a matter for primary legislation, a prerogative of Parliament, not the executive. If there is a need for flexibility (that is, adjustments to the rate of a levy need to be made so frequently and/or so quickly that it is impractical to amend primary legislation) the committee prefers that the primary legislation prescribe either a maximum rate of the levy or a method of calculating such a maximum rate. In this case, although a maximum rate has been set, the disproportion between the current rate of 40 cents and the proposed maximum of $5.00 is such that the committee is concerned that this clause may effectively allow the rate of levy to be set by regulation.

The committee therefore sought the Minister’s advice on why the parameters set by the legislation are so broad in relation to the rate of levy and whether the industry has been consulted on the maximum rate of levy.

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

Imposing levy by regulation
Subclause 5(1)

Subclause 5(1) of Schedule 4 would permit the rate of levy on a particular class of eligible horticultural products to be set by regulation. Although subclause 5(2) seeks to provide for a maximum rate of levy in the legislation, that maximum is dependent upon the Australian Statistician publishing a particular set of figures. The purpose of this clause is to provide for a rate of levy for horticultural products other than onions, apples and pears in anticipation of arrangements with the relevant growers of such products. While the committee understands that an attempt is being made to set a maximum, the committee notes that such clauses are potentially an inappropriate delegation of legislative power for the reasons outlined above and therefore **seeks the Minister's views** on why this particular formula for setting the maximum rate was chosen.

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

On 24 March, the Minister responded as follows:

> In the Alert your Committee raised concerns about the broad range between the operative rate of levy for export onions and the maximum rate of levy for export onions that is included in Clause 3 of Schedule 4 of the proposed **National Residue Survey (Customs) Levy Bill 1998**. Your committee also expressed concern that the levy may become a tax and that it was for Parliament to set a tax rate and not for the makers of subordinate legislation to do so.
>
> The purpose of the National Residue Survey Legislation (NRS) is to recover the cost of an ongoing chemical residue monitoring program from industries that choose to participate in the NRS under a statutory mechanism. The levies are designed to be a collection mechanism to recover the cost of chemical residue monitoring programs on a least-cost basis, that is, as a fee for service rather than as a tax.
>
> The NRS onion export levy was originally put in place in 1992, with an operative rate of $1.56 per tonne. Since then the NRS has been able to reduce the operative rate of levy to 40 cents per tonne through the inclusion of all onions in the monitoring program and efficiencies in operating costs. It is not the intention of this legislation to make any alterations to current operational or maximum levy rates.
>
> As the levy is meant to be applied on a least-cost basis, some amendment to the operative rate of levy may occur from time to time as the industry expands and contacts with seasonal and market fluctuations. The current legislation allows for the operative rate of levy to be amended by regulation only after full consultation has been carried out with industry.
>
> Under Parliamentary process regulations are also disallowable instruments that are subject to the scrutiny of the Standing Committee on Regulations and Ordinances and must sit in both houses for 15 working days during which disallowance can occur.

The system currently operates effectively in ensuring that the twenty-three agricultural commodities that participate in the NRS, and have levy collection mechanisms imposed by regulation, are subject to the scrutiny of the Parliament and also receive the best possible value for money in terms of the service provided.

The maximum rate of levy to which you refer cannot be amended by subordinate legislation, only by primary legislation.

I trust that this information allays the concerns of your Committee and I am happy to provide any further information that the Committee may require.

On 31 March, the Minister provided a supplementary response as follows:

I refer to the verbal request from your Standing Committee's Secretariat on 30 March 1998 for supplementary information on the proposed **National Residue Survey Bills** concerning the cost recovery approach used for small industries whose production figures are not covered by Australian Bureau of Statistics (ABS) surveys. I am only too happy to oblige.

In responding to your request I would again draw your attention to the purpose of the National Residue Survey (NRS) package of legislation, to recover the cost of ongoing chemical residue monitoring programs from industries participating in the NRS. The levies are, in fact, a fee for service rather than as a tax, and are paid into a Trust Account rather than Consolidated Revenue.

This Trust Account (now titled Reserve Money Funds under the new Audit Act provisions) is established by the *National Residue Survey Administration act 1992*. Through this the NRS is accountable for all industry monies paid into the account (section 7) and paid out of the account (section 8).

Monies can be paid into the account through two mechanisms: a statutory mechanism (levy) or by direct payment through a Memorandum of Understanding (MOU). In the case of smaller industries where the Statistician does not publish production figures, industries are encouraged by the NRS to use the MOU system of payment, as the identification of production figures and collection points and the collection cost involved can sometimes double the relevant cost of the monitoring program. Examples of sectors which currently have monitoring programs with the NRS under an MOU are the camel, possum and pecan industries.

An alternative approach that keeps costs to a minimum for closely related industries is to move to the next tier of production where ABS production figures are more readily available. An example of this is the current discussions being held with the stone fruit industry on the implementation of a monitoring program. A proposal has been put to industry to sample all stone fruits on a rotating basis rather than test individual stone fruits. This approach would also overcome the problem of economies of scale and a lack of ABS survey data for some of the lesser known stone fruits.

All programs are reviewed with the industry concerned on an annual basis and consultations carried out with the agreed industry representatives on how costs can be reduced in delivering a cost effective, statistically valid monitoring program. The onion industry is an example of how these efficiencies can be gained. With the inclusion of all onions in the survey, rather than just the export sector as initially intended, the NRS was able to reduce the operative levy rate from $1.56 per tonne

($5.00 maximum) to 40 cents per tonne. Results from the survey were then used by the industry as a marketing tool to encourage greater consumption of the industry's products.

In the event of the NRS being wound up, or an industry no longer requiring a monitoring program, all monies are returned to individual levy payers, not to Consolidated Revenue, nor to the peak industry body.

I trust that this additional information covers the concerns your Committee has raised and I am only too happy to provide any further information that the Committee may require.

The committee thanks the Minister for these comprehensive responses.

National Residue Survey (Excise) Levy Bill 1998

This bill was introduced into the House of Representatives on 4 March 1998 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to impose levies that are duties of excise on 16 commodity groups to replace the relevant imposition Acts proposed to be repealed by the National Residue Survey Administration Amendment Bill 1998.

The committee dealt with this bill in Alert Digest No. 2 of 1998, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in letters dated 24 March 1998 and 31 March 1998. Copies of those letters are attached to this report, and relevant parts of the responses are discussed below.

Imposing levy by regulation—proportionality
Clause 3 of Schedule 3, subclause 4(1) of Schedule 4, the table of rates in clause 3 of Schedule 5 and clause 4 of Schedule 9

In Alert Digest No. 2 of 1998, the committee noted that these provisions set minimum and maximum rates of levy for various primary products that appear to be in disproportionate relationship with one another in that the maximum figure is considerably greater than the minimum. As noted in relation to the National Residue Survey (Customs) Levy Bill 1998, the committee has consistently drawn attention to provisions which allow that rate of a levy to be set by regulation, largely on the basis that a rate of a levy could be prescribed which would amount to a tax. Generally, the committee has taken the view that setting taxes is more appropriately a matter for primary legislation, a prerogative of Parliament, not the executive. If there is a need for flexibility (that is, adjustments to the rate of a levy need to be made so frequently and/or so quickly that it is impractical to amend primary legislation) the committee prefers that the primary legislation prescribe either a maximum rate of the levy or a method of calculating such a maximum rate. In these cases, although maximum rates have been set, the disproportion between the current rates and the proposed maxima are such that the committee is concerned that these provisions may effectively allow the rates of levies to be set by regulation.

The committee therefore sought the Minister's advice on why the parameters set by the legislation are so broad in relation to the rates of levy and whether the replacement levies differ in scope from the previous regime.

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

Imposing levy by regulation
Clause 9 of Schedule 9

Clause 9 of Schedule 9 would permit the rate of levy on a particular class of eligible horticultural products to be set by regulation. Although subclause 9(2) seeks to provide for a maximum rate of levy in the legislation, that maximum is dependent upon the Australian Statistician publishing a particular set of figures. The purpose of this clause is to provide for a rate of levy for horticultural products other than onions, apples and pears in anticipation of arrangements with the relevant growers of such products. While the committee understands that an attempt is being made to set a maximum, the committee notes that such clauses are potentially an inappropriate delegation of legislative power for the reasons outlined above and therefore sought the Minister's views on why this particular formula for setting the maximum rate was chosen.

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

On 24 March 1998, the Minister responded as follows:

> In the Alert your Committee raised concerns about the broad range between several operative rates of levy and the maximum rates of levy included in Schedules 3,4,5 and 9 of the proposed **National Residue Survey (Excise) Levy Bill 1998.** Your committee also expressed concern that the imposition of a levy by regulation proposed by Clause 9 of Schedule 9 may become a tax and that it was for Parliament to set a tax rate and not for the makers of subordinate legislation to do so.
>
> The rates of levy to which you refer to in clause 3 of Schedule 3 (milk fat), subclause 4(1) of Schedule 4 (dried fruits), the table of rates in clause 3 of Schedule 5 (game animals) and clause 4 of Schedule 9 (onions) are current levy rates set at the request of industry. Some of these operative rates have changed since being put in place in 1992. Since then the NRS has been able to reduce the operative rate of some levies through efficiencies in operating costs and an increase in volume of product, while others have been set at $0.00 while that program is in recess. It is not the intention of this legislation to make any alterations to current operational or maximum levy rates.
>
> The overall purpose of the NRS legislation is to recover the cost of an ongoing chemical residue monitoring program from those industries who have chosen to participate in a Nation Residue Survey program. The levy is designed to be a collection mechanism to recover the cost of the program on a least-cost basis, that is, as a fee for service rather than as a tax.
>
> The purpose of clause 9 of Schedule 9 is to allow for horticultural industries currently negotiating with the NRS for the implementation of an ongoing residue monitoring program to have such a program implemented in a timely manner. The

proposed legislation will allow for the operative rate of levy to be set by regulation only after full consultation has been carried out with industry, and the necessary policy approval sought from the Prime Minister and Treasurer.

This process is part of the 'General Principles Applying to Proposals for new and changed Primary Industry Levies for R&D, Promotion, Marketing or Fees for Chemical Residue Testing and Animal Health Services' agreed to by the Government in December 1996.

Under Parliamentary process regulations are also disallowable instruments that are subject to the scrutiny of the Standing Committee on Regulations and Ordinances and must sit in both houses for 15 working days during which disallowance can occur.

This system currently operates effectively in ensuring that the twenty-three agricultural commodities that participate in the National Residue Survey, and have levy collection mechanisms imposed by regulation, are subject to the scrutiny of the Parliament and also receive the best possible value for money in terms of the service provided.

The maximum rate of levy referred to in the proposed subclause 9(2) of Schedule 9 cannot be amended by subordinate legislation, only by primary legislation.

I trust that this information allays the concerns of your Committee and I am happy to provide any further information that the Committee may require.

On 31 March, the Minister provided a supplementary response as follows:

I refer to the verbal request from your Standing Committee's Secretariat on 30 March 1998 for supplementary information on the proposed **National Residue Survey Bills** concerning the cost recovery approach used for small industries whose production figures are not covered by Australian Bureau of Statistics (ABS) surveys. I am only too happy to oblige.

In responding to your request I would again draw your attention to the purpose of the National Residue Survey (NRS) package of legislation, to recover the cost of ongoing chemical residue monitoring programs from industries participating in the NRS. The levies are, in fact, a fee for service rather than as a tax, and are paid into a Trust Account rather than Consolidated Revenue.

This Trust Account (now titled Reserve Money Funds under the new Audit Act provisions) is established by the *National Residue Survey Administration Act 1992*. Through this the NRS is accountable for all industry monies paid into the account (section 7) and paid out of the account (section 8).

Monies can be paid into the account through two mechanisms: a statutory mechanism (levy) or by direct payment through a Memorandum of Understanding (MOU). In the case of smaller industries where the Statistician does not publish production figures, industries are encouraged by the NRS to use the MOU system of payment, as the identification of production figures and collection points and the collection cost involved can sometimes double the relevant cost of the monitoring program. Examples of sectors which currently have monitoring programs with the NRS under an MOU are the camel, possum and pecan industries.

An alternative approach that keeps costs to a minimum for closely related industries is to move to the next tier of production where ABS production figures are more readily available. An example of this is the current discussions being held with the stone fruit industry on the implementation of a monitoring program. A proposal has been put to industry to sample all stone fruits on a rotating basis rather than test individual stone fruits. This approach would also overcome the problem of economies of scale and a lack of ABS survey data for some of the lesser known stone fruits.

All programs are reviewed with the industry concerned on an annual basis and consultations carried out with the agreed industry representatives on how costs can be reduced in delivering a cost effective, statistically valid monitoring program. The onion industry is an example of how these efficiencies can be gained. With the inclusion of all onions in the survey, rather than just the export sector as initially intended, the NRS was able to reduce the operative levy rate from $1.56 per tonne ($5.00 maximum) to 40 cents per tonne. Results from the survey were then used by the industry as a marketing tool to encourage greater consumption of the industry's products.

In the event of the NRS being wound up, or an industry no longer requiring a monitoring program, all monies are returned to individual levy payers, not to Consolidated Revenue, nor to the peak industry body.

I trust that this additional information covers the concerns your Committee has raised and I am only too happy to provide any further information that the Committee may require.

The committee thanks the Minister for these comprehensive responses.

Native Title Amendment Bill 1997 [No. 2]

This bill was introduced into the House of Representatives on 9 March 1998 by the Attorney-General. The bill comprises the earlier bill, as amended and passed by the House of Representatives on 29 October 1997, and certain amendments made by the Senate and agreed to by the House. [Portfolio responsibility: Prime Minister]

The bill proposes to amend the following Acts:

- *Native Title Act 1993* to:
    - deal with certain acts done on or before 23 December 1996 (the date of the High Court's decision in *Wik*) concerning the interaction between native title rights and the interests and other rights and interests in land or waters;
    - confer new functions on representative Aboriginal/Torres Strait Islander bodies and deal with the selection, funding, accountability and administration of representative bodies;
    - explain how the new future acts processes will apply to processes already underway when the amendments commence, what will happen to applications already made to the NNTT and the Federal Court and how the new registration test will apply to claims already on the Register of Native Title Claims; and
    - list historic and current leases considered, on the basis of common law, to confer exclusive possession on the grantee and therefore extinguish native title; and
- *Native Title Act 1993*, *Federal Court of Australia Act 1976* and *Human Rights and Equal Opportunity Commission Act 1986* to:
    - explain how applications concerning native title issues are to be made and dealt with by the Federal Court, the NNTT and State or Territory bodies which have been approved under the *Native Title Act 1993* in relation to applications about native title matters; and
    - amend the way in which the Register of Native Title Claims and the National Native Title Register are to be kept and, in particular, the new registration test that is to be applied to claims for native title.

This Bill is the same, in all relevant respects, as the Bill introduced into the House of Representatives on 4 September 1997, and on which the Committee commented in Alert Digest No 12 of 1997. The committee forwarded a letter to the Prime

Minister on 25 September 1997 seeking a response to its comments, and followed this up by letter on 25 March 1998. The Special Minister of State has responded in a letter dated 31 March 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below. For the information of Senators, the comments from Alert Digest No. 12 of 1997 are repeated below.

Extract from Alert Digest No. 12 of 1997

Commencement by Proclamation/effluxion of time
Subclauses 2(2) to (6)

Subclauses 2(2) to (6) of this bill provide that the substantive amendments made by the bill will commence at various times after Royal Assent. The subclauses state:

> (2) Subject to subsection (3), Part 1 of Schedule 3 commences on a day to be fixed by Proclamation.
>
> (3) If Part 1 of Schedule 3 does not commence within the period of 9 months beginning on the date on which this Act receives the Royal Assent, that Part commences on the first day after the end of that period.
>
> (4) Part 2 of Schedule 3 commences:
>
> (a) on the first day after the end of the period of 12 months after the commencement of Part 1 of Schedule 3; or
>
> (b) if, before the end of that period, a later day is fixed by Proclamation—on that later day.
>
> (5) Subject to subsection (6), the remaining provisions of this Act commence on a day or days to be fixed by Proclamation.
>
> (6) If a provision referred to in subsection (5) does not commence within the period of 9 months beginning on the day on which this Act receives the Royal Assent, that provision commences on the first day after the end of that period.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the

Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

With respect to subclauses (3) and (6), the committee notes that paragraph 4 of the Drafting Instruction is applicable. The explanatory memorandum does not appear to give a reason for using a nine month period rather than a 6 month period for automatic commencement.

With respect to subclause (4), the committee notes that the explanatory memorandum at paragraph 1.13 suggests that the change from the present system for recognising and regulating representative bodies to the new system will need a transition period sufficiently long to enable the necessary preparatory work to be completed. The mechanism chosen, however, will result in a date for commencement that is not limited to any particular time. Paragraph 6 of the Drafting Instruction suggests that such a method should be used only in unusual circumstances.

The committee, therefore, **seeks the advice of the Minister** on the reasons for choosing the mechanisms in subclauses 2(3), (4) and (6).

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

Vicarious liability and reversal of the onus of proof

Subclause 203FH(4)

Subclause 203FH(4) provides:

(4) Any conduct engaged in on behalf of a person other than a body corporate by an employee or agent of the person within the scope of his or her actual or apparent authority is taken, for the purposes of this Part, to have been engaged in also by the person unless the person establishes that the person took reasonable precautions and exercised due diligence to avoid the conduct.

This subclause, if enacted, would impose vicarious liability on a person for the criminal acts of his or her employee or agent. It would also put the onus of disproving liability on the principal by requiring that person to establish that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

The committee has been prepared to accept the imposition of criminal liability on the manager/directors of a company for the acts of a company as they constitute the effective mind and

heart of the company. The company, in effect, thinks and makes decisions through them. Different considerations, however, apply where vicarious liability for the acts of other persons is imposed on an employer or principal who is a natural person.

The primary issue is whether imposing criminal liability vicariously on an employer who is a natural person unduly trespasses on that person's personal rights and liberties. Accordingly, the committee sought the Minister's advice on this matter.

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

In Alert Digest No. 3 of 1998, the Committee reiterated its comments in relation to this Bill.

Pending the Prime Minister's advice, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference and also may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

The Special Minister of State has responded as follows:

> The automatic commencement provisions in subclauses 2(3) and 2(6) operate 9 months after the Act receives the Royal Assent because the Bill is dealing with an operational national system. There are a number of jurisdictions which already have alternate native title systems in place and the additional 3 months will allow sufficient time for their parliamentary processes to amend the relevant legislation so that a consistent national regime can be maintained. The operations of Aboriginal and Torres Strait Islander representative bodies are also substantially affected by the legislation which creates obligations for them to perform functions under the new Act. These functions cannot be performed until the national system is in place.
>
> Subclause 2(4) deals with the transition period for representative bodies to be approved under the new Act. The Explanatory Memorandum at paragraph 33.3 explains the purpose of the staged commencement. The circumstances in relation to this aspect of the Bill are unusual as the Bill seeks to create a system for existing representative bodies which does not disadvantage their clients while the representative body is being assessed under the new criteria. The unspecified date of commencement for the later representative bodies has been included in the event that this assessment process is a little delayed.
>
> The Committee expressed some concerns in relation to subsection 203FH(4) which deals with the conduct of directors, employees and agents of representative Aboriginal/Torres Strait Islander bodies. As the Explanatory Memorandum points out at paragraph 33.75, this provision is similar to section 199 of the *Aboriginal and Torres Strait Islander Commission Act 1989* and it is appropriate that representative bodies be similarly accountable.

The committee thanks the Special Minister for this response.

Winston Crane
Deputy Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH REPORT

OF

1998

13 May 1998

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 1998

The Committee presents its Fifth Report of 1998 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Taxation Laws Amendment Bill (No. 6) 1997

Taxation Laws Amendment Bill (No. 6) 1997

This bill was introduced into the House of Representatives on 29 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
  - deny the ability to offset against capital gains certain capital losses created by an arrangement entered into before 3pm on 29 April 1997 and to prevent companies using capital losses artificially created through an arrangement entered into after that time;
  - allow instalment taxpayers classified as small to pay their likely tax on 15 December following their income year and the balance, if any, of their tax liability on the following 15 March, and make consequential amendments;
  - prevent franking credits or debits arising from the payment or refund of tax where those amounts are attributable to the retirement savings account business of a life assurance company;
  - ensure that taxpayers must reduce the cost base or indexed cost base of an asset to the extent of any net deductions allowable for expenditures included in the cost base;
  - replace the formulae used to determine the passive income of the controlled foreign companies of life and general insurance companies;
  - require life companies to use average calculated liabilities, rather than calculated liabilities at the end of the year of income as the basis for determining exempt income that relates to immediate annuity business and apportioning income and capital gains; and
  - clarify the operation of the depreciation provisions in circumstances when an entity the income of which is exempt becomes, for any reason, subject to tax on any part of its income under the provisions of the Act;
- *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend to companies two concessional tracing rules which are available to trusts under trust loss measures;

- *Fringe Benefits Tax Assessment Act* 1986, *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend the existing exemption for taxi travel beginning or ending at an employee's place of work and to introduce a new exemption from FBT for car parking benefits for certain small business owners; and

- *Sales Tax Assessment Act 1992* to ensure that goods imported into Australia under a temporary importation exemption, used in Australia, exported and then re-imported are subject to sales tax at the time of the later importation.

The Committee dealt with this bill in Alert Digests Nos. 16 and 17 of 1997.

In Alert Digest No 16 of 1997, the Committee raised a number of issues concerning the retrospective application of various proposed amendments. A letter was forwarded to the Treasurer on 13 November 1997 inviting a response, and a letter dated 3 December 1997 was subsequently received from the Assistant Treasurer. The Committee thanked the Assistant Treasurer for this response in Report No 1 of 1998.

In Alert Digest No 17, the Committee dealt with matters raised in a submission from KPMG, Chartered Accountants. This submission raised a number of further issues in relation to the retrospective effect of the legislation. A letter was forwarded to the Treasurer on 27 November 1997 inviting a response in relation to the KPMG submission, and a letter dated 6 February 1998 was subsequently received from the Assistant Treasurer. The Committee thanked the Assistant Treasurer for this response in its Third Report of 1998 and requested some additional comment on the effect of the provisions on early balancing companies.

A further response dated 8 May 1998 has now been received from the Assistant Treasurer. A copy of that letter is attached to this Report and relevant parts of the response are discussed below.

Extract from Alert Digest No 17 of 1997

Retrospectivity
KPMG submission

The KPMG submission, however, raises issues in relation to the retrospective effect of the legislation which escaped the committee's notice. In particular, the submission suggests that:

- the bill would deny the use of certain capital losses that were incurred, but not utilised, at any time after 19 September 1995;
- the circumstances differ from 'the bottom of the harbour schemes' in that there has been no illegal evasion of tax; and

- early balancing companies may be unfairly treated

The Committee notes that the KPMG submission has been forwarded to the Treasurer. Nevertheless, the committee **seeks the Treasurer's advice** on the issues raised in this submission.

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

The Assistant Treasurer responded to the KPMG submission as follows:

> You sought the Treasurer's advice in relation to a submission given to you by KPMG concerning the proposed measures contained in the Taxation Laws Amendment Bill (No 6) dealing with artificially created capital losses.
>
> The KPMG submission claimed that the measures are retrospective, that such an effect is unjustified and that their retrospective application to early balancing companies is unfair. As a result, you were concerned that the provisions may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.
>
> The proposed legislation is not retrospective and will not unduly trespass upon the personal rights and liberties of taxpayers. The legislation is designed to close a loophole under which corporate groups could use the capital gains tax (CGT) roll over provisions to obtain capital losses far in excess of the actual economic loss suffered by the group. The legislation is designed to allow the corporate group the benefit of the actual economic loss while denying the use of any excess loss. For losses created prior to 3pm 29 April 1997 (the time of announcement of the measures), the legislation does this by identifying the amount by which the capital losses created by a company, as a result of the roll over, exceeds the losses that would have been available to that company if the roll over had not occurred. Consequently, the proposed legislation does not reverse any offsetting of a capital gain with an artificial loss which occurred in a previous income year.
>
> The measures do not apply to losses already offset by a company with a 30 June balancing date against capital gains in the 1995-96 or an earlier year of income. Contrary to being unfair to early balancing companies, the proposed legislation contains a concession for early balancing companies. Such companies are able to offset capital losses created prior to 3pm 29 April 1997 against capital gains in the 1996-97 income year as well, provided they have lodged their tax returns for that year before 3pm 29 April 1997. The legislation thereby gives companies in this category an additional income year, compared to ordinary balancing companies, in which to offset the artificial losses, provided that the returns have been furnished before the announcement of these measures.
>
> I should point out that while the schemes used to create these capital losses may not be as objectionable as the 'bottom of the harbour schemes', they will

in most cases involve a deliberate tax avoidance motive. The creation of artificial capital losses of this type involves a deliberate series of steps and

> would not, ordinarily, be an innocent occurrence. Even if the additional capital losses, over and above the actual economic loss, were innocently created, the fact remains that they are not genuine economic losses.
>
> Moreover, the amount of losses artificially created by these schemes pose a serious and continuing risk to the integrity of the revenue base. They allow corporate groups to artificially avoid their fair share of the tax burden.

In its Third Report of 1998, the Committee thanked the Assistant Treasurer for this response and for his assistance with the Bill. The Committee noted from the response that the proposed legislation was said to contain a concession for early balancing companies. Such companies were additionally able to offset capital losses created prior to 3pm on 29 April 1997 against capital gains in the 1996-97 income year, provided that they lodged their tax returns for that year before 3pm on 29April 1997.

However, the Committee understood from the KPMG submission that some early balancing companies might not have lodged their tax returns so soon after the end of their substituted tax year.

Therefore the Committee continued to draw Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, including those of shareholders, in breach of principle 1(a)(i) of the committee's terms of reference.

On 8 May 1998 the Assistant Treasurer provided a further response as follows:

> The Senate Standing Committee for the Scrutiny of Bills, in its Third Report of 1988 (25 March) (at page 57), expressed concerns regarding the alleged retrospective effect of the proposed measures contained in the Taxation Laws Amendment Bill (No. 6) dealing with artificially created capital losses. Further to my letter of 6 February 1998, I am writing to assure the Committee that the issued raised by KPMG in relation to the proposed measures are unfounded. The Committee continues to be concerned that some early balancing companies may not have lodged their tax returns so soon after the end of their substituted tax year.
>
> As explained in my earlier letter, rather than being unfair to early balancing companies, the proposed legislation contains a concession for such companies. Early balancing companies are able to offset eligible rollover losses created before the Government announced the measurers, at 3 pm 29 April 1997 against capital gains in the 1996-97 income year, provided that they lodged their tax returns for that year before the Government announced the measurers, at 3 pm on 29 April 1997. This is in contrast to companies with a 30 June balancing date which are not able to offset such capital losses against capital gains in the 1996-97 income year.
>
> However, early balancing companies that did not lodge their tax returns before the legislation was announced should not be given the opportunity to use eligible rollover losses in returns for the 1996-97 income year lodged after the announcement. They will still have the same benefit of artificial losses used in

earlier income years that is available to companies with later balancing dates. In my opinion there is no justification for extending the concession to such companies.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTH REPORT

OF

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SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 1998

The Committee presents its Sixth Report of 1998 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Commonwealth Rehabilitation Service Reform Bill 1998

Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998

Financial Sector (Shareholdings) Bill 1998

Payment Systems (Regulation) Bill 1998

Commonwealth Rehabilitation Service Reform Bill 1998

This bill was introduced into the House of Representatives on 26 March 1998 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to provide transitional arrangements to facilitate the restructuring of the Commonwealth Rehabilitation Service as a Commonwealth company and makes consequential amendments to eight other Acts.

The Committee dealt with this bill in Alert Digest No. 4 of 1998, in which it made various comments. The Minister for Family Services has responded to those comments in a letter dated 14 May 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Insufficient Parliamentary scrutiny
Clause 18

In Alert Digest No. 4 of 1998, the Committee noted that clause 18 of the bill provides that no instrument made under the bill (with the exception of any regulations made under section 19) is a legislative instrument for the purposes of the *Legislative Instruments Act 1998*. Such a clause is clearly not necessary in relation to instruments which are administrative in nature, and so must relate to instruments which are legislative in nature. The Committee noted that the intention underlying the proposed Legislative Instruments Act is that all such instruments should be scrutinised by the Parliament. Accordingly, the Committee sought the advice of the Minister on the reason for excluding such instruments from scrutiny.

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

The Minister has responded as follows:

> The Commonwealth Rehabilitation Service Reform Bill 1998 provides for the transfer of assets, liabilities and contracts relevant to the Commonwealth Rehabilitation Service (CRS), currently operating as a Division of the Department of Health and Family Services, to a new fully owned Commonwealth company limited by shares without conveyance or assignment.
>
> The instruments referred to in clause 18 of the Commonwealth Rehabilitation Service Reform Bill 1998 facilitate this transfer and are described below:
>
> a. clause 5 which provides for the Minister to nominate in writing that a specified company is the nominated company for the purposes of the Bill. Any declarations must be notified in the Gazette;

b. clause 10, which provides for a declaration to be signed by the Minister specifying that particular assets used by CRS vest in the nominated company. The clause also allows the Minister to declare in writing that the company becomes the Commonwealth's successor in law in relation to those assets (subclauses 2 and 3). Any declarations must be notified in the Gazette;
c. clause 11, which provides a mechanism to substitute the nominated company for the Commonwealth in contracts (other than contracts of employment) relating to CRS (subclause 1). It also allows for a declaration to be made by the Minister that the company becomes the Commonwealth's successor in law in relation to the rights and obligations under the contract (subclause 5). Any declarations must be notified in the Gazette;
d. clause 12, which provides a mechanism to transfer Commonwealth liabilities, relating to CRS to the nominated company. It also allows the Minister to declare that the company becomes the Commonwealth's successor in law in relation to those liabilities. Any declarations must be notified in the Gazette; and
e. clause 13, which provides for the Minister to sign a certificate, identifying particular land and which states that the right, title and interest has become vested in the company under this legislation and for that certificate to be lodged with a land registration official.

It is believed these instruments will be administrative in character. Clause 18 has been included in the Bill to avoid any uncertainty which could conceivably arise about their status under the proposed Legislative Instruments Act.

Once again thank you for writing on this issue.

The Committee thanks the Minister for this response.

Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998

This bill was introduced into the House of Representatives on 26 March 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of bills to effect the introduction of the new regulatory framework for the financial system, this bill proposes to amend the following Acts:

- *Australian Securities Commission Act 1989* to:
    - change the name of the Australian Securities Commission to the Australian Securities and Investments Commission (ASIC);
    - provide the ASIC with additional functions, particularly in relation to the consumer protection and market integrity aspects of insurance and superannuation regulation; and
    - make consequential amendments;
- *Banking Act 1959* to extend the coverage of the Act so that the banking and deposit-taking sector will be administered by the Australian Prudential Regulation Authority (APRA);
- *Financial Corporations Act 1974* to require that authorised deposit-taking institutions provide certain data to both the Reserve Bank of Australia and the APRA;
- *Insurance Acquisitions and Takeovers Act 1991* to facilitate integration with the proposed Financial Sector (Shareholdings) Act 1998 and transfer regulatory responsibility to the APRA;
- *Insurance Act 1973*, *Insurance (Agents and Brokers) Act 1984* and *Insurance Contracts Act 1984* to transfer regulatory responsibility to the APRA;
- *Life Insurance Act 1995*, *Retirement Savings Accounts Act 1997* and *Superannuation Industry (Supervision) Act 1993* to separate responsibility for the administration of the Acts between the ASIC and the APRA;
- *Reserve Bank Act 1959* to:
    - establish the Payments System Board to operate as the policy making board in relation to the payments system;

- reduce the Reserve Bank Board from 11 to nine members; and
- make consequential amendments;

- *Superannuation (Resolution of Complaints) Act 1993* to transfer regulatory responsibility to the ASIC; and

repeals six Acts and makes consequential and transitional amendments to other Acts.

The Committee dealt with this bill in Alert Digest No. 4 of 1998, in which it made various comments. The Parliamentary Secretary to the Treasurer has responded to those comments in a letter dated 25 May 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Non-availability of merits review
Schedule 2, Items 29-40

In Alert Digest No. 4 of 1998, the Committee noted that items 29 to 40 of Schedule 2 to the bill propose substantial changes to section 9 of the *Banking Act 1959*, and add new sections 9A, 9B and 9C to that Act. The effect of these amendments would be to give to the newly established Australian Prudential Regulation Authority (APRA) the power, currently exercised by the Governor-General, to issue and revoke the authority to carry on banking business in Australia. The exercise of such a power clearly has considerable commercial implications, yet the bill seems to make no provision for AAT review of APRA decisions. Accordingly, the Committee sought the advice of the Treasurer on the reason for excluding such decisions from independent review on the merits.

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

The Parliamentary Secretary to the Treasurer has responded as follows:

> Decisions relating to who and who may not engage in banking business may have profound effects on the stability of the financial system. While it is true that such decisions have direct implications for the commercial interests of the parties concerned, the broader consequences of such decisions for depositors and the financial system as a whole are also of concern.
>
> The most competent authority in Australia to assess these implications will be the Australian Prudential Regulation Authority (APRA), which will be required under its legislation to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality. It would be undesirable to have APRA's decisions in this critical area altered by another body that is unlikely to be as competent or to have a similar interest and expertise in the public interest dimension of the financial system. For example, there may be times when decisions relating to

> the issue and revocation of such authorities form part of a broader intervention strategy to resolve a crisis and maximum certainty of outcome will be highly desirable.
>
> That said, decisions relating to the issue and revocation of an authority will, nevertheless, be subject to judicial review. Moreover, in the case of revocation of an authority, where the prospect of private loss is more immediate, grounds for revocation are clearly specified in the Bill as a guard against arbitrary decision making and to guide such review. Taking this into account, together with the wider concerns outlined above, judicial review is seen as providing an appropriate balance between private and public protections in this case.

Insufficient Parliamentary scrutiny
Schedule 2, Item 49

In Alert Digest No. 4 of 1998, the Committee noted that item 49 of Schedule 2 to the bill inserts a proposed new section 11AF in the *Banking Act 1959*. This section will permit APRA to make prudential standards for authorised deposit-taking institutions. These standards appear to be legislative in character. However, there seems to be no provision for parliamentary scrutiny. The Committee noted that the intention underlying the proposed Legislative Instruments Act is that all such instruments should be scrutinised by the Parliament. Accordingly, the Committee sought the advice of the Minister on the reason for omitting such instruments from scrutiny.

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

On this issue, the Parliamentary Secretary to the Treasurer has responded as follows:

> APRA needs to be an independent and operationally autonomous regulator to ensure the financial safety of depositors and to maintain stability in the financial system. The Committee of International Banking Supervisory Authorities (the Basle Committee) noted that these requirements are essential for effective banking supervision. Consistent with this approach, prudential standards should not be disallowable by the Parliament.
>
> Certain and flexible standards powers will allow APRA to respond very quickly and continuously to developments in financial products or the system, as a whole, or in a crisis to prevent contagion effects in the financial system. Recent events in some of the Asian countries have shown that events in financial markets can move unpredictably and with great speed, and that the regulatory environment must respond quickly, and with certainty, to these changes.
>
> Building societies and credit unions, which will in due course be covered under the *Banking Act 1959*, are already subject to prudential standards that are not disallowable by State Parliaments. The standards making powers proposed for

APRA are similar to those currently available to the Australian Financial Institutions Commission.

I note that when the Legislative Instruments Bill is passed, then the standards referred to above would become disallowable. For the reasons set out above, the Government will be seeking an exemption from that Bill for the prudential standards.

APRA will, of course, still be required to appear before parliamentary committees on request and be accountable to the Parliament.

The Committee thanks the Parliamentary Secretary for this response.

Financial Sector (Shareholdings) Bill 1998

This bill was introduced into the House of Representatives on 26 March 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of bills to effect the introduction of the new regulatory framework for the financial system, this bill proposes to regulate the ownership and acquisitions of prudentially regulated financial institutions.

The Committee dealt with this bill in Alert Digest No. 4 of 1998, in which it made various comments. The Parliamentary Secretary to the Treasurer has responded to those comments in a letter dated 25 May 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Non-availability of merits review
Subclause 14(1)

In Alert Digest No. 4 of 1998, the Committee noted that subclause 14(1) of the bill granted to the Treasurer the discretion to determine whether an applicant may hold a stake of more than 15% in a financial sector company. However, the bill seemed to make no provision for review on the merits by the Administrative Appeals Tribunal of any exercise of that discretion. Accordingly, the Committee sought the advice of the Treasurer on the reason for excluding such decisions from independent review on the merits.

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

The Parliamentary Secretary to the Treasurer has responded as follows:

> In considering whether an applicant will be permitted to hold a stake of more than 15 per cent in a financial sector company, the Treasurer is only able to exercise discretion on national interest grounds. The national interest is a broad concept encompassing such concerns as the consequences for depositors, the health of the financial system and the broader economy, and the international financial system, although such decisions by the Treasurer would also have commercial repercussions for the parties involved. It would be undesirable to have a decision of the Treasurer altered by another body that is unlikely to be as competent or to have a similar interest and expertise in the public interest dimension of shareholdings in financial institutions. Further, similar to this Bill, there is no provision for a merit review of decisions in the *Foreign Acquisitions and Takeovers Act 1975*. That said, decisions under this subclause will, nevertheless, be subject to judicial review, which is seen as providing an appropriate balance between private and public protections in this case.

Non-availability of merits review
Clauses 23 and 31

In Alert Digest No. 4 of 1998, the Committee noted that clause 23 of the bill would permit the Treasurer to declare that a person has practical control of a financial sector company. On the making of such a declaration, clause 24(1) requires the person to give up that control. By virtue of clause 24(3), a failure to give up that control is a criminal offence.

Clause 31 of the bill would permit the Treasurer to issue a direction to a stakeholder to reduce his or her stake in a financial sector company if "it would be concluded" (by an unspecified person or persons) that the stakeholder was seeking to avoid other provisions in the bill. A failure to comply with such a direction issued by the Treasurer is, again, a criminal offence.

Since the commission of each of these offences depends, initially, on the exercise of a discretion by the Treasurer, it may be considered that the Treasurer can, in effect, create criminal liability in another person. Accordingly, the Committee sought the advice of the Treasurer on whether the exercise of discretions which may create criminal liability should be subject to independent review on the merits.

Pending the Treasurer's advice, the Committee drew Senators' attention to these provisions, as they may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

On this issue, the Parliamentary Secretary to the Treasurer has responded as follows:

> The Treasurer is only able to exercise discretion (to declare whether a person has practical control of a financial sector company or to require a stakeholder to reduce their stake in a financial sector company) on national interest grounds. The national interest is a broad concept encompassing such concerns as the consequences for depositors, the health of the financial system and the broader economy, and the international financial system, although such decisions by the Treasurer would also have commercial repercussions for the parties involved. It would be undesirable to have a decision of the Treasurer altered by another body that is unlikely to be as competent or to have a similar interest and expertise in the public interest dimension of the control of financial sector companies. Further, similar to this Bill, there is no provision for a merit review of decisions in the *Foreign Acquisitions and Takeovers Act 1975*. That said, decisions under these clauses will, nevertheless, be subject to judicial review, which is seen as providing an appropriate balance between private and public protections in this case.

The Committee thanks the Parliamentary Secretary for this response.

Payment Systems (Regulation) Bill 1998

This bill was introduced into the House of Representatives on 26 March 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of bills to effect the introduction of the new regulatory framework for the financial system, this bill proposes to provide that the Reserve Bank has the power to designate payment systems; to impose access regimes; make standards; arbitrate disputes; and give directions to participants in designated systems.

The Committee dealt with this bill in Alert Digest No. 4 of 1998, in which it made various comments. The Parliamentary Secretary to the Treasurer has responded to those comments in a letter dated 25 May 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Insufficient scrutiny by Parliament of legislative power
Subclause 9(3) and clause 18

In Alert Digest No. 4 of 1998, the Committee noted that subclause 9(3) of the bill would permit the Reserve Bank to issue notices declaring that the Act would not apply to specified facilities. Clause 18 would permit the Bank to make standards for designated payment systems. In each case, the provisions appear to grant the bank a legislative power, with no corresponding provision for Parliamentary scrutiny of the exercise of that power. Accordingly, the Committee sought the advice of the Treasurer as to the reasons for not subjecting the exercise of these powers to Parliamentary scrutiny.

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

The Parliamentary Secretary to the Treasurer has responded as follows:

> Subclause 9(3) provides that the RBA may, by notice in writing, declare that the provisions of the Bill do not apply to a specified facility or to facilities included in a specified class of facilities if the RBA considers that such a declaration is appropriate having regard to the nature of said facilities. The effect of this subclause is to exempt specified purchased payment facilities (such as smart cards and electronic cash) from regulations under clauses 22 to 25 (that is, part 4). A holder of the stored value of a purchased payment facility must be an authorised deposit-taking institution (ADI), or authorised or exempted under Part 4. Subclause 9(3) provides an additional means for the RBA to not apply the regulatory powers of the Bill to specified facilities. This subclause will be used by the RBA for very small and/or isolated purchased payment facilities that operate within a closed environment. The nature of such facilities is such that parliamentary disallowance of a declaration of the RBA under this subclause would be impractical and increase the

level of uncertainty within the financial system. In addition, any declaration by the RBA under this subclause would be subject to judicial review.

Clause 18 allows the RBA to make standards, subject to a public interest test, for designated payment systems. The RBA is required, except in urgent circumstances, to consult widely with interested parties while formulating such standards, and decisions by the RBA under this clause are subject to judicial review. The payments system is considered to be one of the main sources of systemic risk in the economy. Standards will allow the RBA to control this risk and to respond very quickly and continuously to developments in financial products or the system, as a whole, or in a crisis to prevent contagion effects in the payments system. Recent events in some of the Asian countries have shown that events in financial markets can move unpredictably and with great speed and that the regulatory environment must have the capacity to respond quickly to these changes.

I note that when the Legislative Instruments Bill is passed, then the standards referred to above would become disallowable. For the reasons set out above, the Government will be seeking an exemption from that Bill for the prudential standards.

The RBA will, of course, still be required to appear before parliamentary committees on request and be accountable to the Parliament.

Non-availability of merits review
Clauses 21 and 24

In Alert Digest No. 4 of 1998, the Committee noted that clauses 21 and 24 would allow the Reserve Bank to issue directions to various financial institutions. Failure to comply with these directions would be a criminal offence. Such provisions appear to permit the Bank to, in effect, create criminal liability – something which is appropriately the domain of Parliament. Accordingly, the Committee sought the advice of the Treasurer on whether the exercise of discretions which may create criminal liability should be subject to independent review on the merits.

Pending the Treasurer’s advice, the Committee drew Senators' attention to these provisions, as they may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

On this issue, the Parliamentary Secretary to the Treasurer has responded as follows:

Directions under clause 21 relate to designated payment systems while directions under clause 24 relate to authorised holders of the stored value of a purchased payment facility (such as smart cards or electronic cash). In the case of clause 21, directions by the RBA are required to be consistent with the applicable access regime and any applicable standards. In the case of clause 24, directions by the RBA are required to be consistent with the conditions of the applicable authority.

In both instances, a decision by the RBA will be subject to judicial review. In addition, to enforce the directions powers, the RBA would need to take Court action against a corporation which the RBA considers has not complied with a lawful

direction (it should be noted that directions under these clauses apply only to corporations).

Given the overall national economic and urgent nature of the exercise of the directions power, and the strategic role of the payments system in a crisis, the RBA is the most competent authority. It would be undesirable to have a direction of the RBA altered by another body that is unlikely to be as competent or to have a similar interest and expertise in the public interest dimension of the payments system.

Non-availability of merits review
Clauses 23 and 25

In Alert Digest No. 4 of 1998, the Committee noted that clause 23 of the bill would permit the Reserve Bank to authorise a corporation to be a holder of the stored value of a class of purchased payment facilities. Clause 25 of the bill permits the Bank to exempt a corporation from the need to have such an authority. In neither case is the exercise of this discretion subject to review on the merits by the Administrative Appeals Tribunal. Accordingly, the Committee sought the advice of the Treasurer on whether the exercise of such discretions should be subject to independent review on the merits.

Pending the Treasurer's advice, the Committee drew Senators' attention to these provisions, as they may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

On this issue, the Parliamentary Secretary to the Treasurer has responded as follows:

> Purchased payment facilities (such as smart cards and electronic cash) embody the unique characteristic that consumers pay for the facility using conventional means (eg, cash) and rely on the holder of the stored value backing that facility to subsequently redeem that value. A holder of the stored value of a purchased payment facility must be an authorised deposit-taking institution, or authorised or exempted under clauses 23 and 25 respectively.
>
> Decisions relating to who and who may not be a holder of the stored value of a purchased payment facility may have profound effects on consumer confidence in electronic payment systems more generally and hence on the stability of the financial system. While it is true that such decisions have direct implications for the commercial interests of the parties concerned, the broader consequences of such decisions for consumers and the financial system as a whole are also of concern.
>
> The most competent authority in Australia to assess these implications will be the RBA, which will be required under its legislation to be satisfied that a corporation, which is granted an authority (under clause 23), or an exemption (under clause 25), is able to meet its obligations as the holder of the stored value of a purchased payment facility. It would be undesirable to have the RBA's decisions in this critical area altered by another body that is unlikely to be as competent or to have a similar

interest and expertise in the public interest dimension of the payments system. In addition, these decisions by the RBA are subject to judicial review.

I trust the above explanations are of assistance to the Committee.

The Committee thanks the Parliamentary Secretary for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

1998

24 June 1998

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 1998

The Committee presents its Seventh Report of 1998 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Australian Radiation Protection and Nuclear Safety Bill 1998

Australian Radiation Protection and Nuclear Safety Bill (License Charges) Bill 1998

Comprehensive Nuclear Test-Ban Treaty Bill 1998

Datacasting Charge (Imposition) Bill 1998

Electoral and Referendum Amendment Bill (No. 2) 1998

Payment Systems and Netting Bill 1998

Taxation Laws Amendment (Company Law Review) Bill 1998

Australian Radiation Protection and Nuclear Safety Bill 1998

This bill was introduced into the House of Representatives on 8 April 1998 by the Parliamentary Secretary to the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to establish a scheme to regulate the operation of nuclear installations and the management of radiation sources, including ionising material and apparatus and non-ionising apparatus, where these activities are undertaken by the Commonwealth, Commonwealth entities and those who deal with such entities.

The Committee dealt with this bill in Alert Digest No. 6 of 1998, in which it made various comments. The Parliamentary Secretary to the Minister for Health and Family Services has responded to those comments in a letter dated 23 June 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Abrogation of the privilege against self-incrimination
Subclause 55(2)

In Alert Digest No. 6 of 1998, the Committee noted that subclause 55(1)(e) of the bill authorises an inspector to require any person on particular premises to answer any questions put by the inspector and produce any documents requested by the inspector.

Subclause 55(2) makes compliance an absolute requirement. No provision is made for non-compliance where a person has a reasonable excuse. As a consequence, subclause 55(2) removes the privilege against self-incrimination and does not contain the safeguards often included in such provisions (see, for example, *Agricultural and Veterinary Chemicals Code 1994*, s 146; *Child Support Assessment Act 1989*, s 161(4); *Australian Wine and Brandy Corporation Act 1980*, s 39ZH(3); *Ozone Protection Act 1989*, s 64(2)).

Accordingly, the Committee sought the advice of the Minister on the reasons why the requirement in subclause 55(2) makes no provision for possible non-compliance where a person has a reasonable excuse, which would include the likelihood that the information required was likely to incriminate that person.

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

The Parliamentary Secretary to the Minister has responded as follows:

The Committee sought advice in respect of subclause 55(2) of the Bill which creates an offence for, amongst other things, refusing or failing to answer any questions put by an inspector (proposed subparagraph 55(1)(e)(i)). The Committee has stated that subclause 55(2) removes the privilege against self-incrimination and does not contain the safeguards often included in similar provisions.

Criminal Code – privilege against self incrimination

Following discussions with the Attorney-General's Department, the Department of Health and Family Services advices that it is highly likely that sub-clause 55(2) does not abrogate the privilege against self-incrimination. Under clause 10 of the Bill, Chapter 2 of the Criminal Code will apply to the offences in the Bill. It is considered that the Code will not alter the application of the privilege against self-incrimination at common law to Commonwealth offences. That is, the privilege will continue to apply in relation to a Commonwealth law requiring the answering of questions unless the law expressly or by necessary implication indicates a contrary intention: *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309. Further details regarding this matter are at attachment A.

The Committee thanks the Parliamentary Secretary for this response, which addresses some of its concerns. The Committee notes the advice of the Attorney-General's Department that the offences under the Bill are subject to Chapter 2 of the Criminal Code, and that, therefore, "it is highly likely that sub-clause 55(2) does not abrogate the privilege against self-incrimination". While persuasive, this advice is not definitive.

From the advice, it appears that it is intended that the privilege against self-incrimination should continue to apply to an offence under clause 55. If so, there would seem to be no difficulty in expressly providing for it. Such an approach would remove any uncertainty. Accordingly, the Committee seeks the Minister's advice on whether there is any difficulty in expressly providing that the privilege against self-incrimination continues to apply to an offence against clause 55.

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

Australian Radiation Protection and Nuclear Safety (Licence Charges) Bill 1998

This bill was introduced into the House of Representatives on 8 April 1998 by the Parliamentary Secretary to the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to enable annual fees and application fees to be payable by entities regulated under the Australian Radiation Protection and Nuclear Safety Bill 1998.

The Committee dealt with this bill in Alert Digest No. 6 of 1998, in which it made various comments. The Parliamentary Secretary to the Minister for Health and Family Services has responded to those comments in a letter dated 23 June 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Imposing a levy by regulation
Subclauses 4(2) and 5(2)

In Alert Digest No. 6 of 1998, the Committee noted that subclause 4(2) of the bill requires the holder of a "facility licence" to pay an annual charge. Subclause 5(2) imposes a similar requirement on the holder of a "source licence". In each case, the amount of the charge is set by regulation.

At page 62 of its report on *The Work of the Committee during the 37th Parliament (May 1993-March 1996)*, the Committee restated its concerns in this area in the following terms:

> [T]he Committee has consistently drawn attention to legislation which provides for the level of a 'levy' to be set by regulation. This creates a risk that the levy may in fact become a tax. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so. Where the level of a levy needs to be changed frequently and expeditiously the question arises as to whether this can best be done by regulation rather than by statute. If a compelling case can be made out for the level to be set by subordinate legislation the Committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the levy or alternatively a formula by which such an amount can be calculated.

Many bills adopt such an approach, providing for a basic levy to be set by regulation, subject to a statutory maximum rate. Examples of such bills considered by the Committee recently include the Laying Chicken Levy Amendment (AAHC)

Bill 1996 and the Live-stock Export Charge Amendment (AAHC) Bill 1996 (both considered in *Alert Digest No 5 of 1996*), and the Retirement Savings Accounts Supervisory Levy Bill 1996 and the Telecommunications (Carrier Licence Charges) Bill 1996 (both considered in *Alert Digest No 1 of 1997*).

The Explanatory Memorandum to this Bill makes no reference to the appropriateness of such an approach, and the Minister's Second Reading Speech simply notes that the Commonwealth intends employing an independent consultant to advise on appropriate cost recovery processes and fees and charges. Accordingly, the Committee sought the advice of the Minister on why the legislation places no upper limit on the power to set a rate of levy by regulation.

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

The Parliamentary Secretary to the Minister has responded as follows:

> When drafting the Bill the Government gave considerable attention to the issue of annual charges. As reflected in the Second Reading Speech, the charges:
>
> . will only apply to Commonwealth entities rather that private individuals, businesses or corporations; and
>
> . the charges will equate only to the amount necessary to recover the cost of the additional functions described in the Bill.
>
> This is in line with the Government's decisions concerning the establishment of the Australian Radiation Protection and Nuclear Safety Agency. The Government was specific in its intention that this Agency recover the costs associated with its regulatory function from the Commonwealth entities it will regulate. The level of fees and charges is, therefore, directly tied to the cost of licencing, monitoring and enforcing compliance with provisions of the ARPANS Bill.
>
> Before any upper limit can be set for these fees and charges, it is, therefore, necessary to undertake a comprehensive assessment of the additional functions that result from the legislation and to approximate the number of facility and source licenses that will be held by various Commonwealth entities.
>
> Extensive consultation with the approximately 20 Commonwealth agencies to be licenced under the ARPANS Bill has been on-going, since the Government decision to establish the Agency. A major focus of the consultation has been to ascertain details necessary to establish an appropriate regulatory regime.
>
> Now that the details of the regulatory regime have been determined (as reflected in the ARPANS Bill), the Commonwealth has employed the independent consultancy firm, Ernst and Young, to establish a fees and charges regime, against the regulatory framework. All Commonwealth entities to be levied under this Bill will continue to be closely consulted during the course of that project and during subsequent determination of appropriate charges.

To enable this process to be completed, annual charges and licence fees will not be introduced in the short term. Until such time as cost recovery processes are in place, the Health and Family Services portfolio will bear the additional cost of regulating radiation and nuclear safety activities.

I believe that any move to set an upper limit at this time would be arbitrary and contrary to the consultative approach undertaken to date. I note that while the upper limit cannot be written in the Bill at this time, the entire cost recovery regime will be the subject of Parliamentary scrutiny through the Regulation making process. Should there still, despite this, continue to be concern about the inclusion of the upper limit in the substantive legislation, it would be possible for the Licence Charges Act to be amended to reflect the outcome of the current independent consultancy process.

If the Committee has any further queries I would be pleased to arrange verbal briefings.

The Committee thanks the Parliamentary Secretary for this response.

Comprehensive Nuclear Test-Ban Treaty Bill 1998

This bill was introduced into the House of Representatives on 8 April 1998 by the Minister for Foreign Affairs. [Portfolio responsibility: Foreign Affairs]

The bill proposes to effect Australia's obligations as a party to the Comprehensive Nuclear Test-Ban Treaty.

The Committee dealt with this bill in Alert Digest No. 6 of 1998, in which it made various comments. The Minister for Foreign Affairs has responded to those comments in a letter dated 4 June 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Delegation without limitation
Clause 69

In Alert Digest No. 6 of 1998, the Committee noted that clause 69 of the bill permits the Minister to delegate all or any of his or her powers under the Act. No limitations are imposed as to the qualifications or attributes of any potential delegate.

Generally, the Committee prefers to see limits set, either on the sorts of powers that can be delegated or the categories of people to whom they may be delegated. In the latter case, the Committee has expressed a preference that powers be delegated only to the holders of nominated offices, or to members of the Senior Executive Service, or to persons holding specified qualifications. Accordingly, the Committee sought the advice of the Minister on why the bill authorises this unfettered delegation.

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

The Minister has responded as follows:

> As drafted, Clause 69 permitted the relevant Minister to delegate all or any of his or her powers under Act. No limitations were imposed as to the qualifications or attributes of any potential delegate. Scrutiny of Bills Alert Digest No. 6 of 1998 stated that, generally, the Committee preferred to see limits set either on the sorts of powers that can be delegated or the categories of people to whom they may be delegated. In the latter case, the Committee expressed the preference that powers be delegated only to the holders of nominated offices, to members of the Senior Executive Service or to persons holding specified qualifications.

To accommodate the Committee's preference, I have since moved an amendment to clause 69 of the Bill which confines the power of the Minister to delegate authority under the Act to a limited class of persons including the Secretary of the Department of Foreign Affairs and Trade, the Director of the Australian Comprehensive Test Ban Office and members of the Senior Executive Service of the Department of Foreign Affairs and Trade. The amendment was moved on 2 June 1998 and is recorded at page 4169 of Hansard.

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

Datacasting Charge (Imposition) Bill 1998

This bill was introduced into the House of Representatives on 8 April 1998 by the Minister representing the Minister for Communications, the Information Economy and the Arts. [Portfolio responsibility: Communications, the Information Economy and the Arts]

The bill proposes to provide for the imposition of a charge in relation to the provision of datacasting services by commercial and national free-to-air television broadcasters.

The Committee dealt with this bill in Alert Digest No. 6 of 1998, in which it made various comments. The Minister for Communications, the Information Economy and the Arts has responded to those comments in a letter dated 23 June 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Imposing a levy by regulation
Clause 7

In Alert Digest No. 6 of 1998, the Committee noted that clause 7 states that the amount of the charge to be imposed by the bill is to be set through delegated legislation – specifically, in accordance with a written determination of the Australian Communications Authority. Further, the bill does not specify an upper limit on this charge.

At page 62 of its report on *The Work of the Committee during the 37th Parliament (May 1993-March 1996)*, the Committee restated its concerns in this area in the following terms:

> [T]he Committee has consistently drawn attention to legislation which provides for the level of a 'levy' to be set by regulation. This creates a risk that the levy may in fact become a tax. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so. Where the level of a levy needs to be changed frequently and expeditiously the question arises as to whether this can best be done by regulation rather than by statute. If a compelling case can be made out for the level to be set by subordinate legislation the Committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the levy or alternatively a formula by which such an amount can be calculated.

Many bills adopt such an approach, providing for a basic levy to be set by regulation, subject to a statutory maximum rate. Examples of such bills considered

by the Committee recently include the Laying Chicken Levy Amendment (AAHC) Bill 1996 and the Live-stock Export Charge Amendment (AAHC) Bill 1996 (both considered in *Alert Digest No 5 of 1996*), and the Retirement Savings Accounts Supervisory Levy Bill 1996 and the Telecommunications (Carrier Licence Charges) Bill 1996 (both considered in *Alert Digest No 1 of 1997*).

The Explanatory Memorandum to the Bill and accompanying Second Reading Speech indicate that the government's intention is to impose a charge on broadcasters who provide datacasting services, and to set this charge at a level which will be "competitively neutral".

Complementary amendments proposed in the Television Broadcasting Services (Digital Conversion) Bill 1998 indicate that the Australian Communications Authority cannot specify an initial level of charge without first reporting to the Minister, who will be obliged to table that report in the Parliament.

However no reference is made to the appropriateness or desirability of imposing an upper limit on such a charge in the Bill. Accordingly, the Committee sought the advice of the Minister on why the legislation places no upper limit on the power to set a rate of levy by regulation.

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

The Minister has responded as follows:

> Specifically, the Committee has sought my advice on why the legislation places no upper limit on the power to set a rate of levy by regulation.
>
> The Datacasting Charge Bill provides for a charge to be imposed on commercial and national (ABC and SBS) broadcasters who provide datacasting services using residual capacity in their digital terrestrial television broadcasting (DTTB) channels. This charge is imposed on a transmitter licence, and the amount is to be determined by the Australian Communications Authority (ACA) by written instrument.
>
> The Government's policy is that the quantum of the datacasting charge imposed on FTA broadcasters ("FTAs") who use residual capacity for datacasting, should be set such that there is competitive neutrality with other providers of datacasting services using the broadcasting services bands ("non-FTAs").
>
> The Television Broadcasting (Digital Conversion) Bill provides for additional channels to be allocated to FTAs free of up-front and ongoing charge for the conversion to DTTB. On the other hand, non-FTAs will be required to bid in the market place for datacasting channels. If the charge for residual datacasting by the FTAs does not reflect the competitive price paid for other datacasting spectrum, the FTAs could have an unfair competitive advantage over non-FTAs in the provision of datacasting services.
>
> The Government's policy is therefore aimed at FTAs paying a charge which reflects the 'value' of the spectrum as measured by the price paid by non-FTAs.

Additional spectrum will only be allocated for datacasting purposes under a price-based allocation system when spectrum not required for digital conversion of free to air television broadcasters or potential new free to air entrants has been identified by the Australian Broadcasting Authority and made available for price-based allocation by the ACA under the *Radiocommunications Act 1992*; and the regulatory arrangements for the allocation of this datacasting spectrum have been determined.

It is not possible at this stage to speculate on the likely value that bidders will place on the spectrum that is made available. In any case, the value is likely to vary considerably between licence areas, and even within licence areas (for example, datacasting spectrum would probably realise much higher prices in Sydney than in a regional NSW licence area). The different levels of prices paid by non-FTAs would be reflected in the residual datacasting charges imposed on FTAs in each licence area.

Determining the residual datacasting charge in the Datacasting Charge Bill would therefore not enable a charge to be set which adequately reflects the price paid by non-FTAs for datacasting spectrum. Given the ACA's responsibilities for setting other charges relating to the use of the radiofrequency spectrum, it will be best placed to determine the appropriate datacasting charge to be imposed. The Digital Conversion Bill also requires the ACA to provide a report to the Minister on the extent to which the proposed residual datacasting charge meets competitive neutrality principles.

It would neither be desirable nor practicable to set an upper limit on the residual datacasting charge, which is intended to reflect the results of the price-based allocation process under the Radiocommunications Act that is not subject to any upper limit. Any attempt to set an upper limit could underestimate the price that may be paid by successful bidders for datacasting spectrum. On the other hand, an unrealistically high upper limit in terms of the price ultimately paid by successful bidders for datacasting would not impose any practical constraint on the charge determined by the ACA.

The ACA's determination of the residual datacasting charge will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*, and will therefore be subject to Parliamentary scrutiny and disallowance. The ACA's report to the Minister on the proposed datacasting charge will also be required to be tabled in both Houses of Parliament.

I hope that the foregoing has addressed the issues raised by the Committee.

The Committee thanks the Minister for this comprehensive response.

Electoral and Referendum Amendment Bill (No. 2) 1998

This bill was introduced into the Senate on 14 May 1998 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Finance and Administration]

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

- require new electors to produce one original form of identification at time of enrolment;

- provide that a person witnessing an enrolment application must be an elector in a prescribed class of persons;

- provide that all electors must notify the Australian Electoral Commission of a change of address within one month of moving;

- allow for the provision of date of birth and salutation details of electors to Members, Senators and registered political parties;

- provide that any person sentenced to imprisonment is not entitled to enrol or to vote;

- provide that only the Presiding Officer at a polling place may assist electors in marking their ballot papers;

- provide that the preliminary scrutiny of declaration votes may commence on the Monday prior to polling day;

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

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

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

The Committee dealt with this bill in Alert Digest No. 7 of 1998, in which it made various comments. The Special Minister of State has responded to those comments in a letter dated 11 June 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Commencement
Subclause 2(3)

In Alert Digest No. 7 of 1998, the Committee noted that, under subclause 2(3) of the bill, many of the items in Schedule 1 are to commence on Proclamation. No provision is made for automatic commencement or repeal at a particular time.

With respect to commencement provisions, the Committee places much importance on Drafting Instruction No 2 of 1989, prepared by the Office of Parliamentary Counsel. This Drafting Instruction provides, in part:

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

The Committee noted that paragraph 6 of the Drafting Instruction suggested that clauses providing for commencement by Proclamation, with no other restrictions as to time of commencement, should be used only in unusual circumstances, where commencement depends on an event whose timing is uncertain. The Committee further noted that there was no indication in the Explanatory Memorandum of the reason for adopting a provision in this form.

Accordingly, the Committee sought the advice of the Minister on the reason for choosing the mechanism in subclause 2(3).

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

On this issue, the Special Minister of State responded as follows:

> In regard to the first point, the provisions listed in subclause 2(3) relate to the upgrading of witnessing requirements for electoral enrolment, the requirement for new electors to produce one original proof of identity document at the time of lodging an enrolment form, and the removal of the one month qualifying period for enrolment.
>
> The delay in commencement of these provisions will enable consultation and discussion with the State and Territory governments giving them the opportunity to enact complementary legislation.
>
> Without complementary legislation the joint roll arrangements could become irrelevant, requiring electors to complete separate enrolment applications to become enrolled on the Commonwealth and State/Territory rolls. This would be confusing to electors, and would create a duplication of the work involved in processing the claims. As a result, the Commonwealth and State/Territory rolls would soon become out of kilter, leading to accusations of a lack of integrity in the rolls – the very thing these amendments are aimed at improving.
>
> The Australian Electoral Commission (AEC) has advised that it will require a minimum of 6 months to make the necessary administrative arrangements to implement the amendments.
>
> Under these circumstances, the amendments may not be able to be implemented before the next federal election.

The Committee thanks the Special Minister for this response.

The voting rights of prisoners
Schedule 1, Item 10

Section 93(8)(b) of the *Commonwealth Electoral Act 1918* governs the circumstances in which prisoners may have their names excluded from the Commonwealth Electoral Roll. It currently provides that those serving a sentence of imprisonment of 5 years or longer are not entitled to enrol or vote at a federal election.

Item 10 of Schedule 1 to the bill proposes to extend this limitation to all prisoners. The Minister's Second Reading speech observes that this proposed amendment is based on a recommendation of the Joint Standing Committee on Electoral Matters, which, in its report on *The 1996 Federal Election*, stated that those "who disregard

the Commonwealth or State laws to a degree sufficient to warrant imprisonment should not expect to retain the franchise".

One Minority Report argued that the current provision represented "a reasonable balance between conflicting concepts" and suggested that the new provision "would be even harsher than those provided in 1902". Another Minority Report stated that this issue should be addressed when it took legislative form.

Consideration of the issue in 1994 and before

Section 93(8)(b) of the Act has been subject to considerable debate in recent years. Prior to 1983, the Act denied the franchise to all those serving sentences for offences punishable by imprisonment for 1 year or more. On the passage of the *Commonwealth Electoral Legislation Amendment Act 1983,* the franchise was extended to those serving sentences for offences punishable by imprisonment for less than 5 years – in effect, prisoners were then denied a vote where they were convicted of an offence having a potential maximum penalty of 5 years imprisonment.

In a submission to the Joint Standing Committee on Electoral Matters, the Australian Electoral Commission (AEC) noted that this provision had led to difficulties both in practice and in principle. In practice, it was difficult to establish, with certainty, every case in which the potential maximum sentence was imprisonment for 5 years or more. And in principle, such a provision was potentially inequitable – "a person serving an actual sentence of one month could be excluded from enrolment, while a person on a sentence of 59 months could be eligible, depending on the potential maximum sentence in each case".

Therefore, the AEC submitted that a person should be denied a vote only where they were actually serving a sentence of 5 years or more. This approach was ultimately included in the Act (see item 5 of Schedule 1 to the *Electoral and Referendum Amendment Act 1995*), and is currently the law.

However, the approach advocated by a majority of the Joint Standing Committee in 1994 went somewhat further than the AEC's proposal. In its Report on *The 1993 Federal Election,* the Committee noted that it had previously recommended that enrolment and voting rights be granted to all prisoners, regardless of their sentence (unless convicted of treason or treachery):

> an offender once punished under the law should not incur the additional penalty of loss of the franchise. We also note that a principal aim of the modern criminal law is to rehabilitate offenders and orient them positively toward the society they will re-enter on their release. We consider that this process is assisted by a policy of encouraging offenders to observe their civil and political obligations.

In a dissenting report, then Opposition members stated:

> As our coalition colleagues on the committee in the 34th Parliament said when this proposal was last mooted, the concept of imprisonment – apart from any rehabilitation aspects – is one of deterrence, seeking by the denial of a wide range of freedoms to provide a disincentive to crime. A person having committed an offence against society is denied the privileges and freedoms of society of which one important one is the right to vote. The Committee's recommendation is therefore driven by a philosophical position with which we strongly disagree.

The Committee notes the continuing debate and draws the attention of Senators to the various views that have informed it.

The Committee also notes that it currently has before it an inquiry into the appropriate basis for including certain penalty provisions - particularly imprisonment - in legislation. It is possible that people may be imprisoned - perhaps on weekend detention - for relatively minor offences such as failing to provide information or traffic infringements or conscientiously objecting to certain matters. As a consequence, under the bill such people may be denied a vote. While conscious of the continuing debate on philosophical grounds, the Committee would nevertheless appreciate the Minister's advice as to whether consequences such as those noted above are inadvertent or intended.

On this issue, the Special Minister of State has advised as follows:

> Previous legal advice indicates that 'sentence' connotes a judicial judgment or pronouncement fixing a term of imprisonment. A term of imprisonment is the term fixed by the judgment as the punishment for the offence.
>
> It should be noted that, as is currently the case, persons detained on remand or otherwise, or who are held at Her Majesty's pleasure, are not considered to be sentenced to imprisonment and, as such, the new provisions would not apply to them.
>
> In regard to persons sentenced to short term imprisonment, where the AEC receives timely notice that a person has been sentenced to a term of imprisonment, appropriate action will be taken to remove that person's name from the roll. However, while the AEC will be seeking to receive early notification from the Controller of Prisons in each State and Territory, where the AEC receives notice that a person has been sentenced to a term of imprisonment, but that term of imprisonment has expired, the AEC does not propose taking retrospective action. It should also be noted that there are inconsistencies in the notification procedures between the various States and Territories.
>
> Further, included in the amendments of the Bill are the repeal of facilities for mobile polling in prisons and the right to a postal vote due to imprisonment. Accordingly, there will be no facility for voting by persons in prison.
>
> The AEC sought details of the practical application of a similar provision in the Tasmanian State electoral legislation. The Tasmanian *Constitution Act 1934* provides that "no person under any conviction … is entitled to vote in any election…". The Tasmanian *Electoral Act 1985* provides that the Controller of

Prisons shall forward to the Chief Electoral Officer each month for appropriate action, a list of all persons sentenced to a term of imprisonment of 12 months or more.

Advice received is that, in a practical sense, it would be extremely difficult for a Tasmanian prisoner to vote in a State election. No provision is made for mobile polling facilities in prisons and prisoners do not qualify for a postal vote as there is a polling place within 8kms of the jail. The proposed amendments of the Bill would have a similar effect.

The AEC also sought advice on the application of prisoner voting provisions in Britain. The advice received was that convicted prisoners in the UK are legally prevented from voting while detained in penal institutions in pursuance of their sentences. However, convicted but unsentenced and remand prisoners may vote. Sentenced prisoners temporarily absent from prison, for example, while on 'home leave' are still ineligible to vote. There is no equivalent of weekend detention in Britain.

The Committee thanks the Special Minister for this advice. The Committee notes that, under the Bill, it is possible that voters may be dealt with differently depending on the nature of their sentence and the effectiveness of notification procedures in the various States and Territories. Accordingly, the Committee continues to note the possible effect of this provision on personal rights and liberties.

Payment Systems and Netting Bill 1998

This bill was introduced into the House of Representatives on 1 April 1998 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to:

- ensure that multilateral netting arrangements in the payment system that are approved by the Reserve Bank will survive the insolvency of a participant in the arrangement;

- exempt real time gross settlement payments from the possible application of the Zero Hour Rule; and

- provide certainty for close-out netting in financial markets and for netting undertaken in accordance with the rules governing stock and futures exchanges and the associated clearing houses.

The Committee dealt with this bill in Alert Digest No. 5 of 1998, in which it made various comments. The Parliamentary Secretary to the Treasurer has responded to those comments in a letter received on 19 June 1998. A copy of that letter is attached to this report, and the relevant parts of the response are discussed below.

Non-reviewable discretions
Clauses 9 and 12

In Alert Digest No. 5 of 1998, the Committee noted that clause 9 of the bill provides the Reserve Bank with a discretion to approve a payment or settlement system. Under subclause 9(3)(c), the exercise of this discretion is subject to a measure of Parliamentary review in that an approval is a disallowable instrument.

Clause 12 of the bill provides the Reserve Bank with a discretion in deciding whether or not to approve a multilateral netting arrangement. However, the exercise of this discretion does not seem subject to review of any kind. Accordingly, the Committee sought the advice of the Treasurer on the following matters:

i) why the exercise of the discretion by the Reserve Bank under clause 12 is not subject to review; and

ii) why a failure or refusal by the Reserve Bank to exercise its discretion under clauses 9 and 12 is not reviewable.

Pending the Treasurer's advice, the Committee drew Senators' attention to these provisions, as they may be considered to make rights, liberties or obligations unduly dependant upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

The Parliamentary Secretary to the Treasurer has responded as follows:

> Clauses 9 and 12 of the Bill allow the Reserve Bank to approve payments systems where the failure of a participant in the system could result in systemic disruption in the financial system. In each case, the purpose of the approval is to reduce the potential for systemic disruption in the financial system.
>
> The Wallis Report on the financial system highlighted the importance of efficient prudential regulation by competent authorities in the financial markets to help maintain stability and reduce systemic risk. As witnessed recently during the Asian currency crisis, failure of financial institutions to settle their obligations can involve considerable cost to economic growth and the safety of investments. By enhancing the Reserve Bank's supervisory role in the payments system and for netting arrangements, the Bill aims to reduce the likelihood of financial shocks and strengthen the resilience of Australia's financial system.
>
> Given its pivotal role in the regulation of the financial system, the Reserve Bank is well placed to decide whether the failure of a participant in a payments system could result in systemic disruption in the financial system. While it is true that decisions made under clauses 9 and 12 of the Bill will affect the commercial interests of the parties directly concerned, they may also have a profound effect on confidence in the payments system more generally and hence on the stability of the financial system. It would be undesirable to have the Reserve Bank's decisions on these matters altered by another body that is unlikely to be as competent or to have a similar interest and expertise in the public interest dimension of the payment system.
>
> I should mention, however, that while merits review will not be available, decisions made by the Reserve Bank under clause 9 and 12 will be subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977.
>
> I trust this information will assist the Committee in its deliberations.

The Committee thanks the Parliamentary Secretary for this advice.

Taxation Laws Amendment (Company Law Review) Bill 1998

This bill was introduced into the House of Representatives on 8 April 1998 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1936* and associated tax laws to prevent dividend substitution and capital streaming arrangements and to make consequential amendments to tax laws. The bill also proposes to introduce a tainting rule that treats distributions from a tainted share capital account as unfrankable and unrebateable dividends in the hands of shareholders.

The Committee dealt with this bill in Alert Digest No. 4 of 1998, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter dated 26 May 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Indeterminate application
Schedule 1, Item 3

In Alert Digest No. 6 of 1998, the Committee noted that by virtue of item 3 of Schedule 1, the amendments proposed by that Schedule are to apply to the provision of bonus shares or capital benefits occurring on or after a day to be fixed by Proclamation. Therefore, the amendments proposed by this Schedule contravene the spirit of Office of Parliamentary Counsel *Drafting Instruction No 2 of 1989*. This suggests that clauses providing for commencement by Proclamation, with no other restrictions as to time of commencement, should be used only in unusual circumstances, where commencement depends on an event whose timing is uncertain. The Explanatory Memorandum apparently provides no indication of the need for such an open-ended application provision. Accordingly, the Committee sought the advice of the Treasurer on the reason for adopting such a provision.

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

The Assistant Treasurer has responded as follows:

> I understand that the Committee is concerned that this application provision may contravene the spirit of Office of Parliamentary Counsel Drafting Instruction No. 2 on the basis that 'clauses providing for commencement by Proclamation, with no other restrictions as to time of commencement, should be used only in unusual circumstances, where commencement depends on an event whose timing is uncertain'.

In fact, the commencement does depend on an event whose time is uncertain.

By way of background, the Bill will make various consequential amendments to the taxation laws as a result of changes being made to the Corporations Law by the Company Law Review Bill 1997 (the Review Bill) which abolishes the concept of par value for shares and makes it easier for companies to return capital to shareholders.

Although the two Bills are related in this regard, they are not passing through Parliament at the same time.

As a result it is difficult to predict with any degree of certainty when the amendments made by the Bill should apply because it is contingent upon the successful passage of both Bills through Parliament. Therefore, the proposed application provision falls within that category of unusual circumstances where commencement depends on an event whose timing is uncertain. For this reason, the commencement of the Bill on a date to be fixed by proclamation after the Bill has been passed by Parliament is appropriate.

The Committee thanks the Assistant Treasurer for this response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTH REPORT

OF

1998

The Appropriate Basis for Penalty Provisions

In Legislation Comparable to the

Productivity Commission Bill 1996

25 June 1998

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 1998

The Committee presents its Eighth Report of 1998 to the Senate.

CONTENTS

PREFACE

Background to the reference

On 4 December 1996, the Productivity Commission Bill 1996 was introduced in the House of Representatives.[1] In general terms, the Bill proposed to establish the Productivity Commission by merging the functions of the Industry Commission, the Economic Planning Advisory Commission and the Bureau of Industry Economics.

On 13 February 1997, the Bill was introduced into the Senate. On 3 September 1997, the Bill was negatived in the Senate at the third reading stage. However, before this occurred, a number of amendments were proposed to the penalty provisions included in the Bill. In general terms, these amendments proposed to replace the penalty of imprisonment with a fine.[2]

After debate, the Senate agreed to refer the penalty provisions in the Bill to the Senate Scrutiny of Bills Committee for inquiry and report by 29 October 1997.[3]

Conduct of the inquiry

On 30 September 1997, the Committee held a public hearing on the reference at which it took evidence from representatives of the Australian Institute of Criminology and the Commonwealth Attorney-General's Department. Officers of both organisations undertook jointly to prepare a paper to address concerns expressed by the Committee, and provide some general background on the philosophy of judicial punishment. To enable the preparation of this paper, the Committee sought and was granted an extension of time until 20 November 1997 to report.[4]

On 30 October 1997, the Bill was restored to the Notice Paper, and listed for debate on 10 November 1997. Given the likelihood of debate taking place on the Bill before the Committee had had time to prepare its report, on 17 November 1997 the Committee tabled an interim report and appended to it the joint Briefing Paper referred to above.[5]

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1 House of Representatives, *Votes and Proceedings*, No 56, 4 December 1996, p 974.

2 See, for example, Senate, *Hansard*, 3 September 1997, pp 6271-2 (Senator the Hon N Sherry).

3 *Journals of the Senate*, No 122, 3 September 1997, p 2419.

4 *Journals of the Senate*, No 137, 28 October 1997, p 2737.

5 *Journals of the Senate*, No 142, 17 November 1997, p 2851.

Interim report

The Committee concluded its Interim Report by noting that:

> In the light of the issues raised by the paper, the committee finds that determining the appropriate penalties for these kinds of offences requires a longer and more thorough inquiry and will be seeking the approval of the Senate to do so.[6]

On 19 November 1997, the Committee sought, and was granted, a further extension of time until the last Tuesday of the winter sittings in 1998 to conduct its inquiry. In addition, the inquiry's terms of reference were amended to require the Committee to inquire into and report on "the appropriate basis for penalty provisions in legislation comparable to the Productivity Commission Bill 1996".[7]

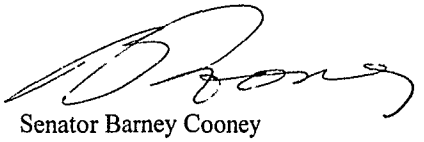
On 30 March 1998, the Senate resumed debate on the Bill and amended a number of its provisions. The penalty provisions were passed unamended. The Bill was then read a third time and, on 1 April 1998, the House of Representatives agreed to the Bill as amended by the Senate.[8]

Structure of this report

The Committee's report is set out in the following way: Chapter 1 deals with the offence and penalty provisions in the Productivity Commission Bill. Chapter 2 examines the penalty provisions for similar offences in other Commonwealth legislation. Chapter 3 discusses the sentencing principles which govern the imposition of penalties. Chapter 4 expresses the Committee's conclusions and recommendations.

Acknowledgment

The Committee would like to acknowledge the assistance provided by the Attorney-General's Department and the Australian Institute of Criminology, and record its appreciation for that assistance.



Senator Barney Cooney
Chairman

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6 Senate Standing Committee for the Scrutiny of Bills, Sixteenth Report of 1997, *Interim Report on the Penalty Provisions of the Productivity Commission Bill 1996*, (13 November 1997), p 333.

7 *Journals of the Senate*, No 144, 19 November 1997, p 2923.

8 House of Representatives, *Votes and Proceedings*, No 152, 1 April 1998, p 2900.

CHAPTER 1

PENALTIES FOR OFFENCES IN THE PRODUCTIVITY COMMISSION BILL 1996

The Productivity Commission and its predecessors

1.1 The Productivity Commission Bill 1996 proposed to establish the Productivity Commission by merging the functions of the Industry Commission (IC), the Economic Planning Advisory Commission (EPAC) and the Bureau of Industry Economics (BIE). The Productivity Commission was intended to be "the government's principal advisory body on all aspects of micro-economic reform".[1]

1.2 The functions of the Productivity Commission, as set out in clause 6(1) of the Bill, are:

- to hold inquiries and report to the Minister about matters relating to industry and productivity which the Minister refers to it;
- to provide secretariat services and research services to government bodies as directed by the Minister;
- (after 1 July 1997) to receive and investigate complaints about the implementation of competitive neutrality arrangements[2] in relation to Commonwealth government businesses and business activities and to report to the Minister on its investigations;
- to provide advice to the Minister about matters relating to industry and productivity, as requested by the Minister;
- to undertake, on its own initiative, research about matters relating to industry and productivity;
- to promote public understanding of matters relating to industry and productivity; and
- to perform any other function conferred on it by the Act, and anything incidental to any of the above functions.

BIE and EPAC

1.3 BIE had been a Division of the Department of Industry and Technology. EPAC was created under the then *Economic Planning Advisory Council Act 1983.*

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1 Senate, *Hansard*, 13 February 1997, p 654 (Senator the Hon I Campbell).

2 These arrangements seek to ensure that significant government business activities do not enjoy net competitive advantages over their competitors by virtue of their public sector ownership.

The functions conferred on EPAC, and the activities performed by BIE, were primarily of a research nature, and neither body had the power to hold inquiries at which witnesses could be called to give evidence.[3]

The Industry Commission

1.4 The Industry Commission was created under the *Industry Commission Act 1989* (now repealed). Its functions were:

- to hold inquiries and report to the Minister about matters relating to industry which the Minister referred to it; and
- to do anything incidental to those functions.[4]

1.5 In performing these functions, the IC was directed to have regard to a number of general policy guidelines. These included: encouraging the development of efficient, self-reliant, enterprising, innovative and internationally competitive Australian industries; facilitating adjustment to structural change in the economy; reducing industry regulation; and recognising the interests of those likely to be affected by IC proposals.[5]

1.6 In general terms, only where the IC had reported on a matter within the previous 12 months was a Minister able to:

- impose, remove, increase or reduce duties on goods imported into Australia;
- prohibit or restrict the importation of goods into Australia;
- remove a prohibition, or extend, reduce or remove a restriction on the import of goods into Australia; and
- provide, or alter the provision of, long term financial assistance to an industry.[6]

The Industries Assistance Commission and the Tariff Board

1.7 The Industry Commission replaced the former Industries Assistance Commission (IAC), created under the *Industries Assistance Commission Act 1973*

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3 Attorney-General's Department and Australian Institute of Criminology, Joint Submission to the Senate Scrutiny of Bills Committee, November 1997, ("Joint Submission"), p 2.

4 *Industry Commission Act 1989*, s 6.

5 *Industry Commission Act 1989*, s 8.

6 *Industry Commission Act 1989*, ss 10, 11.

(now repealed). The IAC itself replaced the former Tariff Board, created under the *Tariff Board Act 1921-1972* (now repealed).

1.8 The functions of the IAC were to hold inquiries and make reports to the Minister in respect of matters affecting assistance to industries and other matters that might be referred to it in accordance with its governing Act.[7] That Act authorised the Minister to refer to the IAC "any matter relating to the giving, continuance or withdrawal of assistance to an industry" or group of industries.[8] Such matters might include:

- the existence of facts relevant to action under dumping and subsidies legislation;
- any matter in connection with the interpretation of any customs tariff or excise tariff or the classification of goods in such a tariff;
- the question of the value for duty of goods;
- matters relating to the giving of duty concessions to goods from developing countries; and
- the reduction or removal of duties or other forms of assistance to industries in connection with negotiations for bilateral or multilateral trade agreements.[9]

1.9 The IAC Act also prevented the taking of certain actions in relation to the provision of industry assistance in the absence of an IAC report. These actions included:

- the imposition, removal or variation of duties on particular goods imported into Australia;
- whether the importation of particular goods into Australia should be prohibited or restricted, or whether such prohibitions or restrictions should be removed or varied; and
- whether long term financial assistance should be provided to an industry or group of industries, or whether such assistance should be suspended, withdrawn or varied.[10]

1.10 The functions of the Tariff Board were similarly focused on specific financial matters such as appropriate levels of tariffs and industry assistance.

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7 *Industries Assistance Commission Act 1973*, s 21.

8 *Industries Assistance Commission Act 1973*, s 23(1).

9 *Industries Assistance Commission Act 1973*, s 23(5).

10 *Industries Assistance Commission Act 1973*, s 23(4).

General observations

1.11 In summary, it can be seen that the functions of the bodies which preceded the Productivity Commission had, over time, changed from the more specific to the more general. Legislation which originally provided for inquiries in relation to the imposition or variation of tariffs or duties or levels of financial assistance to industry now provides for inquiries into matters relating to industry and productivity, and the investigation of complaints about the advantages enjoyed by Commonwealth business activities. It is against this background that the offence and penalty provisions in the Bill should be seen.

The penalty provisions

1.12 Offences under the Productivity Commission Bill, and the relevant penalty provisions, are included in Part 7 of the Bill. In general terms, Part 7 makes it an offence to:

- hinder or disrupt the Commission [cl 50];
- intimidate or disadvantage those providing information or assistance to the Commission [cl 51];
- fail to comply with a notice to provide information and documents [cl 52(3)];
- fail to comply with a summons to attend a hearing and provide documents [cl 53(2)];
- fail to answer questions or provide documents at a hearing (while retaining the privilege against self-incrimination) [cl 54];
- knowingly provide false or misleading evidence or information at a hearing [cl 56]; and
- contravene a Commission direction restricting the publication of evidence or documents [cl 57(2)].

1.13 The penalty for each of these offences is identical, and expressed to be "imprisonment for 6 months". A note declares that this is a maximum penalty;[11] that a court may impose an appropriate fine instead of or as well as imprisonment;[12] and that, where a body corporate is convicted of the offence, a court may impose a fine not more than 5 times the maximum fine that the court could impose on an individual for the same offence.[13]

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[11] By virtue of *Crimes Act 1914* s 4D.

[12] By virtue of *Crimes Act 1914* s 4B(2).

[13] By virtue of *Crimes Act 1914* s 4B(3).

1.14 The Committee was advised that such fines are calculated according to the formula (term of imprisonment x 5). In the case of offences under the Bill, such a fine would equate to 30 penalty units. As each penalty unit represents $110, the equivalent maximum fine for an individual would be $3300, and for a corporation would be $16,500.[14]

1.15 The Committee was also advised that the offences under the Bill are similar to offences previously created under the *Tariff Board Act 1922,* the *Industries Assistance Commission Act 1973*, and the *Industry Commission Act 1989.* Imprisonment has always been available as a penalty for these offences. The following Table, prepared by the Department and the Institute of Criminology, compares these provisions over the history of the legislation.[15]

TABLE 1: COMPARISON OF SIMILAR OFFENCE PROVISIONS

Offence	Tariff Board Act 1922-1962	Tariff Board Act 1962-1973 (applied Crimes Act offences)	Industries Assistance Commission Act 1973	Industry Commission Act 1989	Productivity Commission Bill 1996
Hindering and disrupting	NA	NA	$1000 or 6 mths [s 39]	6 mths or the corresponding fine under s 4B of the Crimes Act [s 22]	6 mths or the corresponding fine under s 4B of the Crimes Act [cl 50]
Summons to attend hearing	NA	NA	$1000 or 6 mths [s 32C]	6 mths or the corresponding fine under s 4B of the Crimes Act [s 18]	6 mths or the corresponding fine under s 4B of the Crimes Act [cl 53]
Person summonsed fail to attend	£500 [s 23]	£500 [s 23]	$1000 or 6 mths [s 35]	6 mths or the corresponding fine under s 4B of the Crimes Act [s 19]	6 mths or the corresponding fine under s 4B of the Crimes Act [cl 53]
Notice to furnish information and documents	£500 [s 23]	£500 [s 23]	$1000 or 6 mths [s 31B]	6 mths or the corresponding fine under s 4B of the Crimes Act [s 15]	6 mths or the corresponding fine under s 4B of the Crimes Act [cl 52]
Refuse to answer questions or produce documents	£500 [s 24]	£500 [s 24]	$1000 or 6 mths [s 37]	6 mths or the corresponding fine under s 4B of the Crimes Act [s 20]	6 mths or the corresponding fine under s 4B of the Crimes Act [cl 54]
False or misleading evidence or information	5 yrs [s 28]	5 yrs [Crimes Act 1914, s 35]	$1000 or 6 mths [s 37A]	6 mths or the corresponding fine under s 4B of the Crimes Act [s 20]	6 mths or the corresponding fine under s 4B of the Crimes Act [cl 56]
Intimidating witnesses	1 yr (or £500 under s 33) [ss 32, 33]	5 yrs [Crimes Act 1914, s 36A]	NA	NA	6 mths or the corresponding fine under s 4B of the Crimes Act [cl 51]
Prejudice witness's employment	£500 or 1 yr [s 34]	5 yrs [Crimes Act 1914, s 36A]	$1000 or 6 mths [s 42]	6 mths or the corresponding fine under s 4B of the Crimes Act [s 26]	6 mths or the corresponding fine under s 4B of the Crimes Act [cl 51]
Disclose confidential information	NA	NA	NA	6 mths or the corresponding fine under s 4B of the Crimes Act [s 17]	6 mths or the corresponding fine under s 4B of the Crimes Act [cl 57]

14 Joint Submission, p 2.

15 Joint Submission, pp 2 and 10-11.

1.16 When the original Tariff Board Bill was introduced into Parliament in 1921, the then Minister for Trade and Customs observed:

> *It is most necessary that penalties should be provided so that the Board in* the exercise of this discretion which is given to it summons a man and puts him on oath, and asks for certain information, provision should be made to punish him in a proper way if he supplies false information.[16]

1.17 The Committee was told that similar considerations were in existence in the debate on the IAC Bill when it was expanded to cover industries beyond manufacturing.[17] However, in debate following the introduction of the Industry Commission Bill in 1989, the emphasis seemed to be on those provisions which protected witnesses rather than on those which compelled information:

> There are provisions for information to be held as confidential where a person objects and the Commission considers the evidence should be protected. The Bill maintains the protection of witnesses to an inquiry, and people making submissions to an inquiry, that are in the IAC Act. In particular the Bill provides for penalties on persons who prejudice another person's employment because of their participation in an inquiry process.[18]

1.18 The purpose of the penalty regime under the Bill is said to be "to enable the commission to operate effectively for those who, at the most extreme, refuse to comply or co-operate with it".[19] Historically, the justification for such a penalty regime was identified by the Attorney-General's Department as follows:

- the Productivity Commission (or its predecessor) must be given adequate power to inform itself as thoroughly as possible before giving accurate advice – to discharge this function, the body must have the power to acquire information by way of compelling others to provide that information, and a penalty is needed where a person or body will not provide that information, or not provide it truthfully;
- protection should be conferred on witnesses, particularly where information provided may be adverse to others – therefore witnesses should not have their employment prejudiced or be subject to intimidation or threats because of their involvement in the inquiry;
- persons involved in the Commission must also be protected from the same conduct; and

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16 House of Representatives, *Hansard*, 6 July 1921, pp 9718-9.

17 Joint Submission, p 4.

18 House of Representatives, *Hansard*, 2 November 1989, p 2427.

19 Transcript of Evidence, p 6 (Mr C Meaney).

- information of a confidential nature should be protected from public disclosure.[20]

Public comment on such a penalty regime

1.19 In 1997, the Senate Economics Legislation Committee received a reference which focused on the general policy underlying the Productivity Commission Bill 1996. However, submissions to that Committee from the Australian Council of Trade Unions (ACTU) and the Australian Chamber of Manufactures (ACM) also commented, in passing, on the penalty provisions. The ACTU simply observed that "the Offence provisions of the Bill are inappropriate for a Government advisory body".[21] The ACM also expressed concern at the inclusion of penalties such as imprisonment and fines:

> While such penalties may be appropriate when the Productivity Commission is considering inquiries in regard to a "competitive neutrality complaint", for the more routine inquiries likely to be undertaken by the Productivity Commission, such as a review of an industry or facility, these penalties seem totally excessive and unnecessary. It would most likely affect business and community leaders' willingness to make submissions and attend public hearings of the Productivity Commission. We would recommend that the conditions where penalties are to be applied be more narrowly defined in the Bill. The current negative reputation of the Industry Commission is a good example of how relevant parties can decline to participate – penalties as proposed would be totally counter productive.[22]

Parliamentary discussion of such a penalty regime

1.20 As noted above, Senate debate on the penalty provisions in the Bill focused on the appropriateness of the penalty of imprisonment in the circumstances envisaged by the Bill. The Senate has previously discussed the appropriateness of such penalties on at least three other occasions in recent times.

Census and Statistics Amendment Bill 1981

1.21 In May 1981, the Senate debated the Census and Statistics Amendment Bill 1981. A provision of that Bill proposed to increase the penalty for knowingly supplying false information when filling out a census form from an existing $100 to $1000 or 6 months imprisonment. The Explanatory Memorandum to the Bill noted a

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20 Joint Submission, pp 4-5.

21 ACTU, Submission No 1 to the Economics Legislation Committee (dated 20/2/97), p 6.

22 ACM, Submission No 6 to the Economics Legislation Committee (dated 21/2/97), p 2.

specific intention to strengthen the secrecy provision in the Act. In passing, it also made reference to "the upgrading of all penalties to reflect current values".

1.22 Senator Mason moved an amendment to this provision seeking to delete the words "or imprisonment for 6 months". In moving this amendment, he stated that:

> The Australian Democrats' view is that the sanction of a $1000 fine, which is provided for in the Schedule, is enough. It increases the previous fine of $100. We believe that penal sanction is improper and out of line with the state of penal law and other aspects of law in Australia, especially criminal law.[23]

1.23 Opposition members expressed support for this amendment. For example, Senator Cavanagh posed the question: 'What is a suitable penalty for an offence of this gravity?

> Much of the legislation we support imposes penalties of $1000 or imprisonment for 6 months, or both. We must consider whether this is a very harsh penalty to be imposed on a person who has committed an offence by knowingly giving incorrect information on a census form – that suggests that it is done deliberately – to mislead the Australian Statistician ... While I think every effort should be made to ensure that the information given on census forms is honest and truthful, I think the penalty provided for in the legislation is a little hard on anyone who even knowingly makes a false statement ...[24]

1.24 While Senator Mason's amendment was defeated in May 1981, on the proposed introduction of a private member's Bill to again put the matter before the Senate it was ultimately accepted by the Government and included in the Census and Statistics Amendment Bill (No 2) 1981. As a result, the Census and Statistics Act now makes no provision for a penalty of imprisonment.

Student Assistance Legislation Amendment Bill 1987

1.25 During the second reading speech on the Student Assistance Legislation Amendment Bill 1987, the Minister noted that the Bill would insert section 31H into the *Student Assistance Act 1973*. This would increase the penalty in the Act for failing to provide information or knowingly providing false information from $100 to $2000 and/or 12 months imprisonment. The reason given for increasing the penalty was that $100 had "little deterrent value for people who might consider attempting to obtain money fraudulently".[25]

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23 Senate, *Hansard*, 13 May 1981, p 1914.

24 Senate, *Hansard*, 13 May 1981, p 1915.

25 Senate, *Hansard*, 25 February 1988, p 688 (Senator the Hon M Tate).

1.26 Senator Macklin unsuccessfully moved amendments which sought to alter this penalty. However, his object was not so much to suggest that imprisonment was an inappropriate penalty, but rather to substitute a shorter period of imprisonment. This was to be determined according to a formula under which the amount of the fine ($2000) would be divided by an amount of average weekly earnings (eg $500) to give an equivalent period of imprisonment (eg four weeks).[26]

Social Security Legislation Amendment Bill (No 2) 1994

1.27 The Social Security Legislation Amendment Bill (No 2) 1994 inserted Part 2.9 into the *Social Security Act 1991*. This Part created a new disability wage supplement and, among other things, required recipients to provide information as to changes in their circumstances. The penalty provisions proposed in the Bill mirrored the existing penalty provisions for all other pensions and benefits throughout the Act.

1.28 Senator Chamarette unsuccessfully moved amendments which sought to remove imprisonment from the proposed penalties.[27] It appears that these amendments were proposed because of a suggestion that the courts were more frequently choosing imprisonment (rather than a fine) as the appropriate penalty in cases of disadvantaged people, especially women. A fine (rather than imprisonment) seemed to be chosen as a more appropriate penalty for other white collar crimes (eg, in a number of cases of tax evasion).

General observations

1.29 It can therefore be seen that the appropriateness of specifying a penalty of imprisonment for some offences has been a matter for discussion on a number of occasions in recent years. Chapter 2 examines the prevalence of such a penalty in other Commonwealth legislation.

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26 Senate, *Hansard*, 10 May 1988, p 2269.

27 Senate, *Hansard*, 30 June 1994, pp 2404-16.

CHAPTER 2

PENALTY PROVISIONS IN OTHER LEGISLATION

Introduction

2.1 The purpose of this Chapter is to examine penalty provisions in other Commonwealth legislation for offences similar to those included in the Productivity Commission Bill.

2.2 In evidence to the Committee, the Attorney-General's Department reiterated that the offence provisions included in the Bill were not uncommon in Commonwealth legislation, and that the penalties applied under the Bill were within the range of penalties normally imposed for such offences.[1]

Survey

2.3 The Committee surveyed a sample of relevant Commonwealth legislation. In undertaking this survey, it became clear that many Commonwealth Acts authorise persons to demand, collect and assess information for various purposes. Offence provisions such as those included in the Bill are routinely included in many of these Acts, which might broadly be grouped together as follows:

- Acts which relate to revenue matters, for example, by providing people with access to a benefit, or requiring them to contribute to the payment of a levy or tax;
- Acts which create quasi-judicial tribunals or other bodies authorised to make or review determinations;
- Acts which create investigative bodies or organisations, including those which are authorised to investigate compliance with particular statutory requirements (eg, the Australian Securities Commission or the Australian Competition and Consumer Commission), and those which are authorised to establish a set of facts (eg, a Royal Commission or the Official Receiver or trustee in Bankruptcy); and

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1 Attorney-General's Department, *Briefing for the Senate Standing Committee for the Scrutiny of Bills: Proposed Penalties in the Productivity Commission Bill* (23 September 1997); Transcript of Evidence, p 5 (Mr C Meaney).

- Acts which create organisations to conduct research, provide advice to Government or undertake inquiries.

2.4 Some legislation (for example, the *Trade Practices Act 1974*) creates both investigative and adjudicative organisations, and so may be referred to in more than one category. Each category is discussed in more detail below.

Revenue legislation

2.5 The Attorney-General's Department advised the Committee that penalty provisions were commonly included in legislation that "involved making claims in relation to the revenue":

> In most of those cases there is money coming from revenue and people are being paid amounts by reference to statements that they make ...
>
> In relation to those sorts of circumstances ... there is usually as part of the regime a power to compel that information relating to those sorts of claims be put in the legislation so that any discrepancies or assertions about whether the preconditions have been satisfied for the payment of the money can be verified.[2]

2.6 Therefore, the making of a false statement in relation to a claim for a benefit or to avoid a levy is usually penalised as a criminal offence.[3] Table 2, reproduced on the following page, sets out a number of such provisions.

Quasi-judicial tribunals

2.7 Difficulties that may arise in ensuring that information is provided to courts are usually addressed by offences such as perjury and the power to punish for contempt. Equivalent statutory offences are often included in legislation which creates tribunals or other bodies to make or review determinations.

2.8 A specific connection between the offences in the Bill and offences going to the administration of justice was made by Dr Smith from the Australian Institute of Criminology:

> The types of offences in the Productivity Commission Bill 1996 are similar to those which deal with the administration of justice. They are forms of conduct which strike at the way in which government operates.

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2 Transcript of Evidence, p 9 (Dr R Smith).

3 Transcript of Evidence, p 7 (Mr C Meaney).

TABLE 2: PENALTY PROVISIONS IN 'REVENUE' LEGISLATION

Act	Fail to provide information	Knowingly provide false information	Fail to attend or produce documents	Wilfully obstruct or hinder; contempt	Intimidate witness
Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994, ss 20, 23, 37	30 pu	30 pu			
Agricultural and Veterinary Chemicals Code Act 1994, Schedule, ss 144, 145	30 pu	30 pu			
Bounty and Capitalisation Grants (Textile Yarns) Act 1981, ss 18, 21K		6 mths; $3000 &/or 6 mths	6 mths		
Bounty (Bed Sheeting) Act 1977, s 18		$1000 &/or 3 mths	$1000 &/or 3 mths		
Bounty (Machine Tools and Robots) Act 1985, s 35		$1000 &/or 6 mths	$1000		
Bounty (Photographic Film) Act 1989, s 24		6 mths	6 mths		
Cattle and Beef Levy Collection Act 1990, ss 12, 17	$6000	12 mths		6 mths	
Child Support (Assessment) Act 1989, ss 159, 161	6 mths	6 mths	6 mths		
Child Support (Registration and Collection) Act 1988, ss 119, 120	$2000	$2000	$2000		
Coal Excise Act 1949, s 27				$100	
Petroleum (Submerged Lands) Act 1967, ss 117, 126	$10,000	$10,000	$10,000	$5000	
Primary Industries Levies and Charges Collection Act 1991, ss 23, 24	$6000	12 mths			
Social Security Act 1991, ss 1304-1307; 1343-1350	12 mths	12 mths			
Student and Youth Assistance Act 1973, ss 150, 343-347	*6 mths;* 12 mths				
Taxation Administration Act 1953, ss 8E, 8M, 8R		$3000	$2000	$2000 &/or 6 mths	
Veterans' Entitlements Act 1986, s 128	$1000 &/or 6 mths	$2000 &/or 12 mths	$1000 &/or 6 mths		

> They are treated generally as very serious in the calendar of the sort of conduct which is outlawed in our community.
>
> With administration of justice, for example, we have offences of perjury which carry very lengthy gaol terms. The Model Criminal Code Officers Committee has a recommendation for a 10-year maximum gaol term for perjury. This is not in exactly the same category, but it is still an offence which strikes at the way in which government operates. Through things like giving false or misleading information, it has an element of deception about it.[4]

2.9 Again, the statutory penalties imposed for these offences vary considerably. Table 3 sets out some of the relevant provisions:

TABLE 3: PENALTY PROVISIONS IN LEGISLATION CREATING 'ADJUDICATIVE' BODIES

Act	Fail to provide information	Knowingly provide false information	Fail to attend or produce documents	Wilfully obstruct or hinder; contempt	Intimidate witness
Administrative Appeals Tribunal Act 1975, ss 61, 62, 62A, 63	$1000 &/or 3 mths	$1000 &/or 3 mths	$1000 &/or 3 mths	$1000 &/or 3 mths	
Broadcasting Services Act 1992, ss 201, 202, 208		1 yr	1 yr	1 yr	
Copyright Act 1968 ss 172, 173			$1000 &/or 3 mths	$1000 &/or 3 mths	
Defence Force Discipline Appeals Act 1955, ss 43-46			$1000 or 6 mths	$1000 or 6 mths	
Human Rights and Equal Opportunity Commission Act 1986, ss 23, 25, 26		$2500 &/or 3 mths [indiv]; $10,000 [corp]	$1000 [indiv]; $5000 [corp]	$1000 [indiv]; $5000 [corp]	$2500 &/or 3 mths [indiv]; $10,000 [corp]
Migration Act 1958, ss 370-372; 432-434		12 mths	6 mths	12 mths	
Native Title Act 1993, ss 171-177		40 pu	20 pu	40 pu	
Trade Practices Act 1974, ss 44ZG-44ZK; ss 152DE-152DJ		12 mths	6 mths	6 mths	12 mths
Trade Practices Act 1974, ss 160-162A			$2000 or 12 mths [indiv]; $10,000 [corp]	$2000 or 12 mths [indiv]; $10,000 [corp]	$2000 or 12 mths [indiv]; $10,000 [corp]
Veterans' Entitlements Act 1986, ss 168-170		$2000 &/or 12 mths	$1000 &/or 6 mths	$2000 &/or 12 mths	

[4] Transcript of Evidence, p 9 (Dr R Smith).

Investigative bodies

2.10 A number of Acts establish organisations, or empower individuals, to investigate and monitor compliance with the provisions of those Acts. Such bodies are usually given wide powers to obtain information from those suspected of having breached the legislation. Table 4, following, sets out some relevant penalty provisions in this area:

TABLE 4: PENALTY PROVISIONS INVOLVING 'INVESTIGATIVE' BODIES

Act	Fail to provide information	Knowingly provide false information	Fail to attend or produce documents	Wilfully obstruct or hinder; contempt	Intimidate witness
Aboriginal Councils and Associations Act 1976, ss 69,70		$1500	$200	$1500	
Australian Securities Commission Act ss 63, 64, 65, 66	100 pu &/or 2 yrs; 50 pu &/or 12 mths; 10 pu &/or 3 mths	100 pu &/or 2 yrs; 10 pu &/or 3 mths	100 pu &/or 2 yrs; 50 pu &/or 12 mths; 10 pu &/or 3 mths	100 pu &/or 2 yrs; 50 pu &/or 1 yr	
Australian Wine and Brandy Corporation Act 1980, ss 39ZH, 42(4)		6 mths [indiv]; $5000 [corp]	$3000		
Bankruptcy Act 1966, ss 264A, 264C, 264E, 265A, 267A, 267C		12 mths	$1000 &/or 6 mths	$1000 &/or 6 mths; 12 mths	
Civil Aviation Act 1988, s 32AJ			30 pu		
Commonwealth Electoral Act 1918, s 316		$1000 &/or 6 mths	$1000		
Financial Transaction Reports Act 1988, ss 28, 29, 33A(3)	2 yrs	5 yrs		10 pu	
Migration Act 1958, ss 18-23, 257,	6 mths	6 mths; 12 mths		6 mths	
National Crime Authority Act 1984, ss 29, 30, 33, 35		5 yrs or $20,000 [on indictment]; $2000 or 1 yr [summarily]	$1000 or 6 mths	$2000 or 1 yr	
Ombudsman Act 1976, s 36	$1000 or 3 mths	$1000 or 3 mths	$1000 or 3 mths	$1000 or 3 mths	
Ozone Protection Act 1989, ss 62, 63, 64		2 yrs; 12 mths	12 mths	6 mths	
Privacy Act 1988, ss 65, 66	$2000 &/or 12 mths [indiv]; $10,000 [corp]	$2000 &/or 12 mths	$2000 &/or 12 mths	$2000 &/or 12 mths	
Royal Commission Act 1902, ss 3, 6, 6H, 6L-6O		5 yrs or $20,000 [on indictment]; $2000 or 1 yr [summarily]	$1000 or 6 mths	$200 or 3 mths	$1000 or 1 yr
Telecommunications Act 1991, ss 365, 400, 401	20 pen units	6 mths	$2000		
Trade Practices Act 1974, s 155	$2000 or 12 mths [indiv]; $10,000 [corp]	$2000 or 12 mths [indiv]; $10,000 [corp]	$2000 or 12 mths [indiv]; $10,000 [corp]	$2000 or 12 mths [indiv]; $10,000 [corp]	

Research and advisory bodies

2.11 Most research organisations created under Commonwealth legislation have no power to compel others to provide them with information, and no penalty provisions apply. As noted above, neither the Bureau of Industry Economics nor the Economic Planning Advisory Commission (both of which have been incorporated into the Productivity Commission) had these powers.

2.12 Other research organisations which have no power to compel the attendance of witnesses or the production of documents include:

- the Australian Law Reform Commission, the functions of which include (in relation to matters referred to it by the Attorney-General) the review of Commonwealth laws to bring them into line with current conditions, ensure they meet current needs, remove defects and simplify them; and to consider proposals for making and consolidating Commonwealth laws, and encouraging uniformity between State and territory laws;[5]

- the Administrative Research Council, the functions of which include monitoring the classes of non-reviewable administrative decisions, inquiring into the adequacy of the law, the practice and the procedure relating to the review of administrative decisions, and making recommendations to the Minister;[6]

- the Australian Institute of Health and Welfare, the functions of which include the collection and production of health and welfare related information and statistics, and the publication of reports;[7]

- the Australian Science, Technology and Engineering Council, the functions of which include the advancement of scientific knowledge; the identification and support of new ideas in science, technology and engineering likely to be of national importance, and fostering innovation in these areas in industry; and the practical development and application of scientific discoveries – the Council has specific statutory powers to collect information and conduct inquiries;[8] and

- the Australian Institute of Marine Science, the functions of which include the carrying out of research and development in relation to marine science and marine technology and the publication of reports.[9]

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5 *Australian Law Reform Commission Act 1996* s 21.

6 *Administrative Appeals Tribunal Act 1975* s 51.

7 *Australian Institute of Health and Welfare Act 1987* s 5.

8 *Australian Science, Technology and Engineering Council Act 1978* ss 5, 7.

9 *Australian Institute of Marine Science Act 1972* s 9.

2.13 The Anti-Dumping Authority, the functions of which include making recommendations to the Minister as to whether a dumping duty notice or a countervailing duty notice should be published, or whether an anti-dumping measure should be continued, and also to provide reports to the Minister on anti-dumping matters, and which has a specific power to conduct inquiries, similarly has no power to compel the attendance of witnesses or the provision of information. However, particular provisions make it an offence to knowingly provide false or misleading information (penalty: $2000 for an individual and $10,000 for a corporation) and to intimidate a witness (Penalty: $1000 for an individual and $5000 for a corporation).[10]

2.14 The Australian Bureau of Statistics (ABS) has functions and powers under the *Australian Bureau of Statistics Act 1975* and the *Census and Statistics Act 1905.* Under the *Australian Bureau of Statistics Act 1975*, the functions of the ABS include the collection and analysis of statistics for Government. In performing these functions, the ABS has no power to compel the provision of information.[11] Under the *Census and Statistics Act 1905*, the functions of the Statistician include the taking of the Census, and the collection of such statistical information as directed by the Minister. In performing these functions, the ABS does have power to compel the provision of information and the answering of questions, but no penalty of imprisonment may be imposed.[12]

2.15 As noted above, the Industry Commission was given such statutory powers, supported by penalty provisions. A similar power was given to the Prices Surveillance Authority (prior to its merger with the then Trade Practices Commission in 1996). Under sections 32, 35 and 36 of the *Prices Surveillance Act 1983* (repealed), a fine of $1000 could be imposed for failing to provide information or documents or answer questions, and knowingly providing false or misleading information.

2.16 The Resource Assessment Commission, the functions of which include holding inquiries and making reports on "resource matters" as referred[13] also has such powers. Under sections 52, 53 and 54 of the *Resource Assessment Commission Act 1989*, a fine of $3000 may be imposed for failing to provide information or documents or answer questions. Knowingly providing false or misleading information and intimidating a witness each attract a maximum penalty of 6 months imprisonment.

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10 *Anti-Dumping Authority Act 1988* ss 5, 7, 8, 24, 27. An "anti-dumping" matter is defined as a matter relating either to the imposition of duties under the Anti-Dumping Act, or the operation of that Act or the *Customs Tariff (Anti-Dumping) Act 1975.*

11 *Australian Bureau of Statistics Act 1975* s 6(1).

12 *Census and Statistics Act 1905,* ss 8, 9, 10(4), 14 and 15.

13 *Resource Assessment Commission Act 1989* s 6. A "resource matter" is defined as any matter relating to the use of a resource, including whether a use of a resource is compatible with other uses of that resource or other resources; and also the nature or extent of the environmental, cultural, social, industry, economic or other effects of the use of a resource: s 3.

General observations

2.17 The above survey indicates that imprisonment is frequently applied as a penalty for offences relating to the provision of information in cases involving revenue matters, and organisations which investigate breaches or statutes or make determinations. Many research and advisory bodies have no power to compel the provision of information; most of those which have this power do not make imprisonment available as a penalty for a failure to provide information (though it may be made available for providing misleading information or intimidating witnesses).

2.18 In addition, there is often a significant variation in the penalties imposed for apparently similar offences, and some (but not all) statutes attempt to draw a distinction between the seriousness of various offences (for example, the penalties in some statutes draw a distinction between failing to provide information and knowingly providing false information).

CHAPTER 3

PRINCIPLES GOVERNING PENALTY PROVISIONS

Introduction

3.1 The purpose of this Chapter is to canvass the principles which should govern statutory provisions which impose penalties. In the context of legislation such as the Productivity Commission Bill 1996, there are a number of principles which relate to penalties generally and others which relate specifically to the penalty of imprisonment. These principles are not always easily reconciled.

Penalties should be fair and appropriate for the particular offence

3.2 It is self evident that penalties should be fair and appropriate for each particular offence. Fairness is an expansive concept. Factors to be taken into account when deciding whether a penalty is fair or not include whether what it seeks to achieve is punishment or compliance or both; whether the action for which the person is being penalised has claimed a victim; whether the offence is one of strict liability or can only be committed with intent; and whether there is a prevalence of the behaviour being dealt with.

3.3 The Commonwealth holds that penalties should be appropriate. The *Crimes Act 1914* states as a general principle that sentencing courts "must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence".[1] A similar principle applies to the setting of penalties, which represent one of the few forms of guidance provided by the Parliament for sentencers.[2]

3.4 There is no necessity that every apparently similar offence should attract exactly the same penalty.[3] Notwithstanding the need for consistency noted below, offences which appear similar in form may attract different penalties because of the context in which those offences operate. Parliament may consider that refusing to provide information to bodies such as the National Crime Authority or the Australian Securities Commission may constitute a more serious offence than failing to provide information to the Productivity Commission. Failing to provide information may itself constitute a less serious offence than providing false information.

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1 *Crimes Act 1914*, s 16A(1).

2 ALRC, *Sentencing of Federal Offenders*, Interim Report, Report No 15, (1980), para 185.

3 Transcript of Evidence, p 15 (Mr C Meaney).

3.5 Therefore, in order to ensure that a penalty is appropriate for an offence, it may be preferable that a range of maximum penalties be developed, both for offences within a particular Act, and for apparently similar offences across a number of Acts.[4] It may also be desirable that this range of penalties should provide for continuing offences (for example, the penalty imposed for a failure to provide information under the *Census and Statistics Act 1905* is a daily maximum fine of $100).[5]

3.6 Another aspect of appropriateness is that penalties should reflect current attitudes and conditions and accord with the normal sentencing practice of the courts.[6]. Penalties should be reviewed periodically to ensure that they remain fair and appropriate in current circumstances. As the UK Advisory Council on the Penal System observed in 1978 in discussing penalties in that jurisdiction , "the pattern of maximum penalties has been governed by historical accident and not by any rational penal or sentencing policy".[7]

Penalties are maximum penalties

3.7 Under Commonwealth criminal law policy, courts are provided with a general sentencing discretion. As a policy matter, minimum sentences are rarely included in legislation, and those penalties expressed in an Act are always maximum penalties rather than set penalties.[8] As such, the full penalty expressed in any particular provision of an Act will only rarely be imposed, and is made available for the worst examples of a particular offence:

> For example ... if there was a persistent and flagrant disregard by particular parties who refuse to produce documents and appear before the [Productivity] Commission, it may well be that if that persisted and disrupted the work of the Commission that sort of conduct could be taken into account in getting toward the upper end of the scale.[9]

Penalties should be consistent

3.8 Consistency is the main aim of criminal law policy when determining penalties.[10] This is usually expressed in the principle: like penalties for like offences.

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4 Transcript of Evidence, p 10 (Dr R Smith).

5 *Census and Statistics Act 1905*, s 14. See also *Commonwealth Electoral Act 1918*, s 315(8), where provision is also made for a continuing daily penalty of $100.

6 ALRC, *Sentencing of Federal Offenders*, Interim Report, Report No 15, (1980), para 194..

7 Home Office, *Sentences of Imprisonment: A Review of Maximum Penalties*, Report of the Advisory Council on the Penal System, HMSO, London (1978), para 63.

8 *Crimes Act 1914*, s 4D.

9 Transcript of Evidence, pp 5-6 (Mr C Meaney).

10 Transcript of Evidence, p 5 (Mr C Meaney).

To ensure consistency, the Attorney-General's Department scrutinises proposed offence provisions:

> Accordingly, advice on penalties for new offences usually involves looking for similar existing provisions in other areas. Sometimes there are arguments for variations if the community or industry which is regulated by the relevant provisions is one in which a greater or lesser level of deterrence is required.[11]

3.9 The Department told the Committee that the penalty provisions in the Bill were within the range of penalties normally imposed for such offences.

Penalties imposed by the Bill are coercive rather than punitive

3.10 The penalties imposed by the Bill are, ultimately, designed to ensure that the Productivity Commission will operate effectively:

> If you want a commission to work efficiently and without interruptions to its activities, then you would want to have available penalties that are effective in keeping the work going.[12]

3.11 This poses some practical difficulties. A penalty of a severity suitable to coerce BHP or the National Australia Bank into compliance under the Bill may appear "horrendous" to others potentially affected, such as small family businesses involved in the tourist industry, who remain theoretically liable in the same way.[13]

3.12 There is a need, here, to have regard to the various objectives of punishment (which are normally seen as deterrence (both general and specific); retribution; rehabilitation; incapacitation; denunciation; restitution and wilful default).[14]

3.13 The most relevant of these to the penalty provisions in the Bill are clearly deterrence (the penalty imposed should dissuade the offender from re-offending, and should deter others from offending at all) and, to some extent, denunciation (the penalty imposed should act as a symbolic statement of society's view of the seriousness of the offence).

3.14 The Committee was advised that the penalty provisions in the *Industry Commission Act 1989* (or its predecessors) had never been formally applied. However, their very existence might simply have provided sufficient general deterrence. As the Industry Commission itself continued:

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11 Joint Submission, p 5.

12 Transcript of Evidence, p 12 (Dr R Smith).

13 Transcript of Evidence, p 16 (Mr C Meaney).

14 Joint Submission, p 12.

> This is not to say ... that the penalty provisions have not been effective. The mere existence of the provisions has helped to promote Parliament's intentions under the legislation, including access to information relevant to the Commission's inquiries, the prevention of disruption of Commission proceedings and contempt, and most importantly the protection of persons appearing before inquiries and of material provided.[15]

3.15 The degree to which the penalties provide an appropriate 'symbolic statement' of society's view of the seriousness of the offences is canvassed above.

Penalties are imposed by a court

3.16 It should be noted that the penalties under the Bill will be imposed by a court and not by the Productivity Commission itself.

Imprisonment should be a punishment of last resort

3.17 In 1988, the Australian Law Reform Commission (ALRC) produced a report on Sentencing. Having previously referred to the principle of "economy in the use of imprisonment",[16] the ALRC went on to observe that:

- imprisonment is, and will continue to be, an important part of the system of punishing offences;
- to remove imprisonment as a sanction would leave the criminal justice system without a punishment of the degree of severity appropriate to some crimes;
- however, the emphasis that the criminal justice system presently placed on imprisonment as a punishment for offences must be reduced,[17] and more emphasis should be placed on non-custodial sanctions; and
- the need to ensure an appropriate level of severity of punishment implied that the range and severity of non-custodial sanctions available to sentencers should be increased.[18]

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15 Joint Submission, p 5.

16 ALRC, *Sentencing of Federal Offenders*, Interim Report, Report No 15, (1980), para 185.

17 See also *Stewart v Collins* (1992) 58 SASR 291: courts should strive to find sentences which will keep people out of prison if that is possible. The courts have said that "serious frauds on the revenue will result in custodial sentences ... [which] will include a period actually be served": *R v Whitnall (1993) 42 FCR 512.* However, certain mitigating circumstances may see even such sentences wholly suspended: *DPP v Carter* [1998] VR 601.

18 ALRC, *Sentencing*, Report No 44, (1988), paras 40-41.

3.18 The ALRC also stated that consideration should be given to eliminating imprisonment as a sanction for some offences:

> The Commission suggests that, of federal offences, social security offences and taxation offences, especially where no systematic fraud is involved, and some customs and quarantine offences should be reviewed first for this purpose. These would be cases where non-custodial sentences, including the fine and community service orders, would be more appropriate than a prison term. Where systematic fraud is involved, fines may well be the appropriate sanction, if set at an appropriately high level.[19]

Imprisonment can only apply to individuals

3.19 A gaol sentence cannot, as a matter of fact, be applicable to a corporation. It might be argued, therefore, that, in relation to legislation that is directed principally at ensuring the compliance of corporations, it might be more appropriate that the penalty provisions focus on corporate liability and provide for a significant monetary penalty.

Practical considerations govern specified terms of imprisonment

3.20 The Committee was told that, for a number of essentially practical reasons, as a matter of criminal law policy the minimum 'base-level' sentence that is now included in statutes (not necessarily that is imposed) is 6 months. If an appropriate sentence falls between 6 months and 3 months, then it is better satisfied by a pecuniary penalty:

> Even if you got your three months and you had not served any time on the day that you were sentenced in court, the amount of time it takes to process somebody through the state prison systems – by the time you take off remission and time off for good behaviour – it means that by the time they walk in the door, they have got to walk out. It is just a waste of administrative effort to do it for that amount of time. We take the view that if an offence is serious enough to warrant a term of imprisonment then the minimum that we would impose is six months. Either you have six months as a minimum now or you just have a fine.[20]

3.21 It is against these principles, as well as the comparative penalties set out in Chapter 2, that conclusions about the penalty provisions in the Bill and comparable legislation should be drawn.

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19 ALRC, *Sentencing*, Report No 44, (1988), para 59.

20 Transcript of Evidence, p 14 (Mr C Meaney).

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

Introduction

4.1 The purpose of this Chapter is to set out the Committee's conclusions and recommendations.

Conclusions

4.2 On the information obtained during the inquiry, a number of conclusions might be drawn. First, it is clear that the appropriateness of penalties is ultimately a matter for the Parliament. Penalties specified in legislation should reflect current conditions and the sentencing practices of the courts.

4.3 Secondly, it is also clear that there are inconsistencies in the approach to penalties imposed for offences such as those included in the Productivity Commission Bill. Such inconsistencies are apparent in the types of penalties imposed: some statutes impose penalties of imprisonment, some provide for imprisonment and a fine as alternatives, some provide for imprisonment potentially in addition to a fine, and others provide only for a fine. Such inconsistencies are also apparent in the size of the penalty imposed – some statutes impose greater penalties than others for apparently similar offences.

4.4 In part, these inconsistencies may arise because offences such as failing to provide information, or providing false and misleading information, may themselves be of differing gravity, or may differ in seriousness depending on circumstances. They are, arguably, more serious in the investigation of a suspected statutory breach, or where a determination or adjudication is to be made, or where a claim is made which involves a potential financial benefit. In these circumstances, there is often only a single source of information.

4.5 They are, arguably, of less seriousness where an organisation is seeking information simply as a basis for research, or to provide advice. In these circumstances there are often alternative sources of information. There may be no need to compel the provision of information at all. If there is such a need, it is less likely that it need be supported by a penalty of imprisonment.

4.6 In part, these inconsistencies may also arise because of changes in sentencing policy. For example, as a policy matter, a penalty of imprisonment for 3 months is no longer specified. They may also arise because the functions performed by an organisation may change over time. Penalties that are appropriate for an organisation making recommendations with direct financial consequences (such as the Tariff

Board) may no longer be suitable for an organisation providing general advice on microeconomic reform (such as the Productivity Commission). Penalties may no longer be appropriate if they have not been reviewed for many years, or because different circumstances existed at the time of their inclusion.

4.7 There is a need to ensure that penalties for all offences are as consistent, as fair and as appropriate as possible. Penalties should deter potential offenders but not, as suggested by the Australian Chamber of Manufactures, become totally counter-productive.

4.8 As proposed by the Law Reform Commission, imprisonment is a necessary penalty of last resort. To ensure that the penalties in legislation comparable to the Productivity Commission Bill remain appropriate, the range and severity of non-custodial penalties should be increased, and imprisonment should be retained only for those offences (or for offences in particular circumstances) which Parliament sees as sufficiently serious. It is unlikely that imprisonment will be an appropriate penalty where an individual declines to provide information to an organisation which undertakes inquiries focussing on policy matters, research or the collection of information. It is more likely to be appropriate where an individual knowingly misleads an organisation for monetary gain, or to prejudice a quasi-criminal investigation. It is also more likely to be appropriate where someone suffers prejudice as a consequence of providing information.

4.9 Ultimately, there is a need to review and clarify the criteria which govern penalty regimes for Commonwealth legislation.

Recommendation

The Committee recommends that the Attorney-General:

a) develop more detailed criteria to ensure that the penalties imposed for offences involving the giving or withholding of information are more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties; and

b) make such criteria available to Ministers, drafters and to the Parliament.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINTH REPORT

OF

1998

1 July 1998

SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT OF 1998

The Committee presents its Ninth Report of 1998 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Australian Radiation Protection and Nuclear Safety Bill 1998

Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997

Australian Radiation Protection and Nuclear Safety Bill 1998

This bill was introduced into the House of Representatives on 8 April 1998 by the Parliamentary Secretary to the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to establish a scheme to regulate the operation of nuclear installations and the management of radiation sources, including ionising material and apparatus and non-ionising apparatus, where these activities are undertaken by the Commonwealth, Commonwealth entities and those who deal with such entities.

The Committee dealt with this bill in Alert Digest No. 6 of 1998, in which it made various comments. The Parliamentary Secretary to the Minister for Health and Family Services responded to those comments in a letter dated 23 June 1998. In its Seventh Report of 1998, the Committee sought further advice regarding clause 55. A further response dated 30 June 1998 has been received from the Parliamentary Secretary. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Abrogation of the privilege against self-incrimination
Subclause 55(2)

In Alert Digest No. 6 of 1998, the Committee noted that subclause 55(1)(e) of the bill authorises an inspector to require any person on particular premises to answer any questions put by the inspector and produce any documents requested by the inspector.

Subclause 55(2) makes compliance an absolute requirement. No provision is made for non-compliance where a person has a reasonable excuse. As a consequence, subclause 55(2) removes the privilege against self-incrimination and does not contain the safeguards often included in such provisions (see, for example, *Agricultural and Veterinary Chemicals Code 1994*, s 146; *Child Support Assessment Act 1989*, s 161(4); *Australian Wine and Brandy Corporation Act 1980*, s 39ZH(3); *Ozone Protection Act 1989*, s 64(2)).

Accordingly, the Committee sought the advice of the Minister on the reasons why the requirement in subclause 55(2) makes no provision for possible non-compliance where a person has a reasonable excuse, which would include the likelihood that the information required was likely to incriminate that person.

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

The Parliamentary Secretary to the Minister responded as follows:

> The Committee sought advice in respect of subclause 55(2) of the Bill which creates an offence for, amongst other things, refusing or failing to answer any questions put by an inspector (proposed subparagraph 55(1)(e)(i)). The Committee has stated that subclause 55(2) removes the privilege against self-incrimination and does not contain the safeguards often included in similar provisions.
>
> *Criminal Code – privilege against self incrimination*
>
> Following discussions with the Attorney-General's Department, the Department of Health and Family Services advices that it is highly likely that sub-clause 55(2) does not abrogate the privilege against self-incrimination. Under clause 10 of the Bill, Chapter 2 of the Criminal Code will apply to the offences in the Bill. It is considered that the Code will not alter the application of the privilege against self-incrimination at common law to Commonwealth offences. That is, the privilege will continue to apply in relation to a Commonwealth law requiring the answering of questions unless the law expressly or by necessary implication indicates a contrary intention: *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309. Further details regarding this matter are at attachment A.

The Committee thanked the Parliamentary Secretary for this response, which addressed some of its concerns. The Committee noted the advice of the Attorney-General's Department that the offences under the Bill are subject to Chapter 2 of the Criminal Code, and that, therefore, "it is highly likely that sub-clause 55(2) does not abrogate the privilege against self-incrimination". While persuasive, this advice is not definitive.

From the advice, it appears that it is intended that the privilege against self-incrimination should continue to apply to an offence under clause 55. If so, there would seem to be no difficulty in expressly providing for it. Such an approach would remove any uncertainty. Accordingly, the Committee sought the Minister's advice on whether there is any difficulty in expressly providing that the privilege against self-incrimination continues to apply to an offence against clause 55.

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

The Parliamentary Secretary has further responded as follows:

> I would like to thank the Committee for their comments.
>
> **Abrogation of the privilege against self-incrimination – subclause 55(2)**
>
> The Committee sought advice as to whether there is any difficulty in expressly providing that the privilege against self-incrimination continues to apply to an offence against clause 55 of the Bill.

As detailed in my previous response, the Attorney-General's Department has advised that the existing provision is highly likely not to abrogate the privilege against self incrimination.

Whilst it is clearly our intention that the privilege not be abrogated, any provision within any legislation is ultimately subject to interpretation by the Courts. If, despite our intentions, there proves to be an ambiguity on the face of the legislation, a Court will be entitled to refer to, among other things, the Explanatory Memorandum accompanying clause 55.

To assist the Courts in their interpretation, and to clarify the intent of the provision, I will issue a corrigendum to the Explanatory Memorandum to the bill which will clarify that the provision is not intended to abrogate the privilege against self incrimination.

The corrigendum to the explanatory memorandum will state:

"Subclause 55(2) does not have the effect of abrogating the privilege against self incrimination."

I trust this addresses the Committee's concerns.

The Committee thanks the Parliamentary Secretary for this further response.

Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997

This bill was introduced into the House of Representatives on 30 October 1997 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

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

The Committee dealt with this bill in Alert Digest No. 16 of 1997, in which it made various comments. The Minister for Immigration and Multicultural Affairs responded to those comments in a letter dated 5 January 1998. In its Fourth Report of 1998, the Committee thanked the Minister for this response, and sought further clarification on the difference between 'national' and 'public' interest. The Minister has responded in a letter dated 24 June 1998. A copy of that letter is attached to this report, and relevant parts of the response are discussed below.

Insufficiently defined administrative powers
Items 12 and 13 of Schedule 1 - proposed section 339 and proposed subsection 411(3)

In its Fourth Report of 1998, the Committee noted that Migration Legislation Amendment Bill (No. 4) 1997 proposed to substitute a new section 339 in the Migration Act. If enacted, this would give the Minister a wide power to certify that some decisions not be reviewable by the Migration Review Tribunal if the Minister thinks that:

(a) it would be contrary to the public interest to change the decision, because any change in the decision would prejudice the security, defence or international relations of Australia; or

(b) it would be contrary to the public interest for the decision to be reviewed because such review would require consideration by the Tribunal of deliberations or decisions of the Cabinet or of a Committee of the Cabinet.

The Committee dealt with this provision in its Thirteenth Report of 1997.

However, the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill now proposes to reduce the range of factors which may inform the Minister's decision to issue a conclusive certificate and

thereby prevent merits review of the decision the subject of the certificate. In place of the relatively precise grounds of prejudicing the security, defence or international relations of Australia and the possibility of exposing Cabinet deliberations to review, items 12 and 13 of the present bill will allow the Minister to issue a certificate merely because he or she believes that it would be contrary to the national interest that a decision be changed or reviewed. In the Committee's view, this reduction of grounds widens the discretion in the use of this administrative power and the issue of whether it constitutes an insufficiently defined administrative power arises. Accordingly, the Committee sought the Minister's advice on this matter.

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

Insufficiently defined administrative powers
Item 23 of Schedule 1 - proposed subsections 501(3) to (5) and 501A (3) and (4)

In its Fourth Report of 1998, the Committee noted that proposed subsections 501(3) to (5), if enacted, would allow the Minister, acting personally, either to refuse to grant a visa or to cancel one that had been granted without hearing any representations which the affected person may wish to make, and therefore in derogation of the rules on natural justice and the codes of procedure set out in the Act. The Minister may use this power where he or she reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the national interest.

As noted above, the use of this power solely on the grounds of 'the national interest' raised the issue of an insufficiently defined administrative power.

Further, the same issue arose with respect to proposed new subsections 501A(3) and (4) which allow the Minister to overturn a favourable decision of his delegate or the Administrative Appeals Tribunal on the character test.

Accordingly, the Committee sought the Minister's advice on these matters and, within that context, whether there would be grounds for judicial review.

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

On these issues, the Minister responded as follows:

The Committee seeks my advice on whether the introduction of a "national interest" test is in breach of principle 1(a)(ii) of the Committee's terms of reference in that the proposed provisions are legislation which makes rights, liberties or obligations unduly dependent upon insufficiently defined legislative powers.

In particular, the "national interest" test is used in both my powers:

. to issue a conclusive certificate to prevent review of a decision by the Migration Review Tribunal (the MRT is established by MLAB4) (item 12) and by the Refugee Review Tribunal (RRT) (item 13); and

. of personal intervention, to make decisions without prior natural justice to:

  - cancel a visa or refuse a visa application under proposed subsection 501(3). Proposed subsections 501(4) and (5), to which the Committee has also referred, are purely supplementary to proposed subsection 501(3); or

  - substitute a cancellation or refusal decision under proposed subsection 501A(3). Proposed subsection 501A(4), to which the Committee has also referred, is purely supplementary to proposed subsection 501A(3).

These amendments are designed to ensure that my personal power to intervene in the review process will be controlled by consistent and uniform criteria (that is, the national interest) across the entire Migration Act. I believe that Australia's national interest is a better test than the existing public interest test for direct Ministerial intervention in the review process because Australia's national interest encompasses a broader range of conduct and considerations than does the public interest.

Judicial review issues

The Committee has also sought my view on whether there would be grounds for judicial review in relation to my powers under proposed subsections 501(3) or 501A(3).

Pending the passage of MLAB5, decisions may be reviewed by:

. the Federal Court under the grounds set out in Part 8 of the Migration Act. The applicability of those grounds depends on what the judicial review applicant is contending; and

. the High Court of Australia in its original jurisdiction under section 75(v) of the Commonwealth Constitution, which in essence means the common law grounds for judicial review of administrative decisions. The applicability of those grounds depends on what the judicial review applicant is contending.

Under the judicial review scheme embodied in MLAB5, review by the Federal Court would be under section 39B of the *Judiciary Act 1903* and by the High Court under section 75(v) of the Constitution, but the grounds of review would be confined to: whether there has been a bona fide attempt by the Minister to exercise a power conferred by the legislation; whether the exercise of the power related to the subject matter of the legislation; and whether the decision was reasonably capable of reference to that power.

In its Fourth Report of 1998, the Committee thanked the Minister for this detailed response which generally addressed the Committee's concerns. The Committee noted the minister's observation that Australia's national interest is a better test than the existing public interest test for direct Ministerial intervention in the review process.

The Committee sought clarification from the Minister of the differences between these two terms and, in particular, whether the definition of public interest in section 339 might be expanded to include considerations of the national interest.

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

On this issue, the Minister has responded as follows:

> **National interest test**
>
> - **proposed section 339 & subsection 411(3) – Items 12 and 13 of Schedule 1**
> - **proposed subsections 501(3) & 501A(3) – Item 23 of Schedule 1**
>
> The Committee seeks my advice on whether the introduction of a *'national interest'* test is in breach of principle 1(a)(ii) of the Committee's terms of reference in that the proposed provisions are legislation which make rights, liberties or obligations unduly dependent upon insufficiently defined legislative powers.
>
> In particular, the *'national interest'* test is used in both my powers:
>
> . to issue a conclusive certificate to prevent review of a decision by the Migration Review Tribunal (the MRT is established by the Migration Legislation Amendment Bill No. 4 [MLAB4]) (item 12) and by the Refugee Review Tribunal (RRT) (item 13); and
>
> . of personal intervention, to make decisions to:
>
> - cancel a visa or refuse a visa application under proposed subsection 501(3). Proposed subsections 501(4) and (5), to which the Committee has also referred, are supplementary to proposed subsection 501(3); or
>
> - substitute a cancellation or refusal decision under proposed subsection 501A(3). Proposed subsection 501A(4), to which the Committee has also referred, is supplementary to proposed subsection 501A(3).
>
> I remain of the view that in the subject matter of this Bill, reference to Australia's national interest is the appropriate standard and not a reference to public interest.
>
> Judicial comments about *'national interest'* stress that it is not possible to give an exhaustive definition of what can be said to be in the national interest. Matters such as Australia's international reputation may be relevant. For example, a reference to the *national interest'* in the context proposed for section 501 of the Migration Act should allow account to be taken of the Government's interest in ensuring that

Australia is not perceived internationally as a haven for criminals, terrorists and other persons of proven bad character. The risk that the presence in Australia of particular persons would promote discord or violence also appears to be relevant to an assessment of the national interest.

The *'national interest'* generally allows regard to be had to more specific governmental concerns related to public safety, national security, defence and Australia's reputation abroad.

You query whether the definition of *public interest'* in section 339 might be expanded to include considerations of the national interest. The Character Bill will replace the *'public interest'* test in section 339 (as introduced by MLAB4) with the *'national interest'* test.

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

The Committee thanks the Minister for this further response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TENTH REPORT

OF

1998

2 December 1998

SENATE STANDING COMMITTEE

FOR

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TENTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

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(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT OF 1998

The Committee presents its Tenth Report of 1998 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Acts Interpretation Amendment Bill 1998

Acts Interpretation Amendment Bill 1998

Introduction

The Committee dealt with this bill in *Alert Digest No 10 of 1998*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 1 December 1998. A copy of that letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No 10 of 1998

This bill was introduced into the House of Representatives on 12 November 1998 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Acts Interpretation Act 1901* to address the implications of a recent decision of the Federal Court in *Foster v Attorney-General* (relating to section 19). The bill proposes to:

- provide for a Minister to authorise a non-portfolio Minister or Parliamentary Secretary to act on his or her behalf;
- validate past authorisations that may have been made in reliance on section 19 to the extent that they may be invalid; and
- ensure that an order can be made by the Governor-General under section 19 whenever there is any change to the administration of government business and validates past orders made under section 19BA to the extent that they may be invalid.

Retrospective validation
Schedule 1, items 2, 5 and 7

This bill proposes to amend the *Acts Interpretation Act 1901* to address the implications of the decision of the Federal Court in *Foster v Attorney-General*, handed down on 12 October 1998.

The Explanatory Memorandum notes that, in that case, the Federal Court found that section 19 of the Act did not enable the Attorney-General to authorise the Minister for Justice to exercise statutory powers for and on his behalf. The Explanatory Memorandum goes on to suggest that this decision has significant ramifications for other authorisations made under section 19 of the Act, and serious implications for government administration generally.

Therefore, items 2, 5 and 7 of Schedule 1 to the bill retrospectively validate acts undertaken under the legislation as presently in force.

While understanding the argument that this validation may be necessary for the orderly conduct of government, the Committee is concerned that the bill may go further than necessary, and that it may prejudice longstanding tradition and practice. Accordingly, the Committee **seeks the advice of the Minister**:

- to identify the specific implications of the decision in *Foster's case* which the legislation is seeking to address;
- to confirm that a non-portfolio Minister (or member of the Executive Council who is not a Minister) has the same general rights and responsibilities at law as a portfolio Minister;
- to identify the usual protocol with regard to oversight by a portfolio Minister of a non-portfolio Minister (or member of the Executive Council who is not a Minister) who would be authorised by the bill to act on the Minister's behalf; and
- to reassure the Committee that the amendment will not prejudice practice that, in the past, has ensured due process.

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

Relevant extract from the response from the Attorney-General

> The Bill makes amendments to the *Acts Interpretation Act 1901* to address the implications of the decision of the Federal Court in *Foster v Attorney-General*. In that case the Court found that section 19 of the Acts Interpretation Act does not enable the Attorney-General to authorise the Minister for Justice to exercise statutory

powers for or on his behalf. An appeal in the *Foster* case was heard by the Full Federal Court on 26 November 1998; the Court has reserved its decision.

It has been the practice of current and previous governments to rely on Section 19 to authorise another Minister to act for a named Minister in a statute, where section 19A of the Acts Interpretation Act is not available; and, in particular, to authorise Parliamentary Secretaries to exercise statutory powers vested in Ministers.

The result of the Foster case is that section 19 of the Act cannot be used as authority:

(i) for a portfolio Minister to authorise a junior portfolio Minister to exercise statutory powers vested in the holder of a specific ministerial office;

and, by implication, section 19 cannot be used as authority for a portfolio Minister:

(ii) to authorise a non-portfolio Minister to exercise statutory powers vested in the holder of a ministerial office;

(iii) to authorise a Parliamentary Secretary to exercise statutory powers vested in the holder of a ministerial office.

The amendments to section 19A address item (i). Section 19A currently provides that a reference in legislation to 'Minister' is taken to be a reference to all ministers appointed to administer the provision. The proposed amendment will provide that a reference to a Minister, whether specific or generic, will be taken to be a reference to all ministers appointed to administer the provision, that is all Ministers within the one portfolio. This will allow all Ministers within a portfolio to exercise relevant statutory powers of the portfolio Minister where appropriate.

Proposed new subsection 18C covers items (ii) and (iii) by providing that a portfolio Minister may authorise a non-portfolio Minister or a member of the Executive Council who is not a Minister to exercise statutory powers on his or her behalf.

The legal framework for government as set out in the Australian Constitution does not distinguish between portfolio and non-portfolio Ministers. All Ministers are appointed under section 64 of the Constitution to administer entire departments of State, with more than one Minister being appointed to administer some Departments. Where more than one Minister is appointed to administer a Department both Ministers are responsible for the administration of that Department.

Parliamentary Secretaries are not appointed under the Constitution to administer departments but since 1990 Parliamentary Secretaries have been appointed as members of the Executive Council under section 62 of the Constitution and so are available if requested to undertake a variety of duties on behalf of Ministers including attendance at Executive Council meetings.

Where a non-portfolio Minister or Parliamentary Secretary acts for or on behalf of another Minister under a Ministerial authorisation, he or she is acting as an agent for the authorising Minister, not as a delegate of the Minister.

The protocol for oversight by a portfolio Minister of a Minister or Parliamentary Secretary authorised to act on the Minister's behalf would vary from Government to Government and Minister to Minister. However, the authorisation would be in writing setting out the functions or exercise of powers in relation to which the Minister or Parliamentary Secretary was authorised to act for and on behalf of the

authorising Minister. The authorisation would also set out the circumstances in which the authorisation was to operate or alternatively specify the time when the authorisation was to be effective. The authorising Minister retains ultimate control as the authorisation may be revoked at any time by the Minister.

The Government has taken note of concerns raised that if oral authorisations were permitted the paper trail of government decisions may be difficult to follow. In light of these concerns the Bill provides that authorisations given to both Ministers and Parliamentary Secretaries must be in writing. This will ensure that it is easier to ascertain the decision maker when seeking to review or challenge an administrative decision.

Due to the serious implications of the *Foster* case for government administration, it is appropriate that urgent legislative action be taken to clarify the legal basis for ministerial authorisations and to validate past authorisations that have been made in reliance on section 19 to the extent that they may be invalid.

The amendments will in no way prejudice practice that has in the past ensured due process. On the contrary, the amendments validate past practice. In addition, the new requirement that authorisations be in writing reinforces due process.

The Committee thanks the Attorney-General for this comprehensive response.

Barney Cooney
Chairman

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT OF 1998

The Committee presents its Eleventh Report of 1998 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Taxation Laws Amendment Bill (No. 2) 1998

Taxation Laws Amendment Bill (No. 2) 1998

Introduction

The Committee dealt with this bill in *Alert Digest No 10 of 1998*, in which it made various comments. The Assistant Treasurer has responded to those comments in a series of letters dated 3 December 1998. Copies of the letters are attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's responses are discussed below.

Extract from Alert Digest No 10 of 1998

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

The bill proposes to amend the following Acts:

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

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

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

- *Fringe Benefits Tax Assessment Act 1986* to:

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

- introduce new record keeping exemption arrangements; and

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

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

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

- simplify "arranger" provisions; and

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

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

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

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

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

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

Relevant extract from the response from the Assistant Treasurer

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

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

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

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

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

I trust the above has been of assistance.

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

Legislation by press release
Schedule 1, Part 2 and Schedule 9

The amendments proposed by Part 2 of Schedule 1 to the bill are to apply from 29 April 1997, being the date of the Treasurer's press release on the matter. Similarly, the amendments proposed by Schedule 9 are to apply from the same date, being the date of a separate press release issued by the Treasurer.

In each case, the application provision is outside the 'six month rule', as set out in the Senate resolution of 8 November 1988. This resolution, which deals with taxation legislation only, states that:

Where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill.

Accordingly the Committee **seeks the Treasurer's advice** as to the reason for the delay in putting the proposed amendments into legislative form.

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

Relevant extracts from the responses from the Assistant Treasurer

Part 2 of Schedule 1

On 29 April 1997, the Treasurer announced that the *Income Tax Assessment Act 1936* (the Act) would be amended to deny the ability to offset against capital gains certain capital losses created by an arrangement entered into before 3 pm on 29 April 1997 and to prevent the use of capital losses artificially created through an arrangement entered into after that time.

The measures to amend the Act were contained in Schedule 1 of *Taxation Laws Amendment Bill (No 6) 1997*, (TLAB6) which was introduced into the House of Representatives on 29 October 1997, six months after the date of announcement. TLAB 6 was passed by the House of Representatives, but had not completed its passage through Parliament when Parliament was prorogued for the Federal election on 31 August 1998. The measures used a two pronged approach. Part 1 was designed to prevent the use of capital losses artificially created by a particular type of scheme. Part 2 amended the general anti-avoidance provisions contained in Part IVA of the Act, so that they could apply to artificially created capital losses in the year in which they are created if they were created under a scheme entered into after 3 pm on 29 April 1997.

The Senate resolved on 8 November 1988 that taxation laws which apply from the date of announcement must be introduced into Parliament or published in draft form within 6 months of that date. This resolution does not specifically take into account Bills which lapse if Parliament is prorogued for a Federal election. However the Senate has previously agreed that a lapsed measure which is reintroduced should retain the status it had when first introduced, so far as the 'six month rule' is concerned (for example the Trust Loss measures contained in *Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997*. In the case of these measures, the spirit of the resolution has been met as the details of the proposed laws were made available to the public in the form of a Bill introduced into Parliament within the required 6 months.

In addition, altering the date of effect of Part 2 of Schedule 1 of TLAB 2 would unfairly advantage taxpayers who have disregarded the proposed measures compared to those who have complied.

The measures contained in Schedule 1 of TLAB 2 should therefore be treated as having been introduced on 29 October 1997, for the purposes of the 'six month rule' ...

Part 2 of the proposed legislation is not retrospective and will not unduly trespass upon the personal rights and liberties of taxpayers. The legislation is designed to make the general anti-avoidance provisions more effective in preventing the creation of artificial capital losses to offset against capital gains.

I trust this answers your concerns.

Schedule 9

In Alert Digest No 10 of 2 November 1998, the Committee queried the length of time between the issue of a Press Release with an immediate date of effect and introduction of the legislation.

On 29 April 1997 the Treasurer announced that the *Income Tax Assessment Act 1936* (the Tax Act) would be amended to require life insurance companies to use average calculated liabilities, rather than calculated liabilities at the end of the year of income, as the basis for determining:

. the amount of income that relates to immediate annuity policies;

. the amount of income that is attributable to overseas branches; and

. the amount of income and capital gains to be allocated to each class of assessable income.

The use of average calculated liabilities will provide a more accurate reflection of the liabilities a life company has for policies held during the income year to be used in the assessment of income tax and will remove distortions that arise by using calculated liabilities at the end of the year of as the basis of apportioning income.

The amendments apply from the first income year that commences on or after 29 April 1997. However, the amendments will apply to a preceding year of income if a significant event occurred in one of the insurance funds of a life company in the period from 29 April 1997 to the end of the income year.

The measures to amend the Tax Act were originally contained in *Taxation Laws Amendment Bill (No. 6) 1997* (TLAB No 6) which was introduced into the House of Representatives on 29 October 1997, six months after the date of announcement. TLAB No 6 was passed by the House of Representatives, but had not completed its passage through Parliament when Parliament was prorogued for the Federal election on 31 August 1998.

The Senate resolved on 8 November 1988 that taxation laws which apply from the date of announcement must be introduced into Parliament or published in draft form within six months of that date. This resolution does not specifically take into account Bills which lapse if Parliament is prorogued for a Federal election. However the Senate has previously agreed that a lapsed measure which is reintroduced should retain the status it had when first introduced so far as the 'six month rule' is concerned (for example the Trust Loss measures contained in *Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997)*. In the case of these measures, the spirit of the resolution has been met as the details of the proposed laws were made available to the public in the form of a Bill introduced into Parliament within the required six months.

In addition, the impact of the amendments in Schedule 9 of TLAB No 2 will sometimes be beneficial to taxpayers. Altering the date of effect of the Schedule would cause disruption to taxpayers who have acted in the expectation that the amendments will be passed by Parliament. The measures contained in Schedule 9 of TLAB No 2 should therefore be treated as having been introduced on 29 October 1997 for the purposes of the 'six month rule' ...

Schedule 9 of TLAB No 2 is not retrospective and will not unduly trespass upon the personal rights and liberties of taxpayers.

I trust this answers your concerns.

The Committee thanks the Assistant Treasurer for these responses, which address its concerns regarding the introduction of the proposals within the 'six month rule'.

Retrospective application
Schedule 7, Parts 1 and 2, and Schedule 8

As a budget announcement, the amendments proposed by Parts 1 and 2 of Schedule 7 apply to assets acquired after 13 May 1997. The amendments proposed by Schedule 8 apply from 1 July 1997.

The Committee usually accepts that measures announced in a Budget may be deemed to apply from Budget night. However, the usual practice is that legislation giving effect to such measures is introduced into Parliament within a few months of the bringing down of the Budget. If the Budget were to be regarded as the equivalent of a Press Release, the amendments proposed in these Schedules would clearly fall outside the six-month period referred to in the Senate Resolution of 8 November 1988.

Accordingly, the Committee **seeks the advice of the Treasurer** on the reason for the delay in putting these proposed amendments into legislative form and whether there are any precedents for such delays in introducing legislation to give effect to Budget measures.

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

Relevant extracts from the responses from the Assistant Treasurer

Parts 1 and 2 of Schedule 7

On 13 May 1997, the Treasurer announced that the *Income Tax Assessment Act 1936* (the Act) would be amended to require taxpayers to reduce the cost base of an asset for CGT purposes by deductible expenditure.

The measures to amend the Act were contained in Taxation Laws Amendment Bill (No 6) 1997, (TLAB 6) which was introduced into the House of Representatives on 29 October 1997, within six months of the date of announcement. TLAB 6 was passed by the House of Representatives, but had not completed its passage through Parliament when Parliament was prorogued for the Federal election on 31 August 1998.

The Senate resolved on 8 November 1988 that taxation laws which apply from the date of announcement must be introduced into Parliament or published in draft form within 6 months of that date. This resolution does not specifically take into account Bills which lapse if Parliament is prorogued for a Federal election. However the Senate has previously agreed that a lapsed measure which is reintroduced should retain the status it had when first introduced, so far as the 'six month rule' is concerned (for example the Trust Loss measures contained in *Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997)*. In the case of these measures, the spirit of the resolution has been met as the details of the proposed laws were made available to the public in the form of a Bill introduced into Parliament within the required 6 months.

In addition, altering the date of effect of Schedule 7 of TLAB 2 would unfairly advantage taxpayers who have disregarded the proposed measures compared to those who have complied. The measures contained in Schedule 7 of TLAB 2 should therefore be treated as having been introduced on 29 October 1997, for the purposes of the 'six month rule' …

The proposed legislation is not retrospective and will not unduly trespass upon the personal rights and liberties of taxpayers. The legislation reflects the principle that an item of expenditure should either be deductible for income tax purposes or included in the cost base of an asset for CGT purposes but not both.

I trust this answers your concerns.

Schedule 8

Schedule 8 replaces the formulae contained in subsections 446(2) and (4) of the *Income Tax Assessment Act 1936* used to calculate the passive income of life and general insurance companies. The measure was announced in the 1997-98 Budget on 13 May 1997 and will correct a deficiency in the existing formulae used to calculate the passive income of the controlled foreign companies (CFCs) of life and general insurance companies.

The deficiency in each existing formula is that it excludes passive income derived from assets that are held by the CFC which are in excess of those needed to meet the calculated liabilities of policy holders of life assurance CFCs, or those needed to be set aside to meet the outstanding claims of general insurance CFCs. The new formulae will remedy this deficiency by excluding from a CFC's passive income only the income derived on assets that are referable to insurance policies owned by non-residents that are not related to the company.

The amendments to give effect to this measure were contained in Taxation Laws Amendment Bill (No. 6) 1997 which was introduced into Parliament on 29 October 1997, within six months of the date of announcement. This Bill was passed by the House of Representatives, but had not completed its passage through Parliament when Parliament was prorogued for the Federal election on 31 August 1998.

The Senate resolved on 8 November 1988 that taxation laws which apply from the date of announcement must be introduced into Parliament or published in draft form within 6 months of that date. This resolution does not specifically take into account Bills which lapse if Parliament is prorogued for a Federal election. However the Senate has previously agreed that a lapsed measure which is reintroduced should retain the status it had when first introduced so far as the "six month rule" is

concerned (for example the Trust Loss measures contained in *Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997)*. In the case of these measures, the spirit of the resolution has been met as the details of the proposed laws were made available to the public in the form of a Bill introduced into Parliament within the required 6 months.

In addition, altering the date of effect of Schedule 8 of TLAB2 would unfairly advantage taxpayers who have disregarded the proposed measures compared to those who have complied. The measures contained in Schedule 8 of TLAB 2 should therefore be treated as having been introduced on 29 October 1997 for the purposes of the "six month rule" ...

As indicated above, it is considered that the proposed legislation is not retrospective and will not unduly trespass upon the personal rights and liberties of taxpayers. The legislation protects the revenue by ensuring that only the passive income derived from assets that are referable to policies owned by non-residents who are not related to the company will be excluded from passive income.

I trust this answers the Committee's concerns.

The Committee thanks the Assistant Treasurer for these responses, which address its concerns regarding the introduction of the proposals within the 'six month rule'.

Barney Cooney
Chairman