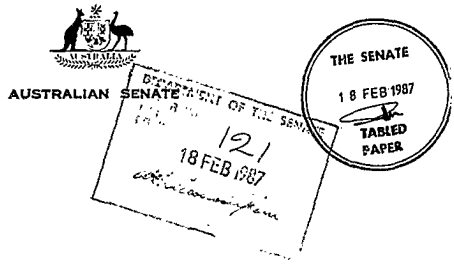

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1987

18 FEBRUARY 1987

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1987

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ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

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

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1987

The Committee has the honour to present its First Report of 1987 to the Senate.

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

Aboriginal Land Rights (Northern Territory) Amendment Bill 1986

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL 1986

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

The Bill will amend the Aboriginal Land Rights (Northern Territory) Act 1976 for various purposes, including to add to the functions, powers and duties of Land Councils, to provide a scheme for the amalgamation of Land Trust areas, and to revise the scheme for the grant of estates or interests in Aboriginal land. Other amendments would add to and vary some aspects of the functions of an Aboriginal Land Commission, further limit the categories of land which can be the subject of a traditional land claim and prevent the alienation of land which is subject to a traditional land claim.

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

Clause 33 - New paragraphs 67A(1)(a) and (3)(a) - Retrospectivity

Clause 33 would insert a new section 67A. New paragraphs 67A(1)(a) and (3)(a) would have invalidated any grant of an estate or interest in, and any reservation, dedication or setting aside of, an area of land purportedly effected after 28 May 1986 and prior to the commencement of the new section, where the area of land in question was the subject of a traditional land claim which had not been finally disposed of.

The Explanatory Memorandum provided no explanation for the retrospective application of this section or the selection of 29 May in particular as the date of effect. The Committee drew new paragraphs 67A(1)(a) and (3)(a) to the attention of the Senate under principle 1(a)(i) in that by reason of their

retrospective effect they might be considered to trespass unduly on personal rights and liberties. The Minister for Aboriginal Affairs has responded, noting in the first instance that new paragraph 67A(3)(a) was omitted in the House of Representatives on 27 November 1986. He continued:

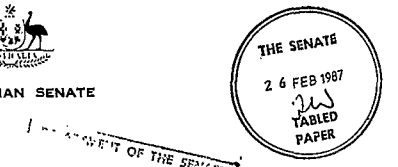
> 'The reason for inclusion of the proposed paragraph 67A(1)(a) is straightforward. On 28 May 1986, the Northern Territory Government was provided with information concerning the Commonwealth's proposals for amending the Aboriginal Land Rights (Northern Territory) Act 1976. These included the proposals now covered in Clause 33, proposed section 67A, for preventing unalienated Crown land which is the subject of a traditional land claim from being alienated, reserved, dedicated or set aside. I might say here that, without such a provision, there is a risk that a primary intent of the Act to allow claims to be made to unalienated Crown land, could be frustrated. This is an important issue, which was dealt with by Mr Justice Toohey in Chapter 9 of his review of the Act, "Seven Years On", and the proposed section 67A flows from his recommendations.
>
> The purpose of setting 28 May as the date is to protect against any actions being taken, subsequent to notification of intention to the Northern Territory Government, which would have the effect of nullifying the intent of the amendment.'

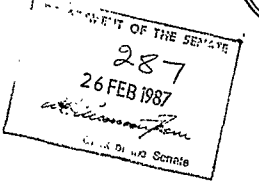
The Committee thanks the Minister for this response. The Committee has consistently criticised the increasingly prevalent practice of making legislation retrospective to the date of the announcement of the proposal to change the law: see, most recently, its comments on the Taxation Laws Amendment Bill (No.4)

1986 in its Eighteenth Report of 1986. The practice carries with it the assumption that citizens should act in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. It treats the passage by the Parliament of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. In the present case it appears from the Minister's response that only the Northern Territory Government was informed of the proposed change to the law even though the retrospective invalidation of any grants of estates or interests in areas of land under claim may affect private citizens who may have dealt with the Northern Territory Government in good faith. The Committee therefore continues to draw new paragraph 67A(1)(a) to the attention of the Senate under principle 1(a)(i) in that by reason of its retrospective effect it may be considered to trespass unduly on personal rights and liberties.

Rosemary Crowley
Acting Chair
18 February 1987

AUSTRALIAN SENATE





SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF 1987

25 FEBRUARY 1987

THE SENATE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF 1987

The Committee has the honour to present its Second Report of 1987 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:

Aborigines and Islanders (Admissibility of Confessions) Bill 1986

Collective Agreements (Corporations) Bill 1986

Taxation Laws Amendment Bill (No. 5) 1986

ABORIGINES AND ISLANDERS (ADMISSIBILITY OF CONFESSIONS) BILL 1986

This Bill was introduced into the Senate on 5 December 1986 by Senator Macklin.

The purpose of the Bill is to make certain provisions relating to the admissibility of confessions made by Aborigines and Pacific or Torres Strait Islanders while in police custody.

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

Sub-clause 15(8) - Time limit for destruction of recording

Sub-clause 15(8) provides that a recording of an interview between an officer and an Aborigine or Islander 'shall be destroyed by the officer having the custody of the recording where proceedings for an offence have not been instituted against the [Aborigine or Islander] within 12 months after the day on which the recording was made'. While it may be the intention that the recording will be destroyed forthwith or as soon as practicable after the expiration of the 12 month period allowed for the institution of proceedings, the provision does not make this explicit. On one reading the timing for the destruction of the recording would be left to the officer having the custody of the recording.

The Committee therefore drew sub-clause 15(8) to the attention of the Senate under principle 1(a)(i) in that, because it did not impose on the officer having custody of a recording a positive obligation to destroy the recording within a particular period of time, it might be considered to trespass unduly on personal rights and liberties. Senator Macklin has responded undertaking

to move an amendment to the Bill substituting a new sub-clause 15(8) which would require that a recording be destroyed 'forthwith' upon the expiry of the 12 month period allowed for the institution of proceedings. The Committee thanks the Senator for this undertaking which answers its concerns in relation to the provision.

COLLECTIVE AGREEMENTS (CORPORATIONS) BILL 1986

This Bill was introduced into the Senate on 26 November 1986 by Senator Siddons.

The purpose of the Bill is to provide for collective agreements, between unions and employers, regulating the terms and conditions of employment of employees of corporations. The Bill is intended to allow unions and employers to enter into binding contracts outside the centralised wage fixing system, should they desire, while retaining the centralised system. It will, however, prevent such collective agreements from undercutting awards.

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

Sub-clause 20(3) - Reversal of onus of proof

Sub-clause 20(1) creates an offence where a corporation victimises an employee by reason of the employee's membership of an association of employees or the employee's actions as an officer or delegate of such an association. Sub-clause 20(3) provides that in proceedings in relation to such an offence, if all elements of the charge other than the necessary reason or intent are established, it shall lie upon the corporation or

person charged to prove that the action the subject of the charge was not actuated by the relevant reason or taken with the necessary intent. The effect of sub-clause 20(3) is thus to place upon the defendant the persuasive burden of proof in negativing certain elements of the offence.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed upon defendants in criminal proceedings but rather that they should merely be required to bear an evidential onus, that is, the onus of adducing evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution. Thus in the present case the defendant might be required to adduce evidence that he or she was not actuated by the relevant reason or did not act with the required intent.

The Committee draws sub-clause 20(3) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive burden of proof on defendants it may be considered to trespass unduly on personal rights and liberties.

TAXATION LAWS AMENDMENT BILL (NO. 5) 1986

This Bill was introduced into the House of Representatives on 28 November 1986 by the Minister Assisting the Treasurer.

The Bill will amend the Income Tax Assessment Act 1936 -

- to provide, for the 1987-88 and subsequent years of income, for the payment of provisional tax by quarterly instalments during the year of income by taxpayers whose annual provisional tax liability exceeds $2000 (September 1985 Tax Reform announcement);

- to treat as assessable income certain realised foreign exchange gains of a capital nature and to allow corresponding income tax deductions for losses, to the extent that the gains or losses are related to the production of assessable income or the carrying on of a business for that purpose (proposal announced by the Treasurer on 18 February 1986);

- to ensure that dividends paid on redeemable preference shares and any other shares issued as part of a short-term financing arrangement for an effective term to maturity of 2 years or less will not be eligible for the intercorporate dividend rebate, but will be tax deductible to the issuing company (proposal announced on 7 April 1986); and

- to exempt from tax the income of the British Phosphate Commissioners Banaba Contingency Fund.

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

Clauses 7 and 9 - Retrospectivity

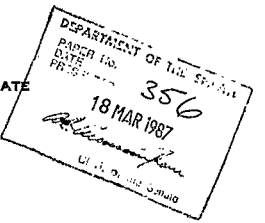
Clause 7 would insert a new section 46C in the Income Tax Assessment Act 1936 denying eligibility for the intercorporate dividend rebate to dividends issued in substitution for interest as part of short-term finance arrangements. The new section will affect dividends issued after 5 o'clock on 7 April 1986, the day on which the proposal was announced. As Parliament was not sitting on that day this announcement was presumably made by way of a press conference or press release. Clause 9 would insert a new Division 3B in Part III of the same Act to provide that foreign exchange gains of a capital nature realised on or after 19 February 1986 (the day after the proposal was announced) are to be treated as assessable income (and that a corresponding deduction is to be allowed in respect of foreign exchange losses realised on or after that date). As in the case of clause 7 the proposal in question was not announced in Parliament but presumably by way of a press release or press conference.

Once again the Committee has occasion to draw attention to the practice of the Taxation Office of making legislation retrospective to the date of the announcement of the proposal to change the law. As it commented in its Eighth Report of 1986 in relation to the Taxation Laws Amendment Bill 1986, in its Ninth Report of 1986 in relation to the Taxation Laws Amendment Bill (No.2) 1986 and in its Eighteenth Report of 1986 in relation to the Taxation Laws Amendment Bill (No.4) 1986, this practice carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. The practice treats the passage by the Parliament of the necessary retrospective legislation 'ratifying' the announcement as a pure formality.

The Committee therefore draws clauses 7 and 9 to the attention of the Senate under principle 1(a)(i) in that by their retrospective application they may be considered to trespass unduly on personal rights and liberties.

Rosemary Crowley
Chair
25 February 1987

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1987

18 MARCH 1987

THE SENATE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1987

The Committee has the honour to present its Third Report of 1987 to the Senate.

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

Australian Protective Service Bill 1986
Australian Stock Exchange and National Guarantee Fund Bill 1987
Commonwealth Guarantees (Charges) Bill 1986

AUSTRALIAN PROTECTIVE SERVICE BILL 1986

This Bill was introduced into the House of Representatives on 16 October 1986 by the Minister for Local Government and Administrative Services. It passed the House on 18 February 1987 and the Senate on 26 February.

The purpose of the Bill is to give legislative recognition to the Australian Protective Service as a body within the Public Service providing personal and property security and custodial services for and on behalf of the Commonwealth.

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

Sub-clause 19(4) - Reversal of the onus of proof

Sub-clause 19(3) provides that it is to be an offence if a protective service officer does not, at all times when in uniform, wear his or her identification number on, or attached to, the front of the uniform. A penalty of a maximum fine of $500 is provided. By virtue of sub-clause 19(4) it is to be a defence to a prosecution for an offence against sub-clause 19(3) if the defendant proves that the contravention resulted from -

(a) an act of another person done without the consent of the defendant; or

(b) an unintentional omission of the defendant.

In other words, once the prosecution establishes that a protective service officer was not wearing his or her identification number, the onus is cast upon the officer concerned to establish one of the defences contained in paragraph 19(4)(a) or (b) on the balance of probabilities.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings but rather that they should merely be required to bear the evidential onus, that is the onus of adducing evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution. Thus in the present case the protective service officer might be required to adduce evidence of one of the defences contained in paragraph 19(4)(a) or (b) rather than being required to prove those defences on the balance of probabilities.

The Committee therefore drew sub-clause 19(4) to the attention of the Senate under principle 1(a)(i) in that by reversing the persuasive onus of proof it might be considered to trespass unduly on personal rights and liberties. The Minister for Local Government and Administrative Services has responded:

> 'As you are aware, I have always been a strong supporter of the protection of personal freedom. As a general rule I would share the views of the Standing Committee on Constitutional and Legal Affairs as to where the burden of proof should lie in criminal proceedings. However, in this case the situation is rather different because the whole purpose of clause 19 is to protect members of the public against any possible attempt by protective service officers to abuse their position without being identifiable. It is important to consider the personal rights and liberties of people in general, not just of the officers directly affected.
>
> You may have noticed that sub-clauses 19(3), (4) and (5) are modelled on section 64A of the Australian Federal Police Act 1979. As the Protective Service is finding itself more and more in the role of handling

demonstrations at Commonwealth premises, especially at controversial locations such as Pine Gap and Nurrungar, the same sorts of provisions as apply to police would seem to be appropriate.

I must say that I have at present no reason to suppose that protective service officers would deliberately remove their identification numbers or maliciously act in a way that went beyond their lawful powers. Nevertheless it seems to me that people are rightly concerned that where special powers affecting liberty are given to public officers the officers should be made strictly accountable for the way they perform their duties. Moreover, if an officer fails to wear an identification number the officer is the person in the best position (perhaps the only person in any position) to know the reason for this failure and so starts with advantage as against the person whose complaint initiated the case.

As I pointed out to [Senator Tate in his] capacity as Chairman of the Caucus Committee on Legal and Administrative Affairs the draft of this Bill was presented to the Sydney barrister, Mr John Young, for comment. Mr Young discussed the question of the reversed onus in this clause with the officers of my Department and it was agreed that in the particular circumstances it is not an unreasonable provision.'

The Committee thanks the Minister for this response. The Committee notes that its concern was drawn to the attention of the Senate by Senator Archer in the course of the Second Reading debate on the Bill on 26 February 1987.

AUSTRALIAN STOCK EXCHANGE AND NATIONAL GUARANTEE FUND BILL 1987

This Bill was introduced into the House of Representatives on 18 February 1987 by the Attorney-General. It passed the House on 25 February and the Senate on 26 February.

The Bill is the same in substance as the Australian Stock Exchange and National Guarantee Fund Bill 1986 introduced at the end of last session but with a number of amendments. The purpose of the Australian Stock Exchange and National Guarantee Fund Bill 1987 is twofold:

- to provide legislative support for a reorganisation of stock exchanges in Australia to establish a single national stock exchange, the Australian Stock Exchange Ltd, with each of the 6 current capital city exchanges as its subsidiaries;

- to create a national guarantee fund consisting of the pooled assets of the existing fidelity funds operated by the separate capital city exchanges, which will provide greater protection to investors in respect of failure of contracting parties to meet their transaction obligations or in respect of dealer insolvency.

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

Clause 7 -
Proposed new sub-section 95(7) - Reversal of the onus of proof

Clause 7 would insert new sections 94A and 95 in the Securities Industry Act 1980. New sub-section 95(1) would require a member organisation of a stock exchange to lodge and maintain a deposit with the exchange. New sub-section 95(7) would provide that it is a defence to a prosecution for a contravention of sub-section (1) if it is established that the contravention was attributable to

the making of a payment out of the trust account kept by the person or partnership concerned, being a payment that the person or partnership was authorised to make under the Act and which the person or partnership would not have been able to make if sub-section (1) had been complied with.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed upon defendants in criminal proceedings but rather that they should merely be required to bear an evidential onus, that is, the onus of adducing evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution. Thus in the present case the person or partnership might be required to adduce evidence of the relevant facts constituting the defence rather than being required to establish the defence on the balance of probabilities.

The Committee has drawn attention on previous occasions to a number of reversals of the persuasive onus of proof in legislation forming part of the national uniform companies and securities scheme (see in particular its Eleventh Report of 1986). The Committee noted that as regarded the reversal of the onus of proof the new section 45 did not differ from the existing section 95 of the Securities Industry Act 1980. Nevertheless the Committee drew new sub-section 95(7) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive burden of proof on defendants it might be considered to trespass unduly on personal rights and liberties.

COMMONWEALTH GUARANTEES (CHARGES) BILL 1986

This Bill was introduced into the House of Representatives on 14 November 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to give effect to the decision by the Government, announced by the Treasurer in the 1986 Budget Speech, that from 1986-87 an annual charge should be applied to borrowings or other raisings of money by Commonwealth semi-government authorities which are guaranteed by the Commonwealth.

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

Sub-clause 4(1) - Retrospectivity

Sub-clause 4(1) provides that the Act is to apply to borrowings undertaken on or after 1 July 1986 by the Commonwealth authorities listed in the Schedule. Thus, although the proposal to impose an annual charge on such borrowings guaranteed by the Commonwealth was announced in the Budget, it is to take effect from the beginning of the financial year.

The Committee suggested that not only was the retrospective operation of the proposal obviously to the disadvantage of the Commonwealth authorities concerned, but to the extent that it was anticipated that the charge would be passed on to persons dealing with those authorities it might be said to be to the disadvantage of those persons also. The Committee therefore drew sub-clause 4(1) to the attention of the Senate under principle 1(a)(i) in that by giving the Bill retrospective operation to 1 July 1986 it might be considered to trespass unduly on personal rights and liberties. The Treasurer has responded:

> 'The Commonwealth guarantee charge and its date of application were announced in the 1986 Budget Speech.
>
> The charge is imposed only on Commonwealth authorities and in that sense does not impinge on the personal rights and liberties of individuals.

> The amount of the charge is small relative to the overall costs of authorities' operations and therefore will not have any signficant effect on the cost to individuals of services provided by the authorities. Moreover, authorities cannot adjust their prices and charges retrospectively.'

The Committee thanks the Treasurer for this response which answers its concerns in relation to the clause.

Sub-clause 4(3) - 'Henry VIII' clause

Sub-clause 4(3) provides that the regulations may amend the Schedule by inserting or omitting Commonwealth authorities or otherwise and may make 'any necessary consequential amendments' to the Act. In so permitting the operation of the Act to be varied by regulations the sub-clause may be characterised as a 'Henry VIII' clause and, as such, the Committee drew it to the attention of the Senate under principle 1(a)(iv) in that it might be considered an inappropriate delegation of legislative power. The Treasurer has responded:

> 'The Bill currently would permit application of the Commonwealth guarantee charge to all Commonwealth authorities which have the power to borrow. It is not considered necessary to require that this legislation be amended by Parliament whenever a new authority with power to borrow is created or when an existing authority changes its name, forms a subsidiary company or has its borrowing powers altered. Those actions are subject to parliamentary scrutiny by other means.
>
> The clause only permits amendments to the Act that are necessarily consequent on amendments to the schedule. Examples of such consequential amendments would be amendments to clause 3 to ensure that the definition of a borrowing or raising of money by an authority for the

purposes of the Bill corresponded with the authority's own borrowing powers. It would not be lawful under this clause for regulations to be made which changed the Act's overall operation.'

The Committee thanks the Treasurer for this response. While the sub-clause is technically a 'Henry VIII' clause, the Committee recognises that in the circumstances it does not constitute an inappropriate delegation of legislative power.

Sub-clauses 5(1) and 6(1) - Lack of parliamentary scrutiny

Sub-clauses 5(1) and 6(1) provide that the Treasurer may make determinations requiring the payment by an authority to the Commonwealth of a charge calculated in the manner provided in the determination in respect of borrowings and raisings of money the repayment of which is guaranteed by the Commonwealth. Paragraphs 5(2)(c) and 6(2)(d) limit the maximum amount of charge which may be imposed to 0.5% per annum of the amount in respect of which the charge is payable.

No provision has been made for parliamentary scrutiny of the Treasurer's determinations as would have been the case, for example, had the matters dealt with in those determinations been required to be included in regulations. The Committee therefore drew sub-clauses 5(1) and 6(1) to the attention of the Senate under principle 1(a)(v) in that they might be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Treasurer has responded:

'A number of Commonwealth authorities, particularly the Commmonwealth financial institutions, have expressed concern that publication of precise details of the application of the charge could adversely affect their competitive position in capital markets.

The matters which the Treasurer may determine are explicitly set out in the Bill.'

The Committee thanks the Treasurer for this response. The Committee concedes that the Treasurer's discretion is limited by the terms of the Bill and that the Parliament will be able to be informed of the amounts of charges imposed through mechanisms other than the tabling of the determinations, for example through the Senate Estimates Committees.

Rosemary Crowley
Chair
18 March 1987

AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF 1987

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF 1987

The Committee has the honour to present its Fourth Report of 1987 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 Standing Order 36AAA:

Australian Institute of Health Bill 1987
Broadcasting Amendment Bill (No.2) 1987
Lemonthyme and Southern Forests (Commission of Inquiry) Bill 1987
Moreton Island Preservation Bill 1987

AUSTRALIAN INSTITUTE OF HEALTH BILL 1987

This Bill was introduced into the House of Representatives on 25 February 1987 by the Minister for Health.

The Bill is to establish the Australian Institute of Health as a statutory authority.

The Bill contains provisions prescribing the functions, powers and constitution of the Institute and the holding of meetings of the Institute and provides for the establishment of committees (including the Australian Institute of Health Ethics Committee) to assist the Institute in performing its functions. The Institute will be required to comply with certain provisions of the Audit Act, which include requirements that the Institute provide estimates of expenditure in respect of its proposed budget and an annual report of its activities. The Institute will also be subject to the scrutiny of the Auditor-General.

The major functions of the Institute will involve the collection, analysis and dissemination of health-related information and statistics and the conduct and promotion of research into health services for, and the health of, the people of Australia.

The role of the Institute will not affect the functions of the Australian Bureau of Statistics.

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

Paragraphs 27(1)(c) and 28(1)(c) - Delegation

Paragraphs 27(1)(c) and 28(1)(c) would permit the Institute and the Director respectively to delegate all or any of their powers under the Act (other than the power of delegation) to any person or body subject only to the approval of the Minister. The

Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the person to whom a delegation may be made. The addition in the present case of the requirement for approval by the Minister does not in the Committee's view materially alter the situation: it merely moves the place at which decisions on delegations are to be taken one level higher in the decision-making structure. The Committee's criticism of such open-ended powers of delegation is that it is for the Parliament in conferring a statutory power to determine the persons by whom that power may be exercised and not for the person on whom that power is conferred, whether that person be a Minister, a statutory authority or a statutory office-holder.

The Committee therefore draws paragraphs 27(1)(c) and 28(1)(c) to the attention of the Senate under principle 1(a)(ii) in that they may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Sub-clause 30(3) - Reversal of the onus of proof

The Epidemiological Studies (Confidentiality) Act 1981 creates offences in respect of the communication of information gained in the conduct of certain Commonwealth epidemiological studies. Sub-clause 30(3) provides that it is a defence to a prosecution under that Act if it is established that the information was communicated or access to a document was given, as the case may be, in accordance with a written request by the Institute. It thus places upon the defendant the persuasive burden of proof in establishing this defence.

The Senate Standing Committee on Constitutional and Legal Affairs in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), recommended that the burden of establishing a defence (the persuasive onus) should not be placed

upon defendants in criminal proceedings and that the evidential onus - the onus of adducing evidence of the existence of a defence - should only be imposed on defendants:

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

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

In the present case neither of these conditions would seem to apply. It should be relatively easy for the prosecution to establish in any particular case whether the Institute made a written request for the relevant information. In the view of the Committee the reversal of the onus of proof in sub-clause 30(3) is unnecessary. An amendment to the Epidemiological Studies (Confidentiality) Act 1981 to exempt the communication of information upon the written request of the Institute could have achieved the same effect without the undesirable reversal of the onus of proof.

Accordingly the Committee draws sub-clause 30(3) to the attention of the Senate under principle 1(a)(i) in that by imposing the burden of proof on defendants it may be considered to trespass unduly on personal rights and liberties.

BROADCASTING AMENDMENT BILL (NO.2) 1987

This Bill was introduced into the House of Representatives on 25 February 1987 by the Minister for Communications.

The Bill makes amendments to the Broadcasting Act 1942 to improve arrangements relating to the collection of licence fees from companies licensed to broadcast commercial (including remote) radio or television services. The amendments complement amendments in the Radio Licence Fees Amendment Bill 1987, the Television Licence Fees Amendment Bill 1987 (introduced as the Television Licence Fees Amendment Bill 1986 and passed by the House of Representatives in the Budget sittings 1986) and the Television Licence Fees Amendment Bill (No.2) 1987.

The Bill provides for the following changes:

- provision is made for an additional penalty fee, computed at the rate of 20% p.a., to be imposed for late payment. The additional penalty can be remitted on broad grounds relating to fairness and reasonableness.

- the provisions relating to suspension, revocation and non-renewal of licences are changed so that the basis for action is "unreasonable or repeated delay" in paying fees rather than a "failure to pay" fees.

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

Clauses 5 and 6 -
New sub-sections 123A(2) and 106AA(2) - Non-reviewable decisions

Clause 5 inserts a new section 123A in the Broadcasting Act 1942 providing for a penalty fee in respect of unpaid licence fees calculated at 20% per annum on the amount unpaid. New sub-section 123A(2) provides that the Minister or an officer authorised by the Minister in writing for the purpose may remit the additional fee or part of the additional fee if he or she is satisfied as to certain mitigating circumstances. Clause 6 inserts in the

Broadcasting and Television Act 1942 as in force in relation to old system licences a new section 106AA in similar terms with a similar power of remission.

No provision has been made for review of a decision of the Minister or an officer refusing to remit the additional fee or part thereof and such a decision would therefore only be reviewable as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. While the Committee recognizes that in this respect the new provisions do not differ from sub-section 207(1A) of the Income Tax Assessment Act 1936 on which they have been modelled, the Committee draws new sub-sections 123A(2) and 106AA(2) to the attention of the Senate under principle 1(a)(iii) in that they may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

LEMONTHYME AND SOUTHERN FORESTS (COMMISSION OF INQUIRY) BILL 1987

This Bill was introduced into the House of Representatives on 26 February 1987 by the Minister for Arts, Heritage and Environment.

The Bill provides for the establishment of a Commission of Inquiry to report on matters relating to the Lemonthyme and Southern Forests areas in Tasmania. It will examine whether the two areas are or include areas which are of World Heritage value or which contribute to the value of a World Heritage area. It will also report on whether there are other areas in Tasmania with forestry resources capable of exploitation.

The Bill also provides for interim protection of the two areas during the period of the Inquiry.

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

Clause 13 - Self incrimination

Clause 13 provides for the application of the Royal Commissions Act 1902 in relation to the inquiry with certain specified modifications. One section of that Act so applied, and not modified, is section 6A, which provides that self incrimination is not to be an excuse for the refusal or failure to produce a document or to answer questions as required by the Commission. Section 6DD further provides that a statement or disclosure made by a witness in giving evidence is not admissible against the witness in subsequent civil or criminal proceedings.

The Committee has been critical of such provisions which remove the right to refuse to answer questions or produce documents on grounds of self incrimination but which confer protection in subsequent proceedings only in respect of the use of the actual answer given or document produced. In the view of the Committee the protection should extend to any information or thing obtained as a direct or indirect consequence of the giving of the answer or the production of the document: see, for example, sub-section 27(4) of the Disability Services Act 1986. The Committee therefore drew clause 13 to the attention of the Senate under principle 1(a)(i) in that by so applying sections 6A and 6DD of the Royal Commissions Act 1902 without modification it might be considered to trespass unduly on personal rights and liberties. The Minister for Arts, Heritage and Environment has responded:

> 'Rather than create a completely new set of machinery provisions for the Commission, the approach adopted in the Bill is to apply the provisions of the Royal Commissions Act 1902 with only those changes which are necessary to enable the Commission to operate satisfactorily. It is likely that there may be provisions of the Royal Commissions Act, as applied,

which will not be used by the Commission of Inquiry e.g. sections 6P, 7A, 7B and 7C. It is considered that, although possible, it is unlikely that any question of self-incrimination would arise, given the terms of reference of the Commission, (i.e. an inquiry into the existence of world heritage areas and alternatives to forestry operations in those areas).'

The Committee thanks the Minister for his response. However, if it is considered unlikely that the question of self incrimination will arise, given the nature of the Commission's inquiry, then in the Committee's view the protection from self incrimination available at common law should not be removed at all. The right to refuse to give answers to questions where this may result in a person being required to incriminate himself or herself is one of the most important protections available at common law and it should not be removed lightly. The Committee has reluctantly recognised the need for its removal in certain circumstances and has, as indicated above, sought the broadest possible protection for those required to give answers which may be self-incriminating. The Minister's response suggests, however, that the present Bill has been thrown together in a hasty and slipshod fashion with more concern for ensuring that the Commission is enabled to operate 'satisfactorily' than for the consequences of applying, in a blanket fashion, provisions of the Royal Commissions Act 1902 which may be wholly inappropriate to the nature of the Commission's inquiry.

The Committee therefore continues to draw clause 13 to the attention of the Senate under principle 1(a)(i) in that by applying sections of the Royal Commissions Act 1902 removing the privilege against self incrimination to the inquiry it may be considered to trespass unduly on personal rights and liberties.

Paragraph 14(c) - Entry and inspection

Clause 14 provides that, for the purposes of performing his or her functions under the Act a member of the Commission of Inquiry or a person authorised in writing for the purpose by a member may, with such assistance, and by such force, as is necessary and reasonable, enter and inspect:

(a) the Lemonthyme area and the Southern Forests area;

(b) any nominated world heritage area; and

(c) any other part of Tasmania that the member or other person considers may be part of a qualifying area or contain forestry resources.

Paragraph 14(c) thus confers on the member or authorised person a broad power to enter upon private land based upon nothing more than the personal opinion of the person exercising the power. By contrast a Royal Commission must obtain a search warrant from a judge in order to have land or premises entered and searched for things connected with the matter into which the Commission is inquiring. The Committee therefore drew paragraph 14(c) to the attention of the Senate under principle 1(a)(i) in that by providing such a broad power of entry upon land it might be considered to trespass unduly on personal rights and liberties. The Minister for Arts, Heritage and Environment has responded:

> 'There are important qualifications on the power given in paragraph 14(c). First, the person entering the area must be doing so for the purpose of exercising his or her powers or functions under the Act. Secondly, it is only those areas which contain forestry resources which are able to be entered under paragraph 14(c) i.e. for the purposes of examining those resources - the trees. It does not enable entry into premises and it is not a comprehensive power of 'search'. Therefore, it is not

comparable to the search warrant provisions of the Royal Commissions Act 1902. In my opinion, the power is necessary to enable the Commission of Inquiry to examine forestry resources which may be alternative to those in the Lemonthyme and Southern Forests areas and report within the one year inquiry period. This relatively short time frame has been decided upon so as to cause least disruption to Tasmania and its forestry industry.'

The Committee thanks the Minister for this response. Although the power is not a power of search it is undeniably a power to enter on private land and whereas an ordinary Royal Commission may only exercise such a power with the consent of the occupier or pursuant to a warrant, the members of the present Commission may do so on the basis of their personal belief that the land in question may be part of a qualifying area or may contain forestry resources. They are not required to have reasonable grounds for this belief and they are not required to notify the owners of private land before entering it in pursuance of this power. The view of the Committee remains that the power is too broadly drawn and the Committee therefore continues to draw paragraph 14(c) to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

MORETON ISLAND PRESERVATION BILL 1987

This Bill was introduced into the Senate on 26 February 1987 by Senator Macklin.

The Bill aims to preserve Moreton Island and its invaluable conservation, recreational, archaeological and scientific qualities for current and future generations. In particular the Bill prohibits sand mining on Moreton Island.

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

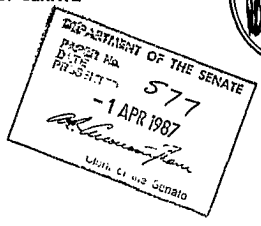
Clause 4 - 'Henry VIII' clause

Clause 4 creates offences where a corporation performs certain acts on Moreton Island 'except as permitted by the regulations'. In so permitting the entire effect of the clause (and so of the Bill) to be altered by regulations the provision may be described as a 'Henry VIII' clause, that is a provision enabling the effect of an Act to be altered by an instrument made by the Executive.

While in this case the regulations would of course be subject to parliamentary scrutiny the Committee nevertheless draws clause 4 to the attention of the Senate under principle 1(a)(iv) in that, as a 'Henry VIII' clause, it may be considered an inappropriate delegation of legislative power.

Rosemary Crowley
Chair
25 March 1987

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF 1987

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THE SENATE

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MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the 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 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) 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 1987

The Committee has the honour to present its Fifth Report of 1987 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 Standing Order 36AAA:

Air Navigation (Smoking) Amendment Bill 1987
Australia Card Bill 1986 [No.2]
Australian Institute of Health Bill 1987

AIR NAVIGATION (SMOKING) AMENDMENT BILL 1987

This Bill was introduced into the Senate on 19 March 1987 by Senator Vigor.

The Bill will prohibit smoking in aerodromes and aircraft except in separately ventilated rooms or bays designated for the purpose of smoking.

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

Clause 3 -
New sub-sections 26A(1) and (3) - Lack of definition of 'smoking'

Clause 3 would insert new sub-sections 26A(1) and (3) providing that a person shall not 'smoke' in any part of an aircraft or aerodrome other than a part designated for the purpose of 'smoking'. The prohibited act is not further defined and little assistance is provided by the surrounding provisions dealing with the ventilation of places where 'smoking' is to be permitted.

In view of the heavy penalties which may be imposed for the prohibited act - fines of up to $5,000 or imprisonment for 6 months - the Committee considers that the words 'smoke' and 'smoking' should be defined. The ordinary meaning of the verb includes acts such as fumigation which are clearly not intended to be caught by the prohibition. While it is true that in the case of any doubt arising regard may now be had to the debate on the Bill, including Senator Vigor's Second Reading Speech, pursuant to section 15AB of the Acts Interpretation Act 1901, the Committee suggests that legislation should not be drafted in such a way that it depends on that provision to give it a clear meaning particularly where, as here, a serious criminal offence is involved.

The Committee therefore drew new sub-sections 26A(1) and (3) to the attention of the Senate under principle 1(a)(i) in that by leaving the acts to be prohibited unclear the sub-sections might be considered to trespass unduly on personal rights and liberties. Senator Vigor has responded:

> 'Consideration was given to providing a definition of smoking when the Bill was drafted, but every suggested definition presents difficulties. For example, another Bill introduced into the Senate defines smoking as "the act of inhaling, exhaling, puffing, sucking, or blowing the smoke of a tobacco product", but this would not cover a person who is shown to have ignited a cigarette but is not proved to have inhaled, etc., the smoke (a remarkable number of smokers allow their cigarettes to burn in the ashtray). There is also the problem of covering all the different substances which are smoked.
>
> Because of such difficulties of definition, it was decided that it would be best to leave it to the courts to determine what constitutes smoking. I think that the likelihood of the courts giving it too wide a definition, so as to catch activities which it is not desired to catch, is extremely remote. The only legitimate activity which I can think of which should not be covered is that of fumigation, which is referred to by the Digest, and which is suggested by the dictionary definitions. As it is highly unlikely that smoke (i.e., the product of combustion) is used to fumigate anything nowadays, I do not think it is necessary to be concerned about this. It is therefore unlikely that anyone would be unjustly punished.

If, on the other hand, the court gives too narrow a meaning to smoking, say, for example, the ignition of a cigarette is held not to be smoking, this would result only in an acquittal and could be corrected by subsequent amendment.'

The Committee thanks the Senator for this response. In continuing to draw attention to new sub-sections 26A(1) and (3), together with the Senator's helpful response, the Committee hopes to promote a fuller consideration of the issue involved at the Committee stage of debate on the Bill.

AUSTRALIA CARD BILL 1986 [NO.2]

This Bill was introduced into the House of Representatives on 18 March 1987 by the Minister for Health.

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. It 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 Bill is in the same form as the Australia Card Bill 1986, rejected by the Senate on 10 December 1986. The Committee drew certain clauses of that Bill to the attention of the Senate in its Eighteenth Report of 1986 (19 November 1986) and the relevant comments, together with the Minister's responses, are reprinted below for the information of the Senate.

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 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 indicated that the necessary amendments would be made through the Statute Law (Miscellaneous Provisions) Bill in the Autumn Session of 1987. The Committee thanked the Minister for this undertaking, which answered its concerns in relation to the sub-clause. In relation to the Australia Card Bill 1986 [No.2] the Committee notes that, should the Bill be read a second time in the Senate, the Committee would prefer to see the amendments made to the Bill while the Bill is before the Parliament.

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 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 thanked 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 noted that it was 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) were to be entitled to access to the Register, under the FOI Act and the Archives Act there was a prima facie right of public access. The question whether access should be refused on the ground that the document contained information relating to the personal affairs of a person rested to be determined in respect of the FOI Act by the agency or Minister to which the request for access was made (having regard to any submissions which might be made by the person whose personal affairs were 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 lay to the Administrative Appeals Tribunal. Thus the protection accorded by the FOI Act and the Archives Act might 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 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 indicated that the necessary amendments would be made through the Statute Law (Miscellaneous Provisions) Bill in the Autumn Session of 1987. The Committee thanked the Minister for this undertaking, which answered 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 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 indicated that the necessary amendment would be made through the Statute Law (Miscellaneous Provisions) Bill in the Autumn Session of 1987. The Committee thanked the Minister for this undertaking which answered its concerns in relation to the clause.

AUSTRALIAN INSTITUTE OF HEALTH BILL

The Committee commented on this Bill in its Fourth Report of 1987 (25 March 1987). The Minister for Health has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Paragraphs 27(1)(c) and 28(1)(c) - Delegation

The Committee drew paragraphs 27(1)(c) and 28(1)(c) to the attention of the Senate under principle 1(a)(ii) because they would permit the Institute and the Director respectively to delegate all or any of their powers under the Act (other than the power of delegation) to any person or body subject only to the approval of the Minister. The Minister for Health has responded:

> 'In the case of the Institute, there will be circumstances where, due to the nature of the Institute's functions, the Institute may need to call upon other persons or bodies to act as a delegate of the Institute to facilitate the Institute's performance of its functions under the Bill. It would be very difficult to see in advance and to identify in the Bill all those circumstances in which a need would arise for the Institute to delegate its powers to persons or bodies other than members and staff of the Institute and would also make the Bill unduly cumbersome. It shoud be noted that any such delegation would require approval of the Minister.
>
> The powers of the Institute referred to in clause 6 of the Bill are narrow and generally of an administrative nature. The more significant powers, such as the power to enter into contracts or arrangements and the power to release information held by the Institute, are subject to certain constraints contained in the Bill. For example, the ability to enter into contracts is limited to contracts involving the payment or receipt by the Institute of a sum not exceeding $200,000. The ability of delegates of the Institute to release information would be controlled by the confidentiality provision in clause 29 of the Bill so that the

Institute's delegate is confined to observing the same principles as the Institute where the release of data is at issue.

In the case of the Director of the Institute, the Director in carrying out his or her functions is subject to the directions of the Institute and is obliged to manage the affairs of the Institute in accordance with its policies. Any delegate of the Director, be that person a member of the Institute or otherwise, would be similarly confined to operating within that framework.

It is my belief that the in-built constraints contained in the Bill in respect of the exercise of powers by both the Institute and the Director of the Institute are such that any exercise of those powers by a delegate of those persons would not make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.'

The Committee thanks the Minister for this response. However its concern with such provisions is not that the powers conferred may be abused by the delegates but rather that it is for the Parliament, in conferring a power, to determine by whom it may be exercised. It is by no means clear to the Committee why the Institute should need to delegate its powers and functions to persons other than members of the Institute or members of the staff of the Institute. There are other means - for example contract or agency - whereby other persons could carry out those powers and functions on the Institute's behalf. Similarly in the case of the Director, whose chief function is to manage the affairs of the Institute subject to the directions of the Institute, the Committee finds it difficult to conceive of a case where it would be necessary to delegate this function to a person outside the Institute. The Committee therefore continues to draw paragraphs 27(1)(c) and 28(1)(c) to the attention of the Senate.

under principle 1(a)(ii) in that by providing for delegation of powers and functions to unspecified persons they may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Sub-clause 30(3) - Reversal of the onus of proof

The Epidemiological Studies (Confidentiality) Act 1981 creates offences in respect of the communication of information gained in the conduct of certain Commonwealth epidemiological studies. Sub-clause 30(3) provides that it is a defence to a prosecution under that Act if it is established that the information was communicated or access to the document was given, as the case may be, in accordance with a written request by the Institute. It thus places upon the defendant the persuasive burden of proof in establishing this defence and the Committee therefore drew it to the attention of the Senate under principle 1(a)(i) in that it might be considered to trespass unduly on personal rights and liberties. The Minister for Health has responded:

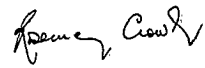
> 'In relation to the concern expressed by the Committee over the reversal of the onus of proof in sub-clause 30(3) of the Bill, I should say that I generally support the view that the burden of proof in criminal proceedings should lie with the prosecution. However, in the case of sub-clause 30(3) I do not believe that the obligation placed upon a defendant to produce a written request from the Institute addressed to that defendant is so unreasonable as would unduly trespass on that person's rights and liberties.
>
> In this regard I would draw the Committee's attention to sub-clause 30(2) of the Bill. This subclause has the effect of requiring a person in possession of confidential information or documents covered by the [Epidemiological Studies (Confidentiality) Act 1981] to obtain a written request from the Institute that he or

she communicate that information, or provide access to those documents, to the Institute before that person may lawfully proceed to release the information or provide access to those documents. This condition is necessary to secure protection for confidential information supplied by individuals concerning their personal affairs.

It would appear reasonable that those in custody of such confidential information, to which the Parliament has given specific protection, should be made properly accountable for any action they may take in releasing that information, even pursuant to another enactment. In the circumstances, it would not seem unreasonable to establish a procedure whereby such persons are required to obtain a written request for information from the Institute and to produce that request at a later date, or to obtain another copy from the Institute.'

The Committee thanks the Minister for this response. It appears to the Committee that clause 30 has been included to enable the Institute to have access to information which would otherwise not be possible because of the operation of the Epidemiological Studies (Confidentiality) Act 1981. Under the circumstances it does not seem unreasonable to require the Crown, before prosecuting someone for communicating information to the Institute in contravention of the Epidemiological Studies (Confidentiality) Act 1981, to ascertain whether a written request for such information was made, rather than imposing the burden of proving that such a request was made upon the defendant at the subsequent trial. Moreover, as the Committee noted in its Fourth Report of 1987, an amendment to the Epidemiological Studies (Confidentiality) Act 1981 to provide that nothing in that Act prevents the communication of information to the Institute upon written request by the Institute would avoid all question of a reversal of the onus of proof. Accordingly the Committee continues to draw sub-clause 30(3) to the attention of

the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant it may be considered to trespass unduly on personal rights and liberties.



Rosemary Crowley
Chair
1 April 1987

AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1987

29 APRIL 1987

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative power; 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

SIXTH REPORT

OF 1987

The Committee has the honour to present its Sixth Report of 1987 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 Standing Order 36AAA:

Defence Legislation Amendment Bill 1987
National Parks and Wildlife Conservation Amendment Bill 1986
National Parks and Wildlife Conservation Amendment Bill (No.2) 1987
Petroleum Resource Rent Tax Assessment Bill 1986
Veterans' Affairs Legislation Amendment Bill 1987

DEFENCE LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 18 March 1987 by the Minister for Defence.

The Bill proposes a variety of amendments to Acts dealing with defence matters. A number of the amendments are minor. The more important amendments include:

- provision for peacetime call out of the Reserve Forces;
- introduction of long term enlistment for sailors, soldiers and airmen;
- extension of the circumstances in which an accused member undergoing trial may have the option of being punished by a court martial or a Defence Force magistrate;
- amendments designed to clarify the operation of the Defence Force Retirement and Death Benefits legislation;
- provision to enable transfer of employees from the Government Aircraft Factories to Aerospace Technologies of Australia; and
- termination of the Service Canteens Trust Fund.

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

Sub-clauses 16(1) and 64(1) -
New sub-sections 38(6) and 27(6) - Inappropriate delegation of legislative power

Sub-clauses 16(1) and 64(1) would insert a new sub-section 38(6) in the Defence Act 1903 and a new sub-section 27(6) in the Naval Defence Act 1910 respectively providing that the regulations may

make additional provision for the extension of the periods for which soldiers or sailors are enlisted beyond that already made in those sections relating to circumstances such as time of war and emergency.

The Committee therefore draws new sub-sections 38(6) and 27(6) to the attention of the Senate under principle 1(a)(iv) in that by so permitting the terms of enlistment of soldiers and sailors to be varied by regulations they may be considered to constitute an inappropriate delegation of legislative power.

Clauses 17 and 65 - Inappropriate delegation of legislative power

Clauses 17 and 65 amend section 44 of the Defence Act 1903 and section 30 of the Naval Defence Act 1910 respectively, these being provisions relating to the discharge of soldiers and sailors by prescribed authorities and for prescribed reasons. Clauses 17 and 65 would further make the entire operation of the two provisions 'subject to the regulations' apparently with the intention of facilitating the making of a code for the retrenchment of soldiers and sailors by regulations.

The Committee therefore draws clauses 17 and 65 to the attention of the Senate under principle 1(a)(iv) in that by so permitting the discharge of soldiers and sailors to be left entirely to regulations they may be considered to constitute an inappropriate delegation of legislative power.

NATIONAL PARKS AND WILDLIFE CONSERVATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 27 November 1986 by the Minister for Arts, Heritage and Environment.

The purpose of the Bill is to provide that no operations for the recovery of minerals may take place in the Kakadu National Park, and that no compensation is to be payable by the Commonwealth as a result of this change to the law.

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

Clause 7 - No compensation payable

Clauses 5 and 6 would prohibit operations for the recovery of minerals in the Kakadu National Park and would provide that section 8B of the Act - which preserves interests in respect of minerals on, in or beneath land included in a park, reserve or conservation zone which were held before that land was so included - is not to apply in relation to any interest in respect of any minerals on, in or beneath land within the Kakadu National Park. Clause 7 provides that the Commonwealth is not to be liable to pay compensation to any person by reason of the enactment of the Act.

The Committee accepts that there is no constitutional obligation on the part of the Commonwealth to pay compensation to persons prevented from exercising their interests in respect of minerals on, in, or beneath land within the Kakadu National Park either upon the basis that the law is supported by the Territories power (s.122) in the Constitution and hence is not subject to the 'just terms' constraint imposed on the acquisition of property by placitum 51 (xxxi) of the Constitution - see Teori Tau v. Commonwealth (1969) 119 CLR 564 - or that no 'acquisition' of proprietary rights is involved so as to bring the law within that constraint: see Commonwealth v. Tasmania (1983) 46 ALR 625 at 708-9 per Mason J., 738 per Murphy J., 795-6 per Brennan J.; cf. 825-9 per Deane J. However the Bill would clearly prevent persons from exercising pre-existing property rights in respect of land within the Kakadu National Park and would not compensate the holders of those rights for the effects of that prohibition. For

that reason the Committee draws clause 7 to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

NATIONAL PARKS AND WILDLIFE CONSERVATION AMENDMENT BILL (NO.2) 1987

This Bill was introduced into the House of Representatives on 18 March 1987 by the Minister for Arts, Heritage and Environment.

The Bill proposes amendments to the National Parks and Wildlife Conservation Act 1975. The Bill, as part of a package of legislative proposals, aims to extend the present Kakadu National Park. It will:

- enable a conservation zone to be declared over part of Gimbat and Goodparla;

- permit Aboriginal land claims over the areas declared as Park or conservation zone and permit the declaration of Park and conservation zone over areas subject to land claim;

- clarify the objects of a conservation zone to ensure that regulations can be made to encourage exploration generally within a conservation zone;

- ensure that any exploration on existing interests within the conservation zone is subject to the same assessment procedures as exploration in other parts of the conservation zone; and

. clarify the regulation making power for a conservation zone.

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

Clause 7 - No compensation payable

Clause 7 provides that notwithstanding any law of the Commonwealth or of the Northern Territory the Commonwealth is not liable to pay compensation to any person by reason of the enactment of the Bill. The provision mirrors clause 7 of the National Parks and Wildlife Conservation Amendment Bill 1986 commented on above. That Bill gives effect to the Government's proposed ban on mining in Kakadu National Park. The present Bill would permit regulations to be made regulating or prohibiting operations for the recovery of minerals in the conservation zone to be declared over those parts of the Gimbat and Goodparla pastoral leases which it is not proposed to incorporate immediately in the Kakadu National Park. The Bill would also require any operation for the recovery of minerals in the conservation zone to be subject to environmental impact assessment under the Environment Protection (Impact of Proposals) Act 1974. In support of these provisions clause 5 amends section 8B of the Principal Act - which preserves interests in respect of minerals on, in or beneath land included in a conservation zone - to provide that its effect may be overridden by the regulations and environmental impact assessment procedures mentioned above.

As was the case with the National Parks and Wildlife Conservation Amendment Bill 1986, the Bill will clearly affect the pre-existing property rights which persons may have in the Gimbat and Goodparla pastoral lease areas and may indeed prevent them from exercising those rights yet it will leave such persons without compensation. The Committee therefore draws clause 7 to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

PETROLEUM RESOURCE RENT TAX ASSESSMENT BILL 1986

This Bill was introduced into the House of Representatives on 28 November 1986 by the Minister Assisting the Treasurer.

The Bill provides for the assessment and collection of the petroleum resource rent tax payable by persons in respect of certain offshore petroleum projects. The tax is to apply to taxable profits from the recovery of petroleum in offshore areas where the Petroleum (Submerged Lands) Act 1967 applies, other than in areas covered by production licences granted on or before 1 July 1984 and the permit areas from which those production licences were drawn.

General comment - Retrospectivity

Although the Bill contains no clear statement as to its real date of effect, it appears that in certain respects it will have retrospective effect to 1 July 1984. Profits from the recovery of petroleum in areas covered by production licences granted on or before that date are expressly excluded - see the definitions of 'eligible production licence' and 'excluded exploration permit' in clause 2 - but it would appear that assessable receipts derived by a person (and eligible expenditure incurred by a person) after that date may be taken into account in determining a person's liability to tax - see clauses 31 and 45 - even though liability will only be imposed on profits of a year of tax, being a financial year commencing on or after 1 July 1986. This conclusion is reinforced by the application of the anti-avoidance provisions in the Bill to arrangements entered into on or after 1 July 1984: see clause 52.

The Second Reading Speech indicates that it is not anticipated that any petroleum resource rent tax will be received before the 1989-90 financial year. However because any tax that will be payable will be determined after taking account of past project receipts and expenditure the Committee draws the retrospective

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

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

Clause 2 -
Definition of 'marketable petroleum commodity' - 'Henry VIII' clause

Clause 2 defines a 'marketable petroleum commodity' as stabilised crude oil, sales gas, condensate, liquefied petroleum gas, ethane or -

> '(f) any other product [produced from petroleum] declared by the regulations to be a marketable petroleum commodity'.

The consideration received by a person for the sale of any marketable petroleum commodity is included within the person's assessable petroleum receipts under clause 24.

Because it would permit the content of the term 'marketable petroleum commodity' to be extended by regulations the definition may be characterised as a 'Henry VIII' clause and, as such, the Committee draws it to the attention of the Senate under principle 1(a)(iv) in that it may be considered to constitute an inappropriate delegation of legislative power.

Clause 107 - Entry and inspection without warrant

Clause 107 provides that, for the purposes of the Act, an officer authorised in writing by the Commissioner may, at all reasonable times, enter and remain on any land or premises and may inspect, examine and make copies of any documents. The only limitation on this power is that, if challenged by the occupier of the land or premises, the officer must produce an authority signed in writing

by the Commissioner stating that the officer is authorised to exercise powers under the clause. There is no requirement that an officer obtain a search warrant before entering premises.

The Committee recognises that in this respect clause 107 does not differ from similar provisions in other taxation laws: see, for example, section 263 of the Income Tax Assessment Act 1936 and section 127 of the Fringe Benefits Tax Assessment Act 1986. However there would appear to be no basis in principle for giving officers enforcing revenue law greater powers than officers enforcing the criminal law. Evasion of tax should not be regarded as more serious than, say, offences against the person, or more difficult to detect than, for example, complex financial fraud. Yet officers enforcing the criminal law are required, except in cases involving the threatened destruction of evidence, to obtain either the consent of the occupier of the premises to be searched or, if that is not forthcoming, a search warrant from a judicial *officer.*

The Committee therefore draws clause 107 to the attention of the Senate under principle 1(a)(i) in that by providing for entry on land or premises and the inspection of documents without a search warrant it may be considered to trespass unduly on personal rights and liberties.

Paragraph 108(1)(b) - Failure to stipulate reasonable time and place

Paragraph 108(1)(b) provides that the Commissioner or the Minister for Resources and Energy may, for the purposes of the Act, *by notice in writing, require a person to attend before the* relevant authority, or before an officer authorised by the relevant authority for the purpose, at a time and place specified in the notice, and then and there to answer questions. There is no requirement that the time and place specified in such a notice must be reasonable and, as the Committee has commented on previous occasions, it does not regard such a requirement as implicit in provisions of this type (see most recently its

comment on sub-clauses 121(1), 145(1) and 147(1) of the Australia Card Bill 1986 in its Eighteenth Report of 1986). In any event, if it is intended that the requirement be implicit, the Committee can see no reason why it should not be made explicit: compare, for example, sub-section 26(1) of the Bounty (Ship Repair) Act 1986 and sub-section 27(1) of the Disability Services Act 1986.

The Committee therefore draws paragraph 108(1)(b) to the attention of the Senate under principle 1(a)(i) in that by failing to stipulate that the times and places at which persons may be required to attend and answer questions must be reasonable it may be considered to trespass unduly on personal rights and liberties.

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 18 March 1987 by the Minister Representing the Minister for Veterans' Affairs.

The Bill will make a number of amendments to the Veterans' Entitlements Act 1986. The main purpose of the Bill is to introduce into the Veterans' Affairs sphere the poverty traps reforms announced by the Treasurer in his statement of 19 September 1985. These poverty traps reforms have been incorporated into the Social Security Act 1947 and will come into effect on 1 July 1987. The Bill also contains measures to combat health fraud which reflect those provisions contained in the Health Insurance Act 1973.

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

Clause 26 -
New sub-section 93B(5) - Reversal of the onus of proof

Clause 26 would insert a new section 93B in the Veterans' Entitlements Act 1986 creating an offence where a person makes a statement capable of being used in connection with a claim for payment for treatment that is false or misleading in a material particular. New sub-section 93B(5) provides that it is a defence if the person did not know, and could not reasonably be expected to have known, that the statement was false or misleading in a material particular. The burden of establishing this defence would rest on the defendant.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings but rather that they should merely be required to bear an evidential onus, that is, the onus of adducing evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution. Thus in the present case persons charged with the offence could be required to adduce evidence that they did not have the relevant knowledge rather than, as at present, being required to prove on the balance of probabilities that they did not have that knowledge.

The Committee drew attention in its Fifteenth Report of 1985 (13 November 1985) to sub-section 128A(5) of the Health Insurance Act 1973 on which the present provision is based. The Committee repeats the suggestion it made then that it would be preferable if the defendant were required merely to bear an evidential onus in establishing the statutory defence provided in new sub-section 93B(5). Accordingly the Committee draws new sub-section 93B(5) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive burden of proof on the defendant it may be considered to trespass unduly on personal rights and liberties. The Minister for Veterans' Affairs has responded:

'The provisions on which the Standing Committee commented are those designed to assist my Department in combatting health fraud. The provisions mirror those already contained in the Health Insurance Act 1973.

Both the provisions in the Health Insurance Act 1973 and those proposed to be included in the Veterans' Entitlements Act 1986 have been the subject of consideration by the major health care provider organisations. None of the organisations consulted has raised any objection to the provisions.

New sub-sections 93B(5) and 93D(9), which the ... Committee has dealt with under the heading "Reversal of onus of proof", both provide a defence to a person charged with an offence under the relevant provision. The matters to which these defences relate are peculiarly within the knowledge of the person charged. That person would be in the best position to be able to explain his or her actions within the terms of the defence provided by these new sub-sections. While, as a matter of general principle, it may be appropriate for the Crown to bear the onus of proof I believe that it is not unreasonable to require a defendant to establish, on the balance of probabilities, matters within his or her knowledge in summary offences such as those dealt with in sections 93B and 93D.

As such the provision falls within the class of provisions considered by the Attorney-General's Department to be justifiable given the need for effective enforcement of Commonwealth legislation - see the extract from its submission quoted at paragraph 5.5 of the Report of the Senate Standing Committee on Constitutional and Legal Affairs on "The Burden of Proof in Criminal Proceedings".'

The Committee thanks the Minister for this response. The Committee does not contest that the matter to which the defence relates is peculiarly within the knowledge of the defendant but it would argue as a matter of principle that the persuasive onus should not be placed upon the defendant in criminal proceedings. Rather, the defendant in such circumstances should merely be required to adduce evidence of the relevant defence. With regard to the views of the Attorney-General's Department, the Committee notes that the Senate Standing Committee on Constitutional and Legal Affairs rejected the justification advanced by that Department for the imposition of the persuasive onus of proof on defendants in criminal proceedings. The Government has still to make its final response to the Report of that Committee and the issue forms part of the Terms of Reference of the current Review of Commonwealth Criminal Law being undertaken by the former Chief Justice of the High Court, Sir Harry Gibbs, Mr Justice Watson and Mr Andrew Menzies.

The Committee therefore continues to draw new sub-section 93B(5) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive onus of proof on the defendant it may be considered to trespass unduly on personal rights and liberties.

New sub-section 93C(4) - Strict liability offence

Clause 26 would also insert a new section 93C creating an indictable offence where a person knowingly makes a statement capable of being used in connection with a claim for payment for treatment that is false or misleading in a material particular. New sub-section 93C(4) would provide that where a jury or the court is not satisfied, on the trial of a person for an offence against 93C, that the person is guilty of that offence, the jury or the court, as the case may be, may convict the person of an offence against section 93B. In other words if the jury or the court is not satisfied that the person knowingly made a false statement the person may nevertheless be convicted of the making of that statement whether or not he or she knew that it was false or capable of being used in connection with a claim for payment

for treatment. It does not appear that a person in this situation would have the advantage of the defence provided for in sub-section 93B(5), considered above, since that defence relates only to persons charged with an offence against section 93B.

The Committee recognised that new sub-section 93C(4) was in the same form as sub-section 128B(4) of the Health Insurance Act 1973 on which it did not comment when it was inserted by the Health Legislation Amendment Act (No.2) 1985. Nevertheless the Committee drew new sub-section 93C(4) to the attention of the Senate under principle 1(a)(i) in that by creating an offence of strict liability where a person unwittingly made a false or misleading statement it might be considered to trespass unduly on personal rights and liberties. The Minister for Veterans' Affairs has responded:

> 'The Committee also raised a perceived difficulty with new sub-section 93C(4) under which a jury or court may find a person charged with an offence against that section guilty of an offence against section 93B. The Committee is of the view that the person would not have the advantage of the defence provided for in sub-section 93B(5). This view is based on an interpretation of sub-section 93B(5) which says that the provision only applies in respect of persons charged with an offence against section 93B.
>
> I am not convinced that this interpretation is correct, particularly as penal provisions are always to be interpreted to a defendant's advantage. While it may not be possible to resolve the issue in the time available before the Bill is considered by the Senate, I will be taking the matter up with the Attorney-General and will ascertain whether an amendment should be brought forward in the Budget Sittings.'

The Committee thanks the Minister for this response. While the Committee welcomes the Minister's undertaking to take the matter up with the Attorney-General it considers that it should be possible to resolve the matter before the Bill is passed into law. If, as the Minister's response implies, it is intended that the defence made available by sub-section 93B(5) in respect of offences under that section should also be available to persons against whom an alternative verdict may be entered under sub-section 93C(4) then this should be placed beyond doubt. Accordingly the Committee continues to draw new sub-section 93C(4) to the attention of the Senate under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

New sub-section 93D(9) - Reversal of the onus of proof

Clause 26 would also insert a new section 93D creating an offence where a practitioner seeks or obtains, or a provider of pathology services or the proprietor of a private hospital offers, any benefit or advantage to a practitioner in respect of a request for the rendering of pathology services or the admission of a person as an in-patient in the relevant hospital. New sub-section 93D(9) would provide a defence if the person proves that the conduct in question was in accordance with the standards of professional conduct generally accepted by medical practitioners.

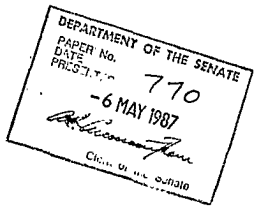
Once again the burden of establishing this defence would rest on the defendant to prove on the balance of probabilities and once again the Committee would suggest that, in accordance with the recommendation of the Senate Standing Committee on Constitutional and Legal Affairs, the defendant should merely be required to adduce evidence of the existence of the defence, the burden of negativing which would then be borne by the prosecution.

The Minister for Veterans' Affairs has responded in the terms set out above under new sub-section 93B(5) and for the reasons given there the Committee continues to draw new sub-section 93D(9) to

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

Rosemary Crowley
Chair
29 April 1987

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF 1987

6 MAY 1987

THE SENATE

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MEMBERS OF THE COMMITTEE

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Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the 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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(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 1987

The Committee has the honour to present its Seventh Report of 1987 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 Standing Order 36AAA:

Broadcasting Amendment Bill (No.2) 1987
Defence Housing Authority Bill 1987
Defence Legislation Amendment Bill 1987
Egg Industry Research (Hen Quota) Levy Bill 1987

The Committee commented on this Bill in its Fourth Report of 1987 (25 March 1987). The Minister for Communications has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Clauses 5 and 6 -
New sub-sections 123A(2) and 106AA(2) - Non-reviewable decisions

Clause 5 inserts a new section 123A in the Broadcasting Act 1942 providing for a penalty fee in respect of unpaid licence fees calculated at 20% per annum on the amount unpaid. New sub-section 123A(2) provides that the Minister or an officer authorised by the Minister in writing for the purpose may remit the additional fee or part of the additional fee if he or she is satisfied as to certain mitigating circumstances. Clause 6 inserts in the Broadcasting and Television Act 1942 as in force in relation to old system licences a new section 106AA in similar terms with a similar power of remission.

No provision has been made for review of a decision of the Minister or an officer refusing to remit the additional fee or part thereof and such a decision would therefore only be reviewable as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. While the Committee recognized that in this respect the new provisions did not differ from sub-section 207(1A) of the Income Tax Assessment Act 1936 on which they had been modelled, the Committee drew new sub-sections 123A(2) and 106AA(2) to the attention of the Senate under principle 1(a)(iii) in that they might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The Minister for Communications has responded:

'As stated in the Digest the provision in the Bill dealing with the remission of additional fees imposed as a penalty for late payment of licence fees is based directly on the Income Tax Assessment Act 1936. This Act was used as a model because of the taxation nature of broadcasting licence fees. That is, they are considered to be taxes on the royalties on profits derived from a licensee's use of the radio frequency spectrum and as such it is considered that they should be subject to the same penalties and conditions as other forms of income tax.

The matter of whether or not there should be provision for review of decisions about the remission of penalties is something which could be considered further by the Administrative Review Council when it reviews the new Inquiry Procedures of the Australian Broadcasting Tribunal and other appeal rights under the Broadcasting Act 1942 in about six months time.'

The Committee thanks the Minister for this response. The Committee considers as a matter of principle that there should be a right of review in respect of a decision of the Minister or an officer refusing to remit additional penalty fees. It has made similar comments on like provisions in other taxation legislation: see its comments on the Taxation Laws Amendment Bill 1984 in its Eleventh Report of 1984. Accordingly, notwithstanding that the issue of rights of review generally under the Broadcasting Act 1942 may be taken up by the Administrative Review Council in about six month's time, the Committee continues to draw new sub-sections 123A(2) and 106AA(2) to the attention of the Senate under principle 1(a)(iii) in that they may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

DEFENCE HOUSING AUTHORITY BILL 1987

This Bill was introduced into the House of Representatives on 18 March 1987 by the Minister for Defence.

The Bill creates a Defence Housing Authority to undertake the management of Defence housing. The Authority is designed to streamline existing arrangements.

The primary functions of the Authority include the management, construction, upgrading and maintenance of Defence housing and the disposal of surplus stock.

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

Sub-clause 63(2) - Lack of parliamentary scrutiny

Sub-clause 63(2) provides that the Minister may, by notice in writing in the Gazette, declare that stamp duty is not payable by the Authority or any other person under a law of the Commonwealth or of a State or Territory in respect of securities dealt with by the Authority or any transaction done or document executed by or on behalf of the Authority for the purpose of a borrowing or a raising of money by the Authority.

As the Committee commented in relation to a similar provision in the Federal Airports Corporation Bill 1986 - see the Committee's Second Report of 1986 (19 February 1986) - the Committee considers that the decision to relieve a statutory authority of the obligation to pay stamp duty under Commonwealth, State or Territory laws should be subject to parliamentary scrutiny. In this regard sub-clause 63(2) contrasts with sub-clause 63(4) which provides that the regulations may subject the Authority to taxation under specified laws of the Commonwealth or of a State or Territory. The Committee therefore drew sub-clause 63(2) to the attention of the Senate under principle 1(a)(v) in that it

might be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny. The Minister for Defence has responded:

> 'While I appreciate that the legislation might give the impression that the power under sub-clause 63(2) could be exercised in a more arbitrary manner, the purpose of this provision is, in fact, to ensure consistency of implementation once an exemption has been decided for a certain class of transactions.
>
> The stamp duty payable on the various classes of transactions concerned is not always predictable. For example, the duty could be levied on a party dealing with the Authority, instead of the Authority , as a means of avoiding the exemption. (For this reason the provision refers to "any other person" as well as the Authority.) That is, there is a possible requirement for declarations of exemption for single cases, but to ensure that all cases within a particular class of transactions are covered rather than to pick and choose between different cases. I think you will agree that it would not be desirable to require the making of regulations for individual cases.
>
> I trust that, as the underlying reason for the provision in question is to secure a consistent approach in a manner that is open but workable, you will not find the provision as objectionable as it might have appeared on the surface.'

The Committee thanks the Minister for this response. However, in suggesting that the power to exempt transactions may be exercised upon a case by case basis, albeit with a view to ensuring that, in the view of the Minister, the exemption is applied consistently, the Minister raises a different concern in the mind of the Committee. The Minister's exercise of the power to exempt transactions would be reviewable only as to its legality pursuant

to the Administrative Decisions (Judicial Review) Act 1977 and given the absence of any objective criteria for the exercise of the power this avenue of review would be very limited. Accordingly a party dealing with the Authority who considered that he or she should be exempted from the requirement to pay stamp duty in respect of the relevant transaction would have little recourse if the Minister declined to make the exemption in that party's case.

The Committee would therefore still have a concern if the power were to be exercised in the manner envisaged by the Minister. However, since it is possible (and indeed necessary) for those transactions attracting stamp duty to be specified in advance with sufficient particularity in the relevant Commonwealth, State and Territory legislation, it should not, in the view of the Committee, be impossible to specify in advance by way of regulations those classes of transactions which are to be exempt from stamp duty. This would ensure that the Parliament would be able to scrutinize the exemptions granted, rather than leaving to the Minister the discretion to apply the exemption provision with consistency. The Committee therefore continues to draw sub-clause 63(2) to the attention of the Senate under principle 1(a)(v) in tht it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

DEFENCE LEGISLATION AMENDMENT BILL 1987

The Committee commented on this Bill in its Sixth Report of 1987 (29 April 1987). The Minister for Defence has since provided a response to the Committee's comments, the relevant parts of which are reproduced here for the information of the Senate.

Sub-clauses 16(1) and 64(1) -
New sub-sections 38(6) and 27(6) - Inappropriate delegation of legislative power

Sub-clauses 16(1) and 64(1) would insert a new sub-section 38(6) in the Defence Act 1903 and a new sub-section 27(6) in the Naval Defence Act 1910 respectively providing that the regulations may make additional provision for the extension of the periods for which soldiers or sailors are enlisted beyond that already made in those sections relating to circumstances such as time of war and emergency.

The Committee therefore drew new sub-sections 38(6) and 27(6) to the attention of the Senate under principle 1(a)(iv) in that by so permitting the terms of enlistment of soldiers and sailors to be varied by regulations they might be considered to constitute an inappropriate delegation of legislative power. The Minister for Defence has responded:

> 'Section 36 of the Defence Act 1903 provides (inter alia) that a person who volunteers to serve as a soldier in the Army shall, if accepted, be enlisted as a soldier in a specified part of the Army and upon enlistment shall be engaged to serve for a prescribed period. The section further provides that a soldier may volunteer to serve for a further period as prescribed and be re-engaged accordingly.
>
> The Australian Military Regulations accordingly prescribe periods of engagement (regulation 135) and periods of re-engagement (regulation 140).
>
> In the course of drafting the Bill to give effect to the new long term enlistment policy, it was decided that the use of the terms "engagement" and "re-engagement" unnecessarily complicated the legislation and that the prescribing in regulations of permitted periods of engagement and re-engagement served no useful purpose.

The proposed new section 36 contained in the Bill simply provides (inter alia) that a person may volunteer to serve as a soldier in a particular part of the Army for a fixed period or until attaining retiring age and proposed new section 37 provides (inter alia) that a soldier enlisted otherwise than until attaining retiring age may volunteer to extend the period of enlistment by a fixed period or until attaining retiring age. In each case the offer to enlist or to extend the enlistment is subject to its acceptance by the Army authorities.

Australian Military Regulation 135(5) provides that, in certain circumstances when a soldier is, for a period in excess of 21 days, either not rendering service (e.g. absent without leave) or not rendering effective service (e.g. in service custody), such a period does not count towards the period of the soldier's engagement. Sub-regulations 135(6) and (7) are of an interpretative nature with respect to sub-regulation (5). (Copies of these provisions are attached.) [See Appendix.]

Concern was felt that sub-regulations 135(5)-(7), suitably amended to conform to the new terminology used in the Act, might be ultra vires and this resulted in the inclusion of proposed sub-section 38(6). Consideration was given to the apparent width of this sub-section but in view of the difficulty of devising a sub-section which would more specifically delineate the scope of regulations that could be made, without on the one hand including the detail in the Act itself or on the other hand unintentionally limiting sub-section 38(6) so that the required provisions could not effectively be prescribed in the regulations, proposed sub-section 38(6) was left in its present form.

It was recognised that any regulations made pursuant to sub-section 38(6) would be subject to scrutiny and liable to disallowance and it was hoped that this would be acceptable as a sufficient safeguard.

With regard to the corresponding amendments to the Naval Defence Act 1910, the Navy does not have a rule like that in Australian Military Regulation 135(5). However a similar amendment is proposed for that Act because it is desired to keep the Acts as uniform as possible with a view to the eventual replacement of the present separate Acts with one Act dealing with conditions of service for the Defence Force.'

The Committee thanks the Minister for this response. It accepts that, in light of the Minister's explanation of the provisions, parliamentary scrutiny of the regulations to be made is in this case a sufficient safeguard.

Clauses 17 and 65 - Inappropriate delegation of legislative power

Clauses 17 and 65 amend section 44 of the Defence Act 1903 and section 30 of the Naval Defence Act 1910 respectively, these being provisions relating to the discharge of soldiers and sailors by prescribed authorities and for prescribed reasons. Clauses 17 and 65 would further make the entire operation of the two provisions 'subject to the regulations' apparently with the intention of facilitating the making of a code for the retrenchment of soldiers and sailors by regulations.

The Committee therefore drew clauses 17 and 65 to the attention of the Senate under principle 1(a)(iv) in that by so permitting the discharge of soldiers and sailors to be left entirely to regulations they might be considered to constitute an inappropriate delegation of legislative power. The Minister for Defence has responded:

'The reason for inserting the words "Subject to the regulations" in section 44 of the Defence Act was given in the Explanatory Memorandum. Briefly, it was to enable a regulation to be made that would require the Chief of the General Staff to give, to a soldier who is enlisted until attaining retiring age, 12 months notice of intention to retrench him or her.

Consideration was given to the apparent width of the amendment and whether some further words might be included which would limit the scope of the regulations that could flow from the amendment as drafted.

Sub-section 44(1) of the Defence Act provides (inter alia) that a soldier may be discharged by the Chief of the General Staff for such reasons as are prescribed. The reasons are prescribed in the Australian Military Regulations (regulation 176). The reason to which the amendment relates is that in paragraph 176(1)(g) which is in the following terms:

> "(g) that the soldier cannot be usefully employed in the Army because of retrenchment in the Army;",

commonly referred to as retrenchment.

Amendment of section 44 of the Act to limit the scope of regulations authorized by the words "Subject to the regulations" to a particular reason for discharge would necessitate referring to that reason for discharge. However, the Act leaves it to the regulations to prescribe the reasons for discharge. To refer in the Act to retrenchment when there is no certainty from a drafting point of view that the regulations will prescribe retrenchment as a reason for discharge would be contrary to normal drafting practice.

The exercise of the power conferred by section 44 to discharge a soldier being dependent on the reasons prescribed in the regulations, it seems to me not unreasonable that restrictions on the exercise of that power also be prescribed in the regulations.

It was recognized that any regulations made pursuant to the phrase "Subject to the regulations" in section 44 would be subject to scrutiny and liable to disallowance. Here, also, it was hoped that this would be acceptable as a sufficient safeguard.

Similar comments apply to the corresponding amendment to the Naval Defence Act.'

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

EGG INDUSTRY RESEARCH (HEN QUOTA) LEVY BILL 1987

This Bill was introduced into the House of Representatives on 18 March 1987 by the Minister for Primary Industry.

The Bill and the associated levy collection Bill seek to establish a new mechanism for levying producers to finance research sponsored by the egg industry, which is also supported by matching Commonwealth grants.

The new arrangements will supersede the present levy mechanism whereby egg producers contribute towards research through a small component of the Commonwealth hen levy. This levy, and the equalisation scheme which has been its main purpose, will be discontinued on 30 June 1987.

Under the present Bill, a levy is to be imposed on the licensed hen quotas held by egg producers under State or Territory laws. The proceeds will be used solely for research.

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

Clause 12 - Termination of Act

Clause 12 provides that the Act is to cease to have effect if the law of any State ceases to provide for hen quota licences. The Second Reading speech and Explanatory Memorandum indicate that such a provision is considered necessary because abolition of hen quotas by one State would render the levy inoperable. Deregulation in one State would have repercussions on egg marketing which would force other States to follow suit.

The Committee suggested that it was inappropriate for the Commonwealth Parliament in making an Act to give each and every State Government a right of veto over the Act, a right, moreover, which could be exercised at any time. If any State were to abandon the present system of regulation of egg marketing it should be for the Commonwealth Parliament to consider, in the light of that circumstance, the future of the hen quota levy. The Committee therefore drew clause 12 to the attention of the Senate under principle 1(a)(iv) in that it might be considered to constitute an inappropriate delegation of legislative power. The Minister for Primary Industry has responded:

> 'Under clause 12 the abandonment of hen quotas by any State would terminate the operation of the hen quota levy throughout Australia. The intent of this provision is to prevent inequity among the States which would arise if the levy ceased to operate in one State before its cessation in other States.

While it is expected that if one State were to abolish hen quotas, the other States would find it necessary to follow suit, it is likely that a period of time would elapse before this occurred as each State would need to take appropriate legislative action.

Meanwhile, it would not be possible to apply the hen quota levy in a State which abolished hen quotas, while the levy would continue to operate in States where quotas still existed. The Government believes that this would be an untenable situation which should not be allowed to arise. Clause 12 will ensure that it does not.

The Committee has suggested, however, that if any State abandons hen quotas, it should be for the Commonwealth Parliament to consider and decide the future of the levy in the light of that circumstance. This course would, unfortunately, lead to the very difficulties which clause 12 is designed to prevent.

The Government believes it is preferable for the Commonwealth Parliament to decide in advance the circumstances and manner in which the levy will be terminated. This will also facilitate the timely introduction of successor levy arrangements to ensure a continued flow of funds for research.

Plans have been made for an alternative levy mechanism to be available if the hen quota levy has to be terminated. The proposed standby mechanism is a levy on chickens hatched for egg production.

It is intended that legislation to create this mechanism be enacted but left unproclaimed until or unless the hen quota levy has to be abandoned. In such an event the alternative levy could be brought into operation by Proclamation at short notice.

I had hoped to submit legislation for both levy schemes to the Parliament at the same time so that the Bills involved could be dealt with as cognate measures. Regrettably, this has not been possible, but I will seek enactment of the standby levy legislation at the earliest possible date.

Against this background, it should be apparent that clause 12 of the Bill under review does not derogate from the powers of the Commonwealth Parliament but enables that Parliament to prevent the development of an undesirable situation in the operation of its legislation due to an event beyond its control.'

The Committee thanks the Minister for this response which answers its concerns in relation to the clause. The Committee suggests that, in order to make it clear upon the face of the legislation that it is intended to operate in the manner described by the Minister, the proposed legislation in relation to the levy on chickens hatched for egg production might be expressed to commence upon the termination of the present Bill in accordance with clause 12, rather than by Proclamation.

Rosemary Crowley
Chair
6 May 1987

Added by 1965, No. 72 amended by 1969, No. 76 1972, No. 123 1976, No. 59

(5) In calculating the period for which a person who is enlisted as a soldier in the Army is engaged to serve under sub-section 36 (1) of the Act, account shall not be taken of any period during which he—

(a) was absent from duty without leave for a period in excess of 21 days;

(b) was serving a sentence, imposed by a court or by a service tribunal, of imprisonment or detention for a period in excess of 21 days;

(c) was in custody by reason of a charge of an offence, being an offence of which he was convicted by a court or by a service tribunal and in respect of which he served a sentence of imprisonment or detention for a period in excess of 21 days; or

(d) was absent from duty on leave without pay for a period in excess of 21 days.

Added by 1965, No. 72

(6) Where a soldier is taken into custody on a charge of an offence and is convicted of another offence, that conviction shall be deemed to be a conviction of an offence to which paragraph (c) of the last preceding sub-regulation applies.

Substituted by 1985, No. 117

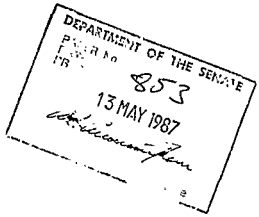
(7) In this regulation, "service tribunal" means—

(a) a service tribunal within the meaning of the *Defence Force Discipline Act 1982*;

(b) a court martial convened under the law of another country and exercising jurisdiction in respect of an offence committed by a member of the Army attached temporarily to a part of the forces of that country under section 116B of the Act; or

(c) an officer of the forces of another country exercising jurisdiction, in accordance with the law of that country, in respect of offences committed by a member of the Army attached to a part of the forces of that country under section 116B of the Act.

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF 1987

13 MAY 1987

THE SENATE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative power; 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 1987

The Committee has the honour to present its Eighth Report of 1987 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 Standing Order 36AAA:

Aboriginal and Torres Strait Islander Heritage Protection Bill 1987
Aboriginal Land (Lake Condah and Framlingham Forest) Bill 1987
Customs Tariff (Miscellaneous Amendments) Bill 1987
National Parks and Wildlife Conservation Amendment Bill 1986
National Parks and Wildlife Conservation Amendment Bill (No.2) 1987
Ships (Capital Grants) Bill 1987
States Grants (Schools Assistance) Amendment Bill 1987
Sugar Cane Levy Collection Bill 1987

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION BILL 1987

This Bill was introduced into the House of Representatives on 25 March 1987 by the Minister for Aboriginal Affairs.

The Bill is a companion to the Aboriginal Land (Lake Condah and Framlingham Forest) Bill 1987. It will provide a new scheme for the protection of Victorian Aboriginal cultural heritage.

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

Clause 7 -
New sub-section 21A(1) - Definition of 'community area' - Inappropriate delegation of legislative power

Clause 7 would insert a new Part IIA dealing with Victorian Aboriginal cultural heritage. New sub-section 21A(1) would define 'community area' for the purposes of that Part as the area in Victoria declared by the regulations to be the area of a local Aboriginal community for the purposes of the Part. A local Aboriginal community may advise the Minister that a temporary or permanent declaration of preservation should be made in relation to a place or object within its community area and it may, for example, grant consent to the excavation of any Aboriginal place or object in that area: see sub-section 21U(3).

The Committee suggests that, given the powers of a local Aboriginal community in relation to its community area, it would be more appropriate if the relevant areas were to be set out in a Schedule to the Act rather than by regulations. The Committee therefore draws the definition of 'community area' in new sub-section 21A(1) to the attention of the Senate under principle 1(a)(iv) in that it may be considered to constitute an inappropriate delegation of legislative power.

New sub-section 21A(2) - 'Henry VIII' clause

New sub-section 21A(2) would empower the Minister, by order published in the Gazette, to vary the content of the Schedule which sets out the names of organisations specified for the purpose of the definition of 'local Aboriginal community' in sub-section 21A(1). The Minister may amend the Schedule by adding, omitting or varying the name of an organisation that is incorporated in, or carries on business in, Victoria.

Because new sub-section 21A(2) would permit the Minister to alter the Schedule by executive instrument it may be characterised as a 'Henry VIII' clause and as such the Committee draws it to the attention of the Senate under principle 1(a)(iv) in that it may be considered to constitute an inappropriate delegation of legislative power.

New sub-section 21B(2) - Delegation

New sub-section 21B(1) empowers the Minister to delegate all or any of the powers that are conferred on the Minister by the new Part to a State Minister and new sub-section 21B(2) enables such a State Minister to authorise another person to exercise the power so delegated. It therefore enables the power to be delegated, in effect, to any person or the holder of any office whom the State Minister may nominate.

The Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the person to whom a delegation may be made. The Committee therefore draws new sub-section 21B(2) to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

New sub-section 21F(2) - Retrospectivity

New sections 21D and 21E provide that a local Aboriginal community which is dissatisfied with a decision of the Minister making, varying, refusing to make or revoking a temporary declaration of preservation in respect of an Aboriginal place or object may require the Minister to appoint an arbitrator to review the Minister's decision. Sub-section 21F(1) provides that an arbitrator may confirm or vary the decision of the Minister or may make any decision which the Minister could have made in substitution for the decision of the Minister. Thus an arbitrator may, for example, make a declaration of preservation in a case where the Minister has refused to make such a declaration. New sub-section 21F(2) provides that a decision made by an arbitrator in substitution for a decision of the Minister has effect on and from the day on which the decision of the Minister had effect unless the arbitrator determines otherwise. Thus in the example given the declaration of preservation made by the arbitrator could have effect retrospective to the date on which the Minister refused to make the declaration.

As the contravention of the terms of a declaration carries very heavy penalties the Committee draws new sub-section 21F(2) to the attention of the Senate under principle 1(a)(i) in that by enabling declarations to be given retrospective effect it may be considered to trespass unduly on personal rights and liberties.

ABORIGINAL LAND (LAKE CONDAH AND FRAMLINGHAM FOREST) BILL 1987

This Bill was introduced into the House of Representatives on 25 March 1987 by the Minister for Aboriginal Affairs.

The Government of the State of Victoria has requested the Commonwealth Parliament to enact legislation to provide for the vesting and control of two parcels of land in Victoria to two

Aboriginal Corporations. The Bill will ensure that the two parcels (Lake Condah and Framlingham Forest) will be vested and controlled by the two Aboriginal Corporations, as well as providing for compensation to be paid for prior interests in the vested land. The Bill also requires the two Corporations to establish a register of sacred sites.

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

Sub-clause 5(2) - Delegation

Sub-clause 5(1) empowers the Minister to delegate to a Minister of the Crown of the State of Victoria all or any of the powers conferred on the Minister by the Act. Sub-clause 5(2) enables a Victorian Minister to whom a power has been so delegated to authorise another person to exercise the power. It therefore enables the power to be delegated, in effect, to any person or the holder of any office whom the State Minister may nominate.

The Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the person to whom a delegation may be made. The Committee therefore draws sub-clause 5(2) to the attention of the Senate under principle 1(a)(ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

CUSTOMS TARIFF (MISCELLANEOUS AMENDMENTS) BILL 1987

This Bill was introduced into the House of Representatives on 2 April 1987 by the Minister Assisting the Minister for Industry, Technology and Commerce.

The Bill proposes amendments to a number of Acts as a consequence of the introduction of the Customs Tariff Bill 1987. The amendments take account of the redrafting of the sections and renumbering of the schedules to the Customs Tariff Act and provisions within those schedules to which references are made in the various Acts.

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

Clause 6 - Non-reviewable decisions or lack of parliamentary scrutiny

Clause 6 would repeal sections 151 and 151A of the Customs Act 1901 and would insert a new section 151 which is essentially a redrafting of the old sections. New paragraphs 151(6)(c), (7)(b), (8)(b) and (9)(c) and new sub-sections 151(13) and (14) would empower the Comptroller-General to determine, by notice in writing in the Gazette, various matters affecting the country of manufacture of goods and hence the tariff which they bear. In particular the Comptroller-General would be empowered to determine:

- that materials are 'manufactured raw materials' of a country and that goods manufactured from those materials are therefore to be taken to be the manufacture of that country;

- percentages of the works or factory cost of goods required to be attributable to the value of labour or materials of certain countries in order for those goods to be treated as the manufacture of those countries;

- the manner in which the factory or works cost of goods or the value of labour or materials is to be determined; and

- that goods shall be deemed to be goods of a kind not commercially manufactured in Australia so that only 25%, rather than 75%, of their factory or works cost need be represented by the value of labour or materials of a country in order for those goods to be treated as the manufacture of that country.

The Committee drew attention to the present sections 151 and 151A when they were inserted by the Customs Tariff (Miscellaneous Amendments) Act 1982 (see the Committee's Thirteenth and Fifteenth Reports of 1982) and at that time the Minister Assisting the Minister for Industry and Commerce responded that the concession in respect of 'manufactured raw materials' then applied to about forty materials from New Zealand and thirty from Canada, that the discretion to vary percentages of factory or works cost had only been used in one instance to enable certain previously qualifying goods to receive preferential admission, and that the provision in respect of goods not commercially manufactured in Australia was employed only after 'consideration of applications by interested parties'. It was therefore unclear to the Committee whether the powers to be conferred on the Comptroller-General by new section 151 should be characterised as administrative or legislative. If, as appeared to be the case in respect of the provision in respect of goods not commercially manufactured in Australia, determinations were to be made on a case by case basis, then it appeared to the Committee that the power might be characterized as administrative. However it was doubtful whether the general power of review conferred on the Administrative Appeals Tribunal by sub-section 273GA(2) in respect of disputes arising as to the rate of duty payable in respect of any goods would extend to the review of such a determination by the Comptroller-General. If, on the other hand, it was anticipated that the Comptroller-General would determine general rules applying to large numbers of cases - as it appeared the concession in respect of 'manufactured raw materials' operated at the moment - then the power might be classified as

legislative. That being so, in the Committee's view its exercise should be subjected to parliamentary scrutiny by way of tabling and disallowance of the Gazette notices.

The Committee therefore drew new section 151 to the attention of the Senate under principles 1(a)(iii) and (v) in that by conferring on the Comptroller-General the power to make determinations affecting the rate of duty payable in respect of goods without either providing for an appropriate power of review or for parliamentary scrutiny it might be considered either to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions or to subject legislative power insufficiently to parliamentary scrutiny. The Minister for Industry, Technology and Commerce has responded:

> 'The discretionary powers of concern to your Committee are not new and have been in place in various forms since 1925 to allow implementation of the discretionary requirements contained in International Trade Agreements. These powers formerly vested in the Minister were transferred to the Comptroller-General by the Customs Administration (Transitional Provisions and Consequential Amendments) Act 1986.
>
> I have given below my comments on the specific powers of concern to your Committee:
>
> S.151(6)(c)
>
> - materials imported into a country that the Comptroller has determined to be "manufactured raw materials of the country"
>
> - the administrative process currently in place with regard to this discretion allows for open scrutiny of actions taken vis:

- application is made by an interested party to Australian Customs Service (ACS) for a material to be determined under the section

- application is advertised in Commonwealth Gazette and Australian Customs Notice seeking public comment/objection within 30 days.

- if objections are received, the ACS endeavours to resolve or disallows the application

- if no objections, or if the issue is resolved, the Comptroller publishes his determination in the Gazette.

S.151(7)(b)
(8)(b)
(9)(c)

- percentage of factory or works cost to be achieved in order for goods to be treated as manufacture of a country.

  - these discretions have been used on only two occasions - in both instances with regard to goods from New Zealand.

S.151(13)

- the manner in which factory or works cost of goods or the value of labour or materials is to be determined

- this is a general discretion of a procedural policy nature and infrequently used, in fact current determinations were signed in 1978 and 1965 respectively

- on these occasions the discretion was used to reflect prevailing accounting procedures.

S.151(14)

- goods of a kind not commercially manufactured

  - rationale behind the provision is that if goods are not manufactured in Australia or protective rates of duty do not apply, then the goods ought to be admitted at preferential rates under fairly liberal conditions

  - currently applies only to goods qualifying for Canadian preference

  - as special rates of duty for Canada diminish this provision loses significance.

It is my view therefore that the powers are administrative in nature and should not be characterised as legislative, therefore the question of the tabling of any gazette notices should not arise.'

The Committee thanks the Minister for this response. While it is apparent that the powers are little exercised, it remains the view of the Committee that, if the powers are to be characterised as administrative, then their exercise should be subject to an appropriate form of review on the merits. The Committee therefore continues to draw new section 151 to the attention of the Senate

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

NATIONAL PARKS AND WILDLIFE CONSERVATION AMENDMENT BILL 1986
NATIONAL PARKS AND WILDLIFE CONSERVATION AMENDMENT BILL (NO.2) 1987

The Committee commented on these Bills in its Sixth Report of 1987 (29 April 1987). A response has since been received from the Minister for Arts, Heritage and Environment and although both Bills passed the Senate on 30 April 1987 the relevant parts of that response are reproduced here for the information of the Senate.

Clause 7 - No compensation payable

The National Parks and Wildlife Conservation Amendment Bill 1986 gives effect to the Government's proposed ban on mining in Kakadu National Park. Clause 7 of the Bill provides that the Commonwealth is not to be liable to pay compensation to any person by reason of its enactment. The National Parks and Wildlife Conservation Amendment Bill (No.2) 1987 will permit regulations to be made regulating or prohibiting operations for the recovery of minerals in the conservation zone to be declared over those parts of the Gimbat and Goodparla pastoral leases which it is not proposed to incorporate immediately in the Kakadu National Park. The Bill will also require any operation for the recovery of minerals in the conservation zone to be subject to environmental impact assessment under the Environment Protection Impact of Proposals Act 1974. Once again clause 7 of the Bill provides that the Commonwealth is not liable to pay compensation to any person by reason of its enactment.

The Committee accepted that there was no constitutional obligation on the part of the Commonwealth to pay compensation to persons prevented from exercising their interests in respect of minerals on, in or beneath land within the Kakadu National Park or the conservation zone either upon the basis that the laws were supported by the Territories power (s.122) in the Constitution and hence were not subject to the 'just terms' constraint imposed on the acquisition of property by placitum 51(xxxi) of the Constitution - see Teori Tau v. Commonwealth (1969) 119 CLR 564 - or that no 'acquisition' of proprietary rights was involved so as to bring the laws within that constraint: see Commonwealth v. Tasmania (1983) 46 CLR 625 at 708-9 per Mason J., 738 per Murphy J., 795-6 per Brennan J.; cf. 825-9 per Deane J. However both Bills clearly affected pre-existing property rights which persons might have had in respect of land within the Kakadu National Park and the conservation zone and both Bills would leave the holders of those rights without compensation. The Committee therefore drew clause 7 of both Bills to the attention of the Senate under principle 1(a)(i) in that the clauses might be considered to trespass unduly on personal rights and liberties. The Minister for Arts, Heritage and Environment has responded:

> 'I have been advised that, as accepted by the Senate Committee, there is no constitutional requirement, arising from s.51(xxxi) of the Constitution, for the provision of compensation to persons whose mining interests would be affected by the prohibition on all mining operations in Kakadu National Park.
>
> Further, the provision in the Bill relating to compensation in respect of pre-existing mineral rights within Kakadu National Park reflects the Government's decisions in relation to the Park.
>
> I have also noted the Committee's comments included in Alert Digest No.4 of 24 March 1987 which raise a similar issue in relation to clause 7 of the National Parks and Wildlife Conservation Amendment Bill (No.2)

1987. My comments in relation to clause [7] of the 1986 Bill are equally applicable to that legislative provision.'

The Committee thanks the Minister for this response. The Committee notes that, in passing the two Bills on 30 April 1987 the Senate accepted the Government's policy decisions in relation to the Park and conservation zone.

SHIPS (CAPITAL GRANTS) BILL 1987

This Bill was introduced into the House of Representatives on 2 April 1987 by the Minister for Transport.

The Bill provides an incentive for the introduction of modern technologically advanced ships to the Australian fleet. The incentive is in the form of a taxable grant of 7% of the capital cost of eligible ships.

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

Sub-clause 6(2) and paragraph 7(1)(c) - Inappropriate delegation of legislative power

The Bill provides for grants to be paid to shipowners subject to certain preconditions, in particular that there is a category certificate in respect of the ship concerned and that the shipowner intends to do all things reasonable to ensure that the number of the ships crew on a voyage will not exceed the maximum crew number for that voyage. A category certificate may specify more than one category and maximum crew numbers are to be set for *each category. Sub-clause 6(1) specifies three particular* categories - tankers on foreign voyages, tankers on domestic voyages and non-tankers on voyages - and sub-clause 6(2) provides

that the regulations may declare further categories in respect of specified ships or classes of ships on specified voyages or voyages generally. Paragraphs 7(1)(a) and (b) set maximum crew numbers for the categories specified in sub-clause 6(1) and paragraph 7(1)(c) provides that the maximum crew numbers for other categories are to be prescribed by the regulations.

The Minister's Second Reading speech indicates that new categories of ships will only rarely be created by regulations and that in such cases maximum crew numbers well below the usual levels set by paragraphs 7(1)(a) and (b) would apply. However the power to prescribe new categories and to set new maximum crew numbers is open-ended and could also be used to undermine the stated intention of the legislation to reduce present crewing levels. Given the importance of the concepts to the whole legislative scheme the Committee draws sub-clause 6(2) and paragraph 7(1)(c) to the attention of the Senate under principle 1(a)(iv) in that by permitting these elements to be varied by regulations they may be considered to constitute inappropriate delegations of legislative power.

Paragraphs 18(1)(e) and (2)(f) - Inappropriate delegation of legislative power

Sub-clauses 18(1) and (2) provide that, if the Secretary forms the opinion that the price paid for a ship or for the conversion of a ship respectively is incorrect or unduly high or, by virtue of paragraph (1)(e) or (2)(f), 'is an unreasonable price because of a prescribed reason', the Secretary may determine an appropriate price for the purposes of the Act. In an appeal in relation to an amount of grant the Administrative Appeals Tribunal may review a determination made by the Secretary under sub-clause 18(1) or (2).

It is quite usual in bounty legislation to provide for the adjustment of the cost of items in respect of which bounty is payable if the cost is considered excessive for some reason - see for example section 8 of the Bounty (Ship Repair) Act 1986 - but

it is unusual to provide, as in paragraphs 18(1)(e) and (2)(f), for the open-ended extension of the reasons for which a price may be determined to be unreasonable. If the reasons set out in paragraphs 18(1)(a) - (d) and (2)(a) - (e) are considered insufficient in themselves it would, in the Committee's view, be more appropriate simply to add a further category to the effect that the price 'is an unreasonable price' rather than to leave to the regulations the addition of further reasons for the exercise of the power to determine an appropriate price.

The Committee therefore draws paragraphs 18(1)(e) and (2)(f) to the attention of the Senate under principle 1(a)(iv) in that by so permitting the reasons for which the Secretary may determine a new price for a ship or the conversion of a ship to be extended by regulations they may be considered to constitute an inappropriate delegation of legislative power.

STATES GRANTS (SCHOOLS ASSISTANCE) AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 29 April 1987 by the Minister Representing the Minister for Education.

The Bill will amend the States Grants (Schools Assistance) Act 1984 to: -

- supplement existing financial provisions relating to the 1987 and 1988 calendar years to take into account increases in price levels;

- enable capital grants for non-government schools in 1988 and subsequent years to be allocated as a block grant for distribution by approved block grant authorities;

- ensure that full fee paying private overseas secondary students will not be eligible for general recurrent grants; and

- make a technical amendment to enable alterations to be made to the list of schools.

The total amount of supplementation to be provided by this Bill is $18 million in 1987 and $9 million in 1988.

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

Clause 3 - Inappropriate delegation of legislative power

Clause 3 would insert a definition of a 'full fee paying private overseas secondary student' as a student of a kind declared by the regulations to be such a student. Such students are to be disregarded in calculating student numbers for the purpose of general recurrent grants and the definition will therefore have a significant impact on the total money expended in grants under the Act.

The Committee suggests that in consequence the definition should be set out in the Act, rather than being left to regulations, and accordingly draws the definition to the attention of the Senate under principle 1(a)(iv) in that it may be considered to be an inappropriate delegation of legislative power.

SUGAR CANE LEVY COLLECTION BILL 1987

This Bill was introduced into the House of Representatives on 2 April 1987 by the Minister for Transport.

The Bill is to provide the machinery necessary for collecting the levy imposed by the Sugar Cane Levy Bill 1987. The Bill specifies the liability of growers and millers under the scheme, outlines penalties for non-compliance and provides appropriate powers of enforcement.

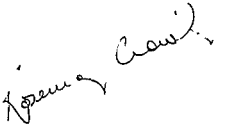
The Committee draws the attention of the Senate to the following clause of the Bill:

Sub-clause 12(2) - Self incrimination

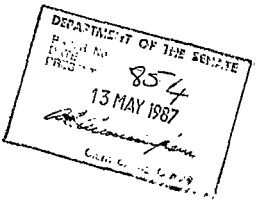
Sub-clause 12(2) provides that a person is not excused from submitting a return or providing information that the person is required by or under the Act or the regulations to submit or provide on the ground that the return or the information might tend to incriminate the person. The sub-clause also contains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

This proviso, which used to be the standard form of such provisions, only protects the person required to give self-incriminating information against the use in any subsequent proceedings of the actual return or information so provided. By contrast the more recent form used in Commonwealth legislation extends the protection to any information or thing acquired as a direct or indirect consequence of the person being required to give the incriminating information: see, for example, sub-section 27(4) of the Disability Services Act 1986. The Committee therefore draws sub-clause 12(2) to the attention of the Senate under principle 1(a)(i) in that by removing the privilege against self incrimination and by failing to provide protection against the use in subsequent proceedings of evidence arising out of the

return or information that the person is so required to submit or provide it may be considered to trespass unduly on personal rights and liberties.



Rosemary Crowley
Chair
13 May 1987



SCRUTINY OF BILLS ALERT DIGEST

NO. 8 OF 1987

13 MAY 1987

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator R.A. Crowley, Chair
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator J.P. McKiernan
Senator J. Newman

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative power; or

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

The Committee has considered the following Bills:

Aboriginal Land Rights (Northern Territory) Amendment Bill (No.3) 1987

Bank Account Debits Tax Amendment Bill 1987

Bounty and Subsidy Legislation Amendment Bill 1987

Nursing Homes and Hostels Legislation Amendment Bill 1987

Supply Bill (No.1) 1987-88

Supply Bill (No.2) 1987-88

Supply (Parliamentary Departments) Bill 1987-88

Taxation Laws Amendment Bill (No.2) 1987

NOTE: This Digest is circulated to all Honourable Senators. Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to do so.

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL (NO.3) 1987

This Bill was introduced into the Senate on 7 May 1987 by the Minister for Resources and Energy.

The Bill amends the Aboriginal Land Rights (Northern Territory) Act 1976. Principally, the Bill provides for a new scheme regulating the exploration for, and mining of, minerals and in particular, the operation of the mining veto on Aboriginal land.

The new scheme will provide clear guidelines governing the granting of a once-only consent at the exploration stage and the negotiation of terms and conditions at the exploration and mining stages.

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

Clause 5 -
New sub-sections 41(3), 42(14) and 47(2) and (4) - Non-reviewable decisions

Clause 5 inserts a new Part IV in the Principal Act relating to the grant of exploration licences and mining interests in respect of Aboriginal land. New sub-section 41(2) imposes time limits on applications for exploration licences but new sub-section 41(3) provides that the Minister may grant an extension of time if, having consulted with the Northern Territory Mining Minister, the Minister is satisfied that:

(a) it is not reasonably practicable for the applicant to make the application within the relevant period; and

(b) in all the circumstances of the case it is appropriate that a longer period should apply.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

New section 42 establishes a negotiating period for the agreement of the terms and conditions to which the grant of an exploration licence may be subject. New sub-section 42(14) provides that, upon request by the Land Council concerned, the Minister may extend the negotiating period if, having consulted with the Northern Territory Mining Minister, the Minister is satisfied that:

(a) it is not reasonably practicable for the Land Council to perform its functions under the section within the relevant negotiating period; and

(b) in all the circumstances of the case, it is appropriate that a longer negotiating period should apply.

New sub-section 47(2), in conjunction with other provisions of that section, provides that an exploration licence is cancelled if, having consulted with the Northern Territory Mining Minister, the Minister is satisfied that:

(a) the relevant Land Council is entitled to state that:

(i) the licence-holder is conducting, or is likely to conduct, exploration works otherwise than in accordance with the proposed exploration program referred to in the application for consent to the grant of the licence; and

(ii) the exploration works are causing, or are likely to cause, a significant impact on the affected land and on Aboriginals; and

(b) the national interest does not require that the exploration works should proceed.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

New sub-section 47(4), in conjunction with other provisions of that section, provides that a mining interest is not to be granted to an applicant, or is to be cancelled, if the Minister is satisfied that:

(a) the proposed mining works or related activities to be conducted on the land to which the application relates are not in accordance with the details set out in the original application for an exploration licence;

(b) the Land Council consented to the grant of the exploration licence;

(c) the works or activities are causing, or are likely to cause, a significant impact on the affected land and on Aboriginals, to the extent that the Land Council would not have consented to the grant of the licence; and

(d) the national interest does not require that the works or activities should proceed.

Although in each case these provisions confer broad discretions on the Minister, in particular as to whether, in the former two cases, it is appropriate, in all the circumstances, that extensions of time should be allowed, and, in the latter two cases, as to whether the national interest requires that works should proceed, no provision has been made for review of the decisions on their merits. The only avenue of review would therefore be as to the legality of the decisions, pursuant to the Administrative Decisions (Judicial Review) Act 1977, and this avenue would be limited by the very breadth of the criteria to which the Minister is to have regard. The drafting of the sub-sections contrasts with that of new paragraph 48(3)(c) which provides that the Minister, after consultation with the Commonwealth Minister for Resources and Energy and the Northern Territory Mining Minister, shall authorise the making of a further application for the grant of an exploration licence if

the Minister is satisfied on reasonable grounds of certain matters including that the public interest requires that a further application be made. The addition of the words 'on reasonable grounds' restricts the discretion afforded the Minister and, in the view of the Committee, makes review pursuant to the Administrative Decisions (Judicial Review) Act 1977 a sufficient avenue for review since it would be possible in an application pursuant to the Act to go behind the Minister's reasons for holding that, for example, the public interest required the making of a further application for an exploration licence in order to test whether the Minister had reasonable grounds for holding that view.

The Committee therefore draws new sub-sections 41(3), 42(14) and 47(2) and (4) to the attention of Senators in that, by affording the Minister broad discretions without providing for review of the exercise of those discretions on their merits, they may be considered to make rights, liberties, and/or obligations unduly dependent upon non-reviewable decisions.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

BANK ACCOUNT DEBITS TAX AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 6 May 1987 by the Minister Assisting the Treasurer.

The Bill will amend the Bank Account Debits Tax Act 1982. It will give effect to some 1986-87 Budget proposals. In particular, it will -

- abolish the higher rates of the bank account debits tax applicable in the Australian Capital Territory (1986-87 Budget announcement); and

- insert anti-avoidance provisions necessary as a consequence of the imposition of tax on debits to payment order accounts kept with non-bank financial institutions, as proposed by the accompanying Taxation Laws Amendment Bill (No.2) 1987.

The Committee has no comments on this Bill.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

BOUNTY AND SUBSIDY LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 6 May 1987 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Bill is an omnibus measure, which proposes to amend a series of Bounty and Subsidy Acts to give effect to various Government decisions, to correct some drafting anomalies and clarify some eligibility criteria in several schemes, and to complete the modernisation of the administrative provisions in several other schemes commenced in the previous two Bounty and Subsidy Legislation Acts of 1986.

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

Clause 22 - Schedule -
Bounty (Computers) Act 1984 - New sub-section 13(1A) - Lack of parliamentary scrutiny

Clause 22 would amend the Acts specified in the Schedule as set out in the Schedule. In particular it would insert a new sub-section 13(1A) in the Bounty (Computers) Act 1984 to provide that a claim may not be made for an amount of bounty that is less than $200 'or such other amount as the Comptroller-General determines in writing'.

The Committee recognises that the new sub-section does not differ materially from sub-section 14(2) of the Bounty (Books) Act 1986 on which the Committee did not comment when it examined the relevant Bill last year. However, in the view of the Committee the determination of the Comptroller-General as to the threshold level for bounty claims should be subject to parliamentary scrutiny by way of tabling and disallowance. The Committee

therefore draws new sub-section 13(1A) to the attention of Senators in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

NURSING HOMES AND HOSTELS LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 7 May 1987 by the Minister for Community Services.

The Bill will amend the National Health Act 1953 and Nursing Homes Assistance Act 1974 to introduce new recurrent funding arrangements for nursing homes for the aged to commence upon 1 July 1987. It will also provide a mechanism for establishing the standards of nursing home care to be provided in nursing homes approved under the National Health Act 1953.

The Bill will amend the Nursing Homes Assistance Act 1974 so that it only applies to nursing homes where the majority of patients are disabled persons who are less than 70 years of age. All other nursing homes approved under that Act will have their approvals transferred to the National Health Act 1953.

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

Clause 16 -
New section 45E - Non-reviewable decisions

Clause 16 would insert new sections 45D and 45E in the National Health Act 1953 empowering the Minister to determine standards to be observed in the provision of nursing home care in approved nursing homes and specifying the consequences of a failure to satisfy these standards. In particular, where the Minister declares that a home does not satisfy the standards Commonwealth benefit is not payable to the proprietor in respect of patients admitted after the making of a determination to that effect.

The Minister's decision that a home does not satisfy the standards would not be reviewable otherwise than as to its legality pursuant to the Administrative Decisions (Judicial

Review) Act 1977. The Minister's Second Reading speech indicates an intention to establish Nursing Home Standards Review Panels in each State and Territory to provide an appropriate professionally qualified peer review mechanism but it is unclear when these Panels will be established and whether they will be given a legislative basis. The Committee notes that clause 16 is to commence on 1 July this year and that there is no assurance that any review mechanism will be in place at its commencement.

Accordingly, the Committee draws new section 45E to the attention of Senators that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

SUPPLY BILL (NO.1) 1987-88

This Bill was introduced into the House of Representatives on 6 May 1987 by the Minister Representing the Minister for Finance.

The Bill seeks appropriations totalling some $8652.1 million for the ordinary annual services of the government. This is $655.4 million, or about 8.2 per cent, greater than the equivalent amounts provided in the Supply Act (No.1) 1986-87.

A significant part of the increase reflects the full year effects of new policies introduced in this year's budget, price and cost increases and exchange rate variations.

The Committee has no comments on this Bill.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

SUPPLY BILL (NO.2) 1987-88

This Bill was introduced into the House of Representatives on 6 May 1987 by the Minister Representing the Minister for Finance.

The Bill seeks interim appropriations, totalling $2,404.3 million, for expenditure on capital works and services, payments to or for the States and the Northern Territory and certain other services for the period 1 July 1987 to 30 November 1987.

The Committee has no comments on this Bill.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

SUPPLY (PARLIAMENTARY DEPARTMENTS) BILL 1987-88

This Bill was introduced into the House of Representatives on 6 May 1987 by the Minister Representing the Minister for Finance.

The Bill seeks interim appropriations to meet expenditures by the Parliamentary Departments during the period 1 July 1987 to 30 November 1987. They total some $23.7 million.

The Committee has no comments on this Bill.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

TAXATION LAWS AMENDMENT BILL (NO.2) 1987

This Bill was introduced into the House of Representatives on 6 May 1987 by the Minister Assisting the Treasurer.

The Bill will implement a number of the major changes announced by the Treasurer on 10 December 1986 as part of the Government's overhaul of the company tax system. In particular, it will abolish, subject to transitional rules, the additional tax payable by private companies under Division 7 of the Income Tax Assessment Act 1936 and will ensure that the intercorporate dividend rebate is allowed on a gross rather than a net basis. It will also remove the present exemption from tax for certain dividends satisfied by the issue of shares.

The Bill will also amend the income tax substantiation rules as they apply to deductions for car expenses. Another amendment will give effect to the Government's decision announced on 28 November 1986 to extend the bank account debits tax to debits made to payment order accounts with non-bank financial institutions, such as building societies and credit unions.

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

Clause 62 -
Schedule 4 - Trespass on personal rights and liberties

Clause 62 would amend the Acts specified in Schedule 4 as set out in the Schedule. In each case the effect of the amendment is to require the occupier of land, premises, a building or a place to provide to a taxation officer 'all reasonable facilities and assistance' for the effective exercise of the officer's investigative powers. A penalty of a maximum fine of $1,000 is specified. The Explanatory Memorandum indicates that it is envisaged that, for example, a taxation officer might require the

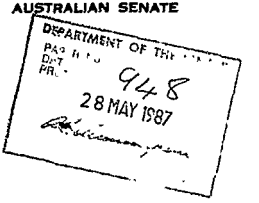
reasonable use of photocopying, telephone, light and power facilities and the facilities to extract relevant information from a computer. The officer could also require assistance in the form of advice as to where relevant documents are located and the provision of access to areas where such documents are located.

The Committee is concerned that the provision may impose an objective requirement upon the occupier of premises which that person may be unable to satisfy. The 'occupier' may, for example, be a junior employee and may be unable to provide access to certain safes or filing cabinets even though a court might consider the requirement to provide such assistance to be 'reasonable' in all the circumstances. The Committee would therefore prefer to see the provision recast so that the occupier might advance a 'reasonable excuse' for failure to provide the facilities or assistance required or so that the obligation is only placed upon the occupier to provide such facilities or assistance as he or she is reasonably able to provide.

The Committee recognises that the provisions to be inserted in the various Acts do not differ from sub-section 127(3) of the Fringe Benefits Tax Assessment Act 1986 on which the Committee did not comment when the relevant Bill was introduced last year. However, the Committee draws the provisions to be inserted by Schedule 4 to the attention of Senators in that by failing to take account of what it may be reasonable for a particular occupier to provide by way of facilities or assistance they may be considered to trespass unduly on personal rights and liberties.

Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to to so.

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF 1987

27 MAY 1987

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF 1987

27 MAY 1987

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF 1987

The Committee has the honour to present its Ninth Report of 1987 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 Standing Order 36AAA:

Aboriginal Land Rights (Northern Territory) Amendment Bill (No.3) 1987
Broadcasting (Ownership and Control) Bill 1987
Nursing Homes and Hostels Legislation Amendment Bill 1987
Sea Installations Bill 1987
Sea Installations Levy Bill 1987
Sea Installations (Miscellaneous Amendments) Bill 1987
Statute Law (Miscellaneous Provisions) Bill (No.1) 1987
Sugar Cane Levy Collection Bill 1987

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL (NO.3) 1987

This Bill was introduced into the Senate on 7 May 1987 by the Minister for Resources and Energy.

The Bill amends the Aboriginal Land Rights (Northern Territory) Act 1976. Principally, the Bill provides for a new scheme regulating the exploration for, and mining of, minerals and in particular, the operation of the mining veto on Aboriginal land.

The new scheme will provide clear guidelines governing the granting of a once-only consent at the exploration stage and the negotiation of terms and conditions at the exploration and mining stages.

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

Clause 5 -
New sub-sections 41(3), 42(14) and 47(2) and (4) - Non-reviewable decisions

Clause 5 inserts a new Part IV in the Principal Act relating to the grant of exploration licences and mining interests in respect of Aboriginal land. New sub-section 41(2) imposes time limits on applications for exploration licences but new sub-section 41(3) provides that the Minister may grant an extension of time if, having consulted with the Northern Territory Mining Minister, the Minister is satisfied that:

(a) it is not reasonably practicable for the applicant to make the application within the relevant period; and

(b) in all the circumstances of the case it is appropriate that a longer period should apply.

New section 42 establishes a negotiating period for the agreement of the terms and conditions to which the grant of an exploration licence may be subject. New sub-section 42(14) provides that, upon request by the Land Council concerned, the Minister may extend the negotiating period if, having consulted with the Northern Territory Mining Minister, the Minister is satisfied that:

(a) it is not reasonably practicable for the Land Council to perform its functions under the section within the relevant negotiating period; and

(b) in all the circumstances of the case, it is appropriate that a longer negotiating period should apply.

New sub-section 47(2), in conjunction with other provisions of that section, provides that an exploration licence is cancelled if, having consulted with the Northern Territory Mining Minister, the Minister is satisfied that:

(a) the relevant Land Council is entitled to state that:

(i) the licence-holder is conducting, or is likely to conduct, exploration works otherwise than in accordance with the proposed exploration program referred to in the application for consent to the grant of the licence; and

(ii) the exploration works are causing, or are likely to cause, a significant impact on the affected land and on Aboriginals; and

(b) the national interest does not require that the exploration works should proceed.

New sub-section 47(4), in conjunction with other provisions of that section, provides that a mining interest is not to be granted to an applicant, or is to be cancelled, if the Minister is satisfied that:

(a) the proposed mining works or related activities to be conducted on the land to which the application relates are not in accordance with the details set out in the original application for an exploration licence;

(b) the Land Council consented to the grant of the exploration licence;

(c) the works or activities are causing, or are likely to cause, a significant impact on the affected land and on Aboriginals, to the extent that the Land Council would not have consented to the grant of the licence; and

(d) the national interest does not require that the works or activities should proceed.

Although in each case these provisions confer broad discretions on the Minister, in particular as to whether, in the former two cases, it is appropriate, in all the circumstances, that extensions of time should be allowed and, in the latter two cases, as to whether the national interest requires that works should proceed, no provision has been made for review of the decisions on their merits. The only avenue of review would therefore be as to the legality of the decisions, pursuant to the Administrative Decisions (Judicial Review) Act 1977, and this avenue would be limited by the very breadth of the criteria to which the Minister is to have regard. The drafting of the sub-sections contrasts with that of new paragraph 48(3)(c) which provides that the Minister, after consultation with the Commonwealth Minister for Resources and Energy and the Northern Territory Mining Minister, shall authorise the making of a further application for the grant of an exploration licence if the Minister is satisfied on reasonable grounds of certain

matters including that the public interest requires that a further application be made. The addition of the words 'on reasonable grounds' restricts the discretion afforded the Minister and, in the view of the Committee, makes review pursuant to the Administrative Decisions (Judicial Review) Act 1977 a sufficient avenue for review since it would be possible in an application pursuant to the Act to go behind the Minister's reasons for holding that, for example, the public interest required the making of a further application for an exploration licence in order to test whether the Minister had reasonable grounds for holding that view.

The Committee therefore draws new sub-sections 41(3), 42(14) and 47(2) and (4) to the attention of the Senate under principle 1(a)(iii) in that, by affording the Minister broad discretions without providing for review of the exercise of those discretions on their merits, they may be considered to make rights, liberties, and/or obligations unduly dependent upon non-reviewable decisions.

BROADCASTING (OWNERSHIP AND CONTROL) BILL 1987

This Bill was introduced into the House of Representatives on 29 April 1987 by the Minister for Communications.

The Bill is to amend the Broadcasting Act 1942 in order to repeal the thirty year old "two station rule" governing the ownership of commercial television and replace it with:

- a "75% reach rule" which will allow persons to hold prescribed interests in any number of commercial television licences so long as the combined population of their service areas does not exceed seventy-five percent of the Australian population;

- limits on cross-ownership between television and newspapers and television and radio within the service area of the related commercial television licence.

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

Sub-clause 22(2) - Retrospectivity

Sub-clause 22(2) provides that paragraph 92(1)(a) of the Principal Act does not apply in relation to the holding of prescribed interests in commercial television licences on or after 28 November 1986 and before the commencement of clause 22. Clause 3 defines the Principal Act as the Broadcasting Act 1942. Paragraph 92(1)(a) presently embodies the 'two station rule' but will, following the amendment to be made by paragraph 22(1)(a) of the present Bill, embody the new '75% reach rule'.

The Committee suggested that sub-clause 22(2) was ambiguous. It could be read either as providing that persons who acquired interests in contravention of the two station rule between 28 November 1986 and the present were not to be taken to have been in breach of paragraph 92(1)(a) as in force before the commencement of paragraph 22(1)(a) of the present Bill or as providing that persons who acquired interests in contravention of the 75% reach rule during that period were not to be taken to have been in breach of paragraph 92(1)(a) as amended by paragraph 22(1)(a) of the present Bill. The Explanatory Memorandum indicated that the latter interpretation was the correct one although it compounded the ambiguity by referring to paragraph 22(1)(a) of the Bill rather than paragraph 92(1)(a) of the Principal Act. However it was difficult to see what scope there would be for the operation of the sub-clause if the latter interpretation was correct since, so far as the Committee was aware, no person held interests approaching the 75% limit at the present time. The Committee suggested that the alternative interpretation was equally tenable, particularly in light of sub-clause 2(4) which provided that the provisions of the Bill

might be brought into effect on different days. The correct interpretation of sub-clause 22(2) could thus depend on whether it was brought into operation at the same time as sub-clause 22(1) or at some time prior to the commencement of that provision.

The Committee suggested that the ambiguity identified by it could be simply overcome by amending sub-clause 22(2) so that it referred expressly to paragraph 92(1)(a) of the Principal Act as re-enacted by paragraph 22(1)(a). The Committee therefore drew sub-clause 22(2) to the attention of the Senate under principle 1(a)(i) in that by reason of this ambiguity, and the potential retrospectivity which it might create, it might be considered to trespass unduly on personal rights and liberties. The Minister for Communications has responded:

> 'The intent of sub-clause 22(2) is to provide that there can be no contravention of the "two station rule" (paragraph 92(1)(a) of the existing Broadcasting Act 1942) through the holding of prescribed interests during the period between 28 November 1986 and commencement of the new "75% reach rule". The Senate Committee has suggested that sub-clause 22(2) of the Bill could also be interpreted to provide that persons who have acquired interests during this period in contravention of the 75% reach rule are not to be taken to be in breach of that rule. The effect of this latter interpretation would be that the existing "two station rule" could operate in this period to bring persons into contravention of the Act.
>
> The Office of Parliamentary Counsel (OPC) has provided my Department with a formal opinion (copy attached for your information) [see Appendix I] which indicates that the only possible legal interpretation of sub-clause 22(2) is that the existing "two station rule" will not apply between 28 November 1986 and commencement of the "75% reach rule". You will note that OPC has pointed

out that sub-clause 22(2) refers to the holding of prescribed interests in this period and that only the existing provisions of the Broadcasting Act 1942 (ie. the two station rule) could have been contravened during this period. OPC have also advised that the alternative interpretation suggested by the Senate Committee could only arise if sub-clause 22(2) had referred to prescribed interests acquired during this period (ie. it could then be argued that, on commencement of the legislation, sub-clause 22(2) of the Bill might operate to protect interests previously acquired from the operation of the "75% reach rule").

The possible ambiguity raised by the Senate Committee appears to have been derived from a technical error in the Explanatory Memorandum for the Ownership and Control Bill. The Explanatory Notes on sub-clause 22(2) refer to paragraph 22(1)(a) of the Bill, rather than to paragraph 92(1)(a) of the existing Principal Act. I have now approved the issue of an Addendum to the Explanatory Memorandum for the Bill which corrects this technical error (copy attached for your information) [see Appendix II].

You will note that the Addendum also provides an explanation of the intended effect of the cross-media directorship limits in new section 92FAD (sub-clause 27(1) of the Bill) to make it clear that these provisions do not provide for contraventions where a person holds a directorship in a single company holding relevant cross-media interests. OPC is confident that this is the legal effect of section 92FAD. However it has been decided to remove any possible legal doubts through an express statement of policy intent in the Explanatory Memorandum for the purposes of section 15AB of the Acts Interpretation Act 1901.'

The Committee thanks the Minister for this response. While the Committee accepts that, in light of the explanation offered by the Office of Parliamentary Counsel, sub-clause 22(2) is not ambiguous, this merely serves to confirm what the Committee feared, namely that sub-clause 22(2) makes the abandonment of the present 'two station rule' retrospective to 28 November 1986, the day after the Minister's press release announcing the proposal to change the law. The Committee has repeatedly criticised the practice of 'legislation by press release', the practice whereby a press release by a Minister is treated as a de facto change to the law and legislation is introduced backdated to the day on which the proposal was announced: see most recently the Committee's comments on Taxation Laws Amendment Bill (No.5) 1986 in its Second Report of 1987. The practice carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. It treats the passage by the Parliament of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. While the Committee concedes that in this case the retrospectivity is beneficial to those who have breached the two station rule in reliance on the Minister's press release it is apparent that at the same time it disadvantages those who have prudently waited for the law to be changed by the Parliament. Whatever the justification for the use of the practice of 'legislation by press release' in stamping out tax avoidance schemes there would appear to be no justification for the use of this method of changing the law in the present case.

The Committee therefore draws sub-clause 22(2) to the attention of the Senate under principle 1(a)(i) in that by reason of its retrospective effect it may be considered to trespass unduly on personal rights and liberties.

NURSING HOMES AND HOSTELS LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 7 May 1987 by the Minister for Community Services.

The Bill will amend the National Health Act 1953 and Nursing Homes Assistance Act 1974 to introduce new recurrent funding arrangements for nursing homes for the aged to commence upon 1 July 1987. It will also provide a mechanism for establishing the standards of nursing home care to be provided in nursing homes approved under the National Health Act 1953.

The Bill will amend the Nursing Homes Assistance Act 1974 so that it only applies to nursing homes where the majority of patients are disabled persons who are less than 70 years of age. All other nursing homes approved under that Act will have their approvals transferred to the National Health Act 1953.

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

Clause 16 -
New section 45E - Non-reviewable decisions

Clause 16 would insert new sections 45D and 45E in the National Health Act 1953 empowering the Minister to determine standards to be observed in the provision of nursing home care in approved nursing homes and specifying the consequences of a failure to satisfy these standards. In particular, where the Minister declares that a home does not satisfy the standards Commonwealth benefit is not payable to the proprietor in respect of patients admitted after the making of a determination to that effect.

The Minister's decision that a home does not satisfy the standards would not be reviewable otherwise than as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. The Minister's Second Reading speech indicates

an intention to establish Nursing Home Standards Review Panels in each State and Territory to provide an appropriate professionally qualified peer review mechanism but it is unclear when these Panels will be established and whether they will be given a legislative basis. The Committee notes that clause 16 is to commence on 1 July this year and that there is no assurance that any review mechanism will be in place at its commencement.

Accordingly, the Committee draws new section 45E to the attention of the Senate under principle 1(a)(iii) that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

SEA INSTALLATIONS BILL 1987

This Bill was introduced into the House of Representatives on 2 April 1987 by the Minister for Arts, Heritage and Environment.

The Bill is one of a number of Bills required to put in place a scheme to regulate the operation of certain offshore sea installations fixed or moored to the sea bed of the Australian continental shelf beyond the territorial sea. The Bill will facilitate the development of technically sound, environmentally acceptable and economically viable sea installations.

It provides a basis for the application of important Commonwealth laws, and for State or Territory laws to be adopted as Commonwealth laws.

These provisions are parallel to those already applying under the Petroleum (Submerged Lands) Act 1967, which regulates offshore petroleum and mineral exploration and extraction.

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

Sub-clause 3(1) -
Definitions of 'environment related activity' and 'sea installation' - Inappropriate delegation of legislative power

The central purpose of the Bill is to require persons to obtain permits before operating 'sea installations' installed in the waters beyond the Australian territorial sea but within the outer limits of the continental shelf or Australia's 200 nautical mile fishing zone. 'Sea installations' are defined as man-made structures (including ships and aircraft) which can be used for an 'environment related activity'. Off-shore drilling rigs and drilling vessels are expressly excluded as are defence installations and, by virtue of paragraph (g) of the definition, prescribed structures. The term 'environment related activity' is defined as any activity relating to tourism or recreation, the carrying on of a business, the exploitation of the living resources of the sea, marine archaeology or, by virtue of paragraph (c) of the definition, any prescribed purpose.

Because the two definitions are critical to the operation of the Bill it may be thought inappropriate that, in the one case, structures should be capable of exclusion from the definition of 'sea installations', and, in the other case, that the definition of 'environment related activity' should be capable of extension, by regulations, rather than by amendment to the Act. The Committee therefore drew paragraph (g) of the definition of 'sea installation' and paragraph (c) of the definition of 'environment related activity' to the attention of the Senate under principle 1(a)(iv) in that they might be considered to constitute inappropriate delegations of legislative power. The Minister for Arts, Heritage and Environment has responded:

> 'I agree that the two definitions are crucial to the operation of the Bill. However, it is not possible at this stage to specify conclusively all the categories of sea installations and environment related activities that may need to be considered under the legislation. If extension or exclusion of the two definitions, as

the case may be, is covered by regulations rather than amendment to the Act, quick action can be taken in any unforeseen case, to avoid defeat of objectives of the Bill. It is anticipated that with time and experience a comprehensive set of definitions could be determined. However, the present the aim is only to elaborate on the concepts on which the Bill is based, not to enlarge them.'

The Committee thanks the Minister for this response. In continuing to draw attention to the paragraphs of the definitions, 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 12(2) and 52(4) - Reversal of the onus of proof

Sub-clause 12(1) creates an offence where a person causes a sea installation to be installed in an adjacent area otherwise than in accordance with a permit. Sub-clause 12(2) provides that it is a defence if it is established that the relevant installation was caused to be installed because of factors beyond the control of the person. Sub-clause 52(3) creates an offence where a vessel enters or remains in a safety zone specified by the Minister for the protection of a sea installation. Sub-clause 52(4) provides that it is a defence if it is established that the entering or remaining:

(a) occurred because of factors beyond the person's control;

(b) was necessary to secure the safety of, or appeared to be the only way of averting a threat to, human life; or

(c) was necessary to secure, or appeared to be the only way of averting a threat to, the safety of a ship at sea or of a sea installation.

In both instances the burden of proving the relevant matters by way of defence will fall upon the accused. This contrasts with the approach taken in the drafting of clause 49 which requires the operator of a sea installation to maintain it in good condition and repair on pain of a penalty. Sub-clause 49(2) provides that the requirement does not apply in relation to any structure, equipment or other property that was not brought into the adjacent area by or with the authority of the operator. The burden of establishing that the structure, equipment or other property was brought into the adjacent area by or with the authority of the operator will thus fall upon the prosecution.

The Committee was prepared to concede that the matters to be raised by way of defence under sub-clauses 12(2) and 52(4) were matters peculiarly within the knowledge of the defendant and that it would therefore be inappropriate to require the prosecution to negative these defences in every case. However, in conformity with the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319/1982), the Committee suggested that the defendant should merely be required to adduce evidence of the existence of the defence rather than, as at present, being required to establish the defence on the balance of probabilities.

The Committee therefore drew sub-clauses 12(2) and 52(4) to the attention of the Senate under principle 1(a)(i) in that by imposing the burden of establishing matters by way of defence on the accused in criminal proceedings they might be considered to trespass unduly on personal rights and liberties. The Minister for Arts, Heritage and Environment has responded:

> 'Sub-clauses 12(2) and 52(4) create offences of strict liability and concern safety factors associated with sea installations. Despite the strict liability imposed by the sub-sections, provision is made in the Bill for certain circumstances to constitute a defence.

As the Committee points out, these matters are peculiarly within the knowledge of the defendant and it would be inappropriate to require the prosecution to negative these defences in every case.

As the Attorney-General indicated in his letter of 16 October 1985 to the Senate Standing Committee on Constitutional and Legal Affairs in his response to its Report on the Onus of Proof in Criminal Proceedings, he is of the view that a reversal of the onus of proof can be justified in some circumstances including situations where the facts to be established are peculiarly within the knowledge of the defendant.

The imposition of an evidential burden on the accused, as suggested by the Committee, in relation to his or her personal state of mind would not facilitate the prosecution case at all but would rather impose an additional element to be negatived by the Crown beyond reasonable doubt. It would be extremely difficult for the Crown to obtain evidence sufficient to negative any defence that may be raised and in practice the Crown would, in all prosecutions, have to conduct extensive investigation to have sufficient evidence to negative any defence and to lead such evidence during it's case, against the contingency that the accused may lead evidence on this point. This flows from the strict rules which prevent the Crown from re-opening its case in other than exceptional circumstances. Even if the Crown were able to re-open, it is unlikely that the proceedings would be adjourned to enable the Crown to marshal the evidence necessary to disprove the matters raised by the defendant. The difficulty and cost of investigation in each case against the contingency that a defence may be raised, could not be justified.'

The Committee thanks the Minister for this response. It accepts that it is appropriate in these cases that the persuasive burden of proof in respect of the relevant defences be imposed on the accused.

Sub-clause 38(3) - Non-reviewable decision

Clause 38 provides that the Minister may give an exemption certificate relieving a person of the obligation to obtain a permit in respect of a specified sea installation if the Minister is satisfied that the installation is to be used only for scientific activities or activities related to marine archaeology. Sub-clause 38(3) provides that an exemption certificate is subject to such conditions as the Minister considers appropriate. Although paragraph 69(1)(k) confers a right of appeal to the Administrative Appeals Tribunal in respect of a refusal to give an exemption certificate there is no right of review of conditions imposed under sub-clause 38(3) otherwise than as to their legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. By contrast paragraph 69(1)(b) confers a right of appeal to the Administrative Appeals Tribunal in respect of the conditions imposed on permits.

Accordingly the Committee drew sub-clause 38(3) to the attention of the Senate under principle 1(a)(iii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The Minister for Arts, Heritage and Environment has responded:

> 'The Committee's point that the Bill does not provide for review of conditions imposed under sub-clause 38(3) in relation to exemption certificates, other than under the Administrative Decisions (Judicial Review) Act 1977, is noted. This provision provides a concession and accordingly any decision under it in favour of an applicant gives a benefit rather than inflicts a disadvantage. It is therefore different from other provisions subject to review.'

The Committee thanks the Minister for this response. However the Committee does not accept that the fact that a provision confers a benefit rather than inflicting a disadvantage is a sufficient rationale for denying a right of review on the merits in respect of the exercise of the discretion concerned. In any case the grant of an exemption certificate on conditions unacceptable to the applicant may be a significant disadvantage. The Committee therefore continues to draw sub-clause 38(3) to the attention of the Senate under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

Sub-clauses 44(2) and (3), 45(7) and 46(7) - 'Henry VIII' clauses

Sub-clause 44(1) provides that the Commonwealth Acts specified in the Schedule apply in relation to sea installations installed in adjacent areas as if those areas were part of the Commonwealth. Sub-clause 44(2) provides that the regulations may revoke the application, or the application in a specified adjacent area, of an Act, or part of an Act, specified in the Schedule. Sub-clause 44(3) further provides that the regulations may apply other Commonwealth Acts, in whole or in part, in relation to sea installations generally or sea installations installed in specified adjacent areas. Sub-clause 45(1) provides that the laws in force in a State for the time being (other than laws of the Commonwealth) apply in relation to sea installations installed in the adjacent area of the State. Sub-clause 45(7) provides that the regulations may provide that such State laws do not apply or apply subject to modifications specified in the regulations. Sub-clauses 46(1) and (7) respectively make similar provision for the application of the laws in force in a Territory to sea installations installed in the adjacent area of the Territory.

The law in force in relation to a sea installation is thus left in effect to the regulations which may modify without limitation the Commonwealth, State and Territory laws which clauses 44, 45 and 46 set out to apply. The Committee therefore drew sub-clauses 44(2) and (3), 45(7) and 46(7) to the attention of the Senate

under principle 1(a)(iv) in that as 'Henry VIII' clauses permitting the operation of Acts to be varied by regulations they might be considered to constitute an inappropriate delegation of legislative power. The Minister for Arts, Heritage and Environment has responded:

> 'Under the Bill, only Commonwealth laws that are set out in the Schedule to the Bill or prescribed under the Bill are applicable to sea installations. Under the Petroleum (Submerged Lands) Act 1967, Commonwealth laws do not apply in general, rather the Act requires each individual Commonwealth Act to be made specifically applicable to such installations.
>
> Extension of additional Commonwealth laws by regulation is consistent with past practice accepted by Parliament, and avoids inadvertent omissions or delayed application of laws. In either case the objectives of the legislation could be defeated. However, taking into account the Committee's comments, the Department and the Attorney-General's Department are examining whether there is a way of applying the body of Commonwealth law so that there are no likely detrimental unforseen consequences.
>
> The power included to modify by regulation State and Territorial laws applying as Commonwealth laws for the purposes of the Bill is analogous to the application of laws of other jurisdictions to territories such as in the Ashmore and Cartier Islands Acceptance (Amendment) Act 1985. This provides a means for the Commonwealth to respond quickly to changes in State and Territory laws, while retaining Parliamentary involvement.'

The Committee thanks the Minister for this response, and in particular the Minister's undertaking to examine, in conjunction with the Attorney-General's Department, a different means of achieving the desired end with regard to the application of

Commonwealth laws. With regard to the application of State and Territorial laws the Committee notes that, in the case of the Ashmore and Cartier Islands, Northern Territory laws are applied subject to modification by the Ordinances of the Territory of Ashmore and Cartier Islands. The Committee's concern is that, while it would be natural for a person operating in the Ashmore and Cartier Islands to consult the Ordinances of that Territory, it may be less obvious that a person operating in the adjacent areas should consult regulations made under the Sea Installations Bill 1987. In continuing to draw attention to sub-clauses 45(7) and 46(7), 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.

Clauses 56 and 65 - Entry without warrant

Clauses 56 and 65 provide that an inspector appointed for the purposes of the Act or an officer within the meaning of section 16 of the Income Tax Assessment Act 1936 may board any sea installation and enter into any part of the installation for the purpose of ascertaining whether or not there has been a contravention of the Act or a permit or for the purpose of valuing the installation respectively. Sub-clauses 56(3) and 65(3) provide that the inspector or officer, as the case may be, shall not enter a person's living quarters without the consent of the person while the person is in them. It therefore appears that it is intended that inspectors and officers may enter the living quarters on board a sea installation without consent and without any requirement for other authorisation provided only that the persons living there happen to be out at the time.

The proposed provision appears to lack logical consistency. If consent is considered sufficiently important to vitiate the right to enter parts of the installation then the requirement to obtain consent should not depend on the mere chance that the occupier of accommodation on board a sea installation is in or out of his or her living quarters: the inspector or officer should at least be required to make reasonable efforts to obtain the occupier's

consent before entering. On the other hand, given that the failure of the occupier to consent operates as a complete bar to entry by the inspector or officer and that no avenue is provided in the legislation by which this might be overcome (for example by way of a judicial warrant), it may be questioned whether the right to enter living quarters is necessary at all.

The Committee therefore drew clauses 56 and 65 to the attention of the Senate under principle 1(a)(i) in that, by providing for the entry into persons' private accommodation on board sea installations without their consent and without any form of judicial authorisation, they might be considered to trespass unduly on personal rights and liberties. The Minister for Arts, Heritage and Environment has responded:

> 'In relation to clause 65, I accept that the Sea Installations Bill could be amended to delete the last phrase in sub-clause 65(3) so that entry without permission would not occur. I am taking this up with the Attorney-General.
>
> The officer within the meaning of s.16 of the Income Tax Assessment Act 1936 referred to in sub-clause 65(1) is empowered under s.263 of that Act to have "full and free access" for the purposes of the Tax Act. The officer therefore does not require a warrant or special powers for the purposes of conducting a valuation.
>
> However, I take the point raised by the Committee that an inspector who is appointed to detect contravention of the Sea Installations Bill, or a permit, is not empowered to enter living quarters without the consent of the person concerned. Accordingly I am arranging for an appropriate amendment to be moved in the Senate providing that an inspector will not be able to enter accommodation without permission.'

The Committee thanks the Minister for these undertakings, which answer its concerns.

SEA INSTALLATIONS LEVY BILL 1987

This Bill was introduced into the House of Representatives on 2 April 1987 by the Minister Representing the Minister for Arts, Heritage and Environment.

The Bill is part of a package of Bills to provide for a scheme to regulate the operation of certain offshore sea installations.

It provides for a levy to be paid to the Commonwealth by a permit holder in relation to the operation of a sea installation. This will ensure that the administrative costs of the States and Territories are met, and that general revenue can benefit, as it would if similar installations were located on the mainland. The levy is expressed as a percentage of a valuation of the installation. The valuation of the installation will be calculated annually in accordance with valuation practice by officers of the Australian Taxation Office. Decisions will be subject to review by the Administrative Appeals Tribunal.

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

Sub-clause 8(1) - Inappropriate delegation of legislative power

Sub-clause 8(1) provides that the rate of levy imposed on sea installations is to be such percentage of the value of the installation as is declared by the regulations. No ceiling is set on the percentage which may be declared. The Committee has consistently argued that Parliament should not delegate its taxing powers lightly and that if the rate of a levy is to be fixed by regulations the empowering statute should at least set a

maximum on the rate of levy which may be imposed: see most recently the Committee's comment on clause 10 of the Dairy Produce Levy (No.1) Bill 1986 in its Ninth Report of 1986.

The Committee therefore drew sub-clause 8(1) to the attention of the Senate under principle 1(a)(iv) in that it might be considered an inappropriate delegation of legislative power. The Minister for Arts, Heritage and Environment has responded:

> 'I would suggest that in setting the rates of levy by regulation the Bill provides for flexibility in establishing operative rates of levy and does not commit the Government to figures that may be inappropriate, being either too low or too high. It would not be prudent to determine a maximum in advance and specify this in the legislation. The Bill includes guidance on setting the rate and the objectives of the legislation would be defeated if unusually high or punitive rates were determined. Under these circumstances I am firmly of the view that the mechanism for establishing the rate of levy is appropriate.'

The Committee thanks the Minister for this response. However the Committee believes that it is for the Parliament, not the Executive, to set a rate of levy in the nature of a tax and that where, as here, the power to set the rate is to be delegated, the Parliament should at least retain a measure of control by setting a statutory maximum. This could of course be altered in future if it proved to be inappropriate but only by amendment to the relevant Act. The Committee therefore continues to draw sub-clause 8(1) to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

SEA INSTALLATIONS (MISCELLANEOUS AMENDMENTS) BILL 1987

This Bill was introduced into the House of Representatives on 2 April 1987 by the Minister for Arts, Heritage and Environment.

The Bill makes amendments to Commonwealth legislation necessitated by the sea installations legislative package.

The Customs Act 1901 and the Excise Act 1901 are amended to give to officers administering the respective Acts power over such installations, and ships, aircraft, persons and goods arriving with or at the installations or departing overseas from such installations.

The Migration Act 1958 is amended to identify the point when sea installations and the persons on board enter Australia and when such installations become or cease to be part of Australia.

The amendments to the Quarantine Act 1908 apply a wide range of controls under the Act to sea installations. The principal control is to make newly arrived installations, persons and goods on the installations subject to quarantine.

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

Clause 12 -
New sub-section 58A(6) - Reversal of the onus of proof; Non-reviewable decision

Clause 12 would insert a new section 58A in the Customs Act 1901 creating an offence where a person travels from an external place to a sea installation or vice versa without the opportunity for questioning in Australia for the purposes of the Customs Act 1901 or where goods are brought from an external place to a sea installation or sent from a sea installation to an external place without being available for examination in Australia for the

purposes of the Act. New sub-section 58A(6) provides that it is a defence if the journey because of which the offence would have been committed:

(a) was necessary to secure the safety of, or appeared to be the only way of averting a threat to, human life;

(b) was necessary to secure, or appeared to be the only way of averting a threat to, the safety of a ship at sea, of an aircraft in flight or of a sea installation; or

(c) was authorised in writing by a Collector, and was carried out in accordance with the conditions (if any) specified in that authorisation.

Objection may be taken to the clause on two grounds. First, like sub-clauses 12(2) and 52(4) of the Sea Installations Bill 1987 to which attention was drawn above, new sub-section 58A(6) imposes upon the accused the burden of proving the relevant matters by way of defence. The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed upon defendants in criminal proceedings but rather that they should merely be required to bear an evidential onus, that is, the onus of adducing evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution.

Secondly, the decision to authorise a journey which would otherwise result in a contravention of new section 58A rests entirely in the discretion of the Collector and this decision is not reviewable otherwise than as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. Given that paragraph 58A(6)(c) discloses no objective criteria for the grant of authorisation by a Collector and imposes no restrictions on

the conditions which may be imposed, the right of review in respect of the legality of the decision would be very limited indeed.

The Committee therefore drew new sub-section 58A(6) to the attention of the Senate under principles 1(a)(i) and (iii) both because by imposing the persuasive onus of proof on the defendant it might be considered to trespass unduly on personal rights and liberties and because by giving such an unfettered discretion to Collectors without a corresponding right to seek review of their decisions on the merits it might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The Minister for Arts, Heritage and Environment has responded:

> 'As offences under the Customs Act 1901 are not criminal offences the proposed amendments are not directly covered by the recommendation in the report by the Senate Standing Committee on Constitutional and Legal Affairs, The Burden of Proof in Criminal Proceedings, referred to by the Committee in the Alert Digest.
>
> I understand that the Committee expressed a similar concern about a proposed amendment in the Customs and Excise Legislation Amendment Bill 1985 (Act No.40, 1985); and that the response forwarded on that occasion (which was included as an appendix to the Committee's 6th Report of 1985, dated 15 May 1985) satisfactorily answered the Committee's concern.
>
> I understand that reverse-onus provisions are not unusual in the Customs Act; where, in the typical case, the matter to be proved is within the sole knowledge of the person charged with the offence. In those circumstances, it is considered reasonable to apply reverse-onus provisions.

Secondly, the Committee has expressed its concern that the new section 58A contains an unfettered discretion without a right to review.

As a matter of general principle, I support the Committee's opposition to administrative decisions which infringe liberties or impose obligations, in absence of a corresponding right to have those decisions reviewed.

However, I should point out that, in this case, the proposed amendment will provide the Collector with a discretion to relax the stringent requirement in existing section 58 that binds the master of a ship or the pilot of an aircraft, in the absence of a reasonable cause, to enter any place other than a port or airport. It is anticipated that the vast majority of persons affected by this provision, belonging as they do to foreign vessels or aircraft, would not be in a position to remain in Australia for the lengthy period usually associated with the concluding of the review process. For these reasons, it is considered that it would be of little value to include a review procedure.'

The Committee thanks the Minister for this response. Although it accepts that customs prosecutions are not regarded in law as criminal proceedings, the provision dealt with in its Sixth Report of 1985 was not in fact a reversal of the onus of proof and the Minister's response in that case did not answer the Committee's concerns. However for reasons given above in relation to the similar provision in the Sea Installations Bill 1987 the Committee is prepared to accept that in this case it is appropriate to impose the persuasive onus on the accused in respect of the relevant defences. The Committee does not accept, on the other hand, that a right of review in respect of the discretion conferred on Collectors would be of little value. It appears to the Committee that such an authorisation could be

granted in respect of more than one journey and that refusal of such an authorisation could severely inconvenience the operator of a sea installation who may be based in Australia even if the ships and aircraft involved are not. The Committee therefore continues to draw new paragraph 58A(6)(c) to the attention of the Senate in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO.1) 1987

This Bill was introduced into the House of Representatives on 30 April 1987 by the Attorney-General.

The Bill continues the practice of introducing an omnibus Bill into each sitting of the Parliament as an expeditious way of making a large number of non-contentious amendments to legislation not otherwise being amended.

Some of the amendments made by this Bill tidy up, correct and up-date existing legislation. Other amendments are of minor policy significance or are matters of routine administration. The Bill amends 76 Acts and repeals 24.

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

Clause 3 - Schedule 1 -
Anglo - Australian Telescope Agreement Act 1970 -
New sub-section 8A(1) - Inappropriate delegation of legislative power

Clause 3 would amend the Acts specified in Schedule 1 as set out in that Schedule. In particular it would insert in the Anglo-Australian Telescope Agreement Act 1970 a new sub-section

8A(1) providing that additional functions may be conferred on the Anglo-Australian Telescope Board by regulations. The Board is presently limited in its functions to the operation and management of the Anglo-Australian Telescope in accordance with the Agreement.

The Committee considers that if the functions of the Board are to be extended beyond those conferred by its establishing statute then this should be done by way of amendment to the Act rather than by way of regulations. The Committee therefore draws new sub-section 8A(1) to the attention of the Senate under principle 1(a)(iv) in that it may be considered an inappropriate delegation of legislative power.

Wine Grapes Levy Collection Act 1979 -
New sub-section 10(2) - Self incrimination

Clause 3 would also have inserted a new sub-section 10(2) in the Wine Grapes Levy Collection Act 1979 providing that a person was not excused from furnishing a return or information that the person was required under the Act or the regulations to furnish on the ground that the return or information might tend to incriminate the person. The new sub-section also contained the proviso that any such return or information so furnished was not to be admissible against the person in criminal proceedings (other than proceedings related to the failure to furnish a return or information or the furnishing of a false or misleading return) or proceedings for the recovery of a penalty for non-payment of the levy.

This proviso, which used to be the standard form of such provisions, only protected the person required to give self-incriminating information against the use in subsequent

proceedings of the actual return or information so provided. By contrast the more recent form used in Commonwealth legislation extends the protection to any information or thing acquired as a direct or indirect consequence of the person being required to give the incriminating information: see, for example, sub-section 27(4) of the Disability Services Act 1986. The Committee therefore drew new sub-section 10(2) to the attention of the Senate under principle 1(a)(i) in that, by removing the privilege against self-incrimination and by failing to provide protection against the use in subsequent proceedings of evidence arising out of the return or information that the person was so required to furnish, it might be considered to trespass unduly on personal rights and liberties. The Committee is pleased to note that new sub-section 10(2) was amended in the House or Representatives on 11 May 1987 on the motion of the Attorney-General to accord with the more recent form of such provisions. The Committee thanks the Attorney-General for this amendment.

SUGAR CANE LEVY COLLECTION BILL 1987

The Committee commented on this Bill in its Eighth Report of 1987 (13 May 1987). It drew attention to the fact that sub-clause 12(2), which removed the privilege against self incrimination in respect of returns and information required to be furnished under the Act, only protected persons required to incriminate themselves against the use in any subsequent proceedings of the actual return or information so provided. By contrast the more recent form of such provisions in Commonwealth legislation - for example sub-section 27(4) of the Disability Services Act 1986 - extended the protection to any information or thing acquired as a direct or indirect consequence of the person being required to give the incriminating information.

The Committee is pleased to note that sub-clause 12(2) was amended in the House of Representatives on 5 May 1987 on the motion of the Minister for Primary Industry to accord with the more recent form of such provisions. The Committee thanks the Minister for this amendment.

Rosemary Crowley
Chair
27 May 1987

APPENDIX I

COMMONWEALTH OF AUSTRALIA

TELEPHONE 71 9111
TELEGRAMS COMATTGEN.
TELEX 62002

OFFICE OF PARLIAMENTARY COUNSEL
ROBERT GARRAN OFFICES
KINGS AVENUE
CANBERRA, A.C.T. 2600

OUR REFERENCE

YOUR REFERENCE

8 May 1987

The Secretary
Department of Communications
BELCONNEN ACT 2616

Attention: Mr Colin Lyons

Broadcasting (Ownership and Control) Bill 1987

It is possible that a simple reference to paragraph 92(1)(a) of the Broadcasting Act could, in the absence of other textual indicators, be a reference either to the old paragraph 92(1)(a) (the 2 station rule) or the new paragraph 92(1)(a) (the 75% rule). However, subclause 22(2) refers to the holding of interests during the period between 28 November 1986 and the commencement of the new paragraph 92(1)(a) (the 75% rule). The only paragraph in force during that period is the old paragraph 92(1)(a) (the 2 station rule). The new paragraph 92(1)(a) (the 75% rule) does not purport to govern the holding of interests at any time before the time when it comes into operation.

2. It is important to note that both versions of paragraph 92(1)(a) turn on the holding of interests during a particular period. They are not concerned with the time when interests are acquired. Subclause 22(2) is also concerned only with the holding of interests. If a person had acquired interests in breach of the old 2 station rule before 28 November 1986, the person would contravene section 92 for each day up to 28 November 1986 but not for any subsequent day; the fact that the interest was acquired before 28 November 1986 is irrelevant to the operation of subclause 22(2).

3. The intention behind subclause 22(2) was that the old 2 station rule should cease to apply as from 28 November 1986 and this is precisely what it does. The provision only applies to the holding of interests after that date and does not refer to their acquisition after that date and, in the context, the only provision that could possibly be caught by the reference to paragraph 92(1)(a) of the Principal Act is the old paragraph embodying the 2 station rule.

Vincent Robinson

(Vince Robinson)
Senior Assistant Parliamentary Counsel

ADDENDUM

1987

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BROADCASTING (OWNERSHIP AND CONTROL) BILL 1987

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Communication
the Hon. Michael Duffy MP)

NOTES ON CLAUSES

Clause 22 - Limitation of interests in commercial television licence

Omit the last paragraph on page 10 of the explanatory memorandum and substitute the following paragraph:

> "Paragraph 22(2) of the Bill provides that paragraph 92(1)(a) of the existing Principal Act (which contains the two station rule) is not to apply in relation to the holding of prescribed interests in commercial television licences on or after 28 November 1986 and before commencement of the 75% reach rule."

The above paragraph is to be substituted because the existing paragraph incorrectly states the effect of paragraph 22(2) of the Bill.

Clause 27 - Insertion of Subdivision

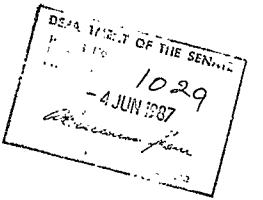
Limitations on cross-media directorships

Insert immediately before the second last line on page 14 of the explanatory meorandum the following new paragraph:

> "It is intended that the cross-media directorship limits in new section 92FAD are to apply only where a person holds directorships in two or more companies which together hold relevant cross-media interests. It is not intended that the cross-media directorship limits apply where a person only holds a directorship in a single company which has relevant cross-media interests. In this situation, the company itself would be held to be in contravention of the cross-media limits in new section 92FAB."

The above paragraph has been included to clarify the operation and intended effect of new section 92FAD.

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF 1987

3 JUNE 1987

THE SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract

(1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;

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

(iv) inappropriately delegate legislative power; 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 1987

The Committee has the honour to present its Tenth Report of 1987 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 Standing Order 36AAA:

Aboriginal and Torres Strait Islander Heritage Protection Bill 1987
Aboriginal Land (Lake Condah and Framlingham Forest) Bill 1987
Aboriginal Land Rights (Northern Territory) Amendment Bill (No.3) 1987
Bounty and Subsidy Legislation Amendment Bill 1987
Communications Legislation Amendment Bill 1987
Mutual Assistance in Criminal Matters Bill 1987
Mutual Assistance in Criminal Matters (Consequential Amendments) Bill 1987
Nursing Homes and Hostels Legislation Amendment Bill 1987
Proceeds of Crime Bill 1987
Ships (Capital Grants) Bill 1987
Social Security and Veterans' Entitlements Amendment Bill 1987
States Grants (Schools Assistance) Amendment Bill 1987
Taxation Laws Amendment Bill (No.2) 1987
Taxation Laws Amendment (Company Distributions) Bill 1987
Telecommunications (Interception) Amendment Bill 1987

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION BILL 1987

The Committee commented on this Bill in its Eighth Report of 1987 (13 May 1987). A response has since been received from the Minister for Aboriginal Affairs and although the Bill passed the Senate on 27 May 1987 the relevant parts of that response are reproduced here for the information of the Senate.

Clause 7 -
New sub-section 21A(1) - Definition of 'community area' - Inappropriate delegation of legislative power

Clause 7 would insert a new Part IIA dealing with Victorian Aboriginal cultural heritage. New sub-section 21A(1) would define 'community area' for the purposes of the Part as the area in Victoria declared by the regulations to be the area of a local Aboriginal community for the purposes of the Part. The Committee suggested that, given the powers of a local Aboriginal community in relation to its community area, it would be more appropriate if the relevant areas were to be set out in a Schedule to the Act rather than by regulations. The Committee therefore drew the definition of 'community area' in new sub-section 21A(1) to the attention of the Senate under principle 1(a)(iv) in that it might be considered to constitute an inappropriate delegation of legislative power. The Minister for Aboriginal Affairs has responded:

> 'While I have noted the Committee's comments on this matter, I have to say that it would be quite impractical to specify community areas in a schedule to the Act rather than by regulations. There is no readily available definition of such areas at this stage, and there will therefore need to be discussions with Aboriginal communities before a system of community areas, for the purposes of the Bill, can be settled. Furthermore, it may prove desirable, in the light of

changing circumstances and to accommodate the wishes of the Aboriginal people concerned, to redefine these boundaries from time to time.

It would therefore be unduly restrictive and cumbersome to provide for these areas to be defined in a schedule to the Act. In the event that concerns were to be expressed about proposed areas, it would of course be open to the Parliament to disallow the relevant regulations.'

The Committee thanks the Minister for this response. It accepts that, in light of the difficulty of specifying the areas in advance, it is appropriate in this case that the areas be declared by regulations which will, as the Minister notes, be subject to parliamentary scrutiny.

New sub-section 21A(2) - Henry VIII clause

New sub-section 21A(2) would have empowered the Minister, by order published in the Gazette, to vary the content of the Schedule which sets out the names of organisations specified for the purpose of the definition of 'local Aboriginal community' in sub-section 21A(1). Because it would have permitted the Minister to alter the Schedule by executive instrument new sub-section 21A(2) could be characterised as a 'Henry VIII' clause and as such the Committee drew it to the attention of the Senate under principle 1(a)(iv) in that it might be considered to constitute an inappropriate delegation of legislative power. The Minister for Aboriginal Affairs responded:

'The views of the Committee on this matter are respected, and I will propose that amendment to the names of "local Aboriginal communities" set out in the Schedule will be by means of regulation, thus giving the Parliament the right of disallowance.'

The Committee thanks the Minister for this response and notes that the necessary amendment was made in the House of Representatives on 1 May 1987.

New sub-section 21B(2) - Delegation

New sub-section 21B(1) empowers the Minister to delegate all or any of the powers that are conferred on the Minister by the new Part to a State Minister and new sub-section 21B(2) enables such a State Minister to authorise another person to exercise the power so delegated. It therefore enables the power to be delegated, in effect, to any person or the holder of any office whom the State Minister may nominate. The Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the person to whom a delegation may be made. The Committee therefore drew new sub-section 21B(2) 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 Aboriginal Affairs has responded:

> 'I have noted the Committee's views on this matter, and will draw them to the attention of the Victorian Minister for Aboriginal Affairs. When I have a response, I will advise the Committee.'

The Committee thanks the Minister for this undertaking.

New sub-section 21F(2) - Retrospectivity

New sub-section 21F(2) provided that a decision made by an arbitrator in substitution for a decision of the Minister making, varying, refusing to make or revoking a temporary declaration of preservation in respect of an Aboriginal place or object was to have effect from the day on which the decision of the Minister had effect unless the arbitrator determined otherwise. Thus a declaration of preservation made by an arbitrator could have

effect retrospective to the date on which the Minister refused to make the declaration. As the contravention of a declaration carries very heavy penalties, the Committee drew new sub-section 21F(2) to the attention of the Senate under principle 1(a)(i) in that by enabling declarations to be given retrospective effect it might be considered to trespass unduly on personal rights and liberties. The Minister for Aboriginal Affairs responded:

> 'The Committee's concern on this matter is understood, and I will propose that the sub-section be amended to provide that the decision of the arbitrator will have effect from the date of that decision only.'

The Committee thanks the Minister for this response and notes that the necessary amendment was made in the House of Representatives on 1 May 1987.

ABORIGINAL LAND (LAKE CONDAH AND FRAMLINGHAM FOREST) BILL 1987

The Committee commented on this Bill in its Eighth Report of 1987 (13 May 1987). A response has since been received from the Minister for Aboriginal Affairs and although the Bill passed the Senate on 27 May 1987 the relevant parts of that response are reproduced here for the information of the Senate.

Sub-clause 5(2) - Delegation

Sub-clause 5(2) was in similar form to new sub-section 21B(2) in the Aboriginal and Torres Strait Islander Heritage Protection Bill 1987, noted above, and the Minister has reponded in similar terms in respect of this provision undertaking to consult with the Victorian Minister for Aboriginal Affairs and to advise the Committee of the result of this consultation. The Committee thanks the Minister for this undertaking.

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL (NO.3) 1987

The Committee commented on this Bill in its Ninth Report of 1987 (27 May 1987). A response has since been received from the Minister for Resources and Energy and although the Bill passed the Senate on 27 May 1987 the relevant parts of that response are reproduced here for the information of the Senate.

Clause 5 -
New sub-sections 41(3), 42(14) and 47(2) and (4) - Non-reviewable decisions

Clause 5 inserts a new Part IV in the Principal Act relating to the grant of exploration licences and mining interests in respect of Aboriginal land. New sub-section 41(2) imposes time limits on applications for exploration licences but new sub-section 41(3) provides that the Minister may grant an extension of time if, having consulted with the Northern Territory Mining Minister, the Minister is satisfied that:

(a) it is not reasonably practicable for the applicant to make the application within the relevant period; and

(b) in all the circumstances of the case it is appropriate that a longer period should apply.

New section 42 establishes a negotiating period for the agreement of the terms and conditions to which the grant of an exploration licence may be subject. New sub-section 42(14) provides that, upon request by the Land Council concerned, the Minister may extend the negotiating period if, having consulted with the Northern Territory Mining Minister, the Minister is satisfied that:

(a) it is not reasonably practicable for the Land Council to perform its functions under the section within the relevant negotiating period; and

(b) in all the circumstances of the case, it is appropriate that a longer negotiating period should apply.

New sub-section 47(2), in conjunction with other provisions of that section, provides that an exploration licence is cancelled if, having consulted with the Northern Territory Mining Minister, the Minister is satisfied that:

(a) the relevant Land Council is entitled to state that:

(i) the licence-holder is conducting, or is likely to conduct, exploration works otherwise than in accordance with the proposed exploration program referred to in the application for consent to the grant of the licence; and

(ii) the exploration works are causing, or are likely to cause, a significant impact on the affected land and on Aboriginals; and

(b) the national interest does not require that the exploration works should proceed.

New sub-section 47(4), in conjunction with other provisions of that section, provides that a mining interest is not to be granted to an applicant, or is to be cancelled, if the Minister is satisfied that:

(a) the proposed mining works or related activities to be conducted on the land to which the application relates are not in accordance with the details set out in the original application for an exploration licence;

(b) the Land Council consented to the grant of the exploration licence;

(c) the works or activities are causing, or are likely to cause, a significant impact on the affected land and on Aboriginals, to the extent that the Land Council would not have consented to the grant of the licence; and

(d) the national interest does not require that the works or activities should proceed.

Although in each case these provisions confer broad discretions on the Minister, in particular as to whether, in the former two cases, it is appropriate, in all the circumstances, that extensions of time should be allowed and, in the latter two cases, as to whether the national interest requires that works should proceed, no provision has been made for review of the decisions on their merits. The only avenue of review would therefore be as to the legality of the decisions, pursuant to the Administrative Decisions (Judicial Review) Act 1977, and this avenue would be limited by the very breadth of the criteria to which the Minister is to have regard. The drafting of the sub-sections contrasts with that of new paragraph 48(3)(c) which provides that the Minister, after consultation with the Commonwealth Minister for Resources and Energy and the Northern Territory Mining Minister, shall authorise the making of a further application for the grant of an exploration licence if the Minister is satisfied on reasonable grounds of certain matters including that the public interest requires that a further application be made. The addition of the words 'on reasonable grounds' restricts the discretion afforded the Minister and, in the view of the Committee, makes review pursuant to the Administrative Decisions (Judicial Review) Act 1977 a sufficient avenue for review since it would be possible in an application pursuant to the Act to go behind the Minister's reasons for holding that, for example, the public interest

required the making of a further application for an exploration licence in order to test whether the Minister had reasonable grounds for holding that view.

The Committee drew new sub-sections 41(3), 42(14) and 47(2) and (4) to the attention of the Senate under principle 1(a)(iii) in that, by affording the Minister broad discretions without providing for review of the exercise of those discretions on their merits, they might be considered to make rights, liberties, and/or obligations unduly dependent upon non-reviewable decisions. The Minister for Resources and Energy has responded:

> 'In the cases of 41(3) and 42(14) the nature of the decision is a ministerial discretion to grant an *extension of an otherwise fixed time for completion of* an action; in the first instance, by the applicant for access to explore and, possibly, mine; in the second instance, by the Land Council undertaking negotiations on such an application. In each case the potential for difference of interests would most likely rest between the principal parties to the question. The Minister is required in each case to consult first with the Northern Territory Mining Minister.
>
> These provisions were drafted in close consultation with the Land Councils and with the mining industry through the Australian Mining Industry Council. It has *been recognised by all parties that the granting of an* extension of time in these circumstances is essentially a political decision, most appropriately taken by the Minister with provision for review as to the legality of the decision only and not the merits.
>
> The Ministerial discretions under sub-sections 47(2) and 47(4) relate respectively to the cancellation of the exploration licence and the refusal to grant, or the cancellation of, the mining interest. In these instances also, the Minister is required to make a

decision concerning an essentially political matter, viz the likelihood that the exploration undertaken or proposed, or the mining works proposed, would be other than in accordance with the proposed program to the extent that the Land Council would not have consented to the grant of the licence. If the Minister so decides he must decide further that the national interest does not require that the works should proceed. The consequential cancellation of the exploration licence under S.47(6), or the non-granting or cancellation of the mining interest under S.47(7), therefore depends on two conditions, the merits of which are most appropriately assessed by the Minister and would not be appropriate to determination by a tribunal.

Alert Digest No. 8 draws attention to the reviewability on grounds of merit and legality of decisions to be taken under 48(3)(c). Such a decision is to be taken by the Minister after consultation with the Commonwealth Minister for mineral resources matters and the Northern Territory Mining Minister upon the application of the Land Council and without detriment to the original applicant for consent to the grant of an exploration licence. The granting of consent, as a subject of appeal, would be of interest principally to a third party. The greater degree of transparency and scope for review in this instance is appropriate where substantial interest may rest with persons not privy to the primary negotiations behind the issue (i.e. the Land Council and the original applicant).'

The Committee thanks the Minister for this response which answers its concerns. The Committee accepts that where a decision is essentially a policy decision of Government and taken by the responsible Minister then review of that decision on its merits by the Administrative Appeals Tribunal is not appropriate.

BOUNTY AND SUBSIDY LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 6 May 1987 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Bill is an omnibus measure, which proposes to amend a series of Bounty and Subsidy Acts to give effect to various Government decisions, to correct some drafting anomalies and clarify some eligibility criteria in several schemes, and to complete the modernisation of the administrative provisions in several other schemes commenced in the previous two Bounty and Subsidy Legislation Acts of 1986.

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

Clause 22 - Schedule -
Bounty (Computers) Act 1984 - New sub-section 13(1A) - Lack of parliamentary scrutiny

Clause 22 would amend the Acts specified in the Schedule as set out in the Schedule. In particular it would have inserted a new sub-section 13(1A) in the Bounty (Computers) Act 1984 to provide that a claim may not be made for an amount of bounty that is less than $200 'or such other amount as the Comptroller-General determines in writing'.

The Committee recognised that the new sub-section did not differ materially from sub-section 14(2) of the Bounty (Books) Act 1986 on which the Committee did not comment when it examined the relevant Bill last year. However, the Committee expressed the view that the determination of the Comptroller-General as to the threshold level for bounty claims should be subject to parliamentary scrutiny by way of tabling and disallowance. The Committee therefore drew new sub-section 13(1A) 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 Industry, Technology and Commerce has responded:

> 'The Committee's criticism of the provision for subjecting the exercise of legislative power to insufficient parliamentary scrutiny is well taken, and the Government has proposed an amendment to the provision to address that concern.
>
> I attach a copy of the amendment for your Committee's information. It is noted in passing that the similar amendments made to 6 Bounty Acts in Schedule 2 of the Bounty and Subsidy Legislation Amendment Act No.2 (No.119 of 1986) were all drafted along the lines proposed in the attached amendment. The Government will address the other claims provisions which are not in this desired style (notably the Bounty (Books) Act 1986) at the next available opportunity.'

The Committee thanks the Minister for this response. It notes that the proposed amendment to the current Bill was made in the House of Representatives on 28 May 1987 and thanks the Minister for his undertaking to address the other claim threshold provisions which are not in the desired style at the next available opportunity.

COMMUNICATIONS LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 2 April 1987 by the Minister for Communications.

The Bill will make miscellaneous amendments to the Overseas Telecommunications Act 1946, the Postal Services Act 1975, the Radiocommunications Act 1983, and the Telecommunications Act 1975.

The amendments will: -

- enable the Overseas Telecommunications Commission ('OTC'), with the approval of the Minister for Communications, to engage in activities in Australia relating to telecommunications other than the actual provision of domestic telecommunications carriage;

- enable OTC to provide, with the Minister's approval, domestic and international telecommunications services for foreign countries;

- put in place a moratorium on the issuing under the Radiocommunications Act of transmitter licences where the transmitter is to be used to provide domestic pay-television; and

- make a number of improvements to administrative arrangements under the Radiocommunications Act.

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

Clauses 14 and 17 - Removal of requirement for public consultation

Clauses 14 and 17 would amend sections 9 and 20 of the Radiocommunications Act 1983 by omitting sub-sections 9(4) and 20(3) respectively. Section 9 deals with the making of standards for transmitters and receivers. Before making a standard the Minister is required to give public notice inviting interested persons to make representations and is required to give due consideration to any representations so made. Sub-section 9(4)

imposes a similar requirement for public consultation where the Minister decides to alter a proposed standard following the consideration of such representations. Section 20 sets out similar requirements for the publication of proposed spectrum plans and frequency band plans and sub-section 20(3), like sub-section 9(4), requires further public consultation where the Minister decides to alter a proposed plan after considering any representations.

The Second Reading speech explained that it was proposed to remove these requirements for public consultation:

> 'to remove unnecessary repetitions which occur in the process of making standards, spectrum plans and frequency band plans. Under the current provisions once even a minor change is made to a plan or standard as a result of public consultation the Minister is obliged to resubmit the whole document for a further round of public consultation. This requirement with its obvious scope for needless delay in the making of plans and standards is to be removed. Of course the Minister will still be free to resubmit an amended plan or standard for further public consultation where amendments are more significant and further consultation is felt to be appropriate.'

It was put to the Committee, however, that there was a need for further public consultation if the initially published proposed standard or plan were altered. The user of a particular frequency might, for example, be unaffected by a proposed plan but might discover too late that he or she was gravely affected by the altered plan which the Minister had promulgated after receiving representations in relation to the initial proposal. Manufacturers or distributors of transmitters or receivers might be similarly affected by altered standards of which they would, under the proposed amendments, have no notice until such standards came into operation. If, for some reason, it was essential that a new standard, spectrum plan or frequency band

plan should be introduced as a matter of urgency, sub-sections 9(9) and 20(4) would already permit the Minister to dispense with the requirements for public consultation.

The Committee suggested that clauses 14 and 17 proposed, in effect, to substitute a Ministerial discretion to consult for a statutory requirement for public consultation. The Committee was aware that the resulting standards and plans would still be tabled in Parliament and would be subject to disallowance. However members and Senators might not necessarily be made aware of the effects which an altered standard or plan might have on individual manufacturers or distributors of devices or users of frequency bands, and these effects might not be apparent on the face of the instrument. Accordingly the Committee drew clauses 14 and 17 to the attention of the Senate under principle 1(a)(i) in that by removing the requirement for public consultation in respect of altered standards or plans it might be considered to trespass unduly on personal rights and liberties. The Minister for Communications has responded:

> 'Under the Radiocommunications Act 1983 ("the Act") as it currently stands the alteration of a proposed standard or plan in any way following the compulsory initial round of public consultation means that the entire document must be set out again in the Gazette and that a further round of public consultation must be called for. This is so no matter how minor the alteration or whether it alters the effect or operation of the proposed standard or plan in any way.
>
> The expense involved in publishing a lengthy and typographically complex document such as a spectrum plan is considerable and to be obliged to publish such a document twice (and conceivably more than twice) where no change of any substance is involved would, to my mind, represent an unjustifiable use of public money.

I cannot agree that subsections 9(9) and 20(4) of the Act provide a mechanism for the avoidance of this kind of unnecessary and costly delay in the making of standards and plans. The power to circumvent the publication and consultation processes which is provided by those subsections is available only where its use can be justified on grounds of genuine urgency. Thus, it might be invoked to put in place an urgent standard to prevent the importation of industrial equipment whose operation is known to have a disastrous affect on radiocommunications with aircraft but it could not be invoked simply to "speed up" the making of a non-urgent standard.

Under the proposed amendments it will be open to the Minister to resubmit a significantly altered draft standard or plan for further public consultation. I can assure the Committee that full consultation will take place in relation to any changes of substance to standards and plans affecting manufacturers or distributors of devices or users of the spectrum.

In summary, I consider that the Act as amended, with its requirement of initial compulsory public consultation on proposed standards and plans, its scope for subsequent consultation on significant alterations and its requirements for tabling in Parliament, will provide ample protection for the interests of manufacturers and distributors of equipment and users of frequency bands.'

The Committee thanks the Minister for this response. The Committee accepts the Minister's argument in this regard but suggests that to address the concerns which the Committee expressed about the effectiveness of parliamentary scrutiny in relation to altered standards or plans it may be desirable that the Minister, when tabling a plan or standard to which only minor

alterations have been made, should indicate the nature of the alterations and the fact that it was not considered necessary to submit the altered plan or standard to further public consultation.

Clause 19 -
New sub-section 24A(3) - Termination of provision by proclamation

Clause 19 would insert a new section 24A in the Radiocommunications Act 1983 providing that the Minister is not to grant transmitter licences in respect of transmitters to be used for the provision of domestic pay-television services. New sub-section 24A(3) would provide that the Governor-General may, by Proclamation, terminate the new section on 1 September 1990 or any day thereafter. The new sub-section may thus be characterised as a 'Henry VIII' clause in that it would permit the Executive to determine that the new section is to cease to have effect without the necessity for the Parliament to agree to its repeal.

The Committee therefore drew new sub-section 24A(3) to the attention of the Senate under principle 1(a)(iv) in that, as a 'Henry VIII' clause, it might be considered to constitute an inappropriate delegation of legislative power. The Minister for Communications has responded:

> 'The Government's intention in introducing the new subsection 24A into the Act is to provide for a moratorium of at least four years' duration to enable a review of the likely impact of the introduction of pay-television on the Government's policy of providing an equal range of free to air services for regional and metropolitan Australia. The review will also take into account changes to the communications environment including optical fibre developments and plans for further satellites.

As planning for the introduction of new communications services requires a lead time of several years, the moratorium should allow for an informed decision on the future of pay-television.

The Government wishes to put in place a moratorium on the introduction of pay-television rather than a completely open-ended prohibition. It also wishes to ensure that the length of the moratorium will be sufficient to enable a full analysis along the lines I have outlined.

At the same time the Government is keen to ensure that the moratorium is no longer in duration than it needs to be. A moratorium of at least four years and terminable thereafter by the Governor-General is seen as the most appropriate means of accommodating these objectives.'

The Committee thanks the Minister for this response. However it notes that the Government's desire to avoid a completely open-ended prohibition could have been accommodated by simply stating that new section 24A is to terminate on 1 September 1990. Then, if it were considered desirable at some future date to extend the moratorium, an amendment could be made to substitute a new date or, indeed, to make the moratorium permanent by omitting sub-section 24A(3) altogether. The Committee's concern with the provision as it stands is that it leaves to the Executive, rather than the Parliament, the decision as to when the moratorium should end. The Committee therefore continues to draw new sub-section 24A(3) to the attention of the Senate under principle 1(a)(iv) in that it may be considered to constitute an inappropriate delegation of legislative power.

MUTUAL ASSISTANCE IN CRIMINAL MATTERS BILL 1987

This Bill was introduced into the House of Representatives on 30 April 1987 by the Attorney-General.

The Bill was first introduced on 22 October 1986. It has now been re-introduced in a substantially amended form. The most important of these amendments enable Australia to provide, and request, assistance concerning freezing and forfeiture of the proceeds of crime.

This Bill will provide a legislative basis for Australia to enter into arrangements with other countries whereby it can request and grant assistance in criminal matters. The assistance will relate both to the investigation and prosecution of crime.

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

Sub-clause 7(2) - 'Henry VIII' clause

Sub-clause 7(1) states that the regulations may provide that the Act applies to a foreign country specified in the regulations. Sub-clause 7(2) provides that the regulations may:

(a) state that the Act applies to a foreign country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral mutual assistance treaty between Australia and that country; or

(b) make provision instead to the effect that the Act applies subject to other limitations, conditions, exceptions or qualifications.

Because it would permit the operation of the Act to be modified by regulations in respect of particular countries sub-clause 7(2) may be characterised as a 'Henry VIII' clause and as such the Committee drew it to the attention of the Senate under principle 1(a)(iv) in that it might be considered an inappropriate delegation of legislative power. The Attorney-General has responded:

> 'At the outset I should state that the [Mutual Assistance in Criminal Matters] Bill, and not the Regulations, sets out the optimum assistance, particularly involving compulsory measures, which may be granted by Australia to any particular foreign country. However, assistance to the same extent may not be permitted by the law of a foreign state in response to a request by Australia. For example, the laws of some countries do not provide for the confiscation of criminally obtained assets, and any request for such action by Australia could not be actioned.
>
> Sub-clause 7(2) has been specifically drafted so as to permit the application of the Act to any particular country to be limited in such a way as to ensure equality of treatment or reciprocity. The sub-clause only permits the Bill to be applied subject to "limitations, conditions, exceptions or qualifications", i.e the application of the Bill can be narrowed, not expanded. In the case mentioned above, assuming that the laws of the particular country permitted all other assistance to be rendered in answer to a request by Australia, the Bill could be applied to that country with the exception of the confiscation of assets provisions.
>
> I am confident that it is not the intention of the Committee to leave Australia in a situation where it would be committed to giving greater assistance to some countries than it could expect in return.'

The Committee thanks the Attorney-General for this response, which answers its concerns in relation to the clause.

Clause 34 - Enforcement of foreign orders

Clause 34 provides that where a foreign country requests the Attorney-General to make arrangements for the enforcement of a foreign forfeiture order or a foreign pecuniary penalty order and the Attorney-General is satisfied that a person has been convicted of the offence in respect of which the order is sought and that the conviction and the order are not subject to further appeal in the foreign country, the Attorney-General may authorise the Director of Public Prosecutions to apply for registration of the order in a court. A foreign order once registered may be enforced as if it were a forfeiture order or pecuniary penalty order under the proposed Proceeds of Crime Act.

The Committee expressed concern that the clause might make rights in Australia unduly dependent upon judicial action in a foreign country and the purely administrative act of registration. By contrast for the enforcement of a foreign civil judgement in this country, the judgement creditor must satisfy a local court that, for example, the foreign court had sufficient 'international' jurisdiction and that the judgement was not obtained by fraud. None of these safeguards are imposed by clause 34.

The Committee therefore drew clause 34 to the attention of the Senate under principle 1(a)(i) in that by providing for the enforcement of foreign judgements in Australian courts without requiring that the courts be satisfied that the conviction and order in question were properly obtained it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

'First it should be pointed out that whilst civil proceedings are between individual parties, criminal proceedings are brought by the state in its capacity as protector of its citizens. Accordingly, questions of fraud would not ordinarily arise.

Secondly, Australia only proposes to negotiate treaties with, and apply the Bill to, countries with acceptable systems and standards of justice which include safeguarding the interests of innocent third parties. For example, UK law provides such protection and also permits, on a reciprocal basis, the registration of foreign forfeiture orders. It would be inappropriate to permit our Courts to, in effect, go behind the judgments of criminal courts of such countries with which Australia has treaty, or other, arrangements.

In addition, I draw the Committee's attention to the other safeguards in the [Mutual Assistance in Criminal Matters] Bill which include:

- That the Attorney-General must be satisfied that the conviction and order are final and not the subject of further appeal in the foreign country;

- The overriding discretion of the Atttorney-General to authorise the Director of Public Prosecutions to apply to a court for registration of a foreign order and to apply for a cancellation of that registraton; and

- The protections afforded to innocent third parties under the Proceeds of Crime Bill when an application is made to restrain dealings in property which may become the subject of a foreign confiscation order.'

The Committee thanks the Attorney-General for this response. Nevertheless, despite the safeguards to which the Attorney-General draws attention, the Committee remains of the view that the person against whom a foreign order is made should have the opportunity of challenging that foreign order in the Australian courts for error of jurisdiction or error of law before it is enforced in Australia. It has become apparent in recent years that there may be miscarriages of justice even in countries with systems of justice as 'acceptable' as that in the United Kingdom and even where all avenues of appeal have been exhausted. The Committee is concerned not so much with innocent third parties as with innocent persons against whom a foreign order may have been made. The only safeguard in the present scheme affecting this would appear to be the discretion afforded the Attorney-General yet there will clearly be pressures upon the Attorney-General to apply for registration of orders even in doubtful cases: for example our friendly relations with the country in question and reciprocal treatment of Australian orders.

The Committee therefore continues to draw clause 34 to the attention of the Senate under principle 1(a)(i) in that by providing for the enforcement of foreign judgements in Australian courts without requiring that the courts be satisfied that the conviction and order in question were properly obtained it may be considered to trespass unduly on personal rights and liberties.

MUTUAL ASSISTANCE IN CRIMINAL MATTERS (CONSEQUENTIAL AMENDMENTS) BILL 1987

This Bill was introduced into the House of Representatives on 30 April 1987 by the Attorney-General.

The Bill was first introduced on 22 October 1986. It has now been re-introduced in an amended form. It amends various Commonwealth Acts as a consequence of provisions in the Mutual Assistance in Criminal Matters Bill 1987. The amendments will -

- enable the Director of Public Prosecutions to appear and grant indemnities in proceedings under the proposed Mutual Assistance in Criminal Matters Act 1987;

- repeal provisions in the Australian extradition legislation in relation to the taking of evidence for the purposes of criminal proceedings overseas since the substance of those provisions are now to be included in the Mutual Assistance in Criminal Matters Act 1987; and

- make provision for the entry into Australia and departure of persons who are non-citizens whose presence is required for purposes connected with the proposed Mutual Assistance in Criminal Matters Act 1987.

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

Clause 3 - Schedule - Migration Act 1958 -
New sub-section 11AB(1) - Delegation

Clause 3 would amend the Acts specified in the Schedule as set out in the Schedule. In particular it would have amended the Migration Act 1958 by inserting a new section 11AB providing for the grant of a visa to a person where, in accordance with sub-section 11AB(1), the Secretary to the Attorney-General's Department, 'or a person authorised by that Secretary', issued a certificate stating that the presence of the person in Australia was required for purposes connected with the proposed Mutual Assistance in Criminal Matters Act 1987. The Committee contrasted the unrestricted delegation of the power to issue certificates contemplated by sub-section 11AB(1) with the power to grant

certificates under new sub-section 18A(3) which was to be restricted to the Secretary to the Department of Immigration and Ethnic Affairs or an officer of that Department authorised by the Secretary.

The Committee noted that it had been critical of powers of delegation such as that in new sub-section 11AB(1) which imposed no limitation, and gave no guidance, as to the attributes of the persons to whom a delegation might be made. The Committee therefore drew the provision 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 Attorney-General has responded noting that new sub-section 11AB(1) was amended in the House of Representatives on 11 May 1987 to restrict the scope of the power of delegation to officers of the Department. The Committee thanks the Attorney-General for this amendment.

NURSING HOMES AND HOSTELS LEGISLATION AMENDMENT BILL 1987

The Committee commented on this Bill in its Ninth Report of 1987 (27 May 1987). A response has since been received from the Minister for Community Services and the relevant parts of that response are reproduced here for the information of the Senate.

Clause 16 -
New section 45E - Non-reviewable decisions

Clause 16 would insert new sections 45D and 45E in the National Health Act 1953 empowering the Minister to determine standards to be observed in the provision of nursing home care in approved nursing homes and specifying the consequences of a failure to satisfy these standards. In particular, where the Minister

declares that a home does not satisfy the standards Commonwealth benefit is not payable to the proprietor in respect of patients admitted after the making of a determination to that effect.

The Minister's decision that a home does not satisfy the standards would not be reviewable otherwise than as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. The Minister's Second Reading speech indicates an intention to establish Nursing Home Standards Review Panels in each State and Territory to provide an appropriate professionally qualified peer review mechanism but it was unclear to the Committee when these Panels would be established and whether they would be given a legislative basis. The Committee noted that clause 16 was to commence on 1 July this year and that there was no assurance that any review mechanism would be in place at its commencement.

Accordingly, the Committee drew new section 45E to the attention of the Senate under principle 1(a)(iii) that it might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The Minister for Community Services has provided a lengthy and detailed response which is set out as an Appendix to this Report. Briefly the Minister indicates:

(i) that he is moving to establish the Nursing Home Standards Review Panels as quickly as possible;

(ii) that to allow flexibility in the initial stages he would prefer that the panels not have a statutory base at this point, but would be willing to reconsider this when suitable arrangements have been tested and are in place; and

(iii) that to address the concerns raised by the Committee he would be willing to give an undertaking not to exercise the new powers in

respect of a nursing home until the establishment of a Review Panel in the State or Territory in which the home is located.

The Committee thanks the Minister for this undertaking, which answers its concerns in relation to new section 45E.

PROCEEDS OF CRIME BILL 1987

This Bill was introduced into the House of Representatives on 30 April 1987 by the Attorney-General.

The Bill has five purposes. The principal purpose is to permit a court to grant orders for the freezing and confiscation of property used in, or derived directly or indirectly from, the commission of an indictable offence against a law of the Commonwealth, or of a Territory (other than the Northern Territory). In addition the Bill:-

- provides for the registration in Territory courts of orders for freezing and confiscation of property made under corresponding State laws and which relate to property located in the Territory;

- provides for the enforcement of foreign freezing and confiscation orders which relate to property in Australia and in respect of which relevant procedures under the Mutual Assistance in Criminal Matters Act 1987 have been complied with;

- confers on police new powers to facilitate the following of the money trail and to require financial institutions to preserve their records to maintain the money trail; and

- creates new offences of money laundering and organised fraud.

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

Sub-clause 82(2) - Reversal of the onus of proof

Sub-clause 82(1) creates an offence where a person receives, possesses, conceals, disposes of or brings into Australia any money or other property that may reasonably be suspected of being proceeds of crime. Although the offence therefore does not require that the person in question knew or ought reasonably to have known that the money or other property constituted proceeds of crime, sub-clause 82(2) provides a defence where the person satisfies the court that he or she had no reasonable grounds for suspecting that the property in question was derived or realised, directly or indirectly, from some form of unlawful activity.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed on defendants but rather that they should merely be required to bear an evidential onus, that is, the onus of adducing evidence of the existence of a defence, the burden of negativing which will then be borne by the prosecution. Thus, in the present case, the defendant could be required to adduce evidence - rather than to satisfy the court - that he or she had no reasonable grounds for suspecting that the property in question was derived or realised, directly or indirectly, from unlawful activity.

The Committee therefore drew sub-clause 82(2) to the attention of the Senate under principle 1(a)(i) in that by imposing the persuasive burden of proof upon the defendant it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

'Clauses 81 and 82 of the Bill create new money laundering offences. Clause 81 creates a serious offence of dealing in property which is, in fact, proceeds of crime. The onus is on the Crown to establish that the defendant either knew, or ought reasonably to have known, that the property was proceeds of some kind of unlawful activity. Very substantial penalties may be imposed for this offence.

In contrast the penalty for a breach of clause 82 is far less severe. The offence is constituted by dealing in property which, on an objective test, is reasonably suspected of being proceeds of crime. Once this has been established the offender is liable to conviction. However, sub-clause (2) gives an additional defence to a person liable to conviction where it can be shown that, notwithstanding the fact that reasonable grounds exist to suspect the property is proceeds of crime, he or she had no reasonable grounds to suspect that the property was derived unlawfully.

As I indicated in my letter of 16 October 1985 to the Senate Standing Committee on Constitutional and Legal Affairs in my response to its Report on the Onus of Proof in Criminal Proceedings, I am of the view that a reversal of the onus of proof can be justified in some circumstances including situations where the facts to be established are peculiarly within the knowledge of the defendant. I am of the view that an offence against s.82 is such a case. The circumstances in which the person acquires or deals with the property, and the extent of his or her awareness of its tainted nature, are matters peculiarly within the knowledge of the accused who ought, in light of the significantly reduced penalty for this offence, to lead evidence of these facts. This is analogous to the common law defence of mistake of fact - where the onus is on the

accused to show that he or she held a particular belief and not simply to establish ignorance of facts as is the case in 82(2).

The imposition of an evidential burden on the accused, as suggested by the Committee, in relation to his or her personal state of mind would not facilitate the prosecution case at all but would rather impose an additional element to be negatived by the Crown beyond reasonable doubt notwithstanding that the liability of the offender has already been established. It would be extremely difficult for the Crown to obtain evidence sufficient to negative any defence that may be raised and in practice the Crown would, in all prosecutions, have to conduct extensive investigation to have sufficient evidence to negative any defence and to lead such evidence during it's case, against the contingency that the accused may lead evidence on this point. This flows from the strict rules which prevent the Crown from re-opening its case in other than exceptional circumstances. Even if the Crown were able to re-open, it is unlikely that the proceedings would be adjourned to enable the Crown to marshal the evidence necessary to disprove the matters raised by the defendant. The difficulty and cost of investigation in each case against the contingency that a defence may be raised, could not be justified for an offence which carried such a relatively low penalty. If the offence were to remain enforceable sub-clause (2) would need to be deleted, in which case the defendant would need to rely on the position of common law which places the onus on him or her to prove mistake of fact.'

The Committee thanks the Attorney-General for this response which answers its concerns in relation to the sub-clause. The Committee further notes that in future it will, by analogy with the common

law defence of mistake of fact, regard as acceptable the imposition of the persuasive onus of proof on the accused in relation to a statutory defence in criminal proceedings where:

(a) the matters to be raised by way of defence by the accused are peculiarly within the knowledge of the accused; and

(b) it would be extremely difficult and costly for the prosecution to be required to negative the defence.

SHIPS (CAPITAL GRANTS) BILL 1987

The Committee commented on this Bill in its Eighth Report of 1987 (13 May 1987). A response has since been received from the Minister for Transport and the relevant parts of that response are reproduced here for the information of the Senate.

Sub-clause 6(2) and paragraph 7(1)(c) - Inappropriate delegation of legislative power

The Bill provides for grants to be paid to shipowners subject to certain preconditions, in particular that there is a category certificate in respect of the ship concerned and that the shipowner intends to do all things reasonable to ensure that the number of the ships crew on a voyage will not exceed the maximum crew number for that voyage. A category certificate may specify more than one category and maximum crew numbers are to be set for each category. Sub-clause 6(1) specifies three particular categories - tankers on foreign voyages, tankers on domestic voyages and non-tankers on voyages - and sub-clause 6(2) provides that the regulations may declare further categories in respect of specified ships or classes of ships on specified voyages or voyages generally. Paragraphs 7(1)(a) and (b) set maximum crew

numbers for the categories specified in sub-clause 6(1) and paragraph 7(1)(c) provides that the maximum crew numbers for other categories are to be prescribed by the regulations.

The Minister's Second Reading speech indicates that new categories of ships will only rarely be created by regulations and that in such cases maximum crew numbers well below the usual levels set by paragraphs 7(1)(a) and (b) would apply. However the power to prescribe new categories and to set new maximum crew numbers is open-ended and could also be used to undermine the stated intention of the legislation to reduce present crewing levels. Given the importance of the concepts to the whole legislative scheme the Committee drew sub-clause 6(2) and paragraph 7(1)(c) to the attention of the Senate under principle 1(a)(iv) in that by permitting these elements to be varied by regulations they may be considered to constitute inappropriate delegations of legislative power. The Minister for Transport has responded:

> 'The ship categories covered in the Bill embrace all the common classes of trading ships i.e. tankers and non-tankers. The latter category includes dry bulk cargo carriers, container ships, roll on-roll off (ro-ro) ships and general cargo ships. The associated crewing levels have been determined on the basis of the workload existing on typical examples of these classes of ship.
>
> There is, however, the expectation that there will be cases where, because of the specialised nature of the ship and/or its trading pattern, good workload grounds exist for a crew greater or less than benchmark levels specified in the Bill. For this reason it is necessary, if the Bill is to achieve its objectives, to provide a mechanism to create new benchmark crew levels to cover non-typical ships.

The example given in the Explanatory Memorandum outlines the case of small ships and ships on short voyages, for which a crew of 21 would normally be far too many. But there is also the possibility that existing benchmarks could be too low for some other types of ship.

Of the existing Australian fleet only one type of ship would fall into a category requiring a much larger crew i.e. a passenger ferry which requires a considerable catering staff such as the "Abel Tasman". It is not the Government's intention to exclude eligibility for a grant for a replacement Bass Strait ferry because of the lack of a provision in the Bill to create an appropriate crew benchmark category.

Careful consideration has been given to the administrative process most appropriate to deal with that problem. A regulation power is considered the most effective way of providing such a provision. However, to ensure that power is exercised in a way that conforms to the Bill's intention to improve the efficiency of Australian shipping, guidelines have been included in the Bill. Sub-clause 6(3) sets out a series of factors which must be taken into account in determining new categories. These focus on the workload factors that need to be taken into account to ensure any new benchmark levels reflect efficient crewing standards.

In short, in order to provide flexibility and timeliness of response to applications for category certificates, and to avoid excluding any new areas of shipping opportunity that might arise, I consider it necessary to have the power to create additional crew categories by regulation. I also note that the power of

Parliament to disallow regulations provides an appropriate safeguard against any inappropriate use of the delegation.'

The Committee thanks the Minister for this response. In continuing to draw attention to sub-clause 6(2) and paragraph 7(1)(c), together with the Minister's helpful response, the Committee hopes to promote a fuller consideration of the issue involved at the Committee stage of debate on the Bill.

Paragraphs 18(1)(e) and (2)(f) - Inappropriate delegation of legislative power

Sub-clauses 18(1) and (2) provide that, if the Secretary forms the opinion that the price paid for a ship or for the conversion of a ship respectively is incorrect or unduly high or, by virtue of paragraph (1)(e) or (2)(f), 'is an unreasonable price because of a prescribed reason', the Secretary may determine an appropriate price for the purposes of the Act. In an appeal in relation to an amount of grant the Administrative Appeals Tribunal may review a determination made by the Secretary under sub-clause 18(1) or (2).

It is quite usual in bounty legislation to provide for the adjustment of the cost of items in respect of which bounty is payable if the cost is considered excessive for some reason - see for example section 8 of the Bounty (Ship Repair) Act 1986 - but it is unusual to provide, as in paragraphs 18(1)(e) and (2)(f), for the open-ended extension of the reasons for which a price may be determined to be unreasonable. The Committee suggested that, if the reasons set out in paragraphs 18(1)(a) - (d) and (2)(a) - (e) were considered insufficient in themselves, it would, in the Committee's view, be more appropriate simply to add a further category to the effect that the price 'is an unreasonable price' rather than to leave to the regulations the addition of further reasons for the exercise of the power to determine an appropriate price.

The Committee therefore drew paragraphs 18(1)(e) and (2)(f) to the attention of the Senate under principle 1(a)(iv) in that by so permitting the reasons for which the Secretary may determine a new price for a ship or the conversion of a ship to be extended by regulations they might be considered to constitute an inappropriate delegation of legislative power. The Minister for Transport has responded:

> 'The power of the Secretary to determine a price unreasonable because of a prescribed reason is a reserve power, intended to safeguard the interests of the taxpayer. It is intended to cover a situation where a claim for a grant is considered unreasonable, even though it does not breach one of the specified conditions which would allow the Secretary to determine another price for the ship. Such a situation could arise where a ship is constructed at such a high price it is obviously excessive for that type of ship or for the trade in which the ship is to be engaged. There would be grave doubts about the basis of that price given that grants are to be a percentage of price.
>
> As any regulations created for this purpose are subject to Parliamentary scrutiny, I consider the requirement for any "unreasonable" reason to be prescribed provides an effective safeguard. The Standing Committee's suggested alternative, that refusal could be on the basis that the price is unreasonable, would make the provision open-ended.'

The Committee thanks the Minister for this response. However it appears to the Committee that in the example given by the Minister the Secretary would be entitled to form an opinion that the price or cost had been fixed in order to obtain an increase in the grant - paragraphs 18(1)(b) and (2)(b) - or that the price or cost was unduly higher than that paid for similar ships or the similar conversion of similar ships: paragraphs 18(1)(c) and (2)(c). The Committee does not accept that its alternative would

make the provision open-ended: the Secretary would be required to form the opinion that the price was objectively unreasonable whereas the present provision leaves open the prescribing of reasons which may not come within that stricture. While the regulations prescribing such reasons would of course be subject to parliamentary scrutiny, it is open to question whether such regulations would fall within the Terms of Reference of the Senate Standing Committee on Regulations and Ordinances, which performs the major part of this scrutiny on the Parliament's behalf, unless the reasons prescribed were manifestly unreasonable.

The Committee therefore continues to draw paragraphs 18(1)(e) and (2)(f) to the attention of the Senate under principle 1(a)(iv) in that they be considered to constitute an inappropriate delegation of legislative power.

SOCIAL SECURITY AND VETERANS' ENTITLEMENTS AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 14 May 1987 by the Minister for Health.

The Bill will amend the Social Security Act 1947, the Veterans' Entitlements Act 1986 and the Seamen's War Pensions and Allowances Act 1940 to implement measures included in the May Economic Statement. The measures will come into effect before or shortly after October 1987.

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

Clause 9 - Communication of information

Clause 9 would substitute a new sub-section 17(4) in the Social Security Act 1947. Whereas the present paragraph 17(4)(b) provides that an officer may divulge any information acquired in the performance of the officer's duties to 'any prescribed authority or person' and the Committee understands that no such authority or person has in fact been prescribed to date, the new paragraph 17(4)(b) will empower the Secretary to divulge any such information to the Secretary of any other Commonwealth Department or to the head of any Commonwealth authority for the purposes of that Department or authority. This is in addition to paragraph 17(4)(a) which enables the Secretary to divulge such information to any person where it is necessary in the public interest to do so.

The Committee expressed concern that the new provision would permit the dissemination, at the discretion of the Secretary, of confidential personal information to any Commonwealth Department or authority. The inclusion of such a blanket authority to communicate information provided to officers under the Social Security Act 1947 to other Departments and authorities could only add to the concerns reported by the Law Reform Commission in its Report on Privacy (ALRC Report No.22) concerning the creation of a general government data bank (see vol.1, pp.180-1). The Committee therefore drew new paragraph 17(4)(b) to the attention of the Senate under principle 1(a)(i) in that by so permitting the unrestricted dissemination of confidential information it might be considered to trespass unduly on personal rights and liberties. The Minister for Social Security has responded:

> 'There is, of course, a limited power to release information under the current legislation. However, it is correct that the Bill does give a much greater power to permit the release of information. The purpose of this new power is to assist in the crackdown against

social security fraud (as well as other fraud against the Commonwealth) and to facilitate the recovery of overpayments due to the Commonwealth.

I appreciate the Committee's view that the new power adds to the concerns reported by the Law Reform Commission in its Report on Privacy (ALRC Report No. 22) and, indeed, the concerns of groups and individuals expressed to me that the scope of the power is broad.

It is my intention that the use of the new power will be very closely controlled. It will be exercised only by senior officers in the Central Office of my Department, and within strict guidelines which I will approve.

While I understand the general concern it is my belief that the new power can be administered in a proper way which will not disturb the community interest in privacy issues. There is certainly no intention to create a general government data bank by the use of the new power.

Incidentally, it is not correct that no person or authority has been prescribed for the purposes of the current paragraph 17(4)(b). Regulation 17 of the Social Services (Reciprocity with New Zealand) Regulations prescribed the Social Security Commission of New Zealand for the purposes of paragraph 17(4)(b).'

The Committee thanks the Minister for this response. In continuing to draw attention to new paragraph 17(4)(b), together with the Minister's helpful response, the Committee hopes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

Paragraphs 27(c), 42(d) and 45(d) - Recovery of overpayments from spouses

Paragraphs 27(c), 42(d) and 45(d) would insert new sub-sections 140(3), 205(2A) and 55A(2A) in the Social Security Act 1947, the Veterans' Entitlements Act 1986 and the Seamen's War Pensions and Allowances Act 1940 respectively, providing in each case that, where a pension is payable to a person under the relevant Act and the spouse of the person (or, where the spouse has died, the estate of the spouse) is liable to repay an amount to the Commonwealth as a result of an overpayment under any of the three Acts, that amount may be deducted from the person's pension.

It seemed to the Committee to be quite wrong in principle that the sins of their spouses should be visited on beneficiaries in this way, particularly when one considered that a spouse for these purposes might only be a person living together with the beneficiary concerned and not, for example, holding property in common with the beneficiary. The person from whose pension, benefit or allowance the amount was to be deducted might have had no knowledge of the mistake giving rise to the liability to repay an amount and might not have benefited in any way from the overpayment. Accordingly the Committee drew paragraphs 27(c), 42(d) and 45(d) to the attention of the Senate under principle 1(a)(i) in that by imposing on persons liabilities incurred by their spouses it might be considered to trespass unduly on personal rights and liberties. The Minister for Social Security has responded:

> 'I think that the position has been overstated. The person is not liable for the spouse's overpayments in any general sense. The provisions mentioned would only enable the reduction of a person's pension to recover an overpayment incurred by the spouse. This sort of mechanism, which looks at both spouses for the purposes of calculating entitled to pension, is not new in principle.
>
> Indeed, a pensioner may be fully qualified for pension but be wholly disentitled due to the income or the assets of the person's spouse. The new provisions are

in some respects a development of the concept of looking at the marital unit for the purposes of calculating payment.

The new provisions do not allow a person to be sued for their spouse's debts, of course.

While I can understand that the measure appears novel, it is not expected to have a widespread use. It will not be necessary where the spouse who incurs the debt is discharging the debt, whether by direct deduction from a continuing entitlement or by repayment (whether in whole or by instalments). Moreover, a person who feels unfairly treated by its application has the normal avenues of appeal against it.

Accordingly, I think that the measure is not quite so wrong in principle as is suggested, but can be seen as a development in the process of debt recovery in the context of social security overpayments.'

The Committee thanks the Minister for this response. The Committee now understands that the Government does not intend to proceed with these proposed amendments.

STATES GRANTS (SCHOOLS ASSISTANCE) AMENDMENT BILL 1987

The Committee commented on this Bill in its Eighth Report of 1987 (13 May 1987). A response has since been received from the Minister for Education and the relevant parts of that response are reproduced here for the information of the Senate.

Clause 3 - Inappropriate delegation of legislative power

Clause 3 would insert a definition of a 'full fee paying private overseas secondary student' as a student of a kind declared by the regulations to be such a student. Such students are to be disregarded in calculating student numbers for the purpose of general recurrent grants and the definition will therefore have a significant impact on the total money expended in grants under the Act.

The Committee suggested that in consequence the definition should be set out in the Act, rather than being left to regulations, and accordingly drew the definition to the attention of the Senate under principle 1(a)(iv) in that it might be considered to be an inappropriate delegation of legislative power. The Minister for Education has responded:

> 'I agree with the Committee's suggestion that it would be preferable for the definition of a 'full fee paying private overseas secondary student' to be set out in the Act, rather than being left to regulations. My Department's drafting instructions to the Office of Parliamentary Counsel requested this course of action. The definition of precisely who meets this test is, however, a complex matter, and given the volume of legislation being prepared for the Parliament, my Department was advised that the Office of Parliamentary Counsel did not have sufficient drafting resources to enable a suitable definition to be developed and included in the Bill at this time.
>
> As it is important that these students, counted in the forthcoming schools census for 1987, be excluded from the calculation of student numbers for the purpose of determining general recurrent grants, I decided, as an interim measure, to adopt the course of having the

definition declared in the regulations. Such regulations are of course subject to full Parliamentary scrutiny and disallowance.

It is my intention to include the definition of a 'full fee paying private overseas secondary student' in the Act and I will be seeking to do this at the earliest opportunity.'

The Committee thanks the Minister for this undertaking which answers its concerns in relation to the definition.

TAXATION LAWS AMENDMENT BILL (NO.2) 1987

This Bill was introduced into the House of Representatives on 6 May 1987 by the Minister Assisting the Treasurer.

The Bill will implement a number of the major changes announced by the Treasurer on 10 December 1986 as part of the Government's overhaul of the company tax system. In particular, it will abolish, subject to transitional rules, the additional tax payable by private companies under Division 7 of the Income Tax Assessment Act 1936 and will ensure that the intercorporate dividend rebate is allowed on a gross rather than a net basis. It will also remove the present exemption from tax for certain dividends satisfied by the issue of shares.

The Bill will also amend the income tax substantiation rules as they apply to deductions for car expenses. Another amendment will give effect to the Government's decision announced on 28 November 1986 to extend the bank account debits tax to debits made to payment order accounts with non-bank financial institutions, such as building societies and credit unions.

The Committee notes that in this case it is reporting, as permitted by its Terms of Reference, on a Bill notwithstanding that the Bill has already passed the Senate. The Committee draws the attention of the Senate to the following clause of the Bill:

Clause 62 -
Schedule 4 - Trespass on personal rights and liberties

Clause 62 would amend the Acts specified in Schedule 4 as set out in the Schedule. In each case the effect of the amendment is to require the occupier of land, premises, a building or a place to provide to a taxation officer 'all reasonable facilities and assistance' for the effective exercise of the officer's investigative powers. A penalty of a maximum fine of $1,000 is specified. The Explanatory Memorandum indicates that it is envisaged that, for example, a taxation officer might require the reasonable use of photocopying, telephone, light and power facilities and the facilities to extract relevant information from a computer. The officer could also require assistance in the form of advice as to where relevant documents are located and the provision of access to areas where such documents are located.

The Committee is concerned that the provision may impose an objective requirement upon the occupier of premises which that person may be unable to satisfy. The 'occupier' may, for example, be a junior employee and may be unable to provide access to certain safes or filing cabinets even though a court might consider the requirement to provide such assistance to be 'reasonable' in all the circumstances. The Committee would therefore prefer to see the provision recast so that the occupier might advance a 'reasonable excuse' for failure to provide the facilities or assistance required or so that the obligation is only placed upon the occupier to provide such facilities or assistance as he or she is reasonably able to provide.

The Committee recognises that the provisions to be inserted in the various Acts do not differ from sub-section 127(3) of the Fringe Benefits Tax Assessment Act 1986 on which the Committee

did not comment when the relevant Bill was introduced last year. However, the Committee draws the provisions to be inserted by Schedule 4 to the attention of the Senate under principle 1(a)(i) in that by failing to take account of what it may be reasonable for a particular occupier to provide by way of facilities or assistance they may be considered to trespass unduly on personal rights and liberties. The Committee notes that its concerns in this regard were drawn to the attention of the Senate by Senator Short during the Committee stage of debate on the Bill on 1 June 1987.

TAXATION LAWS AMENDMENT (COMPANY DISTRIBUTIONS) BILL 1987

This Bill was introduced into the House of Representatives on 2 April 1987 by the Treasurer.

The Bill provides for the elimination of the double taxation of company dividends. It amends the income tax law to introduce, with effect from 1 July 1987, the full imputation system of company tax announced on 10 December 1986. Under the imputation system, dividends paid by Australian companies will be relieved from tax in the hands of resident individual shareholders by a rebate to the extent to which tax has been paid at the corporate level.

The Committee notes that in this case also it is reporting, as permitted by its Terms of Reference, on a Bill notwithstanding that the Bill has already passed the Senate. The Committee draws the attention of the Senate to the following clauses of the Bill:

Clauses 7 and 8 - Retrospectivity

Clause 7 inserts a new section 46D in the Income Tax Assessment Act 1936 which will deny to a company the intercorporate dividend rebate which would otherwise be payable under section 46 or 46A

in respect of a dividend paid to the company after 1 pm on 10 December 1986 (the commencing time) where the dividend is paid in respect of a share issued, or under a finance arrangement entered into, after the commencing time and the payment of the dividend may be regarded as equivalent to the payment of interest on a loan. Clause 8 inserts a new sub-section 47(1A) in the same Act which will bring within sub-section 47(1) - which provides for distributions to shareholders by a liquidator in the course of winding up a company to be treated as dividends paid to the shareholders where the distributions represent income derived by the company - amounts not falling within the ordinary meaning of income but included in the assessable income of the company including capital gains. By virtue of sub-clause 18(2) the new sub-section 47(1A) will generally apply only to distributions made in the course of a winding up which commenced after 1 pm on 10 December 1986 but by virtue of sub-clause 18(3) it will also apply to any distributions made after that time in the course of an informal winding up - that is, where the business of a company has been or is in the course of being, discontinued, otherwise than in the course of a winding up under the companies law - irrespective of when the informal winding up may be said to have commenced.

Both these clauses implement changes to the law which were announced by the Treasurer by way of a press release issued in Canberra at 1 pm on 10 December 1986. Once again the Committee has occasion to draw attention to the practice of the Taxation Office of making legislation retrospective to the date of the announcement of the proposal to change the law. As it has commented on numerous occasions - most recently in relation to the Taxation Laws Amendment Bill (No.5) 1986 in its Second Report of 1987 (25 February 1987) - this practice carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. The practice treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality.

The Committee has noted in the past that it recognises the special convention associated with retrospective legislation making changes to the taxation laws where these changes were announced to the Parliament in the Budget or in similar statements and the necessary legislation is retrospective to the date of that announcement, the reason for such retrospectivity being that taxpayers might otherwise take advantage of the foreknowledge provided by the announcement. The Committee has also indicated that there may be a case for retrospective legislation where an announcement is made that a particular avenue for tax minimisation which has been abused is to be closed off and the subsequent legislation is backdated to the day of that announcement. Even in such circumstances the retrospectivity involved should in the Committee's view be kept to the minimum necessary to prepare the relevant legislation and the Committee would, as a matter of course, draw the retrospectivity to the attention of Senators. However it appears that no such justification is advanced in the present case. Instead it would seem that the Taxation Office has simply decided that a change to the law is desirable and, rather than proceeding by introducing legislation into the Parliament and providing for the change to take effect from the date of that introduction, it has followed what seems fast to be becoming its customary practice and has arranged for the announcement of the change to be made on 10 December 1986 with the necessary legislation to follow, in this case some four months after the change is supposed to have taken effect. The Committee notes that the announcement in question was the subject of a statement by the President of the Law Council of Australia, Daryl Williams Q.C., on 19 December 1986 in which he stated, in respect of the proposed amendment relating to company liquidations:

> 'The Law Council can see no justification for imposing a tax liability suddenly in this way - particularly as it is in an area in which the Government does not stand to lose revenue as a result of not acting promptly.'

The Committee concurs in the view of the Law Council. It is concerned at the use of announcements by way of press release as de facto changes to the law. It is particularly concerned that it is apparently becoming the practice of the Taxation Office to use this method of changing the law as a matter of course and it is especially concerned about the use of this mechanism in the present case because it would appear not to be justified by the nature of the changes involved. Accordingly the Committee draws clauses 7 and 8 to the attention of the Senate under principle 1(a)(i) in that by their retrospective application they may be considered to trespass unduly on personal rights and liberties.

TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 30 April 1987 by the Attorney-General.

The Bill is designed to -

- extend existing telecommunications interception powers of the Australian Federal Police in respect of certain Commonwealth narcotic offences to cover a wider category of serious offences;

- allow the National Crime Authority to seek the issue of an interception warrant in respect of an offence in relation to which the Authority is conducting a special investigation within the meaning of its Act and other serious offences; and

- enable the police force - and in the case of New South Wales, the State Drug Crime Commission - of any State or the Northern Territory to seek the issue of interception warrants in respect of serious offences.

The Bill imposes stringent safeguards on the use of interception powers. Those safeguards include a requirement for judicial warrants, provisions for the auditing by an independent authority of interception activities and of compliance with State laws and the requirements of the Telecommunications (Interception) Act, and provisions regulating the use, disclosure and destruction of intercepted information. Information obtained in contravention of the Act will be inadmissible in evidence in any court, except for the purpose of establishing the contravention.

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

Clause 21 -
New sub-section 61(2) - Conclusive evidentiary certificates

Clause 21 inserts new Parts VI, VII, VIII, IX, X, and XI in the Act. New sub-section 61(2) would provide that a certificate issued by the Managing Director of Telecom setting out the relevant facts with respect to acts or things done by, or in relation to, officers of the Commission in order to enable a warrant authorising the interception of telecommunications to be executed is to be conclusive evidence of the matters stated in the certificate in exempt proceedings (broadly prosecutions for class 1 or class 2 offences under the Act as proposed to be amended or any other offences punishable by imprisonment for at least 3 years).

The new provision replaces section 25A (to be repealed by clause 18) to which the Committee drew attention in its Seventh Report of 1985. The Committee also commented on a similar provision, new section 6C, proposed to be inserted by the Telecommunications (Interception) Amendment Bill 1986, in its Alert Digest No. 11 of 1986. The Committee stressed in those comments that whereas prima facie evidentiary certificates as to purely formal matters were acceptable, conclusive certificates deprived the defendant in

criminal proceedings of the opportunity to challenge elements of the evidence brought against him or her. The Attorney-General responded to the Alert Digest comment as follows:

> 'Evidentiary certificate provisions of this kind were first introduced into the Telecommunications (Interception) Act 1979 in 1985 (as s.25A) in recognition of the need to protect Telecom employees and their families against the possibility of violent reprisals if the employees were forced to give evidence in public in drug offence cases. The justification for such certificates was thus accepted by the Parliament in enacting s.25A of the Act. The new s.6C merely extends the effect of s.25A to cover warrants issued to State police and the National Crime Authority.
>
> Proving the actions of Telecom by certificate would not conflict with the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs. That Committee has taken the view that Parliament should enact legislation to ensure that averment provisions are only resorted to by prosecutors where the matter which the prosecution is required to prove is formal and does not relate to any conduct on the part of the defendant.'

However the Senate Standing Committee on Constitutional and Legal Affairs in its Report on The Burden of Proof in Criminal Procedings (Parliamentary Paper No.319/1982) used the term 'averment provision' to refer to prima facie evidentiary certificates and not conclusive certificates (see paragraph 7.1 of that Report). The Committee did not consider conclusive certificates as such but, as noted in the paper on The Operation of [this Committee] 1981-1985, presented to a conference in Adelaide in August 1985 by the then Chairman, Senator the Hon. M.C. Tate (Parliamentary Paper No.317/1985), the logical corollary of the views the Constitutional and Legal Affairs Committee advanced with regard to the imposition of the

persuasive burden of proof on defendants in criminal proceedings is that it would have regarded as totally unacceptable the removal of particular issues in criminal proceedings from examination by the courts in their entirety.

The Committee therefore drew new sub-section 61(2) to the attention of the Senate under principle 1(a)(i) in that by so removing the facts stated in the certificate from the scrutiny of the court in criminal proceedings it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'As you know, proposed section 61(2) is substantially the same as existing section 25A of Telecommunications (Interception) Act 1979 (inserted in 1985) and proposed section 6C of the now - withdrawn Telecommunications (Interception) Amendment Bill 1986. Alert Digest No.7 of 1987 sets out my response to your Committee's comments on proposed section 6C, in which I referred to the need, accepted by the Parliament when enacting section 25A, to protect Telecom employees and their families against the possibility of violent reprisals if employees were forced to give evidence in public in serious drug offence cases. As that need still exists, a provision such as proposed section 61(2) is necessary to allow formal evidence on actions done by Telecom to facilitate an interception to be put without requiring the identification of the technicians involved. In this regard, it should be stressed that the small group of Telecom employees concerned are ordinary members of the public who may, when an interception warrant is issued, be called upon to use their expertise to facilitate its execution. Proposed section 61(2), like its antecedent, recognises that these Telecom employees may well prove unwilling to accept the risk of reprisals that may arise should their involvement in the interception process be made public.

Alert Digest No.7 of 1987 also refers to that part of my response last year in which I stated that the evidentiary certificate provision in the 1986 Bill would not conflict with the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs in its 1982 report on the Burden of Proof in Criminal Proceedings. Your Committee's comments point out that the 1982 report did not address conclusive certificates, but referred to prima facie evidentiary certificates. Accordingly, I do not believe that any arguments drawn from it are necessarily applicable to the certificates contemplated by proposed section 61(2).

Whilst it is clear that a certificate issued under proposed section 61(2), in putting to a court evidence which must be taken as sufficient proof of the matters stated, will remove those matters from dispute, I do not believe that it will unduly trespass on personal rights and liberties. Rather, I believe that the reasons for including the provision in the Bill - which reasons were accepted by the Parliament in 1985 in relation to section 25A - are compelling.'

The Committee thanks the Attorney-General for this response. In continuing to draw attention to new sub-section 61(2), together with the Attorney-General's response, the Committee hopes to promote a fuller consideration of the issues involved at the Committee stage of debate on the Bill.

New section 64 - Use of unlawfully obtained information

New section 64 would enable information obtained by intercepting a communication in contravention of sub-section 7(1) of the Act to be used in a proceeding begun before the commencement of new Part VII. In proceedings begun after that date information obtained in contravention of the Act will be inadmissible except to establish the contravention. According to the Second Reading

speech, new section 64 has been included because it is not intended to prejudice proceedings that have been commenced before the legislation comes into operation. However the Committee expressed the view that defendants in current proceedings should not be deprived of the benefit of the change to the law effected by this Bill to the extent that it is to their advantage.

The Committee therefore drew new section 64 to the attention of the Senate under principle 1(a)(i) in that by permitting the continued use of information obtained by the unlawful interception of telecommunications it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'In my opinion, amending the Bill along the lines suggested by the Committee would create confusion. Until the High Court's 1985 decision in Hilton v Wells (1985) 58 ALR 245, it was generally accepted that section 7 of the Act prevented the use in proceedings of illegally obtained information. However, in that decision, the High Court ruled that section 7 only regulated the use of information obtained by legal interceptions and that, consequently, the Act did not render illegally obtained information inadmissible. The Bill contains provisions designed to rectify this position. However, current proceedings are conducted on the basis of the law as determined in Hilton v Wells. Amending the Bill in order to provide certain evidentiary benefits to defendants in current proceedings, as suggested by the Committee, would produce the confusing result of changing evidentiary rules whilst prosecutions are in train. In my view, the most effective way to remedy the problem manifested in Hilton v Wells, without creating others in its place, is to enact the Bill as soon as practicable.'

The Committee thanks the Attorney-General for this response. While the Committee supports the Attorney-General's wish to see the Bill enacted as soon as practicable, it does not appear to the Committee that to amend the Bill to ensure that defendants in current proceedings would have the advantage of the proposed change to the law rendering illegally obtained information inadmissible would produce any more confusing result than the decision in Hilton v Wells. In the view of the Committee, if it is wrong in principle that information obtained by illegal interceptions should be admitted - which appears to be acknowledged by the Government in bringing forward these amendments to remedy the problem manifested in Hilton v Wells - then it is wrong that such information should continue to be admissible in proceedings currently before the courts. The Committee therefore continues to draw new section 64 to the attention of the Senate under principle 1(a)(i) in that by permitting illegally obtained information to continue to be admissible in current proceedings it may be considered to trespass unduly on personal rights and liberties.

New sub-sections 88(2), (3) and (4) - Failure to stipulate reasonable time and place

New sub-sections 88(2), (3) and (4) provide that the Ombudsman may require an officer of an agency whom the Ombudsman has reason to believe is able to give information relevant to an inspection of the agency's records:

- to give the information to the Ombudsman at a specified place and within a specified period; or

- to attend before an inspecting officer at a specified place and within a specified period or at a specified time on a specified day to answer questions.

In no case is it stipulated that the period specified or the time, day or place specified must be reasonable.

As the Committee has stated previously in regard to similar provisions, it does not believe that the defence of reasonable excuse for non-compliance (here contained in new sub-section 108(1)) has the same effect as a positive requirement that the periods within which, and times and places at which, the information is to be provided must be reasonable. The Committee therefore drew new sub-sections 88(2), (3) and (4) to the attention of the Senate under principle 1(a)(i) in that by failing to stipulate that the periods, times and places must be reasonable it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'Your Committee has commented on the Ombudsman's power under proposed sub-sections 88(2), (3) and (4) to require an officer to give information or attend before an inspecting officer in connection with an inspection of an agency's records. Your comments point out that the provisions do not stipulate that the period, time, day or place to be specified by the Ombudsman must be reasonable. After considering your comments, I have decided that it would be appropriate for me to move a Government amendment to proposed section 88 along the lines suggested by your Committee.'

The Committee thanks the Attorney-General for this undertaking.

New sub-section 89(1) - Self incrimination

New sub-section 89(1) provides that a person is not excused from giving information, answering a question or giving access to a document as required under new Part VIII on the ground that to do so might tend to incriminate the person. The new sub-section also contains the proviso that the information, the answer or the fact that the person has so given access to the document is not to be admissible in evidence against the person except in a prosecution for an offence relating to the failure to attend before an inspecting officer, to furnish information or to answer questions as required.

This proviso only protects the person required to give self-incriminating information against the use in subsequent proceedings of the actual information, answer or document given. By contrast the more recent form of such provisions in Commonwealth legislation extends the protection to any information or thing acquired as a direct or indirect consequence of the person being required to give the incriminating information: see, for example, sub-clause 66(13) of the Proceeds of Crime Bill 1987. The Committee therefore drew new sub-section 89(1) to the attention of the Senate under principle 1(a)(i) in that by removing the privilege against self incrimination and by failing to provide protection against the use in subsequent proceedings of evidence arising out of the information required to be provided it might be considered to trespass unduly on personal rights and liberties. The Attorney-General has responded:

> 'Your Committee points out that recent Commonwealth provisions of this sort protect the person not just from use of the incriminationg information that the person is required to give, but from any information or thing acquired as a direct or indirect consequence of the person being required to give incriminating information. You point to the example of sub-clause 66(13) of the Proceeds of Crime Bill 1987. I agree with your comment that proposed sub-section 89(1) should be amended to bring it into line with the more recent Commonwealth provisions of this nature, and I will move an appropriate amendment to the provision.'

The Committee thanks the Attorney-General for this undertaking.

Rosemary Crowley
Chair
3 June 1987

APPENDIX

COMMONWEALTH OF AUSTRALIA

MINISTER FOR COMMUNITY SERVICES

Parliament House
Canberra, A.C.T. 2600

Senator R A Crowley
Chair
Standing Committee for Scrutiny of Bills
Parliament House
CANBERRA 2600

Dear Senator Crowley

The Senate Standing Committee for the Scrutiny of Bills commented in its Scrutiny of Bills Alert Digest No 8 of 1987 on Clause 16 of the Nursing Homes and Hostels Legislation Amendment Bill 1987.

The Committee has commented on the non-reviewable nature of decisions under the proposed new section 45E of the National Health Act 1953 (the Act), and has sought clarification in relation to the timing of establishment of Nursing Home Standards Review Panels in each State and Territory, and as to whether the Panels will have a legislative base.

The new section 45D of the Act provides me with the power to gazette standards for the provision of care in nursing homes. These gazetted standards will be disallowable by the Parliament.

The new sub-section 45E(1) of the Act enables me to declare that a home does not satisfy the gazetted standards. It is important to note that the making of a declaration under sub-section 45E(1) is only a first step. The exercise of the new powers under sub-sections 45E(2) or (3) need not necessarily follow. Indeed I would be hopeful that in the majority of cases it would not be necessary to exercise these powers.

In implementing the new standards, the Government intends to adopt an educative and consultative role. As a means of encouraging industry co-operation, an amount of $600,000 will be provided over the next 3 years for training packages aimed at directors of nursing in nursing homes and hostel supervisors. Where sub-standard care is occurring, my Department will work with nursing homes to help develop plans to overcome identified problems to ensure that the welfare of residents is protected. It would only be where this consultative process had been to no avail that I would need to consider what further action should be taken in respect of homes which have declined to respond to efforts to improve care standards.

Such further action may involve the making of a declaration under sub-section 45E(1), the imposition of new conditions of approval under the existing provisions of the Act, and perhaps also action under the new powers in sub-sections 45E(2) and (3). It is relevant here that the new powers stop short of closure of the nursing home and consequently will not impact on a proprietor's livelihood to the extent that the existing suspension and revocation powers under the National Health Act would do. Accordingly it is expected that these powers will provide a more acceptable and workable approach to securing compliance with the required standards than exists at present.

There are two groups of aged people who are of concern in relation to nursing home standards - those who have not yet been admitted to a nursing home, and those who are already resident in a home.

For the first group, the Government has a clear responsibility to ensure that no further elderly people are subjected to the poor quality care being provided in sub-standard homes; the withholding of funding for new residents is intended to offer a measure of protection in this regard.

In relation to the second group who are already resident in a sub-standard home, the Commonwealth needs to have the capacity to bring pressure to bear on the proprietors to lift their standards, without, in the process, jeopardising the well-being of those residents. Clearly, this requires a carefully balanced approach. Accordingly the Bill provides that there will be no reduction in Commonwealth funding in respect of existing residents but there will be no increases in infrastructure funding and no payments for new admissions until proper standards are achieved or progress made toward this goal. Once the powers have been exercised, monitoring of the home will be increased to ensure that existing residents are not further disadvantaged. In some cases, my Department will look to assisting existing residents to find alternative accommodation.

The proposed powers in relation to non-compliance with gazetted standards, and the question of related review and appeal processes, have been canvassed with the nursing home industry and other interested parties. In the course of these discussions, they have expressed a strong wish to avoid a legalistic, adversarial approach to review of the exercise of the proposed powers. The question of AAT Review was raised in some of these discussions and expressly dismissed as inappropriate. Instead industry and consumer representatives have requested that consideration be given to a form of peer review whereby professionals with local knowledge could join with Government representatives to review recommendations regarding homes which are considered to be delivering poor quality care.

In this regard, it is important to recognise that what both the industry and Government are looking for in relation to review of such decisions, is not just a mechanism for considering the merit of particular administrative actions, but rather a system which can also assist in developing appropriate solutions to poor quality care. The development of solutions will require decisions of a technical nature which make sense in the local context, and it is my view, and that of the nursing home industry, that any review process will accordingly require the input of informed professionals.

On this basis I have agreed to create Nursing Home Standards Review Panels in each State and Territory. The Panels will involve representatives of both Commonwealth and State Governments, the industry, the relevant professional body and, of course, the consumers who are most affected by poor quality care.

I am moving to establish these Panels as quickly as possible, and it is likely that one Panel will commence operation very soon after the gazettal of the new standards. This first Panel will have a pilot role, and appropriate adjustments will be made to the model in the light of experiences with the pilot.

To allow flexibility to make appropriate adjustments in the initial stages, I would prefer that the Panels not have a statutory base at this point. However, I am willing to reconsider this approach when suitable arrangements have been tested and are in place.

I acknowledge that Panels will not be in place in all States on 1 July 1987. However, given the extensive inspection and consultation process which is to take place before the new powers are invoked, it will be some time before Panels will be asked to review decisions relating to the exercise of the new powers. It is therefore not critical that all Panels actually be in place on 1 July 1987.

However, to address the concerns raised by the Committee I would be willing to give an undertaking not to exercise the new powers in respect of a nursing home until the establishment of a Review Panel in the State or Territory in which the home is located. This approach would reflect the administrative realities involved in establishing Panels but at the same time would not inhibit appropriate action being taken in the interests of residents in those States where Panels have been established.

Finally, I should stress that the Bill encompasses a range of reforms which have been sought not only by bodies representing the aged but also by service provider organisations as is indicated by the attached letter from the Chairman of the Australian Affiliation of Voluntary Care Associations which represents religious and charitable care providers in all States and Territories.

Yours sincerely

Chris Hurford

CHRIS HURFORD

AUSTRALIAN AFFILIATION OF VOLUNTARY CARE ASSOCIATIONS

CHAIRMAN: Rev Don E. Stewart

PLEASE ADDRESS OFFICE OF Rev Don E. Stewart,
P.O. Box 8,
SHERWOOD Q4075
Phone: (07) 379 9122

12 May, 1987.

The Hon. C. Hurford,
Minister for Community Services
Parliament House,
Canberra, A.C.T., 2600

Dear Minister,

With the Nursing Homes and Hostels Legislation Amendment Bill now before Parliament I wish on behalf of the Australian Affiliation of Voluntary Care Associations (A.A.V.C.A.) to express satisfaction at the general direction of the new legislation.

The A.A.V.C.A., whose member bodies provide about 80,000 beds in Nursing Homes and Hostels across Australia, has consistently campaigned for years for the sorts of changes that have now been introduced into Parliament. The evidence of that campaign can be found in the Joint Reports that have been produced in the Hostel area and in the representations that the A.A.V.C.A. has made from time to time in both the Nursing Home and Hostel areas..

Our deepest concern has been that the real emphasis on the care of the aged should be upon the care that is given - that it should be adequate, that it should be appropriate, that it should be personal, and that it should provide the kind of care that enables the aged resident to live their life to their maximum potential.

Care can not be divorced from cost. It is true that in the provision of care to the aged and disabled more funds are always welcome. Therefore there are some care provider bodies that are concerned at the level at which S.A.M. has been set. There are also many more provider bodies across Australia that see the opportunity opening in the new arrangements for them to be able to provide better levels of care (similar to those achieved in areas where there has been higher levels of funding) from increased funding. Only the operation of the new funding arrangements will demonstrate whether the Government has got the figures right.

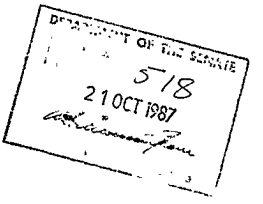
We are pleased that a review process is built into the arrangements. However, rest assured, that if there is a decline in the level of care in those areas where there has been a decrease in funding we shall actively campaign for improvements to the system.

It is a welcome change for the management of the financial side of care to be placed in the hands of the care providing organisations. I believe that the Australian taxpayer will not be disappointed with the result of our balancing of cost and care. On the care side we welcome the emphasis upon care outcomes.

It is our belief that the basic policies within the legislation are part of a bi-partisan approach to the care of the aged and disabled. We hope that the legislation has a safe and speedy passage through Parliament.

Yours sincerely,

Don E. Stewart
National Chairman.



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF 1987

21 OCTOBER 1987

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney, Chairman
Senator M. Beahan
Senator D Brownhill
Senator R.A. Crowley
Senator K Patterson
Senator J.F. Powell

TERMS OF REFERENCE

Extract

(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative power; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF 1987

The Committee has the honour to present its Eleventh Report of 1987 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Act and Bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Administrative Arrangement Act 1987
Bankruptcy Amendment Bill 1987
Statute Law (Miscellaneous Provisions) Bill (No.1) 1987

ADMINISTRATIVE ARRANGEMENTS ACT 1987

This Act was introduced into the Senate on 15 September 1987 by the Minister for Industry, Technology and Commerce. The Bill was passed through the Parliament and assented to on 18 September 1987.

The Act amends the Acts Interpretation Act 1901 and the Public Service Act 1922.

The Acts Interpretation Act 1901 is amended to clarify the scope of existing provisions of that Act in the light of the recent changes (announced 14 July 1987) to Ministerial and Departmental structures. The amendments recognise situations where a single Department is administered by two or more Ministers.

The amendments to the Public Service Act 1922 abolish the Public Service Board and replace it with a Public Service Commissioner. The Commissioner will be a statutory office-holder and have responsibility for a number of matters of administration including recruitment, promotion, mobility, discipline and retirement.

On this occasion the Committee, as permitted by its Terms of Reference, drew the attention of Senators to the following provisions, notwithstanding that the legislation had been agreed to by the Parliament and had become law:

New subsections 18(1) and 18(3) - Delegation

New subsections 18(1) and 18(3) of the Public Service Act 1922 allow the Public Service Commissioner to delegate, and a Secretary to sub-delegate, their statutory powers to any person (other than a person engaged as a consultant pursuant to certain other legislation). The Committee has been critical of such powers of delegation which impose no apparent limitation and give no guidance as to the attributes of the person to whom a delegation may be made.

The Committee's criticism of such arrangements essentially is that it is for the Parliament, in conferring a statutory power to determine the persons by whom a power of delegation is exercised, and not for the person on whom the power is conferred, whether that person is a Minister, statutory authority or - as in the Commissioner's case - a statutory office-holder.

The Committee notes that Section 16(IB) of the Act which was inserted by the Public Service Legislation (Streamlining) Act 1986 limited a Secretary's power by specifying the persons to whom a Secretary may sub-delegate a power in a manner which is acceptable to the Committee.

Although the Bill has passed the Parliament, the issues raised are important and remain of interest. Accordingly the attention of Senators is drawn to new sub-sections 18(1) and 18(3) under principle (ii) in that they may be considered to inappropriately delegate administrative power.

BANKRUPTCY AMENDMENT BILL 1987

This Bill was introduced into the Senate on 15 September 1987 by the Minister for Transport and Communications.
The Bill makes amendments to the Bankruptcy Act 1966 (the Act). The amendments will ensure that the investigatory powers available to the trustee in bankruptcy are such as to empower the trustee to investigate the sophisticated commercial structures which are encountered now more frequently than ever before in bankruptcies.

The amendments in the Bill fall into 5 main categories:

- introduction of a prebankruptcy moratorium to enable debtors to consider possible alternative arrangements with creditors;

- changes designed to enhance the investigatory powers of bankruptcy trustees and to enable asset recoupment from corporations, partnerships and trusts which a bankrupt has used to conceal

- reform of Part X of the Act to ensure that creditors are provided with full and timely information about debtors' affairs;

- improving the administrative controls over private sector registered trustee, and controls by creditors over those trustees; and

- other amendments designed to improve the effectiveness of the Act.

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

Clause 35 - Powers of officials, Commissions etc.

Clause 35 inserts a new section 77A in the Act providing to a trustee in bankruptcy or the Official Receiver, extended powers of investigation and inquiry. Particularly, the proposed section would enable an investigator (a term used to denote a trustee or the Official Receiver) to obtain access to books of an associated entity of a bankrupt when those books are in the possession of a person other than the bankrupt.

Under proposed subsection 77A(2) the investigator would be empowered to require production of books on the condition that, in the investigator's opinion, the books are relevant to the investigation.

Under proposed subsection 77A(3) the investigator would be empowered to require any person, who was a party to the compilation of the books to explain to the investigator, to the best of his or her knowledge and belief, any matter about the compilation of the books, or related matter. In addition, the investigator may require the person to state, to the best of his or her knowledge or belief where the books may be found and, if requested, information as to the identity of the person who, to the best of his or her belief, last had possession, custody or control of the books and where that person may be found.

In the past the Committee has drawn attention to provisions which, with little restriction, empower officials or others to require any person believed to be capable of giving relevant information to attend before them to answer questions and produce documents.

It appears that the investigator would not be required to seek a warrant from a judicial officer (which would be subject to the controls normally exercised on the grant of warrants) as he or she may seek the information provided without having to first substantiate the conclusion that particular persons should be questioned.

Clause 36 - Power of officials, Commissions etc.

Clause 36 proposes a new section 77B which would allow the Official Receiver the same powers of inquiry as presently allowed to a trustee. In particular, paragraph 77B(a) to (d) allow the Official Receiver wide powers of inquiry including the power to require the bankrupt to attend interview and to give information and assistance in connection with the investigation.

The Committee has previously commented that such wide powers of investigation and inquisition, as a means of extracting essential information, should be exercised within bounds which limit the investigator to inquiry on relevant matters.

Whilst the Committee recognised that the new provision does not differ from section 77 of the Bankruptcy Act on which it has been modelled, the Committee drew clauses 35 and 36 to the attention of Senators in that they may be considered to make rights, liberties and/or obligations unduly dependent on the discretion of an Official.

The Minister for Justice has responded as follows:

> 'Proposed section 77A will confer upon the trustee in paibankruptcy and the Official Receiver wider powers of investigation in connection with the administration of a bankruptcy.
>
> Proposed section 77B will impose upon a bankrupt a duty to assist the Official Receiver in various ways which broadly reflect a similar duty already imposed upon a bankrupt by section 77 to assist the trustee.

Thus the powers conferred by sections 77, 77A and 77B are exercisable by the trustee or the offical Receiver. Both trustees and Official Receivers are subject to very rigorous scrutiny, both judicial and official, and that degree of scrutiny will be enhanced by the Bill.

In relation to trustees, the Bankruptcy Act presently contains the following provisions which involve scrutiny of the actions of trustees:

- under section 178 ("Appeal to Court against trustee's decision") any person affected by an act, omission or decision of the trustee may apply to the Court for relief; and

- under sub-section 179(1) ("Control of trustees by the Court") the Court may inquire into the conduct of trustee.

In relation to the Official Receivers, subsection 15(2) provides that "the Official Receivers shall be under the control of the Court." In addition, the Official Receivers act for an on behalf of the Official Trustee in Bankruptcy in bankruptcies administered by it. Sections 178 and 179 also apply to the Official Trustee, so that the actions of the Official Receivers when they are performing trustee functions are subject to the same judicial scrutiny as trustees. It may not be directly in point, but as Official Receivers are officers of the Australian Public Service, an independent check upon their actions is the range of methods already available for review of the actions of public officials, e.g. the Administrative Decisions (Judicial Review) Act 1977 and the Ombudsman Act 1976, supplemented by the Freedom of Information Act 1982.

In addition, the Bill will extend even further the provisions for the scrutiny of the actions of trustees and Official Receivers. Most importantly clause 60 will insert a new Division 4A into Part VIII ("Examination of trustees and other persons") which will provide for their examination on oath before the Registrar.

It should be noted that although section 77 and proposed sections 77A and 77B will impose certain requirements on persons to assist the trustee and the Official Receiver in the administration of bankrupt estates, mere failure by a person to provide the information or other assistance required does not of itself attract a penalty. The sanctions which reinforce section 77 - and proposed sections 77A and 78B - are the existing power to seek a warrant under para. 78(1)(f) and the proposed offence inserted by clause 98. Each of these provides that the sanction is only available where noncompliance occurs without good cause (para. 78(1)(f)) or without reasonable excuse (proposed section 265A). Accordingly some judicial scrutiny of reasonableness is a necessary element for the application of a sanction.

Accordingly it is my view that there is a more than adequate level of scrutiny over the actions of trustees and Official Receivers when exercising their existing powers and the new powers to be conferred upon them by the Bill'.

Subclauses 51(2) and 91(2) - Retrospectivity

Sub-clause 51(2) would have the effect of making the new Division 4A of the Act (a Division to be inserted by clause 51(1)) retrospective, so as to allow orders issued by the Court relating to property to be made even though much of the bankrupt's estate had been dealt with under the Act and other arrangement.

Sub-clause 91(2) makes it an offence for a bankrupt to knowingly make a statement that is false or misleading to the chairman of a creditors meeting. This provision is retrospective and render criminally liable a person who, at the time of committing the act, was not infringing the criminal law.

The Committee drew the attention of these subclauses to the attention of Senators in that, by making the provisions retrospective, it could be considered to trespass unduly on personal rights and liberties.

The Minister for Justice has responded as follows:

> 'Clause 51 confers upon the Court a new power to deal with existing matters. This should be contrasted with retrospectivity where the law is expressed to operate from a past date. As Professor Pearce stated in Statutory Interpretation in Australia "[few] Acts do not interfere with some existing right. The usual intention of a legislature is to make some change in an existing course of conduct. It is, therefore, appropriate to talk in terms of retrospectivity only where an Act affects rights by changing them with effect prior to the commencement of the amending Act." In those terms clause 51 is not retrospective.
>
> Subclause 91(2) is a clarifying provision. The correct interpretation of it is that the conduct which will constitute the offence must occur after the commencement of the provision. However the new offence will apply even if the meeting was called pursuant to a section 188 authority signed before commencement. This is the effect of the application provision in subclause 91(2).
>
> Once again this is not retrospectivity. A statute "is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing." (R-v-St. Mary, Whitechapel (Inhabitants) (1848) 12 Q.B. 120 at 127 per Lord Denman CJ).

This provision is included in order to avoid doubt about the application of the offence in circumstances where the conduct occurs after commencement but it occurs in connection with a section 188 authority signed before commencement. It is emphasised that the offensive conduct must occur after commencement.

For the reasons given above I find myself unable to agree with the views expressed by the Committee in relation to the proposed amendments. However I do thank the Committee for its comments'.

The Committee thanks the Minister for this response. In drawing attention to the clauses of the Bill together with the Minister's response, the Committee hopes to promote a fuller consideration of the issues involved during debate on the Bill.

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO.1) 1987

This Bill was introduced into the House of Representatives of 30 April 1987 by the Attorney-General and was re-introduced into the Senate on 23 September 1987 by the Minister for Justice.

The Bill continued the practice of introducing an omnibus Bill into each sitting of the Parliament as an expeditious way of making a large number of non-contentious amendments to legislation not otherwise being amended.

The Committee drew the attention of Senators to the following clause of the Bill in Alert Digest No.7 of 1987.

Clause 3 - Schedule 1 -
Anglo-Australian Telescope Agreement Act 1970 -
New sub-section 8A(1) - Inappropriate delegation of legislative power

Clause 3 would amend the Acts specified in Schedule 1 as set out in that Schedule. In particular it would insert in the Anglo-Australian Telescope Agreement Act 1970 a new sub-section 8A(1) providing that additional functions may be conferred on the Anglo-Australian Telescope Board by regulations. The Board is presently limited in its functions to the operation and management of the Anglo-Australian Telescope in accordance with the Agreement.

The Committee considered that if the functions of the Board were to be extended beyond those conferred by its establishing statute then this should be done by way of amendment to the Act rather than by way of regulations. The Committee drew new sub-section 8A(1) to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

The Minister for Justice has responded as follows:

> 'By virtue of section 8 of the Act, the functions of the Board are presently limited to matters relating to the Treaty between Australia and the United Kingdom concerning the Anglo-Australian Telescope located at Siding Spring. Co-located with the Anglo-Australian Telescope, but not covered by the Treaty, is the United Kingdom Schmidt Optical Telescope to which Australian astronomers have enjoyed valuable access.

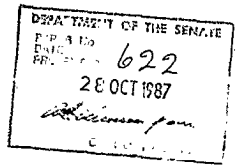
At the present time negotiations are taking place between the Australian and United Kingdom Governments concerning the future operation and funding of the Schmidt Optical Telescope in the event of a reduction by the United Kingdom Government of its financial commitment to southern hemisphere astonomy.

The purpose of the inclusion of the proposed section 8A is to ensure that, upon completion of the current negotiations with regard to the future operation of the Schmidt Optical discharge new functions that it will be necessary for it to have in order to operate that telescope. As the precise additional functions that would be required to be conferred on the Board are dependent upon the outcome of the negotiations, amendment of the Act ahead of the completion of the negotiations to specify such additional functions would not be a practical option - hence the proposal to include a new s.8A enable the Board's functions to be extended by regulation at short notice to meet the particular additional functional needs that will be identified at that time'.

The Committee thanks the Minister for his response.

Barney Cooney
(Chairman)

21 October 1987



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1987

28 October 1987

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Senator B. Cooney, Chairman
Senator D. Brownhill, Deputy Chairman
Senator M. Beahan
Senator R.A. Crowley
Senator K. Patterson
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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1987

The Committee has the honour to present its Twelfth Report of 1987 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 Standing Order 36AAA:

Petroleum Resources Rent Tax Assessment Bill 1987

Sea Installations Bill 1987

Taxation Laws Amendment Bill (No.3) 1987

PETROLEUM RESOURCE RENT TAX ASSESSMENT BILL 1987

This Bill was introduced into the House of Representatives on 21 October 1987 by the Minister for Primary Industries and Energy.

The Bill provides for the assessment and collection of the petroleum resource rent tax payable by persons in respect of certain offshore petroleum projects. The tax is to apply to taxable profits from the recovery of petroleum in offshore areas where the Petroleum (Submerged Lands) Act 1967 applies, other than in areas covered by production licences granted on or before 1 July 1984 and the permit areas from which those production licences were drawn.

The Bill is one of a package of Bills which were originally introduced into the Parliament on 28 November 1986, but which lapsed on the double dissolution on 5 June 1987.

The Bill, is in the same form as the Bill of the same title introduced in the last Parliament

The Committee drew certain clauses of the Bill to the attention of the Senate in its Sixth Report of 1987 (29 April 1987). These comments are reprinted below for the information of the Senate.

General comment - Retrospectivity

Although the Bill contains no clear statement as to its real date of effect, it appears that in certain respects it will have retrospective effect to 1 July 1984. Profits from the recovery of petroleum in areas covered by production licences granted on or before that date are expressly excluded - see the definitions of 'eligible production licence' and 'excluded exploration permit' in clause 2 - but it would appear that assessable

receipts derived by a person (and eligible expenditure incurred by a person) after that date may be taken into account in determining a person's liability to tax - see clauses 31 and 44 - even though liability will only be imposed on profits of a year of tax, being a financial year commencing on or after 1 July 1986. This conclusion is reinforced by the application of the anti-avoidance provisions in the Bill to arrangements entered into on or after 1 July 1984: see clause 51.

The Second Reading Speech indicates that it is not anticipated that any petroleum resource rent tax will be received before the 1989-90 financial year. However because any tax that will be payable will be determined after taking account of past project receipts and expenditure the Committee draws the retrospective application of the Bill to the attention of Senators in that it may be considered to trespass unduly on personal rights and liberties.

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

Clause 2 - Definition of 'marketable petroleum commodity' - 'Henry VIII' clause

Clause 2 defines a 'marketable petroleum commodity' as stabilised crude oil, sales gas, condensate, liquefied petroleum gas, ethane or -

> '(f) any other product [produced from petroleum] declared by the regulations to be a marketable petroleum commodity'.

The consideration received by a person for the sale of any marketable petroleum commodity is included within the person's assessable petroleum receipts under clause 24.

Because it would permit the content of the term 'marketable petroleum commodity' to be extended by regulations the definition may be characterised as a 'Henry VIII' clause and, as such, the Committee draws it to the attention of the Senate under principle 1(a)(iv) in that it may be considered to constitute an inappropriate delegation of legislative power.

Clause 107 - Entry and inspection without warrant

Clause 107 provides that, for the purpsoes of the Act, an officer authorised in writing by the Commissioner may, at all reasonable times, enter and remain on any land or premises and may inspect, examine and make copies of any documents. The only limitation on this power is that, if challenged by the occupier of the land or premises, the officer must produce an authority signed in writing by the Commissioner stating that the officer is authorised to exercise powers under the clause. There is no requirement that an officer obtain a sear warrant before entering premises.

The Committee recognises that in this respect clause 107 does not differ from similar provisions in other taxation laws: see, for example, section 263 of the Income Tax Assessment Act 1936 and section 127 of the Fringe Benefits Tax Assessment Act 1986. However there would appear to be no basis in principle for giving officers enforcing revenue law greater powers than officers enforcing the criminal law. Evasion of tax should no be regarded as more serious than, say, offences against the person, or more difficult to detect than, for example, complex financial fraud. Yet officer enforcing the criminal law are rquired, except in cases involving the treatened destruction of evidence, to obtain either the consent of the occupier of the premises to be searched or, if that is not forthcoming, a search warrant from a judicial officer.

The Committee therefore draws clause 107 to the attention of Senators in that by providing for entry on land or premises and the inspection of documents without a search warrant it may be considered to trespass unduly on personal rights and liberties.

Paragraph 108(1)(b) - Failure to stipulate reasonable time and place

Paragraph 108(1)(b) provides that the Commissioner or the Minister for Resources and Energy may, for the purposes of the Act, *by notice in writing, require a person to attend before the* relevant authority, for the purpose, at a time and place specified in the notice, and then and there to answer questions. There is no requirement that the time and place specified in such a notice must be reasonable and, as the Committee has commented on previous occasions, it does not regard such a requirement as implicit in provisions of this type (see most recently its comment on sub-clauses 121(1), 145(1) and 147(1) of the Australia Card Bill 1986 in its Eighteenth Report of 1986). In any event, if it is intended that the requirement be implicit, the Commjittee can see no reason why it should not be made explicit: compare, for example, sub-section 26(1) of the Bounty (Ship Repair) Act 1986 and sub-section 27(1) of the Disability Services Act 1986.

The Committee therefore draws paragraph 108(1)(b) to the attention of Senators in that by failing to stipulate that the times and places at which persons may be required to attend and answer questions must be reasonable it may be considered to trespass unduly on personal rights and liberties.

SEA INSTALLATIONS BILL 1987

This Bill was introduced into the House of Representatives on 7 October 1987 by the Minister for Arts, Sport, the Environment, Tourism and Territories. The Bill is similar to a Bill of the same title introduced on 2 April 1987.

The Bill is one of a number of Bills required to put in place a scheme to regulate the operation of certain offshore sea installations fixed or moored to the sea bed of the Australian continental shelf beyond the territorial sea. The Bill will facilitate the development of technically sound, environmentally acceptably and economically viable sea installations.

It provides a basis for the application of important Commonwealth laws, and for State or Territory laws to be adopted as Commonwealth laws.

These provisions are parallel to those already applying under the Petroleum (Submerged Lands) Act 1967, which regulates offshore petroleum and mineral exploration and extraction. In its Ninth Report of 1987 (27 May 1987) the Committee reported on several clauses of the original Bill and the Minister's response to the Committee's concerns. The Committee's Report dealt with the following clauses of the Bill:

Clause 4(1)
Clauses 14(2) and 57(4)
- (Clauses 12(2) and 52(4) in the original Bill)
Clause 40(4)
- (Clause 38(3) in the original Bill)
Clauses 45(2) and (3), 46(7), 47(7)
- (Clauses 44(2) and (3), 45(7), 46(7) in the original Bill)
Clause 62
- (Clause 56 in the original Bill)

The Committee's concerns regarding clauses 4(1), clauses 12(2), 52(4) and clause 56 of the original Bill have been taken into account in the drafting of this Bill. (The new clause numbers are clauses 4(1), 14(2), 57(4) and 62). The Committee thanks the Minister for his response.

The Committee reproduces below extracts from its Ninth Report of 1987 on clauses 40(4), clauses 45(2) and (3), 46(7) and 47(7) of this Bill as the comments made in the report still apply. (Senators should note that the extract shows the clause numbering in the original Bill).

'Sub-clause 38(3) - Non-reviewable decision

Clause 38 provides that the Minister may give an exemption certificate relieving a person of the obligation to obtain a permit in respect of a specified sea installation if the Minister is satisfied that the installation is to be used only for scientific activities or activities related to marine archaeology. Sub-clause 38(3) provides that an exemption certificate is subject to such conditions as the Minister considers appropriate. Although paragraph 69(1)(k) confers a right of appeal to the Administrative Appeals Tribunal in respect of a refusal to give an exemption certificate there is no right of review of conditions imposed under sub-clause 38(3) otherwise than as to their legality pursuant to the Administrative Decisions (Judicial Review) Act 1977. By contrast paragraph 69(1)(b) confers a right of appeal to the Administrative Appeals Tribunal in respect of the conditions on permits.

Accordingly the Committee drew sub-clause 38(3) to the attention of the Senate under principle 1(a)(iii) in that it might be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The Minister for Arts, Heritage and Environment has responded:

'The Committee's point that the Bill does not provide for review of conditions imposed under sub-clause 38(3) in relation to exemption certificates, other than under the Administrative Decisions (Judicial Review) Act 1977, is noted. This provision provides a concession and accordingly any decision under it in favour of an applicant gives a benefit rather than inflicts a disadvantage. It is therefore different from other provisions subject to review.'

The Committee thanks the Minister for this response. However the Committee does not accept that the fact that a provision confers a benefit rather than inflicting a disadvantage is a sufficient rationale for denying a right of review on the merits in respect of the exercise of the discretion concerned. In any case the grant of an exemption certificate on conditions unacceptable to the applicant may be a significant disadvantage. The Committee therefore continues to draw sub-clause 38(3) to the attention of the Senate under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

Sub-clauses 44(2) and (3), 45(7) and 46(7) - 'Henry VIII' clauses

Sub-clause 44(1) provides that the Commonwealth Acts specified in the Schedule apply in relation to sea installations instaslled in adjacent areas as if those areas were part of the Commonwealth. Sub-clause 44(2) provides that the regulations may revoke the application, or the application in a specified adjacent area, of an Act, or part of an Act, specified in the Schedule. Sub-clause 44(3) further provides that the regulations may apply other Commonwealth Acts, in whole or in part, in relation to sea installations generally or sea installations installed in specified adjacent areas. Sub-clause 45(2) provides that

the laws in force in a State for the time being (other than laws of the Commonwealth) apply in relation to sea installations installed in the adjacent area of the State. Sub-clause 45(7) provides that the regulations may provide that such State laws do not apply or apply subject to modifications specified in the regulations. Sub-clauses 46(1) and (7) respectively make similar provision for the application of the laws in force in a Territory to sea installations installed in the adjacent area of the Territory.

The law in force in relation to a sea installation is thus left in effect to the regulations which may modify without limitation the Commonwealth, State and Territory laws which clauses 44, 45 and 46 set out to apply. The Committee therefore drew sub-clauses 44(2) and (3), 45(7) and 46(7) to the attention of the Senate under principle 1(a)(iv) in that as *'Henry VIII' clauses permitting the operation of Acts* to be varied by regulations they might be considered to constitute an inappropriate delegation of legislative power. The Minister for Arts, heritage and Enviornment has responded:

> 'Under the Bill, only Commonwealth laws that are set out in the Schedule to the Bill or prescribed under the bill are applicable to sea installations. Under the Petroleum (Submerged Lands) Act 1967, Commonwealth Laws do not apply in general, rather the Act requires each individual Commonwealth Act to be made specifically applicable to such installations.
>
> Extension of additional Commonwealth laws by regulation *is consistent with past practice accepted* by Parliament, and avoids inadvertent omissions or delayed application of laws. In either case the objectives of the legislation could be defeated. However, taking into account the Committee's comments, the Department

and the Attorney-General's Department are examining whether there is a way of applying the body of Commonwealth law so that there are no likely detrimental unforseen consequences.

The power included to modify by regulation State and Territorial laws applying as Commonwealth laws for the purposes of the Bill is analogous to the application of laws of other jurisdictions to territories such as in the Ashmore and Cartier Islands Acceptance (Admendment) Act 1985. This provides a means for the Commonwealth to respond quickly to changes in State and Territory Laws, while retaining Parliamentary involvement.'

The Committee thanks the Minister for this response, and in particular the Minister's undertaking to examine, in conjunction with the Attorney-General's Department, a *different means of achieving the desired end with regard to* the application of Commonwealth laws. With regard to the application of State and Territorial laws the Committee notes that, in the case of the Ashmore and Cartier Islands. The Committee's concern is that, while it would be natural for a person operating in the adjacent areas should consult regulations made under the Sea Installations Bill 1987. In continuing to draw attention to sub-clauses 45(7) and 46(7), 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.'

TAXATION LAWS AMENDMENT BILL (NO.3) 1987

This Bill was introduced into the House of Representatives on 23 September 1987 by the Minister Assisting the Treasurer.

The Bill will amend the income tax law. The measures are designed primarily to prevent abuses of the new imputation system of company tax, and changes to the capital gains, superannuation deductions and gift provisions of the income tax law and the taxing arrangements for certain educational allowances.

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

Clauses 38 and 43 - Retrospectivity

Clause 38 of the Bill contains two proposed subclauses (2) and (16) which would have the effect of increasing liability to income tax net respectively from two dates. In the case of subclause (2), the date is 4 June 1987 being the date a 'draft exposure Bill' was released by the Treasurer. Further, clause 43(2) would provide that liability under proposed clause 42 applies on and after 14 August 1987, the date on which the Treasurer announced the proposed change in a press release.

The Committee has expressed concern at the increasing use of the practice of 'legislation by press release' to justify the making of retrospective legislation, especially in the field of taxation. This is the practice whereby a Minister announces, by way of a press release or a press conference, the intention of the Government to change the law with effect from that day and then, often many months later, introduces into the Parliament legislation giving effect to that change backdated to the day of the announcement.

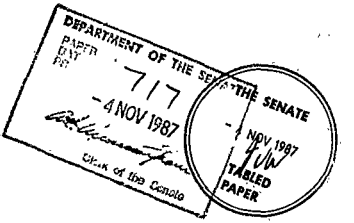
As the Committee has repeatedly stated in its previous comments, the practice of 'legislation by press release' carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. 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. 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. (See comment on the Taxation Laws Amendment Bill (No. 2) 1986, Ninth Report of 1986, pp. 150-51, and Occupational Superannuation Standards Bill 1987, Alert Digest No. 9 of 1987, pp. 20-21). 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 annoucement 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 Committee has indicated that it recognises the special conventions associated with retrospective legislation making changes to the taxation laws where these changes are announced to the Parliament in the Budget or in similar statements and the necessary legislation is retrospective to the date of that announcement, the reason for such retrospectivity being that taxpayers might otherwise take advantage of the foreknowlege provided by the announcement. The Committee has also indicated

that there may be a case for retrospective legislation where an announcement is made that a particular avenue for tax minimisation which has been abused is to be closed off and the subsequent legislation is backdated to the day of that annoucement. Even in such circumstances the retrospectivity involved should in the Committee's view be kept to the minimum necessary to prepare the relevant legislation and the Committee would, as a matter of course, draw the retrospectivity to the attention of the Senate.

However the Committee has also expressed concern that it appears that the Treasurer is resorting to the practice of 'legislation by press release' as a matter of course when making changes to the taxation laws. In two of the instances identified by the Committee it appeared that the announcement by way of press release had been made as a matter of administrative routine rather than because of a fear that, if prompt action were not taken, a significant loss to the revenue would result. (Taxation Laws Amendment Bill (No. 4) 1986, Eighteenth Report of 1986, pp. 134-5; and Taxation Laws Amendment (Company Distributions) Bill 1987, Tenth Report of 1987, pp. 178-81).

Accordingly, the Committee draws clauses 38 and 43 to the attention of the Senate under principle 1(a)(i) of the Committee's principles, in that their retrospective application may be considered to trespass unduely on personal rights and liberties.



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1987

4 November 1987

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1987

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ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney, Chairman
Senator D. Brownhill, Deputy Chairman
Senator M. Beahan
Senator R.A. Crowley
Senator K. Patterson
Senator J.F. Powell

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 insufficiently defined administrative powers;

(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, nowithstanding that such proposed law, document or infomation has not been presented to Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1987

The Committee has the honour to present its Thirteenth Report of 1987 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 Standing Order 36AAA:

Administrative Decisions (Judicial Review) Amendment Bill 1987

Migration Amendment Bill 1987

Australian Tourist Commission Bill 1987

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) AMENDMENT BILL 1987

This Bill was introduced into the Senate on 15 September 1987 by the Minister for Transport and Communications.

The Bill which amends the Administrative Decisions (Judicial Review) Act 1977 (the Act) has three main purposes.

- to strengthen the provisions under which the Federal Court has a discretion to refuse to grant an application for review where provision is made by another law for review of the relevant decision by a tribunal, authority or person.

- to discourage the disruption of administrative proceedings, by narrowing the scope for resort to the Act during the course of those proceedings, where legislative provision exists for the review of the decision complained of at the conclusion of those proceedings.

- to make specific provision in relation to the Federal Court's general discretion under the Act to refuse to grant an application.

The Committee noted in Alert Digest No.11 of 1987 (7 October 1987) that the Bill was referred to the Standing Committee on Legal and Constitutional Affairs on 24 September 1987 for examination and report. The Bill was referred to the Committee on Legal and Constitutional Affairs during second reading debate on the Bill. The Administrative Decisions (Judicial Review) Bill 1986 (a Bill identical to this Bill) was the subject of a note by the Committee in Alert Digest No.17 of 1986 (12 November 1986).

The Legal and Constitutional Affairs Committee tabled its report on the Bill on 29 October 1987.

Having examined the report from the Standing Committee on Legal and Constitutional Affairs, the Committee reports it has no further comment to make on the Bill.

MIGRATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 7 October 1987 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill amends the Migration Act 1958 to impose new fees for service arrangements, including -

- reconsideration of decisions
- requests for entry permits and visas
- immigration clearance

The Bill also provides for alternative penalty mechanism for breaches of Section 11C of the Act. The Committee drew attention to the following clause of the Bill in Alert Digest No.12 of 1987 (21 October 1987):

Clause 7 - Inappropriate delegation of legislative power

Clause 7 would enact a new section 34A of the Act. Proposed subsection 34A(1) may be regarded as a "Henry VIII" clause to the extent that it would permit the amount of a prescribed fee, which would require passengers on international flights seeking to enter Australia after 1 January 1988 to pay a fee for the services relating to pay a fee for the services relating to their immigration. Arrangements for the collection of the fee, and its amount, will be prescribed by regulation under a new paragraph 67(1)(cb), which could be inspected by clause 9.

Whilst the announced amount of the fee ($5) may be regarded as no more than recovery of costs, the Committee in the past has consistently objected to imposition of fees which may be regarded as a form of taxation by regulation without a limit set by legislation. The Committee has continually argued that the Parliament should not lightly delegate its taxing powers. The Committee has also taken the view that a ceiling amount on such a fees should properly be prescribed in legislation.

The Minister for Immigration, Local Government and Ethnic Affairs has reponded to the Committee's comment as follows;

> 'It is agreed that the Parliament should not lightly delegate its taxing powers. In respect of this amendment, however, what must be borne in mind is that the Immigration Clearance Fee is not a form of taxation. It was introduced as a Budgetary measure to assist in the recovery of costs incurred by my Department in performance of its immigration control function.
>
> The provisions of clause 7 impose on each prescribed passenger a liability to pay a fee for the service to the passenger of providing the immigration clearance. I announced on Budget night, and in the second reading speech for the Bill, that the level of the fee is to be initially set at $5. This amount is less than full recovery of the cost of providing immigration clearance.
>
> The Immigration Clearance Fee is a fee for service, and not a tax as it bears a reasonable relation to the actual costs involved in the provision of the service, and is payable by the person to whom the services is provided. The power to set the fee by regulation is in fact limited, to an amount equal to the cost of providing the service.

There are also obvious practical problems in imposing, in legislation, an upper limit for the level of the fee. Fees by their very nature are imposed as a means of full or partial cost recovery for a service provided. If the level of the fee is prescribed in the legislation the flexibilty of being able to increase, or decrease the level of the fee, depending on the costs to the Department will be lost'.

The Committee thanks the Minister for his response. The Committee is happy to accept that the Immigration Clearance Fee is intended to be a fee for service, and that it appears to bear a reasonable relation to the costs of the service involved. Equally, however, the Committee believes that there are not insuperable practical problems in limiting the amount of such a fee to a maximum by legislation, given that a realistic maximum (based on recovery of cost) should be fixed. It is by this means that the Parliament can continue to properly scrutinise such provisions

The Committee accordingly continues to draw the attention of the Senate to clause 7 of the Bill in that by enabling the setting of a fee by regulation without an upper limit the Bill may be considered to be an inappropriate delegation of legislative power.

The Committee also draws attention to the following clause:

Clauses 2 and 9 - Retrospectivity

Clause 9 would insert a new paragraph 67(1)(ac) in the Act which would allow the making of regulations in relation to the reconsideration of prescribed decisions under the Act on application made by prescribed persons and the charging, recovery, remission refunding or waiving of fees in repect of applications for reconsideration of decisions made under the Act, and for exempting people from liability for fees.

Subclause 2(2) of the Bill provides that any regulations made under the proposed paragraph 67(1)(ac) shall be taken to have come into operation on 16 September 1987, the date on which it was announced that a fee (nominated to be $240) would be payable on application for reconsideration of prescribed decisions.

Research conducted within the Committee has been unable to find a comparable provision to subclause 2(2) in the statutes.

The Committee strongly believes that this provision, announced at the time of the Budget, is offensive for the following reasons:

- it is an apparently novel use of a Bill to attempt to retrospectively impose a fee by regulation.

- The imposition of a fee retrospectively by regulation (which cannot be introduced until this Bill has passed the Parliament) is clearly contrary to the provisions of subsection 48(2) of the Acts Interpretation Act, insofar as the regulations which would provide for retrospective imposition of a liability on a person would not be subject to consideration by the Parliament as required by the Acts Interpretation Act.

- The description of the fee as a budget measure is being used to justify the retrospective imposition of a fee which appears to be aimed at recovery of costs, rather than realisation of revenue.

A further matter that should be drawn to Senators' attention is, fees that are payable on lodgment of appeals, on applications for review by courts, tribunals or other bodies have previously been imposed by legislation and have been fixed, as to the amount, by regulations which must be tabled in the Parliament.

The Committee accordingly draws clauses 2 and 9 of the Bill to the attention of the Senate under principle (1)(a) in that, by permitting the making of executive instrument with retrospective effect, it may be considered to trespass unduly on personal rights and liberties.

AUSTRALIAN TOURIST COMMISSION BILL 1987

This Bill was introduced into the Senate on 8 October 1987 by the Minister for the Environment and the Arts.

The Bill provides for the restructuring and reorganisation of the Australian Tourist Commission to give effect to the majority of the recommendations of the report of the Austalian Government Inquiry into Tourism.

In Alert Digest No.12 of 1987 (21 October 1987) the Committee drew the attention of Senators to the following clause of the Bill.

Clause 29(4) - Lack of Parliamentary Scrutiny

Clause 29 of the Bill would give the Minister power to give directions, in exceptional circumstances, to the Board of the Commission.

Subclause (3) sets out a procedure to be followed when a direction is given to the Board. A copy of the direction was to be published in the Gazette as soon as practicable after giving the direction and laid before each House of the Parliament within 15 sitting days of each House after giving the direction.

In addition, particulars of the direction and an assessment of the impact that the direction has had on the operation of the Commission must be included in the next annual report of the Commission on the period in which the direction took effect.

Subclause (4) of the Bill, provided that subclause (3) would not apply to a particular direction if the Minister determined in writing that compliance would be contrary to the public interest. No provision was made in the Bill to allow Parliamentary scrutiny of determinations by the Minister under subclause (4). The Committee noted that there may be occasions when it would be in the public interest that a direction be confidential. The Committee agreed that in such cases it should be possible, at least, for the Minister to table in the Parliament notice of such a determination setting out the reasons why publication of the direction in accordance with subclause (3) would be contrary to the public interest.

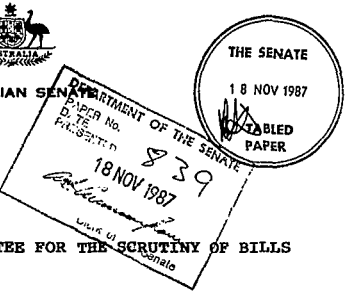
The Committee believed that subclause (4) should be drawn to the attention of the Senate in that it might be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee notes that subclause 29(4) was left out of the Bill by the Senate on 27 October 1987.

Barney Cooney
Chairman

4 November 1987

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1987

18 November 1987

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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(1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1987

The Committee has the honour to present its Fourteenth Report of 1987 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 Standing Order 36AAA:

Broadcasting Amendment Bill (No.4) 1987

Family Law Amendment Bill 1987

Fishing Legislation Amendment Bill 1987

Horticultural Export Charge Bill 1987

Horticultural Levy Bill 1987

Horticultural Export Charge Collection Bill 1987

Horticultural Levy Collection Bill 1987

Horticultural Policy Council Bill 1987

BROADCASTING AMENDMENT BILL (NO.4) 1987

This Bill was introduced into the House of Representatives on 28 October 1987 by the Minister for Transport and Communications.

The Bill proposes amendments to the Broadcasting Act 1942 and the Broadcasting and Television Act 1942. The amendments will -

- introduce an "establishment fee" for new commercial radio licences.

- impose a moratorium on the transfer of commercial radio and television licences within two years of the initial grant of the licence.

The Committee draws attention to the following clause in the Bill:

Clause 3 - 'Henry VIII' clause

Clause 3 of the Bill would insert a new paragraph 82AA(2)(d) in the Act.

The provision would permit an establishment or licence fee to be set by reference to the formula set out in the paragraph which allows for the fee 'D' (proposed as $15) to be altered by regulation with no upper limit on the fee being set by the Bill. Although either House of the Parliament would be able to disallow any regulation which increased the fee, such a regulation could be made and fees changed under the regulation when the Parliament is not sitting. Any subsequent disallowance of the regulation would not effect the validity of the imposition of the fee.

Accordingly, the Committee draws the attention of Senators to the provision, in that it may be considered an inappropriate delegation of legislative power.

FAMILY LAW AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 29 October 1987 by the Attorney-General.

The Bill amends the Family Law Act 1975 -

- to implement the references of powers to the Commonwealth from New South Wales, Victoria, South Australia and Tasmania relating to -
  - the maintenance of children and the payment of expenses in relation to children or child bearing; and
  - the custody and guardianship of, and access to, children in those States and to apply the Act as amended to the Territories in which the Act presently applies;
- to amend the child maintenance provisions to ensure that children receive a proper level of financial support from a reasonable and adequate share of the income, property and financial resources of their parents.
- to require that an entitlement of the applicant for maintenance to an income tested pension or benefit is not taken into account in awarding spousal and child maintenance; and
- to make a number of general amendments to enable the Act to operate more effectively.

In Alert Digest No.14 of 1987 (4 November 1987), the Committee drew the attention of the Senate to the following clause of the Bill:

Clause 5 - 'Henry VIII' Clause

Clause 5 of the Bill would introduce a new definition of 'income tested pension'.

The clause, taken alone, has no meaning unless and until regulations are made which will give the phrase some content. The Committee notes that the phrase 'income tested pension' is used in proposed new sub-paragraph 66D(3)(b)(ii), paragraph 66E(4)(a), subclause 66Y(3), and subclause 75(3) as a matter which the Family Court must disregard.

Because the clause allows the future definition of the phrase by regulations it may be characterised as a 'Henry VIII' clause and as such was drawn to the attention of the Senate under principle (iv) in that it may be regarded as an inappropriate delegation of legislative power.

The Attorney-General has responded to the Committee's comments as follows:

> 'The present intention of the Government is that all income tested pensions, allowances or benefits should be disregarded by the courts in maintenance proceedings. However it cannot be assumed that the many and varied users of the Family Law Act (for example, Judges, Magistrates, legal practitioners and potential litigants) will know or be able easily to find out which pensions, allowances or benefits are in fact income tested. A list of such pensions should therefore be readily accessible to the users of the Act. To include such a list in the legislation would be quite impracticable given the frequent variations to the legislative provisions governing pensions, allowances and benefits.
>
> This fact of the frequent variation of the legislation concerning pensions, allowances and benefits also means that any more detailed definition of "income tested pension,

benefit of allowance" could only have been in most general terms. In such terms it would be of little assistance to users of the Act and may well result in unintended applications.

In these circumstances it is considered that the most convenient and satisfactory approach is for the legislation to provide for regulations to list the current income tested pensions, benefits and allowances that are to be disregarded in maintenance proceedings.

Furthermore, the device of defining the ambit of the operation of particular legislative provisions by reference to matters to be provided in regulations is one which is commonly used where it is not practicable to specify those matters in the principal legislation; see for example the definition of "non-bank financial institution" in section 3 of the Cheques and Payment Orders Act 1986, the definition of "community area" in section 7 of the Aboriginal and Torres Strait Islander Hertitage Protection Amendment Act 1987, and the definitions of "proceeds of crime" and of "narcotic substance" in the Proceeds of Crime Act 1987.

If the present objections by the Committee were to be upheld by the Senate, it would considerably complicate the drafting of legislation and greatly increase the workload of the Parliament by having to deal with frequent amending Bills.'

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

FISHING LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 18 September 1987 by the Minister for Resources.

The Bill proposes amendments of a miscellaneous and essentially administrative and procedural nature to the Continental Shelf (Living Natural Resources) Act 1968, the Fisheries Act 1952 and the Torres Strait Fisheries Act 1984.

In particular the Bill will shift the emphasis of provisions in the Acts authorising the Minister to make notices away from the notices to the prohibitions in them. This will facilitate the preparation of notices containing several prohibitions each requiring separate endorsements of licences. The Bill will also strengthen the powers of fisheries officers to enter and search a vessel or vehicle without warrant where the officers have reasonable grounds for believing that there is upon the vessel or vehicle any thing which may afford evidence as to the commission of an offence.

In Alert Digest No.11 of 1987 (7 October 1987), the Committee drew the attention of Senators to the following clause of the Bill:

Clause 6 - Powers of entry, search and seizure

Proposed new subsection 14(3) of the Continental Shelf (Living Natural Resources) Act 1968 would allow an officer to obtain a search warant, upon reasonable grounds, from a Justice of the Peace. The Committee has noted in the past that search warrants should ideally, and properly, be issued by judicial officers (such as Magistrates) in keeping with traditional concerns as to the civil liberties of members of the community.

The attention of Senators was accordingly drawn to proposed subsection 14(3) of the Bill in that it may be considered to trespass unduly on personal rights and liberties.

The Minister has responded to the Committee's comments as follows:

> 'The major part of the horticultural and fishing industries are located in country or remote areas where there is unlikely to be ready access to a magistrate and it will be necessary to obtain the services of a Justice of the Peace. In these days of computer records, an investigation officer can clearly be placed in a situation where a warrant is required urgently in order to forestall either removal of goods or records or falsification of records. It is essential to have the choice of magistrate or Justice of the Peace.
>
> The Attorney-General's Department has advised that section 10 of the Crimes Act 1914 allows the issue of search warrants by Justices of the Peace and this is the main source of power for the issue of search warrants. Most of the legislation administered by the Department of Primary Industries and Energy provides for example:
>
> - Quarantine Act 1908
> - Export Control Act 1982
> - Meat Inspection Act 1983
> - Biological Control Act 1984'

The Committee notes the Minister's view that a combination of geographical remoteness and the widespread and growing use of computer records are reasons of policy for allowing authorised investigaters a "choice of magistrate or Justice of the Peace".

The Committee thanks the Minister for his comments. In the Committee's view, the point that was made regarding this clause of the Bill in Alert Digest No.11 of 1987 (7 October 1987) remains a relevant consideration. While the Committee concedes

that the provisions in the clause would allow the issue of warrants to authorised officers on clearly specified grounds, such warrants should properly be issued by magistrates. The Committee accordingly continues to draw clause 6 of the Bill and the Minister's reponse to the attention of the Senate.

HORTICULTURAL EXPORT CHARGE BILL 1987, HORTICULTURAL LEVY BILL 1987

These Bills were introduced into the House of Representatives on 18 September 1987 by the Minister for Science and Small Business.

The Bills together with the Horticultural Export Charge Collection Bill and the Horticultural Levy Collection Bill provide for the imposition of a charge and a levy on horticultural products. Funds raised are to assist the operation of the Australian Horticultural Corporation and the Horticultural Research and Development Corporation and are to be paid into separate accounts to be administered by those Corporations.

In Alert Digest No.11 of 1987 (7 October 1987) the Committee drew the attention of Senators to the following clauses of the Bills:

Clauses 8,9 and 10 - Inappropriate delegation of legislative power

Clauses 8, 9 and 10 of the Bills (which are identical) would permit relevant charges and levies destined for the Australian Horticultural Corporation, the Horticultural Research and Development Corporation and other purposes to be fixed by regulation. Clause 7(2) of the Bills is directed at provision of a maximum rate of charges or levy by reference to figures on average product values which must be published by the Australian Statistician. This provision clearly will only result in fixing a maximum level if such figures are published. The Bills make no provision for a maximum rate of charge or levy in the event that such figures have not been published, or the publication discontinued.

The Committee has drawn attention to such regulation making powers before. The Committee's view has consistently been that the primary guiding principle should be that, having established a legislative scheme, Parliament should not leave such unrestricted decision making power to the Minister. In particular, the fixing of charges and levies without a maximum rate of charge being provided in the legislation is a matter which should be subject to careful consideration.

Accordingly the Committee drew clauses 8, 9 and 10 of the Bill to the attention of Senators in that by allowing the Minister the power to fix charges and levies without a specified maximum charge is an innapropriate delegation of legislative power.

The Minister has responded to the Committee's comments at length the Minister's letter is reproduced as an appendix to this Report. The relevant points in the Minister's letter read as follows:

> 'It should be pointed out that horticulture covers a large, diverse range of products, including well over a hundred types of fruit, vegetables, nuts and nursery products. Horticultural products are grown mainly on small properties covering a wide geographic spread, though with some regional concentrations.
>
> ....
>
> Many of these minor-product industries may not pursue charges of levies for some years, if at all. It seems more likely that a part of a small industry may contribute funds, collected voluntarily, for research purposes through the Horticultural Research and Development Corporation and thereby gain the advantage of matching monies from the Commonwealth.

There are also safeguards in situations where charges or levies are sought and where a maximum rate is not set by the legislation. Details of an actual rate proposed by an industry have to be submitted, together with the written views of the eligible industry body consulted, by the appropriate Corporation to the Minister and these have to be taken into account by the Governor-General for the purpose of making regulations. Furthermore, those regulations are open to disallowance in the normal way.

Overall, the provisions in the Bills provide producers with good safeguards against excessive levy rates being imposed on them. In the special circumstances of the horticultural industries, the provisions are adequate for those residual industries not covered by relevant ABS data.'

The Committee thanks the Minister for his response.

The Committee reiterates its view that the primary guiding principle for such provisions should be that, having established a legislative scheme, parliament should not leave such unrestricted power to the Miinister. In particular, the fixing of charges and levies without a maximum rate of charge being provided in the legislation is a matter which should be subject to careful consideration by the Parliament.

Accordingly the Committee continue to draw clauses 8, 9 and 10 of the Bills to the attention of Senators in that by allowing the Minister the power to fix charges and levies without a specified maximum charge is an innappropriate delegation of legislative power.

HORTICULTURAL EXPORT CHARGE COLLECTION BILL 1987, HORTICULTURAL LEVY COLLECTION BILL 1987

These Bills were introduced into the House of Representatives on 18 September 1987 by the Minister for Science and Small Business.

The Bills are complementary to the Horticultural Export Charge Bill and the Horticultural Levy Bill. They make provision for the efficient and effective collection of the charges imposed by those Bills.

The Committee drew the attention of Senators to the following clauses of the Bills:

Subclause 13(1) - Powers of entry and search

Subclause 13(1) of the Bill, when read with the definition of magistrate in clause 4(1) of the Bills, would allow an officer to obtain the issue of a warrant on the grounds set out in the clause from a Justice of the Peace.

The Committee commented on a similar provision in relation to the Fishing Legislation Amendment Bill 1987 (which is reproduced in this Report) and considers the same considerations apply to this clause.

In Alert Digest No.11 of 1987, the attention of Senators was accordingly drawn to proposed subsection 13(1) of the Bill in that it may be considered to trespass unduly on personal rights and liberties.

The Minister's response to the Committee's comments was identical to those made on clause 6 of the Fishing Legislation Amendment Bill 1987. The relevant parts of the response are reproduced on page 10 of this Report.

The Committee notes the Minister's view that a combination of geographical remoteness and the widespread and growing use of computer records are reasons of policy for allowing authorised officers a "choice of magistrate or Justice of the Peace".

The Committee thanks the Minister for his response. In the Committee's view, the point that was made regarding this clause of the Bill in Alert Digest No.11 of 1987 (7 October 1987)

remains a relevant consideration. While the Committee concedes that the provisions in the clause would allow the issue of warrants to authorised officers on clearly specified grounds, such warrants should properly be issued by magistrates. The Committee accordingly continues to draw clause 13 of the Bills and the Minister's reponse to the attention of the Senate.

Subclause 16(2) - Self incrimination

Subclause 16(2) of the Bill provides that a person is not excused from submitting required returns and information on the ground that the return or information might tend to incriminate the person thus removing the privilege against self-incrimination.

The subclause is generally in a form standard for such provisions, except that paragraph 16(2)(b) would allow the information obtained to be used in proceedings for recovery of a penalty for late payment.

The Committee notes that the clause also employs the, 'use-derivative use indemnity' form which has been strongly supported by the Committee in such cases and is aimed at ensuring that, not only would the actual incriminating statement or document be inadmissible in criminal proceedings (other than those related to the failure to answer a question or produce a document or the provision of false or misleading answers or documents), but also any information, document or thing obtained as a direct or indirect consequence of the answer or the production of the document or thing obtained as a direct or indirect consequence of the answer or the production of the document, would be similarly inadmissible.

HORTICULTURAL POLICY COUNCIL BILL 1987

This Bill was introduced into the House of Representatives on 18 September 1987 by the Minister for Science and Small Business.

The Bill will establish the Horticultural Policy Council (HPC), which is designed to assist in the development of consistent and comprehensive policies for Australia's horticultural industries and to co-ordinate the participation of horticultural industries in the policy formulation process. It will:

- examine issues affecting the horticultural industries on its own initiative and report on these to the Minister;

- examine matters relevant to horticulture referred to it by the Minister; and

- develop recommendations, guidelines and plans for measures designed to safeguard, or further the interests of, the horticultural industries.

The Bill is one of the package of bills relating to horticulture.

In Alert Digest No.11 of 1987 (7 October 1987) the Committee drew attention to the following subclauses of the Bill:

Subclause 9(2) and subclause 15(4) - Inappropriate delegation of legislative power

Subclause 9(2) of the Bill provides the Minister with the power to vary the provisions of proposed subsection by regulation. Proposed subsection (1) provides for the constitution and membership of the HPC.

Subclause 9(2) would permit the Minister by making an order (which does not require the approval of the Executive Council) to increase or decrease the size of the HPC.

In addition, the Minister may, under subclause 15(4), make an order which could substantially increase the remuneration paid to new members of the HPC.

The Minister has responded to the Committee's comments as follows:

> 'The HPC is an advisory body empowered to present to Government cohesive and comprehensive industry advice on policies relevant to the Australian horticultural industries. Its proposed composition, as described in sub-clause 9(1), is intended to be broadly representative of the existing horticultural industries. These industries are characterised by being geographically dispersed, diverse and fragmented, and this is reflected in the structure of their organisations. It is expected that, following the establishment of the three horticultural institutions, the organisational structure of the horticultural sector will change significantly. There will be a need to reflect these changes speedily in the composition of HPC to ensure an appropriate balance of representation, such that its advice reflects a comprehensive horticultural sector view to the greatest extent possible. The efficient administration of the legislation is facilitated through providing the Minister with this power to vary the membership of the HPC.
>
> It is recognised that sub-clause 9(2) permits the Minister to make orders which do not require the approval of the Executive council; nevertheless, sub-clause 30(3) of the Bill ensures that in every other respect they are subject to the same provisions in law, of tabling and disallowance, as are regulations.
>
> Sub-clause 15(4) relates to the prescirption of allowances (not remuneration as stated in the Digest) which are to be paid to Council members other than the Chairperson. Members would receive allowances only to recompense them for costs of attending HPC meetings.
>
> My comments earlier in relation to the safeguards provided by sub-clause 30(3) apply also in this instance.'

The Committee thanks the Minister for this response. The Committee continues to draw this aspect of the Bill to the attention of the Senate, together with the Minister's response as the Committee wishes to promote full consideration of the issues involved at the Committee stage of the Bill.

Barney Cooney
Chairman

18 November 1987

APPENDIX.

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
THE HON. JOHN KERIN, M.P.

Parliament House,
Canberra A.C.T. 2600
Telephone (062) 73 1711
Telex 62308
Facsimile (062) 73 2194

- 2 NOV 1987

Senator B Cooney
Chairman
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the four letters dated 8 October 1987 from your Committee's Secretary expressing concern at some of the provisions in the Bills relating to the horticultural industries and the fishing industry.

My comments on each of the Committee's concerns are set out below.

1. HORTICULTURAL EXPORT CHARGE BILL AND HORTICULTURAL LEVY BILL - MAXIMUM RATES

In each of these Bills, clauses 8, 9 and 10 would permit actual charges and levies on horticultural products to be fixed by regulation whereas clause 7(2) provides for maximum rates by reference to figures on average product values published by the Australian Statistician

The Committee has pointed out that the Bills make no provision for a maximum rate of charge or levy in the event that figures have not been published or the publication discontinued by the Statistician. The Committee considers that Parliament should not leave such unrestricted decision making power to the Minister. In particular, it notes that fixing charges and levies without maximum rates set in legislation should be subject to careful consideration.

I appreciate the views of the Committee and I wish to clarify the situation.

It should be pointed out that horticulture covers a large, diverse range of products, including well over a hundred types of fruit, vegetables, nuts and nursery products. Horticultural products are grown mainly on small properties covering a wide geographic spread, though with some regional concentrations.

Products covered by the Australian Bureau of Statistics

The Australian Bureau of Statistics (ABS) publishes statistics on many horticultural industries but there is no other source which provides data on product values for a range of products on a national, regular and professional basis.

The products for which ABS publishes average product values on a regular basis (see Attachment) provide a substantial coverage of the total value of Australian horticultural production.

Fruit and vegetables are the dominant product groups and the list of fruits covered by ABS accounted for more than 90 per cent of the value of total fruit and nut production in Australia in 1985-86 while the list of vegetables accounted for 76 per cent of the total value of Australian vegetable production.

Discussions with ABS officers indicate that the Bureau has no plans to discontinue any of the series in the Attachment and there is a prospect of further products being added over the next few years.

Products not covered by the Australian Bureau of Statistics

For the products for which ABS does not publish average product values, the determination of maximum rates for inclusion in the legislation is impracticable for a number of reasons.

The industries involved are individually small eg the growing of raspberries, chestnuts or flowers. The fact is that there is a lack of statistical data and the high cost of gathering statistics for such industries acts as a deterrent to collection.

Given the lack of data, it is not possible to provide appropriate maximum rates of levy for individual products (eg raspberries, blueberries, loganberries) or for a group of such products (eg berry fruit) or for even broader categories.

Further, it is virtually impossible to set an appropriate or sensible maximum rate of levy for a broad category because of the wide range of average product values that will normally prevail in the category. The range shown for the main horticultural products (see Attachment) is great, extending from under $300 per tonne for potatoes to over $3,000 per tonne for strawberries. One would expect the range of average product values for products not covered by ABS to be at least as great as it would include rare, luxury fruits and other very high priced products.

In the absence of any reliable data, to determine in the legislation a rate for non ABS published products is fraught with difficulties. For example, the use of a high maximum rate for a broad category in order to cover very high priced products would imply an absurdly high maximum value for most of the products in the broad category.

Nevertheless, it is most desirable to encourage participation of many of these small industries in the activities of the Australian Horticultural Corporation and the Horticultural Research and Development Corporation in order to enable those industries to develop and exploit their export potential through funding by export charges or levies.

Safeguards

Many of these minor-product industries may not pursue charges or levies for some years, if at all. It seems more likely that a part of a small industry may contribute funds, collected voluntarily, for research purposes through the Horticultural Research and Development Corporation and thereby gain the advantage of matching monies from the Commonwealth.

There are also safeguards in situations where charges or levies are sought and where a maximum rate is not set by the legislation. Details of an actual rate proposed by an industry have to be submitted, together with the written views of the eligible industry body consulted, by the appropriate Corporation to the Minister and these have to be taken into account by the Governor-General for the purpose of making regulations. Furthermore, those regulations are open to disallowance in the normal way.

Overall, the provisions in the Bills provide producers with good safeguards against excessive levy rates being imposed on them. In the special circumstances of the horticultural industries, the provisions are adequate for those residual industries not covered by relevant ABS data.

2. HORTICULTURAL EXPORT CHARGE COLLECTION BILL, HORTICULTURAL LEVY COLLECTION BILL AND FISHING LEGISLATION AMENDMENT BILL 1987 - POWERS OF ENTRY AND SEARCH

Sub-clause 13(1) and clause 4 of the Horticultural Bills and clause 6 of the Fishing Legislation Amendment Bill empower Justices of the Peace to issue warrants because of the significant practical difficulties which will arise for departmental officers conducting investigations under the legislation, if they are required to use the services of magistrates for the issue of warrants.

The major part of the horticultural and fishing industries are located in country or remote areas where there is unlikely to be ready access to a magistrate and it will be necessary to obtain the services of a Justice of the Peace. In these days of computer records, an investigation officer can clearly be placed in a situation where a warrant is required urgently in order to forestall either removal of goods or records or falsification of records. It is essential to have the choice of magistrate or Justice of the Peace.

The Attorney-General's Department has advised that section 10 of the Crimes Act 1914 allows the issue of search warrants by Justices of the Peace and this is the main source of power for the issue of search warrants. Most of the legislation administered by the Department of Primary Industries and Energy provides for issue of search warrants by Justices of the Peace, for example:

- Quarantine Act 1908
- Export Control Act 1982
- Meat Inspection Act 1983
- Biological Control Act 1984.

3. HORTICULTURAL POLICY COUNCIL BILL 1987

Sub-clause 9(2), of the Bill provides the Minister with the power to make orders to vary the composition and number of members of the Horticultural Policy Council (HPC). It has been included in the Bill to accommodate major organisational and sectoral changes that may occur in the future within the horticultural industries.

The HPC is an advisory body empowered to present to Government cohesive and comprehensive industry advice on policies relevant to the Australian horticultural industries. Its proposed composition, as described in sub-clause 9(1), is intended to be broadly representative of the existing horticultural industries. These industries are characterised by being geographically dispersed, diverse and fragmented, and this is reflected in the structure of their organisations. It is expected that, following the establishment of the three horticultural institutions, the organisational structure of the horticultural sector will change significantly. There will be a need to reflect these changes speedily in the composition of HPC to ensure an appropriate balance of representation, such that its advice reflects a comprehensive horticultural sector view to the greatest extent possible. The efficient administration of the legislation is facilitated through providing the Minister with this power to vary the membership of the HPC.

It is recognised that sub-clause 9(2) permits the Minister to make orders which do not require the approval of the Executive Council; nevertheless, sub-clause 30(3) of the Bill ensures that in every other respect they are subject to the same provisions in law, of tabling and disallowance, as are regulations.

Sub-clause 15(4) relates to the prescription of allowances (not remuneration as stated in the Digest) which are to be paid to Council members other than the Chairperson. Members would receive allowances only to recompense them for costs of attending HPC meetings.

My comments earlier in relation to the safeguards provided by sub-clause 30(3) apply also in this instance.

Yours fraternally

John Kerin

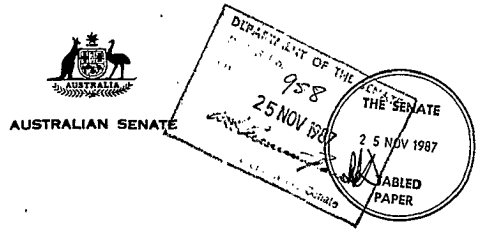
ATTACHMENT

AVERAGE UNIT GROSS VALUE OF HORTICULTURAL PROJECTS: AUSTRALIA

FRUIT	$ PER TONNE 1983-84	1984-85	1985-86
Apples	502.22	506.49	476.06
Apricots	744.98	806.13	827.38
Bananas	594.77	643.44	756.63
Cherries	2,516.01	2,832.72	2,405.85
Lemons and limes	265.63	224.83	265.31
Oranges	268.81	296.50	267.03
Peaches	526.01	474.01	476.68
Pears	376.12	366.39	445.38
Pineapples	227.79	268.95	247.51
Plums and prunes	877.56	961.72	1,081.76
Strawberries	3,103.59	3,237.23	3,468.13
Grapes			
- dried vine fruit (dried weight)	988.49	1,221.00	1,435.28
- table	782.04	961.53	987.66
- Wine	232.26	238.80	218.98
VEGETABLES			
Beans, french and runner	473.28	575.49	461.62
Cabbages & brussels sprouts	205.12	158.61	293.54
Carrots	341.52	251.26	301.38
Cauliflower	327.29	268.33	313.22
Lettuce	449.91	442.60	472.56
Mushrooms	2,663.28	2,951.79	3,365.27
Onions, white & brown	445.48	307.81	265.90
Potatoes	284.02	163.78	213.27
Tomatoes	392.99	393.45	411.25

Source: Australian Bureau of Statistics - Value of Agricultural Commodities Produced Australia 1985 -86

Average unit gross values are obtained, for each product, by dividing the total gross value of the commodity produced by the total quantity produced.



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF 1987

25 November 1987

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

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ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney, Chairman
Senator D. Brownhill, Deputy Chairman
Senator M. Beahan
Senator R.A. Crowley
Senator K. Patterson
Senator J.F. Powell

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 insufficiently defined administrative powers;

(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, nowithstanding that such proposed law, document or infomation has not been presented to Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF 1987

The Committee has the honour to present its Fifteenth Report of 1987 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 Standing Order 36AAA:

Australian National University Amendment Bill 1987

Canberra College of Advanced Education Amendment Bill 1987

Community Services and Health Legislation Amendment Bill 1987

Maritime College Amendment Bill 1987

States Grants (Tertiary Education Assistance) Bill 1987

AUSTRALIAN NATIONAL UNIVERSITY AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 5 November 1987 by the Minister for Employment, Education and Training.

The Bill will provide, as a consequence of the States Grants (Tertiary Education Assistance) Bill 1987, amendments to the Australian National University Act 1946.

It will enable the Australian National University to apply for a limited relaxation of the prohibition on fees for specialised postgraduate award courses catering for students already in employment who are seeking to upgrade their vocational skills and income.

It will also permit the introduction of charges to the Higher Education Administration Charge.

In Alert Digest No.15 of 1987 (18 November 1987) the Committee drew attention to the following clauses of the Bill:

Clause 5 - Lack of Parliamentary scrutiny

The Committee's comments in this Digest on clause 3 of the States Grants (Tertiary Education Assistance) Bill 1987 are applicable to subclauses 5(c) and 5(e) of this Bill.

As the clause will permit the Minister to exercise discretion without Parliamentary scrutiny, the Committee draws it to the attention of the Senate under principle 1(a)(iv) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 3 - Powers of Officials, Institutions etc.

The Committee's comments in this Digest on clause 9 of the States Grants (Tertiary Education Assistance) Bill 1987 are also applicable to subclause 3(c) of this Bill.

The clause would permit an institution (in this case the University) apparently unlimited power to examine the affairs of a person, the Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that, by providing for undefined powers of examination of personal affairs, it may be considered to trespass unduly on personal rights and liberties.

CANBERRA COLLEGE OF ADVANCED EDUCATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 5 November 1987 by the Minister for Employment, Education and Training.

The Bill is to provide,as a consequence of the States Grants (Tertiary Education Assistance) Bill 1987, amendments to the Canberra College of Advanced Education Act 1967.

It will enable the Canberra College of Advanced Educatiion to apply for a limited relaxation of the prohibition on fees for specialised postgraduate award courses catering for students already in employment who are seeking to upgrade their vocational skills and income.

It will also permit the introduction of changes to the Higher Education Administration Charge.

In Alert Digest No.15 of 1987 (18 November 1987) the Committee drew attention to the following clauses of the Bill:

Clause 4 - Lack of Parliamentary scrutiny

The Committee's comments in this Digest on clause 3 of the States Grants (Tertiary Education Assistance) Bill 1987 are also applicable to subclause 4(c) of this Bill.

As the clause will permit the Minister to exercise discretion without Parliamentary scrutiny, the Committee draws it to the attention of the Senate under principle 1(a)(iv) in that it may *be considered to subject the exercise of legislative power* insufficiently to parliamentary scrutiny.

Clause 3 - Powers of officials, Institutions etc.

The Committee's comments on clause 9 of the States Grants (Tertiary Education Assistance) Bill 1987 in this Digest are also applicable to subclause 3(c) of this Bill.

As the clause would permit an institution (in this case the College) apparently unlimited power to examine the affairs of a person, the Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that, by providing for *undefined powers of examination of personal affairs, it may be* considered to trespass unduly on personal rights and liberties.

COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 4 November 1987 by the Minister for Community Services and Health.

The Bill is an omnibus Bill to amend the Aged or Disabled Persons Homes Act 1954; the Health Insurance Act 1973; the National Health Act 1953; and the States Grants (Nurse Education Transfer Assistance) Act 1985.

The amendments will introduce new variable capital funding arrangements for hostels and to improve the legislative base for the management of the new Nursing Home recurrent funding system introduced on 1 July 1987. It also introduces improved new arrangements for conditions of capital and recurrent subsidies for hostels.

In Alert Digest No.15 of 1987 (18 November 1987). The Committee drew attention to the following clause of the Bill:

Clause 30 - Powers of entry, search and seizure

Clause 30 of the Bill would enact proposed new subsection 61D(2) of the National Health Act.

Proposed new subsection 61D(2) would permit an authorised officer, where the officer has reasonable grounds for believing there are on any premises certain accounts, books etc., to obtain a search warrant from a Justice of the Peace rather than, as is more usual, from a Magistrate or other judicial officer. The Committee commented in Alert Digest No.11 of 1987, (7 October 1987) on similar provisions in relation to the Fishing *Legislation Amendment Bill 1987* and *the Horticultural Export* Charge Collection Bill 1987.

The Committee draws the attention of the Senate to proposed subsection 61D(2) of the National Health Act, contained in clause 30 of this Bill, under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

MARITIME COLLEGE AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 5 November 1987 by the Minister for Employment, Education and Training.

The Bill will provide, as a consequence of the States Grants (Tertiary Education Assistance) Bill 1987, amendments to the Maritime College Act 1978.

It will enable the Maritime College to apply for a limited relaxation of the prohibition on fees for specialised postgraduate award courses catering for students already in employment who are seeking to upgrade their vocational skills and income.

It will also permit the introduction of changes to the Higher Education Administration Charge.

In Alert Digest No.15 of 1987 (18 November 1987) the Committee drew attention to the following clauses of the Bill:

Clause 5 - Lack of Parliamentary scrutiny

The Committee's comments on clause 3 of the States Grants (Tertiary Education Assistance) Bill 1987 in this Digest are also applicable to subclause 4(c) of this Bill.

As the clause will permit the Minister to exercise an unfettered discretion without Parliamentary scrutiny, the Committee draws it to the attention of the Senate under principle 1(a)(iv) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 3 - Powers of officials etc.

The Committee's comments on clause 9 of the States Grants (Tertiary Education Assistance) Bill 1987 in this Digest are also applicable to subclause 3(6) of this Bill.

As the clause would permit an institution (in this case the College) apparently unlimited power to examine the affairs of a person, the Committee draws the clause to the attention of the

Senate under principle 1(a)(i) in that, by providing for undefined powers of examination of personal affairs, it may be considered to trespass unduly on personal rights and liberties.

STATES GRANTS (TERTIARY EDUCATION ASSISTANCE) BILL 1987

This Bill was introduced into the House of Representatives on 5 November 1987 by the Minister for Employment, Education and Training.

The Bill is to provide the legislative basis for the distribution of Commonwealth funds for tertiary education in the States and the Northern Territory for 1988. The Bill reflects Government decisions made in the 1987/88 Budget context and subsequently, including the transfer of administrative responsibility for Commonwealth tertiary education programs to the Department of Employment, Education and Training.

In Alert Digest No.15 of 1987 (18 November 1987). The Committee drew attention to the following clause of the Bill:

Clause 3 - Lack of Parliamentary scrutiny

A definition of "relevant enrolment" is included in paragraph 3(1)(c) for the purposes of levying the Higher Education Administration Charge, and is to be read with clauses 3(10) and 8(2) of the Bill. By virtue of paragraph (c) the Minister may exercise an unfettered discretion to exempt certain persons from that charge, the exercise of that discretion not being subject to any form of Parliamentary scrutiny. The provision in this Bill follows closely a provision inserted in the States Grants (Tertiary Education Assistance) Bill (No.2) 1986, on which the Committee both commented, and rebutted the then Minister's response, in its Seventeenth Report of 1986, (12 November 1986) (pp.100-102).

The definition of "relevant date" in clause 3(1) similarly permits the Minister to specify a date in the future without being subject to Parliamentary scrutiny. The importance of the "relevant date" is to be found by a reading of clauses 3(1) and 8(2)(b). It appears, when reading those provisions with the Minister's Second Reading Speech (the sentence on pp.4 and 5 thereof), that the intention is that, on the first day of teaching in 1988, a student will be deemed to be enrolled in the course for which he or she has applied, and that the charge is payable then. However, that requires reading the phrase "undertaking a course" when used in the Bill as including "intending to study for a course" or "having applied to undertake a course". If that meaning is adopted, there does not seem to be anything in the Bill to prevent the Minister specifying February as the "relevant date", and imposing the charge on any person who has applied to study at a particular institution. If such a person, during February, decides to pursue the same course at another institution, he or she would be liable to pay the charge a second time, to the other institution, under clause 8(2)(a), and would not be within the exemption of clause 8(4).

As the clause will permit the Minister to exercise discretion without adequate Parliamentary scrutiny, the Committee draws it to the attention of the Senate under principle 1(a)(v) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 9 - Powers of Officials, Institutions etc.

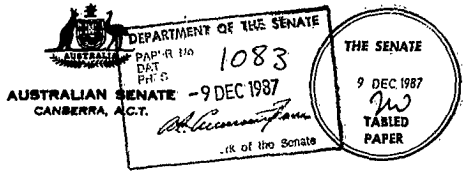
Clauses 9(2) and (4) may in their practical operation, trespass unduly on personal rights and liberties. The subclauses will permit tertiary institutions to charge fees for specific courses, provided that the students on whom the fees will be charged have "earned a living at any time". It is extremely difficult to know what this phrase means and, for institutions validly to charge these fees, the institutions will either have to conduct an examination of each student's curriculum vitae, possibly requiring the production of income tax assessments, or create a

presumption that any applicant over the age (say) of 21 has earned a living, and then cast the onus on the applicant to disprove that. In either eventuality, it appears that this provision will require undue revelations, to education institutions, of the person financial details of intending students.

As the clause would permit an institution apparently unlimited power to examine the affairs of a person, the Committee draws the clause to the attention of the Senate under principle 1(a)(i) in that, by providing for undefined powers of examination of personal affairs, it may be considered to trespass unduly on personal rights and liberties.

Barney Cooney
Chairman

25 November 1987



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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

(iii) make such rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iv) inappropriately delegate legislative power; or

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF 1987

The Committee has the honour to present its Sixteenth Report of 1987 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 Standing Order 36AAA:

Broadcasting Amendment Bill (No.4) 1987

Migration Amendment Bill 1987

Petroleum Excise (Prices) Bill 1987

States Grants (Tertiary Education Assistance) Bill 1987

BROADCASTING AMENDMENT BILL (NO.4) 1987

This Bill was introduced into the House of Representatives on 28 October 1987 by the Minister for Transport and Communications.

The Bill proposes amendments to the Broadcasting Act 1942 and the Broadcasting and Television Act 1942. The amendments will -

- introduce an "establishment fee" for new commercial radio licences.

- impose a moratorium on the transfer of commercial radio and television licences within two years of the initial grant of the licence.

In Alert Digest No.14 of 1987 the Committee drew the attention of the Senate to the following clause in the Bill:

Clause 3 - 'Henry VIII' clause

Clause 3 of the Bill would insert a new paragraph 82AA(2)(d) in the Act.

The provision would permit an establishment or licence fee to be set by reference to the formula set out in the paragraph which allows for the fee 'D' (proposed as $15) to be altered by regulation with no upper limit on the fee being set by the Bill. Although either House of the Parliament would be able to disallow any regulation which increased the fee, such a regulation could be made and fees charged under the regulation when the Parliament is not sitting. Any subsequent disallowance of the regulation would not effect the validity of the imposition of the fee.

Accordingly, the Committee drew the attention of Senators to the provision, in that it may be considered an inappropriate delegation of legislative power.

The Minister for Transport and Communications has now responded to the Committee's comments as follows:

> 'The per capita figure to which my attention was drawn will only be used to calculate the establishment fee where a substantial portion of the population to be served by the proposed service does not already receive a commercial radio service. This will be a small minority of cases.
>
> The ability to change the figure by regulation was drafted into the Bill because it was felt inappropriate for any particular dollar figure to be set in legislation without an indication that it would change to take account of movements in the general price level. The Second Reading Speech explains that the $15 figure reflects per capita earnings in regional markets in 1985-86, the most recent year for which data is available. This data becomes available on 1 January each year and may fluctuate significantly because of sensitivity to economic and demographic factors. If legislative amendment was required to update the figure, considerable delays in inviting applications for some new licences may occur. Alternatively, if the licences were called with fees set on the basis of old data, significant inequities could result.
>
> The rationale for calculating the fee, set out in the Second Reading Sppech, provides a clear indication of the way in which any new figure would need to be derived. I believe this represents an adequate fetter on the delegation of legislative power to which you have drawn attention.'

The Committee thanks the Minister for his response. The Committee has two comments to make on the response which may assist consideration of the Bill by Senators

First, the Committee's comment was primarily directed to the fact that the Bill provides no maximum figure beyond which the fee set by regulation could go. As the Bill stands, there is nothing to prevent the regulations from specifying, say, $1000, for factor "D" in proposed new s.82AA(2)(d). The Committee notes that its objection to the provision could be overcome if it were to provide an upper limit for factor D of, say, $50, which should give sufficient flexibility to cope with the significant fluctuations referred to by the Minister.

Secondly, the Committee notes the Minister's reference, in the final paragraph of his letter, to the proposition that the Second Reading speech provides an adequate fetter on the delegation of legislative power. While a Second Reading speech may be referred to by a court as an aid to interpretation, by virtue of s.15AB of the Acts Interpretation Act 1901, the terms of proposed new s.82AA(2)(d) appear sufficiently clear as not to warrant a reference to such extrinsic material. If regulations were to specify $1000 as factor D, the Senate Regulations and Ordinances Committee would to move for the disallowance of such regulations, as not being in accordance with the intentions unerlying this Bill.

It would place a considerable burden on the Regulations and Ordinances Committee to have to refer, not only to regulations and the enabling Act, but also to a Second Reading speech before considering whether to move for the disallowance of regulations. It would appear to be more appropriate for factor D in the Bill to specify a suitable upper limit at the outset.

MIGRATION AMENDMENT BILL 1987

The Committee drew the attention of the Senate to the provisions of clause 7, and clauses 2 and 9 of this Bill in its Thirteenth Report of 1987 (4 November 1987). In that report the Committee discussed the Minister's reponse to comments originally made by the Committee on clause 7 of the Bill in Alert Digest No.12 of 1987 (28 October 1987).

The Minister has commented further on clause 7 of the Bill, which would set a $5 immigration clearance fee by regulation without an upper limit his response reads:

> 'In respect of the first point raised in the report, the setting of the $5 immigration clearance fee by regulation without an upper limit, I would reply that such a concept is not uncommon and would refer the Committee to the following examples of fees imposed by regulations, without an upper limit.
>
> i) the fees prescribed in the Passport Regulations and
> ii) fees prescribed in the Federal Court of Australia Regulations.
>
> While it is possible to limit the amount of the fee by legislation it is not as practicable as setting the level of the fee by regulation. If costs increase or decrease, the level of the fee needs to be able to reset quickly to reflect the new costs involved in providing the service. This is important as it is necessary to ensure that the level of the fee bears a reasonable relation to the costs involved and to therefore protect revenue or to ensure that passengers are not being overcharged.'

The Committee thanks the Minister for his further response. The Committee considers that it does not need to add to the comments on clause 7 in its Thirteenth Report of 1987.

Clauses 2 and 9 - Retrospectivity

The Committee believes it should report further to the Senate on clauses 2 and 9 of the Bill.

Clause 9 of the Bill would insert a new paragraph 67(1)(ac) in the Migration Act, the effect of which would be to allow the Minister to make regulation in relation to the reconsideration of prescribed decisions under the Act on application made by prescribed persons, and the charging, recovery, remission, refunding or waiving of fees in respect of applications for reconsideration of decisions made under the Migration Act, and for exempting people from liability for fees.

The relevant part of clause 2 of the Bill is subclause 2(2) which reads, in part:

> 'that the first regulations made under paragraph 67(1)(ac) of the Principal Act as amended by this Act, shall be taken to have come into operation on 16 September 1987,'

16 September 1987 is the date from which a fee (stated in the Minister's second reading speech to be $240) is to be payable on lodgment of applications for reconsideration of a number of prescribed decisions under the Act.

The Committee's preliminary report on subclause 2(2) drew the Senate's attention to a number of concerns the Committee had regarding the its apparent effect. These may be summarised as follows:

- the subclause appears novel insofar as it would allow for the retrospective operation of regulations which had not been considered by the Parliament at the time the Bill was before the Parliament.

- on the face of it, the subclause appears to be in breach of the provisions of Section 48(2) Acts Interpretation Act which prohibits regulations with retrospective effect.

- the introduction of a fee payable on lodgment of appeals and applications for reconsideration of decision have, in the past, been imposed by legislation and have been fixed (as to the sum of the fee) by regulations with prospective effect which have been tabled and considered by the Parliament.

Following the tabling of the Committee's Thirteenth Report of 1987, the Senate resolved that further consideration of the Bill in Committee not proceed until the first sitting day of the Senate after a draft of the first regulations to be made under proposed paragraph 67(1)(ac) were tabled in the Senate. These draft regulations were tabled in the Senate on Wednesday, 25 November 1987.

The Committee has consistently drawn attention to provisions in legislation which have effect retrospectively to the date of legislation.

The Committee has also noted that 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 or other charges to be given effect from the date of their introduction into Parliament. The Committee draws a distinction between these practices, which it regards as acceptable, and the making of changes to laws retrospective to the date of a Ministerial announcement, whether in Parliament or by way of press release (See the Committee's Annual Report for 1986-87,

pp.10-14). Comment which is relevant to this Bill was made in the paper on the operation of the Committee (Parl. Paper 317 of 1985):

> 'Whereas the making of legislation retrospective to the date of its introduction into Parliament may be countenanced as part of the Parliamentary process a similar rationale cannot be advanced for the treatment of Ministerial announcement as de facto legislation.' (see p.25)

In Alert Digest No.9 of 1987 (27 May 1987), the Committee drew the Senate's attention to subclauses 4(3) and (4) of the Occupational Superannuation Standards Bill 1987. The clauses - now enacted as subsection 4(3) and (4) of the Occupational Superannuation Standards Act 1987 - permits regulations setting operating standards for approved superannuation funds to be given retrospective effect to a day not earlier than 1 July 1986. The provisions of subclause 2(2) of this Bill give rise to similar considerations to the above clauses.

In response to the comment by Committee on clauses 2 and 9 of this Bill, the Minister for Immigration, Local Government and Ethnic Affairs has advised:

> 'The first and third points concern the apparently novel use of a Bill to attempt to retrospectively impose a fee by regulation in the Budget context. The fee was introduced retrospectively to ensure that the extra funds expended by the Government in extra staff for both the Immigration Review Panel and Departmental staff to assist in the review of decisions is recovered by those taking advantage of the extra services being provided. Without such measures:-
>
> - there would be no recognition that the beneficiaries of services should contribute towards the cost of providing those services;

- the services would, as a free good, be over-utilised; and

- the cost would be borne entirely by the taxpayer.

If it were only a revenue measure, clearly a higher fee could have been imposed given the substantial under-recovery contemplated by the fee. The fee as proposed balances questions of equity and the need to effectively utilise scarce administrative resources.'

The Committee thanks the Minister for his response. The Committee points out that the fee is apparently not only a revenue measure but also an offset of increased costs of providing more staff resources to the Immigration Review Panel. The Committee does not question the administrative desirability or equity of the fee but points out that a provision such as subclause 2(2) will allow the fee being charged prior to the introduction of regulations imposing such a fee.

The Committee particularly noted in its Annual Report for 1986-87 that the extension of the practice of retrospective application of taxation measures announced on Budget night to other areas of legislation, was undesirable and would also be drawn to the attention of Senators in future.

The Minister also responded to the Committee's observation in its Thirteenth Report of 1987 that the retrospective operation of the first regulations to be made under clause 9 would be contrary to the provisions of subsection 48(2) of the Acts Interpretation Act. He advised.

'Sub-section 48(2) applies only to regulations containing retrospective commencement provisons. The retrospective operation of the proposed regulations will not, however result from any such provisons in the regulations, but from the provisions of subclause 2(2) apply only to the first batch of regulations. Any subsequent regulations would not

have retrospective effect. I should add that the provisions of the Acts Interpretation Act requiring the tabling of regulations will apply to the regulations in the same way as they apply to all other regulations.'

The Committee thanks the Minister for this response. It should be noted that subsection 48(2) of the Acts Interpretation Act has been given an extremely literal interpretation by the courts. The effect of that interpretation has been to weaken the application of the subsection. In its Eightieth Report, the Senate Regulations and Ordinances Committee (at pp.11-14) has questioned whether the subsection, in fact, gives effect to Parliament's intention to prohibit regulatory retrospectivity which is prejudicial to the rights and interests of individuals, unless expressly authorised by statute.

The Committee does not pursue this question but notes that if such provisions as subclause 2(2) were a common feature of legislation, the prejudicial effect of retrospective 'first' regulations would be beyond the scope of the Senate Regulations and Ordinances Committee.

The Committee therefore draws clauses 2 and 9 of the Bill to the attention of Senators in that by giving retrospective application to certain regulations under the Bill, it may be considered to trespass unduly on personal rights and liberties.

PETROLEUM EXCISE (PRICES) BILL 1987

This Bill was introduced into the House of Representatives on 18 November 1987 by the Minister for Resources.

From 1 January 1988, the marketing of indigenous crude oil will be deregulated and Import Parity Prices will no longer be used as the basis for allocated sales of domestic crude oil or the calculation of crude oil excise. The Bill provides the Minister

for Primary Industries and Energy with the powers to determine the prices to be used as the basis for crude oil excise and in particular to determine the volume weighted average of realised (VOLWARE) prices for sales of Bass Strait crude oil. The final VOLWARE price for each month will be the final price basis for crude oil excise for that month.

In Alert Digest No.16 of 1987 (25 November 1987) the Committee drew attention to the following clauses of the Bill:

Clauses 5 and 7 - Inappropriate delegation of administrative power

Clauses 5 and 7 would permit the Minister to delegate his or her powers of determination to "a person". The Committee has consistently objected to such unfettered Ministerial discretions as this, and has sought a definition of the qualifications, or office occupied by, such delegates.

The clauses were drawn to the attention of Senators in that, by allowing an unrestricted delegation of the Minister's powers to any person the minister nominates without restriction or qualification may be considered to be in breach of principle 1(a)(ii) of the Committee's principles in that it would constitute inappropriate delegation of administrative power.

The Minister for Primary Industries and Energy has responded to the Committee's comments as follows:

> 'I am advised that the formulation concerning the delegation of powers used in the Bill is a standard one which has been used and accepted in other legislation and regulations. However I can understand your wish to know that such delegations will be made only appropriate officers. The intention of the provisions permitting me to delegate powers is to simplify the administration of the determination of prices under the Petroleum Excise (Prices) Act. I can

assure you that delegations under these provisions will only be made to officials in my Department who are in the Senior Executive Service.

The Committee thanks the Minister for his response.

The Committee has previously commented that if the intention of the Government is not to delegate powers to others than (for example) Departmental Officers who are members of the Senior Executive Service then such a provision can be included in legislation it is for the Parliament, in conferring a statutory power, to determine the persons by whom the power might be exercised whether such persons are Ministers or not. (See Eighteenth Report of 1986, pp.130-131; Science and Industry Research Legislation Amendment Bill 1986).

The Committee therefore continues to draw the clauses to the attention of Senators in that they may be considered to be in breach of principle 1(a)(ii) in that they would constitute inappropriate delegation of administrative power.

Clause 9 - Powers of entry, search and seizure

Subclause 9(1) would permit "a person" to enter on to "any land or premises" without the safeguard of having obtained a search warrant from a judicial officer, but merely with an authorisation from the Minister. Furthermore, although the entry is available for the purpose of verifying information given to the Minister, there is no explicit requirement that the Minister have reasonable grounds for believing that the particular premises to which he authorises entry have the relevant information kept there.

The Committee has consistently drawn the Senate's attention to such provisions. The Committee has, in particular, pointed out that the issue of a warrant by a judicial officer is always preferable to the conferral of a power of entry without warrant.

Clause 9 of the Bill was accordingly drawn to the attention of Senators in that it may be considered to be in breach of principle 1(a)(i) of the Committee's principles and trespass unduly on personal rights and liberties.

The Minister has responded to the Committee's comments as follows:

> 'The provisions of clause 9 in the Bill are the appropriate provisions for administrative Acts for revenue purposes. The Attorney-General's Department advise that this provision has the same function and purpose in relation to the revenue aspects of this Act as does section 14J of the Taxation Administration Act in relation to the revenue aspects of the taxation legislation. As its is appropriate that similar legal standards be applied to pwoers available to officers administering revenue acts, the legal standards in clause 9 are the same as those in section 14J.
>
> On your specific point concerning the absence of a requirement on me to have reasonable grounds for believing that premises contain relevant documents for the verification of the oil producers' information, I would point out that clause 9 allows access to premises only where there may be documents relevant to information required under the Act. The Attorney-General's Department advise that the view that documents on the premises may be relevant must be reasonably held, and reached on the basis of facts which support that view, in order for this power to be lawfully exercised. A change to the clause is therefore unnecessary.'

The Committee thanks the Minister for his response. Despite the Minister's contrary view, and his advice that departmental officers would have the hold a reasonable belief that relevant documents etc. existed on premises to be searched, the Committee believes its argument on the clause should continue to be drawn to Senator's attention.

The Committee has also consistently questioned the rationale for the exception, drawn here by the Minister, between the enforcement of revenue laws and other laws. (see Annual Report 1986-87, p.10).

The Committee accordingly continues to draw the attention of Senators to clause 9 in that it may be considered to trespass unduly on personal rights and liberties.

Clause 10 - Powers of officials and others

The clause would insert a new paragraph 10(1)(b) would enable the Minister or an authorised person to require another person to attend before them to answer questions, but the paragraph does not state that the time and place for attendance should be reasonable.

The clause is drawn to the attention of Senators in that it may be considered to be a breach of principle 1(a)(i) of the Committee's principles and trespass unduly on personal rights and liberties.

the Minister has responded to the Committee's comments as follows:

> 'I note the Committee's comments in relation to sub-clause 10(1), to the effect that the time and places specified must be reasonable. However, given that this Bill will only apply to a very small class of legal persons, in effect the two oil companies involved in excise, and given the relationship between the oil companies and the Government, this power is most unlikely to be exercised without careful consideration being given to the rights of the persons affected. Indeed it would be highly damaging to the relationship if the Government were seen to be acting capriciously in this regard.'

The Committee thanks the Minister for his response. Again, despite the Minister's contrary view, it appears to the Committee that, with due respect, the fact that the clause will only apply to a small class of persons does not necessarily amount to a argument in favour of a statutory provision which may in future come to apply to a different situation (such as a larger class of persons).

Accordingly the Committee continues to draw Senators' attention to the clause in that it may be considered to breach principle 1(a)(i) of the Committee's principles.

STATES GRANTS (TERTIARY EDUCATION ASSISTANCE) BILL 1987

This Bill was introduced into the House of Representatives on 5 November 1987 by the Minister for Employment, Education and Training.

The Bill is to provide the legislative basis for the distribution of Commonwealth funds for tertiary education in the States and the Northern Territory for 1988. The Bill reflects Government decisions made in the 1987/88 Budget context and subsequently, including the transfer of administrative responsibility for Commonwealth tertiary education programs to the Department of Employment, Education and Training.

In Alert Digest No.15 of 1987 (18 November 1987) and in the Fifteenth Report of 1987, the Committee drew attention to the following clause of this Bill and to similar provisions in the Australian National University Amendment Bill 1987; the Canberra College Advanced Education Amendment Bill 1987, and the Maritime College Amendment Bill 1987.

Clause 3 - Lack of Parliamentary scrutiny

A definition of "relevant enrolment" is included in paragraph 3(1)(c) for the purposes of levying the Higher Education Administration Charge, and is to be read with clauses 3(10) and

8(2) of the Bill. By virtue of paragraph (c) the Minister may exercise an unfettered discretion to exempt certain persons from that charge, the exercise of that discretion not being subject to any form of Parliamentary scrutiny. The provision in this Bill follows closely a provision inserted in the States Grants (Tertiary Education Assistance) Bill (No.2) 1986, on which the Committee both commented, and rebutted the then Minister's response, in its Seventeenth Report of 1986, (12 November 1986) (pp.100-102).

The definition of "relevant date" in clause 3(1) similarly permits the Minister to specify a date in the future without being subject to Parliamentary scrutiny. The importance of the "relevant date" is to be found by a reading of clauses 3(1) and 8(2)(b). It appears, when reading those provisions with the Minister's Second Reading Speech (the sentence on pp.4 and 5 thereof), that the intention is that, on the first day of teaching in 1988, a student will be deemed to be enrolled in the course for which he or she has applied, and that the charge is payable then. However, that requires reading the phrase "undertaking a course" when used in the Bill as including "intending to study for a course" or "having applied to undertake a course". If that meaning is adopted, there does not seem to be anything in the Bill to prevent the Minister specifying February as the "relevant date", and imposing the charge on any person who has applied to study at a particular institution. If such a person, during February, decides to pursue the same course at another institution, he or she would be liable to pay the charge a second time, to the other institution, under clause 8(2)(a), and would not be within the exemption of clause 8(4).

As the clause would permit the Minister to exercise discretion without adequate Parliamentary scrutiny, the Committee drew it to the attention of the Senate under principle 1(a)(v) in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

The Minister for Employment, Education and Training has responded to the Committee's comment as follows:

> 'I consider that the gazettal arrangements provided for under clause 3(1) of this Bill are the only practicable means of dealing with the matters at issue. Similar arrangements apply under other legislation, including the current Act governing Commonwealth tertiary education programs for 1987.
>
> The alternative approach of providing for disallowance by the Parliament of Ministerial determinations on these matters could involve extensive delays between an original decision and subsequent confirmation or disallowance by the Parliament. Ths could have the undesirable effect of making persons who had been declared exempt from the charge retrospectively liable for payment long after they had commenced their courses. A similar situation could occur for students affected by any variations to the specified "relevant date".
>
> Related to this, it is intended that the dates which coincide with the latest date of commencement of lectures and classes in the first and second semester of the year in a State or the Northern Territory should be the specified dates for that State or Territory. This definition will help to overcome the problems of concern to your Committee by allowing students who have had two or more offers of a place to be liable for payment of the charge only at that institution they are attending when studies commence or are deemed to have commenced. Later starters would not be liable for the charge until the "relevant date" in the second semester.'

The Committee thanks the Minister for this response.

The Committee has commented previously on such a provision (see p.102 of its Seventeenth Report of 1986).

The Committee accordingly continues to draw the to the attention of the Senate to the definitions of "relevant enrolment" and "relevant date" in the clause in that it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Clause 9 - Powers of Officials, Institutions etc.

Clauses 9(2) and (4) may in their practical operation, trespass unduly on personal rights and liberties. The subclauses will permit tertiary institutions to charge fees for specific courses, provided that the students on whom the fees will be charged have "earned a living at any time". It is extremely difficult to know what this phrase means and, for institutions validly to charge these fees, the institutions will either have to conduct an examination of each student's curriculum vitae, possibly requiring the production of income tax assessments, or create a presumption that any applicant over the age (say) of 21 has earned a living, and then cast the onus on the applicant to disprove that. In either eventuality, it appears that this provision will require undue revelations, to education institutions, of the person financial details of intending students.

The Minister has responded to the Committee's comments on the clause as follows:

> 'Your Committee has also expressed concern that clauses 9(2) and (4) of this Bill may, in their practical operation, trespass unduly on personal rights and liberties.
>
> These clauses are designed to give effect to the Government's 1987-88 Budget decisions to relax the legislative prohibition on charging of fees in a limited range of post-basic award courses in question would be specified by the Minister in accordance with the provisions of clauses 9(1) and (3), and would typically be courses in which all, or the great majority of, students involved would

need to have completed a period of relevant employment/professional experience as a normal condition of entry to the course.'

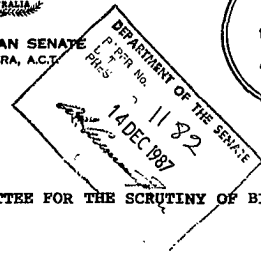
In these circumstances, the process of course admission itself would serve to establish a prime facie liability for payment of a fee, and there would be neither requirement nor need for an institution to undertaske a separate and detailed examination of a student's curriculum vitae and financial circumstances. I am confident that there is no cause for concern at any trespass on the personal rights and liberties of individuals.'

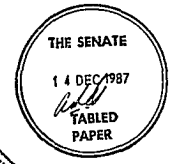
The Committee thanks the Minister for his response.

As the Minister has noted, the number of tertiary students who may have to seek exemption from fees may increase. In continuing to draw the attention to the clause together with the response, the Committee wishes to promote a fuller consideration of the issues involved during further debate on the Bill.

Barney Cooney
Chairman
9 December 1987

AUSTRALIAN SENATE
CANBERRA, A.C.T.





SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1987

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney, Chairman
Senator D. Brownhill, Deputy Chairman
Senator M. Beahan
Senator R.A. Crowley
Senator K. Patterson
Senator J.F. Powell

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 insufficiently defined administrative powers;

(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, nowithstanding that such proposed law, document or information has not been presented to Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1987

The Committee has the honour to present its Seventeenth Report of 1987 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bill which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Customs and Excise Legislation Amendment Bill (No.2) 1987

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL (No.2) 1987

This Bill was introduced into the House of Representatives on 18 November 1987 by the Minister for Science and Small Business.

The Bill proposes to amend the Customs Act 1901 and the Excise Act 1901 to give effect to a series of Government proposals, the principal of which are the amendments to the valuation provisions of the Customs Act 1901 (Division 2 of Part VIII) and the introduction of consequential enforcement and penalty provisions to effect the second instalment of the Government's strategy to combat commercial practices designed solely or predominantly to understate the value of imported goods, so as to minimise or avoid customs duty (Clause 12, and Clauses 6, 22, and 24 to 26 inclusive).

In Alert Digest No.16 of 1987 (25 November 1987) the Committee drew the Senate's attention to the provisions of a number of clauses of the Bill which may be considered to be in breach of the Committee's principles

The Committee has received a detailed and helpful response from the Minister for Industry, Technology and Commerce. The Committee has attached a copy of the letter to this report for the information of Senators. The Committee has directly quoted relevant parts of the letter in this report.

The Committee drew attention to the following clauses of the Bill in Alert Digest No.16:

Clause 16 - Alteration of Existing Legal Rights

By clause 16 of the Bill, a new subsection 165(1) would be inserted in the Customs Act providing for the recovery of short paid customs duties by a Collector of Customs. The subclause would provide no limitation period for the Collector's power to

demand further duty, if the duty has been short levied by reason of fraudulent conduct. This may be compared with the normal position of a private individual who has suffered loss as a result of another's fraud, who normally is barred from recovering that loss within 6 years after he or she might, with reasonable diligence, have discovered the fraud.

The relevant part of the Minister's response is as follows:

> 'I consider the suggestion of the Committee is inappropriate in this situation, essentially because the amended section 165 is aimed at fraud against the Commonwealth, not fraud against an individual. The Australian Customs Service is charged with the responsibility of collecting customs duty on imported goods as agent for the Commonwealth. Where incorrect duty is collected, or where an amount of duty has been erroneously refunded, by reason of fraud, then it is the Government's view that in order to protect the Commonwealth revennue, the perpetrator of the fraud should not be able to hide behind an arbitrary statute of limitation. The facility and ability to correct the duty short fall should be availabe indefinitely.
>
> In fact, contrary to the suggestion of the Committee, I am advised the amendment to section 165 to expressly exempt fraud cases from any time limitation accords with Commonwealth Criminal law policy as contained in the Crimes Act 1914. The offence of defrauding the Commonwealth (section 29D) is an indictable offence, for which a prosecution may be commenced at any time after the commission of the offence (paragraph 21(1)(a)). In addition to any penalty imposed upon a person, one of the options open to a Court in a fraud case is to order the restitution of any loss suffered by the Commonwealth by reason of the fraud (paragraph 21B(c)). The Court might therefore order the offender to pay the amount of the evaded duty, in addition to any penalty it might impose on the offender personally (see Murphy, Minister of State for Customs and

H.F. Trading Co. Pty Limited and Another, 47 A.L.J.R. at pg. 200, where in a Customs fraud case, the High Court ordered the offender to make reparation to the Commonwealth by way of a money payment of $54,111.58 in respect of the loss suffered by the Commonwealth (evaded customs duty) by reason of the fraud).

I am therefore of the view that the proposed amendment to subsection 165(1) does no more than expressly state in the Customs Act both the prevailing legal position relating to criminal proceedings where fraud against the Commonwealth is involved, and the practical result of a restitution order in such circumstances, and thus does not infringe or alter established legal rights.'

The Committee thanks the Minister for his response.

The Committee notes that it pointed out that fraud against an individual is subject to a 6 year limitation period from the time when the fraud might reasonably have been discovered; the lack of any limitation period in new section 165 may, with respect, give an advantage to inefficient Customs officers who fail reasonably to discover a fraud which is not available to the private individual. Further, since the section merely allows for the recovery of short-paid duty, and does not create a criminal offence, the analogy with a private individual appears to be more apt than the analogy with the criminal law.

The Committee draws the attention of the Senate to the Committee's comments and the Minister's response, and trusts that they will assist Senators' consideration during Committee stages of the Bill.

Clause 22 - Powers of entry, search and seizure

Clause 22 would introduce a new subsection 214AB(2) to the Customs Act which, when read with the definition of "Magistrate" to be inserted by clause 4, would permit a search warrant to be

obtained from a Justice of the Peace. This is a matter to which the Committee has drawn the attention of Senators in relation to other legislation, most recently, in the Fourteenth Report of 1987 (18 November 1987) regarding the Fishing Legislation Amendment Bill 1987 and other legislation.

The relevant part of the Minister's response to the Committee's comments is as follows:

> 'It would appear the premise underlying the Committee's view is that only judicial officers are obliged to act judicially, and that therefore, to permit the granting of a search warrant by other than a judicial officer offends accepted standards of atural justice, judicial impartiality, and the like.
>
> While I accept the proposition that Justices of the Peace are not judicial officers, I would suggest that case law has long established that justices of the peace are required to act judicially. They are required to observe the principles of natural justice in exercising their duties as justices; they must act honestly and fairly; where insufficient or no evidence is presented to justify the exercise of their power, they must not do so, else these actions might be struck down by a court.
>
> I do not therefore consider that the possible issue of a search warrant by a Justice of the Peace on clearly limited grounds, in the situation envisaged by new section 214AB, constitutes an undue trespass on personal rights and liberties. Furthermore, there are important practical reasons why it is deemed essential to have the choice of Magistrate or Justice of the Peace for these warrants. Customs field audits and inspections of commercial documents might realistically have to be undertaken in parts of the country where chamber Magistrates are not readily available. Additionally, warrants might be required urgently in order to preclude the possibility of any removal or falsification

of commercial records. This is especially so with the prevalence of computer records in Customs work, and the speed with which those records can be altered.

Given these considerations, and the overriding requirement for Justices of the Peace to act judicially in the exercise of their powers, I believe there are justifiable grounds for extending to Justices of the Peace the power to grant search warrants in the circumstances envisaged by new section 214AB, without any consequential diminution of civil liberties.'

The Committee thanks the Minister for this response. In response to a number of comments on clauses such as clause 22, Ministers have put the view that the need to act speedily, and the fact that access to Justices of the Peace, is much easier when compared to Magistrates is a practically important, (if not compelling) reason for allowing the issue of such warrants by either a Justices of the Peace or a Magistrate.

In continuing to draw the Committee's comments to the attention of the Senate, the Committee notes the considerations advanced by the Minister but believes that such warrants should properly be issued by magistrates.

The Committee accordingly continues to draw clause 22 to the attention of the Senate.

Clause 25 - Inappropriate delegation of legislative power

Clause 25 of the Bill would insert a new section 240 in the Customs Act. Paragraph 240(4)(b) would allow classes of persons and documents exempted from the criminal sanctions of proposed new subsections 240(1), (2) and (3) to be determined by regulation at a later date.

The Committee notes that these provisions would leave the entire content regarding people and documents to be set out in regulations, such possible variations being potentially quite wide. The Committee drew the attention of Senators to clause 25 of the Bill in that it may be in breach of principle 1(a)(iv) of its principles and constitute an inappropriate delegation of legislative power.

The part of the Minister's response of direct relevance to the Committee's comment is as follows:

> 'The proposed new section 240 inserted by Clause 25 of the Bill imposes a new requirement on importers to keep all the commercial documents relating to imported goods for a period of up to 5 years after the goods are entered for home consumption. The new provision is designed to complement the new audit and verification of information powers in Clause 22, and was modelled along the lines of the record keeping provision in the Income Tax Assessment Act 1936 (Section 262A). While the record-keeping obligation is expressed to apply generally to all importers of goods, it is quite possible that classes of importers (for instance some holiday-makers) or types of transactions (for isntance, less than a certain pecuniary value) might in future be deemed to fall outside the "revenue-risk' categories, such that an exemption from the record-keeping requirement will be appropriate. I believe regulations provide a useful and appropriate mechanism to exempt in a general way persons and classes of documents from the record-keeping obligation in proposed new section 240. Unlike the precedent from the Income Tax legislation, which allows the Commissioner to specifically exempt taxpayers from the record-keeping requirements (subsection 262A(2)), the regulation exemption facility in subsection 240(4) will provide Parliament with the facility to scrutinise, and disallow if it sees fit, any proposed exemption. At present no general exemptions have

been considered; however it is desirable to have such a facility if in future specific exemption categories, including those discussed above, arise.'

The Committee thanks the Minister for his response.

While the Minister is correct in observing that any regulations made under new subsection 240(4) would be subject to parliamentary scrutiny, the Committee observes that the effect of such scrutiny could only be to allow or to disallow the regulation, whereas if the exemption proposed by the Minister were in the form of a Bill to amend the Customs Act, the measures would be subject to amendment in the light of debate in the Parliament.

In drawing the Committee's comments, together with the Minister's response, to the Senate's attention the Committee trusts that its report will assist fuller consideration of the clause at the Committee stage of debate on the Bill.

Clause 26 - Trespass on personal rights and liberties

Clause 26 would insert new sections 243T and 243U in the Customs Act. The Committee draws attention to the proposed section on three grounds:

(a) they would give to a Collector a power normally reserved to a court, of determining whether a statement is false or misleading in a material particular, and then imposing a penalty for that falsity;

(b) they would impose that penalty on a person, even though the latter was completely innocent of any intention to mislead; this may be compared with the normal situation in the criminal law, in which a person may be convicted only if he or she has a "guilty mind" or guilty intent;

(c) they would allow the Comptroller to exercise the functions of an "appeal court" over the decision of a Collector, by remitting the penalty if the Comptroller (in effect) considers it fair and reasonable to do so.

The Committee has consistently drawn particular attention to such provisions. The Committee considers that it is an important basic part of its role to point out to the Senate possible alteration of existing rights and liberties, which are proposed by legislation.

The clause was accordingly drawn to the attention of Senators under principle 1(a)(i) of the Committee's principles, in that it may be considered to trepass unduly on personal rights and liberties.

The parts of the Minister's response relevant to the Committee's comments are as follows:

'While it is agreed the Collector under 243T will have the initial power to determine the question of fact as to whether a statement made to an officer was false or misleading in a material particular, the result of that judgement is not without a review facility. If the Collector feels duty has been shortpaid as a result of the false or misleading statement made, the Collector must issue a demand for the penalty duty, which is calculated on the basis or twice the excess duty that should have been payable. Any aggrieved person can elect to have the Collector's excess duty assessment reviewed in the normal way by paying the excess duty under protest (section 167), which remits the whole matter to the Administrative Appeals Tribunal for review pursuant to subsection 273GA(2). Further, the penalty duty that is payable under proposed new subsection 243T(1) is automatically subject to remission where a decision of the Administrative Appeals Tribunal on an application made pursuat to subsection 273GA(2) would result in a less amount of duty being payable in respect of

the imported goods than the amount demanded by a Collector, or in no duty being payable (new subsection 243U(3)). I therefore feel there is an adequate and appropriate check against a potential unbridled exercise of a Collector's discretion under subsection 243T(1) to demand penalty duty.

While I concede the fact that an honest mistake is subject to this proposed penalty provision, and the fact that the Comptroller's power to remit is unreviewable, I do not accept that this is unwarranted, especially given the background of the "green" line clearance system against which they have been introduced. Where a quick process for clearing goods is demanded, so to is there a need for a fast track method for dealing with cases of duty short-paid as a result of false or misleading statements. While one of the benefits to the community of the quick clearance system is that all goods are cleared immediately, I would suggest one of the costs in trying to protect the revenue from potential abuse is that all erors which affect the revenue are treated, in the first instance, the same. The honest mistake, and the fraudulent, reckless and negligent mistake, are subject to penalty duty equally. The fact of a duty short payment as opposed to any intent behind the short payment, is the first concern. It is only with the power of remission that an element of degree for one's mistake becomes relevant. I consider it is appropriate and fair that a power of remission exist, but I do not feel the decision to remit should be independently reviewable; in essence because any review of the decision to remit would proceed on supposed degrees of culpability; and culpability in this fast-track method for dealing with cases of duty short-paid is irrelevant in the first instance. When remission does become relevant, I believe it should not then become subject to a series of reassessments, in a way which effectively frustrate the original need for the fast-track penalty system.'

The Committee thanks the Minister for his response and helpful clarification of this complex provision. The Committee accepts that a Collector's decision is subject to satisfactory review. Whether the Comptroller's power to remit a penalty should be reviewable or not appears to be a matter of policy, depending largely on individual views as to the price to be paid for the benefits of the 'fast-track' method described by the Minister in his response.

The Committee trusts that these comments will assist Senators' consideration of the clause during debate on the Bill.

(Barney Cooney)
Chairman

14 December 1987

APPENDIX

MINISTER FOR INDUSTRY,
TECHNOLOGY AND COMMERCE
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

-9 DEC 1987

Dear Senator Cooney

I am writing in response to your Committee's comments on the Customs and Excise Legislation Amendment Bill (No.2) 1987 in Alert Digest No.16 of 1987 dated 25 November 1987.

I propose to answer the Committee's criticisms under the same clause headings employed in its Digest report, as follows:

a) Clause 16 (re. amendments to section 165 of the Principal Act - short paid duty etc. may be recovered)

The Committee criticised the proposed amendment to subsection 165(1), which purports, amongst other things, to permit the recovery of short levied or erroneously refunded duty in cases of "fraud" any time after the date of the short levy or refund. The Committee implied that the ability to recover short paid duties in fraud cases unrestricted by time limitations altered established legal rights; the Committee suggested in fact that a 6 year statute of limitations applied in situations where one individual suffers loss as a result of another's fraud.

I consider the suggestion of the Committee is inappropriate in this situation, essentially because the amended section 165 is aimed at fraud against the Commonwealth, not fraud against an individual. The Australian Customs Service is charged with the responsibility of collecting customs duty on imported goods as agent for the Commonwealth. Where incorrect duty is collected, or where an amount of duty has been erroneously refunded, by reason of fraud, then it is the Government's view that in order to protect the Commonwealth revenue, the perpetrator of the fraud should not be able to hide behind an arbitrary statute of limitation. The facility and ability to correct the duty short fall should be available indefinitely.

In fact, contrary to the suggestion of the Committee, I am advised the amendment to section 165 to expressly exempt fraud cases from any time limitation accords with Commonwealth Criminal law policy as contained in the Crimes Act 1914. The offence of

defrauding the Commonwealth (section 29D) is an indictable offence, for which a prosecution may be commenced at any time after the commission of the offence (paragraph 21(1)(a)). In addition to any penalty imposed upon a person, one of the options open to a Court in a fraud case is to order the restitution of any loss suffered by the Commonwealth by reason of the fraud (paragraph 21B(c)). The Court might therefore order the offender to pay the amount of the evaded duty, in addition to any penalty it might impose on the offender personally (see Murphy, Minister of State for Customs and H.F. Trading Co. Pty Limited and Another, 47 A.L.J.R. at pg. 200, where in a Customs fraud case, the High Court ordered the offender to make reparation to the Commonwealth by way of a money payment of $54,111.58 in respect of the loss suffered by the Commonwealth (evaded customs duty) by reason of the fraud).

I am therefore of the view that the proposed amendment to subsection 165(1) does no more than expressly state in the Customs Act both the prevailing legal position relating to criminal proceedings where fraud against the Commonwealth is involved, and the practical result of a restitution order in such circumstances, and thus does not infringe or alter established legal rights.

I agree with the Committee's comment about the commencement of Clause 16 in the explanatory memorandum to the Bill. It is indeed correct that both the proposed new interest provision (subsection (4)), and the extended time provision (subsection (1)) will only apply prospectively, and will not apply in respect of goods entered for home consumption prior to the date on which the Act receives the Royal Assent. The omission of any reference to new subsection (1) in the explanatory memorandum's notes on subclause 2 was purely inadvertent.

(b) Clause 22 (re. new section 214AB - Powers of officers to inspect commercial documents in other circumstances)

With regard to this section the Committee repeated the concern it has expressed in relation to other legislation; namely, its view that search warrants should properly be issued by judicial officers, and not by Justices of the Peace.

It would appear the premise underlying the Committee's view is that only judicial officers are obliged to act judicially, and that therefore, to permit the granting of a search warrant by other than a judicial officer offends accepted standards of natural justice, judicial impartiality, and the like.

While I accept the proposition that Justices of the Peace are not judicial officers, I would suggest that case law has long established that justices of the peace are required to act judicially. They are required to observe the principles of natural justice in exercising their duties as justices; they must act honestly and fairly; where insufficient or no evidence is presented to justify the exercise of their power, they must not do so, else these actions might be struck down by a Court.

I do not therefore consider that the possible issue of a search warrant by a Justice of the Peace on clearly limited grounds, in the situation envisaged by new section 214AB, constitutes an undue trespass on personal rights and liberties. Furthermore, there are important practical reasons why it is deemed essential to have the choice of Magistrate or Justice of the Peace for these warrants. Customs field audits and inspections of commercial documents might realistically have to be undertaken in parts of the country where chamber Magistrates are not readily available. Additionally, warrants might be required urgently in order to preclude the possibility of any removal or falsification of commercial records. This is especially so with the prevalence of computer records in Customs work, and the speed with which those records can be altered.

Given these considerations, and the overriding requirement for Justices of the Peace to act judicially in the exercise of their powers, I believe there are justifiable grounds for extending to Justices of the Peace the power to grant search warrants in the circumstances envisaged by new section 214AB, without any consequential diminution of civil liberties.

c) Clause 25 - (re. new section 240 - requirement to keep commercial documents)

The proposed new section 240 inserted by Clause 25 of the Bill imposes a new requirement on importers to keep all the commercial documents relating to imported goods for a period of up to 5 years after the goods are entered for home consumption. The new provision is designed to complement the new audit and verification of information powers in Clause 22, and was modelled along the lines of the record keeping provision in the Income Tax Assessment Act 1936 (Section 262A). While the record-keeping obligation is expressed to apply generally to all importers of goods, it is quite possible that classes of importers (for instance some holiday-makers) or types of

transactions (for instance, less than a certain pecuniary value) might in future be deemed to fall outside the "revenue-risk" categories, such that an exemption from the record-keeping requirement will be appropriate. I believe regulations provide a useful and appropriate mechanism to exempt in a general way persons and classes of documents from the record-keeping obligation in proposed new section 240. Unlike the precedent from the Income Tax legislation, which allows the Commissioner to specifically exempt taxpayers from the record-keeping requirements (subsection 262A(2)), the regulation exemption facility in subsection 240(4) will provide Parliament with the facility to scrutinise, and disallow if it sees fit, any proposed exemption. At present no general exemptions have been considered; however it is desirable to have such a facility if in future specific exemption categories, including those discussed above, arise.

(d) Clause 26 (re. new Division 4 - penalty for making false statements, etc)

The Committee has criticised a number of elements of the proposed new penalty duty provisions for the making of statements which are false or misleading in a material particular. Before addressing the Committee's particular concerns, I think it is appropriate to briefly set out the rationale behind the proposed penalty duty structure.

Over the past few years, industry and commercial pressure to have imported goods cleared of Customs control "immediately" has led to the introduction of a "green-line" clearance system by the Customs Service. The system is basically an honour system; the Customs Service clears 90% of cargo on the basis that the documentation supplied and duty proffered to it are correct. The importers of goods essentially self-assess the duty payable on the goods, and their assessment is accepted on its face, with the result that their goods are cleared from Customs control within 4 hours.

Using profiles, risk analysis, risk assessment and random sampling techniques, the Customs Service selects the 10% balance of transactions for basic checking. The focus of this checking however is still aimed at quick clearance of the goods; only in the most blatant cases of suspected fraud are goods seized and further investigation undertaken.

The amendments proposed in this Bill relating to the new record-keeping obligation (clause 25) and the new information-gathering and auditing powers for the

Customs (Clause 22) highlight the shift away from on the spot 100% checks of all imported goods, to limited on the spot checks with the facility for after the fact or post clearance audits to ensure the Commonwealth revenue is not evaded. The new penalty duty provision is seen as a necessary adjunct to a "green" line clearance system, as it is felt such a penalty mechanism acts as a necessary deterrent to playing the odds that the proffered documents and duty will be accepted outright.

That such a deterrent is necessary is evidenced by figures supplied to me by the Customs Service for the month of October, 1987. Of a total 158,891 entries for the clearance of goods which were made, the 10% check conducted of those entries revealed errors resulting in the short-payment of $887,675 of customs duty. Even more revealing, over one half of the errors made were tariff classification errors; yet the facility exists for importers to seek Tariff Classification Advices from Customs to correctly classify goods where they are unsure of the classification. I am advised that since the introduction of the "green" line clearance system, requests for Tariff Classification Advices have fallen by over 50%.

The implication from the figures I think is clear. There is no incentive to get documentation relating to goods, on which duty is then assessed, correct. In fact, given the only realistic penalty except in cases of blatant fraud is that the balance of the duty which should have been paid might be demanded, there is almost a commercial advantage to be gained by playing the "green" line odds.

Against the above background for the perceived need for a penalty duty system, I note the Committee's first criticism of proposed new section 243T is that it considers a Collector is vested with a power normally reserved to a Court; ie that of determining whether a statement is false or misleading in a material particular.

While it is agreed the Collector under 243T will have the initial power to determine the question of fact as to whether a statement made to an officer was false or misleading in a material particular, the result of that judgement is not without a review facility. If the Collector feels duty has been shortpaid as a result of the false or misleading statement made, the Collector must issue a demand for the penalty duty, which is calculated on the basis of twice the excess duty that should have been payable. Any aggrieved

person can elect to have the Collector's excess duty assessment reviewed in the normal way by paying the excess duty under protest (section 167), which remits the whole matter to the Administrative Appeals Tribunal for review pursuant to subsection 273GA(2). Further, the penalty duty that is payable under proposed new subsection 243T(1) is automatically subject to remission where a decision of the Administrative Appeals Tribunal on an application made pursuant to subsection 273GA(2) would result in a lesser amount of duty being payable in respect of the imported goods than the amount demanded by a Collector, or in no duty being payable (new subsection 243U(3)). I therefore feel there is an adequate and appropriate check against a potential unbridled exercise of a Collector's discretion under subsection 243T(1) to demand penalty duty.

The Committee's other criticisms of the new double penalty provisions focussed on the facts that the "honest" mistake was being subjected to the regime, and the Comptroller's power to remit the penalty duty was unreviewable.

While I concede the fact that an honest mistake is subject to this proposed penalty provision, and the fact that the Comptroller's power to remit is unreviewable, I do not accept that this is unwarranted, especially given the background of the "green" line clearance system against which they have been introduced. Where a quick process for clearing goods is demanded, so to is there a need for a fast track method for dealing with cases of duty short-paid as a result of false or misleading statements. While one of the benefits to the community of the quick clearance system is that all goods are cleared immediately, I would suggest one of the costs in trying to protect the revenue from potential abuse is that all errors which affect the revenue are treated, in the first instance, the same. The honest mistake, and the fraudulent, reckless and negligent mistake, are subject to penalty duty equally. The fact of a duty short payment as opposed to any intent behind the short payment, is the first concern. It is only with the power of remission that an element of degree for one's mistake becomes relevant. I consider it is appropriate and fair that a power of remission exist, but I do not feel the decision to remit should be independently reviewable; in essence because any review of the decision to remit would proceed on supposed degrees of culpability; and culpability in this fast-track method for dealing with cases of duty short-paid is irrelevant in the first instance. When remission does become relevant, I believe it should

not then become subject to a series of reassessments, in a way which effectively frustrate the original need for the fast-track penalty system.

I trust the above is of assistance in addressing your Committee's concerns on this Bill.

Yours sincerely

John N Button

(John N. Button)

Senator B.C. Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT

THE SENATE

ROLL 14-12 87

SENATORS—

1. [redacted]
2. ARCHER
3. [redacted]
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6. BEAHAN
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THE SENATE

ROLL 14-12-87

SENATORS—

1. ALSTON
2. ARCHER
3. AULICH
4. BAUME, Michael
5. BAUME, Peter
6. BEAHAN
7. BISHOP
8. BJELKE-PETERSEN
9. BLACK
10. BOLKUS
11. BOSWELL
12. BROWNHILL
13. BURNS
14. BUTTON
15. CALVERT
16. CHANEY
17. CHAPMAN
18. CHILDS
19. COATES
20. COLLINS
21. COLSTON
22. COOK
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24. COULTER
25. CRICHTON-BROWNE
26. CROWLEY
27. DEVEREUX
28. DEVLIN
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30. EVANS
31. FOREMAN
32. GIETZELT
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35. HAMER
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55. PUPLICK
56. RAY
57. REID
58. REYNOLDS
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61. SANDERS
62. SCHACHT
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66. STONE
67. TAMBLING
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69. TEAGUE
70. VALLENTINE
71. VANSTONE
72. WALSH
73. WALTERS
74. WATSON
75. WOOD
76. ZAKHAROV

THE SENATE

ROLL 14-12-87

SENATORS—

1. ~~ALSTON~~
2. ~~ARCHER~~
3. ~~AUFICH~~
4. ~~BAUME, Michael~~
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6. BEAHAN
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76. ~~ZAKHAROV~~

SENATE

198 7

14th day of December

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Question, Housing Assistance Bill 2°R – am. m. by Sen. Short.

Senate

~~Committee~~

SENATORS –

AYES

~~1. ALSTON~~
~~2. ARCHER~~
3. AULICH
~~4. BAUME, Michael~~
~~5. BAUME, Peter~~
6. BEAHAN
~~7. BISHOP~~
~~8. BJELKE-PETERSEN~~
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72. WALSH
~~73. WALTERS~~
~~74. WATSON~~
75. WOOD
76. ZAKHAROV

Ayes 30

Noes 36

TELLER FOR THE AYES–SENATOR [illegible signature]

SENATE

1987

14 day of December

/

Question, Housing Assistance Amdt Bill 1987

That the 2° and 4 moved by Short be agreed to

Senate

~~Committee~~

SENATORS - **NOES**

1. ALSTON
2. ARCHER
3. ~~AULICH~~
4. BAUME, Michael
5. BAUME, Peter
6. BEAHAN
7. BISHOP
8. BJELKE-PETERSEN
9. ~~BLACK~~
10. ~~BOLKUS~~
11. BOSWELL
12. BROWNHILL
13. ~~BURNS~~
14. BUTTON
15. CALVERT
16. CHANEY
17. CHAPMAN
18. ~~CHILDS~~
19. ~~COATES~~
20. ~~COLLINS~~
21. ~~COLSTON~~
22. ~~COOK~~
23. ~~COONEY~~
24. ~~COULTER~~
25. CRICHTON-BROWNE
26. ~~CROWLEY~~
27. ~~DEVEREUX~~
28. ~~DEVLIN~~
29. DURACK
30. ~~EVANS~~
31. ~~FOREMAN~~
32. ~~GIETZELT~~
33. ~~GILES~~
34. ~~HAINES~~
35. HAMER
36. HARRADINE
37. HILL
38. ~~JENKINS~~
39. ~~JONES~~
40. KNOWLES
41. LEWIS
42. MacGIBBON
43. McGAURAN
44. ~~McKIERNAN~~ (Teller)
45. ~~McLEAN~~
46. ~~MACKLIN~~
47. MAGUIRE
48. MESSNER
49. ~~MORRIS~~
50. NEWMAN
51. PANIZZA
52. PARER
53. PATTERSON
54. ~~POWELL~~
55. PUPLICK
56. ~~RAY~~
57. REID
58. REYNOLDS
59. RICHARDSON
60. ~~RYAN~~
61. ~~SANDERS~~
62. ~~SCHACHT~~
63. SHEIL
64. SHORT
65. ~~SIBRAA~~
66. STONE
67. TAMBLING
68. ~~TATE~~
69. TEAGUE
70. ~~VALLENTINE~~
71. VANSTONE
72. ~~WALSH~~
73. WALTERS
74. WATSON
75. ~~WOOD~~
76. ~~ZAKHAROV~~

Ayes, 30

Noes, 36

TELLER FOR THE NOES - SENATOR J McKiernan

SENATE

198 7

14th day of December

2

Question, Moving Amendments Bill — 2 amendments m. by Sen Coulter.

~~Senate~~ Committee

SENATORS –

AYES

1. ALSTON
2. ARCHER
3. AULICH
4. BAUME, Michael
5. BAUME, Peter
6. BEAHAN
7. BISHOP
8. BJELKE-PETERSEN
9. BLACK
10. BOLKUS
11. BOSWELL
12. BROWNHILL
13. BURNS
14. BUTTON
15. CALVERT
16. CHANEY
17. CHAPMAN
18. CHILDS
19. COATES
20. COLLINS
21. COLSTON
22. COOK
23. COONEY
~~24. COULTER~~
25. CRICHTON-BROWNE
26. CROWLEY
27. DEVEREUX
28. DEVLIN
29. DURACK
30. EVANS
31. FOREMAN
32. GIETZELT
33. GILES
~~34. HAINES~~
35. HAMER
36. HARRADINE
37. HILL
~~38. JENNING~~
39. JONES
40. KNOWLES
41. LEWIS
42. MacGIBBON
43. McGAURAN
44. McKIERNAN
~~45. McLEAN~~
~~46. MACRIDIN~~ teller
47. MAGUIRE
48. MESSNER
49. MORRIS
50. NEWMAN
51. PANIZZA
52. PARER
53. PATTERSON
~~54. POWELL~~
55. PUPLICK
56. RAY
57. REID
58. REYNOLDS
59. RICHARDSON
60. RYAN
~~61. SANDERS~~
62. SCHACHT
63. SHEIL
64. SHORT
65. SIBRAA
66. STONE
67. TAMBLING
68. TATE
69. TEAGUE
~~70. VALENTINE~~
71. VANSTONE
72. WALSH
73. WALTERS
74. WATSON
~~75. WOOD~~
76. ZAKHAROV

Ayes 9

Noes 55

TELLER FOR THE AYES—SENATOR

SENATE

1987

14 day of December

2

Question, Housing Assistance Amdt Bill 1987. that the 2 Amdts (CL4) moved together, by leave, by Coulter be agreed to.

Senate Committee

SENATORS –

NOES

1. ~~ALSTON~~
2. ~~ARCHER~~
3. ~~AULICH~~
4. ~~BAUME, Michael~~
5. ~~BAUME, Peter~~
6. BEAHAN
7. ~~BISHOP~~
8. ~~BJELKE-PETERSEN~~
9. ~~BLACK~~
10. ~~BOLKUS~~
11. ~~BOSWELL~~
12. ~~BROWNHILL~~
13. ~~BURNS~~
14. BUTTON
15. ~~CALVERT~~
16. CHANEY
17. ~~CHAPMAN~~
18. ~~CHILDS~~
19. ~~COATES~~
20. ~~COLLINS~~
21. ~~COLSTON~~
22. ~~COOK~~
23. ~~COONEY~~
24. COULTER
25. ~~CRICHTON-BROWNE~~
26. ~~CROWLEY~~
27. ~~DEVEREUX~~
28. ~~DEVLIN~~
29. ~~DURACK~~
30. EVANS
31. ~~FOREMAN~~
32. ~~GIETZELT~~
33. ~~GILES~~
34. HAINES
35. ~~HAMER~~
36. HARRADINE
37. ~~HILL~~
38. JENKINS
39. ~~JONES~~
40. ~~KNOWLES~~
41. ~~LEWIS~~
42. ~~MacGIBBON~~
43. McGAURAN
44. ~~McKIERNAN~~
45. McLEAN
46. MACKLIN
47. MAGUIRE
48. ~~MESSNER~~
49. ~~MORRIS~~
50. ~~NEWMAN~~
51. ~~PANIZZA~~
52. ~~PARER~~
53. PATTERSON
54. POWELL
55. ~~PUPLICK~~
56. ~~RAY~~
57. ~~REID~~ (Teller)
58. REYNOLDS
59. RICHARDSON
60. ~~RYAN~~
61. SANDERS
62. ~~SCHACHT~~
63. ~~SHEIL~~
64. ~~SHORT~~
65. SIBRAA
66. ~~STONE~~
67. ~~TAMBLING~~
68. ~~TATE~~
69. ~~TEAGUE~~
70. VALLENTINE
71. ~~VANSTONE~~
72. WALSH
73. ~~WALTERS~~
74. ~~WATSON~~
75. WOOD
76. ~~ZAKHAROV~~

Ayes 9

Noes 55

TELLER FOR THE NOES–SENATOR Mal Reid

SENATE

198 7

14th day of December

3

Question, Petroleum Resource Rent Tax Assessment Bill 1987 + related Bills Bills be read 2°

Senate Committee

SENATORS – **AYES**

1. ALSTON
2. ARCHER
~~3. AULICH~~
4. BAUME, Michael
5. BAUME, Peter
6. BEAHAN
7. BISHOP
8. BJELKE-PETERSEN
~~9. BLACK~~
~~10. BOLKUS~~
11. BOSWELL
12. BROWNHILL
~~13. BURNS~~
14. BUTTON
15. CALVERT
16. CHANEY
17. CHAPMAN
~~18. CHILDS~~
~~19. CONTER~~
~~20. COLLINS~~
~~21. COLSTON~~
~~22. COOK~~
~~23. COONEY~~
~~24. COULTER~~
25. CRICHTON-BROWNE
~~26. CROWLEY~~
~~27. DEVEREUX~~
~~28. DEVLIN~~
29. DURACK
~~30. EVANS~~
~~31. FORBMAN~~
~~32. GIETZELT~~
~~33. GILES~~
~~34. HAINES~~
35. HAMER
36. HARRADINE
37. HILL
~~38. JENKINS~~
~~39. JONES~~
40. KNOWLES
41. LEWIS
42. MacGIBBON
43. McGAURAN (Teller)
~~44. McKIERNAN~~
~~45. McLEAN~~
~~46. MACKLIN~~
~~47. MAGUIRE~~
48. MESSNER
~~49. MORRIS~~
50. NEWMAN
51. PANIZZA
52. PARER
53. PATTERSON
~~54. POWELL~~
55. PUPLICK
~~56. RAY~~
57. REID
58. REYNOLDS
~~59. RICHARDSON~~
~~60. RYAN~~
~~61. SANDERS~~
~~62. SCHACHT~~
63. SHEIL
64. SHORT
~~65. SIBRAA~~
66. STONE
67. TAMBLING
~~68. TATE~~
69. TEAGUE
~~70. VALLENTINE~~
71. VANSTONE
~~72. WALSH~~
73. WALTERS
74. WATSON
~~75. WOOD~~
~~76. ZAKHAROV~~

Ayes 38

Noes 32

TELLER FOR THE AYES—SENATOR

SENATE

198 7

14 day of December

3

3

Question, Petroleum Resource Rent Tax Assessment Bill 1987 T 3 Bills That the Bills be now read 2 ~~a amendment proposed by Senator Reid that the amendment be agreed to~~

Senate

~~Committee~~

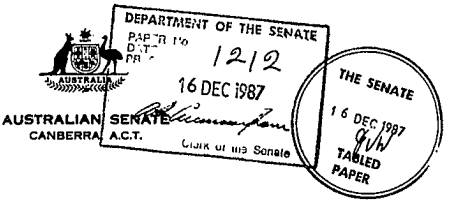
SENATORS - **NOES**

1. ~~ALSTON~~
2. ~~ARCHER~~
3. AULICH
4. ~~BAUME~~, Michael
5. ~~BAUME~~, Peter
6. BEAHAN
7. BISHOP
8. ~~BJELKE-PETERSEN~~
9. BLACK
10. BOLKUS
11. ~~BOSWELL~~
12. ~~BROWNHILL~~
13. BURNS
14. BUTTON
15. ~~CALVERT~~
16. ~~CHANEY~~
17. ~~CHAPMAN~~
18. CHILDS
19. COATES
20. COLLINS
21. COLSTON
22. COOK
23. COONEY
24. COULTER
25. ~~CRICHTON-BROWNE~~
26. CROWLEY
27. DEVEREUX
28. DEVLIN
29. ~~DURACK~~
30. EVANS
31. FOREMAN
32. GIETZELT
33. GILES
34. HAINES
35. ~~HAMER~~
36. ~~HARRADINE~~
37. ~~HILL~~
38. JENKINS
39. JONES
40. ~~KNOWLES~~
41. ~~LEWIS~~
42. ~~MacGIBBON~~
43. McGAURAN
44. McKIERNAN
45. McLEAN
46. MACKLIN
47. MAGUIRE
48. ~~MESSNER~~
49. MORRIS
50. ~~NEWMAN~~
51. ~~PANIZZA~~
52. ~~PARER~~
53. PATTERSON
54. POWELL
55. ~~PUPLICK~~
56. RAY
57. ~~REID~~ Zelles
58. REYNOLDS
59. RICHARDSON
60. RYAN
61. SANDERS
62. SCHACHT
63. ~~SHELL~~
64. ~~SHORT~~
65. SIBRAA
66. ~~STONE~~
67. ~~TAMBLING~~
68. TATE
69. ~~TEAGUE~~
70. VALLENTINE
71. ~~VANSTONE~~
72. WALSH
73. ~~WALTERS~~
74. ~~WATSON~~
75. WOOD
76. ZAKHAROV

Ayes, 38

Noes, 32

TELLER FOR THE NOES - SENATOR G.R. Reid



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1987

16 December 1987

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

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EIGHTEENTH REPORT

OF 1987

16 December 1987

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney, Chairman
Senator D. Brownhill, Deputy Chairman
Senator M. Beahan
Senator R.A. Crowley
Senator K. Patterson
Senator J.F. Powell

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 insufficiently defined administrative powers;

(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, nowithstanding that such proposed law, document or information has not been presented to Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1987

The Committee has the honour to present its Eighteenth Report of 1987 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 Standing Order 36AAA:

Extradition Bill 1987

War Crimes Amendment Bill 1987

EXTRADITION BILL 1987

This Bill was introduced into the House of Representatives on the 28 October 1987 by the Attorney-General.

The Bill consolidates Australia's extradition laws by combining the operation of the Extradition (Commonwealth Countries) Act 1966 and the Extradition (Foreign States) Act 1966. The consolidation process involves the elimination of unnecessary duplication, the removal of inconsistencies, the remedying of proven deficiencies and follows an exhaustive review of the current Acts.

In Alert Digest No.14 of 1987 (4 November 1987), the Committee drew attention to the following clauses of the Bill:

Clause 19 - Reversal of the onus of proof

Clause 19 of the Bill sets out certain requirements of eligibility for extradition which are to be determined by a magistrate. Subclause 19(2) would, inter alia, place upon a person eligible for surrender in relation to an extradition offence (for which surrender of the person is sought by any extradition country) the burden of proving that the offence for which extradition is sought is of a political or similar nature.

In its discussions on provisions which place the burden of proof of matters on a person, the Committee has previously suggested that the imposition of an evidential onus (that is, the onus of adducing evidence of the existence of a defence) on a person should be restricted to cases where the accused may be presumed to have peculiar knowledge of the facts in issue in a matter.

In the case of paragraph 19(2)(d) of the Bill, a person whose extradition is sought has to establish to the satisfaction of a magistrate that there are substantial grounds for believing that there is an 'extradition objection', which includes a number of

possible considerations affecting personal rights. It could be argued that it should be up to the country seeking the person's extradition should carry the burden of proving that a person whose extradition is sought does not come within an 'extradition objection'.

As the Attorney-General pointed out in the Second Reading Speech, the Bill seeks to clarify a difficult area of law when offences which exist in other jurisdictions do not exist in Australia, and *vice versa*. The Committee noted the intentional limitations imposed on political offences, so as to ensure that terrorist conduct is not used as an extradition objection.

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

The Attorney-General has responded to the Committee's comments as follows:

> 'It is difficult, in my opinion, to equate the onus of raising (and establishing) a substantive defence to a criminal charge with the onus placed upon a person by this provision of the Bill. Extradition objections are creatures peculiar to the extradition process and are designed to ensure that a person can put to the proper authorities in the requested country compelling reasons why, in all the circumstances, he or she should not be sent to stand trial in another country.
>
> For example, a person charged with murder in Australia could never raise as a defence the argument that the motivation for committing the offence was political or that the motivation behind the charge was political. Thus the political offence exception has no parallel in our domestic criminal justice system.

Having drawn the fundamental distinction between defences and extradition objections may I draw to your attention the fact that paragraph 19(2)(d) expresses what is currently the law. In a number of cases the courts have held that it is for the person whose extradition is sought to raise and establish the existence of matters which affect eligibility to be surrendered. For example in Daemar v. Parker [(1975) 7 ALR 564] the Supreme Court of New South Wales held that the fugitive must raise and establish matters which can operate to preclude surrender. Similarly, in Commonwealth of Australia v. Riley [(1984) 57 ALR 249 at 259] the Federal Court held that the onus of showing that the fugitive had, in respect of the same offence, been the subject of a prior pardon, acquittal or punishment lay with the fugitive. That the political offence exception is a matter to be proved by the fugitive was decided by the Queen's Bench Division in R. v. Governor f Brixton Prison ex parte Kolczynsky [1955] QB 540 at pp 549-550. Paragraph 19(2)(d) is included simply because the Bill is intended to codify the law as to extradition from Australia.

You suggest that it could be argued that the requesting country should negative the existence of any extradition objection. In my opinion this suggestion is unworkable. For instance, the question whether or not an offence is an offence of a political character is determined by reference to the motivation of the accused. Motivation for the commission of an offence is a matter solely within the knowledge of the accused. Similarly, prior pardon, acquittal or service of sentence is a matter peculiarly within the knowledge of the person sought. It would be extremely difficult, if not impossible, for the requesting country to negative in anticipation every possible extradition objection which could be raised by a fugitive.'

The Committee thanks the Attorney for this response.

Clause 45 - Retrospectivity

Clause 45 of the Bill creates the new offence under subclause 45(1) of being an Australian citizen and engaging overseas in conduct which would, if it occurred in Australia, have constituted an offence.

Subclause 45(2) will mean that any offence under clause 45(1) is to be retrospective, so that a citizen of Australian may now be charged in Australia with an offence which, at the place and time it was done, was lawful according to both Australian and foreign law.

The Committee drew the clause to the attention of the Senate in that, by making the provision of clause 45 retrospective, it may be considered to trespass unduly on personal rights and liberties.

The Attorney-General has responded to the Committee's comments as follows:

> 'Turning now to the Committee's comments on retrospectivity, I note that sub-clause 45(2) has the effect of allowing Australian courts to hear and determine criminal cases where the criminal conduct allegedly occurred outside Australia prior to the coming into force of this legislation. Although sub-clause (1) creates a new federal offence it does so by making punishable in Australia conduct which prior to this legislation was not so punishable merely because it took place outside the jurisdiction. Paragraph (d) of sub-clause (1) specifically requires that the conduct must, at the time it occurred, have been conduct which would have been punishable had it taken place in Australia at the time of the alleged commission of the offence.

It is particularly important to note also that the conduct must have been proscribed by the law of the country seeking extradition at the time it was engaged in. That this is the case will be determined by the Magistrate when he hears the extradition request. Section 45 cannot, of course, have any operation unless the magistrate has committed the person to custody to await the issue of the Attorney-General's warrants of surender, that is, unless the magistrate has determined that the person is eligible to be surrendered.

With respect, I think the Committee's comment that an Australian citizen "may be charged in Australia with an offence which at the time and place it was done was lawful according to both Australian and foreign law" is wrong. Conduct of the type engaged in must have been punishable in both places at the time it was done before section 45 can be relied upon.

The reason for giving the section a retrospective operation was to enable Australia to refuse extradition on the basis of citizenship from the time the legislation commences. without sub-clause (2) Australia would, unless it was to create a haven for Australian criminals, in practical terms be unable to refuse to extradite on the basis of citizenship alone any citizen accused of an offence committed abroad before the commencement date. Thus the benefit of the section would not fall on Australia citizens for some years.

Although the mechanism used is the creation of a new offence, the practical reality is that the type of conduct to which the extradition request refers must be proscribed but would not have been within the jurisdiction of Australian courts because of the traditional territorial concepts of the common law criminal justice system. One could, for example, argue that what is created is a retrospective jurisdiction rather than a retrospective offence.'

The Committee thanks the Attorney for this detailed and complete response. The Committee acknowleges that the explanation satisfies its concerns about the Bill and has no further comment to make.

WAR CRIMES AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 28 October 1987 by the Attorney-General.

The Bill proposes amendments to the War Crimes Act 1945 to provide for the prosecution of Australian citizens or persons resident in Australia alleged to have committed war crimes. The amendments will apply the Act to war crimes committed in the course of the World War 2, whether in Australia or overseas, by any person.

It also abolishes trials for war crimes by Military Tribunal, providing instead for their trial by civil courts. For an act committed overseas to be a war crime, it must have been such that if it had occurred in Australia, it would have been an offence against Australian criminal law at that time and in addition must be shown to be linked to a war or conflict in the manner set out in the Bill. Although acts that satisfy these tests would be war crimes at international law, Australian courts will not be required to apply international law to determine whether a war crime has been committed.

In Alert Digest No.14 of 1987 (4 November 1987), the Committee drew attention to the following clause of the Bill:

Clause 6 - Retrospectivity

All of the amendments to be made by the Bill are retrospective to the period of the Second World War. Clause 6(3) creates an offence of doing something which, at the time and in the place that it was done, might not have been contrary to the law then in force. Subclause 6(4) creates the wholly new offence of

deportation or internment, and subclause 6(6) makes it clear that the legality of any act, by the law in force at the place where it was done, shall be disregarded. The clause apparently would permit (for instance) the prosecution of a person who was then a member of the Australian Armed Forces for inflicting grievous bodily harm on another member of the Australian Forces in England in 1940. There is no express provision in the Bill to prevent such a prosecution in the event of the accused having (again for example) already been tried for such an offence in England in 1940.

The Committee was particularly concerned at the apparently unprecedented extent and number of possible retrospective offences which may be introduced by this Bill. The Committee accordingly drew clause 6 of the Bill to the attention of the Senate in that such a retrospective provision may be considered to trespass unduly on personal rights and liberties.

The Attorney has responded to the Committee's comments as follows:

> 'The Bill does not create offences retrospectively. The Nuremberg Tribunal had no difficulty in assuming that war crimes and crimes against humanity in the narrow sense or the Nuremberg Charter were crimes under customary international law at the time the acts were committed. These crimes, defined in Article 6(b) of the Charter, included but were not limited to murder, ill-treatment of deportation to slave labour camps or for any other purpose.
>
> Further, Articles 46, 50, 52, and 56 of the Hague Convention of 1907 and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929 were recognised by the Tribunal as embodying international law already existing in relation to war crimes. These instruments were separate from the war crimes recognised in Article 6 (b) of the Charter. Their separate existence confirms that many of these crimes were already recognised as war crimes at least as early as 1907.

The Bill simply extends the jurisdicition of Australian civil courts to try recognised war crimes that were committed during the period of World War 2 (whether or not occurring in or outside Australia) by persons now citizens or residents of Australia.

A person who was then a member of the Australian Armed Forces who inflicted grievous bodily harm on another member of the Australian Forces in england in 1940, as in the Committee's example, would not be liable to prosecution under the Bill. The Bill provides that a serious crime (such as murder, manslaughter or grievous bodily harm) constitutes a war crime only if it was committed in the course of hostilities in a war or occupation. A serious crime is not committed in the course of such hostilities merely because the crime is only incidentally or remotely connected with the hostilities or occupation.

The Government has made a conscious decision that the Bill contain no provision against double jeopardy. A blanket prohibition on the 'retrial' of any person, regardless of the nature of the forum, its impartiality, and its concern with the merits of a prosecution and the seriousness of the offence, would be contrary to the interests of justice. The recognition of 'show trials' as a bar to further impartial proceedings represents an unacceptable erosion of our responsibilities in this area. Of course, should a case arise where a person has been dealt with to finality by a just tribunal anywhere in the world for the act alleged to constitute an offence against the War Crimes Act as proposed to be amended, the matter will be dealt with by an appropriate exercise of prosecutorial discretion.'

The Committee notes the Attorney's detailed response.

The Committee notes that aspects of the Bill were referred to the Senate Standing Committee on Legal and Constitutional Affairs on 15 December 1987 for inquiry and report by the first sitting day of sitting in 1988.