

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1986

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) That the Committee, for the purpose of reporting upon the clauses of a Bill when the Bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1986

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

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

Australia Card Bill 1986

Australian Capital Territory Tax (Transfers of Marketable Securities) Bill 1986

Overseas Students Charge Amendment Bill 1986

Overseas Students Charge Collection Amendment Bill 1986

Parliamentary Privileges Bill 1986

Protection of the Sea Legislation Amendment Bill 1986

Science and Industry Research Legislation Amendment Bill 1986

Subsidy (Cultivation Machines and Equipment) Bill 1986

Taxation Laws Amendment Bill (No.4) 1986

AUSTRALIA CARD BILL 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Minister for Health.

The purpose of the Bill is to create a national system of identification to facilitate the administration and operation of Commonwealth laws relating to taxation, social security, medical and hospital benefits and immigration.

The Bill provides for the operation of the national system of identification by the establishment of the Australia Card Register and the issue of an Australia Card. The Health Insurance Commission will be the administering authority for the Australia Card program.

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

Sub-clause 12(15) - Lack of parliamentary scrutiny

Sub-clause 12(15) provides that persons included in a class of persons specified by the Minister by notice in the Gazette are not to be obliged to comply with requirements made by an issuing agency with respect to the making of photographs, the provision of specimen signatures and attendance at interviews. No provision has been made for parliamentary scrutiny of such notices and they are therefore not subject to tabling and disallowance as would be the case if the classes of persons to be exempted were to be prescribed by regulations.

The Committee drew sub-clause 12(15) to the attention of the Senate under principle 1(a)(v) in that it might be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister for Health has responded:

'I appreciate the Committee's concern in this matter. Although the provision was devised as a method for the Minister to exempt a person, included in a class of persons specified in the notice, from one or more of the requirements in clause 12, in the event that it appears unreasonable for the person to have to comply with the requirements, I agree that there should be Parliamentary scrutiny of such notices and that they should be subject to tabling and disallowance provisions.'

The Minister further indicates that the necessary amendments will be made through the Statute Law (Miscellaneous Provisions) Bill in the Autumn Session of 1987. The Committee thanks the Minister for this undertaking, which answers its concerns in relation to the sub-clause. While the Committee would prefer to see the amendments made to the Bill while the Bill is before the Parliament the Committee can see the difficulty the Minister would be placed in were the Senate to agree to the amendments only after the House of Representatives had risen for the summer recess.

Sub-clause 25(6) - Availability of personal information for public access

Sub-clause 25(6) provides that the provisions of the Act, other than, inter alia, sub-sections 55(1) and (3), apply in relation to applications and requests made to the Authority and documents given to the Authority to verify the identity and eligibility of persons as if those documents formed part of the Australia Card Register. Such applications and documents will contain personal information to be included on the Register and it is therefore important that they be given the same protection with regard to unauthorised access and improper disclosure as is given to the Register itself. However sub-sections 55(1) and (3) are the provisions which exempt the Register from the application of the Freedom of Information Act 1982 and (except to the extent that the Register contains information that relates only to persons

who are dead) the Archives Act 1983. It is therefore apparently intended that, subject to the exemptions specified in those Acts, access will be available to the applications and documents referred to above pursuant to those Acts even though the Register itself will be exempt.

The Committee stated that it seemed clear that the relevant applications and documents, to the extent that they contained personal information, would be exempt from disclosure under the two Acts on the ground that to make them available would involve an unreasonable disclosure of information relating to the personal affairs of a person (see section 41 of the Freedom of Information Act 1982 and paragraph 33(1)(g) of the Archives Act 1983). However the Committee raised the question why it had been chosen to rely on these exemptions, which might be uncertain in their application, rather than to include the applications and other documents in the blanket exception to be provided by sub-clauses 55(1) and (3). Such applications and other documents by their very nature could only contain personal information required to be entered on the Register, information relevant to such information or to the verification of such information and information relating to the identity of a person or the eligibility of a person for the issue of a Card. The Committee therefore drew sub-clause 25(6) to the attention of the Senate under principle 1(a)(i) in that by leaving open the possibility that such personal information might be made available for public access it might be considered to trespass unduly on personal rights and liberties. The Minister for Health has responded:

'The Freedom of Information Act and the Archives Act were excluded from applying to the Register because Part V of the Bill provides a system of access to the Register for Card-subjects. It would have been unnecessary and unproductive to duplicate those provisions by allowing the Freedom of Information Act and the Archives Act to apply to the Register.

The documents covered by sub-clause 25(6) are not formally part of the Register and it was not considered appropriate to attempt to modify the system devised for access to the Register in Part V of the Bill to those documents. Any personal information in the documents will be given the same degree of protection as any similar documents to which access is sought under the Freedom of Information Act or the Archives Act. The degree of protection given to personal information under those Acts is considered to be no less than that provided to information on the Australia Card Register under the Australia Card legislation.'

The Committee thanks the Minister for this response. While in practice the protection accorded to personal information by the Freedom of Information Act 1982 ('FOI Act') and the Archives Act 1983 ('Archives Act') may be no less than that provided for information on the Australia Card Register under the Australia Card Bill 1986, the Committee notes that it is structured differently. Whereas under the Bill only the Card-subject or the prescribed representative of the Card-subject (apart from officials of the Department of Social Security, the Taxation Office and the Health Insurance Commission) are to be entitled to access to the Register, under the FOI Act and the Archives Act there is a prima facie right of public access. The question whether access should be refused on the ground that the document contains information relating to the personal affairs of a person rests to be determined in respect of the FOI Act by the agency or Minister to which the request for access is made (having regard to any submissions which may be made by the person whose personal affairs are in issue under new section 27A to be inserted in the FOI Act by the Privacy (Consequential Amendments) Bill 1986) and in respect of the Archives Act by the Director-General of the Archives in consultation with the responsible Minister. In both cases an appeal from the refusal to grant access lies to the Administrative Appeals Tribunal. Thus the protection accorded by

the FOI Act and the Archives Act may be said at least to be less certain than that provided to information on the Australia Card Register by the Bill.

In continuing to draw sub-clause 25(6) to the attention of the Senate, together with the Minister's response, the Committee hopes to promote a fuller consideration of the issue involved at the Committee stage of debate on the Bill.

Sub-clauses 121(1), 145(1) and 147(1) - Lack of limitation as to reasonableness of time or place

Sub-clauses 121(1) and 145(1) provide that a member of the Data Protection Agency or an Associate Commissioner conducting an inquiry in relation to a reviewable decision or an investigation into a complaint may require a person, by notice in writing, to furnish information and produce documents or records relevant to the inquiry or investigation 'at such place, and within such period or on such day and at such time, as are specified in the notice'. Sub-clause 147(1) provides that the Agency may, by notice in writing, require a complainant, the body about which a complaint has been made and any other person who, in the opinion of the Agency, is likely to be able to provide information relevant to the matter to which the complaint relates to attend a compulsory conference 'at a time and place specified in the notice'. Failure to comply with a notice under sub-clause 121(1) or 145(1) without reasonable excuse is an offence punishable by a fine of \$2,000 or imprisonment for 12 months or both in the case of a natural person and by a fine of \$10,000 in the case of a body corporate. Failure to attend a compulsory conference as required under sub-clause 147(1) without reasonable excuse is an offence punishable by a fine of \$1,000 or imprisonment for 6 months or both in the case of a natural person and by a fine of \$5,000 in the case of a body corporate.

In none of the three sub-clauses is it specified that the times and places at which persons may be required to attend or to furnish information or produce documents must be reasonable. As

the Committee has stated previously in regard to similar provisions, it does not consider that the defence of reasonable excuse for non-compliance is a sufficient safeguard and it does not believe that such powers should be read as subject to an implicit requirement of reasonableness. The highest that this latter argument can be put in the Committee's view is that relief could be granted if the power were to be exercised in such a manner that no reasonable person could have exercised the power in that fashion. This is rather different from a positive stipulation in the legislation that the times and places at which persons may be required to attend should be reasonable. The Committee therefore drew sub-clauses 121(1), 145(1) and 147(1) to the attention of the Senate under principle 1(a)(i) in that by failing to contain such a stipulation they might be considered to trespass unduly on personal rights and liberties. The Minister for Health has responded:

'My view is that exercise of the powers referred to in these sub-clauses would be subject to an implicit requirement of reasonableness and if the powers were exercised unreasonably they would be subject to challenge in the courts. The defence of reasonable excuse would also assist persons who having received a notice to attend an Agency inquiry or to provide information to the Agency were unable rather than unwilling to attend an inquiry or investigation or produce the information.

However I appreciate the viewpoint expressed by the Committee that the provisions specified should include a proviso that the times and places referred to in notices should be reasonable - and I undertake that this test of reasonableness will be made explicit on the face of the legislation.'

Once again the Minister indicates that the necessary amendments will be made through the Statute Law (Miscellaneous Provisions) Bill in the Autumn Session of 1987. The Committee thanks the Minister for this undertaking, which answers its concerns in relation to the sub-clauses.

Clause 186 - Delegation

Sub-clause 186(1) provides that the chief executive officer of the administering Authority and the President of the Agency may each delegate to 'a person' all or any of their powers under the Act, other than the power of delegation. The Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. Given the nature of the powers to be delegated in the present case, the Committee stated that it thought it unlikely that it would be necessary for the scope of the delegation to extend beyond the confines of the staff of the Authority and office-holders and staff of the Agency respectively.

The Committee therefore drew sub-clause 186(1) to the attention of the Senate under principle 1(a)(ii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers. The Minister for Health has responded:

'I did not envisage that this clause would be used by the chief executive officer of the Authority or President of the Agency to delegate powers to anyone other than the staff of the Authority or the office-holders and staff of the Agency. The word 'person' is used in the clause to encapsulate in one word those to whom the powers can be delegated, namely the staff of the Authority and the Agency and the office-holders of the Agency. I am willing to undertake

that the legislation should be amended so that the intention to restrict the scope of the delegation in this way appears on the face of the legislation.'

Once again the Minister indicates that the necessary amendment will be made through the Statute Law (Miscellaneous Provisions) Bill in the Autumn Session of 1987. The Committee thanks the Minister for this undertaking which answers its concerns in relation to the clause.

AUSTRALIAN CAPITAL TERRITORY TAX (TRANSFERS OF MARKETABLE SECURITIES) BILL 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Assisting the Treasurer.

The Bill will impose Australian Capital Territory tax on the registration, by a company incorporated in the ACT, of transfers of marketable securities listed on a register kept outside the ACT.

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

Clause 2 - Retrospectivity

Clause 2 provides that the Act is to be deemed to have come into operation on 10 June 1986, that being, according to the Explanatory Memorandum, the date on which the proposed imposition of this new tax was announced. Certain associated provisions of the Australian Capital Territory Stamp Duty Amendment Bill 1986 and amendments to the Australian Capital Territory Taxation (Administration) Act 1969 contained in the Taxation Laws Amendment Bill (No.4) 1986 will also be retrospective to 10 June 1986.