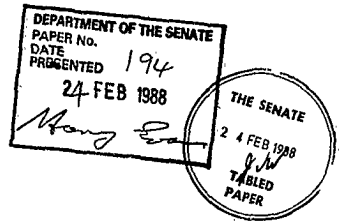

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1988

24 FEBRUARY 1988

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. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

(2) 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 1988

The Committee has the honour to present its First Report of 1988 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 (Ownership and Control) Bill (No.3) 1987

Child Support Bill 1987

Community Services and Health Legislation Amendment Act 1987

Student Assistance Legislation Amendment Bill 1987

BROADCASTING (OWNERSHIP AND CONTROL) BILL (NO.3) 1987

This Bill was introduced into the Senate on 10 December 1987 by the Minister for Transport and Communications.

The Bill provides for a major new package of commercial radio ownership rules. The rules implement the policy announced on 28 October 1987.

The Bill also puts into legislative form the results of the review of ownership limits for commercial radio and effects of the review of cross-media ownership in the light of revised rules for the ownership and control of commercial radio licenses.

In Alert Digest No.18 of 1987 the Committee drew attention to the following clauses of the Bill:

Clause 4 - Trespass on personal rights and liberties

Clause 4 of the Bill would insert a new subsection 89X(3) in the Broadcasting Act 1942 (the Act) which would create a criminal offence of strict liability in that a person might be liable under the section despite having no knowledge of the falsity of a document. The common, almost invariable form in which such offences are cast is for a person to be liable only if he or she knowingly or recklessly makes a false or misleading statement to bodies such as the Broadcasting Tribunal.

The Committee drew the clause, and in particular proposed subsection 89X(3) to the attention of Senators in that, in respect of its apparent creation of an offence of strict liability, it may be considered to trespass unduly on personal rights and liberties.

The Minister for Transport and Communication has responded to the Committee's comments and noted that, as the proposed section 89X was a consolidation of three existing sections in the Act (sections 90C, 92JA and 92W), the Government's intention is that the proposed clause is 'policy neutral'.

The Minister also advised the Committee:

> 'It was not the Government's intention to make substantive changes to the enforcement provisions of the Principal Act in this Bill. The enforcement provisions are currently being examined as part of my Department's review of broadcasting legislation. The sanctions available to the Australian Broadcasting Tribunal are also being examined by the House of Representatives Standing Committee on Transport, Communications and Infrastructure. In these circumstances I suggest that consideration of possible changes to proposed new section 89X(3) of the Broadcasting Act should be postponed.'

The Committee thanks the Minister for his response.

CHILD SUPPORT BILL 1987

This Bill was introduced into the House of Representatives on 9 December 1987 by the Minister for Social Security.

The Bill is the centre-piece of the Government's Child Support Scheme.

The Bill sets up the first stage of the legislative scheme to ensure that parents who have the capacity to pay do not abandon the financial responsibility to support their children to the Social Security system.

In Alert Digest No.18 of 1987 (16 December 1987), the Committee drew attention to the following clauses of the Bill:

Clause 4 - 'Henry VIII' Clause

The clause would enact subsection 4(1) which defines 'income tested pension'. The definition in turn relies on the definition of that phrase inserted in the Family Law Act by the amendments to that Act recently before the Parliament. The proposed provision in the Family Law Act would in turn define the phrase 'income tested pension' in regulations. The Committee commented on this point in its report on the Family Law Amendment Bill (Fourteenth Report of 1987), and draws the provision to the attention of Senators under principle 1(a)(iv), in that it may be regarded as an inappropriate delegation of legislative power.

The Minister for Social Security has provided a comprehensive and detailed response to the Committee's comments. The response provides both a statement of general policy on the reason for adopting the approach taken in drafting the Bill, as well as a specific comment on these clauses discussed. The relevant part of the Minister's response regarding clause 4 is reproduced for the information of the Senate:

> 'The receipt of an income tested pension, benefit or allowance is a significant factor in determining a person's entitlement to participate in the Child Support Scheme. Legal practitioners, accountants, officers of the Taxation Office and the Department of Social Security and the general public will need to be able to find out which pensions, allowances or benefits are in fact income tested. A list should therefore be readily accessible. To include such a list in legislation would be impracticable given the frequent variations to the legislative provisions or administrative guidelines provisions governing pensions, allowances and benefits.
>
> This fact of the frequent variation of the legislation and guidelines concerning pensions, allowances and benefits also means that any more detailed definition of 'income tested pension, benefit or 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 the regulations in the Family Law Act to list the current income tested pensions, benefits and allowances relevant to this Bill.
>
> 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 Heritage Protection Amendment Act 1987, and the definitions of 'proceeds of crime' and of 'narcotic substance' in the Proceeds of Crime Act 1987.'

The Committee notes that this clause is similar in wording to a provision in the Family Law Amendment Bill 1987. The Committee's comment on that Bill (in its Fourteenth Report of 1987) noted that the Committee found merit with the explanation provided by the Attorney-General, on that occasion. The Committee thanks the Minister for his response and draws it to the Senate's attention.

Clause 19 - 'Henry VIII' clause

Subclause 19(1) may be considered to be a 'Henry VIII' clause in that it would, in its effect, allow for amendment of proposed clauses 17 and 18 by later regulation. Since the principal aim of the Bill is the enforcement of registrable maintenance liabilities, it may be suggested that subclause 19(1), which appears to permit the exclusion of some liabilities, by later regulation is a 'Henry VIII' clause. As such it is drawn to the attention of Senators under principle 1(a)(iv) in that it may be regarded as an inappropriate delegation of legislative power.

The Minister has responded to the Committee's comment by noting that the clause was drafted in such a form with the primary aim of facilitating the administration of the scheme introduced by the Bill, particularly in its early stages. The Minister stated:

'As explained in the explanatory memorandum notes of clause 19, it is intended that the Registrar will collect maintenance amounts specified in maintenance orders issued to couples who separate after the date the Bill comes into effect and issued to cover children born after that date where the parents have not lived together. The Registrar will also be able to collect orders issued to people in receipt of Social Security and Veterans' pensions, benefits and allowances no matter what date they separated. In addition the Registrar will collect maintenance liabilities which are lodged for collection by agencies in the States and Territories as the functions of those agencies are taken over by the Commonwealth collection agency. It is envisaged that State collection agency functions will be taken over in a staged way over the next two years.'

The Committee thanks the Minister for this response. The Committee has no further comment on the clause.

Clause 61 - Power of search, entry and seizure

Subclause 61(1) would permit an authorised officer to enter land or premises without a judicially sanctioned search warrant, but merely on the authority of the Child Support Registrar. The clause is similar to clause 9 of the Petroleum Prices (Excise) Bill 1987, on which the Committee commented in its Sixteenth Report of 1987 (9 December 1987). The Committee notes provisions of this sort are argued to be 'appropriate' when a Bill is deemed to be a revenue measure. In view of the provisions clause 123 of the Bill, that justification appeared not to be available in relation to subclause 61(1) of the Bill.

The clause was drawn to the Senate's attention in that, by providing for the issue of a search warrant by other than a judicial official, such as a judge, 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 comment on the clause by noting that, contrary to the view expressed by the Committee, the Bill should be construed as a revenue measure. The relevant parts of the Minister's response are reproduced for Senators' information:

> 'It [the Bill] is but one piece of legislation in a package of Bills which, when taken together, will have a considerable impact on Government expenditures and significantly improve the standard of living of custodial parents and their children.
>
> The Commissioner of Taxation, as Registrar, has the general administration of the Bill. In 1984, the penalty and offence provisions of the various laws administered by the Commissioner of Taxation were standardised in the Taxation Administration Act 1953 - that Act provides that a 'taxation law' means that Act or any other of which the Commissioner has the general administration. One effect of that is the general application of that Act's various offences and penalties applicable to individuals with obligations and duties under those Acts.
>
> It was not intended, and the Bill reflects this, to apply the same level of penalties and offences to individuals under the Bill as applied generally under taxation laws. Clause 123 simple allowed the draftsman the flexibility to provide for lower penalties for individuals as the Bill could not be construed as a taxation law for the purposes of the Taxation Administration Act. ...
>
> It is also important to consider the background of access provisions of the kind provided for by clause 61.
>
> Acts of which the Commissioner has the general administration have, almost without exception, provisions which enable officers authorised by the Commissioner to have full and free access to land or premises for the purposes of the administration of those Acts. Drafting weaknesses were brought to light in those provisions in O'Reilly v State Bank of Victoria Commissioners (1983) 153CLR1. Put simply, the provisions were virtually ineffective. Accordingly, a model provision was drafted and incorporated in 1985 in the Sales Tax Procedure Act 1934. The model provision - section 12E of that Act - ensured the Commissioner's officers reasonable access for the purposes of administering that Act. That provision has since been used to improve existing access provisions in the Fringe Benefits Tax Assessment Act 1986 and, of course, the Income Tax Assessment Act 1936. These similar provisions in laws administered by the Commissioner do not rely on a judicially sanctioned search warrant for their effectiveness nor has there been any evidence of their abuse in their present form.

> There is, therefore, an element - one which I would see as important - of consistency between the access provision in this Bill and provisions in other laws administered by the Commissioner of Taxation.
>
> Moreover it must be noted that clause 61 may only be used for the purposes of administering the automatic withholding provisions of the Bill. In this regard, it would prove administratively burdensome to require a judicially sanctioned search warrant in that clause.'

The Minister also pointed out that as inspectors under Taxation legislation presently have the power to visit employers for the purposes of existing compliance schemes. The Minister suggested that:

> 'If the Senate were to act on the concerns expressed in the alert, these same inspectors would require a judicially sanctioned search warrant to examine the same records for the purposes of the automatic withholding provisions of the Bill. At best, this would be a curious result.'

The Committee suggests that, with respect, whilst the application of a number of penalty and offence provisions presently in the Taxation Administration Act to the scheme established by the Bill may facilitate administration of the Act by the Commissioner, it does not mean that the legislation may necessarily be construed as revenue legislation.

The Committee has two further points to make in this regard. The first is that the fact that legislation which fails to conform with the Committee's guidelines, and is legislation in respect of revenue or taxation, does not of itself render such legislation above criticism. Secondly, the 'labelling' of a particular piece of legislation as revenue or taxation legislation does not automatically make it such legislation if its actual character is, in fact, otherwise.

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

Clause 119 - reversal of onus of proof

Subclause 119(2) would apparently reverse the persuasive onus of proof in a criminal prosecution. It is not obvious as to why such a provision is necessary. The Committee notes that it is the virtually universal practice that, in creating offences relating to false or misleading statements, a person will be liable only if he or she made the statement knowingly or recklessly. It is therefore difficult to see why this provision should be so different.

The provision was drawn to the attention of Senators in that it may be considered to be in breach of principle 1(a)(i) and trespass unduly on personal rights and liberties.

The Minister advised the Committee in his response that the overriding requirement of the Bill was to support the collection functions of the Taxation Office by including in the Bill offence and penalty provisions of the Taxation Administration Act. The Minister noted that the provisions were selectively carried over to the Bill, and in some cases (including clause 119) the penalty provided for upon conviction of the offence is lower than in the equivalent section of the Taxation Administration Act.

The Minister also noted in his response:

> '... clause 119 is identical in its language but not as severe in its effect as the equivalent provision in the Taxation Administration Act. Both operate as a reversal of the onus of proof.'

The Committee remains concerned at the effect of the clause and continues to draw it to the Senate's attention in that it may be considered to be in breach of principle 1(a)(i) and trespass unduly on personal rights and liberties.

COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT ACT 1987

This Act was introduced into the House of Representatives on 4 November 1987 by the Minister for Community Services and Health. The Bill passed through the Parliament and was assented to on 16 December 1987.

The Act is omnibus legislation and amends 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 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 (15 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 attention to clause 30 in that it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i).

The Minister responded to the Committee's comments and noted:

> 'I am grateful for the views expressed by the Committee, but I understand that the question of the issuing of search warrants is at present under examination by the Review of Commonwealth Criminal Law, being conducted by the Rt. Hon. Sir Harry Gibbs, G.C.M.G., K.B.E. Discussion Paper No 4 - 'Search Warrants' - issued by the Review in September 1987 specifically deals with the appropriate issuing authority for search warrants ... The Government, on the advice of the Attorney-General, will be able to decide whether the legal policy which currently exists should be altered in some manner.'

Having had its attention drawn to the above Discussion Paper the Committee notes for the information of the Senate that the relevant paragraph of the Paper poses a number of questions, for comment particularly whether it is desirable persons authorised to grant such warrants should be limited to judicial officers such as a judge.

The Committee, as permitted by its terms of reference, draws the attention of the Senate to the section as the Committee has consistently maintained that search warrants should be issued by judicial officers only and not by Justices of the Peace.

STUDENT ASSISTANCE LEGISLATION AMENDMENT BILL 1987

This Bill was introduced into the House of Representatives on 18 November 1987 by the Minister for Employment Services and Youth Affairs.

The Bill seeks to amend the Student Assistance Act 1973 to include a package of measures to facilitate the prevention of fraud and the recovery of overpayments under the AUSTUDY Scheme and the Post-graduate Awards Scheme.

In Alert Digest No.16 of 1987 the Committee drew attention to several matters in clause 6 of the Bill:

Clause 6 - Rights of appeal

Proposed new section 31C would give the Minister an unfettered discretion to waive the right of recovery of overpayments. Although the explanatory memorandum suggests that this provision is similar to section 186 of the Social Security Act 1947, that proposition may be questioned. Under that Act, decisions of the Minister are subject to a series of reviews, whereas under the Student Assistance Act it is only decisions of authorised persons (and not decisions of the Minister) that are subject to review.

Accordingly the Committee drew the attention of Senators to clause 6 under principle 1(a)(iii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon a non-reviewable administrative decision.

In responding to the Committee's comments the Minister for Employment, Education and Training has pointed out that the Student Assistance Act provides for appeal to the Student Assistance Review Tribunal and, ultimately, the Administrative Appeals Tribunal. These bodies may reject such an appeal, uphold the appeal so that no repayment is required, or may vary the amount of the overpayment. The Minister also noted that any decision to write off or waive an overpayment of allowance paid under the Act should desirably be a discretionary decision within the authority of the Minister or the Minister's delegate.

The Minister also noted that decisions not to waive or write off an overpayment would be subject to consideration by the Ombudsman or by the courts under the Administrative Decisions (Judicial Review) Act.

Clause 6 - Trespass on personal rights and liberties

Proposed new subsections 31D(1) and paragraph 31D(2)(b) are very wide-ranging provisions, which would apparently permit an authorised person to obtain information about a recipient of student assistance. While the power is to be exercised 'for the purposes of the Act', it may be that a person from whom information was required would not necessarily know what those purposes are, or would be aware of his or her rights to require further justification from the authorised person before divulging the information.

As the clause would permit an authorised person wide powers of inquiry into a person's affairs the Committee drew the clause to the attention of Senators under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

The Minister had advised the Committee that the provision in subclause 31D(1) and paragraph 31D(2)(b)

> '... are modified to the extent that clause 31E prevents information obtained under proposed section 31D being used in criminal proceedings against the person ...'.

The Minister has advised the Committee that the provisions are modelled closely on provisions of the Social Security Act.

The Committee thanks the Minister for his response.

Clause 6 - Self incrimination

Clause 6 would insert a new section 31E in the Act which would abrogate a person's protection against self-incrimination. The clause is not in the 'use-derivative - use-indemnity' form since it does not prevent the use of information obtained <u>indirectly</u> from the documents produced being used in evidence.

'Use-derivative - use-indemnity' clauses are aimed at ensuring that, not only is the actual incriminating statement or documents inadmissible in criminal proceedings (other than those related to the failure to answer a question or produce a document on the provision of false and 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, are to be similarly inadmissible. As the clause would apparently abrogate a person's protection against self incrimination, the Committee drew the clause to attention of Senators under principle 1(a)(i) of its principles in that it may be considered to trespass unduly on personal rights and liberties.

The Minister responded to the Committee's comments as follows:

> 'With regard to proposed section 31E, I note that this is based on the corresponding section of the Social Security Act, section 165. Although I appreciate the Committee's concerns on this point, I consider it desirable for the Student Assistance Act to follow the provisions of the Social Security Act in this respect.'

The Committee thanks the Minister for his response.

The Committee does not accept the proposition that, because a particular piece of legislation is based on precedent, the legislation is thereby above criticism. If it is in breach of the Committee's guidelines then it will be criticised notwithstanding it is based on precedent. In the absence of a good and compelling reason it should be commented upon adversely.

The proposed section is in the 'use-derivative' rather than the 'use-derivative - use-idemnity' form. The Committee has noted in its last annual report that it would draw the Senate's attention under principle 1(a)(i) to such clauses.

Accordingly the clause is again drawn to the attention of the Senate in that it may be considered to be in breach of principle 1(a)(i) and to trespass unduly on personal rights and liberties.

Barney Cooney
(Chairman)

24 February 1988

AUSTRALIAN SENATE
CANBERRA, A.C.T.

DEPARTMENT OF THE SENATE
PAPER No. 286
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16 MAR 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF 1988

16 MARCH 1988

THE SENATE
16 MAR 1988
TABLED PAPER

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF 1988

The Committee has the honour to present its Second Report of 1988 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:

Australian Airlines (Conversion to Public Company) Bill 1987

AUSTRALIAN AIRLINES (CONVERSION TO PUBLIC COMPANY) BILL 1987

This Bill was introduced into the Senate on 16 December 1987 by the Minister for Transport and Communications.

The aim of the Bill is to:

- establish Australian Airlines (the Australian National Airlines Commission) as a public company;
- provide for the re-organisation of the airline into a more appropriate commercial structure prior to incorporation; and
- remove certain statutory controls on the airline's operations.

The Bill will establish the airline as a public company by providing for the Australian Airlines Commission (the Commission) to be deemed to be a company incorporated in the ACT under the Companies Act 1981 on a day to be proclaimed. It is anticipated that the commencing day of the company (the transition day) will be 31 March 1988.

All shares in the deemed company will be held either directly by the Commonwealth, or by a Commonwealth-owned holding company.

The Bill also provides, inter alia, for the removal of existing statutory controls on the airline which are embodied in the Australian National Airlines Act 1945, through the repeal of most of that Act. The removal of these statutory controls will occur at the time of deeming the airline to be a company. Any controls which the Government decides should remain over the airline will be specified in either the Memorandum and Articles of the new company or in the Guidelines to Directors of the new company.

In Alert Digest No.1 of 1988 (24 February 1988) the Committee commented as follows on the Bill:

General Comment

The Committee draws the Senate's attention to the fact that there is no requirement in the Bill that the annual reports from new company be tabled in the Parliament.

As the provisions of the Companies Act are to apply to the new company, it will be required to prepare an annual report which must include detailed financial statements, and which must be lodged with the ACT Corporate Affairs Commission.

Under the Australian National Airlines Act 1945 (section 40) the Commission is currently obliged to prepare an annual report of its activities, including audited financial statements and forward it to the Minister within six months of the end of the financial year. The report must be tabled in each House by the Minister within fifteen sitting days of its receipt.

The Bill would repeal section 40 of the Australian National Airlines Act 1945, and makes no provision for the tabling of the new company's annual report in the Parliament.

The Committee notes that it has been a primary concern of the Senate and its Committees (in particular the Standing Committee on Finance and Government Operations) that all Commonwealth bodies be obliged to report to the Parliament annually on its activities, including audited financial statements.

The current Policy Guidelines for Commonwealth Statutory Authorities and Government Enterprises (Parl. Paper 333 of 1987) is clear as to the importance of such annual reports:

'An authority's annual report to the responsible Minister, which is required to be tabled in the Parliament, is the centre-piece of its accountability. An essential component of enabling legislation constituting a statutory authority should be a provision requiring the authority to present a report to the responsible Minister, to be tabled in both Houses of Parliament within fifteen sitting days thereafter. In the absence of specific provision, section 34C of the Acts Interpretation Act 1901 requires such a report to be presented to the Minister (no later than six months after the end of each reporting period, usually the financial year) and tabled in both Houses of Parliament (within fifteen sitting days).

In addition to any specific requirements imposed by legislation or requested by the Minister, the report should conform to the Guidelines for the Content, Preparation and Presentation of Annual Reports by Statutory Authorities, tabled in the Senate on 11 November 1982.' (p. 10)

The Committee does not question the decision to convert the Commission to a public company, but draws attention to the present practice regarding the QANTAS annual report. QANTAS Airways Pty. Limited is a company incorporated in Queensland in which all issued shares are held by the Commonwealth. The QANTAS annual report is directed to the Minister for Transport and Communications (representing the Commonwealth). The report is lodged with the Queensland Corporate Affairs Office and is subsequently tabled in the Parliament by the Minister. The report is tabled in Parliament pursuant to convention rather than in compliance with a legislative requirement.

The Committee believes that it should at least be a legislative requirement that annual reports prepared by the new company be tabled in Parliament to ensure that required standards of accountability applicable to Commonwealth bodies are maintained.

The Committee accordingly draws its comment to the attention of the Senate in order that consideration of the Bill may be assisted.

Clause 5 - Insufficiently defined administrative power

The definition of 'authorised person' in clause 5 would permit the Minister to delegate to 'a person' the function of certifying matters under clause 36. By virtue of subclause 36(2), a certificate under that clause is to be conclusive evidence of the facts stated therein. It appears that such a definition would make rights dependent on insufficiently defined administrative powers.

The Committee draws the clause to the attention of the Senate in that it may be considered to be in breach of principle 1(a)(ii) of the terms of reference in that it makes personal rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

Barney Cooney
(Chairman)

16 March 1988

AUSTRALIAN SENATE

DEPARTMENT OF THE SENATE
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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1988

THE SENATE
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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF 1988

The Committee has the honour to present its Third Report of 1988 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:

Conservation Legislation Amendment Bill 1988

Diplomatic and Consular Privileges Amendment Bill 1988

CONSERVATION LEGISLATION AMENDMENT BILL 1988

This Bill was introduced into the Senate on 25 February 1988 by the Minister for Resources.

The Bill clarifies and strengthens the provisions of the World Heritage Properties Conservation Act 1983. The Bill also makes it clear that the Environment Protection (Impact of Proposals) Act 1974 does not apply, and is to be taken never to have applied, to action taken under the World Heritage Act or to the submission by Australia of heritage properties to the Committee for inclusion in the World Heritage List, in accordance with its international obligations under the Convention for the Protection of World Cultural and Natural Heritage.

General Comment

Clause 6 of the Bill would introduce a new section 17A to the World Heritage Properties Conservation Act. The provision allows a duly authorised inspector to enter an eligible place for an eligible purpose. Eligible place includes land and buildings (excluding a dwelling house). Inspectors are empowered to stop, detain, enter and search any vehicle after first either obtaining the consent of the person in charge of the property or vehicle, or obtaining a warrant issued by an eligible Judge. The Judge must be satisfied, on information or oath provided by an inspector, that it is reasonably necessary to enter an eligible place or a vehicle.

Proposed paragraph 17A(4)(c) would allow inspectors to enter land, premises or vehicles without either the consent of the owner or a warrant, if the conditions in subparagraphs 17A(4)(c)(i) and (ii) are satisfied, namely:

(i) the inspector believes on reasonable grounds that it is necessary to enter in order to prevent the concealment, loss or destruction of any thing; and

(ii) the entry is made in circumstances of such seriousness and urgency as to require and justify immediate entry without the consent of the person in charge or the authority of a warrant issued under subsection (5).

The Committee draws to the Senate's attention the fact that an inspector who exercised such powers would, if charged with, or sued for, trespass, have to prove as a fact the matters contained in subparagraph 17A(4)(c)(ii) and not merely his or her reasonable belief therein.

However, the Committee has consistently drawn the Senate's attention to powers of entry and search possessed by officials and inspectors under a variety of Commonwealth legislation. Included among such officials are customs and taxation officers, and inspectors under primary industries legislation. The Committee is concerned to note the grant of powers of search and entry to another group of officials.

Clause 6 - Inappropriate delegation of legislation power

Proposed new subsection 9(1) of the World Heritage Properties Conservation Act may be regarded as an improper delegation of legislative power in that it leaves the determination of acts which are to be unlawful to Regulations.

Notwithstanding that such regulations would be subject to parliamentary scrutiny, it may be observed: (a) that the regulations would come into force on the day of gazettal and (if they were subsequently regarded as improper) would continue in force unless and until disallowed; and (b) that the regulations would not be subject to amendment by either House, but each regulation could only be disallowed or accepted.

Although the proposed provision is similar in effect to existing paragraph 9(1)(h) of the Act (on which the Committee made no comment when the Bill for the World Heritage Properties Conservation Act was before the Senate in 1983 - see First Report of 1983) the Committee notes that, in its original form the clause assumed much less significance than the proposed subsection insofar as the clause as originally drafted, and enacted, prescribed acts which were to be unlawful in some detail.

The Committee draws the clause to the attention of the Senate in that it may be considered to be an inappropriate delegation of legislative power.

The Minister has responded to the Committee's comment and has noted that:

> 'The new subsection is substantially to the same effect as paragraph 9(1)(h) of the Act, which is to be repealed, and paragraphs 10(2)(m) and (11(1)(j), which are not. The regulations conferring protection on the southwest Tasmanian wilderness and Queensland rainforest world heritage areas - Statutory Rules Nos 65 and 67 of 1983 and No 2 of 1988 - were made under the three existing paragraphs.'

The Minister also advised that:

> 'It is not practical to list all acts which may have to be prohibited in respect of the range of properties to which the Act will apply. If attempted, any such list would be long, complex and liable to frequent change. As you will know the High Court pointed out the constitutional ramifications of such a list in the Tasmanian Dam case. Therefore regulations have been used.'

The Minister also drew attention to section 13 of the Act, which allows the Minister to consent to allow the carrying out of acts made unlawful by the regulations, to consult State ministers on the desirability of such consent. Gazettal of such consents, tabling in Parliament, and certain rights of review under the Administrative Decisions (Judicial Review) Act 1977 are also given by the section. This last right may, pursuant to section 13, be exercised so as to allow persons

whose property is affected by such a decision, or can show an interest in the matter to be heard in any review of the Minister's decision.

The Committee thanks the Minister for his response.

The Committee has drawn attention in the past to regulation making powers such as those proposed by the clause. In all such cases the principle simply is that, the Parliament having established a legislative scheme, it should not be left to the Executive to make alteration to that scheme, particularly where it would create criminal offences, by regulation.

On the basis of the Franklin Dam case (Commonwealth v. Tasmania (1983) 158 CLR 1), it is understandable that the Government would seek to prescribe unlawful acts under section 9 of the Act by regulation. The Senate and its Committees may wish to consider the issues raised by creating offences by regulations, rather than by Act, in the light of the position presently prevailing under the Constitution.

The Committee trusts that its comments will assist further consideration of the Bill by Senators.

DIPLOMATIC AND CONSULAR PRIVILEGES AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 17 February 1988 by the Acting Minister for Foreign Affairs and Trade.

The Bill amends both the Diplomatic Privileges and Immunities Act 1967 and the Consular Privileges and Immunities Act 1972 which give legislative effect to the provisions of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations respectively.

The Bill provides that tax imposed under any of the various sales tax acts is not payable in respect of goods intended for the official use, and not resale, of a diplomatic mission or consular post of a prescribed overseas country provided the goods are purchased from a registered sales tax payer.

In Alert Digest No.1 of 1988 (24 February 1988) the Committee made the following comment on the Bill:

Clauses 7 and 8 - non-reviewable decision

Proposed new subsection 10A(2) of the Diplomatic Privileges and Immunities Act 1967, and proposed new section 8A(2) of the Consular Privileges and Immunities Act 1972, would give to the Treasurer an unfettered discretion to determine whether a particular mission or consular post already has sufficient goods of a particular kind. As the proposed subsections stand, a head of mission or consular officer dissatisfied with such a declaration by the Treasurer would be able to challenge that declaration only as to its legality, under the Administrative Decisions (Judicial Review) Act 1977, and not on the merits under the Administrative Appeals Tribunal Act 1975.

While the Explanatory Memorandum to the Bill correctly observes that these provisions are similar to measures already in each of the Acts, the Committee points out that those measures were passed before the Committee was established. Provisions which may have been in force for some time do not render legislation which is in breach of the Committee's principles above criticism. If provisions in a Bill are in breach of those guidelines the Committee will draw the Senate's attention to such matters.

As the clauses would give the Treasurer an apparently unfettered discretion, the Committee draws the attention of Senators to the clauses, as they may be considered to be in breach of principle 1(a)(iii) of the terms of reference in that they may make rights, liberties or obligations unduly dependent upon a non-reviewable decision.

The Minister for Foreign Affairs and Trade has responded by pointing out that the clause will not affect the rights or obligations of Australian citizens and relates only to foreign diplomatic missions and consular posts in Australia. The Minister also noted that any dispute arising from any exercise of the Treasurer's discretion will essentially involve the Government's relationship with, and regulation of, foreign diplomatic and consular missions in Australia. As such, any dispute over a decision by the Treasurer would be a dispute between two sovereign states.

In this regard, the Minister advised:

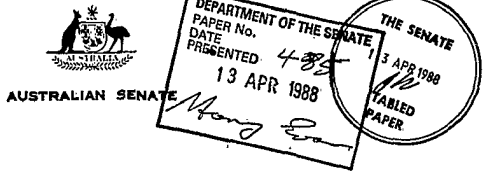
> 'Under international law, disputes between sovereign States are not resolved by resort to the domestic courts or tribunals of one of the States. Rather, the dispute is resolved by a process of consultation and negotiation between the States. Where such consultation and negotiation fails, the matter is then referred either to international arbitration or to the International Court of Justice. In fact the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, to which Australia is a party, specifically sets out the procedures to be followed in resolving disputes involving the interpretation of the Vienna Convention.'

The Minister concluded his comments by noting also that both the Administrative Review Council and the Attorney-General's Department had accepted the validity and applicability of the mechanism for resolving any dispute which may result from a decision by the Treasurer when the Bill for the Act was originally before the Parliament in 1979.

In view of the apparent emphasis placed on the notions of reciprocity and resolution of dispute by consultation in international law the Committee's comments on the clause are answered. The Committee thanks the Minister for his response.

Barney Cooney
(Chairman)

23 March 1988



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF 1988

13 APRIL 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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FOURTH REPORT

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ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF 1988

The Committee has the honour to present its Fourth Report of 1988 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 36AAA:

Textiles, Clothing and Footwear Development Authority Bill 1988

TEXTILES, CLOTHING AND FOOTWEAR DEVELOPMENT AUTHORITY BILL 1988

This Bill was introduced into the Senate on 25 February 1988 by the Minister for Resources.

The Bill proposes the establishment of a Textiles, Clothing and Footwear (TCF) Development Authority to promote the restructuring and revitalisation of the TCF industries so that they can become more efficient and internationally competitive and less dependent on assistance provided by the Commonwealth.

The Committee drew the Senate's attention to the following clauses of the Bill in Alert Digest No. 2 of 1988.

Clause 46 - Powers of officials, Commissioners, etc., of the Authority

In clause 46, the power of the Chairperson of the Authority to summon witnesses is apparently not qualified by a requirement for the time and place specified for the giving of evidence and production of books and documents to be reasonable. The Committee notes that, where such provisions may be necessary in the scheme of such legislation (particularly in areas involving bounty administration), the conferring of unrestricted powers on officials who possess investigative powers is undesirable.

Since by virtue of clause 47 of the Bill a failure to attend carries a considerable penalty, the Committee draws the attention of the Senate to clause 46 in that it may be considered to confer an unrestricted power to summon persons and to be in breach of principle 1(a)(i) and trespass unduly on personal rights and liberties.

The Committee notes that clauses 46 and 47 were omitted from the Bill in the Committee stage of debate on the Bill on 25 March 1988.

Clause 66 - Inappropriate delegation of legislative power

Clause 66 provides that the Authority is empowered to delegate by resolution to an appropriate person, to a member, a member of the Authority's staff or (with the Minister's approval) any other person or body, all or any of the Authority's powers under the Act.

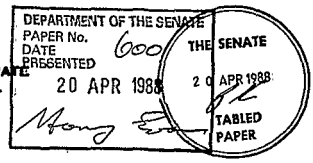
Paragraph 66(1)(c) would allow the Authority to exercise a discretion as to the quality or attributes of the person to whom it might choose to delegate its powers. The Committee has consistently commented adversely on the grant of such a discretion, which imposes no apparent limitation and gives no guidance as to the attributes or qualifications of the person to whom such a delegation may be made.

The clause is accordingly drawn to the attention of the Senate in that it may be considered to be in breach of principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

Barney Cooney
(Chairman)

13 April 1988

AUSTRALIAN SENATE
CANBERRA, A.C.T.



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF 1988

20 APRIL 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF 1988

20 APRIL 1988

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(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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF 1988

The Committee has the honour to present its Fifth Report of 1988 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:

Bounty and Subsidy Legislation Amendment Bill 1988

Statute Law (Miscellaneous Provisions) Bill 1988

BOUNTY AND SUBSIDY LEGISLATION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 16 March 1988 by the Minister for Science, Customs and Small Business, the Minister Representing the Minister for Industry, Technology and Commerce.

This Bill is an omnibus measure which proposes to amend a series of Bounty and Subsidy Acts to give effect to various Government decisions, to clarify some eligibility criteria and to repeal certain expired bounty and subsidy Acts.

The Committee commented on the Bill in Alert Digest No. 3 of 1988 (23 March 1988) as follows:

Clause 2 - Retrospectivity

By virtue of clause 2, various amendments to be made by the Bill will have retrospective effect. In most cases the Committee notes that retrospectivity is either beneficial to possible recipients of a bounty or subsidy, or is a technical drafting change. The one exception is the retrospectivity to be provided for in subclause 2(2), as the bounty on agricultural tractors will have been extinguished as from 15 September 1987. However this amendment is a Budget measure, and it is to be assumed that the manufacturers of such equipment have been aware of this change.

The Minister has noted the Committee's comment and has advised that all known interested parties (i.e. existing Australian tractor manufacturers trading at the relevant time) were sent a telex from the Department on 15 September 1987 advising them of the termination of the bounty scheme from that night.

The Committee thanks the Minister for this advice.

The Committee draws its comments on the clause and the Minister's advice to the Senate's attention for information.

Clause 4 and Schedule 1 - Non-reviewable decision

The amendment to be made to the Bounty (Books) Act 1986 by the insertion of a new subsection 5(8A) may be commented on for two reasons:

(a) the Minister is given an apparently unfettered discretion to determine which books come within the terms of the subsection so that, for instance, if an instrumentality of a State is dissatisfied with the Minister's decision, that instrumentality would be able to challenge the decision only as to legality, under the Administrative Decisions (Judicial Review) Act 1977, and not as to the merits, under the Administrative Appeals Tribunal Act 1975;

(b) the phrase 'instrumentality or authority of the Commonwealth or of a State' used in the subsection is not defined in the Bounty (Books) Act, with the consequence that the Minister may have a further discretion, which may be challenged only as to legality, to determine which bodies fall within the terms of the phrase.

The Committee accordingly drew the proposed amendment to the attention of the Senate in that, by giving an unfettered discretion, it may be considered to breach principle 1(a)(iii) and make rights, liberties and/or obligations unduly dependent upon a non-reviewable decision.

The Minister has responded that he considers the review of the discretion by the Administrative Appeals Tribunal was not provided for justifiable policy reasons.

The Minister gave the Committee two reasons for this view. Firstly, where the organisation 'affected' by the Minister's decision was a Commonwealth instrumentality or authority (which includes a Department of State), and there was a review by the Administrative Appeals Tribunal provided, a situation could arise when a Commonwealth authority, or indeed another Commonwealth Minister (if the affected instrumentality was a Department), could seek to have a decision of another Federal Minister reviewed by the Administrative Appeals Tribunal. The Minister noted that:

> I think it is particularly undesirable to have a situation where one Commonwealth Minister could take another Minister to a body such as the Administrative Appeals Tribunal. I believe the more appropriate place to resolve such disputes is within the machinery of Government itself.

The Minister's second observation was that he considered the Administrative Appeals Tribunal was an inappropriate body to determine inter-governmental disputes between the Commonwealth and a State particularly given that, when there has been an error of law, a State body is able to seek judicial review pursuant to the Administrative Decisions (Judicial Review) Act 1977.

As to the Committee's further comment noted in paragraph (b) above, the Minister advised:

> I note the Committee's further comment on this proposed amendment is that the Minister may have a further unreviewable discretion when making a decision as to what precisely is an instrumentality or authority of the Commonwealth or of a State. Given my view as to the inappropriateness of merit review in the situation outlined above, I consider there would be no useful purpose served in making the decision on whether a specific body falls within the phrase reviewable.

The Committee thanks the Minister for this response and draws it to Senators' attention.

General Comment

The Committee notes that the Bill proposes amendment of subsection 14(2) of the Bounty (Books) Act 1986.

In its Eighth Report of 1987 the Committee was critical of the fact that the Comptroller-General of Customs could amend the minimum amount of bounty as specified by an Act, without the Parliament having the capacity to review or examine the Minister's decision.

The Committee notes that, in accordance with an undertaking given by the Minister, subsection 14(2) will be amended by the Bill so as to provide that any amendment to the minimum claim for bounty will only be made by regulation, consistent with the policy adopted since the Minister's undertaking.

The Committee notes the proposed amendment with approval and thanks the Minister for proposing it in a form recommended by the Committee.

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 1988

This Bill was introduced into the Senate on 25 March 1988 by the Minister for Justice.

The Bill implements, for the last time, 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. It amends 31 different Acts and repeals 10.

General Comment

In the past the Committee has drawn the Senate's attention to Statute Law (Miscellaneous Provisions) Bills [SL (MP) Bills], and has commented on the Bills as they comply with the

Guidelines for SL (MP) Bills tabled in the Senate on 30 May 1985 (see Hansard, 30 May 1985, pp. 2784-5). The Committee particularly notes that the primary guideline for the SL (MP) Bills states that only amendments that 'deal with tidying up, connection and up-dating (including modernisation of style) with routine administration changes or, with the approval of the Prime Minister, with changes of minor policy significance' should be included.

The Guidelines also indicate that lengthy, complex, substantial policy issues (including legal policy issues), or contentious matters (including those related to a contentious matter) should not be included in the Bill. While the question of whether particular amendments comply with the Guidelines is always a matter of judgment, the Committee draws the Senate's attention to amendments to the following Acts:

Australian Capital Territory Supreme Court Act 1933

The proposed amendment to the Act would provide for the appointment of a Master of the Supreme Court who would be empowered to exercise similar powers to those presently exercised by Masters of the State Supreme Courts and relieve the heavy workload pressures on the Judges of the ACT Supreme Court.

While the amendment proposed may not be regarded as contentious and does not involve a substantial policy issues, it might be thought that they border on the lengthy. Whether that is the case is also a matter of judgment. The Committee believes the provision should be brought to the Senate's attention given the powers to be provided.

Australian National University Act 1946

Proposed subsection 15AA(3) appears to be a 'Henry VIII' clause insofar as it would allow the effect of section 15AA to be changed by a University statute. Section 15AA is a provision concerned with the procedure at meetings of the University Council.

The Committee recognises that the people who may exercise the powers under the clause (the Council of the University) and will be affected by its implementation, will be limited to the governing body of the University. However, the Committee considers that 'Henry VIII' clauses should always be drawn to Senators' attention in accordance with the principles set out in Standing Order 36AAA.

Judiciary Act 1903

Section 34 of the Act currently enables a person to appeal as of right to the Full Court of the High Court from a judgment of a Justice or Justices exercising the Court's original jurisdiction.

The proposed amendment of subsection 34(2) will require a person dissatisfied with an interlocutory judgment to obtain the leave of the Court before he or she can appeal to the Full Court.

So far as the Committee can judge, the amendments proposed are within the Guidelines. The proposed amendment to section 34 might be regarded as having some policy significance, but has presumably been approved by the Prime Minister in accordance with the Guidelines.

The Committee also endorses the Government's decision to discontinue Statute Law (Miscellaneous Provisions) Bills and to introduce in future Statute Law Revision Bills and Portfolio

Omnibus Bills as announced by the Minister in the Second Reading Speech for this Bill.

The Committee also notes that, in the course of his Second Reading Speech, the Minister told the Senate that:

> The Government has agreed to new guidelines for the inclusion of matters in portfolio bills which will enable them to include amendments of all legislation within a ministerial portfolio or of related legislation within the portfolio. Major new policy proposals will continue to be implemented, in the first instance, by separate bills.

The Committee believes that any guidelines which are to be applied in determining the content of Portfolio Omnibus Bills should be tabled in the Parliament to allow adequate and appropriate opportunity for examination by all interested Members and Senators. The Committee looks forward to the early tabling of the guidelines for Portfolio Omnibus Bills.

Barney Cooney
(Chairman)

20 April 1988

AUSTRALIAN SENATE

DEPARTMENT OF THE SENATE
PAPER No. 653
DATE PRESENTED
27 APR 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1988

THE SENATE
27 APR 1988
TABLED PAPER

27 APRIL 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1988

27 APRIL 1988

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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Senator B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
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(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

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

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF 1988

The Committee has the honour to present its Sixth Report of 1988 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:

Honey Marketing Bill 1988

Broadcasting (Ownership and Control) Bill 1988

Social Security Amendment Bill 1988

Taxation Laws Amendment Bill (No. 2) 1988

HONEY MARKETING BILL 1988

This Bill was introduced into the House of Representatives on 23 March 1988 by the Minister for Primary Industries and Energy.

The Bill proposes to revise the Australian Honey Board's functions and powers, change the membership provisions and enhance accountability to the industry which provides the Board's funds through levies and an export charge.

In Alert Digest No. 4 of 1988 (13 April 1988), the Committee drew attention to the following clause of the Bill:

Clause 46 - Trespass on personal rights and liberties

Clause 46 provides for a licensee to submit a return, or returns, of information which the Honey Board may require relating to the export of honey. The time limit set for providing such returns is to be 'as the Board specifies'. Subclause 46(2) provides for a penalty of $500 if a licensee fails, without reasonable excuse, to comply with the Board's requirement.

Subclause 46(1) does not specify any limit on the minimum amount of time which the Board may allow to a licensee to give the returns. Thus the Board might, for example, require returns within two days of its giving notice, and the licensee's failure to provide them could lead to the imposition of a $500 penalty.

The Committee suggests that, as it stands, the clause may trespass unduly on personal rights. It would not do so if the clause were either to fix a minimum time within which returns must be given, or provide that the time be reasonable in the circumstances.

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

BROADCASTING (OWNERSHIP AND CONTROL) BILL 1988

This Bill was introduced into the Senate on 14 April 1988 by the Minister for Transport and Communications.

The Bill provides for new commercial radio ownership rules with reference to other broadcasting licences and media ownership. It also consolidates the existing ownership and control provisions in broadcasting legislation. The Bill replaces the Broadcasting (Ownership and Control) Bill (No. 3) 1987 introduced in the Senate last year.

In Alert Digest No. 5 of 1988 (20 April 1988), the Committee drew attention to the following clause of the Bill:

Clause 2 - Retrospectivity

Subclause 2(2) of the Bill provides that certain transitional ownership and control limits in subclauses 6(1), 7(1) and clauses 10 and 11 will be deemed to have come into effect at the date of an announcement by the Minister on 29 October 1987 of proposed increased limits on the ownership and control of radio licences.

The Committee notes that, in its Ninth Report of 1987 (27 May 1987), it drew the Senate's attention to the practice of 'legislation by press release' which occurred in relation to the Broadcasting (Ownership and Control) Bill 1987.

The Committee has drawn attention, both in its Ninth Report of 1987 (27 May 1987) and in its Annual Report 1986-87 (Parl. Paper 443 of 1987), to several concerns relating to 'legislation by press release' in the area of broadcasting

legislation. The Committee noted that it would be undesirable if information as to the Government's intention on such questions as ownership and policy were either the subject of rumour and speculation, or available only to a privileged few in the community while legislation was in the course of preparation and drafting.

Equally, the Committee is concerned to point out that the two principal problems for the Parliament which were highlighted in the above reports in the practice of 'legislation by press release' are again illustrated by this Bill.

Firstly, by indicating that the legislation changes in ownership rules, such as broadcasting, is to be retrospective to the date of a Minister's announcement, a degree of uncertainty as to the status of the law during the period between the announcement and the passage of the necessary legislation by the Parliament is created. The ability of Parliamentarians to assess the merit of proposed legislation may be prejudiced by the realisation that people have altered their position (for example by making large investments) in reliance on a government's prior media announcement that the legislation is to be introduced. To that extent such announcements are a matter of concern.

Second, by the time the Parliament considers the Bill, the Parliament may be placed in the invidious position of either agreeing to the legislation without major amendment or upsetting transactions which may have taken place during the intervening period in reliance on the Minister's announcement.

The Committee accordingly draws the clause to the Senate's attention in that by reason of its retrospective effect it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

The Committee also draws Senators' attention to proposed new subsection 89X(3) of the Principal Act. The subsection is in the same form as in the previous version of this Bill. The Committee commented on the subsection, and the Minister's subsequent response, in relation to the earlier version of the Bill in its First Report of 1988 (24 February 1988).

SOCIAL SECURITY AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 13 April 1988 by the Minister for Social Security.

This Bill is a portfolio omnibus Bill to amend the Social Security Act 1947. The amendments are intended to correct minor drafting defects and consolidate major programs introduced in 1987.

In Alert Digest No. 5 of 1988 (20 April 1988), the Committee drew attention to the following clause of the Bill:

Clause 2 - Retrospectivity

Pursuant to clause 2, many of the provisions of the Bill are to have retrospective operation. However, in almost all cases the retrospectivity will apparently be either beneficial to recipients or is a correction of drafting errors or anomalies.

TAXATION LAWS AMENDMENT BILL (NO. 2) 1988

This Bill was introduced into the House of Representatives on 14 April 1987 by the Minister for Employment and Education Services.

This Bill will amend a number of tax-related Acts with the main thrust of the amendments aimed at improving requirements for the registration of tax agents.

In Alert Digest No. 5 of 1988 (20 April 1988), the Committee drew attention to the following clause of the Bill:

Clause 15 - Retrospectivity

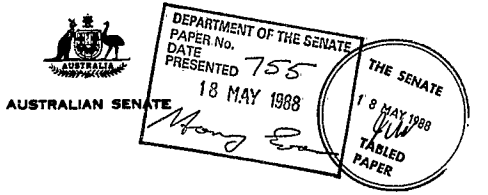
Clause 15 of the Bill amends section 57AM of the Income Tax Assessment Act 1936 and will restrict concessions available to the purchasers of new or substantially modified ships, in that a taxpayer, so as to obtain the concession allowed by the section, must comply both with taxation legislation and the Ships (Capital Grants) Act 1987. The amendment is retrospective to 22 December 1986.

The clause is a further example of 'legislation by press release'. The Committee also draws the Senate's attention to the fact that the press release announcing the proposed change and its retrospectivity to 22 December 1986 was itself released on 2 April 1987.

The clause is drawn to the Senate's attention as it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties to the extent that the clause would have effect retrospectively to the date of introduction of the Bill.

Barney Cooney
(Chairman)

27 April 1988



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF 1988

18 MAY 1988

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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. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF 1988

The Committee has the honour to present its Seventh Report of 1988 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:

Cash Transaction Reports Bill 1988

Civil Aviation Bill 1988

Honey Marketing Act 1988

CASH TRANSACTION REPORTS BILL 1987

This Bill was introduced into the House of Representatives on 25 November 1987 by the Attorney-General. The Bill is similar to a Bill of the same title introduced in the previous Parliament, but not passed prior to the double dissolution.

The Bill has four purposes: -

- to require the reporting of certain domestic currency transactions in excess of $10,000 to the Cash Transaction Reports Agency;

- to require the reporting of certain currency transfers to and from Australia in excess of $5,000 to the Cash Transaction Reports Agency;

- to establish a Cash Transaction Reports Agency to collect, retain, compile, analyse and disseminate information relating to cash transaction reports and to perform other functions under the legislation in consultation with the Commissioner of Taxation; and

- to impose obligations on financial institutions in relation to the verification of the identity of persons seeking to open accounts with financial institutions, and of signatories to existing accounts.

The Committee drew the attention of the Senate to clauses of the previous Cash Transaction Reports Bill in Alert Digest No.9 of 1987 (27 May 1987).

The Committee drew the attention of Senators to a number of clauses of this Bill in Alert Digest No. 17 of 1987 (9 December 1987).

The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs on 15 December 1987. That Committee's report to the Senate on the Bill was tabled on 28 April 1988.

Having considered the report from the Legal and Constitutional Affairs Committee, and a detailed reply on this Committee's comments received from the Attorney-General, the Committee reports on the following clauses of the Bill:

Subclause 3(1) -
Definition of 'unit trust' - Inappropriate delegation of legislative power

Subclause 3(1) defines the term 'unit trust' as including 'cash management trust', 'property trust' and arrangements falling within a class of arrangements which are declared by the Minister to be, for the purposes of the definition, cash management, property or unit trusts as the case may be. The entire content of such definitions is thus left to be formulated by the Minister and is to be declared by the Minister by notice in the Gazette only, and not prescribed by regulation which would be subject to tabling and disallowance.

As a trustee or manager of a cash management trust, property trust or unit trust is a 'cash dealer' on whom reporting requirements are to be imposed by the Bill, it may be thought that the content of these definitions should be set out in the Bill, rather than simply notified in the Gazette. The Committee drew the clause to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislative power.

The Attorney-General has responded to the Committee's comments and noted that the prescription of arrangements which reflect the class of trusts to be dealt with would require a great deal of research and drafting to ensure that all such arrangements are covered. The Attorney-General also advised that because

such arrangements may be varied so as to fall both technically and legally outside the ambit of prescribed arrangements, without altering the arrangement so that it does not constitute a trust.

In this regard, the Attorney-General noted:

> It should be borne in mind that once an arrangement falls outside the prescription, cash transactions conducted through the trust fall outside the reporting requirements and the trust can become an immediate and effective vehicle for money laundering. Every effort must be made to avoid this possibility and accordingly, it is in my view essential that the legislation provide for a mechanism that permits immediate response to this highly technical area.

The Committee thanks the Attorney-General for this response.

The Committee notes that the point raised by the Committee in its Alert Digest comment, i.e. that it was inappropriate that such matters be notified in the Gazette, instead of by regulation, has not been directly addressed. The Committee sees merit in the Attorney's explanation, however, and expects that it will assist Senators in further debate on the Bill.

Subparagraph 9(2)(d)(ii) and subclause 9(5) - Inappropriate delegation of legislative power

Clause 9 will require a cash dealer to report to the Director of the Cash Transaction Reports Agency any transaction involving the physical transfer of Australian or foreign currency of not less than $10,000 in value. A financial institution (a bank, building society or credit union) will not, however, be obliged to report a transaction if it is eligible for exemption in accordance with clause 9 and if the institution enters the transaction on its exemption register. Subclause 9(2) provides an exemption where the transaction in question is between the institution and a customer who, under subparagraph 9(2)(d)(ii), may carry on 'a business declared by the Minister, by notice in writing in the Gazette, to be an

entertainment business or a hospitality business for the purposes of this Act'. Subclause 9(5) further provides that a cash transaction is also eligible for exemption if it falls within a class of transactions notified in the Gazette to be eligible for exemption.

The Committee drew subparagraph 9(2)(d)(ii) and subclause 9(5) to the attention of Senators in that by leaving it to the Minister to notify such matters as are required under the provision in the Gazette, the provision may be considered to constitute an inappropriate delegation of legislative power.

The Attorney has told the Committee in his response that the purpose of the exemptions granted by the clause is to enable high cash flow customers to be excluded from reporting requirements for the large number of legitimate transactions which would necessarily be dealt with if no exemptions existed. A second point the Attorney made was that:

> The decision whether to create and maintain an exemption register and grant exemption to all or any eligible customers, or simply to report every transaction, is a matter solely within the discretion of each financial institution.

The result in the Attorney's view is that, in the light of the power given to the Director to revoke or vary exemptions at any time, rights are not directly affected by the existence of a power to extend the class of persons eligible by notice in the Gazette.

The Attorney also advised that the novelty of the scheme embodied in the Bill is an important consideration when examining the Bill.

> The scheme is novel, having no precedent other than in the United States and it is thus difficult, without practical experience, to identify every type of customer who has a legitimately derived high cash flow. It is thus essential that steps can be taken at short notice to remove unreasonable burdens of CTR reporting placed on financial institutions in respect of a previously in-eligible class

of customer which demonstrates a legitimately derived high cash flow. Accordingly, I believe the flexibility of expanding exemptions by notice in the Gazette is necessary to minimise unforeseen burdens on financial institutions and their customers.

The Committee draws Senators' attention also to the discussion of the clause in the report on the Bill by the Legal and Constitutional Affairs Committee (p. 24, et seq.). The Committee concerned itself primarily with the questions of personal privacy as they may be affected by the operation of the clause.

The Committee does not consider that, in the light of the comments by the Legal and Constitutional Affairs Committee, it need comment further on this clause. The Attorney-General's response to this Committee's comment is also of assistance. The Committee expects that it will also assist Senators in further debate on the Bill.

Subclause 10(3) - Non-reviewable decision

Subclause 10(3) provides that, where a financial institution believes that one of its customers is likely to enter into cash transactions on a regular basis which would be eligible for exemption, it may enter the class of transactions of that kind against the customer's name in its exemption register. Transactions of that kind thereupon become exempt from the reporting requirements. Subclause 10(3) provides, however, that the Director may direct an institution to delete or amend such an entry in its exemption register.

No provision has been made for the review of the Director's decision on its merits and clause 33 expressly excludes decisions under the Act from the application of the Administrative Decisions (Judicial Review) Act 1977. A decision of the Director under subclause 10(3) would therefore only be subject to review by the courts by way of the actions available at common law prior to the enactment of the Administrative Decisions (Judicial Review) Act 1977. As a

decision of the Director under subclause 10(3) may impose quite onerous reporting requirements on financial institutions the Committee drew the subclause to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

The Attorney-General has responded to the Committee's comment and has observed that, in his view, the Bill is principally a taxation law. He told the Committee in this regard that:

> Although the Agency is not directly answerable to the Commissioner [of Taxation], the principal purpose of the Bill is to facilitate the administration of taxation laws. All agency functions must be performed in consultation with the Commissioner, and so as to maximise the utility of information held by the Agency to the Commissioner. Accordingly, the Bill is, in all but name, a taxation law.

The Attorney also noted that the generally covert nature of taxation investigations, and other investigations, was generally essential to their success and to '... disclose the reasons for the removal of an exemption would invariably prejudice the investigation'.

Whilst the Bill may be regarded principally as a legislative measure to assist in the administration of the taxation laws, the Committee does not accept that the Bill can be characterised as a 'taxation law'. The Bill, in fact, has a number of other objects including:

- facilitation of the administration and enforcement of laws of the Commonwealth and Territories (other than taxation laws) (subclause 4(2))

- making information collected by the Agency available to State authorities to facilitate the administration and enforcement of the laws of the States (subclause 4(3)).

The Cash Transaction Reports Agency, in the Committee's view, falls into that group of Commonwealth authorities which may be broadly and conveniently described as crime intelligence agencies. In this regard, it is worth noting that the Director of the Cash Transaction Reports Agency will be enabled to act in a manner which is directed to obtain information intended for use by a number of areas of revenue and crime prevention, such as the Customs Service, the National Crime Authority and State and Territory police forces (see clause 25).

The Committee believes that, bearing these considerations in mind, there should at least be provision for review of Director's decisions under the Administrative Decisions (Judicial Review) Act.

Accordingly the Committee continues to draw the subclause to the attention of the Senate in that it may be considered to breach principle 1(a)(iii) and would make rights, liberties and/or obligations unduly dependent upon a non-reviewable decision.

Subclauses 13(1) - Trespass on personal rights and liberties

Subclause 13(1) appears to create an offence of strict liability where a person takes or sends foreign currency of not less than $5,000 in value out of Australia or brings or sends Australian or foreign currency of not less than $5,000 in value into Australia without giving a report in the approved form in respect of the transfer to the Director of the Cash Transactions Reports Agency, a customs officer or a police officer before the transfer takes place. As the Committee pointed out in its comments in Alert Digest No.9 of 1987, a person may be convicted of the offence notwithstanding that he or she did not know that, for example, the baggage he or she was carrying contained currency. A penalty of a fine of up to $5,000 or 2 years imprisonment, or both in the case of a natural person, or a fine of up to $25,000 in the case of a body corporate may be imposed.

The Committee accordingly drew subclause 13(1) to the attention of Senators in that, in respect of its apparent creation of an offence of strict liability, it may be considered to trespass unduly on personal rights and liberties.

The Attorney-General's response to this comment notes that he rejects the suggestion. The Attorney observed that the decision of the High Court in He Kaw Teh v The Queen, (1985) 59 ALJR 620, holds that, under present law, proof of intention would be essential to any successful prosecution under the provision.

The response also noted that:

> ... in the commercial circumstances of modern airlines and shipping companies which carry many hundreds of passengers and thousands of items of luggage, no obligation is cast upon the airline or shipping company to satisfy itself in all cases that it is not carrying prohibited imports or exports, stolen property or any cargo which it may be unlawful to carry. In my view an airline or shipping company must have actual knowledge of the illicit nature of the goods, or reasonable grounds to suspect the same, before a prosecution could be successful under 13(1).

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

CIVIL AVIATION BILL 1988

This Bill was introduced into the House of Representatives on 14 April 1988 by the Minister for Transport and Communications.

This Bill will enable the establishment of a Civil Aviation Authority as a Commonwealth statutory authority. The primary functions of the new Authority will be the safety, regulation of civil aviation operations in Australia and Australian aircraft operating overseas, and the provision of air traffic and related services to aircraft operators in Australia.

The Committee drew attention to the following clauses of the Bill in Alert Digest No. 5 of 1988 (20 April 1988):

Clauses 22, 29 and 30 - Reversal of the onus of proof

Subclauses 22(4) and 29(3) and clause 30 of the Bill reverse the normal onus of proof in a criminal prosecution for offences under a number of provisions. The Committee noted in its Annual Report 1986-87 (Parl. Paper 443 of 1987, p. 22) that the imposition of the persuasive burden of proof on the accused, in relation to a statutory defence, in criminal proceedings is only acceptable where both:

(a) the matters to be raised by way of defence by the accused were 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.

While the first of these conditions may arguably be met by these clauses, it does not appear to the Committee that the second condition is.

The Committee accordingly drew the clauses of the Bill to the attention of the Senate in that they may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties by reversing the onus of proof in criminal proceedings.

The Minister for Transport and Communications has responded to the Committee and, in doing so, has commented generally on the criteria employed by the Committee in assessing the acceptability of clauses which reverse the onus of proof in criminal prosecutions.

The Minister's comments are reproduced for Senators' information.

> By way of general comment on the points raised, the Senate Standing Committee on Constitutional and Legal Affairs in its Report on the Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319 of 1982 at page 62) had identified two situations as justifying a reversal of the evidential onus only. The first of these was 'where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue'. The second is 'where proof by the prosecution of a particular matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence'. The Attorney-General has taken the view that a reversal of the persuasive burden of proof is justifiable in either of these circumstances.
>
> It appears that your Committee also has accepted a reversal of the persuasive burden of proof. However, it is unclear whether the Committee, in the text which is set out at page 7 of Digest No 5, is restating the first of the tests identified by the Senate Standing Committee on Constitutional and Legal Affairs or is in fact making the two tests identified by that Committee cumulative. If the latter is the case the test proposed by your Committee in my view is substantially narrower than that proposed by the Attorney-General. If it is the former, the difficulty in negativing a defence without prior notice of the nature of that defence is inherent in Australian criminal procedure. As the Committee would be aware, there is no legal obligation on the defendant to make known to the prosecution details of the defence which will be used.

The Committee has considered the Minister's comment and notes that in its Report entitled 'Burden of Proof in Criminal Proceedings' (Parl. Paper 319 of 1982), the Senate Standing Committee on Constitutional and Legal Affairs suggested that it might be permissible to reverse the evidential burden, in either of two alternative situations. This situation is referred to in paragraph 2.15 of the Scrutiny of Bills Committee annual report for 1986-87 (Parl. Paper 443 of 1987). In a letter to this Committee regarding the Proceeds of Crime Bill 1987, the Attorney-General, however, considered that the persuasive burden might be reversed in either of those two alternative situations.

The views of the Attorney-General appear considerably wider than those of the Constitutional and Legal Affairs Committee, because to reverse the evidential burden means that, under Australian criminal law the prosecution must still lead evidence which will negative any defences which the accused may suggest; whereas to reverse the persuasive burden means that it is for the accused to persuade the court of the matters in which that burden has been reversed. It appears to the Committee that the Attorney-General would be prepared to allow some situations in which it is for the accused to disprove his (presumed) guilt, whereas the Committee on Constitutional and Legal Affairs would require the prosecution in all cases finally to prove the guilt of the accused.

The Committee has, in its annual report for 1986-87 (p.18, et seq.), adopted a position which it considers is somewhere between the above two views. It has accepted that there are occasions on which it might be acceptable for the defence to bear a persuasive onus (thus differing from the Committee on Constitutional and Legal Affairs, which thought that there ought to be no such occasions). This Committee has not extended this view as far as the Attorney-General. Whereas the Attorney-General is prepared to see a reversal of the persuasive onus in either of two alternative situations, the Committee - as is made plain in paragraph 2.20 of our annual report of 1986-87 - would countenance a reversal of the persuasive onus only where the two conditions are met cumulatively.

The Minister, in the second sentence of the second paragraph quoted above, may have misunderstood the significance given to the difference between a shift of the evidential burden and a shift of the persuasive burden. While the Committee on Constitutional and Legal Affairs referred only to the former, this Committee is prepared, in some cases, to accept the latter. However, as explained above, the Minister is correct

that the circumstances in which the Committee may be prepared to accept a shift in the persuasive burden are more restrictive (or narrower) than those which the Attorney-General would accept.

In relation to the specific comments on the clauses of the Bill which were the subject of comment, the Minister has observed, in relation to subclause 22(4), that:

> The defence created by subsection 22(4) relates to the state of mind of the pilot in command of the aircraft at the time of failure to comply with the direction. The belief which leads to the pilot's action and the factors giving rise to that belief are solely within the knowledge of the pilot and are not capable of objective proof by he prosecution. For example, in the case where a civil aircraft is intercepted by a military aircraft, the manoeuvre which the civil aircraft might be instructed to take could be considered by the pilot in command to be unsafe and he/she might decline to obey the instruction. Such instruction could be conveyed through internationally accepted signalling techniques and there may be no record of radio communication between the intercepted and intercepting aircraft.

The Committee thanks the Minister for his advice, which answers the Committee's concern regading the subclause.

In relation to subclause 29(3) and clause 30, the Minister has responded to the Committee's comment by noting that any actions by a pilot, and any factors giving rise to that action, are within the knowledge of the pilot of an aircraft alone.

In relation to the second leg of the Committee's test, as applied to such provisions, the Minister has observed:

> The imposition of an evidential burden on the accused in cases such as these in relation to his or her personal state of mind would not facilitate the prosecution case at all, but rather would 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. In practice the Crown would, in all prosecutions, have to conduct extensive

investigation (particularly in the case of an offence committed overseas) to have sufficient evidence to negative any defence and to lead such evidence during its 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.

The Committee draws Senators' attention to an alternate view to that of the Minister. It may be said that whether a person is 'knowingly concerned' in an act is peculiarly within that person's knowledge. But it may also be said that whether A intends to kill B, or whether A and B have agreed to pervert the course of justice, are matters peculiarly within the knowledge of the accused. It has never been suggested that if a person is charged with murder or conspiracy he or she bears any onus of proof of a lack of guilty intent. Clause 29, in subclause (1), creates offences of strict (or absolute) liability which may be committed by all the persons in any way connected with an aircraft, but then seeks to introduce the concept of guilty intent by the terms of subclause (3). The clause would conform to accepted notions of criminal liability if it were cast in a form, such as, 'the owner, operator, etc., shall not knowingly permit an aircraft to, etc.'.

With regard to clause 30, it is difficult to see how it complies even with the Attorney-General's broader view of the acceptable circumstances in which the persuasive burden might be reversed. It is surely difficult to suggest that the existence of 'extreme weather conditions' is a matter which is peculiarly within the knowledge of the accused, nor would it appear to be extremely difficult and costly for the prosecution to prove the absence of such conditions. The same could equally be said of the other exculpatory matter or other unavoidable cause referred to.

The Committee also notes that a conviction under clause 29 would subject a person to fines not exceeding $5,000 or imprisonment for a period not exceeding two years, or both. In the Committee's view, penalties which include the possibility of imprisonment do not fall within the description of 'relatively low penalty' given by the Minister.

The Committee accordingly continues to draw subclause 29(3) and clause 30 to Senators' attention in that they may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

HONEY MARKETING ACT 1988

This Act was introduced into the House of Representatives on 23 March 1988 by the Minister for Primary Industries and Energy. The Bill was passed through the Parliament and assented to on 11 May 1988.

The Act revises the Australian Honey Board's functions and powers, change the membership provisions and enhance accountability to the industry which provides the Board's funds through levies and an export charge.

On this occasion the Committee, as permitted by Standing Order 36AAA, draws the attention of Senators to a section of the Act, notwithstanding that the legislation had been agreed to by the Parliament and had become law.

In Alert Digest No. 4 of 1988 (13 April 1988), the Committee drew attention to the following section of the Act:

New section 46 - Trespass on personal rights and liberties

Section 46 provides for a licensee to submit a return, or returns, of information which the Honey Board may require relating to the export of honey. The time limit set for providing such returns is to be 'as the Board specifies'. Subsection 46(2) provides for a penalty of $500 if a licensee fails, without reasonable excuse, to comply with the Board's requirement.

Subsection 46(1) does not specify any limit on the minimum amount of time which the Board may allow to a licensee to give the returns. Thus the Board might, for example, require returns within two days of its giving notice, and the licensee's failure to provide them could lead to the imposition of a $500 penalty.

The Committee suggested that, as it stands, the section may trespass unduly on personal rights. It would not do so if the section were either to fix a minimum time within which returns must be given, or provide that the time be reasonable in the circumstances.

The Committee accordingly drew the provisions of the section to the Senate's attention under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

The Minister has responded to the comments made in Alert Digest No. 4 of 1988 (13 April 1988) and noted as follows:

> In practice the Australian Honey Board will require, possibly as a condition of licence, regular returns of information from licensees with ample time for its provision. Instances may occur, however, where specific information is required from one or more individual licensees for a particular reason.

Inclusion of a minimum time provision would not provide flexibility to meet urgent commercial situations and so could be too restrictive on the Board in the exercise of its functions. For example, the information may be needed at short notice to facilitate an export shipment or to enable a sale to be finalised. Similarly, a quick input or response may be required to assist the Board in reaching decisions on export pricing policies or changes to export prices in a changing market situation.

In some instances information requested by the Board may be necessary to assist the licensee in negotiating export sales or meeting shipping requirements. The licensee thus stands to benefit from prompt action.

A time limit provision would not provide any scope for meeting urgent commercial situations, such as outlined above. Similarly a 'reasonable time in the circumstances' provision would be open to debate as to what is reasonable.

The Committee thanks the Minister for his response.

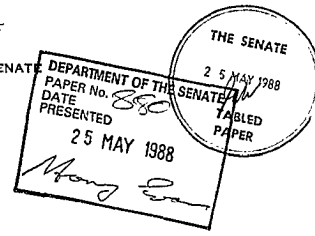
The Committee draws Senators' attention to the Committee's consistent view that such requirements properly should be the subject of legislative prescription.

Accordingly, although the Bill has passed the Parliament, the issue raised is important. The attention of Senators is drawn to section 46 of the Act under principle 1(a)(i) in that it may be considered to trespass unduly on personal rights and liberties.

Barney Cooney
(Chairman)

18 May 1988

AUSTRALIAN SENATE



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF 1988

25 MAY 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH 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. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF 1988

The Committee has the honour to present its Eighth Report of 1988 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:

Audit Amendment Bill 1988

Community Services and Health Legislation Amendment Bill 1988

Electoral and Referendum Amendment Bill 1988

Employment, Education and Training Bill 1988

Research and Development Legislation Amendment Bill 1988

Taxation Laws Amendment (Employee Share Acquisitions) Bill 1988

AUDIT AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 28 April 1988 by the Minister Representing the Minister for Finance.

The Bill amends the Audit Act 1901 and intends principally to enhance the Commonwealth's financial reporting, administration and audit and to bring certain penalty provisions into line with present day criminal law policy.

In Alert Digest No. 7 of 1988 (18 May 1988), the Committee drew attention to the following clauses of the Bill:

Clause 6 - Delegation of legislative power

Clause 6 would amend section 49 of the Audit Act. Subsection 49(1) of the Act provides for the publication by the Minister for Finance of the Minister's monthly Statement of Financial Transactions. Subsection 49(2) of the Act presently provides that the format of the Monthly Statement can only be varied with the prior approval of both Houses of the Parliament.

The amendment proposed by clause 6 of the Bill provides that the format of the Statement would, in future, be specified by regulation which would be subject to tabling and disallowance in the normal manner.

The Senate's attention is drawn to the fact that a proposed amendment of similar effect was contained in the Statute Law (Miscellaneous Provisions) Bill 1987. That clause was left out of the Bill during debate in the Senate on 7 October 1987.

The clause is drawn to Senators' attention.

Clause 15 - Inappropriate delegation of legislative power

Clause 15 would introduce a new section 63R to the Audit Act. The clause would give the Auditor-General a discretion to determine what matters are of such minor importance, or immateriality, that they do not need be reported. The Committee believes that the difficulty with such a discretion is that, of its nature, it would clearly not be possible for persons outside the Auditor-General's Office to determine the circumstances in which the discretion has been exercised, if and when it were exercised. While endorsing the Minister's comments on the high degree of competence and integrity of the Auditor-General's office in the Minister's Second Reading speech, the Committee notes that the Minister's acknowledgement that the Joint Committee of Public Accounts has expressed disquiet over the effect of such a clause.

The Committee accordingly draws the clause to the Senate's attention in that it may be considered to breach principle 1(a)(iv) of the Committee's principles and constitute an inappropriate delegation of legislative power.

Schedule 1 - Self-incrimination

Proposed new subsections 63G(9), 63L(9) and 63ME(6), each contained in the Schedule to the Bill, would abrogate the privilege against self-incrimination. In each case, however, the abrogation is sufficiently limited so as to be acceptable the Committee, given the Committee's guidelines for such provisions.

The proposed subclauses are drawn to Senators' attention for information.

COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 21 April 1988 by the Minister for Housing and Aged Care.

This Bill proposes to amend the National Health Act 1953 in the following three ways:

1. To introduce new arrangements for nursing and personal care of patients in nursing homes.

2. To introduce new respite care arrangements in non-Government nursing homes.

3. To enable contributors to a health benefit organisation to transfer membership to another without the imposition of a waiting period.

The Bill also proposes amendment of the following Acts:

- Aged or Disabled Persons Homes Act 1954
- Australian Institute of Health Act 1987
- Nursing Homes and Hostels Legislation Amendment Act 1987
- States Grants (Nurse Education Transfer Assistance) Act 1985

In Alert Digest No. 6 of 1988 (27 May 1988), the Committee drew attention to the following clauses of the Bill:

Clause 5 - Inappropriate delegation of legislative authority

Proposed new paragraphs 10D(1)(c) and (d) of the Aged or Disabled Persons Homes Act 1954 may be regarded as improper delegations of Parliamentary authority. Under the existing paragraph 10D(1)(c) - inserted by the Community Services and Health Legislation Amendment Act 1987 - the amount of financial assistance payable to an organisation was specified as being at

the rate of $8.05 per day, or such higher amount as determined by the Minister. Under the proposed new paragraphs the Parliament is given no indication of the likely amount of the assistance. That information will be available only when the Minister has made a determination - that determination being required to be laid before each House, and subject to disallowance, by virtue of section 10FB of the Act, also introduced in the 1987 amendment.

The Committee drew Senators' attention to the clause as the paragraphs referred to may be considered to be in breach of principle 1(a)(iv) of the Committee's principles and constitute an inappropriate delegation of legislative authority.

The Minister for Housing and Aged Care has responded to the Committee's comments and has given detailed advice on the application of the proposed paragraphs.

> In my Second Reading Speech in support of the above Bill, I said the current respite care subsidy of $8.05 per day will be retained for 'hostel care' level residents and, accordingly, that amount will be determined under the proposed new paragraph 10D(1)(c). With respect to proposed new paragraph 10D(1)(d), I stated that there will be a payment for 'personal care' respite residents of the personal care subsidy plus a supplement based on 25 per cent of the personal care subsidy. The amount which will initially be determined under proposed new paragraph 10D(1)(d) will be $16.80. This is calculated as follows:
>
> | | |
> |---|---|
> | Personal care subsidy as prescribed by the existing paragraph 10D(1)(b) of the Act | $11.85 |
> | Increase in personal care subsidy in accordance with a regulation under that paragraph operating on and from 1 May 1988 | $ 1.60 |
> | New personal care subsidy on and from 1 May 1988 | $13.45 |
> | PLUS 25% of new personal care subsidy | $ 3.35 |
> | Amount to be determined under proposed new paragraph 10D(1)(d) | $16.80 |

> The amount of a determination under proposed new paragraph 10D(1)(d) will therefore be known because it will bear a fixed relationship to the amount of the then prevailing personal care subsidy.

The Committee thanks the Minister for his response. The Committee observes that its Alert Digest comment on the clause was directed to the fact that it would clearly not be possible to calculate the respite care bed benefit supplements by reading the proposed paragraphs in the Bill. To calculate the amount of the supplement, reference must be made to Ministerial instruments, of which there may be a number, in which the Minister may have determined prevailing rates of financial assistance and other relevant matters.

The Committee will not readily accept the delegation of legislative power of the Parliament to Ministers. Equally, however, the Committee recognises that there are individual legislative schemes which may be most efficiently - and, more importantly, equitably - administered by delegated legislation, so long as that delegated legislation is subject to tabling and disallowance.

The Committee does not press its concern regarding the clause which was set out in Alert Digest No. 6 of 1988. However, the Committee draws to Senators' attention a particular problem which confronts the citizen, and interested groups and persons attempting to ascertain the state of the law in this area. The complexity and growing volume of delegated legislation and other instruments, such as notices and determinations which will be made under this Bill, make it difficult to ascertain what constitutes the current law at any given time.

The advent of portfolio omnibus Bills is one legislative solution which could, and should, be applied to the drafting and publication of delegated legislation. In this regard, the Committee believes that delegated legislation which is prepared by a Minister for areas within a portfolio be prepared and published in consolidated form.

Clause 5 - 'Henry VIII' clause

Proposed new subsections 10D(5) and (6) of the Act are 'Henry VIII' clauses, in that they would allow subsection 10D(4) to be amended, and terms therein to be defined, by Ministerial determination. While such determinations are subject to Parliamentary review by reason of section 10FB, the width of the power given to the Minister by subsections (5) and (6) is such as to give subclause (4) little apparent meaning.

The Committee drew Senators' attention to the clause as it may be considered to be in breach of principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

The Minister has told the Committee, as a first point, that

> Subsections 10D(5) and (6) are amplifications of [proposed] subsection 10D(4). The latter subsection provides, in effect, that respite care benefits will only be paid under paragraphs 10D(1)(c) and (d), in respect of any given patient, for a maximum period of 63 days in any benefit period. In my Second Reading Speech, I indicated that the benefit period will be one year. The purpose of subsection 10D(6) is to enable a degree of flexibility concerning the commencement date of that year. This is necessary because some administrative lead time will be required before a commencement date can be fixed. As a result it may be appropriate to determine a financial year to be the benefit period rather than a calendar year (or vice versa) depending on the date of commencement of the respite care arrangements.
>
> The period of 63 days referred to in subsection 10D(4) was based on the findings of a Departmental review of residential respite care arrangements. That period was chosen as a substantial period of respite care without impacting on the arrangements which normally apply to short-term residential care. The purpose of subsection 10D(5) is to enable monitoring of this period to determine whether, in practice, it is of appropriate length and to enable a degree of responsiveness to the needs of carers, who play a crucial role in preventing early admissions to costly long-term care, by an adjustment of the period if this appears to be necessary or desirable.

The Committee thanks the Minister for this response, which it believes will be of assistance to Senators in further debate on the Bill.

However, the Committee notes that the Minister's explanation has not addressed the point of the Committee's comment that the power the clause would give to the Minister to vary a legislative provision by instrument, not subject to tabling and disallowance, is a classic 'Henry VIII' clause. In the Committee's view, Ministerial instruments made under the clause should, as a minimum requirement, be subject to tabling and disallowance. It should be noted that instruments made under subsection 10D(1) of the Act are subject to tabling and disallowance.

The Committee accordingly continues to draw Senators' attention to the clause as it may be considered to be in breach of principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

Clause 19 - Non-reviewable decision

Proposed new subsection 40AFA(5) of the National Health Act 1953 is drawn to the attention of Senators. By virtue of proposed new section 40AFF of the Act, a review by the Secretary of a classification is subject to appeal to the Minister, but the Secretary's initial classification under proposed new subsection 40AFA(5) is not subject to such Ministerial oversight. If, therefore, the Secretary's initial classification of a patient were, say, unduly low, the only means of redress for a nursing home proprietor would apparently be by way of proceedings in the Federal Court to challenge the legality of the decision under the Administrative Decisions (Judicial Review) Act 1977.

The Minister has given the Committee a detailed and comprehensive reply to the Committee's comment, which is reproduced in full for Senators' attention.

The Committee has also drawn attention to clause 19 of the Bill which relates to the classification of certain nursing home patients.

I should mention that individual patients are not classified under proposed new subsection 40AFA(5) but under proposed new sections 40AFC (classification before admission to a nursing home) or 40AFD (classification after such admission). The purpose of subsection 40AFA(5) is to require the Secretary of my Department to classify nursing home patients in accordance with the Principles determined by the Minister under subsection 40AFA(3). Those Principles, which are subject to possible Parliamentary disallowance, will, in general, leave the Secretary or his delegate virtually no discretion in the determination of patient classifications. These classifications would be derived automatically by a formula which would apply to all existing and prospective residents of nursing homes. This formula would be specified in those Principles.

Such classifications are derived from clinical assessments by Directors of Nursing or geriatric assessment services. As a result, patient classifications will, in essence, be self-assessed by Directors of Nursing or geriatric assessment services and, as such, administrative review would not be appropriate.

Details of patient classifications will be provided to Directors of Nursing and geriatric assessment services to enable them to check for keying errors and should these occur, my Department will, in all cases brought to its attention, arrange for any necessary adjustment to date from the patient's date of admission.

Proposed new section 40AFE provides for reviews of classification of nursing home patients by the Secretary of my Department. The circumstances in which that power may be exercised would include:

- where there have been keying errors;
- where a Director of Nursing disagrees with a classification resulting from an assessment of a geriatric assessment service prior to admission of a person to a nursing home; and
- where there is evidence that a Director of Nursing's assessment of a nursing home patient's dependency level is not accurate.

I should mention that payments by nursing home patients in respect of their nursing home care are unaffected by whether they are included in the categorisation arrangements or otherwise or, if they are, by whether they are in one category or another. There is, therefore, no reason for a patient to seek review with regard to either of these matters.

As the Committee has noted, a review by the Secretary of a classification is subject to appeal to the Minister.

The Committee thanks the Minister for his advice. Decisions made by the Secretary of the Department under the classification scheme which the Bill would introduce are, as the Minister has observed in this concluding comment, subject to an appeal by a nursing home proprietor to the Minister.

While noting that a number of classification decisions are subject to review by the Secretary under clause 40AFE and to an appeal to the Minister under clause 40AFF, the Committee has consistently drawn Senators' attention to the view that such decisions as are made by the Secretary under 40AFE should properly be subject to a review of such a decision on its merits by the Administrative Appeals Tribunal as the body which has been established by the Parliament for such a role. As the Committee noted in its Alert Digest comment, the only existing means of further review and possible redress of any decision by the Secretary or Minister would be by way of proceedings against a decision under the Administrative Decisions (Judicial Review) Act.

In most cases where an internal appeal mechanism is proposed in a Bill, the Committee would press its concern that an alternative, or further, avenue of appeal be introduced to a Bill to ensure that there is no question concerning the fairness of departmental procedures.

This general rule is subject to exception in individual cases, where the Committee is completely satisfied that the proposed appeal procedure will properly accommodate the rights of citizens and organisations affected.

The Committee believes that the rights and liberties of the people who are affected by the operation of this legislation, mainly those who are very old or infirm - and often terminally ill - will be less affected by the internal review provisions

proposed by the Bill than by possible delay in pursuing a remedy before the Administrative Appeals Tribunal.

Proposed new paragraph 40AFB(1)(c) and new subsection 40AFB (3) of the National Health Act are also drawn to the attention of Senators. These provisions would grant to the Minister quasi-legislative powers, to determine classes of patients to whom the classification system used under the Act would not apply. The only review of the exercise of these functions is an indirect one insofar as the determinations must be in accordance with principles declared by the Minister under proposed new subsection 40AFB(4). These principles are subject to Parliamentary review by virtue of proposed new paragraph 139B(1)(d).

The clause was drawn to the attention of Senators as it may be in breach of principle 1(a)(iii) of the Committee's principles as it may make rights, liberties and/or obligations unduly dependent upon a non-reviewable decision.

In relation to the Committee's comment on proposed paragraph 40AFB(1)(c) and subclause 40AFB(3), the Minister has advised that both provisions will enable a Minister to make special arrangements by determination to ensure the continuing viability of small nursing homes which may cater for patients with special needs, such as remote communities or ethnic or Aboriginal communities.

The Minister also advised that, by way of comparison, paragraph 40AFB(1)(c) could, for instance, enable a transition period of a certain period of time to be applied to nursing home patients who may have been admitted to private nursing homes prior to the proposed commencement date of new categorisation arrangements.

The Committee thanks the Minister for this response, which it believes will be of assistance to Senators in further debate on the Bill.

Clause 28 - Creation of absolute offence

Proposed new subsection 62(2A) of the National Health Act appears to create an absolute offence, in that a person might contravene the subsection, and be liable for the penalty there provided, even though the person does not know, and has no reason to know, that the information or document he or she has furnished is false or misleading. Such provisions are usually cased in the terms of prohibiting a person from knowingly furnishing information, etc.

The clause was drawn to the attention of Senators in that it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

The Minister's response to this comment notes that the proposed new subsection 62(2A) is subject to the existing subsection 62(3) which provides that:

> 'In a prosecution of a person for an offence against this section, it is a defence if the person proves that he did not know, and had not reason to suspect, that the statement, information or document to which the prosecution relates was false or misleading, as the case may be.'

The Committee's concerns about the clause are accordingly answered.

ELECTORAL AND REFERENDUM AMENDMENT BILL 1988

This Bill was introduced into the Senate on 29 April 1988 by the Minister for Home Affairs.

The Bill is designed to give legislative effect to the remaining accepted recommendations of the Joint Select Committee on Electoral Reform's Reports Nos. 1 and 2. To this

end it amends the Commonwealth Electoral Act 1918 and the Referendum (Machinery Provisions) Act 1984.

Clause 32 - Trespass on personal rights and liberties

Clause 32 of the Bill introduces a new subsection 91(9) to the Electoral Act which would provide for the Electoral Commission, at the request of the Secretary of a Department or the Chief Executive Officer of an authority of the Commonwealth, to provide the Secretary or Chief Executive Officer with a microfiche of a Roll, together with other information, including particulars of the occupations, sex or dates of birth of electors in the possession of the Electoral Commission as the Electoral Commissioner directs.

This provision appears to be wider than that recommended by the Joint Select Committee. It specifies the additional and irrelevant information which the Electoral Commission is now to collect, and gives an apparently unfettered power to the Electoral Commissioner to supply that information to any Department or authority of the Commonwealth without any obligation owed by the body to whom the information is supplied to deal with that information in confidence.

By way of example, Qantas, Australian Airlines and other Commonwealth authorities with commercial operations may be able to direct mail commercial literature to persons in high status occupations on the basis of such information. The proposed subsection 91(9) does not require the bodies seeking this information to establish some reasonable justification for its supply. It would accordingly engage the Electoral Commissioner in compiling and supplying information for no apparently useful purpose.

The Committee draws the clause to Senators' attention as it may be considered to breach principle 1(a)(i) of the Committee's principles and trespass unduly on personal rights and liberties.

EMPLOYMENT, EDUCATION AND TRAINING BILL 1988

This Bill was introduced into the House of Representatives on 28 April 1988 by the Minister for Employment, Education and Training.

The Bill intends to rationalise the advisory structures within the Ministry of Employment, Education and Training as reported by the Minister in 1987. It proposes to establish the National Board of Employment, Education and Training and four supporting Councils. It also proposes to abolish the Commonwealth Employment Service and provide for a similar service within the Department. To facilitate these changes the Bill repeals the following three Acts:

- Commonwealth Tertiary Education Commission Act 1977
- Commonwealth Schools Commission Act 1973
- Commonwealth Employment Service Act 1978

In Alert Digest No. 7 of 1988 (18 May 1988), the Committee drew attention to the following clause of the Bill:

Clause 4 - 'Henry VIII' clause

Subclause 4(1) is a 'Henry VIII' clause in that it would permit the amendment of Schedule 1 of the Bill, which sets out the institutions to which the Bill would apply, by Ministerial declaration. The declarations would be subject to Parliamentary review, by virtue of clause 4(2), but it is difficult to see the reason for the Minister having this power of amendment. The fact that an institution is, or is not, specified in the Schedule would not affect the existence of that institution, and the Higher Education Council is not limited by the terms of Schedule 1 with regard, for instance, to making recommendations on the grant of financial assistance under subparagraph 25(a)(v).

The clause is drawn to the Senate's attention in that it may be considered to breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

RESEARCH AND DEVELOPMENT LEGISLATION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 28 April 1988 by the Minister for Industry, Technology and Commerce.

The Bill will amend the Income Tax Assessment Act 1936 and the Industry Research and Development Act 1986 with the aim of increasing the effectiveness in promoting stimulus for investment in research and development by industry in Australia of the 150% tax concession.

In Alert Digest No. 7 of 1988 (18 May 1988), the Committee drew attention to the following clause of the Bill:

Clause 16 - Review

Proposed new section 39J of the Industry Research and Development Act 1986 would give the Industry Research and Development Board a discretion to register a company as entitled to a tax rebate. The Minister has acknowledged in his Second Reading speech that this Bill will give 'additional discretionary powers to the Board'. However, the only avenue of redress for a company dissatisfied with a decision of the Board is by action in the Federal Court under the Administrative Decisions (Judicial Review) Act 1977, rather than the speedier and less expensive procedure of review by the Administrative Appeals Tribunal.

The clause is drawn to Senators' attention in that it may be considered to breach principle 1(a)(iii) and make rights, liberties and obligations unduly dependent upon a non-reviewable decision.

TAXATION LAWS AMENDMENT (EMPLOYEE SHARE ACQUISITIONS) BILL 1988

This Bill was introduced into the Senate as a Private Senator's Bill on 25 March 1988 by Senator Chaney.

The Bill introduces a new section into the Income Tax Assessment Act 1936 which will allow, under certain conditions, discounts granted on shares sold to employees to not attract income tax liability as they do at present.

In Alert Digest No. 5 of 1988 (20 April 1988), the Committee drew attention to the following clause of the Bill:

Clause 4 - 'Henry VIII' clause

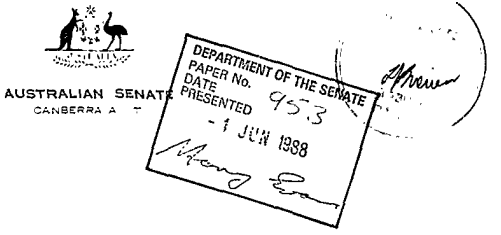
A number of the provisions of the Bill would leave matters to be determined by Regulations. For example, the definition of 'maximum yearly discount amount', in proposed new subparagraphs 26AA(7)(e)(i) and (ii), and proposed new paragraph 26AA(9)(b). When each is taken together, and when it is borne in mind that in no instance is the regulation-making provision apparently limited by a maximum or minimum as to amount or period, the provisions apparently impose no limitation on the regulation-making power.

The imposition of taxation, or the relief from taxation, is a matter which falls within the responsibility of the Parliament.

The Bill may be regarded as imposing (or exempting) taxation by regulation, and accordingly is brought to the attention of Senators in that it may be considered to be in breach of principle 1(a)(iv) of the Committee's principles as an inappropriate delegation of legislative power.

Barney Cooney
(Chairman)

25 May 1988



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF 1988

1 JUNE 1988

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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. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF 1988

The Committee has the honour to present its Ninth Report of 1988 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:

Agricultural and Veterinary Chemicals Bill 1988

Audit Amendment Bill 1988

Australian Film Commission Amendment Bill 1988

Commonwealth Employees' Rehabilitation and Compensation Bill 1988

AGRICULTURAL AND VETERINARY CHEMICALS BILL 1988

This Bill was introduced into the House of Representatives on 28 April 1988 by the Minister for Primary Industries and Energy.

The Bill will establish a new authority, the Australian Agricultural and Veterinary Chemicals Council (the Council), which will operate as a co-ordinating and clearing organisation charged with recommending the conditions and restrictions which are to apply in relation to the use in Australia of agricultural and veterinary chemical products.

In Alert Digest No. 7 of 1988 (27 April 1988) the Committee drew attention to the following clauses of the Bill:

Clause 20 - Non-reviewable decision

Clause 20 describes restrictions on the disclosure of information concerning chemical products. If enacted, subclause 20(3) of the Bill would allow the Council and Chairperson to divulge confidential commercial information to such persons as the Minister certifies in writing, and to divulge information to a prescribed authority or person, or to a person who, in the Chairperson's opinion, is either expressly or implicitly authorised by the proprietor of a chemical product, to obtain information.

The subclause may be regarded as conferring unacceptably wide and unreviewable discretions. By virtue of paragraph 20(3)(a), the Minister would be granted a discretion to authorise the divulging of confidential commercial information to any person, so long only as the Minister regards that as necessary in the public interest. By virtue of paragraph 20(3)(c) the Chairperson would be permitted to divulge such information to any person, so long as the Chairperson was of the opinion that the proprietor of the information had impliedly authorised such action. It may be that the disclosure of the information could conceivably cause irreparable commercial harm to its owner, and

owner, and there appears to be little recourse that such an owner would have to prevent or challenge such disclosures.

The Committee has in the past drawn attention to such provisions because they give a Minister the ability to make a decision which would make information, deemed by the legislation to be commercially confidential, available to other persons without the recognised proprietor of that information having the ability to challenge the decision.

The clause is drawn to the Senate's attention in that it may be considered to make rights unduly dependent upon a non-reviewable decision.

Clause 22 - Reversal of the onus of proof

If enacted, clause 22 would provide that certain persons (holders of certificates of clearance issued by the Council) are required to notify the Council of any new information at variance with information previously provided to the Council, or which may indicate that the use of chemicals in accordance with published recommendation may be harmful, or less effective, than originally represented to the Council. Failure to notify the Council may lead to prosecution.

Clause 22(3) would reverse the onus of proof in a prosecution under the provision. It is a defence to a charge, under the clause, that the person charged did not possess, and had no means of access to, the information referred to in the clause. Although the matters which would constitute the defence are such as would be peculiarly within the knowledge of the defendant, it is difficult to see how rebuttal of these matters would cause undue expense or difficulty to the prosecution.

The clause is accordingly drawn to the Senate's attention in that, by reversing the onus of proof in a criminal prosecution it may be considered to trespass unduly on personal rights and liberties.

AUDIT AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 28 April 1988 by the Minister Representing the Minister for Finance.

The Bill amends the Audit Act 1901 and intends principally to enhance the Commonwealth's financial reporting, administration and audit machinery and to bring certain penalty provisions into line with current criminal law policy.

In Alert Digest No. 7 of 1988 (18 May 1988), and in its Eighth Report of 1988 (25 May 1988), the Committee drew attention to the following clauses of the Bill:

Clause 6 - Delegation of legislative power

If enacted, clause 6 would amend section 49 of the Audit Act. Subsection 49(1) of the Act currently provides for the publication by the Minister for Finance of the Minister's Monthly Statement of Financial Transactions. Subsection 49(2) of the Act presently provides that the format of the Monthly Statement can only be varied with the prior approval of both Houses of the Parliament.

The amendment proposed by clause 6 provides that the format of the Statement would, in future, be specified in regulation which would be subject to tabling and disallowance.

Senators' attention was drawn to the fact that a proposed amendment of similar effect was contained in the Statute Law (Miscellaneous Provisions) Bill 1987. That clause was left out of the Bill during debate in the Senate on 7 October 1987.

The Minister for Finance has responded to the Committee's comments and has advised the Committee that the primary reason for the proposed amendment is to allow the Minister to more

easily alter the form of the Statement, in minor ways, so that the form will reflect internationally accepted principles of functional classification of receipts and expenditure developed by the United Nations. In particular, the Minister noted that such changes include:

> '... new revenue measures, changes in the character of programs on the emphasis the Government wishes to give certain functions or to correct classification issues to maintain conformity with basic classification principles.'

The Minister also advised the Committee that:

> 'Advance notice of proposed changes to the format (as required by the existing arrangements) could reveal Budgetary details before the presentation of the Budget. Accordingly, approval of format changes is not sought until after Budget presentation or other relevant announcements have been made; in the interim information has to be presented to Parliament in an outdated format.
>
> The amendment to section 49 is designed to allow details of monthly transactions of expenditure and receipts to be presented to Parliament in a timely manner and in a format that is consistent with the presentation used in the Budget.'

With reference to the commencement of the provision, the Minister advised:

> 'This clause is to come into operation on a date to be fixed by proclamation. This is necessary to prevent the possibility of a hiatus developing if the section 49 amendment was passed and a replacement regulation was subsequently rejected. It will be necessary therefore to co-ordinate the date of proclamation with the expiration of the period for disallowance of the regulation.'

The Committee thanks the Minister for his response and trusts that it will assist Senators in debate on the Bill.

Clause 15 - Inappropriate delegation of legislative power

Clause 15 would introduce a new section 63R to the Audit Act. The clause would give the Auditor-General a discretion to

determine what matters are of such minor importance, or immateriality, that they do not need be reported to the Parliament. The Committee believes that the difficulty with such a discretion is that, of its nature, it would clearly not be possible for persons outside the Auditor-General's Office to determine the circumstances in which the discretion has been exercised, if and when it were exercised. While endorsing the comments on the high degree of competence and integrity of the Auditor-General's office in the Minister's Second Reading speech, the Committee noted the Minister's acknowledgement that the Joint Committee of Public Accounts has expressed disquiet over the effect of such a clause.

The Committee accordingly drew the clause to the Senate's attention in that it may be considered to constitute an inappropriate delegation of legislative power.

The Minister for Finance has responded to the Committee's comments and has noted that, if enacted, the proposed provision would complement a number of existing provisions of the Audit Act which allow the Auditor-General discretion to direct audit activities, or not to report matters that the Auditor-General considers immaterial or trivial, and that the proposed provision would make existing provisions of the Act uniform with reference to the reporting requirements the Act now imposes on the Auditor-General.

The Minister also advised the Committee that there would be a necessary resource cost in requiring the Auditor-General to pursue and report every breach of the law; a cost that - in the Minister's view - would be unjustified.

The Minister observed:

> To be able to carry out the audit function within reasonable resource limits, the Auditor-General argued that he must be allowed to exercise judgement about how he uses his resources. The Government accepted his argument. In this context, the amendment seeks to remove an impossible requirement from the law to permit the

Auditor-General to use his professional judgement about materiality.

I am sure your Committee would agree that the presence of trivial requirements in law brings the law into disrepute and, in this case, exposes the Auditor-General to undeserved ridicule when he is made out to be concerned about trivial, nit-picking matters. Other auditors are not so impaired, they are able to apply their professional standards as they judge best. In this context it is made easy for Statutory Authorities to express dissatisfaction with the Auditor-General because the lack of this discretionary power makes him appear to be overly concerned about insignificant matters. They resent having to pay sizeable Audit fees to see the Auditor-General pursuing insignificant, immaterial issues that another, commercially engaged, auditor would not waste time on and whose fee may therefore be more attractive than the Auditor-General's.

The Committee thanks the Minister for his response. The Committee believes that the Minister's advice will assist Senators' consideration of the Bill.

The Committee notes in conclusion that any alteration, limitation or reduction of the powers or of the reporting requirements of the Auditor-General are of particular importance to the Committee. Being an Officer of the Parliament, the Auditor-General's independence and the legislative requirements placed on the holder of that office to report fully to the Parliament must be scrupulously protected by the Parliament so as to ensure appropriate financial accountability.

Schedule 1 - Self-incrimination

Proposed new subsections 63G(9), 63L(9) and 63ME(6), each contained in the Schedule to the Bill, would abrogate the privilege against self-incrimination. In each case, however, the abrogation is sufficiently limited so as to be acceptable the Committee, given the Committee's guidelines for such provisions.

The proposed subclauses were drawn to Senators' attention for information.

AUSTRALIAN FILM COMMISSION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 18 May 1988 by the Minister for the Arts and Territories.

The Bill seeks to amend the Australian Film Commission Act 1975 so as to enable the incorporation of the company Film Australia Pty. Ltd.

The Bill will remove from the Australian Film Commission the function of making films and TV programs, which will become the responsibility of the new company. It will also enable the transfer of certain staff, assets, contractual rights and obligations from the Australian Film Commission to the new company.

General Comment

Under the amendment proposed in clause 14, the Commission would be required to report to Parliament each year on the Commission's activities, but would no longer be required to report on certain present activities which are, by virtue of this Bill, to become the functions of Film Australia Pty. Ltd. The company Film Australia Pty. Ltd. will be a company incorporated in the Australian Capital Territory and hence will be subject to the reporting requirements specified in the Companies Act.

The Committee commented in its Second Report of 1988 (16 March 1988) that the lack of any provision in the Australian Airlines (Conversion to Public Company) Bill 1988 requiring the company created by that Bill to report annually to the Parliament, meant that a major Commonwealth business enterprise would not in future be required to report to the Parliament.

The Committee again drew Senators' attention to the long-standing concern of the Senate that all Commonwealth bodies, including companies in which the Commonwealth, or a Commonwealth agency, holds all or a majority of the issued shares, should be obliged to report annually to the Parliament on its activities.

The Minister for the Arts, Sport, the Environment, Tourism and Territories has responded to the Committee's comment and has expressed support for the Committee's concern that the

> '... accountability of Commonwealth bodies should be secured in appropriate cases by means of Parliamentary reporting processes.

With reference to the thrust of the Committee's observation that all Commonwealth bodies should report annually to the Parliament, or that their reports should at least be made available to the Parliament, the Minister advised:

> ... I am happy to undertake to follow, and to ensure that the responsible Minister also follows, the convention to which the Committee referred in its Second Report of 1988 with regard to the Qantas annual report; that is, the convention of tabling in the Parliament the relevant Commonwealth-owned company's annual report after its statutory lodgement.
>
> I do not consider that it would be appropriate to amend this Bill to require that Film Australia report to the Minister, and through her/him, to the Parliament. Unlike the Australian Airline (Conversion to Public Company) Act 1988, to which the Committee's Second Report referred and which has the direct effect of deeming the Australian Airlines Commission to be incorporated under the Companies Act. By contrast, this Bill does not actually establish Film Australia (which has been incorporated under the Companies Act 1981 in the normal way).

Senators may also be interested in the Minister's advice that:

> ... the Articles of Association of Film Australia provide that, in consultation with the directors, the Minister, may determine such supplementary information as may be required for the purposes of discharging the Minister's obligations to inform the parliament and to ensure the proper supervision of the affairs of Film Australia.

The Minister's concluding comment to the Committee was that, in his view, the provisions of the Bill are appropriate.

The Committee thanks the Minister for his response.

Notwithstanding the Minister's undertaking to the Committee, the Committee believes that all Commonwealth bodies, including companies in which the Commonwealth, or a Commonwealth agency, holds all or a majority of the issued shares, should be obliged to report annually to the Parliament on its activities.

As the Committee noted in its Second Report of 1988, legislation which provide for the establishment of new Commonwealth bodies, including incorporated companies, should also provide for the tabling of that body's annual report in the Parliament.

COMMONWEALTH EMPLOYEES' REHABILITATION AND COMPENSATION BILL 1988

This Bill was introduced into the House of Representatives on 27 April 1988 by the Minister for Social Security.

The Bill seeks to repeal the Compensation (Commonwealth Government Employees) Act 1971 and establish a new system of compensation and rehabilitation for employees who are injured in the course of their employment by the Commonwealth.

In Alert Digest No. 7 of 1988 (18 May 1988), the Committee drew attention to the following clauses of the Bill:

Clause 4 - Trespass on personal rights and liberties

Subclause 4(13) of the Bill provides that an employee who is under the influence of alcohol or a drug shall be deemed to be guilty of serious and wilful misconduct. Hence, by virtue of subclause 14(3), an employee would not be entitled to

compensation for an injury caused while being under the influence of alcohol or drugs, unless the employee dies, or suffers serious and permanent impairment.

The clause was drawn to the Senate's attention in that it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

The Minister for Social Security has responded to the Committee's comment, and has advised:

> This provision deems an employee who is under the influence of alcohol or a non-prescription drug to be guilty of serious and wilful misconduct. The effect of the provision is only to disentitle those employees who do not suffer serious injury or death because of the influence of alcohol or non-prescription drugs. Where the employee suffers a serious impairment or dies, this subclause does not operate (subclause 14(3) refers).
>
> Similar provisions can be found in some of the State compensation schemes, e.g. Victoria (Section 82(4) Accident Compensation Act 1985) and Northern Territory (Section 60(1) Work Health Act 1986).

The Committee thanks the Minister for his response which clarifies the effect of the proposed clause.

Clause 44 - General Comment - Removal of Common law right of action

Clause 44 would, if enacted, deprive a Commonwealth employee injured as a result of the Commonwealth's negligence of the right to sue for damages.

An employee's common law right to sue an employer is an action based on the common law action negligence action. The action was developed during the nineteenth century from the old action on the case.

As an action by employee against employer, the action arises from a breach of the employer's duty of care towards his

employees, the classical expression of which remains Lord Wright's formulation in Wilsons & Clyde Coal Co. v. English 1937 A.C.57 of a threefold obligation by employers to their employees involving 'the provision of a competent staff of men, adequate material and a proper system and effective supervision'.

The common law action has, from time to time, been modified and supplemented by actions for breach of statutory duty, such as a duty to provide guards to dangerous parts of machinery, or to reduce other hazards.

The Standing Committee is concerned to ensure that, if it is proposed that an existing right of action at common law is to be removed by legislation and replaced by an administrative scheme, it is recognised that the removal of such an important and fundamental right should be replaced by an adequate alternative remedy.

In its Alert Digest comment on the clause, the Committee noted that the existing common law right of a Commonwealth employee to sue the Commonwealth would generally entitle an employee, who pursued it with full success, to a lump sum for the total loss suffered. The Committee also noted that the Bill seeks to compensate all Commonwealth employees, with few exceptions, injured at work whether through the Commonwealth's negligence or otherwise and observed that compensation payable under the Bill's scheme may generally be less than they would have obtained had employees been fully successful at common law.

The Minister for Social Security has responded to the Committee's comment by noting that the scheme proposed by this Bill will '... provide compensation on a no fault basis and especially assist the seriously injured employee.' The Minister summarised the benefits proposed by the Bill, which are set out in detail in the Minister's Second Reading speech, and observed:

This is a comprehensive package of benefits designed to meet the needs of injured employees as they arise. The advantage of this approach is that money is paid on a consistent basis commensurate with the needs of the employee as those needs.

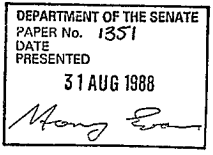
The Committee thanks the Minister for his response.

Barney Cooney
(Chairman)

1 June 1988

AUSTRALIAN SENATE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS



TENTH REPORT

OF 1988

31 AUGUST 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF 1988

31 AUGUST 1988

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. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF 1988

The Committee has the honour to present its Tenth Report of 1988 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:

Industrial Relations Bill 1988

INDUSTRIAL RELATIONS BILL 1988

This Bill was introduced into the House of Representatives on 28 April 1988 by the Minister for Industrial Relations.

The Bill provides for the establishment of a federal institutional framework for the prevention and settlement of industrial disputes by conciliation and arbitration.

In Alert Digest No.7 of 1988 (18 May 1988) the Committee drew attention to the following clauses of the Bill:

Clause 86 - Powers of search

Clause 86 provides that an inspector appointed under the legislation would be entitled to enter private premises without a warrant in order to determine whether awards, or other provisions of the legislation, are complied with. The Committee notes that, whilst such a power may be deemed necessary for the effective enforcement of the proposed Bill, the Committee believes to be consistent, it must draw the Senate's attention to the grant of such powers.

The Committee drew the clause to the attention of Senators in that, by providing a power of search without warrant, it may be considered to breach principle 1(a)(i) of the terms of reference and to trespass unduly on personal rights and liberties.

The Deputy Secretary of the Department of Industrial Relations has responded to the Committee's comments on clauses of the Bill on behalf of the Minister for Industrial Relations. As the response is comprehensive and detailed, it is annexed to this report for Senators' information.

In response to the Committee's comment on the clause, the response observes that the exercise of powers of entry which would be granted by the clause are subject to a number of other provisions of the Bill which effect prevention or restriction of possible arbitrary exercise of an inspector's powers.

The Government's response also details the Minister's view on why it is unnecessary that there be a specific statutory provision requiring the granting of a warrant to an inspector, before the inspector can exercise a power to enter, or search premises is as follows:

> The Government does not consider, however, that a system of search warrants is appropriate or required. This conclusion has been reached considering:
>
> (a) the safeguards mentioned;
>
> (b) the number and nature of inspections conducted;
>
> (c) the history of co-operation between employers, workers (and their representatives) and inspectors in securing voluntary award compliance;
>
> (d) the practical difficulties which may be experienced in obtaining warrants in some circumstances, eg, in remote geographical locations;
>
> (e) the successful operation of the similar powers of entry and inspection currently applying under section 125 of the Act.

The Committee has consistently expressed its concern, based on sound civil liberties principles, at the conferral of powers of entry, search and seizure on officials such as inspectors.

The response to the Committee's comment may, in our view, be fairly summed up as one which primarily relies on the view that equivalent provisions in existing industrial relations legislation have functioned satisfactorily; that is, without obvious abuse of inspector's powers. While such a claim may be true, it does not directly answer the Committee's concerns. Equally it may also be maintained that the response highlights certain practical difficulties which may lie in the way of any changes to the Bill.

The Committee finds some merit in the response to the Committee's comment on this clause and believes that it will assist the consideration of the Bill.

Clause 121 - 'Henry VIII' clause

Clause 121 provides that, in relation to an industrial dispute involving public sector employment, the proposed Australian Industrial Relations Commission may make an award that is not consistent with any law of the Commonwealth or of an internal Territory relating to the relationship between employers and employees in public sector employment other than:

(a) the Compensation (Commonwealth Government Employees) Act 1971, the Long Service Leave (Commonwealth Employees) Act 1976, the Superannuation Act 1922 or the Superannuation Act 1976; or

(b) any prescribed Commonwealth Act or prescribed Northern Territory Ordinance, or any prescribed provisions of such an Act or Ordinance.

The clause may be classified as a 'Henry VIII' clause on two counts: first, it permits the Commission to make awards overriding the laws made by Parliament, and secondly, it leaves those laws which may not be overridden - other than the four expressly identified - to be set out in regulations.

The Committee drew the clause to the attention of Senators in that, by permitting the Commission to override certain laws in the fashion proposed by the bill, it may be considered to constitute an inappropriate delegation of legislative power.

Senators' attention is drawn to pages 4 to 6 of the response which deals with the comment made by the Committee. The Committee observes that, the response and its comments on clause 121 are similar to those on clause 86; that is, it relies on the view that equivalent provisions in existing law have functioned satisfactorily and without abuse.

The Committee notes also that the response has focused on the policy background to the scheme of the Bill, rather than on the point that was raised by the Committee and believes its comment remains pertinent and that enactment of the provision would constitute a delegation of legislative power.

Subclause 134(3) - Delegation

Subclause 134(1) provides that a member of the Commission, or an authorised person, may at any time during working hours enter a workplace and inspect or view work, machinery or documents and interview employees.

An authorised person is defined as a person authorised under subclause 134(3) which provides that a member of the Commission or a Registrar may authorise a person to exercise powers under subclause 134(1) for the purpose of, or in connection with, the exercise of another power, or the performance of a function, conferred on the Commission.

Subclause 134(3) thus permits the delegation of the powers under subclause 134(1) to any person whom the Commission may choose to authorise.

The Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made.

The Committee drew subclause 134(3) to the attention of the Senate in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

The essence of the response to the Committee's comment on the clause is given on page 7 of the letter to the Committee. In common with responses to previous such comment it suggests that:

- sufficient constraint exists on the exercise of the power to be delegated
- any delegation would be in writing and specify the extent of the power delegated
- the need to have a wide discretion as to whom authority can be delegated
- a successful operation of a broadly equivalent provision under existing legislation

The Committee accepts that, in practical terms, these observations have merit in terms of application of such provisions.

The Committee has not, and does not, suggest that individual delegation schemes are subject to abuse. Rather, it is the routine inclusion of such clauses in Bills by the draftsman which indicates willingness on the part of Departments and authorities to determine in advance which powers should or should not be delegated, and has suggested that, while it will always be a matter for judgement as to who should be delegated such powers - and the powers in this case are important - the judgement on who should be delegated administrative powers should be that of the Parliament.

As the Committee has pointed out in its Annual Report for 1985-86 (Chapter 4) several bills have in fact, been drafted so as to recognise and give effect to the Committee's comments on such clauses.

The Committee notes in conclusion that the response states

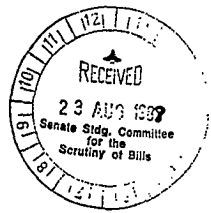
> 'If there were to be a specification of the persons who could be authorised under clause 134, that could prove to be an unnecessary obstacle to the effective operation of the provision in some cases, unless that specification were so general as to add little, if anything, to the existing constraints.'

The Committee does not accept this view, and continues to draw the clause to the Senate's attention as it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative power.

Barney Cooney
(Chairman)
31 August 1988

Department of Industrial Relations

Our Reference :
Your Reference:



Senator B C Cooney
Chairman
Standing Committee for
the Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the observations in the the Scrutiny of Bills Alert Digest No 7 of 1988 on the Industrial Relations Bill 1988 ("the Bill") and to your letter of 19 May 1988 to the Senior Private Secretary to the Minister for Industrial Relations, the Hon Ralph Willis MP, concerning those observations.

The Minister has asked me to provide you with the following comments on the main matters raised in the Digest, excluding those mentioned for information only. The Minister regrets that, as a result of pressures arising from the foreshadowed Ministerial changes, he is unable on this occasion to reply personally.

At the outset, I would like to indicate that, having considered the Committee's views, the Government does not propose to amend the clauses concerned. The reasons for that decision are set out below.

Clause 86 - Powers of Inspectors

Clause 86 is one of the provisions which constitute Part V of the Bill - "Inspectors". The primary purpose of this Part is to establish a federal labour inspection service and to ensure that it is carried out effectively and in a manner that is consistent with Australia's obligations under the International Labour Organisation Convention No 81 on Labour Inspection, which Australia has ratified.

It should be noted that, under sub-clause 84(4) of the Bill, it is provided that:

> "An inspector has such powers and functions in relation to the observance of this Act and awards as are conferred by this Act."

Inspectors are required to ascertain whether awards, and the requirements of the Bill, are being met - see sub-clause 86(1).

1 Farrell Place. GPO Box 9879. Canberra. ACT. 2601. Telephone: (062) 43 7333. Telex: 'DIR' 62944

It should also be noted that, under sub-clause 84(5), the Minister may, by notice published in the Gazette, give directions specifying:

(a) the manner in which; and

(b) any conditions and qualifications subject to which;

powers or functions conferred on inspectors are to be exercised or performed.

A similar provision is contained in sub-section 125(5) of the Conciliation and Arbitration Act 1904 ("the Act") and the most recent Ministerial directions are set out in:

(a) Gazette No s.229 of 8 September 1987;

(b) Appendix G to the 1986-87 Annual Report of the Arbitration Inspectorate presented to the Senate on 26 April 1988.

In practice, the principal function of inspectors is to secure the observance of awards. This is achieved by the conferral of powers:

(a) to enter on premises:

- without force; and
- where an inspector has reasonable cause to believe that work to which an award applies is being or has been performed [sub-paragraph 86(1)(a)(i)];

(b) to enter a place of business:

- without force; and
- in which the inspector has reasonable cause to believe that there are documents relevant to the purpose of ascertaining whether awards are being or have been observed [sub-paragraph 86(1)(a)(ii)];

(c) to do certain things while on such premises or in such a place - see paragraph 86(1)(b);

(d) to require the production of relevant documents - see paragraph 86(1)(b)(iv) and sub-sections 86(2), (3) and (4);

(e) in appropriate cases, to sue for and recover a penalty for a breach of an award - see clause 178.

Clause 304 makes it an offence to obstruct an inspector in the exercise or performance of the inspector's powers or functions.

Much the same legislative scheme applies where an inspector is seeking to ascertain whether the requirements of the Bill are being or have been observed - see clause 86.

On the other hand, where an inspector is investigating a safety matter as requested by the Industrial Relations Commission under clause 87, the inspector's powers of entry and inspection may derive from:

(a) authorisation by the Commission or a Registrar under clause 134; or

(b) if an award or a requirement of the Bill is involved, clause 86.

The extent of the award inspection activity should be noted. As recorded in the Arbitration Inspectorate's 1986-87 Annual Report, during that financial year:

(a) over 24,000 inspections were completed throughout Australia (including in a number of remote geographical areas);

(b) there were nearly 18,000 inspection visits;

(c) over 16,000 places were entered;

(d) 28,828 prima facie award breaches were detected;

(e) over $4 million was voluntarily paid by employers to employees to terminate award breaches;

(f) only a small number of prosecutions were necessary (102 completed in the financial year) - the great majority of breaches detected are rectified by employers voluntarily.

There are a number of safeguards against the arbitrary exercise of an inspector's powers:

(a) as noted, the exercise of an inspector's powers is subject to the published directions of the Minister - sub-clauses 84(5) and (6);

(b) an inspector must carry an identity card issued by the Minister - clause 85;

(c) an inspector who, pursuant to the Bill, is on or proposes to enter premises must produce that identity card to the occupier upon demand (failure to do so disqualifies the inspector from entering or remaining on the premises) - sub-clause 86(5);

(d) where any documents are retained by an inspector, the person otherwise entitled to their possession, or an agent of that person, may inspect, copy or take extracts from the documents at all reasonable times;

(e) the activities of inspectors will be reviewable by:

- the Commonwealth Ombudsman under the Ombudsman Act 1976; and

- the Parliament upon presentation of the *Inspectorate's Annual Report* - clause 88.

It is the Government's view that the entry and inspection powers for inspectors are reasonable and necessary for the carrying on of an effective labour inspection service. It should also be noted that such powers are required under Article 12 of ILO Convention No 81 regarding labour inspection.

The Government does not consider, however, that a system of search warrants is appropriate or required. This conclusion has been reached considering:

(a) the safeguards mentioned above;

(b) the number and nature of inspections conducted;

(c) the history of co-operation between employers, workers (and their representatives) and inspectors in securing voluntary award compliance;

(d) the practical difficulties which may be experienced in obtaining warrants in some circumstances, eg, in remote geographical locations;

(e) the successful operation of the similar powers of entry and inspection currently applying under section 125 of the Act.

Clause 121 - Power to override laws affecting public sector employment

The Bill supports the Government's intention that the proposed Industrial Relations Commission should have responsibility for the prevention and settlement of industrial disputes in both the public and private sectors through processes of conciliation and arbitration (see relevant definitions in sub-clause 4(1) and the additional jurisdiction conferred under clause 5). The broad objective of the legislation is to establish an appropriate framework at the federal level by which this objective may be achieved.

For this purpose, it is necessary to provide for the resolution of any possible conflict between an award or order of the Commission and:

(a) a law of the Commonwealth or of an internal territory; or

(b) determinations made pursuant to such a law by a Commonwealth or territory employing authority relating to terms and conditions of employment.

By way of examples:

(a) at present, in the absence of section 41A, it is arguable that the Australian Conciliation and Arbitration Commission would be unable to make stand-down orders in relation to federal public servants engaging in industrial action [because the disciplinary provisions of the Public Service Act 1920 could be seen to be a complete legislative code relating to an officer's refusal to perform his or her duties - see Bennett v Commonwealth (1980) 30 ALR 423];

(b) it is longstanding practice for the Australian Conciliation and Arbitration Commission to make key awards in relation to employment in the Australian Public Service, the terms of which are passed on throughout the service under determinations made by the employer pursuant to section 82D of the Public Service Act 1922.

In the absence of section 41A of the Act, the Australian Conciliation and Arbitration Commission might be unable to make a further award or order to resolve a dispute relating to employment covered by such a determination if the award or order would be inconsistent with the determination.

To avoid these difficulties, the Government has, in sub-clause 121(1), maintained in updated form the power presently conferred under sub-section 41A(1) of the Act enabling the tribunal to make awards and orders which are, or may be, inconsistent with a relevant law of the Commonwealth or a Territory.

On the other hand, there are some responsibilities of the Commonwealth and territory governments as employers which are provided for by legislation but are not intended to be subject to modification by award or order. This is particularly true where a complete code is deliberately enacted in relation to particular employment matters and has significant expenditure implications for governments, eg, by providing for superannuation or long service leave for Commonwealth employees.

Sub-clause 121(2) [in line with the scheme in existing sub-section 41A(2)] therefore provides for:

- the exclusion of certain specified Acts from the award-making power conferred by sub-clause 121(1);

- the capacity to prescribe other legislation (or provisions of other legislation) so as to exclude it from the Commission's award-making power.

It may be helpful to point out that:

(a) section 41A of the Act has been in operation since 1956, subject to a number of amendments which are not relevant for present purposes;

(b) a like power was conferred on the Public Service Arbitrator under section 22 of the Public Service Arbitration Act 1920 from the time of its enactment until its repeal in 1984.

Finally, on this point, it should be recalled that clause 121 does not in any way derogate from the power of the Parliament to include in other legislation relating to employment by the Commonwealth express provisions regulating the Commission's award-making powers (eg, see section 32 of the Australian Industry Development Corporation Act 1970).

Clause 134 - Power of Inspection

The Bill, like the Act, makes provision for entry on premises for various purposes relating to matters provided for under the Bill. Clause 134 forms part of that scheme (see also Part V - Inspectors and clause 285). It should also be noted that persons may be granted certain entry rights under awards, eg, where a union official is authorised, subject to certain conditions, to enter an employer's premises to interview union members.

Clause 134 permits entry on prescribed premises by:

(a) a member of the Commission; or

(b) a person authorised in writing by a member of the Commission or a Registrar.

When on such premises, the person concerned has the powers of inspection and interview provided for in paragraphs 134(1)(b) and (c).

There are a number of constraints on the use of these powers:

(a) their exercise may only be for the purpose of, or in relation to, the exercise of another power or the performance of a function conferred by the Act - sub-clauses 134(2) and (3) [eg, the conducting of inspections of workplaces for the purposes of settling an industrial dispute];

(b) a person who is authorised under sub-clause 134(3) to exercise these powers may only do so to the extent and for the purposes specified in the authority - sub-clause 134(4);

(c) the right of entry on premises is confined to working hours - sub-clause 134(1);

(d) entry is also confined to "prescribed premises", ie, premises on which or in relation to which:

- there are or have been any of the activities specified in paragraphs 134(5)(a)-(d);

- there are documents relevant to a secret ballot under the Bill - see paragraph 134(5)(e);

- an award or order of the Commission has been made - see paragraph 134(5)(f).

It is the Government's view that this provision is an important mechanism for the achievement of the objectives of the Bill. It is not considered necessary to specify to whom the powers under the provision may be delegated having regard to:

(a) the constraints on the exercise of the powers mentioned above, particularly the limitations on the purposes for which they may be exercised;

(b) the requirement that the written authority given to the delegate specify the extent and purposes of the powers so delegated;

(c) the fact that the authority may only be given by members of the Commission or Registrars [who are, subject to the Bill, under the ultimate direction of the President - see sub-clauses 67(4) and 75(2)];

(d) the need for a wide discretion as to whom authority may be given, having regard to the circumstances in which the Commission will exercise its powers (eg, in relation to disputes with quite distinctive features and in a wide range of locations);

(e) the successful history of the operation of the equivalent provision in the Act (section 42).

On the other hand, if there were to be a specification of the persons who could be authorised under clause 134, that could prove to be an unnecessary obstacle to the effective operation of the provision in some cases, unless that specification were so general as to add little, if anything, to the existing constraints.

Yours sincerely

Julia Fellows

Julia Fellows
Deputy Secretary

DEPARTMENT OF THE SENATE
PAPER No. 1504
DATE
PRESENTED
29 SEP 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF 1988

28 SEPTEMBER 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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TERMS OF REFERENCE

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(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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(2) 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 1988

The Committee has the honour to present its Eleventh Report of 1988 to the Senate.

The Committee draws the attention of the Senate to clauses of the following Bills, and a section of the Research and Development Legislation Amendment Act 1988, which contain provisions that the Committee considers may fall within principles 1(a) (i) to (v) of Standing Order 36AAA:

Agricultural and Veterinary Chemicals Bill 1988

Electoral and Referendum Amendment Bill 1988

Research and Development Legislation Amendment Act 1988

AGRICULTURAL AND VETERINARY CHEMICALS BILL 1988

This Bill was introduced into the House of Representatives on 28 April 1988 by the Minister for Primary Industries and Energy.

The Bill will establish a new Commonwealth authority, the Australian Agricultural and Veterinary Chemicals Council (the Council), which will operate as a co-ordinating and clearing organisation principally charged with recommending conditions and restrictions which apply in relation to the manufacture, sale and use in Australia of agricultural and veterinary chemical products.

In Alert Digest No. 7 of 1988 and in its Ninth Report of 1988 the Committee drew attention to the following clauses of the Bill:

Clause 20 - Non-reviewable decisions

Clause 20 prescribes certain restrictions on the disclosure of information concerning chemical products subject of the legislation. If enacted, subclause 20(3) of the Bill would allow the Council and its Chairperson to divulge commercially confidential information to such persons as the Minister certifies in writing. It would also allow the divulging of information to a prescribed authority or person or to a person who in the Chairperson's opinion, is either expressly or impliedly authorised by the proprietor of a chemical product to obtain information.

The subclause may be regarded as conferring an unacceptably wide and unreviewable discretion. By virtue of paragraph 20(3)(a), the Minister would be given discretion to authorise the divulging of confidential commercial information to any person, so long as the Minister regards such action as necessary in the public interest.

By virtue of paragraph 20(3)(c) the Council Chairperson would also be permitted to divulge such information to any person, so long as the Chairperson was of the opinion that the proprietor of the information had impliedly authorised the divulging of such information.

It may be that any such disclosure of the information could conceivably cause irreparable commercial harm to its owner. There appears to be little recourse that an owner would have to prevent or challenge a decision to authorise such disclosure.

The Committee has in the past drawn attention to provisions which give a Minister or a statutory office-holder the power to decide that information, deemed by the legislation to be commercially confidential, may be made available to other persons without provision for review of such a decision.

The clause was accordingly drawn to the Senate's attention in that it may be considered to be in breach of principle 1(a)(iii) and make rights unduly dependent upon a non-reviewable decision.

In response to the Committee's comment on clause 20, the Minister for Primary Industries and Energy, observed that the provision was included in the Bill for use when emergencies arose, or where public concern had been aroused to a degree which justified the release of commercially confidential information. Specifically, the Minister noted

> Agricultural and veterinary chemicals, when manufactured, packaged, stored, transported and used in accordance with recommendations are safe. However, one cannot overlook their hazardous potential or their complexity. In instances where recommendations are not followed, in instances of accident or where new information regarding the impact of chemicals comes to light it may be necessary to divulge information immediately to enable a possible or actual emergency to be dealt with. In such situations the public interest, specifically protection of public

> health and safety, clearly overrides the need to protect the commercial interest of chemical manufacturers. It is only in circumstances such as these that I can envisage a Minister making use of this provision of the Bill.

The Minister also advised the Committee that he would support an amendment of paragraph 20(3) (a). The Minister proposed that the amendment would require the Council Chairperson to use all reasonable endeavours to advise the supplier of information, that information was to be divulged in the manner envisaged, prior to it being divulged. The Minister undertook to incorporate an amendment to this effect in a portfolio omnibus bill during the Budget sittings of the Parliament. The Committee thanks the Minister for his response, and welcomes the foreshadowed amendment.

In relation to the Committee's comments on paragraph 20(3) (c) the Minister observed that the provision is 'designed to cater for more prosaic situations'. The provision will allow the Council Chairperson to decide whether to disclose particular information on the basis of approvals to do so already provided to the Council by proprietors of chemical products.

It appears that there will be occasions where the Council, or Chairperson may not be sure whether approval for disclosure of information has been given. This apparently practical difficulty, when it arises, will be overcome by granting the Chairperson a discretion to determine whether approval may be implied (that is, implied by the Chairperson) from data and documents provided by the proprietor to the Council.

Put simply, the Chairperson will require the power given in the paragraph, because the volume of data provided by proprietors of products may result in practical difficulty in identifying express authorisation to disclose information.

The Minister has asserted that he expects use of the power will be limited. Nevertheless, the Committee regards that use, particularly improper use, could seriously, and perhaps irreperably damage a company's commercial position in a particular market. The Committee also believes that the power to take important discretionary decisions, such as those of the class given by paragraph 20(3)(c), should be subject to contrary argument or representation by a proprietor and be reviewed on the merits by the Administration Appeals Tribunal.

The Committee has noted the beneficial effect the AAT has had on the quality, and the coherence of decisions which can affect individual citizens. While it is a matter for careful judgement whether a particular administrative decisions should be reviewable, consideration of such factors as cost, delay, uncertanity must be balanced against the ideal of review of decisions on their merit. On balance, it is the Committee's view that decisions that may be taken under paragraph 20(3)(c) of the Bill should be subject to review.

The Committee accordingly continues to draw paragraph 20(3)(c) to Senators' attention as it may breach principle 1(a)(iii) and make rights unduly dependent upon a non-reviewable administrative decision.

Clause 22 - Reversal of the onus of proof

Clause 22 would require certain persons (holders of certificates of clearance issued by the Council) to notify the Council of any new information at variance with information previously provided to the Council, or which may indicate that the use of certain chemicals in accordance with published recommendations may be harmful, or less effective, than originally represented to the Council. Failure to notify the Council of such information may lead to prosecution.

Clause 22(3) would reverse the onus of proof in a prosecution commenced under the provision. It is a defence to a charge under the clause that the person charged did not possess, and had no means of access to, the information referred to in the clause. Although the matters which would constitute the defence would be peculiarly within the knowledge of the defendant, it is difficult to see that rebuttal of these matters would cause undue expense or difficulty to the prosecution.

The clause was accordingly drawn to the Senate's attention as it may breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

In response to the Committee, the Minister has described in detail one possible situation in which the provision of information under the subclause may be required.

> For example, the Council may seek information as to why a chemical that has been cleared for registration in Australia is subsequently refused clearance (or its equivalent) in another country. Assuming that the Australian clearance holder was also the applicant for clearance in that other country this information may well be information of which that Australian clearance holder might reasonably be expected to have knowledge. However, the actual possession of that information, or of access to that information, will depend upon clearance refusal, the existence of any review rights in relation to the clearance refusal and the exercise of those review rights which are matters that can, in many cases, only be known to the clearance holder. Of course, if the clearance holder in Australia is not also the applicant for clearance in that other country, (a situation which may well arise if different distributors seek clearance of chemicals in different countries), the likelihood of anyone other than the defendant being able to demonstrate access or lack of access to the information concerned becomes even more remote.

The Committee's concern was that it could not see why the relevant information required to prove the offence would necessarily be extremely difficult or expensive for the prosecution to obtain.

In its Annual Report for 1986-87 (Parliamentary Paper No. 443 of 1987) the Committee stated that, if it is presented with a convincing arguments as to why reversal of the onus of proof in criminal proceedings is necessary it will consider those arguments and may accept such a provision.

The Committee also observed, however, that it will regard such arguments with great care, and only alter its view on provisions which reverse the onus of proof in criminal proceedings where both

i) the matters to be raised by way of defence by an accused person are peculiarly within the knowledge of the accused; and

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

The Committee thanks the Minister for his response. It finds the example offered by the Minister a cogent reason for reversing the onus of proof in this provision. The Committee is satisfied that its concerns in relation to clause 22 are answered.

ELECTORAL AND REFERENDUM AMENDMENT BILL 1988

This Bill was introduced into the Senate on 29 April 1988 by the Minister for Home Affairs.

The Bill is designed to give legislative effect to the remaining accepted recommendations of the Joint Select Committee on Electoral Reform's Reports Nos. 1 and 2. To this end it amends the Commonwealth Electoral Act 1918 and the Referendum (Machinery Provisions) Act 1984.

In its Eighth Report of 1988 the Committee drew the following clause to the Senators' attention:

Clause 32 - Trespass on personal rights and liberties

Clause 32 of the Bill would introduce a new subsection 91(9) to the Commonwealth Electoral Act. The new section would provide for the Electoral Commission, at the request of the Secretary of a Department or the Chief Executive Officer of an authority of the Commonwealth, to provide the Secretary or Chief Executive Officer with a microfiche of an electoral roll, together with other information, including particulars of the occupations, sex or dates of birth of electors in the possession of the Electoral Commission, as the Electoral Commissioner directs.

This provision appears to be drafted in terms wider than that recommended by the Joint Select Committee. It specifies additional information which the Electoral Commission will collect. It also gives an apparently unfettered discretionary power to the Electoral Commissioner to supply that information to any department or authority of the Commonwealth. No obligation is placed on the Department or authority to whom the information is supplied to deal with that information in confidence.

By way of example, Qantas, Australian Airlines and other Commonwealth authorities with commercial operations may be able to direct-mail commercial literature to persons in high status occupations using such information.

Proposed subsection 91(9) does not require the bodies seeking this information to establish reasonable justification for its supply. It may accordingly engage the Electoral Commissioner in compiling and supplying information for no apparently useful purpose.

The Committee drew the clause to Senators' attention as it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

In response to the Committee, the Minister for Home Affairs observed that the effect of the subclause would be to expressly limit any additional information that may be supplied by the Electoral Commissioner. The information may only be provided if the Commissioner so directs.

The Minister also observed that the subclause is designed to give effect to recommendation 18(a) of the First Report of the Joint Select Committee on Electoral Reform (Parliamentary Paper 1 of 1987).

The Minister concluded his response to the Committee's comment on this aspect of the clause with an undertaking that he will move for amendment of the Bill, so as to require the Electoral Commissioner to be satisfied as to, the existence of safeguards ensuring confidentiality before such information is supplied.

As to the second point raised by the Committee, the Minister observed that it appeared appropriate that the Commissioner be given a discretion whether to supply information, or not. The Minister provided the Committee with a list of departments, authorities and agencies supplied with copies of microfiche of the roll; and Government departments authorities and agencies with access to roll microfiche.

He also stated

> I will introduce a Government amendment to exclude from the operation of the amendment such Commonwealth authorities with commercial operations as are prescribed by regulations under the Act. I would then propose to exclude such bodies as Qantas, Australian Airlines and the Commonwealth Bank.

The Committee thanks the Minister for this advice, and notes the undertaking to move amendments to the Bill. The Committee's concern concerning the clause are accordingly answered.

RESEARCH AND DEVELOPMENT LEGISLATION AMENDMENT ACT 1988

The Bill for this Act was introduced into the House of Representatives on 28 April 1988 by the Minister for Industry, Technology and Commerce. The Bill was passed through the Parliament and assented to on 15 June 1988.

The Act will amend the Income Tax Assessment Act 1936 and the Industry Research and Development Act 1986 with the aim of increasing the effectiveness in promoting stimulus for investment in research and development by industry in Australia of the 150% tax concession.

In Alert Digest No. 7 of 1988, and in it's Eighth Report of 1988 the Committee drew attention to the following clause of the Bill:

New Section 39J - non-reviewable decision

New section 39J of the Industry Research and Development Act 1986 would give the Industry Research and Development Board a discretion to register a company as entitled to a tax rebate. The Minister has acknowledged in his Second Reading Speech that this Bill will give 'additional discretionary powers to the Board'. However, the only avenue of redress for a company dissatisfied with a decision of the Board is by action in the Federal Court under the Administrative Decisions (Judicial Review) Act 1977, rather than the speedier and less expensive procedure of review or the merit by the Administrative Appeals Tribunal.

The clause was drawn to Senators' attention as it may breach principle 1(a)(iii) and make rights, liberties and obligations unduly dependent upon a non-reviewable decision.

The Minister responded to the Committee's comment and advised that

> Since the Amendment Bill was drafted, the Administrative Review Council has circulated a discussion paper suggesting that certain discretionary decisions of the board, under its administrative responsibilities for the R&D tax incentive, should be reviewable by the Administrative Appeals Tribunal. This includes the Board's discretion to register companies for the R&D tax incentive. The Board has decided to support this suggestion.

The Minister also observed in his letter that he had no objection to the introduction of such review process, but noted that the powers in the new section do not extend the Board's discretionary powers beyond those it already possesses. He added

> I am reluctant to pre-empt discussion of the more general issues by the Administrative Review Council and hope you agree that this matter would best be considered in that forum, rather than in the context of the legislation.

Although the Bill has been passed by the Parliament the Committee believes the matters raised by the Committee are of interest to Honourable Senators, as is the Minister's advice that the issue addressed by the Committee is under active review by the Administrative Review Council.

Barney Cooney
(Chairman)

28 September 1988

DEPARTMENT OF THE SENATE
PAPER No. 1553
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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT OF 1988

12 OCTOBER 1988

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1988

12 OCTOBER 1988

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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. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF 1988

The Committee has the honour to present its Twelfth Report of 1988 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:

Taxation Laws Amendment Bill (No.4) 1988

Taxation Laws Amendment (Tax File Numbers) Bill 1988

TAXATION LAWS AMENDMENT BILL (NO.4) 1988

This Bill was introduced into the House of Representatives on 31 August 1988 by the Minister assisting the Treasurer.

The Bill will give effect to a number of the tax measures announced in the May Economic Statement and to some measures announced in the 1988-89 Budget. The May Statement measures relate to income tax deductions for depreciation or special write-off of income producing plant, prepaid expenses and mains electricity connection costs; the treatment of certain dividends; the abolition of section 26AAA; the valuation of live stock; and increases in pensioner rebates.

Budget measures in the Bill increase rebates for recipients of social security unemployment, sickness or special benefits, or of certain training or Commonwealth educational allowances; exempt from tax the special temporary allowance; and, establish, the basis for calculation of provisional tax for 1988-89.

Other income tax measures to be given effect by the Bill deal with the taxation of non-cash business benefits, debt finance for corporate restructuring, public trading trusts, expenditure substantiation rules and gift provisions.

The Bill will also amend the fringe benefits tax law so that remote area home ownership benefits receive further concessional treatment as announced.

In Alert Digest No. 11 of 1988 (28 September 1988) the Committee drew attention to the following clause of the Bill:

Clause 53 - Retrospectivity

Subclause 53(19) of the Bill will amend the Income Tax Assessment Act so as to impose certain additional tax upon taxpayers from 20 June 1988.

20 June 1988 is the date on which a press release announcing the proposed alterations introduced by the Bill, and a draft of this Bill was released by the Treasurer. In his Second Reading Speech (when referring to the matters dealt with by the Bill,) the Minister assisting the Treasurer said

> While the amendments will generally apply from 1 July 1987, under transitional arrangements in the Bill, companies that are less than 100 percent foreign controlled will not be subject to the legislation on restructures carried out between 1 July 1987 and 19 June 1988.
>
> As part of its consultative approach to new and complex tax legislation, the Government released a draft of the main operative provisions of this legislation on 20 June 1988 and called for comment from interested persons.
>
> This initiative was well received and, in conjunction with the seminars sponsored by the Taxation Institute of Australia, has resulted in constructive submissions being made by members of the accounting and legal professions and by industry.
>
> A number of changes recommended in these submissions have been adopted so that the measures will not intrude unnecessarily into the normal trading activities of foreign controlled companies.
>
> For example, although the earlier draft legislation was to have a 15 percent foreign control threshold, the Government has agreed to increase the level to 50 percent.

The Committee has consistently argued over a period of several years that legislation made retrospective to the date of a Ministerial announcement is undesirable: see, for example, comments on clause 15 of the Taxation Laws Amendment Bill (No. 2) 1988 in its Sixth Report of 1988 (27 April 1988) and its extended comment on such clauses in the Committee's Annual Report for 1986-87 (Parl. Paper 443 of 1987). The Committee notes that, in the present case, the alteration to the law will be retrospective to the date of the issue of a media release which also coincided with the release of a draft bill. The Committee observes that, despite the consultation process which has been followed by the Treasurer in preparing this Bill for submission to the Parliament, time will pass (and has passed in the present case) between an announcement and a bill's introduction.

The Committee again questions how a person may be expected to know the content of a law when the terms of that law are not publicly available, but may only be ascertained from a reading of Ministerial media announcements, or, in this case, a draft bill which was modified in content before its presentation to the Parliament.

The Committee accordingly draws the clause to the Senator's attention as it may breach principle 1(a)(i) and, due to its retrospective effect, may be considered to unduly trespass on personal rights and liberties.

TAXATION LAWS AMENDMENT (TAX FILE NUMBERS) BILL 1988

This Bill was introduced into the House of Representatives on 1 September 1988 by the Treasurer.

The Bill aims to improve the efficiency and effectiveness of the Australian Taxation Office's income matching system. Under that matching system income reports (e.g. interest and dividends paid by companies) supplied to the Taxation Office are matched with details disclosed by recipients in their tax returns to identify any omissions or understatements of income. Under the measures proposed by this Bill a person entering into a specified transaction or activity will be required to quote his or her tax file number.

In Alert Digest No. 11 of 1988 (28 September 1988) the Committee drew Senators' attention to the following clauses of the Bill:

Clause 6 - Inappropriate delegation of legislative power

Proposed new subsection 221YHZC(1C) of the Income Tax Assessment Act 1936 (see p.30, lines 19 to 25 of the Bill) would impose a withholding tax on income earned from certain investments. The amount of such tax is to be fixed by regulation.

The Bill amends the Income Tax Regulations by the insertion of a new regulation 54ZEL fixing the amount of tax. It also provides, in subclause 30(3), for the future amendment of that provision by regulation. The Committee has previously commented critically on provisions which permit the setting of a level tax by regulation, but fix no upper limit on the amount of that tax.

The clause is drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

New Section 202G - Inadequate Parliamentary scrutiny

Proposed section 202G (see page 21 of the Bill, lines 30ff.) provides that the Commissioner of Taxation may, by notice published in the Gazette, specify methods by which the transmission of information to the Commissioner is to be made.

The information to be transmitted to the Commissioner will be personally and commercially confidential. The Committee believes that the specification of the means of transmission of such information by banks and financial institutions which must comply with the Bill's provisions is a matter of interest and concern to the Parliament. The Committee considers such matters should be specified by way of regulation, and not by way of notice in the Gazette made subject to tabling and disallowance, and to scrutiny by the Parliament.

The proposed section is drawn to Senator's attention as it may breach principle 1(a)(v) of the terms of reference and insufficiently subject the exercise of legislative power to parliamentary scrutiny.

General Comment

The civil right to privacy and confidentiality of personal information is of fundamental importance. Statutory alteration of, or enroachment upon, that right without the provision of proper safeguards, is regarded by the Committee as a trespass on personal rights and liberties. When a statutory scheme for the collection of private personal information is proposed in a Bill, the Committee will carefully examine the provisions relating to the collection, recording and use of that

information.

The Committee drew attention to its concerns regarding two clauses of the Bill in its Alert comments. These comments are repeated in this Report.

The Committee notes for Senators' information that in the Treasurer's Second Reading Speech it was stated that a Privacy Bill is to be introduced during the current sittings of the Parliament which is to include provisions relating to the tax file number system established by the Bill.

Barney Cooney
(Chairman)

12 October 1988

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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. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF 1988

The Committee has the honour to present its Thirteenth Report of 1988 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:

Aboriginal and Torres Strait Islander Commission Bill 1988

Social Security (Review of Decisions) Bill 1988

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION BILL 1988

This Bill was introduced into the House of Representatives on 24 August 1988 by the Minister for Aboriginal Affairs.

The Bill will establish the Aboriginal and Torres Strait Islander Commission, commonly known as ATSIC. The Commission will be established as a body corporate with responsibilities across the spectrum of Aboriginal and Torres Strait Islander affairs. There are to be 15 Commissioners, all Aboriginal or Torres Strait Islanders. Twelve will be elected representatives of various communities.

The Bill also provides for the establishment of the Aboriginal Economic Development Corporation (AEDC) and the Institute of Aboriginal and Torres Strait Islander Studies.

In Alert Digest No. 11 of 1988 (28 September 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clause 8 - 'Henry VIII' clause

Clause 8 of the Bill will empower the Prime Minister to confer a departmental function on the Commission, for the purpose of furthering the development of Aboriginal and Torres Strait Islander peoples. Departmental function is defined in subclause 8(3) as a function previously performed by a Department of State of the Commonwealth.

Exercises of power made under subclause 8(2) of the Bill are to be notified by notice published in the Gazette.

Clause 7(m) of the Bill (which gives to ASTIC such other functions as are conferred on ATSIC by the Prime Minister under clause 8) would accordingly be given effect to by way of instrument not subject to scrutiny by the Parliament.

The Committee has consistently drawn attention to the effect of such clauses. Instruments made in the manner proposed by clause 8 may widen the functions of a body beyond those conferred on that body by original legislation. As a result, the Committee has generally regarded such provisions as an inappropriate delegation of legislative power.

The Committee reported in its Tenth Report of 1987 (3 June 1987), that it had drawn Senators' attention to a clause in the Aboriginal and Torres Strait Islander Heritage Protection Bill 1987 which would have empowered the Minister, by way of Gazette notice, to vary the content of a schedule to that Bill. The Minister, it should be noted, accepted the Committee's view with regard to that provision and agreed to amendment of that Bill so that the Minister was obliged to amend the schedule in question by regulation thus giving the Parliament the right of disallowance of any amendment, should it so decide.

Clause 8 of the Bill is accordingly drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

Clause 101 - Trespass on personal rights and liberties

Clause 101 of the Bill requires a member of a Regional Council established by the Bill, to disclose his or her pecuniary interest in a matter before the Council and not to thereafter refrain from discussion of the matter in which the member has such an interest.

Subclauses 29(2), 140(2) and 185(2) require a councillor not only to disclose his or her pecuniary interest in matters before a council, but to refrain from discussion on the matter after such a declaration unless express consent from other Commissioners present is given, and is properly recorded.

In view of the possibility that a decision arrived at by a Regional Council might enhance the rights of a member with a direct interest therein, a decision reached under such circumstances could conceivably, and undesirably, infringe the rights of the Council's constituents.

The clause is accordingly drawn to Senators' attention as it may be in breach of principle 1(a)(i) of the terms of reference and trespass unduly on personal rights and liberties.

Clause 210 - Delegation

Clause 210 of the Bill allows the Treasurer to delegate to 'a person' the power to give approvals for 'a bank' to operate as a bank for certain purposes under the legislation.

The Committee has consistently objected to such provisions as are proposed by this clause. The power to delegate such important powers to 'a person' without further qualification as to the person's position, would give the Treasurer an unacceptably wide discretion in the Committee's opinion.

The clause is accordingly drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of administrative power.

Clause 211 - Inappropriate delegation of legislative power

Paragraphs 211(1)(b) and (c) of the Bill would give the Minister a discretion, subject to certain circumstances set out in the clause, to determine the remuneration and allowances payable to the holders of certain offices under the Bill.

The Minister's discretion is to be exercised by means of determination, which is deemed to be an instrument subject to tabling and disallowance pursuant to section 46A of the Acts Interpretation Act.

Any decision taken by the Minister, while it will be subject to parliamentary scrutiny, may not be subject to such scrutiny for some considerable time - perhaps even some months - after the Minister makes a determination.

The Committee, whilst observing that a fetter would be placed on the exercise of the discretion by the Minister, draws the clause to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and be an inappropriate delegation of legislative power.

Clause 213 - 'Henry VIII' clause

Subclause 213(1), in paragraphs (a) to (e), lists certain decisions which may be taken under the Bill and which may be the subject of an application for a review as to the merits of such decisions by the Administrative Appeals Tribunal.

Subclause 213(1) will include in the category of decisions that may be subject to an application for review 'any other decision of the Commission or Council included in a class of decisions declared by the Minister by notice published in the Gazette to be reviewable decisions.'

The paragraph is a 'Henry VIII' provision which would, in effect, permit the Minister to amend the terms of the subclause by Gazette notice without reference to the Parliament.

The clause is drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

Clause 214 - Inappropriate delegation of legislative power

Subclauses 214(2) and (3) of the Bill would allow the Auditor-General a discretion as to whether any irregularities which may be disclosed by an audit inspection of a subsidiary company of the Commission, or the Aboriginal Economic Development Corporation, were of sufficient importance to justify them being drawn to the Minister's and the Parliament's attention. The clause also empowers the Auditor-General to *dispense with all or any part of the inspection and audit of* any accounts or records of a subsidiary company of the Commission or Corporation.

In its Ninth Report of 1988 (1 June 1988), the Committee noted that any alteration of the requirements to notify the Parliament of such matters placed on the Auditor-General by the Audit Act are of particular importance to the Committee, and believes that all such provisions should be drawn to Senators' attention.

Clause 214 is drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and be an *inappropriate delegation of legislative power.*

SOCIAL SECURITY (REVIEW OF DECISIONS) BILL 1988

This Bill was introduced into the House of Representatives on 29 September 1988 by the Minister for Social Security. The Bill was passed by the Senate, without amendment, on 17 October 1988.

The Bill will amend the Social Security Act 1947 to:

- provide for a rationalisation of the social security review process by establishing a Social Security Appeals Tribunal with power to make decisions on matters under review; and

- renumber provisions of the Act.

In its Alert Digest No. 12 of 1988 (12 October 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clause 6 - Inappropriate delegation of legislative power

New subsection 17(1) will enable the Minister to prepare a written statement of Government policy in relation to the administration of the Social Security Act and give a copy to the Secretary of the Department of Social Security and the National Convenor of the Social Security Appeals Tribunal.

New subsection 17(2) will provide that such a statement shall be laid before both Houses of Parliament within 15 sitting days of the statement being given either to the Secretary or the National Convenor.

New subsection 17(3) and (4) will provide that officers of the Department of Social Security, the National Convenor and the Social Security Appeals Tribunal shall have regard to the statement in exercising powers under the Act.

Proposed subsection 17(4) would appear to constitute an inappropriate delegation of the Parliament's legislative function. The policy statement to be prepared by the Minister has no legislative force. However, such a statement could clearly have a significant effect on the manner in which the National Convenor and the Social Security Appeals Tribunal exercise their functions. In the Committee's view the Convenor and Tribunal should be - and ought to be seen to be - independent of the Department and arrive at their respective decisions as a result only of consideration of the legislative provisions (whether in the Act or in regulations) relevant to a particular case. Neither, in the Committee's view, should have to consider non-legislative policy statements by the Minister.

The clause is drawn Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

New section 202 - Trespass on personal rights and liberties

New subsection 202(1) would provide that the National Convenor may give:

- general directions to be followed in connection with the review of decisions; and

- particular directions to be followed in connection with a particular review. These may be given at any time either before or after the hearing of a review has commenced - new subsection 202(3).

New subsection 202(2) would require that directions not be inconsistent with the Principal Act or Regulations.

New subsection 202(4) would give the presiding member authority to give directions as to the procedure to be followed on the hearing of that particular review provided the directions are not inconsistent with the Act, Regulations or the National Convenor's directions given under the new subsection 202(1). The presiding member's directions may be given before or after the hearing begins.

New subsection 202(7) requires that all directions given under this section, whether by the National Convenor or the presiding member, should have regard to the objectives of the Tribunal as laid down by new section 176.

The Committee considers that it is inappropriate that the National Convenor be empowered to give directions to the Tribunal. Such a statutory power raises the possibility, however remote, of some undesirable interference by the Convenor with the independent actions of the Tribunal.

The clause is drawn to Senators' attention as it may breach principle 1(a)(i) of the terms of reference and trespass unduly on personal rights and liberties.

Barney Cooney
(Chairman)

19 October 1988

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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 B. Cooney (Chairman)
Senator D. Brownhill (Deputy Chairman)
Senator M. Beahan
Senator R. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1988

The Committee has the honour to present its Fourteenth Report of 1988 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 Capital Territory (Planning and Land Management) Bill 1988

Australian Capital Territory (Self-Government) Bill 1988

AUSTRALIAN CAPITAL TERRITORY (PLANNING AND LAND MANAGEMENT) BILL 1988

This Bill was introduced into the House of Representatives on 19 October 1988 by the Minister for the Arts and Territories.

This Bill is one of three Bills to provide for self-government for the Australian Capital Territory. This Bill proposes to repeal the National Capital Development Commission Act 1957 and make provision for the planning and land management of the A.C.T. by the National Capital Planning Authority, consequent upon the establishment of self-government for the Territory.

In Alert Digest No. 14 of 1988 (2 November 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clause 35 - 'Henry VIII' clause

Subclause 35(1) is a 'Henry VIII' clause, which would allow the remuneration of members of the Authority to be determined by regulation. It is similar to the proposed new subsection 36A(2) of the Postal Service Act, on which the Committee commented in Alert Digest No. 12 of 1988 (12 October 1988).

The clause is accordingly drawn to Senators' attention as it may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

Clause 49 - Delegation

Paragraphs 49(b) and (c) would give the proposed Authority a very wide discretion in determining to whom it might delegate all or any of its powers. Such powers, in the Committee's view, should be delegated only to members of staff of or above a certain level of seniority and that delegation of these powers to a person on secondment (as provided for in paragraph (c)) is an unacceptably wide discretion.

The clause is accordingly drawn to Senators' attention as it may breach principle 1(a)(ii) and constitute an inappropriate delegation of administrative power.

AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) BILL 1988

This Bill was introduced into the House of Representatives on 19 October 1988 by the Minister for the Arts and Territories.

This Bill is one of three Bills to provide for self-government for the Australian Capital Territory. This Bill proposes to establish a Legislative Assembly and an Australian Capital Territory Executive.

In Alert Digest No. 14 of 1988 (2 November 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clauses 22, 32 and 73 - 'Henry VIII' clauses

Subclauses 22(2) and 32(5) and (6), and paragraph 73(c), are 'Henry VIII' clauses. Their combined effect is that the classes of matters over which the proposed Assembly is to have legislative power may be changed by regulation and not as a result of debate or resolution either in the Assembly or in the Parliament.

The clauses are accordingly drawn to Senators' attention as they may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

Clause 33 - Non-reviewable decision

Subclause 33(2) would give to the Governor-General a wide discretion, not subject to review, to disallow a Territory enactment, apparently for any reason that the Governor-General may think fit.

The Committee notes for Senators' attention that a not dissimiliar provision in the Commonwealth Constitution, relating to the legislative powers of State Parliaments, was terminated by the Australia Act 1986.

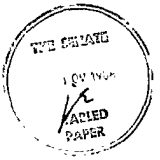
The clause is accordingly drawn to Senators' attention as it may breach principle 1(a)(iii) of the terms of reference and constitute a non-reviewable decision.

Barney Cooney
(Chairman)

9 November 1988

DEPARTMENT OF THE SENATE
PAPER No. 1978
DATE
PRESENTED
24 NOV 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS



FIFTEENTH REPORT

OF 1988

23 NOVEMBER 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF 1988

23 NOVEMBER 1988

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MEMBERS OF THE COMMITTEE

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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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF 1988

The Committee has the honour to present its Fifteenth Report of 1988 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:

ANL (Conversion into Public Company) Bill 1988

Australian National Railways Commission Amendment Bill 1988

Insurance Legislation Amendment Bill 1988

OTC (Conversion into Public Company) Bill 1988

Social Security (Review of Decisions) Act 1988

Triticale Levy Collection Bill 1988

ANL (CONVERSION INTO PUBLIC COMPANY) BILL 1988

This Bill was introduced into the House of Representatives on 31 August 1988 by the Minister for Transport and Communications

The Bill will establish the Australian Shipping Commission, which presently trades as the Australian National Line (ANL), as a new public company; ANL Limited. The Bill will also remove certain statutory controls on ANL's operations.

In Alert Digest No. 11 of 1988 the Committee drew attention to the following clause of the Bill:

Clause 7 - Annual Report

Clause 7 of the Bill would, among other things, repeal Division 4 of Part II of the Australian Shipping Commission Act 1956. Section 35 of the Australian Shipping Commission Act provides that the Commission is a public authority to which Division 2 of Part XI of the Audit Act applies. Pursuant to those provisions of the Audit Act, the Commission is presently required to furnish an annual report on its activities to the Minister responsible for the Commission's administration. The Minister is, in turn, required to table the report in the Parliament within 15 sitting days of each House, following receipt of the report.

Although the Minister has stated in his Second Reading Speech that ANL will in future prepare and publish annual reports in the same way as any other public company, the Bill imposes no requirement that ANL's annual reports be tabled in the Parliament.

Senators' attention is drawn to the Committee's comments on the Australian Airlines (Conversion to a Public Company) Bill 1987, (see First Report of 1988) and the Australian Film Commission Amendment Bill 1988 (see Ninth Report of 1988).

The latter Bill was amended following comment by the Committee. The Company, established by the Bill must now forward a copy of its annual report to the Minister for presentation to the Parliament. Pursuant to the amendment, the Minister is also obliged to table a copy of the report in each House within 15 sitting days of each House after its receipt.

The Committee again draws clause 7 of the Bill to Senators' attention, as it considers that a minimum level of accountability to the Parliament, should be a specific requirement for the tabling in the Parliament of annual reports by all Commonwealth bodies.

AUSTRALIAN NATIONAL RAILWAYS COMMISSION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 19 October 1988 by the Minister for Transport and Communications.

This Bill proposes to amend the Australian National Railways Commission Act 1983 to:

- widen the Commission's powers to allow it to expand the scope of its business activities;
- extend the planning and accountability mechanisms applicable to the Commission; and
- remove most of the remaining day-to-day controls currently exercised by Government over the Commission.

In Alert Digest No. 14 of 1988 the Committee drew Senators' attention to the following clause of the Bill:

Clause 66 - Inappropriate delegation of legislative power

Proposed paragraph 66A(1)(b) and subsection 66A(2) of the Principal Act would give to the Commission auditor discretions to dispense with, and not report, certain matters in carrying out his or her functions. The provision is somewhat similar to section 63R of the Audit Act 1901, on which the Committee commented in its Eighth Report and Ninth Report of 1988.

The clause is again drawn to Senators' attention as it may breach principle 1(a)(iv) of its terms of reference and constitute an inappropriate delegation of legislative power.

INSURANCE LEGISLATION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 3 November 1988 by the Minister assisting the Treasurer.

This Bill proposes to amend the:

- Insurance Act 1973;
- Insurance (Agents and Brokers) Act 1984; and
- Life Insurance Act 1945.

The Bill will levy an annual supervisory fee on general insurers and life insurers, provide for registration of insurance intermediaries dealing with unauthorised foreign insurers and make a number of other amendments to improve the effectiveness of existing arrangements.

In Alert Digest No. 15 of 1988 the Committee drew attention to the following clause of the Bill:

Clause 4 - Inappropriate delegation of legislative power

Proposed new subsection 49A(1) of the Insurance Act 1973 (and proposed new subsection 76A(1) of the Life Insurance Act 1945; see clause 35) would permit the imposition of an annual supervisory fee, the amount of which is to be prescribed by regulation. Although it is indicated in the Second Reading speech that the fee is designed to cover the costs incurred by the Commonwealth, since the subsections contain no upper limit for the fee it cannot be said that this intention will be carried out. As the provisions stand, there is nothing to prevent the fee from becoming a form of taxation. The only measure of control is for Senators (or, perhaps, the members of the Regulations and Ordinances Committee) to satisfy themselves, when the regulations are made, that they conform to the currently stated intention.

The clause is again drawn to Senators' attention as it may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

OTC (CONVERSION INTO PUBLIC COMPANY) BILL 1988

This Bill was introduced into the House of Representatives on 12 October 1988 by the Minister for Transport and Communications.

The Bill will:

- provide for the conversion of the Overseas Telecommunications Commission (OTC), which is established as a statutory corporation under the Overseas Telecommunications Act 1946, into a company incorporated under the Companies Act 1981; and

- make other amendments to implement the Government's reform package for OTC.

In Alert Digest No. 13 of 1988 the Committee drew Senators' attention to the following clause of the Bill:

Subclause 8 - Annual Report

Subclause 8(2) would repeal, among other provisions, section 53 of the Overseas Telecommunications Act. Under that provision the Commission's annual report to the Minister would be tabled in Parliament.

As a public company, OTC Limited, would be obliged to file an annual report with the appropriate Companies Office. The Bill makes no provision for a copy of that report to be tabled in Parliament.

As the Committee pointed out in Alert Digest No. 11 of 1988 (28 September 1988), in relation to the ANL (Conversion into Public Company) Bill 1988, it regards as a matter of importance the tabling in Parliament of the annual reports of all Commonwealth instrumentalities, whether statutory authorities or companies, in which the Commonwealth owns all or a substantial part of the issued shares.

SOCIAL SECURITY (REVIEW OF DECISIONS) ACT 1988

This Act was introduced into the House of Representatives on 29 September 1988 by the Minister for Social Security. The Bill was passed by the Senate, without amendment, on 17 October 1988 and assented to on 31 October 1988 as Act No. 85 of 1988.

The Act amends the Social Security Act 1947 to:

- provide for a rationalisation of the social security review process by establishing a Social Security Appeals Tribunal with power to make decisions on matters under review; and

- renumber provisions of the Act.

In its Alert Digest No. 12 of 1988 (12 October 1988) and, subsequently, in its Thirteenth Report of 1988 (19 October 1988), the Committee drew Senators' attention to various aspects of the (then) proposed new sections 17 and 202 of the Social Security Act. The Minister for Social Security responded to the Committee's comments in a letter dated 1 November 1988. Although the Act has already been passed, the issues raised remain of interest. The Committee's original comments and the Minister's responses are reproduced below:

New section 17 - Inappropriate delegation of legislative power

New subsection 17(1) enables the Minister to prepare a written statement of Government policy in relation to the administration of the Principal Act and give a copy to the Secretary to the Department of Social Security and the National Convenor of the Social Security Appeals Tribunal.

New subsection 17(2) provides that such statement shall be laid before both Houses of Parliament within 15 sitting days of the statement being given either to the Secretary or the National Convenor.

New subsections 17(3) and (4) provide that officers of the Department of Social Security, the National Convenor and the Social Security Appeals Tribunal shall have regard to the statement in exercising powers under the Principal Act.

The Committee reported that subsection 17(4) would appear to constitute an inappropriate delegation of the Parliament's legislative function. The policy statement to be prepared by the Minister has no legislative force. However, such a statement could have a significant effect on the manner in which the National Convenor and the Social Security Appeals Tribunal exercise their functions. In the Committee's view the Convenor and Tribunal should be - and ought to be seen to be - independent of the Department and arrive at their respective decisions as a result only of consideration of the legislative provisions (whether in the Act or in regulations) relevant to a particular case. Neither should have to consider non-legislative policy statements by the Minister.

The Minister for Social Security has responded as follows:

> The new section 17 does not constitute an inappropriate delegation of legislative power. It is an established principle of administrative law that administrative tribunals take account of announced Government policy. In the case of Re Drake and the Minister for Immigration and ethnic Affairs (No 2) (1979) 2 ALD 634, it was held that the Administrative Appeals Tribunal will ordinarily apply Government policy in reviewing a decision unless that policy is unlawful or its application will lead to an unjust result. It was also said that any departures from that policy should be made cautiously and sparingly, particularly if Parliament has in fact scrutinised and approved that policy.
>
> The new section 17 is not binding on the Department or the Social Security Appeals Tribunal. It simply requires, by the new subsections 17(3) and 17(4), that decision makers in both the Department and the Tribunal have regard to the tabled policy statements. This comtemplates that there would be occasions where the policy may not apply in a particular case and departure from that policy would be justified.

The Committee thanks the Minister for this response. The Committee notes that, while the Administrative Appeals Tribunal has endorsed the thrust of Re Drake (No. 2) in subsequent

decisions (eg Re Aston and Secretary, Department of Primary Industry (1985 8 ALD 366)), it has been mindful of the status of departmental instructions. In Re Henry and Secretary, Department of Social Security ((1986) 11 ALN 10) the Tribunal said in relation to press statements and departmental instructions:

> [N]either the press release nor the departmental instruction can be given effect strictly according to their terms. They do not state the law. The law is stated in the Act. The Tribunal must make up its own mind as to what is reasonable in the circumstances.

The Committee notes that the Minister's response recognises this important limitation on the operation of non-legislative policy statements issued by the Government.

New section 202 - Trespass on personal rights and liberties

New subsection 202(1) provides that the National Convenor may give:

- general directions to be followed in connection with the review of decisions; and

- particular directions to be followed in connection with a particular review. These may be given at any time either before or after the hearing of a review has commenced - new subsection 202(3).

New subsection 202(2) requires that directions not be inconsistent with the Principal Act or Regulations.

New subsection 202(4) gives the presiding member authority to give directions as to the procedure to be followed on the hearing of that particular review, provided the directions are not inconsistent with the Principal Act, Regulations or the National Convenor's directions given under the new subsection

202(1) [new subsection 202(5)]. The presiding member's directions may be given before or after the hearing begins [new subsection 202(6)].

New subsection 202(7) requires that all directions given under this section, whether by the National Convenor or the presiding member, should have regard to the objective of the Tribunal as laid down by new section 176.

The Committee reported that it considered that it was inappropriate that the National Convenor be empowered to give directions to the Tribunal. Such a power raised the possibility of some undesirable interference by the Convenor with the independence of the Tribunal.

The clause was drawn to Senators' attention as it may breach principle 1(a)(i) of the terms of reference and trespass unduly on personal rights and liberties.

The Minister for Social Security has responded as follows:

> The National Convener heads the Social Security Appeals Tribunal (new section 216) and is given the statutory responsibility to ensure that the Tribunal efficiently and effectively performs its function [new paragraph 217(1)(c)]. Accordingly, it is appropriate that the National Convener be empowered to give general directions as to the procedure to be followed in review of decisions and directions to the procedure to be followed in particular reviews.
>
> These powers accord with established administrative procedures for such tribunals. I note that there is a similar provision in the Veterans' Entitlements Act 1986 [subsection 148(5)] for the Principal Member of the Veterans' Review Board.

The Committee thanks the Minister for his comments.

TRITICALE LEVY COLLECTION BILL 1988

This Bill was introduced into the House of Representatives on 2 November 1988 by the Minister for Primary Industries and Energy.

This Bill proposes to provide the machinery necessary for collecting the levy imposed by the *Triticale Levy Bill 1988*.

In Alert Digest No. 15 of 1988 the Committee drew attention to the following clause of the Bill:

Clause 16 - Delegation

Clause 16 would give to the Secretary the unfettered discretion to appoint anyone whom he or she pleased to be an authorised person, with power to enter premises, search for documents etc (see the provisions of clauses 12 and 13). The Committee believes the Secretary's discretion should be limited to the appointment of a specified class of persons.

The clause is drawn to Senators' attention as it may breach principle 1(a)(ii) and make rights unduly dependant on a delegation of administrative power.

Barney Cooney
(Chairman)

23 November 1988

DEPARTMENT OF THE SENATE
PAPER No. 2094
DATE
PRESENTED
30 NOV 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF 1988

30 NOVEMBER 1988

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF 1988

The Committee has the honour to present its Sixteenth Report of 1988 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 Capital Territory (Planning and Land Management) Bill 1988

Australian Capital Territory (Self-Government) Bill 1988

Australian Centennial Roads Development Bill 1988

Australian Industry Development Corporation Amendment Bill 1988

Australian Sports Commission Bill 1988

Broadcasting Legislation Amendment Bill 1988

Broadcasting (Limited Licences) Fees Bill 1988

Broadcasting (National Metropolitan Radio Plan) Bill 1988

Broadcasting (Retransmission Permits and Temporary Transmission Permits) Fees Bill 1988

Community Services and Health Legislation Amendment Bill 1988

Customs and Excise Legislation Amendment Bill 1988

Defence Service Homes Amendment Bill 1988

Foreign Takeovers Amendment Bill 1988

Postal Services Amendment Bill 1988

Telecommunications Amendment Bill 1988

AUSTRALIAN CAPITAL TERRITORY (PLANNING AND LAND MANAGEMENT) BILL 1988

This Bill was introduced into the House of Representatives on 19 October 1988 by the Minister for the Arts and Territories.

This Bill is one of three Bills to legislate to provide self-government for the Australian Capital Territory. This Bill proposes to repeal the National Capital Development Commission Act 1957 and make provision for the planning and land management of the A.C.T. by the National Capital Planning Authority, consequent upon the establishment of self-government for the Territory.

In Alert Digest No. 14 of 1988 (2 November 1988), the Committee drew attention to various clauses of the Bill. The Minister for the Arts and Territories responded to the Committee's comments on 23 November 1988. Though the Senate passed the legislation on 25 November 1988 (and the House of Representatives, likewise, on 29 November 1988), the issues raised by the Committee and the Minister's responses remain of interest. For the information of Senators, they are reproduced below:

Clause 35 - 'Henry VIII' clause

Subclause 35(1) is a 'Henry VIII' clause, which would allow the remuneration of members of the Authority to be determined by regulation. It is similar to the proposed new subsection 36A(2) of the Postal Service Act, on which the Committee commented in Alert Digest No. 12 of 1988 (12 October 1988).

The clause was drawn to Senators' attention as it may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

The Minister responded:

> My understanding is that this clause is drafted in terms similar to provisions in a number of other Commonwealth Acts. Sub-clause 35(1) is intended as a 'fail safe' mechanism in the event that the Remuneration Tribunal is not able to make a determination which is operative from the date that the National Capital Planning Authority is established. In any case, sub-clause 35(3) provides that any regulations made under sub-clause 35(1) would be subject to any determination the Tribunal subsequently makes.

The Committee thanks the Minister for this response.

Clause 49 - Delegation

Paragraphs 49(b) and (c) would give the proposed Authority a very wide discretion in determining to whom it might delegate all or any of its powers. Such powers in the Committee's view should be delegated only to members of staff of or above a certain level of seniority, and that delegation of these powers to a person on secondment (as provided for in paragraph (c)) is an unacceptably wide discretion.

The clause was drawn to Senators' attention as it may breach principle 1(a)(ii) and constitute an inappropriate delegation of administrative power.

The Minister has responded as follows:

> The Committee ... expressed concern that paragraphs 49(b) and (c) give a very wide discretion to the National Capital Planning Authority as to whom it might delegate its powers.
>
> I note the Committee's view that such powers should only be delegated to members of the staff of, or above, a certain level of

seniority. However, in advance of the establishment of the Authority, it is not possible to specify to whom its powers might be delegated. Nevertheless, I will draw the Committee's views to the attention of the Authority.

The Committee expressed reservations about the delegation of the Authority's powers to persons on secondment. For all intents and purposes, a person on secondment with the Authority is a member of the staff of the Authority and in these times of greater mobility and exchange of staff between organisations, I consider it will aid efficiency/effectiveness to have, in appropriate situations, such persons able to exercise delegated powers.

The Committee thanks the Minister for his assistance in this matter and notes his undertaking to bring the Committee's views on delegation of powers to the attention of the National Capital Planning Authority. The Committee trusts that its concerns will be addressed by the Authority at that organisation's earliest opportunity.

AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) BILL 1988

This Bill was introduced into the House of Representatives on 19 October 1988 by the Minister for the Arts and Territories.

This Bill is one of three Bills to legislate to provide self-government for the Australian Capital Territory. This Bill proposes to establish a Legislative Assembly and an Australian Capital Territory Executive.

In Alert Digest No. 14 of 1988 (2 November 1988), the Committee drew attention to various clauses of the Bill. The Minister for the Arts and Territories responded to the Committee's comments on 23 November 1988. The Bill passed all stages in the Senate on 25 November 1988 (and, likewise, in the House of

Representatives on 29 November 1988). However, as noted in relation to the Australian Capital Territory (Planning and Land Management) Bill 1988, the matters canvassed remain of interest. The Committee's comments and the Minister's responses are reproduced below for the information of Senators:

Clauses 22, 32 and 73 - 'Henry VIII' clauses

Subclauses 22(2) and 32(5) and (6), and paragraph 73(c), are 'Henry VIII' clauses. Their combined effect is that the classes of matters over which the proposed Assembly is to have legislative power may be changed by regulation and not as a result of debate or resolution either in the Assembly or in the Parliament.

The clauses were drawn to Senators' attention as they may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

The Minister has responded as follows:

> First, I should mention that the Government proposes to move amendments to the Self-Government Bills to provide that responsibility for criminal law, police, legal practitioners and related matters are to transfer to the ACT Legislative Assembly no later than 1 July 1990.
>
> These amendments reflect a commitment given by me in my Second Reading Speech to transfer, or consider the transfer, to the ACT of certain powers listed in sub-clause 22(1). Clearly the question of the scope of the Assembly's power is a matter that is able to be debated during the passage of the Bill through the Parliament. Accordingly, it is considered that the regulation making powers contained in sub-clauses 22(2) and 32(5) and paragraph 73(c) are appropriate mechanisms to allow the Commonwealth to

transfer various retained functions before 1 July 1990 if circumstances permit or if agreement is reached with the Assembly.

The regulation making power contained in sub-clause 32(5) is necessary to cover Ordinances which relate to retained Commonwealth functions and which are made in the period after this Bill receives Royal Assent and before the commencing day of self-government.

The Committee thanks the Minister for his response and notes that the scope of the Assembly's power was, indeed, debated at some length in the Senate on 23, 24 and 25 November 1988.

Clause 33 - Non-reviewable decision

Subclause 33(2) would give the Governor-General a wide discretion, not subject to review of any sort, to disallow a Territory enactment, apparently for any reason that the Governor-General may think fit.

The Committee notes that a not dissimilar provision in the Commonwealth Constitution, relating to the legislative powers of State Parliaments, was terminated by the Australia Act 1986.

The clause was drawn to Senators' attention as it may breach principle 1(a)(iii) of the terms of reference and constitute a non-reviewable decision.

The Minister has responded as follows:

> Clause 33 is, of course, similar to provisions in the Northern Territory (Self-Government) Act 1978 and the Norfolk Island Act 1979. Such a provision is particularly relevant in the case of the ACT given the Commonwealth's special responsibilities in the National Capital.

> It is a power of last resort which indeed has never been used in the Northern Territory.

The Committee thanks the Minister for this response. While the Committee accepts that the equivalent power to that contained in clause 33 has, in fact, never been used in the Northern Territory, it re-iterates its original concerns about this type of provision.

AUSTRALIAN CENTENNIAL ROADS DEVELOPMENT BILL 1988

This Bill was introduced into the House of Representatives on 29 September 1988 by the Minister for Land Transport and Shipping Support.

The Bill will establish the Australian Centennial Roads Development Trust Fund which will fund a program of financial assistance for land transport for a five year period from 1 January 1989. A share of excise and customs duty on motor spirit and diesel fuel will provide the finance. The share will be identified as the 'road user charge'.

The Committee dealt with this Bill in Alert Digest No. 12 of 1988 (12 October 1988) but did not comment on it at that stage. However, some points have since been raised which the Committee now draws to the attention of Senators.

Clause 25 and paragraph 40(1)(c) - Inappropriate delegation of legislative power

Part II of the Bill provides for the establishment of the Australian Centennial Roads Development Trust Fund. Clause 25 provides that the Fund shall be closed at the end of 30 June

1994. It further provides that any money standing to the credit of the Fund at that time shall be paid out "as determined by the Minister".

Paragraph 40(1)(c) deals with money standing to the credit of "existing Funds" which, by virtue of paragraph 40(1)(b), are to be closed on or before 30 April 1989. Prior to the closure of these existing Funds, it is proposed that any money paid out "shall ... be paid out to the States and approved organisations in such manner and for such purposes as the Minister determines".

In the case of clause 25, the Minister has a complete discretion to determine the destination of money standing to the credit of the Fund when it is closed. Though paragraph 40(1)(c) limits payments out to "States and approved organisations", the Minister's discretion is similarly wide.

The clauses are drawn to Senators' attention as they may breach principle 1(a)(iv) as an inappropriate delegation of administrative power.

AUSTRALIAN INDUSTRY DEVELOPMENT CORPORATION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 7 November 1988 by the Minister for Science, Customs and Small Business.

This Bill proposes to amend the Australian Industry Development Corporation Act 1970 to enable the re-organisation of the Corporation's business. This will involve the transfer of the Corporation's assets and liabilities to a nominated wholly-owned subsidiary of the Corporation. The subsidiary will issue

shares to the public, be listed and use the capital raised to increase investment and financing of industry development, revitalisation and restructuring.

In Alert Digest No. 16 of 1988 (23 November 1988), the Committee drew Senators' attention to the following clauses of the Bill:

General Comment

The Bill may substantially reduce the information which the Parliament will have on the operations of the Corporation and its proposed subsidiary. The Corporation itself is still required to make an annual report to Parliament - subsection 37(5) of the Act is not to be amended. However, the Corporation's activities are likely to be substantially reduced by this Bill, as most of the functions it formerly carried out will be performed by the subsidiary. In addition, although the subsidiary will be a public listed company, and required to file an annual report with the N.C.S.C., that report will not automatically be made available to the Parliament, nor will members of the Parliament be able to raise questions about any aspects of the subsidiary's operations.

Clause 8 - Delegation

The definition of 'authorised person' in proposed new section 29A of the Principal Act would give to the Minister an unfettered and, it is suggested, unacceptably broad discretion to delegate his or her powers to 'a person', without any specification of the office or employment (or lack of it) that such a person might hold. When it is recalled that such a person may exercise important functions under proposed new subsections 29P(1) and 29Y(1), the Committee believes that the delegation by the Minister should be to a person holding or performing the functions of a specified office.

Senators' attention is again drawn to the clause as it may be considered to breach principle 1(a)(ii) and make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

AUSTRALIAN SPORTS COMMISSION BILL 1988

This Bill was introduced into the House of Representatives on 31 August 1988 by the Minister for the Arts and Territories representing the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The Bill will establish the Australian Sports Commission as a Commonwealth statutory authority. The Bill will streamline Commonwealth sports administration by combining the functions and powers, and the establishments, of the Australian Sports Commission (created by the Australian Sports Commission Act 1985) and the Australian Institute of Sport (created by the Australian Institute of Sport Act 1986).

The Commission will be able to operate under the name of the Australian Institute of Sport when performing certain functions.

The Bill sets out the objectives, functions and powers of the Commission, and those functions that will be performed, in whole or in part, by the Commission under the name of the Australian Institute of Sport. It also covers a wide range of issues relating to the management and operation of the Commission.

The Bill also defines the relationship between the Commission and the Government within which the Commission will undertake its tasks.

In Alert Digest No. 11 of 1988 the Committee drew attention to the following clauses of the Bill:

Clauses 17 and 33 - Inappropriate delegation of legislative power

Subclauses 17(1) and (2), and subclauses 33(1) and (2) (and clause 40 when it is read with clause 33) would allow the remuneration of members of the Commission; the Executive Director of the Commission; and the Director of the Institute to be prescribed by regulation if no existing remuneration for those persons has been recommended by the Remuneration Tribunal.

Sections 13 and 23 of the Australian Sports Commission Act 1985 provide that remuneration for Commissioners and the General Manager of the Commission will be as determined by the Remuneration Tribunal under the Remuneration Tribunals Act 1973. There is no provision in the Australian Sports Commission Act allowing for the prescription of the remuneration of the above office holders by regulation.

The Remuneration Tribunal has made recommendations as to the level of remuneration for present Commissioners, the General Manager and the Director of the Institute. The Committee cannot see why it is necessary for the Minister to in future prescribe remuneration by way of regulation as provided by these clauses.

Clauses 17 and 33 were accordingly drawn to the Senate's attention as they may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

The Minister for the Arts, Sport, the Environment, Tourism and Territories has responded to the Committee's comments as follows:

> Clauses 17, 33 and 40 would allow the remuneration of members of the Commission, the Executive Director of the Commission, and the Director of the Institute to be prescribed by regulation, with effect in each case if, and only if, no determination of the relevant remuneration by the Remuneration Tribunal is in operation.
>
> This is to ensure that if the Remuneration Tribunal has not made a determination prior to the commencement of an Act (which I understand has occurred in relation to some other Acts), the relevant office holders will not be prevented from being paid due to the absence of a Remuneration Tribunal determination. Once such a determination is made, for so long as it remains in force, it will prevail over any regulation prescribing remuneration.

The Committee thanks the Minister for this response and trusts that it will be of assistance to Senators in debating the Bill.

Clause 49 - Delegation

Subclause 49(2) would give the Treasurer a discretion to delegate the ability to approve a bank as a bank with which the Commission may invest moneys, not immediately required for the of the Commission to 'a person'.

In common with similar provisions to which the Committee has drawn Senators' attention in the past, the clause neither imposes limitation, nor gives any guidance, as to the attributes of the person to whom a delegation may be made.

The Committee's criticism of such provisions is that it is up to the Parliament to specify the person, or persons, by whom such power may be exercised. Such powers should desirably not be granted to the person conferred with the power without limitation, whether the person is a Minister, statutory office-holder or statutory authority.

The clause was drawn to Senators' attention as it may breach principle 1(a)(iv) as an inappropriate delegation of administrative power.

The Minister has responded as follows:

> Clause 49 reproduces, with the necessary changes, section 63E of Audit Act 1901. The clause restates, rather than adding to or taking away, the Treasurer's existing discretion under section 63E of the Audit Act to authorise a person to approve a bank under that section.

The Committee thanks the Minister for his assistance on this point.

Clauses 54 and 55 - Delegation

Paragraph 54(1)(c) and subclause 55(1) would allow the delegation to an employee of the Commission of various powers given to the Commission by the Bill. Among the powers that may be delegated are the powers conferred on the Executive Director by subclause 29(1); namely, the power to manage the affairs of the Commission in accordance with policies determined by the Commission.

One possible result of delegation under either of these clauses could be that the Commission delegates its function of determining policies to the Executive Director on (for example)

the granting of sporting scholarships who in turn delegates his or her statutory function of carrying out those policies to an employee of the Commission.

The Committee drew Senators' attention to the Committee's consistently expressed view that, while it may not be possible in all cases to specify in advance which persons are to be delegated statutory power with any particularity, in general it should be possible to arrive at appropriate and workable restrictions. The Committee does not regard it as a sufficient answer to its concerns in this regard that eventual accountability to the Parliament by the person to whom a power is granted, whether Minister, public servant, statutory authority or statutory office-holder constitutes a fetter on the exercise of legislatively delegated discretions.

The Committee accordingly drew the clauses to Senators' attention as they may breach principle 1(a)(ii) and constitute an inappropriate delegation of administrative power.

The Minister has responded to the Committee's concerns as follows:

> Clauses 54 and 55 as drafted already place significant constraints on the powers of delegation by the Commission and by the Executive Director respectively.
>
> Subclause 54(1) specifically identifies a number of powers that the Commission cannot delegate, and additionally limits the delegation of powers under subclauses 54(1)(a), (b) and (c) to a member of the Commission, a committee established under section 22, or a person employed under section 41. Similarly, the powers the Executive Director can delegate under subclause 55(1) may only be delegated to a person employed under section 41.

> The clauses on delegation are of standard form, and are consistent with the format of most other Acts. The delegation provisions of section 61 of the Textiles, Clothing and Footwear Development Authority Act 1988 (no. 14 of 1988), section 61 of the Honey Marketing Act 1988 (no. 33 of 1988), and section 39 of the Cash Transactions Reports Act 1988 (no. 64 of 1988), are particularly relevant in this regard, as they allow the statutory authority to delegate all of its powers to members of staff, without the additional restrictions already proposed under subclause 54(1).

However, the Minister went on to say:

> ... I am cognisant of your desire to limit the power of delegation by the Commission in relation to clause 29(1), and accordingly have decided that clause 54(1) be amended to include subclause 29(1) among the list of powers which cannot be delegated by the Commission.
>
> I have also decided that the persons to whom the Commission's powers under subclause 54(1) can be delegated be further amended to include the Executive Director of the Commission and the Director of the Institute, and that persons to whom the Executive Director can delegate his or her powers be expanded to include the Director of the Institute.
>
> Government amendments as outlined above will be introduced in the House of Representatives.

The Committee notes that these amendments were, indeed, introduced in the House of Representatives and are contained in the version of the Bill which was introduced in the Senate on 25 November 1988. The Committee thanks the Minister for his assistance.

Clause 69 - Trespass on personal rights and liberties

Subclause 69(1) provides that the employees of the previous Australian Institute of Sport will automatically become employees of the new Commission on terms and conditions of employment that are the same as the terms and conditions applicable to those persons immediately before the commencement date of the legislation. No provision is made in the Bill to preserve any rights and accrued benefits which may accrue to those employee's from continuity of service, such as long service leave, sick leave or other benefits.

The Committee considers that, as a minimum, provisions such as those in clause 69 should explicitly provide for the preservation of accrued benefits and rights of employees of an authority or other body that is to be statutorily abolished. Any doubt as to the preservation of the entitlements of continuing employees is clearly undesirable.

The clause was drawn to Senators' attention as it may breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

The Minister has responded as follows:

> I recognise the importance of the issue raised by the Committee with respect to the accrued benefits and rights of employees and agree that there should be no doubt whatsoever that these will be maintained.
>
> Subclause 41(2) empowers the Commission to determine the terms and conditions of employment. Consequently, the Bill does not stipulate details of the benefits, rights or terms and conditions. However, under subclause 69(3) the Bill requires that the Commission's employees shall have the same terms and conditions of employment as they have had under the Australian Institute of Sport Act 1986. I assure the Committee that

> the Commission will take such administrative action as may be required to ensure that these people are employed on terms as favourable as though their accrued rights and benefits had in fact been expressly preserved.

The Committee thanks the Minister for this response and, in particular, for his assurance in relation to the preservation of the accrued rights and benefits of continuing employees.

BROADCASTING LEGISLATION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 29 September 1988 by the Minister for Transport and Communications.

The Bill proposes amendments to the Broadcasting Act 1942 to introduce a special category of limited licences aimed at meeting the need for a variety of specialised services which require technical planning but do not warrant the stringent program conditions applied to current broadcasting services.

The Bill also proposes amendments to the Australian Broadcasting Corporation Act 1983 in relation to its financial and staffing powers. A number of consequential and minor amendments to other Acts are proposed by the Bill.

In Alert Digest No. 12 of 1988 (12 October 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clause 23 - 'Henry VIII' Clause

Clause 23 of the Bill would add a new section 81C to the Broadcasting Act. Proposed new subsection 81C(1) of the Act is a 'Henry VIII' provision which would permit amendment of proposed new subsection 81B(1) of the Act. Regulations

specifying certain matters and conditions can be made pursuant to the new subsection so as to significantly enlarge the scope and operation of the Act. The only form of parliamentary control exercisable over the contents of the regulations would be by disallowance, rather than by amendment, which would be the case if additional matters were to be included by way of a bill amending the Primary Act.

The clause was drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

The Minister for Transport and Communications, in a detailed response to the Committee, has answered these concerns as follows:

> This is a similar, but narrower power to that available to the Minister under the Radiocommunications Act 1983....
>
> The proposed provision in the Broadcasting Act only gives the power to make regulations prescribing purposes for which limited licences may be granted by the Australian Broadcasting Tribunal. To the extent that it draws from the model of the Radiocommunications Act, it reflects the need for greater flexibility in licensing services, which is being forced by rapid technological change and new ideas for services. The Government could not justify specifically legislating for each new form of limited service having regard to the minor nature of the services and the competing priorities for Parliamentary time.
>
> Further, the effect of the regulation making power in proposed section 81C is constrained in both its exercise and its effect.
>
> Firstly, the Minister has an obligation under section 125D of the Broadcasting Act to consult with representatives of licensees in exercising his power to plan the development of broadcasting services in Australia. This

obligation generally would require consultation before making regulations under proposed section 81C and the Departmental representative at the Broadcasting Council, (the formal consultative body comprising representatives of existing licensees, the ABC and the SBS) has advised the Council that such consultation will occur. I note that extensive consultation with the Council and the Media and Communications Council (which includes representatives of trade unions such as the AJA and ATEA and community groups such as the Australian Council for Children's Film and Television, AFCO and the Communications Law Centre) also occurred in developing the proposals included in this Bill.

Secondly, the regulation-making power does not, in itself allow anything to occur at the Minister's direction. All limited broadcasting licences must be granted by the ABT, to which the Bill gives broad powers to consider whether particular services are in the public interest. The Tribunal will be obliged to commence an inquiry into each grant, to which public submissions may be invited. The ultimate decisions or whether any new forms of service go to air as a result of new regulations are ones for the independent, specialist broadcasting authority.

Finally, I note that both Houses of Parliament have the opportunity for substantive debate on the content of regulations if a motion for disallowance is moved.

The Committee thanks the Minister for this response, which answers the concerns raised by the Committee.

Clause 26 - Non-reviewable decisions

Clause 26 would add a new section 82AB to the Broadcasting Act. Proposed new paragraphs 82AB(3)(a) and (b) would give to the Minister (or, by virtue of the power of delegation which is contained in proposed new subsection 125G(a), an officer of the Department) a discretion to either dismiss or defer

consideration of an application for a limited licence on technical or planning grounds. The exercise of such discretion will not be subject to any review on the merits. The only available form of review appears to be a review as to legality of any exercise of the discretion under the Administrative Decisions (Judicial Review) Act 1977.

The clause was drawn to the Senate's attention as it may breach principle 1(a)(iii) of the terms of reference and constitute a non-reviewable decision.

The Minister has responded as follows:

> The Broadcasting Act makes the Minister responsible for the planning and technical aspects of broadcasting services. New services can only be introduced where the Minister invites applications for them. Any proposals for, for example, new commercial or public television or radio services have no status under the Act, and do not oblige the Minister to invite applications or even to consider the proposal. Decisions about what new services will be introduced are not reviewable. However, the Minister's obligation to consult representatives of existing licensees in planning the development of broadcasting services in Australia (section 125D(1)(a)) may give rise to review under the AD(JR) Act 1977. The latter form of review will also be available under the proposed section in relation to limited licences. However, it would be inconsistent to have planning decisions in relation to relatively minor "limited" services reviewable on their merits, while major planning decisions in relation to commercial and public television and radio are not.
>
> Further, the Administrative Review Council is currently reconsidering the recommendations from its 1982 report on AAT jurisdiction under the Broadcasting Act. This is also an issue being examined as part of the review of the Broadcasting Act currently being undertaken by the Department of Transport and

> Communications and the current inquiry by the House of Representatives Transport, Communications and Infrastructure Committee into the role of the ABT. I believe that any new review provisions would be best considered as part of those more comprehensive exercises to ensure a consistent approach throughout the Act.

The Committee thanks the Minister for this response. The Committee welcomes the comprehensive review processes which the Minister advises are currently under way in relation to the Broadcasting Act.

In the response reproduced above, the Minister has suggested that it would be "inconsistent" to have planning decisions in relation to "relatively minor" decisions reviewable on their merits when major planning decisions are not. The Committee would be concerned if the only basis for declining to allow review of "minor" decisions is that there is no mechanism for review of major ones. The Committee is equally concerned about the absence of merits review in relation to these major decisions and trusts that the review processes currently under way will address this issue.

Clauses 27, 30 and 31 - 'Henry VIII' clauses

These clauses would respectively add new sections 83D, 86F and 89CA to the Broadcasting Act. The new clauses are 'Henry VIII' provisions and would allow the specification of matters by way of regulation which the Broadcasting Tribunal may take into account in arriving at a decision.

The relevant provisions are proposed new paragraphs 83D(4)(f) and 86F(4)(g) and subparagraph 89CA(4)(c)(v). The matters which may be prescribed by regulations could have an important bearing on decisions arrived at by the Tribunal, particularly in relation to the grant or renewal of remote broadcasting licences.

The clauses were drawn to Senators' attention as they may breach principle 1(a)(iv) of the Committee's terms of reference and constitute an inappropriate delegation of legislative power.

The Minister has responded as follows:

> These provisions are merely re-drafting of the existing provisions relating to the grant, renewal and transfer of remote licences and involve no policy change.
>
> The existing provisions recognise that the economics of these satellite delivered remote commercial services are very marginal, and special considerations may need to be applied at relatively short notice to facilitate their delivery. They allow the Minister to give additional guidance to the ABT on matters relevant to their deliberations in licensing remote services.
>
> I note also that both Houses of Parliament have the opportunity for substantive debate on the content of regulations if a motion for disallowance is moved.

The Committee thanks the Minister for his assistance on these points.

Clauses 27, 31, 33 and 34 - Non-reviewable decisions

Various provisions are added to the Broadcasting Act by these clauses. They would give to the Broadcasting Tribunal the power to take into account 'any other matters or circumstances that [it] considers relevant.' These provisions are: proposed paragraphs 83D(4)(g), 83E(z)(d), 86G(4)(h), 88C(2)(d), 88D(2)(e), and subparagraphs 89CA(4)(c)(vi) and 89CB(5)(d).

With regard to the first two provisions, the Broadcasting Tribunal's decision is not subject to review by the Administrative Appeals Tribunal (AAT). To challenge the exercise of any discretion on the grounds of legality under the Administrative Decisions (Judicial Review) Act appears to the Committee to be extremely difficult, if not virtually impossible. With regard to the remainder of the provision, although decisions made thereunder will be subject to review by the AAT, it is difficult to see how the AAT could review a decision by the Broadcasting Tribunal that a particular matter or thing was (or was not) relevant to any decision it made.

The clauses were drawn to Senators' attention as they may breach principle 1(a)(iii) of the terms of reference and constitute non-reviewable decisions.

The Minister has responded as follows:

> These provisions allow the ABT to have regard to "any other matters or circumstances that the Tribunal considers relevant" apart from those specified, in exercising its powers to grant, renew, suspend, revoke or transfer remote or limited licences.
>
> Those relating to remote licences are merely re-drafting of existing provisions and involve no policy change. They are intended only to make the Act more readable. Those relating to limited licences merely mirror those for remote licences.
>
> The provisions ensure that the ABT has broad powers to consider any issues, it regards as relevant to the public interest in exercising its licensing powers in relation to remote and limited licences. For those decisions for which AAT review is available (renewal, suspension, revocation, transfer), the AAT can clearly investigate the Tribunal's decision that a matter is relevant. As you will be aware, AAT review is on the merits of the case and the AAT stands in the shoes of the decision maker. I have difficulty in

understanding the basis for the suggestion that the existence of non-exclusive public interest criteria would prevent review of the Tribunal's decision.

For those decisions for which AAT review is not available (licence grants), the relevance of particular factors which the Tribunal takes into account in individual cases is still reviewable on a question of law under the AD(JR) Act 1977.

The Committee thanks the Minister for this response.

Clause 36 - Non-reviewable decision

Clause 36 would add a new section 89DA to the Broadcasting Act. The new section will govern the administration of retransmission permits. Proposed new section 89DA and proposed subsection 89DE(5) would give the Minister (or a delegate of the Minister) under new paragraph 125G(d) a discretion to grant or cancel a retransmission permit.

Any exercise of that discretion would be only reviewable as to legality, and not reviewable on the merits. With regard to the discretion to grant such a permit, proposed paragraph 89DA(9)(c) would, in the Committee's view make it extremely difficult to challenge the exercise of the discretion as it permits the Minister to have regard to 'any other matters or circumstances that the Minister considers relevant.'

The clause was drawn to Senators' attention as it may breach principle 1(a)(iii) of the terms of reference and constitute a non-reviewable decision.

The Minister has responded as follows:

> The proposed section 89DA introduces "retransmission permits", which will be administered by the Minister, to replace the existing re-broadcasting and retransmission

licences, which are administered by the Tribunal. As licences, their grant has not been subject to review in the past.

Further, the rationale for transferring responsibility to the Minister is that these services merely relay existing services and do not originate programs. The issues raised are thus in effect technical or planning ones. The Minister's planning powers have always been treated as economic in nature, since they relate to the allocation of a public resource to a particular purpose. As such, they have not been treated as appropriate subjects for review on merits.

Finally, the Administrative Review Council is currently reconsidering the recommendation from its 1982 report on AAT jurisdiction under the Broadcasting Act. This is also an issue being examined as part of the review of the Broadcasting Act currently being undertaken by the Department of Transport and Communications and the current inquiry by the House of Representatives Transport, Communications and Infrastructure Committee into the role of the ABT. I believe any new review provisions would be best considered as part of those more comprehensive exercises to ensure a consistent approach throughout the Act.

The Committee thanks the Minister for his assistance on these matters.

Clause 43 - 'Henry VIII' clause

Clause 43 would add a new section 119AC to the Broadcasting Act. Proposed paragraph 119AC(6)(c) is a 'Henry VIII' provision. It would enable the making of regulations specifying types of limited licence, the holders of which would be able to broadcast sponsorship announcements. Although Parliament would be able to scrutinise such regulations, it would not (for instance) have the power to add to categories of limited licence referred to by the regulations, but merely to disallow the regulations as a whole.

The clause was drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

The Minister has responded as follows:

> The regulation making power in the proposed section 119AC is essential if the power to create additional forms of limited licence by regulation is accepted. This power will allow the Minister, in deciding that new forms of limited source may be appropriate, to make available a limited source of revenue-raising to licensees, through sponsorship. The provision will not allow full advertising to be authorised in this way.

The Committee thanks the Minister for this response and for his assistance with the other matters raised in connection with the Bill.

The Committee notes the Minister's advice that the Administrative Review Council is currently reconsidering the recommendations contained in its 1982 report entitled Review of Decisions under the Broadcasting and Television Act 1942 (ARC 16 - Parliamentary Paper No. 440 of 1982). The outcome of this reconsideration will be awaited with interest.

BROADCASTING (LIMITED LICENCES) FEES BILL 1988

This Bill was introduced into the House of Representatives on 29 September 1988 by the Minister for Transport and Communications.

The Bill will provide for the payment of fees in respect of the granting or renewal of a 'limited licence' to be issued under the Broadcasting Act 1942 as amended.

In Digest No. 12 of 1988 (12 October 1988), the Committee drew Senators' attention to the following clause of the Bill:

Clause 5 - Inappropriate delegation of legislative power

The Bill would provide for the amount of the relevant fees, described in the Bill as a tax, to be determined by regulation. There is no indication in the Bill of the maximum amount of the proposed fee (or tax). The Committee has consistently criticised provisions which allow for a tax to be set by regulation, and fail to provide for a maximum level of that tax.

The Minister has indicated in the Second Reading Speech that the level of the fees will be consistent with those applying under the Radiocommunications Act 1983. The only effective means for ensuring that the Minister's assertion is consistently adhered to is for Senators (or, particularly, the members of the Regulations and Ordinances Committee) to recall this statement when the relevant regulations are tabled in the Parliament, which may not occur for some considerable time.

The clause was drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

The Minister has responded as follows:

> The varied nature of services to be introduced pursuant to limited licences demands flexibility in setting fees. The Minister's undertaking that fees would be consistent with those fixed by regulation under the various Radiocommunication Fees Acts accords with the restricted nature of these services.

There may be circumstances in which no fee would be considered appropriate for granting certain types of licence or permit. The flexibility of regulation-making powers is considered essential in the development and maintenance of an appropriate fee structure.

My Second Reading Speeches indicate that it is not expected that significant revenue will be generated by the Bills.

My Department will be consulting with representatives of existing broadcasting licensees in establishing the fees, and I intend to introduce the necessary regulations into the Parliament as soon as possible to ensure that they commence at the same time as the relevant legislation.

I note that both Houses of Parliament have the opportunity for substantive debate of the content of regulations if a motion for disallowance is moved.

The Committee thanks the Minister for this response.

BROADCASTING (NATIONAL METROPOLITAN RADIO PLAN) BILL 1988

This Bill was introduced into the House of Representatives on 2 November by the Minister for Transport and Communications.

This Bill proposes to amend the Broadcasting Act 1942 to implement the first stage of the National Radio Plan. The Plan will provide more commercial FM radio licences in all mainland capital cities and establish AM networks for Parliamentary and Radio for the Print Handicapped broadcasting. This Bill, legislating for a first stage, will allow eligible invited AM licensees the right to bid for the right to convert their existing AM licences to FM frequencies.

In Alert Digest No. 15 of 1988 (9 November 1988), the Committee drew attention to the following clause of the Bill:

Clause 4 - Non-reviewable decision

Proposed new subsection 89DAN(1) of the Principal Act would give to the Minister a discretion to determine whether or not licence bids had been affected by collusion. Such a discretion would be reviewable only as to legality, under the Administrative Decisions (Judicial Review) Act 1977, and not as to the merits by the Administrative Appeals Tribunal.

The clause is again drawn to Senators' attention as it may breach principle 1(a)(iii) of the terms of reference and constitute a non-reviewable decision.

BROADCASTING (RETRANSMISSION PERMITS AND TEMPORARY TRANSMISSION PERMITS) FEES BILL 1988

This Bill was introduced into the House of Representatives on 29 September 1988 by the Minister for Transport and Communications.

The Bill will provide for the payment of fees in respect of the granting or renewal of a retransmission or temporary transmission permit under the Broadcasting Act 1942.

In Alert Digest No. 12 of 1988 (12 October 1988), the Committee drew Senators' attention to the following clause of the Bill:

Clause 5 - Inappropriate delegation of legislative power

The Bill would provide for the amount of the relevant fees, described in the Bill as a tax, to be determined by regulation. There is no indication in the Bill of the maximum amount of the proposed fee (or tax). The Committee has consistently

criticised provisions which allow for a tax to be set by regulation, and fail to provide for a maximum level of that tax.

The Minister has indicated in the Second Reading Speech that the level of the fees will be consistent with those applying under the Radiocommunications Act 1983. The only effective means for ensuring that the Minister's assertion is consistently adhered to is for Senators (or, particularly, the members of the Regulations and Ordinances Committee) to recall this statement when the relevant regulations are tabled in the Parliament, which may not occur for some considerable time.

The clause was drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

The Minister's response to these comments is in identical terms to his response to the Committee's comments on clause 5 of the Broadcasting (Limited Licences) Fees Bill 1988 (see pp. 167-68 above).

The Committee thanks the Minister for this response.

COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT BILL (NO. 2) 1988

This Bill was introduced into the House of Representatives on 10 November 1988 by the Minister for Housing and Aged Care.

This Bill proposes to amend several Acts affecting services within the Community Services and Health portfolio. Principally the amendments relate to the:

- First Home Owners Act 1983 to clarify the circumstances under which a person is eligible for assistance under the Act;

- Health Insurance Act 1973 to restrict eligibility for Medicare benefits to persons residing in Australia on a legally permanent basis and withdraw benefits from Australian residents living or travelling overseas;

- National Health Act 1953 dealing with the provision of financial assistance for the operation of nursing homes and hostels, and

- Community Services and Health Legislation Amendment Act 1988 to clarify arrangements to be made for the provision of financial assistance to patients receiving respite care in approved nursing homes.

The Bill further proposes to empower the Minister and the departmental secretary to delegate powers and functions to persons who are not officers of the Australian Public Service.

In Alert Digest No. 16 of 1988 (23 November 1988), the Committee drew Senators' attention to the following clause of the Bill:

Clause 14 - Inappropriate delegation of legislative power

Proposed new paragraph 40AE(4)(a) and subsection 40AEE(2) of the National Health Act 1955 impose lodgment and processing fees for requests for review of certain decisions. The Minister's Second Reading speech makes it clear that the level of these fees is intended to limit appeals to those involving 'genuine grievances'. Proposed new paragraphs 49AEB(1)(d) and (2)(b) and 40AEG(b) provide for the refund of those fees if the

result of the review is 'wholly or substantially' favourable to the person seeking it. Three comments about these provisions may be raised:

- apparently the Minister has a discretion, challengeable only as to legality, to determine whether or not a decision is 'wholly or substantially' in favour of a proprietor, thereby permitting a refund of moneys;

- the amount of the lodgment fee may be varied by Ministerial notice and, although that notice may be disallowed, the Bill sets no upper limit on the amount of money which may be charged; and

- the amount of processing fees may be varied by Ministerial notice. Not only does the Bill set no upper limit on the possible amount that may be charged, but the Ministerial notice is also not subject to parliamentary scrutiny.

Senators' attention is again drawn to the clause as it may be considered to breach principle 1(a)(iv) and inappropriately delegate legislative power.

CRIMES (TORTURE) BILL 1988

This Bill was introduced into the House of Representatives on 23 March 1988 by the Attorney-General.

The Bill will enable Australia to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, establishing Australia jurisdiction over acts of

torture committee outside Australia where the offender is found within Australian territory. The Bill creates a new federal offence of torture.

The Bill was considered in relation to Alert Digest No. 4 of 1988 (13 April 1988) but was not commented on at that stage. However, some possible problems with the Bill have now been drawn to the Committee's attention. As permitted by the Committee's terms of reference, it is appropriate that these matters be now drawn to the attention of the Senate.

The Committee draws Senators' attention to the following clauses of the Bill:

Clause 8 - Trespass on rights and liberties

Clause 8 of the Bill provides for proceedings for an offence against the Act to take place only with the consent of the Attorney-General. Subclause 8(2) further provides that, notwithstanding that the consent of the Attorney-General has not been given:

(a) A person may be arrested for the offence and a warrant for the arrest of a person for the offence may be issued and executed;

(b) A person may be charged with the offence;

(c) A person so charged may be remanded in custody or on bail; but no further steps in proceedings referred to in sub-section (1) shall be taken until such a consent has been given; and

(d) Nothing in sub-section (2) prevents the discharge of the accused if the proceedings are not continued within a reasonable time.

Under the legislation as proposed, clearly, a person could be arrested, charged and remanded in custody in relation to a charge which is ultimately not proceeded with. While this could be regarded as operating to the benefit of a person charged, the Committee draws the attention of Senators to the clause as it may be considered to be in breach of principle 1(a)(i) and trespass unduly on personal rights and liberties.

Clause 9 - Reversal of onus of proof

Clause 6 of the Bill provides that an "act of torture", as defined by clause 3, that is done outside of Australia is punishable within Australia as an offence against the law of the jurisdiction in which the proceedings are brought. Subclause 6(2) of the Bill requires that regard is to be had in such proceedings to any defence which could be raised in relation to such an offence in that jurisdiction.

Clause 9(2) provides that where the onus of establishing a defence to the offence would be on the accused if the offence had been committed within the jurisdiction, the onus is also on the accused to establish any defence raised in relation to an offence under the Bill. Though any reversal of the onus of proof would, in effect, have its origins in the relevant State or Territory law picked up by the Bill, the result of the clause may be to reverse the onus of proof that would have applied if the offence had been charged under a (say) Commonwealth enactment.

Accordingly, the provision is drawn to the attention of Senators as it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 7 November 1988 by the Minister for Science, Customs and Small Business.

This Bill is an omnibus Bill proposing miscellaneous amendments to the Customs Act 1901 and the Excise Act 1901 relating to the manner in which beer is measured for customs and excise duty purposes; controls pertaining to prohibited defence exports; duty free entry to Australia of goods from Christmas Island; offence provisions in the Customs Act, and to ensure that existing legislative provisions protecting government instrumentalities from excise duty are of no current effect.

In Alert Digest No. 16 of 1988 (23 November 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clause 2 - Retrospectivity

Subclause 2(3) would give the amendment to be made by paragraph 8(1)(a) retrospective effect to 27 August 1987. The Explanatory Memorandum indicates that the purpose of this latter paragraph is to put beyond doubt the validity of a regulation made on that day. While it may be said that the purpose of this retrospectivity is merely to give effect to Parliament's intention, it could also be argued that a person may have done an act in (say) late 1987 which, if challenged at that time, would have been found to have been lawful, because of the invalidity of the relevant regulation but which, if challenged after the Bill receives the Royal Assent, is found to be an offence.

Senators' attention was drawn to the clause as it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

The Minister for Science, Customs and Small Business has provided a detailed response to these comments. For the information of Senators, the Committee has reproduced his comments in full:

> As the Committee noted in its comments on this clause of the Bill, the amendment contained in paragraph 8(1)(a) (which will permit the prohibition of the exportation of goods in specified circumstances) is designed to put beyond doubt the capacity of the Government to make a regulation that so prohibits the exportation of goods. It is not conceded however, that the first regulation which relied upon such a head of power (ie. Regulation 13G, inserted by Statutory Rules 1987 No. 176 on 27 August 1987) was made in the absence of authority; the proposed provision is merely a clarification of the power to prohibit the exportation of goods contained in section 112 of the Customs Act 1901, and is designed to remove any possibility of a regulation being found to be beyond that legislative power on purely technical grounds.
>
> Even if regulation 13G was found to be technically faulty in the manner noted by the Committee, I do not consider it improper for the provisions of paragraph 8(1)(a) to take effect as from 27 August 1987.
>
> Statutory Rules 1987 No. 115, which was gazetted on 15 June 1987, added a regulation 13F to the Customs (Prohibited Exports) Regulations (later renumbered 13E by Statutory Rules 1987 No. 156) to impose restrictions on the exportation of militarily sensitive dual-use technology, as part of Australia's response to the Co-Ordinating Committee for Multilateral Export Controls' (COCOM) objective of restricting access to such technology to essentially "Eastern-block" countries.

It then came to notice that the export control was being circumvented by the exportation of the prescribed technology to non-proscribed countries, which then acted as conduits for the transfer of the technology to one of the proscribed countries. Accordingly, regulation 13G (which was considered to be validly made pursuant to paragraph 112(2)(b) of the Customs Act 1901) gained passage through the Executive Council, and was gazetted on 27 August 1987.

As your Committee quite properly acknowledged, the intention of both the Government and the Parliament was manifestly clear on the face of the legislation; it was not acceptable to avoid the effects of regulation 13E of the Customs (Prohibited Exports) Regulations by sending prescribed equipment to proscribed countries via third countries, with the consequent effect that Australia could not fulfil its international obligations. The law was clear; it is not as if, for example, the amendment proposed in this Bill was being made retrospective to the date of publication of a press release that merely announced the intention of the government to control an activity. A body of law was in place on 27 August 1987. All this amendment is doing is ensuring that persons engaged in the inappropriate activity discussed above, which the legislation prohibited by regulation 13G since August 1987, do not escape the consequences of their behaviour through the possibility of a mere technicality.

The Committee thanks the Minister for this response.

Clause 5 - Delegation

Proposed new subsection 9(1) of the Customs Act would give to the Minister the unfettered discretion to delegate his or her powers and functions to 'any person'. The amendment is proposed in order to allow the Minister to delegate functions as well as powers. In view of the Committee's consistent criticism of provisions permitting delegation to 'a person',

and acceptance by Ministers of the need to specify more closely to whom delegations might be made, the Committee believes section 9 should be altered in this respect.

Senators' attention was drawn to the clause as it may be considered to breach principle 1(a)(ii) and make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

The Minister has responded as follows:

> I am aware that your Committee has consistently been critical of unfettered delegation provisions in legislation. Indeed, on the basis of the Committee's position, recent legislation sponsored by the Australian Customs Service has restricted the class of persons to whom delegations of power might be given to persons who are "officers of Customs" (see for instance, section 32 of the Bounty (Books) Act 1986 and Section 33 of the Bounty (Ship Repair) Act 1987).
>
> As was stated in the Explanatory Memorandum of the Bill, the proposed amendments to the Minister's delegation power contained in clause 5 were made to align the Minister's powers with the powers of delegation conferred on the Comptroller-General of Customs by section 14 of the Customs Administration Act 1985.
>
> In light of the Committee's comments however, I have asked the Australian Customs Service to review the breadth of the delegation powers contained in both section 9 of the Customs Act 1901 and section 14 of the Customs Administration Act 1985, with a view to amending these provisions, and any other such delegation powers, at the earliest opportunity, so as to give effect to the views of the Committee and the more recent legislative precedents for Customs sponsored legislation.

The Committee thanks the Minister for his response and for his initiatives in reviewing the breadth of the delegation powers contained in the legislative provisions mentioned. The Committee will await the outcome of this review with interest.

Clause 8 - Non-reviewable decision

Proposed new subsection 112(2AB) of the Customs Act would apparently give the Minister for Defence a discretion, which is reviewable only as to legality and not as to the merits, to determine various matters in paragraphs (c) and (d) and the remainder of the proposed subsection.

Senators' attention was drawn to the clause as it may be considered to breach principle 1(a)(iii) and make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

The Minister has responded as follows:

> Your Committee has correctly identified that the proposed new subsection 112(2AB) of the Customs Act 1901, contained in clause 8 of this Bill, does not have a provision allowing for the review of the proposed decision of the Minister for Defence to suspend a licence or permission to export defence-related goods when the Minister is of the opinion that because of circumstances in an overseas destination of the goods, the exportation of such goods from Australia would be contrary to the national interest.
>
> I consider it quite appropriate that a decision made by a Minister of the Crown in the national interest should not be subject to merit review by a body such as the Administrative Appeals Tribunal.
>
> The Government has the responsibility of ensuring that Australia maintains the security of itself and its region. Therefore, should the Government obtain

information that defence related goods are to be used in a manner that is, in the Government's opinion, against the country's national interest, the Government believes that it has an obligation to intercede and to suspend previously granted permissions or licences to export defence related goods. The provision contained in clause 8 of this Bill allows the Government to do so.

As this decision is one that relates to both national security and to considerations that may affect Australia's international relations, I consider that the discretion vested in the Minister for Defence falls within the accepted category of decisions that are not appropriate for merit review.

The Committee thanks the Minister for his assistance on these matters.

FOREIGN TAKEOVERS AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 9 November 1988 by the Minister assisting the Treasurer.

This Bill proposes to amend the Foreign Takeovers Act 1975 to give legislative effect to changes to foreign investment policy announced by the Government in 1985 and 1987. Primarily the Bill proposes to prevent foreign interests from buying Australian urban real estate without approval; strengthen the penalty and enforcement sections of the Act, and increase the value below which proposals by foreigners to buy Australian businesses are exempt for examination, by excluding from examination foreign acquisitions of mineral exploration rights and by increasing to $20 million the threshold above which offshore takeovers are subject to the Act.

In Alert Digest No. 16 of 1988 (23 November 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clause 20 - Non-reviewable decision

Proposed new subsection 25(1A) would give to the Treasurer an unfettered discretion, reviewable only as to legality, to impose conditions on a foreign takeover or acquisition. By virtue of proposed new subsection 25(1C), a failure to comply with those conditions will be a criminal offence. This new subsection could affect the rights of Australian citizens, as vendors.

Senators' attention is again drawn to the clause as it may be considered to breach principle 1(a)(iii) and make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

Clause 32 - Retrospectivity

Subclause 32(2) of the Bill, and the Explanatory Memorandum, for that clause, make it clear that the proposed amendments are an example of legislation, if not by press release, then by 'detailed corrigenda to the foreign investment guidelines'. The *Second Reading speech further indicates that the Foreign* Investment Review Board has been acting, for more than a year, as though this proposed legislation had already been passed by both Houses of the Parliament.

Though this situation is comparable to what has been done in relation to previous proposed amendments to the tax legislation, Senators' attention is again drawn to the clause as it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

LANDS ACQUISITION BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Minister for Administrative Services.

The Bill intends to give legislative effect to the Government's decisions on issues arising from the Australian Law Reform Commission report on lands acquisition. It proposes an entirely new and comprehensive process that must be followed when the Commonwealth wishes to acquire property.

In Alert Digest No. 9 of 1988 (1 June 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clause 21 - 'Henry VIII' clause

Subclause 21(b) is a 'Henry VIII' clause. Although the Bill may be considered to generally provide for a reasonable process of publicity and review in relation to the acquisition of land by the Commonwealth, the whole of that scheme would be by-passed by the making of regulations under this clause. Furthermore, the regulation could, for instance, be made soon after the Senate rises and the entire process of acquisition completed before the Senate had the opportunity to consider and disallow the regulations.

The Committee drew the clause to the attention of Senators in that such delegation of legislative power might be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister for Administrative Services has responded to the Committee's comments as follows:

> I accept this concern and the Bill has been amended so that an exemption regulation under subclause 21(b) must be first scrutinized by Parliament before any acquisitions can proceed. Furthermore the same concern applies to subclause 117(b) regarding disposals and this clause has been similarly amended. Hence, even though an exemption regulation may be gazetted, an acquiring authority so exempted cannot act upon that exemption until Parliament has considered the matter.

The Committee thanks the Minister for his response and for his attention to the concerns raised by the Committee.

Clauses 22 and 24 - Non-reviewable decision

Subclauses 22(4) and clause 24 would apparently give the Minister an unreviewable discretion to by-pass the pre-acquisition procedures which are set out in Part V, on the grounds either that the acquisition is essential for the implementation of a particular policy, or that it is a matter of urgency. These provisions, it may be argued, could completely nullify the effect of the carefully spelt-out provisions of Part V of the Bill.

The Committee drew these clauses to the attention of Senators in that such discretions might be considered unfettered discretions which would make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

The Minister has provided a detailed response to these comments. In support of the clauses, the Minister has referred the Committee to recommendations of the Law Reform Commission (LRC) (Report No. 14, Lands Acquisition and Compensation -

Parliamentary Paper No. 78 of 1980) and the Administrative Review Council (Land Use in the Australian Capital Territory - Parliamentary Paper No. 264 of 1982). The Minister stated:

> [T]he restraint on appeal relevant to the essentiality provision has been included on the recommendation of the Administrative Review Council. Circumstances where this provision might be used would arise infrequently but, for example, the Commonwealth may need to acquire land that must be in a unique location such as an aircraft navigation aid.
>
> Council expressed the view that in such instances appeal to the AAT should be precluded provided the Minister makes a public declaration that the acquisition is essential. Such a declaration would indicate the Government's commitment to the acquisition. Hence review by the AAT would be redundant given that the Government is not bound to accept a recommendation of the AAT. The Council believed that it was highly desirable that the Minister remain politically accountable for such decisions.

However, the Minister noted:

> The Bill has now been amended to delete the more severe of these provisions at clause 24(1)(b). However I am of the view that sub clause 22(4) (sub clause 22(6) in the revised Bill) should remain unaltered because in its present form the need for public accountability is met.
>
> If a Minister chose to use this provision he would not be able to do so without the details of what he was doing being public. A pre-acquisition declaration would be issued to anyone affected by the acquisition and copies of the declaration would have to be published in the gazette and in a newspaper circulated in the area where the land was located.
>
> Furthermore if an owner of land being acquired using any of the above three provisions i.e. urgency, national security or essentiality believed that the provision was

being misused he or she would be able to appeal to the Federal Court under the provisions of the Administrative Decisions (Judicial Review) Act 1977.

The Committee thanks the Minister for his response and for his attention to the matters raised by the Committee.

Clause 33 - Non-reviewable decision

Clause 33 would provide the Minister with a non-reviewable discretion. Whereas in most cases decisions of the Administrative Appeals Tribunal are binding on the Minister as well as the applicant, under this clause the Administrative Appeals Tribunal has the power only to make recommendations to the Minister, who has a completely unfettered discretion to accept or reject the recommendation. Although, by virtue of subclause 33(2), the Minister must explain to both Houses of Parliament the reasons for rejection, neither House has the power to overturn the decision.

The Committee drew the clause to the attention of Senators in that such a discretion might be considered an unfettered discretion which would make rights, liberties and/or obligations unduly dependent upon a non-reviewable decision, in breach of principle 1(a)(iii) of the Committee's terms of reference..

The Minister has responded as follows:

> The LRC considered this point and recommended that although in normal circumstances the AAT makes decisions which would bind both the Minister and the applicant, in this instance the final decision to acquire or not acquire should rest with the responsible Minister. A decision on a matter which may contain important political and financial implications should be made by a person who is responsible to Parliament and the electors.

> I agree with this view provided that some time limit is placed on the Minister's consideration of an AAT recommendation and that the Minister's decision is open to public scrutiny. The Bill provides that the Minister has 90 days within which to reject an AAT recommendation and he must provide a statement to each House of Parliament within 3 sitting days explaining his reasons for the rejection.

The Committee thanks the Minister for his response.

Clause 47 - Non-reviewable decision

Subclause 47(2) would give to the Minister a further discretion; a discretion to permit an authority to enter into possession of land that is acquired. Although the Minister's discretion under subclause 47(4) is subject to review pursuant to provisions in subclause (6), the discretion under subclause (2) is apparently not subject to review.

The Committee drew the clause to the attention of Senators because such a discretion might be considered an unfettered discretion which would make rights, liberties and/or obligations unduly dependent upon a non-reviewable decision.

The Minister has responded to these comments as follows:

> The provisions in this clause are identical to those proposed by the LRC. Whilst the Commission recognised the apparent inconsistency of not providing review of the urgency certification it concluded that to provide AAT review of the Minister's decision that land was required immediately would likely occasion a delay which would defeat the purpose for which the particular power was exercised.
>
> I accept this view and believe this section of the Bill should remain as drafted.

The Committee thanks the Minister for his response.

Clause 139 (formerly clause 137) - Delegation

Subclause 139(1) (formerly subclause 137(1)) permits the Minister to delegate many of his or her powers to 'a person', a form of words which the Committee regards as conferring an unacceptably wide discretion on a Minister and does not provide a sufficiently defined category of the person or persons to whom such wide powers may be delegated.

The Committee drew the clause to the attention of Senators in that such a delegation of legislative power might be considered an insufficiently defined delegation of legislative power.

The Minister has responded as follows:

> I accept the Committee's concern and the Bill has been amended to the effect that relevant powers can only be delegated to a member of the Australian Public Service.

The Committee thanks the Minister for his response and for his attention to this matter. The Committee has consistently criticised provisions permitting delegation to "a person". It is the Committee's firm view that Ministers need to restrict delegations to holders of a particular office or to a specified class of persons.

POSTAL SERVICES AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 29 September 1988 by the Minister for Transport and Communications.

The Bill proposes to establish a new corporate structure for Australia Post as the Australian Postal Corporation; establish a Board; redefine the role of the Minister, Board and Management; provide new employment provisions, and remove certain day-to-day controls. It also proposes to enable the Australian Postal Corporation to commercially develop its properties.

The Bill also proposes to make minor amendments to the arrangement between Telecom and Australia Post concerning telegram services.

In Alert Digest No. 12 of 1988 (12 October 1988), the Committee drew Senators' attention to the following clause of the Bill:

Clause 10 - 'Henry VIII' clause

Proposed subsection 36A(2) of the Bill would allow for remuneration of directors of the Corporation to be determined by regulation if no determination by the Remuneration Tribunal is in operation. Such clauses in the Australian Sports Commission Bill 1988 were drawn to Senators' attention in Alert Digest No. 11 of 1988 (28 September 1988). The Committee has a similar concern regarding this clause.

The clause was accordingly drawn to Senators' attention as it may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

The Minister for Transport and Communications has responded as follows:

> I understand the Committee's concern that it should not be possible for regulations to override the requirement that the remuneration of Australia Post directors be fixed by the Tribunal. However, proposed

subsection 36A(2) only allows regulations to be made when there is no Tribunal determination in place, which is a different matter, because once a determination is in operation the power to make the regulations will cease.

The Bill abolishes the positions of Commissioners and creates new positions of directors of the new body, the board. The existing determinations for Commissioners will not apply to the new directors. It is proposed that the new Board for Australia Post will be appointed from 1 January 1989 and the power to make regulations will allow remuneration to be fixed for directors appointed to the new board if there is any delay in the making of a determination by the Tribunal. As the Australia Post Board will be a new body, there might otherwise be no power to pay directors in the interim period.

The Committee thanks the Minister for his explanation.

TELECOMMUNICATIONS AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 29 September 1988 by the Minister for Transport and Communications.

The Bill proposes to establish a new corporate structure for Telecom, as the Australian Telecommunications Corporation; establish a Board; redefine the role of the Minister, Board and management; provide for new employment provisions and remove day-to-day controls.

It will also amend the Telecommunication (Interception) Act 1979 to extend the exemption which currently applies to Telecom staff who would otherwise be guilty of interception in carrying out installation and maintenance work, so that it applies to private sector employees legally carrying out maintenance on, or installation of, PABX's.

In Alert Digest No. 12 of 1988 (23 November 1988), the Committee drew Senators' attention to the following clause of the Bill:

Clause 11 - 'Henry VIII' clause

Proposed new subsection 33A(2) to be added by the Bill would allow for remuneration of directors to be determined by regulation.

The provision is in essence the same as subclauses 17(1) and 33(1) of the Australian Sports Commission Bill 1988, on which the Committee commented in Alert Digest No. 11 of 1988 (28 September 1988).

The clause was drawn to Senators' attention as it may breach principle 1(a)(iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

The Minister for Transport and Communications has responded as follows:

> I understand the Committee's concern that it should not be possible for regulations to override the requirement that the remuneration of Telecom directors be fixed by the Tribunal. However, proposed subsection 33A(2) only allows regulations to be made when there is no Tribunal determination in place, which is a different matter, because once a determination is in operation the power to make the regulations will cease.
>
> The Bill abolishes the existing positions of Commissioners and creates new positions - directors of the new body, the Board. The determinations for Commissioners in force when the Board is created will not apply to the directors.

It is proposed that the new Board for Telecom will be appointed from 1 January 1989 and the power to make regulations will allow remuneration to be fixed for directors appointed to the new Board if there is any delay in the making of a determination by the Tribunal. As the Telecom board will be a new body, there might otherwise be no power to pay directors in the interim period.

The Committee thanks the Minister for his explanation.

Barney Cooney
(Chairman)
30 November 1988

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1988

7 DECEMBER 1988

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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. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF 1988

The Committee has the honour to present its Seventeenth Report of 1988 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 Centennial Roads Development Bill 1988

Defence (Safe and Unimpeded Access for Visiting Foreign Warships Bill 1988

Higher Education Funding Bill 1988

Ozone Protection Bill 1988

Ozone Protection (Licence Fees - Imports) Bill 1988

Ozone Protection (Licence Fees - Manufacture) Bill 1988

Social Security Legislation Amendment Bill 1988

State Grants (Technical and Further Education Assistance) Bill 1988

Triticale Levy Collection Bill 1988

AUSTRALIAN CENTENNIAL ROADS DEVELOPMENT BILL 1988

This Bill was introduced into the House of Representatives on 29 September 1988 by the Minister for Land Transport and Shipping Support.

The Bill will establish the Australian Centennial Roads Development Trust Fund, which will fund a program of financial assistance for land transport for a five year period from 1 January 1989. A share of excise and customs duty on motor spirit and diesel fuel will provide the finance. The share will be identified as the 'road user charge'.

The Committee dealt with this Bill in Alert Digest No. 12 of 1988 (12 October 1988) but did not comment on it at that stage. However, in its Sixteenth Report of 1988 (30 November 1988), the Committee drew certain clauses of the Bill to Senators' attention. A further aspect of the Bill has now come to the Committee's attention which the Committee brings to the attention of the Senate.

Clause 10 - Inappropriate delegation of legislative power

Clause 10 allows the Minister to make determinations in relation to the "charge rate", expressed in cents per litre, which is relevant in determining the "road user charge". Pursuant to subclause 3(1), the charge rate is 4.95 cents per litre, unless a determination by the Minister under clause 10 is in force.

Subclause 10(2) allows the Minister, in consultation with the Treasurer, to set the charge rate. Subclauses 10(3) and (4) limit that charge rate in respect of the 1989 and 1990 financial years, to an amount which will, as nearly as possible, bring in to the Fund a "guaranteed amount", as

defined by paragraphs 10(1)(a) and (b). These paragraphs define the "guaranteed amount" for the 1989 and 1990 financial years respectively.

The program to be set up by the Bill would operate until 31 December 1993. There is no limit set on the charge rate for the period between 30 June 1991 and 31 December 1993. It is in the complete discretion of the Minister, who is only required to consult with the Treasurer, and subject to no parliamentary or other review.

The Committee draws Senators' attention to the clause as it may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

DEFENCE (SAFE AND UNIMPEDED ACCESS FOR VISITING FOREIGN WARSHIPS) BILL 1988

This Bill was introduced into the Senate on 19 October 1988 by Senator Newman as a Private Senator's Bill.

This Bill proposes to formalise the authorisation of entry to Australian waters by foreign warships where such entry is desired and to safeguard such approved visits from obstruction and interference.

In Alert Digest No. 14 of 1988 (2 November 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clause 10 - Trespass on personal rights and liberties

Subclause 10(2) may be regarded as infringing unduly on personal rights. Its apparent effect would be to enable the Minister to override the terms and conditions of a person's employment, or the instructions given by an employer to an

employee, in giving a direction under subclause 9(1) and to enforce compliance with that direction by the sanction of the penalty in subclause 10(1).

The clause was drawn to Senators' attention as it may breach principle 1(a)(i) of the terms of reference and trespass unduly on personal rights and liberties.

Senator Newman has responded to the Committee's comments as follows:

> This subclause is so drafted in order to make it clear that the warships of our friends and allies must have completely unimpeded and safe access to our ports when the Minister, on behalf of the federal government, has granted approval for a visit. Visiting warships are extremely large vessels. As their name implies, they are warships. While in the hands of competent navy personnel, the arrival and departure of such vessels is safe. Interference, or attempted interference, with them or their movements can obviously give rise to great danger to the ships, their crew, the harbour, other craft, spectators and the interferers themselves. It is necessary, therefore, that there be no such dangerous interference and that such dangerous interference not be permissible by a person under the protection of a concept of "higher authority". If such a defence were acceptable in this kind of situation, it would have very serious consequences for the enforcement of the proposed Act from the point of view of personal safety. I believe that the promotion and protection of personal safety must be the overriding consideration in this matter and subclause 10(2) has been drafted with that in mind.

The Committee thanks Senator Newman for this response and trusts that it will assist the Senate in debating this matter.

Clause 14 - Delegation

Clause 14 would allow the Minister to delegate to an officer of the Australian Public Service, or a member of the Defence Force all or any of the Minister's powers under the Act. The clause would allow delegation of wide powers to persons who, in the Committee's view, may not be suitable persons to exercise the powers given to the Minister by the Bill. As the Committee has consistently noted, such powers should be delegated only to members of organisations above a certain level of seniority, and that delegation of those powers to (say) a leading aircraftsman or leading seaman in the armed forces would be an unacceptable exercise of that discretion.

The clause was drawn to Senators' attention as it may breach principle 1(a)(ii) of its terms of reference and constitute an inappropriate delegation of administrative power.

Senator Newman has responded to the Committee's comments as follows:

> I am happy to accept the point made by the Committee egarding the delegation of ministerial powers and, when my Bill is called on for debate, I will foreshadow, and later move, a committee amendment to restrict such delegations to public servants in the Senior Executive Service, and armed forces personnel occupying ranks in the various branches of the forces that are equivalent to the first level of the Senior Executive Service.

The Committee thanks Senator Newman for this response and for the undertaking to amend the Bill in accordance with the Committee's comments.

HIGHER EDUCATION FUNDING BILL 1988

This Bill was introduced into the House of Representatives on 3 November 1988 by the Minister for Employment, Education and Training.

This Bill proposes to provide grants of financial assistance to the States, the Northern Territory and institutions of higher education for the 1989-91 triennium. This Bill reflects decisions arising from the Government's White Paper (Higher Education - a Policy Statement) and the Statement released as part of the 1988-89 Budget (A New Commitment to Higher Education in Australia).

In Alert Digest No. 15 of 1988 (9 November 1988), the Committee drew attention to the following clauses of the Bill.

Clauses 15 and 16 - Inappropriate delegation of legislative power

Clauses 15 and 16 (and the other clauses referred to in clause 111) may be regarded as giving to the Minister an unacceptably wide discretion in determining the amounts that he or she may pay to a State for higher education purposes. While the exercise of that discretion is subject to parliamentary review by virtue of clause 111, the only control which the Parliament may exercise is to prevent, by disallowance, the exercise of the discretion in a particular way, and not to substitute its own decision for that of the Minister. Thus - to take an extreme example - if the Minister determined to make no money available to (say) the University of Sydney for operating purposes, it is difficult to see how the Parliament could alter that position, even if it wished to do so.

The clauses were drawn to Senators' attention as they may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

The Minister for Employment, Education and Training has responded to the Committee's comments as follows:

> The Committee's concern is appreciated but the Government has been prevented by time constraints from providing a detailed breakup in this Bill of the amounts being legislated for higher education purposes. These time constraints have arisen principally from the requirement to consult with institutions on the detailed allocations and also from the need to consider the education profiles of the institutions before deciding on the level of funds to be made available to individual institutions. The details of the majority of institutional grants for the 1989-91 triennium have now been settled and were tabled in the House of Representatives on 24 November and in the Senate on 28 November. As required by legislation appropriate determinations, which are subject to disallowance, will be issued and tabled in Parliament following receipt of Royal Assent.

The Committee thanks the Minister for his response. While the Minister has explained the reason for the form of the clauses, the Committee's original concerns remain. It remains the case that it is only the Minister's determinations which are subject to disallowance. If the Minister were to fail to make a determination, it is difficult to see what control the Parliament would have.

Accordingly, the clauses are again drawn to Senators' attention as they may be considered to breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

Clause 40 - 'Henry VIII' Clause

Subclause 40(7) may be regarded as an indirect form of 'Henry VIII' clause, as conferring an unreviewable discretion on the Minister (or, by virtue of subclause 113(1), on an officer in the Department). Subclause 40(7) gives little guidance on the way in which the index number referred to in the clause is to be arrived at, and there is no opportunity for any person, or for the Parliament, to challenge the decision to specify the figure. Furthermore, by the operation of the remainder of the clause, the determination of the index figure will amend the reference to the figure $1,800 in subclause 40(1). It may be argued that the Australian Statistician is given similar powers in a variety of legislation (including subclause 66(11) of this Bill), but the Committee observes that the Statistician is an independent statutory office holder, and is subject to control both by the Parliament and the Australian Statistics Advisory Council, by virtue of the Australian Bureau of Statistics Act 1975.

The clause was drawn to Senators' attention as it may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

The Minister has responded to the Committee's comments as follows:

> The provision being made by subclause 40(7) in regard to the "index number" in relation to the annual course contribution of $1,800 in 1989 for a standard student load is in fact no different from the indices published by the Department of Employment, Education and Training relating to the supplementation of higher education operating grants. The derivation and methods for determining all the tertiary indexes published by the Department are provided in a manual which is automatically given wide distribution to all higher education institutions in Australia

> and to the professional and union bodies involved in higher education. It is intended that the methodology in regard to this index number be included in the updated manual which will be provided to institutions shortly.

The Committee thanks the Minister for this response. The Minister has indicated that the means by which the index figure is arrived at is given wide publicity among the bodies concerned with its application. This to some extent addresses the concerns expressed by the Committee. The Committee trusts that the Minister's response will assist Senators in debating the Bill.

OZONE PROTECTION BILL 1988

This Bill was introduced into the House of Representatives on 10 November 1988 by the Minister representing the Minister for the Arts, Sport, the Environment, Tourism and Territories.

This Bill proposes to give effect to the obligations which will arise when Australia ratifies the Montreal Protocol on Substances that Deplete the Ozone Layer, and to provide for additional controls, beyond those required by the Protocol, which will further reduce the usage, and emission to the air, of ozone depleting substances.

In Alert Digest No. 17 of 1988 (30 November 1988), the Committee drew Senators' attention to the following clauses of the Bill:

Clauses 16, 19 and 20 - Non-reviewable decisions

Subclauses 16(4), 19(5) and 20(1) would give the Minister a discretion in making various decisions. Although these decisions are reviewable on the merits, by virtue of clause 66,

the generality of the former provisions is such that it would be difficult for the Administrative Appeals Tribunal to review them in a meaningful way.

Accordingly, Senators' attention was drawn to the clauses as they may be considered to breach principle 1(a)(iii) and make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

The Minister for the Arts and Territories, in the absence of the Minister for the Arts, Sport, the Environment, Tourism and Territories, has provided the following response:

> Although no specific criteria are laid down for the exercise of this discretion, subclause 16(5) sets out a number of matters of fact to which the Minister must have regard for the purpose. Subclause 16(7) requires provisions of reasons for refusal, and clauses 19 and 20 make similar requirements. Accordingly, review by the Administrative Appeals Tribunal would be meaningful, as the Tribunal could ensure that all matters specified by subclause 16(5) are taken into account, and address any irrelevant considerations which might form part of the stated reasons for the refusal or cancellation.

The Committee thanks the Minister for this response and trusts that it will be of assistance to Senators in debating the Bill.

Clauses 29 and 30 - Non-reviewable decisions

Clauses 29 and 30 would give to the Minister a discretion to determine the discretionary component of the CFC quotas, which is reviewable only as to legality. Further, in view of paragraphs 29(9)(b) and 30(5)(b), which would permit the Minister to have regard to 'such matters as the Minister thinks fit', it is difficult for the Committee to see how the exercise of that discretion could realistically be challenged.

Senators' attention was drawn to the clauses as they may be considered to breach principle 1(a)(iii) and make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

The Minister has responded as follows:

> The generality of the circumstances taken into account for the determination of the discretionary part of quotas is necessary as it is not possible to accurately predict what matters may need to be included in such consideration. The reason for having such a provision is that the Montreal Protocol uses 1986 as a base year, and thus it may be necessary to take into account changes in business arrangements which have occurred in the intervening period.
>
> As the Committee noted, decisions as to discretionary components are reviewable as to legality. Though the Minister may have regard to such matters as he thinks fit, there is an inherent limit to the extent of the discretion in that the matters taken into consideration must be relevant to the objects of the Act: a decision could conceivably be challenged for improper purpose or improper motive on this basis.

The Committee thanks the Minister for this response and trusts that it will be of assistance to Senators in debating the Bill.

Clause 64 - Trespass on personal rights and liberties

Subclauses 64(3) and (6) would abrogate the protection against self-incrimination, but are in a form which the Committee regards as acceptable. However, subclause 64(9) would abrogate the protection against self-incrimination for bodies corporate, but contains no limitation on the purposes for which the information may subsequently be used.

As the Committee noted in its Thirteenth Report of 1985 (16 October 1985), the question as to whether or not the privilege against self-incrimination may be claimed by corporations remains to be decided in Australia. The High Court has recognised the uncertainty which exists in this area of the law but to date has, on several occasions, declined to rule on the matter. The Committee notes that the existence of the right has been accepted by the English courts, the leading case being Triplex Safety Glass Co. v Lancegaye ([1939] 2 KB 395).

Senators' attention was drawn to the clause as it may be considered to breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

The Minister has responded as follows:

> As there is no settled law in Australia relating to the protection of corporations from self-incrimination, this paragraph was specifically provided to clarify the question for the purposes of this Bill. It is thought to be appropriate in the circumstances.

The Committee thanks the Minister for this response. While the Committee accepts the need for clarification on this matter, it is suggested that, should the High Court find that corporations do have a common law right to protection against self-incrimination, this Bill excludes that protection.

Accordingly, the Committee again draws the clause to Senators' attention as it may be considered to breach principle 1(a)(iv) and trespass unduly on personal rights and liberties.

OZONE PROTECTION (LICENCE FEES - IMPORTS) BILL 1988

This Bill was introduced into the House of Representatives on 10 November 1988 by the Minister representing the Minister for the Arts, Sport, the Environment, Tourism and Territories.

This Bill proposes to provide for the levying of quarterly fees on the holders of licences issued under the Ozone Protection Bill in respect of importation of substances and products regulated by the Bill.

In Alert Digest No. 17 of 1988 (30 November 1988), the Committee drew Senators' attention to the following clause of the Bill:

Clause 4 - Inappropriate delegation of legislative power

Subclause 4(1) of the Bill would allow the amount of the fees to be charged under the Bill to be set by regulation, with no upper limit specified in the Bill. Although the Explanatory Memorandum indicates that the Government's present intention is to charge no more than that which will recoup the cost of administering the proposed Ozone Protection Act, the only means of ensuring that such an intention is adhered to is for the Regulations and Ordinances Committee to bear this statement in mind when the relevant regulations are tabled.

Senators' attention was drawn to the clause as it may be considered to breach principle 1(a)(iv) and inappropriately delegate legislative power.

The Minister for the Arts and Territories, in the absence of the Minister for the Arts, Sport, the Environment, Tourism and Territories, has provided the following response:

> In drafting the [Bill] it was not possible to specify an upper limit to licence fees. Because the intent of the principal legislation is to reduce the quantities of substances manufactured or imported over time, the amount of the fees charged per kilogram of product must increase to recover the same cost. The value of the products is high enough that the licence fees will not be a significant cost for the manufacturer or importer.
>
> I would like to give the Standing Committee my assurance that the scale of licence fees charged will be commensurate only to recover relevant administrative costs associated with the three Bills [ie. the Ozone Protection Bill 1988, the Ozone Protection (Licence Fees - Imports) Bill 1988 and the Ozone Protection (Licence Fees - Manufacture) Bill 1988].

The Committee thanks the Minister for his response and notes his assurance that the scale of licence fees will be commensurate to the recovery of relevant administrative costs only.

OZONE PROTECTION (LICENCE FEES - MANUFACTURE) BILL 1988

This Bill was introduced into the House of Representatives on 10 November 1988 by the Minister representing the Minister for the Arts, Sport, the Environment, Tourism and Territories.

This Bill proposes to provide for the levying of quarterly fees on the holders of licences issued under the Ozone Protection Bill in respect of manufacture of substances and products regulated by the Bill.

In Alert Digest No. 17 of 1988 (30 November 1988), the Committee drew Senators' attention to the following clause of the Bill:

Clause 4 - Inappropriate delegation of legislative power

Subclause 4(1) of the Bill would allow the amount of the fees to be charged under the Bill to be set by regulation, with no upper limit specified in the Bill. Although the Explanatory Memorandum indicates that the Government's present intention is to charge no more than that which will recoup the cost of administering the proposed Ozone Protection Act, the only means of ensuring that such an intention is adhered to is for the Regulations and Ordinances Committee to bear this statement in mind when the relevant regulations are tabled.

Senators' attention was drawn to the clause as it may be considered to breach principle 1(a)(iv) and inappropriately delegate legislative power.

The Minister for the Arts and Territories, in the absence of the Minister for the Arts, Sport, the Environment, Tourism and Territories, has provided the following response:

> In drafting the [Bill] it was not possible to specify an upper limit to licence fees. Because the intent of the principal legislation is to reduce the quantities of substances manufactured or imported over time, the amount of the fees charged per kilogram of product must increase to recover the same cost. The value of the products is high enough that the licence fees will not be a significant cost for the manufacturer or importer.
>
> I would like to give the Standing Committee my assurance that the scale of licence fees charged will be commensurate only to recover relevant administrative costs associated with the three Bills [ie. the Ozone Protection Bill 1988, the Ozone Protection (Licence Fees - Imports) Bill 1988 and the Ozone Protection (Licence Fees - Manufacture) Bill 1988].

The Committee thanks the Minister for his response and notes his assurance that the scale of licence fees will be commensurate to the recovery of relevant administrative costs only.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 19 October 1988 by the Minister for Social Security.

This Bill proposes to amend the Social Security Act 1947 to further implement changes flowing from the Social Security Review established in 1985 (lead by Professor Cass). Other amendments will implement decisions announced in the 1988 May Statement and the 1988/89 Budget.

The Committee considered the Bill in relation to Alert Digest No. 14 of 1988 (2 November 1988), but did not comment on it at that stage. However, the Committee has re-examined the Bill in the light of its comments in relation to the Social Security (Review of Decisions) Act 1988, contained in its Fifteenth Report of 1988. In that Report the Committee discussed, among other things, the effect of the new section 17 of the Social Security Act 1947, which was inserted as a result of the Social Security (Review of Decisions) Act.

The Committee draws Senators' Attention to the following clause of the Bill:

Clause 57 - Inappropriate delegation of legislative power

Clause 57 of the Bill would insert new subsections 251(1A), (1B) and (1C) into the Social Security Act. Proposed subsection (1A) would require the Secretary of the Department of Social Security, in exercising her/his right to waive the

right of the Commonwealth to recover a debt payable under the Social Security Act, to act in accordance with any directions issued by the Minister. Proposed subsection (1B) would authorise the Minister to issue, vary or revoke such directions by way of a determination.. Proposed subsection (1C) would require the Minister to table any determination under proposed subsection (1B) in each House of Parliament within 15 sitting days of that determination being made. However, there is no power to disallow those determinations.

The Explanatory Memorandum to the Bill states that the Social Security Appeals Tribunal and the Administrative Appeals Tribunal, in exercising the same power (by way of review), shall also act in accordance with any Ministerial directions.

The obligation which would be imposed on the Secretary by these subsections is significantly different to that imposed by new subsections 17(3) and (4) of the Social Security Act, which were discussed in the Committee's Fifteenth Report. Those subsections require the Secretary to "have regard to" policy statements issued by the Minister. Proposed subsection 251(1A) would require the Secretary to "act in accordance with" any Ministerial directions. Therefore, to the extent of the Minister's direction, the Secretary's discretion under subsection 251(1) (and, ultimately, that of the S.S.A.T. and the A.A.T.) is removed.

In view of the binding effect of determinations issued by the Minister pursuant to proposed subsection 251(1B), it may be more appropriate to make such determinations "disallowable instruments" for the purposes of the Acts Interpretation Act 1901. The Committee notes in this context that research development guidelines issued pursuant to subsection 39E(1) of the Industry Research and Development Act 1986, for example, are so defined and are, consequently, subject to disallowance. Similarly, the Committee notes that Ministerial principles

governing the exercise of the Minister for Community Services and Health's discretion to approve subsidies to hostels under the Aged or Disabled Persons Homes Act 1954 are to be disallowable instruments pursuant to proposed subclause 10K(d). This is discussed further in Alert Digest No. 18 of 1988, in relation to the Aged or Disabled Persons Homes Amendment Bill 1988.

The clause is drawn to Senators' attention as it may breach principle 1(a)(iv) of the Committee's terms of reference and constitute an inappropriate delegation of legislative power.

STATES GRANTS (TECHNICAL AND FURTHER EDUCATION ASSISTANCE) BILL 1988

This Bill was introduced into the House of Representatives on 3 November 1988 by the Minister for Employment, Education and Training.

This Bill proposes to make provision for grants of financial assistance to the States and the Northern Territory for technical and further education for 1989. It gives effect to a number of funding measures announced in 'TAFE 1989 Commonwealth Programs and Priorities' (released on 24 August 1988).

In Alert Digest No. 15 of 1988 (9 November 1988), the Committee drew attention to the following clauses of the Bill:

Clauses 9 to 14 - Inappropriate delegation of legislative power

Clauses 9 to 14 (inclusive) grant to the Minister (or, by virtue of clause 20, an officer in the Department) the discretion to determine how much is paid to each State in respect of various purposes for technical and further education. The only method of review of this discretion, by

virtue of clause 18, is by Parliament. The comments made in relation to clauses 15 and 16 of the Higher Education Funding Bill 1988 (on pages 197-98 of this Report) apply to these clauses also.

Accordingly, the clauses were drawn to Senators' attention as they may breach principle 1(a)(iv) of the terms of reference and constitute an *inappropriate delegation of legislative* power.

The Minister for Employment, Education and Training has responded to the Committee's comments as follows:

> In keeping with current practice applicable in TAFE the Government is not in a position to provide a detailed breakup of the level of funds to be provided to the States and the Northern Territory until agreements provided for by Section 7 of the Bill have been negotiated with the States.
>
> As indicated in my second reading speech the negotiation of resource agreements provides a mechanism for an integrated approach to Commonwealth and State priorities for TAFE, a new flexibility in the use of Commonwealth funding and an emphasis on performance and outcomes. As these negotiations are likely to take some time the Government is not in a a position to provide a detailed breakup of the level of funds to be provided to the States and the Northern Territory for technical and further education at this time.

The Committee thanks the Minister for his response. While the *Minister has explained the reason for the clauses being in this* form, the Committee's original concerns remain. It remains the *case* that it is only the Minister's determinations which are subject to disallowance. If the Minister were to fail to make a determination, it is difficult to see what control the Parliament would have.

Accordingly, the Committee again draws Senators' attention to the clauses as they may be considered to breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

TRITICALE LEVY COLLECTION BILL 1988

This Bill was introduced into the House of Representatives on 2 November 1988 by the Minister for Primary Industries and Energy.

This Bill proposes to provide the machinery necessary for collecting the levy imposed by the Triticale Levy Bill 1988.

In Alert Digest No. 15 of 1988 (9 November 1988), the Committee drew attention to the following clause of the Bill:

Clause 16 - Delegation

Clause 16 would give to the Secretary the unfettered discretion to appoint anyone whom he or she pleased to be an authorised person, with power to enter premises, search for documents etc (see the provisions of clauses 12 and 13). The Committee believes the Secretary's discretion should be limited to the appointment of a specified class of persons.

The clause was drawn to Senators' attention as it may breach principle 1(a)(ii) and make rights unduly dependant on a delegation of administrative power.

The Acting Minister for Primary Industries and Energy has responded to the Committee's comments as follows:

> As Mr Kerin previously indicated to the Committee in response to Alert Digest No. 16 of 1987 (25 November 1987) the formulation concerning the appointment of authorised persons used in the Bill is a standard one which has been widely used and accepted in other legislation. The intention of the provision to allow the Secretary to appoint any person to perform the duties specified in Clauses 12 and 13 is to enable an efficient and cost effective means of administering the Act.
>
> I am advised that only officers of my Department who are involved in the levy collection and investigation processes will be appointed as authorised persons. Such officers occupy a broad spectrum of Public Service classification categories ranging from Regional Directors at Senior Executive Service level to Administrative Service Officers and individual appointments are considered necessary to provide a practical way of administering the function and the attendant responsibilities.
>
> In addition the appointment of an authorised person leads to other provisions of the Bill being invoked eg the issue of an identity card under Section 17. The Bill specifically states (Section 12) that, unless a warrant is obtained from a Magistrate, an authorised person may only enter premises with the consent of the occupier and after producing an identity card for inspection. I consider these provisions effectively ensure the protection of individuals rights.

The Committee thanks the Acting Minister for this response. While the Acting Minister has indicated that only departmental officers will be appointed as authorised persons, the Committee notes that, on its face, clause 16 is not so limited. As the Committee has consistently maintained, it is up to the Parliament to specify the person or class of persons by whom such power may be exercised. It is the Committee's view that such powers should only be delegated to holders of a specified office or to members of staff of or above a certain level of seniority.

Accordingly, the Committee again draws Senators' attention to the clause as it may be considered to breach principle 1(a)(ii) and make rights unduly dependent on a delegation of administrative power.

Barney Cooney
Chairman

7 December 1988

DEPARTMENT OF THE SENATE
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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1988

14 DECEMBER 1988

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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. Crowley
Senator K. Patterson
Senator J.F. Powell

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.

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF 1988

The Committee has the honour to present its Eighteenth Report of 1988 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:

ANL (Conversion into Public Company) Bill 1988

Australian National Railways Commission Amendment Bill 1988

Community Services and Health Legislation Amendment Bill (No. 2) 1988

National Occupational Health and Safety Commission Amendment Bill 1988

OTC (Conversion into Public Company) Bill 1988

Social Security Legislation Amendment Bill 1988

ANL (CONVERSION INTO PUBLIC COMPANY) BILL 1988

This Bill was introduced into the House of Representatives on 31 August 1988 by the Minister for Transport and Communications

The Bill will establish the Australian Shipping Commission, which presently trades as the Australian National Line (ANL), as a new public company; ANL Limited. The Bill will also remove certain statutory controls on ANL's operations.

In Alert Digest No. 11 of 1988 (28 September 1988) and in its Fifteenth Report of 1988 (23 November 1988), the Committee drew attention to the following clause of the Bill:

Clause 7 - Annual Report

Clause 7 of the Bill would, among other things, repeal Division 4 of Part II of the Australian Shipping Commission Act 1956. Section 35 of the Australian Shipping Commission Act provides that the Commission is a public authority to which Division 2 of Part XI of the Audit Act applies. Pursuant to those provisions of the Audit Act, the Commission is presently required to furnish an annual report on its activities to the Minister responsible for the Commission's administration. The Minister is, in turn, required to table the report in the Parliament within 15 sitting days of each House, following receipt of the report.

Although the Minister has stated in his Second Reading Speech that ANL will in future prepare and publish annual reports in the same way as any other public company, the Bill imposes no requirement that ANL's annual reports be tabled in the Parliament.

Senators' attention was drawn to the Committee's comments on the Australian Airlines (Conversion to a Public Company) Bill

1987, (see First Report of 1988) and the Australian Film Commission Amendment Bill 1988 (see Ninth Report of 1988).

The Committee noted that the latter Bill was amended following comment by the Committee. The Company, established by the Bill must now forward a copy of its annual report to the Minister for presentation to the Parliament. Pursuant to the amendment, the Minister is also obliged to table a copy of the report in each House within 15 sitting days of each House after its receipt.

The Committee accordingly drew clause 7 of the Bill to Senators' attention, as it considered that a minimum level of accountability to the Parliament, should be a specific requirement for the tabling in the Parliament of annual reports by all Commonwealth bodies.

The Minister for Transport and Communications has responded to the Committee's comments as follows:

> One of the Government's objectives in reforming Government Business Enterprises is to make them more commercially responsive organisations without diminishing accountability. In ANL's case, once the existing report provisions of the present Act are repealed ANL Limited, like all other companies, will be required to fulfil the accounting and reporting requirements of the Companies Act 1981. This requires Annual Reports to be available within 5 months of the end of the financial year, including a profit and loss account, a balance sheet, an auditor's report and a report of operations. In short, the new companies will be subject to exactly the same public accountability requirements as any private sector enterprise.
>
> In the circumstances, I consider that the full accountability of ANL Limited will be properly achieved by the Bill as currently drafted. However, in the interests of

> ensuring that the Parliament is kept properly informed of the enterprise's performance, I will ensure that the Annual Report is tabled each year immediately it becomes available. This approach is consistent with that currently adopted in respect of Qantas, AA and Aussat.

The Committee thanks the Minister for his response and notes his assurance that the Annual Reports of ANL Limited will be tabled in Parliament immediately they become available. The Committee would, however, prefer that a requirement to do so be included in the Act.

AUSTRALIAN NATIONAL RAILWAYS COMMISSION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 19 October 1988 by the Minister for Transport and Communications.

This Bill proposes to amend the Australian National Railways Commission Act 1983 to:

- widen the Commission's powers to allow it to expand the scope of its business activities;
- extend the planning and accountability mechanisms applicable to the Commission; and
- remove most of the remaining day-to-day controls currently exercised by Government over the Commission.

In Alert Digest No. 14 of 1988 (2 November 1988) and its Fifteenth Report of 1988 (23 November 1988), the Committee drew Senators' attention to the following clause of the Bill:

Clause 66 - Inappropriate delegation of legislative power

Proposed paragraph 66A(1)(b) and subsection 66A(2) of the Principal Act would give to the Commission auditor discretions to dispense with, and not report, certain matters in carrying out his or her functions. The provision is somewhat similar to section 63R of the Audit Act 1901, on which the Committee commented in its Eighth Report and Ninth Report of 1988.

The clause was drawn to Senators' attention as it may breach principle 1(a)(iv) of the Committee's terms of reference and constitute an inappropriate delegation of legislative power.

The Minister for Transport and Communications has provided a lengthy response to the Committee's comments. For the information of Senators it is reproduced in full:

> One of the Government's objectives in reforming Government Business enterprises is to make them more commercially responsive organisations.
>
> However, a major concern expressed by the Government Business Enterprises was that the Australian Audit Office (AAO) performed, and charged for, services in excess of those necessary in a normal commercial audit. In addition, the advice normally sought from a commercial auditor cannot be provided due to potential conflict of interest problems. The Government decided to enable AN to appoint the auditor of its choice, having regard to price and quality of service offered. This approach is consistent with the Companies Code under which AN's competitors and incorporated Government Business Enterprises will operate.
>
> The Government's decision recognises that private sector auditors are subject to standards set by the accounting profession. It also allows the AAO to compete for AN's business against the private sector should it wish to do so. The Minister for Transport and Communications is still able to seek,

with the agreement of the Minister for Finance, audits by the AAO. Where such audits are undertaken for reasons of Government ownership or because of Parliamentary requirements, the costs of these additional audits will be taken into account in determining AN's financial target.

Opportunities remain for the AAO to participate in an audit of AN. The Government decision provides for a change in emphasis to better reflect the commercial realities facing AN and the continuing pressure on AN to improve its commercial performance through enhanced accountability for bottom line results.

Paragraph 66A(1)(b) requires the Commission auditor to immediately draw to the Minister's attention any irregularity disclosed by the inspection and audit that is of sufficient importance to justify doing so. To expect the Commission's auditor to report all irregularities would require a full audit which would be time consuming and extremely costly and would not be consistent with the standards that normally apply to private sector company audits.

I consider that to require the Commission auditor to report all irregularities regardless of materiality would result in a significant amount of resources being devoted to pursuing insignificant and immaterial issues. The standard of auditing required should of course take into account public ownership of the enterprise, but in general terms, should be consistent with that which applies in the private sector.

Subsection 66A(2) allows for the Commission's auditor to dispense with all or part of the detailed inspection and audit of accounts and records. This allows the Commission's auditor to carry out a system based audit which is normal commercial practice. This method is also used by the Commonwealth Auditor General.

If this requirement was not implemented then the Commission auditor would be required to carry out a transaction based audit (ie the

examination of every transaction handled by the Commission) which again would be prohibitively expensive.

In the circumstances, I consider that it is appropriate for the Commission audit to be carried out using the standards set by the Accounting Profession which would normally apply to a company audit.

I would expect that the Commission auditor would apply professional standards and judgement as to what matters are of significant importance to be reported to me or require further investigation.

The Committee thanks the Minister for this response and trusts that it will be of assistance to Senators in debating the Bill.

COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT BILL (NO. 2) 1988

This Bill was introduced into the House of Representatives on 10 November 1988 by the Minister for Housing and Aged Care.

This Bill proposes to amend several Acts affecting services within the Community Services and Health portfolio. Principally the amendments relate to the:

- First Home Owners Act 1983 to clarify the circumstances under which a person is eligible for assistance under the Act;

- Health Insurance Act 1973 to restrict eligibility for Medicare benefits to persons residing in Australia on a legally permanent basis and withdraw benefits from Australian residents living or travelling overseas;

- National Health Act 1953 dealing with the provision of financial assistance for the operation of nursing homes and hostels, and

- Community Services and Health Legislation Amendment Act 1988 to clarify arrangements to be made for the provision of financial assistance to patients receiving respite care in approved nursing homes.

The Bill further proposes to empower the Minister and the departmental secretary to delegate powers and functions to persons who are not officers of the Australian Public Service.

In Alert Digest No. 16 of 1988 (23 November 1988) and in its Sixteenth Report of 1988 (30 November 1988), the Committee draws Senators' attention to the following clause of the Bill:

Clause 29 - Inappropriate delegation of legislative power

Clause 29 (which was referred to as 'clause 14' in the Sixteenth Digest) would insert proposed new paragraph 40AE(4)(a) and subsection 40AEE(2) of the National Health Act 1955 and impose lodgment and processing fees for requests for review of certain decisions. The Minister's Second Reading speech makes it clear that the level of these fees is intended to limit appeals to those involving 'genuine grievances'. Proposed new paragraphs 49AEB(1)(d) and (2)(b) and 40AEG(b) provide for the refund of those fees if the result of the review is 'wholly or substantially' favourable to the person seeking it. Three comments about these provisions may be raised:

- apparently the Minister has a discretion, challengeable only as to legality, to determine whether or not a decision is 'wholly or substantially' in favour of a proprietor, thereby permitting a refund of moneys;

- the amount of the lodgment fee may be varied by Ministerial notice and, although that notice may be disallowed, the Bill sets no upper limit on the amount of money which may be charged; and

- the amount of processing fees may be varied by Ministerial notice. Not only does the Bill set no upper limit on the possible amount that may be charged, but the Ministerial notice is also not subject to parliamentary scrutiny.

Senators' attention was drawn to the clause as it may be considered to breach principle 1(a)(iv) of the Committee's terms of reference and inappropriately delegate legislative power.

The Minister for Housing and Aged Care has provided a lengthy and detailed response to the Committee's comments. For the information of Senators, it is annexed to this Report.

The Minister's response refers to the Bill being put forward in an attempt to counter 'a largely orchestrated form of protest against aspects of nursing home reforms.' The Minister estimates that requests for Ministerial review, which are the principal form of 'protest', cost $4000 per request. This, it is suggested, not only involves considerable cost but also diverts resources away from 'essential Government reforms in aged care' and from 'genuine requests for review'. The amendments upon which the Committee commented are intended to address this diversion of resources.

In relation to the use of the phrase 'wholly or substantially favourable to the proprietor of a nursing home', which the Committee suggested was challengeable only as to legality, the Minister responded as follows:

> In a policy sense it would have been easier to have the clause drafted in such a way that only decisions 'wholly' favourable to a proprietor should result in refund in fees. I regarded it as important to have a discretion in this area so that appellants who considered they had a genuine grievance but which may not be totally upheld would not be discouraged from seeking redress.
>
> In most cases there will be little doubt as to whether fees should be refunded or not refunded. The criterion that a decision under subsection 40AEF(1) should be wholly or substantially favourable to the proprietor is a relatively simple one. If a proprietor's appeal has been wholly allowed or disallowed, there will, of course, be no doubt about the decision to be made. It will also generally be readily apparent whether an appeal has been substantially allowed. Having regard to the fact that, in normal circumstances, it is anticipated that there will be less than 30 appeals a year, the number of marginal cases, where it will be a matter of fine judgement whether an appeal has been substantially allowed, will be very small. In order to give maximum protection to genuine appellants, I have instructed my Department that, in such marginal cases, the appellant is to be given the benefit of any doubt that may exist (unless there is a compelling reason to do otherwise) and a refund of lodgement and processing fees is to be made.

The Committee thanks the Minister for this response and trusts that this will be of assistance to Senators in debating the Bill.

In relation to the Committee's comment that a Ministerial notice varying the amount of processing fees is not subject to Parliamentary scrutiny, the Minister has responded as follows:

> I must point out that a Ministerial notice varying the amount of processing fees will, in fact, be subject to Parliamentary scrutiny. Proposed subsection 40AEE(5) provides, inter alia, that such a notice is a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901. Such an instrument is subject to tabling in, and possible disallowance by each House of Parliament.

The Committee thanks the Minister for his assistance on this point.

In relation to the Committee's comment that no upper limits are set in relation to lodgment of processing fees, the Minister has responded as follows:

> The Government considered that the amounts of $500 lodgement fee and $500 per half day processing fee would have a deterrent effect while noting that a typical appellant would be meeting, at these rates, only between one-third and one-half of the costs of such an appeal. As I indicated above, it is anticipated that the average appeal will cost the taxpayer about $4000. About $1500 in lodgement and processing fees will be paid by the average appellant towards total costs estimated at today's rates. A ceiling on the Minister's power to vary the amounts of $500 would make the adjustment of the fees to take account of inflation much more difficult and would unnecessarily waste limited Parliamentary time with minor amendments.
>
> Parliamentary control is, nevertheless, maintained by the mechanism of a Ministerial notice varying the amount of a lodgement or processing fee being a disallowable instrument.

The Committee thanks the Minister for this response and trusts that it will be of assistance to Senators in debating the Bill.

NATIONAL OCCUPATIONAL HEALTH AND SAFETY COMMISSION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 31 August 1988 by the Minister for Industrial Relations.

The Bill proposes amendments to the National Occupational Health and Safety Commission Act 1985 to separate the management functions of the Chief Executive Officer and broaden a more public role of the Chairperson of the National Occupational Health and Safety Commission. This separation was one of the recommendations of the 1987 review of the Commission which was conducted to improve its operations and streamline its administration.

The Committee considered the Bill in relation to Alert Digest No. 11 of 1988 (28 September 1988) but did not comment on it at that stage. However, as permitted by the Committee's terms of reference, the Committee now draws Senators' attention to the following clause:

Clause 10 - Inappropriate delegation of legislative power

Clause 10 of the Bill would insert proposed section 16A. This section would allow the Minister to appoint 'a person' to act in the office of Chief Executive Officer of the National Occupational Health and Safety Commission in the event of the office being vacant, by absence or otherwise. The Committee has consistently taken the view that powers should be delegated by reference to a particular office, to a specified class of people or to officers above a certain level of seniority.

The Committee also notes that, unlike section 16 of the Principal Act, there is no limit on the period for which a person can act in the event of a vacancy. Subsection 16(4) of the Act places a 12 month limit on persons acting in the office of Chairperson of the Commission.

The clause is drawn to Senators' attention as it may breach principle 1(a)(iv) of the Committee's terms of reference and constitute an inappropriate delegation of legislative power.

OTC (CONVERSION INTO PUBLIC COMPANY) BILL 1988

This Bill was introduced into the House of Representatives on 12 October 1988 by the Minister for Transport and Communications.

The Bill will:

- provide for the conversion of the Overseas Telecommunications Commission (OTC), which is established as a statutory corporation under the Overseas Telecommunications Act 1946, into a company incorporated under the Companies Act 1981; and

- make other amendments to implement the Government's reform package for OTC.

In Alert Digest No. 13 of 1988 (19 October 1988) and in its Fifteenth Report of 1988 (23 November 1988), the Committee drew Senators' attention to the following clause of the Bill:

Subclause 8 - Annual Report

Subclause 8(2) would repeal, among other provisions, section 53 of the Overseas Telecommunications Act. Under that provision the Commission's annual report to the Minister would be tabled in Parliament.

As a public company, OTC Limited, would be obliged to file an annual report with the appropriate Companies Office. The Bill makes no provision for a copy of that report to be tabled in Parliament.

As the Committee pointed out in Alert Digest No. 11 of 1988 (28 September 1988), in relation to the ANL (Conversion into Public Company) Bill 1988, it regards as a matter of importance the tabling in Parliament of the annual reports of all Commonwealth instrumentalities, whether statutory authorities or companies, in which the Commonwealth owns all or a substantial part of the issued shares.

The Minister for Transport and Communications has responded to the Committee's comments as follows:

> One of the Government's objectives in reforming Government Business Enterprises is to make them more commercially responsive organisations without diminishing accountability. In OTC's case, once the existing report provisions of the present Act are repealed OTC Limited, like all other companies, will be required to fulfil the accounting and reporting requirements of the Companies Act 1981. This requires Annual Reports to be available within 5 months of the end of the financial year, including a profit and loss account, a balance sheet, an auditor's report and a report of operations. In short, the new companies will be subject to exactly the same public accountability requirements as any private sector enterprise.

> In the circumstances, I consider that the full accountability of OTC Limited will be properly achieved by the Bill as currently drafted. However, in the interests of ensuring that the Parliament is kept properly informed of the enterprise's performance, I will ensure that the Annual Report is tabled each year immediately it becomes available. This approach is consistent with that currently adopted in respect of Qantas, AA and Aussat.

The Committee thanks the Minister for his response and notes his assurance that the Annual Reports of OTC Limited will be tabled in Parliament immediately they become available. As the Committee has noted above, in relation to the ANL (Conversion into Public Company) Bill 1988, the Committee would prefer to see such a requirement in the legislation itself.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1988

This Bill was introduced into the House of Representatives on 19 October 1988 by the Minister for Social Security.

This Bill proposes to amend the Social Security Act 1947 to further implement changes flowing from the Social Security Review established in 1985 (lead by Professor Cass). Other amendments will implement decisions announced in the 1988 May Statement and the 1988/89 Budget.

The Committee considered the Bill in relation to Alert Digest No. 14 of 1988 (2 November 1988), but did not comment on it at that stage. The Committee subsequently re-examined the Bill and made certain comments in its Seventeenth Report of 1988 (7 December 1988). Some further matters have now been brought to the Committee's attention. Though the Bill was actually passed by the Senate, without amendment, on 13 December 1988, the Committee makes the following additional comments for the information of Senators.

The Committee draws Senators' attention to the following clauses of the Bill:

Clause 8 - Inappropriate delegation of legislative power

Clause 8 inserts new subsections 19(4A), (4B) and (4C) into the Social Security Act 1947. Subsection 19(4A) will require the Secretary of the Department of Social Security, in certifying that it is necessary in the public interest to divulge information relating to a person, to act in accordance with any Ministerial guidelines issued in the form of determinations pursuant to subsection 19(4B). Subsection 19(4C) will require the Minister to table copies of determinations containing guidelines or variations on existing guidelines in each House of Parliament within 15 sitting days after the issuing of such determinations. There is no provision for Parliamentary disallowance of such determinations.

The Explanatory Memorandum to the Bill suggests that the effect of the proposed amendments is to restrict the Secretary's discretion to divulge information. Though this would depend on the substance of the actual guidelines, the Committee accepts that this is the likely effect of the amendments. However, the Committee notes that the requirement to table the determinations does not involve a disallowance provision. As the Committee suggested in its Seventeenth Report of 1988 (7 December 1988), in relation to clause 57 of this Bill, it may be appropriate to make such determinations 'disallowable instruments' for the purposes of section 46A of the Acts Interpretation Act 1901.

The clause is drawn to Senators' attention as it may breach principle 1(a)(iv) of the Committee's terms of reference and constitute an inappropriate delegation of legislative power.

Clauses 13 and 23 - General comment

Clauses 13 and 23 inserts sections 60B and 83, respectively. Both of these provisions have an element of retrospectivity, in that they apply to people who have gone overseas prior to the introduction of this Bill, on the assumption that their benefits would continue for some time, but who would now discover that the benefits would cease after 12 months or 3 years absence respectively. Although the Explanatory Memorandum does not indicate the reason for the choosing of the respective dates of 1 July 1988 and 18 May 1986 for the effective operation of these provisions, it may be that they are examples of 'legislation by press release', or the (eventual) inclusion in legislation of proposals announced in a Budget or Economic Statement.

Clause 52 - Trespass on personal rights and liberties

Clause 52 inserts new subsections 164(2AA) to (2AJ). Although the Explanatory Memorandum states that the Secretary's powers under the existing legislation 'should be limited to avoid unnecessary intrusion upon the privacy of individuals, particularly those who are not in receipt of a pension, benefit or allowance under the Act', it is suggested that these new provisions do not have this effect.

While many of the new subsections limit the purposes for which the Secretary may obtain information, and the nature of the information which may be obtained, new subsection 164(2AE) appears to be unduly obtrusive. It enables the Secretary to obtain the personal details listed in proposed subsection (2AF) from a whole class of persons (eg, all the employees of a State Government Department, or all the students at a University) even though no-one in that class has had any connection with the Department of Social Security.

Accordingly, the clause is drawn to Senators' attention as it may breach principle 1(a)(i) of the Committee's terms of reference and trespass unduly on personal rights and liberties.

The Committee acknowledges that these comments are being made on a Bill which has been passed by the Senate. However, in accordance with its terms of reference, the Committee makes these comments to enhance Senators' awareness of the issues raised.

Barney Cooney
Chairman

14 December 1988

ATTACHMENT

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Portfolio of
Community Services
and Health

13 DEC 1988

Senator B.C. Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

By letter dated 23 November 1988, the Acting Secretary of your Committee brought to the attention of my Senior Private Secretary comments contained in the Scrutiny of Bills Alert Digest No 16 of 1988 concerning clause 29 (not clause 14 as stated in the Digest) of the Community Services and Health Legislation Amendment Bill (No 2) 1988, and invited my response thereto. That Bill was introduced into the Senate on 25 November 1988.

Clause 29 of the Bill provides for the amendment of the National Health Act 1953 by the repeal of the existing section 40AE and the insertion of new provisions. The existing section 40AE makes provision for the Minister to review a decision of the Secretary of my Department under subsection 40AD(1B) of that Act in relation to the fees to be charged to the patients of a nursing home approved under that Act for the purpose of the payment of Commonwealth benefits to the proprietor of that home in respect of those patients. Clause 29 provides for the reinsertion of the substance of the existing section 40AE into the Act. It also inserts new provisions which authorise the deduction of a lodgement fee and a processing fee from Commonwealth benefits payable to a nursing home proprietor who lodges a request for Ministerial review of a decision under subsection 40AD(1B) referred to above.

Your Committee has raised three issues concerning clause 29 in the Senate Alert Digest, namely:

- "apparently the Minister has a discretion, challengeable only as to legality, to determine whether or not a decision is "wholly or substantially" in favour of a proprietor, thereby permitting a refund of moneys;

- the amount of the lodgement fee may be varied by Ministerial notice and, although that notice may be disallowed, the Bill sets no upper limit on the amount of money which may be charged; and

- the amount of processing fees may be varied by Ministerial notice. Not only does the Bill set no upper limit on the possible amount that may be charged, but the Ministerial notice is also not subject to parliamentary scrutiny."

As I said in my Second Reading Speech, the Government's decision to impose lodgement and processing fees was made in the context of the 1988-89 Budget. Following the introduction of the Government's major aged care reforms on 1 July 1987, there has been a very significant escalation in the number of requests for Ministerial review from an average of about 20 a year to a total of about 600 in 1987-88. The industry itself has indicated that this has resulted from a largely orchestrated form of protest against aspects of the nursing home reforms. It currently is, and will continue to be, a statutory requirement that such requests, before being considered by the Minister, be first investigated by an expert and independent Committee established in each State and known as a Nursing Homes Fees Review Committee of Inquiry.

The overall time spent by a Committee, the Minister and Departmental officers on a request for review varies, but on average, as I mentioned in my Second Reading Speech, amounts to almost 100 hours. This represents a cost, entirely borne by taxpayers at present, estimated at about $4000 per request. Apart from this considerable cost, such investigations of non-genuine cases divert limited Departmental resources away from the implementation of essential Government reforms in aged care and the processing of genuine requests for review, thus preventing the expeditious handling of those cases.

The only effective means of distinguishing between genuine and protest/vexatious requests at present is a full investigation on the basis of each request. The Government believes that the only practicable approach, which will protect the interests of the taxpayer, genuine appellants, the industry, and the community as a whole, is a preventive one that will discourage non-genuine appellants.

Clearly, requests that are wholly or substantially upheld can be presumed to be genuine and will, in effect, because of the refund provisions to be inserted in the Act by clause 29, be investigated free of charge. This will fully safeguard the position of genuine appellants. On the other hand, the Government considers that the proposed lodgement fee of $500 and the additional processing fee of $500 for each half-day that a Committee meets to consider a request will provide a deterrent to non-genuine appellants.

With regard to the Committee's first comment, new paragraphs 40AEB(1)(d) and (2)(b) and 40AEG(b) and (d) provide for the refund or non-deduction from Commonwealth benefits, as the case requires, of a lodgement fee and a processing fee respectively where the Minister, under new subsection 40AEF(1), varies a decision of the Secretary in a manner "wholly or substantially favourable to the proprietor of a nursing home". Because the same criterion for refund applies to both lodgement and processing fees, clearly both fees would either be refunded or not refunded. (In practice,

processing fees will not be refunded but will simply not be deducted from Commonwealth benefits).These provisions do not specify the decision maker. Thus, while the Minister could make a decision to refund lodgement and processing fees in a particular case, the provisions do not restrict the making of such a decision to the Minister.

In a policy sense it would have been easier to have the clause drafted in such a way that only decisions "wholly" favourable to a proprietor should result in refund in fees. I regarded it as important to have a discretion in this area so that appellants who considered they had a genuine grievance but which may not be totally upheld would not be discouraged from seeking redress.

In most cases there will be little doubt as to whether fees should be refunded or not refunded. The criterion that a decision under subsection 40AEF(1) should be wholly or substantially favourable to the proprietor is a relatively simple one. If a proprietor's appeal has been wholly allowed or disallowed, there will, of course, be no doubt about the decision to be made. It will also generally be readily apparent whether an appeal has been substantially allowed. Having regard to the fact that, in normal circumstances, it is anticipated that there will be less than 30 appeals a year, the number of marginal cases, where it will be a matter of fine judgement whether an appeal has been substantially allowed, will be very small. In order to give maximum protection to genuine appellants, I have instructed my Department that, in such marginal cases, the appellant is to be given the benefit of any doubt that may exist (unless there is a compelling reason to do otherwise) and a refund of lodgement and processing fees is to be made.

With regard to the present accumulation of about 600 appeals, it is expected that the vast majority of non-genuine appellants will be discouraged from proceeding with their requests for review as a result of the imposition of processing fees. (Lodgement fees will not be payable in respect of appeals lodged before 24 August 1988). Of the remainder, it is considered likely that only a small number will be required to have processing fees deducted from Commonwealth benefits payable to them, and of these, only very few may seek to dispute this requirement.

In respect of this anticipated small number of disputed decisions, a right of review is available under the Administrative Decisions (Judicial Review) Act 1977.

The grounds for appeal under that Act include the following:

- the decision was contrary to law:
- an irrelevant consideration was taken into account or a relevant consideration was not taken into account when making the decision;
- the decision was made in bad faith;

- the decision was made in accordance with a rule or policy without regard to the merits of the particular case; or

- the decision was so unreasonable that no reasonable person could have made it.

I should, perhaps, mention that there is precedent for such a provision in regulation 20 of the Administrative Appeals Tribunal Regulations which also refers to "in a manner favourable" in a similar context.

I will now address your Committee's comments that:

- a Ministerial notice varying the amount of processing fees is not subject to Parliamentary scrutiny; and

- that no upper limits were set in respect of either lodgement or processing fees.

Firstly, with respect, I must point out that a Ministerial notice varying the amount of processing fees will, in fact, be subject to Parliamentary scrutiny. Proposed subsection 40AEE(5) provides, inter alia, that such a notice is a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901. Such an instrument is subject to tabling in, and possible disallowance, by each House of Parliament. (As the Committee has pointed out, a notice varying the amount of the lodgement fee is also such a disallowable instrument.)

I turn now to the Committee's comment that the Bill sets no upper limit on the possible amount that may be charged as lodgement or processing fees. The Government considered that the amounts of $500 lodgement fee and $500 per half day processing fee would have a deterrent effect while noting that a typical appellant would be meeting, at these rates, only between one-third and one-half of the costs of such an appeal. As I indicated above, it is anticipated that the average appeal will cost the taxpayer about $4000. About $1500 in lodgement and processing fees will be paid by the average appellant towards total costs estimated at today's rates. A ceiling on the Minister's power to vary the amounts of $500 would make the adjustment of the fees to take account of inflation much more difficult and would unnecessarily waste limited Parliamentary time with minor amendments.

Parliamentary control is, nevertheless, maintained by the mechanism of a Ministerial notice varying the amount of a lodgement or processing fee being a disallowable instrument.

With regard to an earlier matter raised in the Committee's Eighth Report of 1988 concerning the Health Legislation Amendment Bill 1988, I am happy to inform you that I have arranged for the recent introduction into Parliament of amendments to the Aged or Disabled Persons Homes Act 1954 that have the effect sought by your Committee. The Secretary to your Committee, Mr Snedden, wrote to me on 1 June 1988 to inform me, amongst other things, that your Committee was concerned that the proposed new subsections 10D(5) and (6) of the above Act are "Henry VIII" clauses in that they

would give a Minister of the day the power to amend a section of an Act of Parliament by written instrument without reference of that instrument to Parliament. Your Committee considered that section 10FB of the Act should be amended to provide that instruments made under subsections 10D(5) and (6) are "Ministerial instruments" within the meaning of that section, thus making those instruments subject to possible Parliamentary disallowance.

In my letter to you dated 27 October 1988 I said that I recognised the point made by your Committee that that I would ensure that the Committee's views were given full consideration during the formulation of the detailed respite care arrangements.

The Aged or Disabled Persons Homes Amendment Bill 1988 was introduced into the House of Representatives on 30 November 1988. Clause 23 of that Bill provides, inter alia, for the insertion of new section 10K into the Aged or Disabled Persons Homes Act 1954. New paragraph 10K(e) provides that instruments under subsections 10D(1), (5) and (6) are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901. Such disallowable instruments are subject to tabling in, and possible disallowance by both Houses of Parliament.

Clause 23 is to commence to operate on a day to be fixed by Proclamation of the Governor-General. In order that instruments under subsections 10D(5) and (6) will be subject to disallowance by both Houses of Parliament prior to the abovementioned proclaimed day, subclause 21(1) of the Bill provides for the insertion in subsection 10FB(1) of the Principal Act of references to subsections 10D(5) and (6) of that Act. Subclause 21(2) of the Bill enables the repeal of section 10FB of the Principal Act when new section 10K, referred to above, comes into force.

It is anticipated that the Bill will be debated in the Autumn 1989 Sittings of Parliament.

Yours sincerely

Peter Staples