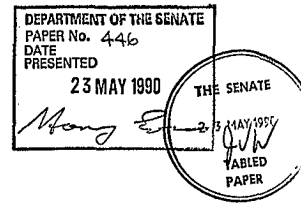


SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT
OF 1990

23 MAY 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF 1990

23 MAY 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator R. Crowley
Senator J. Faulkner
Senator J. McGauran
Senator J.F. Powell
Senator A. Vanstone

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 1990

The Committee has the honour to present its First Report of 1990 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 24:

Sales Tax Laws Amendment Bill 1990
Sales Tax (No. 1) Amendment Bill 1990
Sales Tax (No. 2) Amendment Bill 1990
Sales Tax (No. 3) Amendment Bill 1990
Sales Tax (No. 4) Amendment Bill 1990
Sales Tax (No. 5) Amendment Bill 1990
Sales Tax (No. 6) Amendment Bill 1990
Sales Tax (No. 7) Amendment Bill 1990
Sales Tax (No. 8) Amendment Bill 1990
Sales Tax (No. 9) Amendment Bill 1990

Superannuation Legislation Amendment Bill 1990

SALES TAX LAWS AMENDMENT BILL 1990
SALES TAX (NO. 1) AMENDMENT BILL 1990
SALES TAX (NO. 2) AMENDMENT BILL 1990
SALES TAX (NO. 3) AMENDMENT BILL 1990
SALES TAX (NO. 4) AMENDMENT BILL 1990
SALES TAX (NO. 5) AMENDMENT BILL 1990
SALES TAX (NO. 6) AMENDMENT BILL 1990
SALES TAX (NO. 7) AMENDMENT BILL 1990
SALES TAX (NO. 8) AMENDMENT BILL 1990
SALES TAX (NO. 9) AMENDMENT BILL 1990

These Bills passed the Senate, with amendments, on 22 May 1990. However, given the nature of those amendments, the Committee makes the following comments.

RETROSPECTIVITY
Clause 2

In Alert Digest No. 1 of 1990 (16 May 1990), the Committee commented on clause 2 of each of these Bills, which propose to increase the rate of sales tax payable on vehicles above a certain value and to decrease the sales tax payable on vehicles specially fitted for transporting disabled persons seated in wheelchairs. The effect of clause 2, in each case, is to retrospectively apply the provisions of the Act to 1 May 1990, this being the date which had been announced as the date from which the legislation was to take effect.

The Committee drew Senators' attention to the clauses in accordance with its long-standing policy of drawing attention to examples of 'legislation by press release', whereby a Minister announces by way of press release or press conference the intention to enact or change a law, with effect from the date of the announcement. At a later date, the Minister then introduces legislation giving effect

to the change foreshadowed in the announcement. As here, the legislation in question will contain a provision giving the legislation effect retrospectively to the date of the announcement.

In the present case, the original announcement was made on 21 February 1990, in the Government's Economic Statement. The change was expressed to take effect from 1 April 1990. However, on 27 March 1990, the Treasurer announced that, in view of the delay in finalising the election result, the change would not take effect until 1 May 1990. This uncertainty may have posed difficulties for those dealing with the (foreshadowed) legislation.

In addition, it should be noted that those persons legally responsible for paying the increased or decreased sales tax (essentially, in this case, motor vehicle dealers) are dealing with third parties (motor vehicle purchasers). While, on the one hand, the motor vehicle dealers have no legal authority to apply the new rates of tax, the Treasurer indicated in a press release dated 24 April 1990 that

> the Government would expect motor vehicle dealers to make provision for the additional liability pending passage of legislation in the forthcoming session of Parliament.

Subsection 70D(2) of the Sales Tax Assessment Act (No. 1) 1930 expressly prohibits a person liable to pay sales tax (ie, in this case, the motor vehicle dealer) from including in the price of an item an amount representing sales tax that is in excess of the amount payable by them. Arguably, a motor vehicle dealer would be in breach of this provision if, after the date from which the legislation was intended to have effect, they duly made provision for the higher sales tax figure as a component of the retail price.

In his press release of 24 April, the Treasurer indicated that the Australian Taxation Office would not seek to penalise motor vehicle dealers who make provision for or

remit additional sales tax in anticipation of legislation being passed. While the announcement may have been welcomed by motor vehicle dealers who have made such provision, it does not address the broader question of what really is the law in these situations.

As noted above, the Senate amended the Bills in question on 22 May 1990, by deleting the clauses giving them retrospective operation. The Committee welcomes these amendments and notes that the case serves to illustrate the kinds of problems which `legislation by press release' can create and why, therefore, the practice should be avoided.

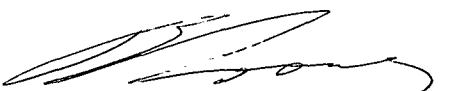
SUPERANNUATION LEGISLATION AMENDMENT BILL 1990

RETROSPECTIVITY
Subclause 2(2)

In Alert Digest No. 1 of 1990 (16 May 1990), the Committee drew attention to several clauses of the abovementioned Bill. The Committee noted that subclause 2(2) provided that the operation of clause 48, which deals with lump sums payable on commutation of a pension, would be retrospective to 1 May 1990. Accordingly, the clause was drawn to Senators' attention under principle 1(a)(i) as it might be considered to trespass unduly on personal rights and liberties.

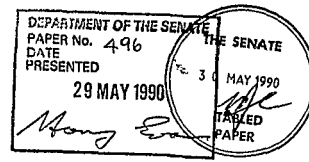
Since tabling the Alert Digest, the Committee has re-considered the explanation of clause 48 contained in the Explanatory Memorandum. In particular, paragraph 129 of the Explanatory Memorandum states that the effect of the proposed amendment is to make sure that the amount of a person's accumulated supplementary contributions will not again become payable as a result of the commutation.

On this analysis, the provision appears to operate to the benefit of persons other than the Commonwealth. According, the Committee makes no further comment.



Barney Cooney
(Chairman)

23 May 1990



SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SECOND REPORT
OF 1990

30 MAY 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF 1990

30 MAY 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator R. Crowley
Senator J. Faulkner
Senator J. McGauran
Senator J.F. Powell
Senator A. Vanstone

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

SECOND REPORT OF 1990

The Committee has the honour to present its Second Report of 1990 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 24:

Australian Heritage Commission (National Estate Protection) Amendment Bill 1989 [1990]

Geneva Conventions Amendment Bill 1989 [1990]

Superannuation Legislation Amendment Bill 1990

AUSTRALIAN HERITAGE COMMISSION (NATIONAL ESTATE PROTECTION) AMENDMENT BILL 1989 [1990]

This Bill was introduced into the Senate on 22 November 1989 as a Private Senator's Bill by Senator Dunn.

The Bill lapsed as a consequence of the dissolution of the House of Representatives on 19 February 1990 but was restored to the Notice paper by resolution of the Senate on 21 May 1990.

The purpose of the Bill is to amend the Australian Heritage Commission Act 1975 to allow for regulations to be made to control certain actions by corporations within the National Estate. The Bill relies on the Commonwealth's power with respect to foreign corporations and trading or financial corporations and its powers with respect to the peoples of the Aboriginal race.

The Committee commented on this Bill in Alert Digest No. 17 of 1989 (29 November 1989) and received a response from Senator Dunn, which was dealt with in the Twenty-first Report of 1989 (13 December 1989).

General Comment

The Committee noted that the terms of this Bill are particularly unclear and, as a consequence, the Bill is difficult to understand.

Senator Dunn responded that the Bill was prepared in accordance with her instructions by the Parliamentary Draftsman and that the Bill can be understood by those practised in reading and interpreting legislation.

The Committee is of the opinion that, as the Bill introduces criminal offences which can lead to fines of up to $100,000, it should be drafted in clear terms. It is not just persons practised in reading and interpreting legislation who are required to read the legislation and abide by its provisions.

Proposed section 30A states:

> Taking of certain action prohibited
>
> "30A.(1) Where the Governor-General is satisfied that the doing of a particular act in any place, or in a particular place, that is in the Register will adversely affect, or might adversely affect to a significant degree, any place that is in the Register, or that particular place, as the case may be, as part of the national estate, the Governor-General may make regulations prohibiting the doing of that act in any place that is in the Register, or in that particular place, as the case may be, by a corporation.
>
> "(2) Where the Governor-General is satisfied that the doing of an act outside any place, or a particular place, that is in the Register will adversely affect, or might adversely affect to a significant degree, places that are in the Register, or that particular place, as the case may be, as part of the national estate, the Governor-General may make regulations prohibiting the doing of that act outside any place that is in the Register, or outside that particular place, as the case may be, by a corporation.
>
> "(3) A corporation shall not do, or cause or permit to be done, an act or thing the doing of which is prohibited by regulations made for the purposes of subsection (1) or (2).
>
> Penalty: $100,000."

The Committee believes this provision could be more clearly written.

Senator Dunn's response is attached to this Report.

Granting too wide a power
Proposed sections 30A and 30B

Proposed sections 30A and 30B will allow for the creation of criminal offences by means of regulation. The Committee is concerned that the Bill allows too wide and vague a power for the creation of criminal offences bearing high penalties.

Senator Dunn responded that the criminal offences and the maximum penalties are to be created by the Bill. The regulations will define the details of both the prohibited areas and activities. The actual scope of the provisions including the class of person and activities which may be sanctioned, the classes of lands affected and the penalties are set out in the Bill.

In the opinion of the Committee, persons and corporations required to comply with the provisions of the Bill and facing criminal sanctions if they fail to do so, should be able to establish the nature of the relevant offence from the Bill as the principal legislation.

The Committee brought the proposed subsections of the Bill to the attention of the Senate as it regards the power to create criminal offences set out in the Bill as not being subject to sufficiently defined parameters.

As indicated above, the response from Senator Dunn is attached to this Report.

GENEVA CONVENTIONS AMENDMENT BILL 1989 [1990]

This Bill was introduced into the Senate on 30 August 1989 as a Private Senator's Bill by Senator Macklin.

The Bill lapsed as a consequence of the dissolution of the House of Representatives on 19 February 1990 but was restored to the Notice paper by resolution of the Senate on 9 May 1990.

The Bill proposes to amend the Geneva Conventions Act 1957 to enable Australia to ratify Protocols I and II, additional to the Conventions. It is identical to the Bill introduced by the Government into the House of Representatives on 2 March 1989.

The Committee commented on the Government version of the Bill in Alert Digest No. 1 of 1989 (8 March 1989). In that Alert Digest, the Committee brought Senators' attention to the Schedule to the Bill, which the Committee noted had a significant human rights impact that was directly relevant to the Committee's terms of reference. In Alert Digest No. 11 of 1989 (6 September 1990), in response to the introduction of Senator Macklin's Bill, the Committee referred to its earlier comments without commenting further.

In Alert Digest No. 1 of 1990 (16 May 1990), the Committee drew attention to several clauses of the abovementioned Bill. Subsequently, in its First Report of 1990 (23 May 1990), the Committee made some further comments in the light of having re-examined the Explanatory Memorandum relating to the Bill.

The Minister for Finance, Mr Willis, has now provided a response to the Committee's comments on the Bill. Though the Bill was passed by the Senate on 28 May 1990, the Minister's letter is attached and, where appropriate, his comments are extracted below for the information of Senators.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 1, the Committee drew attention to subclause 2(2) of the Bill, which provides that clause 48 of the Bill is to be retrospective to 1 May 1987. Clause 48 deals with lump sums payable on commutation of a pension. The Committee drew attention to the provision as it may breach principle 1(a)(i) of the Committee's terms of reference and unduly trespass on personal rights and liberties.

The Minister has responded as follows:

> [S]ection 76A of the Superannuation Act 1976 allows a person in receipt of invalidity pension under the Act to renounce that pension in favour of an age retirement pension in certain circumstances. That section came into operation on 1 May 1987.
>
> Because of a failure to make, at the same time, a consequential amendment to section 65 of the Act, a person who renounces the invalidity pension could become entitled to payment of the

amount of his or her accumulated supplementary contributions twice. This is clearly inappropriate.

Clause 48 corrects the omission and, necessarily, operates from 1 May 1987 in accordance with subclause 2(2).

Essentially, the purpose of the amendment is to correct an omission in the 1987 amendment to section 65 of the Act. Nevertheless, the effect of the amendment may be to prejudice persons who have organised their affairs in reliance on the previously existing situation.

As the Bill has been passed by the Senate, the Committee does not press its concerns. However, it should be noted that while omissions of this nature may be seen to provide a windfall to some people if left uncorrected, the retrospective adjustment of such errors could also be seen to prejudice persons who have relied upon the situation as represented by the original (1987) amendment. Accordingly, such omissions should be avoided.

Retrospectivity
Clause 90

In Alert Digest No. 1, the Committee drew attention to Clause 90 of the Bill, which extends the regulation-making power by providing that regulations made under a substantial number of provisions may be made within 12 months and may be made retrospective to a date no earlier than 1 July 1990. The Committee drew the provision 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 Minister has responded as as follows:

> [C]onsequent upon various amendments included in the Bill, it will be necessary for the Regulations referred to in the new subsection 168(9) to be amended with effect from 1 July

> 1990. There is insufficient time for the prospective amendment of the Regulations with that date of effect and, accordingly, the new subsection permits a limited degree of retrospectivity while allowing time for the amendments to the Regulations to be prepared.
>
> The amending Regulations will, of course, be disallowable.

The Committee thanks the Minister for this response.

General Comment

In Alert Digest No. 1, the Committee noted that clause 39 of the Bill contains numerous examples of sexist language which, in the Committee's view, was inappropriate. Accordingly, it was the Committee's view that the provisions should be re-drafted.

The Minister has responded as follows:

> [T]he clause inserts some words into subsection 47(1) of the Act. Like the rest of section 47, that subsection is drafted in the old style and contains references only to the male gender. The same approach has been adopted in the inserted words in the interests of consistency and pending a review of the whole section.

The Committee thanks the Minister for this response. However, the Committee notes that the approach described by the Minister has not been applied consistently throughout the Bill. For example, the Committee notes that clause 54 of the Bill adds a new subsection (3) to section 94 of the Act. Subsection 94(1) uses the masculine gender. The new subsection 94(3), however, is expressed in non-sexist terms. Clause 55 adds a new subsection (2) to section 95. While subsection 96(1) uses the masculine gender, the new subsection (2) is expressed in non-sexist terms. Clause 75 amends section 136 of the Act using non-sexist terms while subsection 136(1) continues to be expressed in the male

gender. Similarly, clause 91 amends section 184 of the Act using non-sexist terms while the existing subsections contain several uses of the male gender only.

The Committee acknowledges the difficulties faced by Parliamentary Counsel when amending legislation that was enacted prior to the adoption of the non-sexist drafting style. It is not an answer, however, to say in response to the Committee's comment on clause 39 that the approach was adopted for the sake of consistency. The Committee urges the Minister and his department to conduct the review of the whole of section 47 (and, indeed, the whole Act) which is foreshadowed by the Minister's response, at the earliest opportunity, with a view to removing all instances of sexist language.

Barney Cooney
(Chairman)

30 May 1990

PARLIAMENT OF AUSTRALIA · THE SENATE

IRINA DUNN
INDEPENDENT SENATOR FOR N.S.W.

PARLIAMENT HOUSE
CANBERRA
A.C.T. 2600
TEL. (062) 77 3745
FAX: (062) 77 3315
77 3387

COMMONWEALTH PARLIAMENT OFFICES
MORGAN GRENFELL BUILDING
56-70 PHILLIP STREET
BOX 36, G.P.O.
SYDNEY, N.S.W. 2000
TEL. (02) 241 2711
FAX: (02) 271 282

6 December 1989

Mr Ben Calcraft
Secretary
Standing Committee for
Scrutiny of Bills
Telelift 20.4
PARLIAMENT HOUSE

Dear Secretary

Australian Heritage Commission (National Estate Protection) Amendment Bill 1989

I was most interested, if a little surprised, to read the published comments in the Scrutiny of Bills Alert Digest No 17 referring to the abovementioned Bill introduced into the Senate by me on 22 November 1989.

My Bill was prepared in accordance with my instructions by the Parliamentary Draughtsman and in every respect meets that authority's usual high standard.

I do not believe the Bill is "particularly unclear" and "difficult to understand" as stated in your Alert. It certainly can be understood by those practised in reading and interpreting legislation, including one eminent constitutional lawyer who has commented to me that "it would easily survive a constitutional challenge". The Bill, at only ten pages, is also a model of brevity.

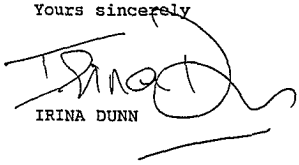
Your Committee's objection to "the creation of criminal offences by means of regulation" could lead readers into believing that this is what my Bill does. In fact the criminal offences (breaches of specified provisions of the Bill) and the maximum penalties in each instance (financial and penal) are to be created by the Act and are not some "wide and vague power" to be left to be determined in regulations. The regulations would define the details of the prohibited areas and the prohibited activities, but the scope of the prohibitions, including the

classes of persons, and activities which may be sanctioned, the classes of lands affected and the penalties are clearly set out in the terms of the Bill.

In adopting the approach my Bill is not unlike the World Heritage Properties Conservation Act (but perhaps less open to charges of vagueness than that Act) which was drafted under instructions by the Government and passed by the Parliament in 1983. That Act in section 9 (1) (h) prohibits activities (except with the consent of the Minister) which are not set out in the Act but which may be prescribed by regulations, in respect of lands which are also not defined in the Act but which may be proclaimed by the Governor General. The High Court in Commonwealth v Tasmania 46 ALR 625 had no difficulty with these arrangements and upheld the validity of that Act.

Should you or any of the member of your Committee require further assistance, I will be pleased to give it.

Yours sincerely

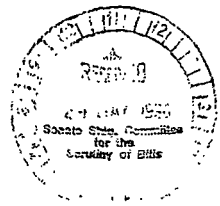


IRINA DUNN

Minister For Finance

Hon. Ralph Willis M.P.

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



Dear Senator Cooney,

I refer to the letter of 17 May 1990 to my Private Secretary from the Secretary of the Committee concerning the Superannuation Legislation Amendment Bill 1990. Regarding subclause 2(2) of the Bill, section 76A of the Superannuation Act 1976 allows a person in receipt of invalidity pension under the Act to renounce that pension in favour of an age retirement pension in certain circumstances. That section came into operation on 1 May 1987.

Because of a failure to make, at the same time, a consequential amendment to section 65 of the Act, a person who renounces the invalidity pension could become entitled to payment of the amount of his or her accumulated supplementary contributions twice. This is clearly inappropriate.

Clause 48 corrects the omission and, necessarily, operates from 1 May 1987 in accordance with subclause 2(2).

With reference to clause 90 of the Bill, consequent upon various amendments included in the Bill, it will be necessary for the Regulations referred to in the new subsection 168(9) to be amended with effect from 1 July 1990. There is insufficient time for the prospective amendment of the Regulations with that date of effect and, accordingly, the new subsection permits a limited degree of retrospectivity while allowing time for the amendments to the Regulations to be prepared.

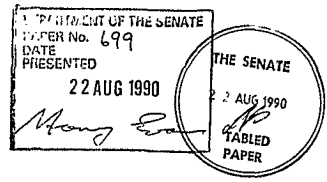
The amending Regulations will, of course, be disallowable.

Turning to your general comment on sexist language in relation to clause 39, the clause inserts some words into subsection 47(1) of the Act. Like the rest of section 47, that subsection is drafted in the old style and contains references only to the male gender. The same approach has been adopted in the inserted words in the interests of consistency and pending a review of the whole section.

Yours sincerely

Ralph Willis

24 MAY 1988



SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

1990

22 AUGUST 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF

1990

22 AUGUST 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator V. Bourne
Senator R. Crowley
Senator J. Faulkner
Senator A. Vanstone

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 1990

The Committee has the honour to present its Third Report of 1990 to the Senate.

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

Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990

Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990

Privacy Amendment Bill 1989 [1990]

Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990

Training Guarantee (Administration) Act 1990

The following Acts passed both Houses of the Parliament on 1 June 1990:

Remuneration and Allowances Act 1990

Remuneration and Allowances (Amendment) Act 1990

Wool Marketing Amendment Act 1990

Due to the timing of their introduction, the Committee was unfortunately unable to consider and report on them prior to their passage. However, there are no provisions in the Acts to which the Committee would draw the Senate's attention as possibly falling within principles 1(a)(i) to (v) of Standing Order 24.

Similarly, the Committee was unable to comment on the Remuneration and Allowances Amendment Bill 1990, which was introduced on 1 June 1990 but was made redundant by the Remuneration and Allowances (Amendment) Bill 1990 and was, as a result, not proceeded with. However, there are no provisions in the Bill to which the Committee would draw the Senate's attention as possibly falling within principles 1(a)(i) to (v) of Standing Order 24.

PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) ACT 1990

The Bill for this Act was introduced into the House of Representatives on 8 May 1990 by the Minister for Resources.

The Act gives effect to the Treaty between Australia and the Republic of Indonesia in the Zone of Cooperation between the Indonesian Province of East Timor and Northern Australia, which was signed on 11 December 1989. The treaty provides a framework for the exploration for and exploitation of petroleum resources in the zone.

The Committee commented on the Bill in Alert Digest No. 1 of 1990. The Minister for Resources responded to those comments by letter dated 24 July 1990. Though the Bill passed both Houses of the Parliament on 28 May 1990, the Minister's response contains a useful explanation of the rationale behind the provisions. The points are reproduced below for the information of Senators. A copy of the Minister's response is also attached to this report.

STRICT LIABILITY OFFENCES
Sections 7 and 8

Sections 7 and 8 create offences of strict liability for unauthorised prospecting for petroleum and undertaking petroleum operations respectively.

In Alert Digest No. 1, the Committee drew the provisions to Senators' attention as possibly involving a breach of principle 1(a)(i) of its terms of reference, by unduly trespassing on personal rights and liberties.

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

> The Committee should note that the formulation adopted in the Act is consistent with that adopted in the Petroleum (Submerged Lands) Act 1967.
>
> A strict liability offence is one which does not have a 'mens rea' element. Such an offence is one which can be committed in circumstances where the defendant does not know or is recklessly indifferent to material facts. To provide that these offences should not be committed 'without reasonable excuse' is not appropriate for the kind of offence involved.
>
> Offence provisions do not now have to specify explicitly that mens rea needs to be proved by the prosecution. Recent court decisions lead to the conclusion that statutory silence on the issue of mens rea will generally result in the element of mens rea being presumptively imported into the offence in question. (e.g. Sweet v Parsley (1970) A.C. 132; Cameron v Holt (1980) 142 C.L.R. 342 and He Kaw Teh v The Queen (1985) 59 ALJR 620).

The Committee thanks the Minister for this response.

PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) (CONSEQUENTIAL PROVISIONS) ACT 1990

The Bill for this Act was introduced into the House of Representatives on 8 May 1990 by the Minister for Resources.

The Act provides for a series of amendments to legislation which would otherwise be inconsistent with the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990.

The Committee commented on the Bill in Alert Digest No. 1 of 1990. The Minister for Resources responded to those comments by letter dated 24 July 1990. Though the Bill passed both Houses on 18 May 1990, the Minister's response contains a useful explanation of the rationale behind the provision commented on by the Committee. The relevant points are reproduced below for the information of Senators. A copy of the Minister's response is attached to this report.

STRICT LIABILITY OFFENCES
Section 9

Section 9 inserts new section 58B into the Crimes at Sea Act 1979. The new section creates a number of strict liability offences relating to journeys between resources installations and 'external places'.

In Alert Digest No. 1, the Committee drew attention to the provision as possibly involving a breach of principle 1(a)(i) of its terms of reference, by unduly trespassing on personal rights and liberties.

The Minister has responded as follows:

> I am advised that it was considered necessary to impose strict liability in respect of an offence against the new section 58B to ensure customs control over the movement of persons and/or goods to and from resources installations. The new section is intended to prevent goods and/or persons avoiding the normal barrier controls applicable to entry into Australia.It was considered inappropriate to require a blameworthy state of mind - a mens rea element - as an ingredient of the offence when the fact of the journey was the mischief to be prevented.

However, the Minister's response goes on to note:

> A safeguard against undue trespass on personal rights and liberties is nevertheless provided by new subsections 58B(6) and (7) which provide statutory defences to a prosecution for an offence against the section. Subsection (6) prescribes three exceptions to the "prohibition" on direct journeys to or from resources installations in Area A, where:
>
> a) the direct journey to or from the resources installation was necessary to secure the safety of, or avert a threat to, human life;
>
> b) the direct journey to or from the resources installation was necessary to secure the safety of, or avert a threat to, a ship at sea, an aircraft in flight or a resources installation; or
>
> c) the direct journey to or from the resources installation was authorised in writing by the Comptroller, and was carried out in accordance with any conditions which may have been prescribed.
>
> Subsection (7) goes even further and makes it clear that the specific defences set out in subsection (6) are not to be taken to limit by implication any other defence that would be available to a person charged with an offence against the section. This subsection ensures that an honest and reasonable mistake of fact will continue to be a ground of exculpation in cases of an offence against section 58B.

The Committee thanks the Minister for this response.

PRIVACY AMENDMENT BILL 1989 [1990]

This Bill was introduced into the Senate on 16 June 1989 by the Minister for Consumer Affairs.

The Bill lapsed as a consequence of the dissolution of the House of Representatives on 19 February 1990 but was restored to the Notice Paper by resolution of the Senate on 1 June 1990.

The Bill proposes to amend the Privacy Act 1988 to provide privacy protection for individuals in relation to their consumer credit records. The Bill principally adopts the OECD Guidelines on Personal Privacy, which Australia has adhered to.

In Alert Digest No. 9 of 1989, the Committee drew the following provision of the Bill to the attention of the Senate.

DISCRETION TO EXEMPT A CLASS OF CREDIT PROVIDERS
Proposed subsection 11B(2)

The Committee commented on two aspects of the proposed subsection. The Committee noted that provision would grant to the Governor-General, acting on the advice of the Executive Council, the discretion to exempt a class of credit providers from obligations to be imposed by proposed Part IIIA of the Principal Act. Further, the provision will allow the application of subsection 11B(1) to be changed by regulation.

The (then) Minister for Consumer Affairs informed the committee that proposed subsection 11B(2) will allow a corporation that is 'prima facie' a credit provider, to be exempted by regulation from the provisions of the legislation applying to credit providers. The regulation will be tabled and subject to disallowance.

The purpose of the provision, as outlined by the Minister, is to allow flexibility in the regulatory scheme for the determination of who is a credit provider. There is provision in the Bill in subparagraph 11B(1)(b)(v) to enable classes of corporations that are not within the categories of bodies defined as credit providers by the legislation to be determined to be credit providers by the Privacy Commissioner. The determination is reviewable by Parliament.

There is also provision in the proposed subsection to allow bodies which fall within the definition of credit provider, but do not provide consumer credit or have ceased to provide consumer credit, to be declared by regulation not to be credit providers.

The Minister stated that the flexibility provided is required to enable the legislative scheme to be able to adapt to the changing circumstances of credit providers.

The Minister told the Committee,

> I would consider it to be an unnecessary burden on the limited resources of the Parliament for it to be required to pass legislation dealing with the status of corporations under the Act each time their business operations changed.

In its Thirteenth Report of 1989, the Committee thanked the Minister for his response but indicated that it considered that policy changes of the magnitude of those proposed by the particular provisions of the Bill should be incorporated within an amending bill as the primary source of legislation.

This brought a further response from the Ministerwhich was discussed in the Committee's Fifteenth Report of 1989. The Minister told the Committee:

> It is essential that the proposed regulatory scheme for the credit reporting industry be able to adapt to the changing circumstances of credit providers. The

provision in question is a technical device to enable proper regulation of the credit reporting industry ie to only allow those credit providers who are substantially in the business of providing credit to have access to a database maintained by a credit reporting agency.

The Minister also noted that the Privacy Commissioner is required to develop a Code of Conduct for the credit industry after consultation with the industry and the community. The Minister indicated that by means of the Code and by supervising the credit reporting industry, the Privacy Commissioner can identify those bodies that no longer provide credit. The Privacy Commissioner is able to advise the Minister of the necessity of a regulation to exempt the relevant bodies.

The Minister assured the Committee that the provision would not be used to change the policy set out in the Bill and that any possible change of policy relating to consumer and commercial credit providers will be incorporated in an amending bill.

For the information of Senators, copies of both responses of the Minister are attached to this report.

TRADE PRACTICES (MISUSE OF TRANS-TASMAN MARKET POWER) ACT 1990

The Bill for this Act was introduced into the House of Representatives on 9 May 1990 by the Attorney-General.

The Act implements Australia's obligations under Article 4 of the Protocol to the Australia New Zealand Close Economic Relations - Trade Agreement on Acceleration of Free Trade in Goods. Article 4 of the Protocol recognises that the maintenance of Australian and New Zealand anti-dumping provisions in respect of goods originating in the other country will be inappropriate upon the achievement of full free trade in goods, which came into effect on 1 July 1990. It provides that from that date the competition laws of both countries should be applied to relevant anti-competitive conduct affecting trans-Tasman trade in goods.

The Committee commented on the Bill in Alert Digest No. 1 of 1990. The Attorney-General responded to those comments by letter dated 4 June 1990. Though the legislation passed both Houses of the Parliament on 30 May 1990, the Attorney's response to the Committee's comments are reproduced below. A copy of the letter to the Committee is also attached to this report.

ABROGATION OF PROTECTION AGAINST SELF-INCRIMINATION
Section 12

Section 12 of the Act inserts new subsection 155B(4) into the Trade Practices Act 1974. In Alert Digest No. 1, the Committee commented that the provision abrogates the protection against self-incrimination. However, the Committee noted that the provision still grants protection against the use of information obtained both directly and indirectly from the information or document required to be disclosed. The provision was therefore

of a type which the Committee has previously regarded as acceptable. However the Committee sought the Attorney's explanation of the need for the provision to be drafted in this way.

The Attorney has responded as follows:

> Under proposed sub-section 155B(4), the protection against self-incrimination is abrogated to render effective in the public interest the investigatory functions of the Trade Practices Commission and the New Zealand Commerce Commission in relation to possible breaches of the new trans-Tasman misuse of market power provisions of the Trade Practices Act 1974 or the New Zealand Commerce Act 1986.

The Attorney goes on to note:

> However, sub-section 155B(4) does contain, in accordance with current Commonwealth criminal law policy, a "use-derivative use indemnity" provision of the type that your Committee has previously considered acceptable. Under this provision, the information obtained under proposed sub-section 155B(4) cannot be used in any criminal proceedings other than under proposed section 155B itself.

The Committee thanks the Attorney for this response.

TRAINING GUARANTEE (ADMINISTRATION) ACT 1990

The Bill for this Act was introduced into the House of Representatives on 10 May 1990 by the Minister for Employment, Education and Training.

The Act provides for the administration of the scheme set up by the Training Guarantee Act 1990.

In Alert Digest No. 1 of 1990, the Committee made general comments in relation to various provisions in the legislation. The Minister for Employment, Education and Training responded to those comments by letter dated 30 May 1990. Though the legislation passed both Houses on 31 May 1990, the Minister's response to the Committee's comments contains some useful points, which are reproduced below. A copy of the Minister's letter to the Committee is also attached to this report.

IMMUNITY FROM SUIT
Section 85

Section 85 of the Act provides that if an employer other than a government body makes false or misleading statements, the employer has to pay by way of penalty an additional training guarantee charge. While the Committee noted that this is not a criminal liability, the Committee observed that a government body is immune from penalty in respect of such statements. The Committee sought the Minister's explanation as to why this apparent immunity was necessary.

The Minister has responded as follows:

> It should be noted that the clause is similar in operation to the penalty tax provisions of other taxation laws - see for example section 115 of the Fringe Benefits Tax Assessment Act 1986 ... and

section 223 of the [Income Tax Assessment Act 1936]. Those sections also exclude government bodies from penalty tax.

The view is taken that it would not be appropriate to subject government bodies to a penalty by way of additional training guarantee charge where no such penalty exists for comparable offences under other taxation law.

The Committee thanks the Minister for this response.

TAXATION LEGISLATION LOOK-ALIKE PROVISIONS
Sections 60, 70, 77, 83, 97 and 98

In Alert Digest No. 1, the Committee observed that the Bill contained a number of taxation legislation look-alike provisions. The Committee commented that, if seen in this light, most of them would be acceptable. The Minister has responded as follows:

> As described under the main features part of the explanatory memorandum the administration of the training guarantee scheme will rest with the Commissioner of Taxation. Collection and recovery of training guarantee charge provisions, including those relating to penalties for late payments etc., will be modelled on those operating for income tax.
>
> This is particularly important where recovery action in respect of unpaid training guarantee charge needs to be taken in conjunction with recovery action for unpaid income tax, fringe benefits tax, etc. In these circumstances it is essential in the interests of equity and good administration that the Commissioner be able to invoke similar provisions in respect of each unpaid tax.
>
> Clause 81, for example, authorises the Commissioner to collect training guarantee charge by garnisheeing money owing to an employer without having regard to recovery proceedings through a Court. The clause is the counterpart of section 218 of the Income Tax Assessment Act 1936 ... . If it were not included in the Bill, the Commissioner would have to resort to recovery action through a Court for unpaid training guarantee charge but would be able to garnishee moneys in respect of unpaid income tax.

The Minister's response goes on to address the Committee's individual concerns. The Committee's comments and the relevant responses are set out below:

(a) Section 60: Procedure on review or appeal

The Committee observed that clause 60 provides that on review or appeal the burden of proving that an assessment is excessive lies with the employer.

The Minister responded:

> Clause 60 mirrors section 190 of the [Income Tax Assessment Act] and section 86A of the [Fringe Benefits Tax Assessment Act]. A taxpayer or an employer, under those provisions, has the burden of proving that an assessment is excessive because the assessment itself is normally based on the peculiar knowledge of the taxpayer or employer concerned and not the Commissioner.
>
> On those rare occasions when an assessment is not based on the taxpayer's peculiar knowledge (e.g., a default assessment where a taxpayer refuses to lodge a return) the taxpayer must also prove that the assessment is excessive because any amended assessment will have to be based on the taxpayer's peculiar knowledge.
>
> A similar situation will occur under the training guarantee scheme especially as the Bill provides for a system of self-assessment by the employer.

(b) Section 70: Pending review or appeal not to affect assessment

The Committee observed that clause 70 provides that the fact that a review or appeal is pending does not alter the effect of the assessment or prevent the recovery of the charges or additional charges.

The Minister responded:

> This clause is modelled on section 201 of the [Income Tax Assessment Act] and section 88 of the [Fringe Benefits Tax Assessment Act]. The provision will ensure that an employer cannot automatically defer payment of training guarantee charge simply by objecting to an assessment or requesting a referral.
>
> In appropriate cases (e.g., where the law is unclear and the matter is looked upon as a test case) the Commissioner is authorised to give an extension of time for payment of the training guarantee charge under the general extension power - clause 74 - of the Bill.
>
> It is also relevant that by clause 103 of the Bill the Taxation (Interest on Overpayments) Act 1983 will be amended to authorise the payment of interest on amounts of training guarantee charge refunded by the Commissioner following a successful objection, referral or appeal.

(c) Section 77: Substituted service

The Committee observed that section 77 provides for substituted service of documents in relation to recovery of charges and service can be effected on an absentee or someone who cannot be found by posting to the last known address, without leave of the court.

The Minister responded:

> Although it is a customary taxation provision it should be noted that before the clause can have effect the Commissioner must be satisfied, after reasonable enquiry, that the employer cannot be found or is absent from Australia and there is nobody in Australia on whom the document can be served.

(d) Section 83: Public officer of trust estate

The Committee observed that section 83 provides for service on the public officer of a trust estate and that subsection 83(2) provides that, if there is no public officer, service on a person

acting or appearing to act in the business of the trust estate is sufficient.

The Minister responded:

> Under the [Income Tax Assessment Act], the public officer of a trust estate is answerable for the doing of all such things as are required to be done by the trust estate, and, if in default, is liable to the same penalties. Clause 83 is similar in operation to section 63 of the Child Support Act 1987, in that it provides that the person who is the public officer for income tax purposes is also the public officer for purposes of this legislation and is therefore answerable for such things as are required under the Training Guarantee Bill.
>
> If there were no public officer or there were no mechanism for service on a trust estate that did not have a public officer, the provisions of this Bill would effectively be unenforceable on such a trust estate.

(e) Section 97: Evidence

The Committee observed that section 97 provides that the production of a notice of assessment or a copy thereof is conclusive evidence of its making and that the particulars are correct, except for the purposes of review or appeal. The section also provides that the production of certain documents, certificates or training guarantee statements are prima facie evidence. The Committee noted that subsections 97(2), (4) and (5) use the phrase 'prima facie evidence', whereas subsection 97(3) merely uses 'evidence'.

The Minister responded:

> This clause is also customary in other taxation legislation. It provides an efficient means of specifying the evidentiary value of certain documents and copies of documents. Subclause 97(3) uses the term "evidence" instead of "prima facie evidence" or

"conclusive evidence" because it gives the copy or extract the same evidentiary status that the original would have had, whether that is conclusive or prima facie.

(f) Section 98: Access to premises, etc.

The Committee observed that section 98 provides for access to premises and documents and permits an authorised officer to inspect and copy documents. The authorised officer can do so upon the production of a written authority from the Commissioner of Taxation and does not require a search warrant issued by a judicial officer.

The Minister responded:

> As discussed in the explanatory memorandum, clause 98 follows the procedural form common to other taxation law. It provides for a power to enter and to obtain access to documents subject to procedural requirements but not requiring a warrant. Those documents may not still be available for inspection if a warrant had to be issued.

The Committee thanks the Minister for his detailed response to its comments.

Barney Cooney
(Chairman)

22 August 1990

MINISTER FOR RESOURCES

The Hon. Alan Griffiths, MP

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

Dear Senator Cooney

I refer to comments contained in the Scrutiny of Bills Digest No. 1 of 1990, dated 16 May 1990 concerning the Petroleum (Australia-Indonesia Zone of Cooperation) Bill 1990 and the Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Bill 1990. These Bills received Royal Assent on 7 June 1990.

PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) ACT 1990
Sections 7 and 8.

The Committee expressed concern that sections 7 and 8 create offences of strict liability. Section 7 relates to unlawful prospecting for petroleum while section 8 relates to unlawful petroleum operations.

The Committee should note that the formulation adopted in the Act is consistent with that adopted in the Petroleum (Submerged Lands) Act 1967.

A strict liability offence is one which does not have a 'mens rea' element. Such an offence is one which can be committed in circumstances where the defendant does not know or is recklessly indifferent to material facts. To provide that these offences should not be committed 'without reasonable excuse' is not appropriate for the kind of offence involved.

Offence provisions do not now have to specify explicitly that mens rea needs to be proved by the prosecution. Recent court decisions lead to the conclusion that statutory silence on the issue of mens rea will generally result in the element of mens rea being presumptively imported into the offence in question. (e.g. Sweet v Parsley (1970) A.C. 132; Cameron v Holt (1980) 142 C.L.R. 342 and He Kaw Teh v The Queen (1985) 59 ALJR 620).

PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION)
(CONSEQUENTIAL PROVISIONS) ACT 1990
Section 9.

I refer now to the further concerns expressed by the Committee in relation to the consequential amendments made by the Act to section 58B of the Customs Act 1901.

Ministerial Office:
Parliament House, CANBERRA ACT 2600
Tele: (06) 277 7480 Fax: (06) 273 4154

Electorate Office:
12 Pascoe Vale Road, MOONEE PONDS VIC 3039
Tele: (03) 375 1617 Fax: (03) 370 1380

I am advised that it was considered necessary to impose strict liability in respect of an offence against the new section 58B to ensure customs control over the movement of persons and/or goods to and from resources installations. The new section is intended to prevent goods and/or persons avoiding the normal barrier controls applicable to entry into Australia. It was considered inappropriate to require a blameworthy state of mind - a mens rea element - as an ingredient of the offence when the fact of the journey was the mischief to be prevented.

A safeguard against undue trespass on personal rights and liberties is nevertheless provided by new subsections 58B(6) and (7) which provide statutory defences to a prosecution for an offence against the section. Subsection (6) prescribes three exceptions to the "prohibition" on direct journeys to or from resources installations in Area A, where:

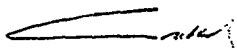
a) the direct journey to or from the resources installation was necessary to secure the safety of, or avert a threat to, human life;

b) the direct journey to or from the resources installation was necessary to secure the safety of, or avert a threat to, a ship at sea, an aircraft in flight or a resources installation; or

c) the direct journey to or from the resources installation was authorised in writing by the Comptroller, and was carried out in accordance with any conditions which may have been prescribed.

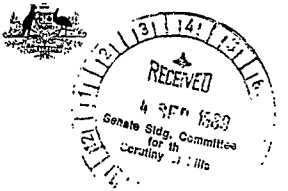
Subsection (7) goes even further and makes it clear that the specific defences set out in subsection (6) are not to be taken to limit by implication any other defence that would be available to a person charged with an offence against the section. This subsection ensures that an honest and reasonable mistake of fact will continue to be a ground of exculpation in cases of an offence against section 58B.

Yours sincerely



Alan Griffiths

SENATOR THE HON. NICK BOLKUS
Minister for Consumer Affairs
Minister Assisting the Treasurer for Prices



Parliament House
Canberra, A.C.T. 2600
Telephone: (062) 77 7380

JAL89/9016:JAM

- 4 SEP 1989

Senator B. Cooney
Chair
Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Barney

I refer to the letter dated 18 August 1989 from the Secretary to your Committee concerning the Privacy Amendment Bill 1989.

Your Committee drew proposed subsection 11B(2) to the attention of the Senate on two grounds. First, that the provision would grant to the Governor-General acting on advice of the Executive Council, the discretion to exempt a class of credit providers from the obligations to be imposed under proposed Part IIIA of the Principal Act. Secondly, that the provision may also constitute an inappropriate delegation of power as it permits the application of subsection 11B(1) to be changed by regulations.

It is the intention that proposed subsection 11B(2) would enable a corporation, which prima facie would be a credit provider within the terms of the legislation, to be determined by regulation not to be a credit provider. Such a regulation would be required to be notified in the Gazette and laid before each House of the Parliament within 15 sitting days of their making. It can be disallowed by either House.

The purpose of this provision is to give some flexibility to the regulatory scheme for determining who are credit providers. Consumer credit is provided by a wide range of bodies. The definition of credit provider sets out certain categories of bodies which would be commonly regarded as credit providers. However, there are other bodies which provide consumer credit and which should legitimately be classified as credit providers for the purposes of the Bill. Proposed section 11B makes provision for two mechanisms to provide a means of meeting any contingencies that may arise in relation to that definition. One, proposed section 11B(1)(b)(v), enables classes of corporations which do not fall within the earlier parts of the provision to be

determined to be credit providers by the Privacy Commissioner. Such a determination is reviewable by the Parliament. The second, proposed s.11B(2), enables corporations, which although falling within the earlier parts of the provision do not provide consumer credit or are no longer providing consumer credit, to be declared by regulation not to be credit providers.

It is essential that there is some flexibility contained in the proposed regulatory scheme for the credit reporting industry to enable the scheme to be adaptable to the changing circumstances of credit providers. Proposed subsection 11B(2) provides this flexibility. I would consider it to be an unnecessary burden on the limited resources of the Parliament for it to be required to pass legislation dealing with the status of corporations under the Act each time their business operations changed. In the circumstances, I do not regard the provision as an inappropriate delegation of power.

Yours sincerely

NICK BOLKUS

SENATOR THE HON. NICK BOLKUS
Minister for Consumer Affairs
Minister Assisting the Treasurer for Prices

Parliament House
Canberra, A.C.T. 2600
Telephone: (062) 77 7380

JAL89/9016:JAM

Senator B. Cooney
Chair
Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Barney

I refer to your Committee's views concerning the Privacy Amendment Bill 1989 set out in the Committee's Thirteenth Report.

The Committee has reported that it considers that policy changes of the magnitude of those proposed by the particular provision (subsection 11B(2) of the Bill) should be incorporated within an amending bill or the primary source of legislation.

In my previous letter to the Committee, I noted that it was the intention of proposed subsection 11B(2) that it would enable a corporation, which prima facie would be a credit provider within the terms of the legislation, to be determined by regulation not to be a credit provider. Such a regulation would be required to be notified in the Gazette and laid before each House of the Parliament within 15 sitting days of their making. It could be disallowed by either House.

The purpose of subsection 11B(2) is to give some flexibility to the regulatory scheme for determining who are credit providers as consumer credit is provided by a wide range of bodies for whom the nature of business can rapidly change.

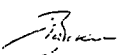
It is essential that the proposed regulatory scheme for the credit reporting industry be able to be adapt to the changing circumstances of credit providers. The provision in question is a technical device to enable proper regulation of the credit reporting industry ie to only allow those credit providers who are substantially in the business of providing credit to have access to a database maintained by a credit reporting agency.

The Privacy Commissioner who will have responsibility for supervising the credit reporting industry will be in a position to monitor the status of credit providers. In this regard, I note that he is required to develop a Code of Conduct for the industry in close consultation with industry, privacy, and community groups. Through the Code and his supervision of the credit reporting industry, the Privacy Commissioner will be able to clearly identify those bodies who are no longer providing credit and will be able to advise the responsible Minister of the need for a regulation to be recommended by the Executive Council to the Governer-General.

The Commissioner must be in a position whereby he can seek an immediate response in relation to a body which was formerly a credit provider. It should be noted that while a body remains classified as a credit provider it can obtain access to individuals' credit files. Where such a body is no longer providing credit it can continue to access an individuals' credit file use and disclose credit reports or personal information derived from those reports until it is excluded from being a credit provider by proposed s.11B(2). In effect, it can defeat the whole purpose of the legislation which is to provide privacy protection for individuals in relation to their personal credit records by restricting access to those records to providers of credit and other specified bodies. The relative speed with which regulations can be made would seem to indicate that they are a more appropriate vehicle than a bill to meet this need.

Also, I can assure the Committee that the provision in question would not be used to change the policy set out under the Bill. Any possible change of policy in relation to consumer and commercial credit providers would be incorporated in an amending bill.

Yours sincerely

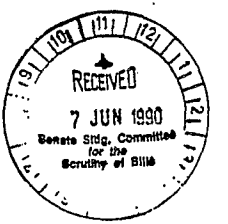


NICK BOLKUS

Attorney-General

DESPATCHED
4 JUN 1990
Initials

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600



BAD90/6325
76887:MF

Senator B Cooney
Chairman
The Senate Standing Committee
on the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 17 May 1990 from the Secretary to the Senate Standing Committee for the Scrutiny of Bills to my Senior Private Secretary enclosing an extract from the Committee's Alert Digest No. 1 of 1990 (16 May 1990), which raises the matter of protection against self-incrimination in the Trade Practices (Misuse of Trans-Tasman Market Power) Bill 1990. The Bill was introduced in the Senate on 22 May 1990.

The Committee has drawn attention to new sub-section 155B(4) to be inserted into the Trade Practices Act by the Bill. While the Committee noted that the provision is of a type which it had previously regarded as acceptable, the Committee nevertheless sought an explanation from me as to the need for the provision to be drafted in the way that it is.

Under proposed sub-section 155B(4), the protection against self-incrimination is abrogated to render effective in the public interest the investigatory functions of the Trade Practices Commission and the New Zealand Commerce Commission in relation to possible breaches of the new trans-Tasman misuse of market power provisions of the Trade Practices Act 1974 or the New Zealand Commerce Act 1986.

However, sub-section 155B(4) does contain, in accordance with current Commonwealth criminal law policy, a "use-derivative use indemnity" provision of the type that your Committee has previously considered acceptable. Under this provision, the information obtained under proposed sub-section 155B(4) cannot be used in any criminal proceedings other than under proposed section 155B itself.

I trust that this response meets your Committee's concerns.

Yours sincerely

Signed

MICHAEL DUFFY

Minister for Employment, Education and Training
Parliament House, Canberra, ACT, 2600

30 MAY 1990

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

Dear Senator Cooney

The Senate Standing Committee for the Scrutiny of Bills made a number of comments in the Scrutiny of Bills Alert Digest No. 1 of 1990 concerning the Training Guarantee (Administration) Bill 1990. I would like to provide the following comments on each of the issues raised.

General comment:

The Committee has noted that the Bill contains a number of taxation legislation look alike provisions. As described under the main features part of the explanatory memorandum the administration of the training guarantee scheme will rest with the Commissioner of Taxation. Collection and recovery of training guarantee charge provisions, including those relating to penalties for late payment etc., will be modelled on those operating for income tax.

This is particularly important where recovery action in respect of unpaid training guarantee charge needs to be taken in conjunction with recovery action for unpaid income tax, fringe benefits tax, etc. In these circumstances it is essential in the interests of equity and good administration that the Commissioner be able to invoke similar provisions in respect of each unpaid tax.

Clause 81, for example, authorises the Commissioner to collect training guarantee charge by garnisheeing money owing to an employer without having regard to recovery proceedings through a Court. The clause is the counterpart of section 218 of the Income Tax Assessment Act 1936 (ITAA). If it were not included in the Bill, the Commissioner would have to resort to recovery action through a Court for unpaid training guarantee charge but would be able to garnishee moneys in respect of unpaid income tax.

Clause 85: False or misleadidng statements

The Committee requires an explanation why clause 85 - which provides a penalty by way of additional training guarantee charge where an employer makes a false or misleading statement - does not apply to a government body. It should be noted that the clause is similar in operation to the penalty tax provisions of other taxation laws - see for example section 115 of the Fringe Benefits Tax Assessment Act 1986 (FBTAA) and section 223 of the ITAA. Those sections also exclude government bodies from penalty tax.

The view is taken that it would not be appropriate to subject government bodies to a penalty by way of additional training guarantee charge where no such penalty exists for comparable offences under other taxation law.

Clause 60: Procedure on review or appeal

Clause 60 mirrors seciton 190 of the ITAA and section 86A of the FBTAA. A taxpayer or an employer, under those provisions, has the burden of proving that an assessment is excessive because the assessment itself is normally based on the peculiar knowledge of the taxpayer or employer concerned and not the Commissioner.

On those rare occasions when an assessment is not based on the taxpayer's peculiar knowledge (e.g., a default assessment where a taxpayer refuses to lodge a return) the taxpayer must also prove that the assessment is excessive because any amended assessment will have to be based on the taxpayer's peculiar knowledge.

A similar situation will occur under the training guarantee scheme especially as the Bill provides for a system of self-assessment by the employer.

Clause 70: Pending review or appeal not to affect assessment

This clause is modelled on section 201 of the ITAA and section 88 of the FBTAA. The provision will ensure that an employer cannot automatically defer payment of training guarantee charge simply by objecting to an assessment or requesting a referral.

In appropriate cases (e.g., where the law is unclear and the matter is looked upon as a test case) the Commissioner is authorised to give an extension of time for payment of the training guarantee charge under the general extension power - clause 74 - of the Bill.

It is also relevant that by clause 103 of the Bill the Taxation (Interest on Overpayments) Act 1983 will be amended to authorise the payment of interest on amounts of training guarantee charge refunded by the Commissioner following a successful objection, referral or appeal.

Clause 77: Substituted service

As the Committee has observed this clause will enable the Commissioner, when taking any recovery action, to serve a document by posting it to the last know address of the employer without leave of the Court.

Although it is a customary taxation provision it should be noted that before the clause can have effect the Commissioner must be satisfied, after reasonable enquiry, that the employer cannot be found or is absent from Australia and there is nobody in Australia on whom the document can be served.

Clause 83: Public officer of trust estate

Under the ITAA, the public officer of a trust estate is answerable for the doing of all such things as are requried to be done by the trust estate, and, if in default, is liable to the same penalties. Clause 83 is similar in operation to section 63 of the Child Support Act 1987, in that it provides that the person who is the public officer for income tax purposes is also the public officer for purposes of this legislation and is therefore answerable for such things as are required under the Training Guarantee Bill.

If there were no public officer or there were no mechanism for service on a trust estate that did not have a public officer, the provisions of this Bill would effectively be unenforceable on such a trust estate.

Clause 97: Evidence

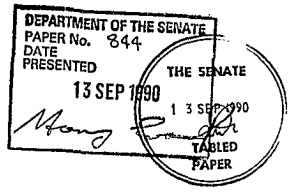
This clause is also customary in other taxation legislation. It provides an efficient means of specifying the evidentiary value of certain documents and copies of documents. Subclause 97(3) uses the term "evidence" instead of "prima facie evidence" or "conclusive evidence" because it gives the copy or extract the same evidentiary status that the original would have had, whether that is conclusive or prima facie.

Clause 98: Access to premises, etc

As discussed in the explanatory memorandum, clause 98 follows the procedural form common to other taxation law. It provides for a power to enter and to obtain access to documents subject to procedural requirements but not requiring a warrant. Those documents may not still be available for inspection if a warrant had to be issued.

Yours sincerely

John Dawkins



SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

OF

1990

12 SEPTEMBER 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF

1990

12 SEPTEMBER 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator A. Vanstone (Deputy Chairman)
Senator V. Bourne
Senator R. Crowley
Senator I. Macdonald
Senator N. Sherry

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 1990

The Committee has the honour to present its Fourth Report of 1990 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 24:

Australian Maritime Safety Authority Bill 1990

Commonwealth Serum Laboratories (Conversion into Public Company) Bill 1990

AUSTRALIAN MARITIME SAFETY AUTHORITY BILL 1990

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Transport and Communications.

The Bill proposes to establish the Australian Maritime Safety Authority as a statutory body. The functions which would be conferred on the Authority under this Bill include search and rescue and control of ship-sourced marine pollution. The Bill would amend other Acts to confer on the Authority other functions, including the safety regulation of maritime operations in Australia and Australian ships operating overseas and also the provision of marine navigational aids in Australian waters.

The Committee commented on the Bill in Alert Digest No. 2 of 1990. The Minister for Shipping and Aviation Support responded to those comments by letter dated 25 July 1990. Relevant parts of the Minister's response are discussed below. A copy of the response is also attached to this report.

Termination of appointment
Clause 21

In Alert Digest No. 2, the Committee noted that clause 21 of the Bill provides for the circumstances in which the Minister can terminate the appointment of a member of the Authority. Subclauses 21(1) and (2) provide that the Minister can terminate an appointment in the case of misbehaviour, physical or mental incapacity, bankruptcy, etc.

The Committee noted that paragraph 21(2)(e) provides that, in addition, the Minister may terminate the appointment of a member if 'the Minister is of the opinion that the performance of the *member has been unsatisfactory for a significant period of time*'. Indeed, subclause 21(3) provides that the Minister can terminate

the appointment of any or all members of the Authority (with the exception of the Chief Executive Officer) if the performance of the Authority has been, in the Minister's opinion, unsatisfactory for a significant period of time. The Committee noted that there appears to be no appeal against such a removal.

The Committee suggested that such provisions might operate to militate against the Authority making independent judgments and giving independent advice. They might also undermine the impact of the specific reasons for removal set out in subclauses 21(1) and (2).

Accordingly, the Committee drew Senators' attention to the provision as it may breach principle 1(a)(i) and unduly trespass on personal rights and liberties.

The Minister has responded to these comments as follows:

> It is not considered necessary to include a specific provision creating a right of appeal to a specified body as any aggrieved member already has the right to seek reasons for, and a review of, such a dismissal decision pursuant to the Administrative Decisions (Judicial Review) Act 1977. Pursuant to that Act, the Federal Court has the power to set aside decisions not made in accordance with law. This is considered to be sufficient protection of member's interests.

The Minister goes on to say:

> It is not envisaged that the provision of independent advice would amount to unsatisfactory performance. The provision is linked with such powers as clause 8 which allows the Minister to give general directions to the Authority as to the performance of its functions. If a member of the Board or the Authority generally, without actual misbehaviour, fails to make sufficient effort to comply with the directions, without the Minister's ability to dismiss for continued unsatisfactory performance there would be no sanction for that failure.

The Committee thanks the Minister for this response.

Appointment of Chief Executive Officer
Clauses 49, 53

In Alert Digest No. 2, the Committee noted that clause 49 of the Bill provides for the appointment by the Minister of a Chief Executive Officer of the Authority. This appointment is to be made after the Minister has received a recommendation from the Authority. Pursuant to subclause 49(2), the appointment is to be for a period not exceeding 5 years.

The Committee noted that clause 53 of the Bill states that the Chief Executive Officer holds office 'during the Authority's pleasure'. The Committee indicated that this would appear to be at odds with clause 49, as there would appear to be scope for the authority to terminate, at any time, the appointment of a Chief Executive Officer duly appointed by the Minister for a term of up to 5 years. Accordingly, the Committee sought from the Minister an explanation of the relationship between the two clauses.

The Minister has responded as follows:

> I do not believe that clauses 49 and 53 are inconsistent. They reflect the Government's view, already given effect to in recent amendments to the Federal Airports Corporation Act 1986 and the Civil Aviation Act 1988, that the Minister, as direct representative of the government and sole 'shareholder', ought to be personally involved in the process of appointment of the Chief Executive. The Authority is, however, responsible for the subsequent performance of the Chief Executive and should have the ability to exercise that responsibility fully, including the ability to terminate the appointment.

The Committee thanks the Minister for this response.

Delegation of power
Clause 58

In Alert Digest No. 2, the Committee noted that clause 58 provides that the Authority may delegate to 'a person' any or all of its powers under the Bill. Unlike clause 57, which provides for the persons or classes of persons to whom the Minister can delegate various of his or her powers under the Bill, there is no limitation as to the persons or classes of persons to whom powers can be delegated. The Committee noted that there is nothing in either the Bill or the Explanatory Memorandum to explain the need for a power to delegate of this width.

The Committee has on numerous occasions pointed out that delegations to 'a person' are inappropriate. Accordingly, the Committee drew the provision to Senators' attention as it may breach principle 1(a)(iv) and constitute an inappropriate delegation of legislative power.

The Minister's response to the Committee indicates that the explanation for this broad delegation was inadvertently omitted from the Explanatory Memorandum to the Bill. As a result, a correction has been prepared, for tabling in the Budget Sittings. The Minister has provided the Committee with a copy of that document, which says, in part:

> The scope of delegation has been made deliberately flexible to allow for some of the technical functions to be delegated to such persons as State/Territory officials, officials of overseas marine administrations or even, where appropriate, to non-governmental professional persons.

The Committee thanks the Minister for providing it with this document and for his response to the comment made by the Committee. While the Committee understands and accepts the need for flexibility which the Minister has identified, the Committee

is still concerned that the power to delegate contained in clause 58 of the Bill is open-ended. In this regard, it might be more acceptable if there were some limit on the powers which the Authority can delegate under the clause.

COMMONWEALTH SERUM LABORATORIES (CONVERSION INTO PUBLIC COMPANY) BILL 1990

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Community Services and Health.

The Bill proposes to establish the Commonwealth Serum Laboratories (CSL) as a company and to provide for CSL to be registered as a company incorporated under the Companies Act 1981. The Bill provides that, on transition, each staff member of CSL would become an employee of the company on the same terms and conditions as applied to his or her employment by the statutory authority.

The Bill was the subject of a general comment in Alert Digest No. 2 of 1990. A response has now been provided to that comment. Relevant parts of the response are discussed below. A copy of the response is also attached to this report.

General comment
Annual report

In Alert Digest No. 2, the Committee noted that this Bill is substantially similar to the Commonwealth Serum Laboratories (Conversion into Public Company) Bill 1989, which the Committee originally commented on in Alert Digest No. 17 of 1989 (29 November 1989). In Alert Digest No. 17, the Committee observed that CSL is required, under the existing legislation, to make an annual report to the Parliament. However, under the proposed legislation there is no such requirement. An annual report will, of course, have to be made and lodged with the appropriate Corporate Affairs Commission in order to comply with the Companies Act 1981.

In Alert Digest No. 17, the Committee recognised that once lodged with the Corporate Affairs Commission the annual report of CSL would be a public document but nevertheless requested that the Minister take appropriate steps to ensure that it is tabled in the Parliament.

In a letter dated 19 April 1990, the (then) Minister for Housing and Aged Care, Mr Staples, advised the Committee that, if the Government was re-elected, it was intended that the annual reports of CSL would be tabled in the Parliament. However, in Alert Digest No. 2 the Committee noted that, like its predecessor, the current Bill contains no formal requirement to do so. Consequently, the Committee thanked the Minister for the assurance that the annual report of CSL would be tabled in the Parliament but indicated that it would be preferable if a formal requirement to do so was contained in the legislation.

Given the introduction of the new procedures for regular and enhanced scrutiny by the Senate's legislative and general purpose standing committees of annual reports tabled in the Senate (pursuant to the Senate's resolution of 14 December 1989), the *Committee said it was preferable that a formal requirement* to table such annual reports be contained in legislation, so as to guarantee that this regular and enhanced scrutiny will continue to take place.

A response to this comment was provided to the secretary of the Committee by way of a letter from the Department of Community Services and Health dated 10 July 1990. That letter indicates that the Minister has instructed that an amendment be prepared to account for the Committee's concerns. The letter goes on to say that it is expected that the amendment can be incorporated prior to the passage of the legislation, which is expected to be in the Budget Sittings.

The Committee thanks the Minister for the response and for acting on the Committee's concerns.

Barney Cooney
(Chairman)

12 September 1990

Minister for Shipping and Aviation Support

The Hon. Bob Collins
for the Northern Territory

Darwin Office
7th Floor, Mitchell Street
Darwin NT 0800
Tel. (089) 819 595
Fax. (089) 813 040

Parliament House
Canberra ACT 2600
Australia
Tel. (06) 277 7040
Fax. (06) 273 4572

25 JUL 1990

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

Dear Senator Cooney

I am grateful to the Secretary of the Committee for bringing to my attention, in his letter of 23 May 1990, the Committee's comments on the Australian Maritime Safety Authority Bill 1990 ("the Bill").

The Committee has commented on the following clauses of the Bill:

(a) Clause 21 - Termination of Appointment.

(b) Clauses 49 and 53 - Appointment of the Chief Executive Officer (CEO).

(c) Clause 58 - Delegation of Power.

More specifically, on clause 21 the Committee has commented on the lack of an appeal provision in relation to the Minister's ability to terminate the appointment of a member, or indeed all members, of the Authority (except the CEO) where the Minister is of the opinion that the performance of the member or the Authority has been unsatisfactory for a significant period of time.

It is not considered necessary to include a specific provision creating a right of appeal to a specified body as any aggrieved member already has the right to seek reasons for, and a review of, such a dismissal decision pursuant to the *Administrative Decisions (Judicial Review) Act 1977*. Pursuant to that Act, the Federal Court has the power to set aside decisions not made in accordance with law. This is considered to be sufficient protection of member's interests.

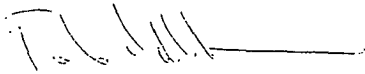
It is not envisaged that the provision of independent advice would amount to unsatisfactory performance. The provision is linked with such powers as clause 8 which allows the Minister to give general directions to the Authority as to the performance of its functions. If a member of the Board or the Authority generally, without actual misbehaviour, fails to make sufficient effort to comply with the directions, without the Minister's ability to dismiss for continued unsatisfactory performance there would be no sanction for that failure.

I do not believe that clauses 49 and 53 are inconsistent. They reflect the Government's view, already given effect to in recent amendments to the *Federal Airports Corporation Act 1986* and the *Civil Aviation Act 1988*, that the Minister, as direct representative of the government and sole "shareholder", ought to be personally involved in the process of appointment of the Chief Executive. The Authority is, however, responsible for the subsequent performance of the Chief Executive and should have the ability to exercise that responsibility fully, including the ability to terminate the appointment.

In relation to clause 58, the explanation for the broad delegation power was inadvertently omitted from the Explanatory Memorandum. A correction has been prepared and will be tabled in the Budget Sittings. A copy is attached for the Committee's information.

The scope of the delegation was deliberately drafted to be broad in order to allow for some of the technical functions to be delegated, as the need arose and in accordance with existing practice, to such persons as State and Territory officials, officialese of overseas marine administrations or even, where appropriate, to non-governmental professional persons.

Yours sincerely



(Bob Collins)

CORRECTION

AUSTRALIAN MARITIME SAFETY AUTHORITY BILL 1990

EXPLANATORY MEMORANDUM

Insert at the end of the Explanatory Memorandum the attached paragraphs 128 to 136 which refer to clauses 58 to 63 inclusive, which were omitted in error.

(Circulated by authority of the Minister
for Transport and Communications,
the Honourable Kim Beazley MP)

12509/90 Cat. No. 90 4510 6

Clause 58 - Delegation by Authority

128. This clause allows the Authority to delegate its powers. The scope of delegation has been made deliberately flexible to allow for some of the technical functions to be delegated to such persons as State/Territory officials, officials of overseas marine administrations or even, where appropriate, to non-governmental professional persons.

Clause 59 - Substitution of Authority for Commonwealth in contracts etc

129. This clause empowers the Minister to substitute the Authority for the Commonwealth in respect of a contract or other instrument relating to the assets of the Authority.

Clause 60 - Publication of directions

130. This clause requires that Ministerial directions under clauses 8, 29 or 38 be notified in the *Gazette* within 21 days.

Clause 61 - Regulations

131. This clause empowers the Governor-General to make regulations.

Clause 62 - Amendments of other Acts

132. This clause provides, in a schedule, for consequential amendments to other legislation as a result of this Act.

133. Most of the amendments are a direct transfer of functions to the Authority under various maritime statutes or a necessary result of such transfer. The opportunity has also been taken to tidy up the power to make Marine Orders, currently appearing in various ways in various places in the *Navigation Act 1912*, into a single section of that Act.

Clause 63 - Actions etc. under provisions amended or repealed

134. Subclause (1) provides that acts done or decisions made under other legislation amended, or repealed and re-enacted, by this Bill are to continue to have effect.

135. Subclause (2) provides that in an instrument kept in effect by subclause (1), references to Secretary and Department are to be read as references to the Authority.

136. Subclause (3) provides that Ministerial orders made under the *Navigation Act 1912*, the *Protection of the Sea (Powers of Intervention) Act 1981* or the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (known collectively as "Marine Orders") are continued in force.

MINUTE

DEPARTMENT OF
COMMUNITY SERVICES
AND HEALTH

Mr S Argument
The Secretary
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Mr Argument

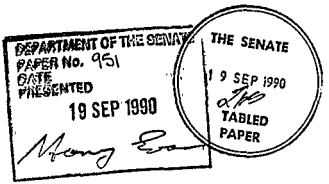
I refer to your letter of 23 May 1990 to the Senior Private Secretary to the Minister for Community Services and Health and to the request in the Scrutiny of Bills Alert Digest of the same date relating to a formal requirement for CSL to table an annual report in Parliament.

The Minister for Community Services and Health has instructed that an appropriate amendment be prepared. Details of a proposed amendment have been forwarded to Attorney Generals for drafting and subsequent inclusion in the Commonwealth Serum Laboratories (Conversion into Public Company) Bill 1990. It is expected that the amendment can be incorporated prior to the passage of the legislation which is expected to be in the Budget Sittings.

Yours sincerely

N G MERSIADES
Principal Advisor
Budget Management Branch

10 July 1990



SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH REPORT

OF

1990

19 SEPTEMBER 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF

1990

19 SEPTEMBER 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator A. Vanstone (Deputy Chairman)
Senator V. Bourne
Senator R. Crowley
Senator I. Macdonald
Senator N. Sherry

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 1990

The Committee has the honour to present its Fifth Report of 1990 to the Senate.

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

Parliamentary Entitlements Act 1990

Patents Bill 1990

PARLIAMENTARY ENTITLEMENTS ACT 1990

The Bill for this Act was introduced into the House of Representatives on 8 May 1990 by the Minister Representing the Minister for Administrative Services.

The Act authorises expenditure to or on behalf of members of the Parliament, including Ministers and Office-Holders of the Parliament, on certain entitlements and validates any payments made in respect of their entitlements before the commencement of the Act. An entitlement listed in Schedule 1 of the Act may be varied or omitted either by reference to the Remuneration Tribunal for determination or by regulation made under the Act.

The Committee commented on the Bill in Alert Digest No. 1 of 1990. The Minister responded to these comments by letter dated 3 September 1990. Though the Act passed both Houses of the Parliament on 16 May 1990, the Minister's response to the Committee's comments is discussed below. A copy of the Minister's letter is also attached to this report.

'Henry VIII' clause
Clause 9

In Alert Digest No. 1, the Committee noted that clause 9 of the (then) Bill is a 'Henry VIII' clause, as it provides for the alteration of the Schedule to the Act by determination of the Remuneration Tribunal or by regulation and also provides that a determination or regulation 'may make such consequential or transitional provisions as are necessary. Any such regulations will, of course, be numbered, published and accessible to the public. The will also be subject to parliamentary tabling and disallowance. Similarly, the

determinations will be subject to the tabling and disallowance provisions of section 7 of the Remuneration Tribunals Act 1973.

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

After setting out some of the background to the legislation, the Minister's response states, in part:

> The Bill as presented to the Parliament did contain some restrictions on the ability of the Remuneration Tribunal to amend the schedules. However, these restrictions were removed by amendment when the Bill was debated in the Senate. The Act now provides that the schedules to the Act which list the benefits provided, may be amended by the Remuneration Tribunal or by regulation rather than by amendment to the Act itself in every case. The schedules list a range of entitlements which are currently available to those persons subject to the Act. Certain of the benefits provided for in the schedules by their nature are intended to be updated from time to time.

The Committee thanks the Minister for this response.

PATENTS BILL 1990

This Bill was introduced into the Senate on 29 May 1990 by the Minister for Industry, Technology and Commerce. According to the Minister's Second Reading Speech, the Bill is a 'reincarnation' of the Patents Bill 1989, which the Committee originally dealt with in Alert Digest No. 8 of 1989.

The Bill proposes to implement the Government's response to the 1984 report of the Industrial Property Advisory Committee entitled 'Patents, Innovation and Competition in Australia'. The Bill proposes a number of amendments to the Patents Act 1952 which would result in a thorough redrafting and re-arrangement of the original Act with the intention of modernising language and avoiding unnecessary complexity. The Bill would also incorporate amendments to the Patents Act relating to extensions of patent term.

The Bill was commented on by the Committee in Alert Digest No. 4 of 1990. The Minister responded to those comments by letter dated 13 September 1990. Relevant parts of the response are discussed below. A copy of the Minister's letter is also attached to this report.

'Henry VIII' clause
Clause 228(2)(t)

In Alert Digest No. 4, the Committee noted that clause 228 of the Bill sets out the matters in relation to which the Governor-General may make regulations under the Bill. In particular, paragraph 228(2)(t) authorises regulations 'modifying the operation of [the Bill] in relation to [Patent Cooperation Treaty] applications ... by excluding, varying or substituting different provisions for specified

provisions of [the Bill]'. The Committee noted that this is what it would generally classify as a 'Henry VIII' clause, as it would allow the Principal Act to be amended by regulation.

Accordingly, the Committee drew Senators' attention to the provision as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> The [Patent Cooperation Treaty] (and its Regulations) provides for the filing of an international patent application wherein the applicant designates those member countries in which the international application is to have effect. Thus, an international patent application has the same effect in each of the designated countries as if a national patent application had been filed in each of those countries.
>
> The PCT regulates in detail the formal requirements with which any international application must comply. It is, by necessity, predominantly procedural in nature as it is required to accommodate the procedures of all countries that can be designated, of which there are currently 43.

Having given this background, the Minister goes on to state:

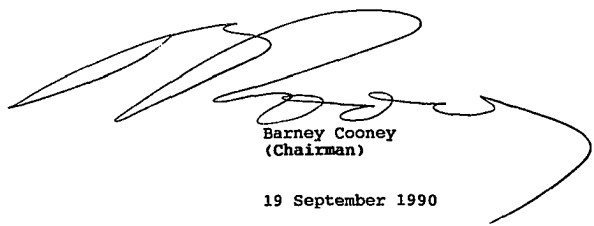
> Whilst the fundamental provisions of the PCT have been included in the Patents Bill 1990 (see, for example, Chapter 8 - PCT Applications and Convention Applications) there is still the possibility that a procedure in the PCT can, or could, in the future, be in conflict with the parallel Australian provisions.
>
> The aim, therefore, of proposed paragraph 228(2)(t) is to make sure that the procedures of the Act can be modified speedily, if need be, so that the PCT applications can proceed in conformity with the procedures in Australia and under the PCT. In the absence of such a mechanism, an applicant for an international patent could be disadvantaged if the application is unable to proceed under Australian

law because of minor procedural differences with the PCT.

The Minister notes that such regulation-making powers are not new, referring to section 58J of the existing Patents Act 1952. While this does not operate to excuse such a provision if it, in fact, breaches the principles which the Committee seeks to enforce, the Committee notes that, in the course of his appearance before the Senate Standing Committee on Industry, Science and Technology (which had the Bill referred to it), the Minister said:

> I can understand what [is being put] as a principle of subordinate legislation generally, but it is to meet international treaty obligations essentially and it has been there for a long time and no finger has been pointed at its abuse in any way.

The Committee thanks the Minister for his response.

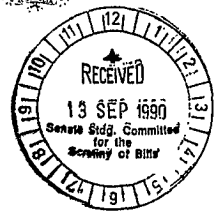


Barney Cooney
(Chairman)

19 September 1990

SENATOR THE HON. NICK BOLKUS
Minister for Administrative Services

Parliament House
Canberra, A.C.T. 2600
Telephone: (06) 277 7600
Facsimile: (06) 273 4124



Senator Barney Cooney
Chairman
Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Mr Cooney

I refer to the letter of 17 May from the Secretary of your Committee requesting a response to the Standing Committee's comments on the Parliamentary Entitlements Bill 1990.

You will be aware that the *Parliamentary Entitlements Act 1990* has had effect from 24 May 1990. The High Court decision in Brown v West placed in doubt the provision of benefits having a pecuniary value unless provided by or under legislation even though the Court was not required to rule on the question. Legal advice provided to the Government was to the effect that it was advisable to ensure that a range of entitlements currently and previously provided to members of the Parliament by the government were provided by legislation.

The Parliamentary Entitlements Act validates all benefits which have been used by or made available to the parliamentary Office Holders including the leaders of the Opposition and to Senators and Members.

The Bill as presented to the Parliament did contain some restrictions on the ability of the Remuneration Tribunal to amend the schedules. However, these restrictions were removed by amendment when the Bill was debated in the Senate. The Act now provides that the schedules to the Act which list the benefits provided, may be amended by the Remuneration Tribunal or by regulation rather than by amendment to the Act itself in every case. The schedules list a range of entitlements which are currently available to those persons subject to the Act. Certain of the benefits provided for in the schedules by their nature are intended to be updated from time to time.

Yours sincerely

NICK BOLKUS

-3 SEP 1990

MINISTER FOR INDUSTRY,
TECHNOLOGY AND COMMERCE
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

15 SEP 1990

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

Dear Senator Cooney

I refer to the Committee's comments concerning the Patents Bill 1990 made in the Scrutiny of Bills Alert Digest No. 4 of 1990 (22 August 1990). The Committee has drawn to Senators' attention that the provisions of proposed new paragraph 228(2)(t) may be considered to be an inappropriate delegation of legislative power.

Paragraph 228(2)(t) provides the regulation making power for regulations modifying the operation of the Patents Act in relation to PCT applications that are treated as patent applications under the Act by excluding, varying, or substituting different provisions for, specified provisions of the Act.

A PCT application is an international application, filed under the multilateral Patent Cooperation Treaty (PCT), in which Australia is specified as a designated State and which has been given an international filing date. Australia is a member of the PCT.

The PCT (and its Regulations) provides for the filing of an international patent application wherein the applicant designates those member countries in which the international application is to have effect. Thus, an international patent application has the same effect in each of the designated countries as if a national patent application had been filed in each of those countries.

The PCT regulates in detail the formal requirements with which any international application must comply. It is, by necessity, predominantly procedural in nature as it is required to accommodate the procedures of all countries that can be designated, of which there are currently 43.

Whilst the fundamental provisions of the PCT have been included in the Patents Bill 1990 (see, for example, Chapter 8 - PCT Applications and Convention Applications) there is still the possibility that a procedure in the PCT can, or could, in the future, be in conflict with the parallel Australian provisions.

The aim, therefore, of proposed paragraph 228(2)(t) is to make sure that the procedures of the Act can be modified speedily, if need be, so that the PCT applications can proceed in conformity with the procedures in Australia and under the PCT. In the absence of such a mechanism, an applicant for an international patent could be disadvantaged if the application is unable to proceed under Australian law because of minor procedural differences with the PCT.

Regulation making powers to this effect are not new - they already exist in section 58J of the existing Patents Act 1952 - and regulations are in place which modify the provisions of the Act as they relate to matters such as the refund of a fee required to be refunded under the PCT and the period within which an annual maintenance fee for an application is due to be paid in Australia (see part IVA of the Regulations - International Applications under the Patent Co-operation Treaty).

The provisions of paragraph 228(2)(t) proposed in the Patents Bill 1990 do not represent a change in this policy. It is still desirable, in the light of experience, to have a relatively simple mechanism in place for modifying the operation of the Act in relation to procedures for PCT applications to ensure that these applications can proceed in conformity with patent procedures in Australia and under the PCT.

Yours sincerely

John N Button

(John N Button)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTH REPORT

OF

1990

17 OCTOBER 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF

1990

17 OCTOBER 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator A. Vanstone (Deputy Chairman)
Senator V. Bourne
Senator R. Crowley
Senator I. Macdonald
Senator N. Sherry

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 1990

The Committee has the honour to present its Sixth Report of 1990 to the Senate.

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

Extradition Amendment Act 1990

EXTRADITION AMENDMENT ACT 1990

The Bill for this Act was introduced into the House of Representatives on 22 August 1990 by the Attorney-General. It passed both Houses of the Parliament on 9 October 1990.

The Act amends the Extradition Act 1988 to:

- clarify regulation-making with respect to multi-lateral treaties, bi-lateral treaties and reciprocal arrangements;

- provide a scheme for consent surrender to New Zealand;

- increase police powers in situations where a person does not comply with bail conditions;

- permit Australian magistrates to take evidence overseas; and

- make minor technical changes.

The Committee dealt with the Bill in Alert Digest No. 5 of 1990, without commenting on anything in it. At a later date, however, it was suggested to the Committee that clause 10 of the Bill may contain provisions to which the Committee might draw attention. Having re-considered the provision, the Committee maintained its original view on the Bill. However, out of an abundance of caution, the Committee decided to raise the concern with the Attorney-General by letter.

The Attorney-General responded to the Committee by letter dated 9 October 1990. Though the Bill has, as noted above, now been passed by both Houses and while the Committee has not changed its view on the provision in question, the Committee believes that the content of the Attorney-General's response is of general interest to Senators. As a result, it is briefly discussed below. A copy of the letter is also attached.

Arrest without warrant
Section 10

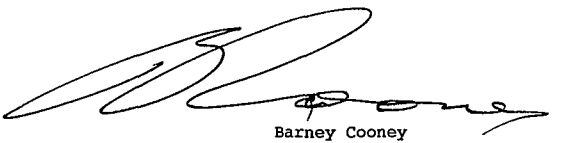
Section 10 of the amending Act inserts a new section 49A into the Extradition Act. It authorises a police officer to arrest without warrant a person who has been released on bail under the Extradition Act if the police officer has

> reasonable grounds for believing that the person has contravened, or is about to contravene, a term or condition of a recognisance on which bail was granted to the person.

In its letter to the Attorney-General, the Committee noted that it pays particular attention to clauses which provide for arrest without warrant and accordingly sought his advice as to the rationale behind the provision in question.

In his response, the Attorney-General indicated that the amendment was designed to 'minimise the chances a person released on bail under the Extradition Act has of escaping the jurisdiction of the court'. Bearing in mind the current procedures governing the issue of a warrant, the Attorney-General's letter refers to the difficulty a police officer would have in arresting, say, a person who the officer knows to be on bail and who is about to board an aircraft headed out of the jurisdiction. The amendment will enable an officer to arrest the person in such circumstances.

The Committee thanks the Attorney-General for this explanation, which has confirmed the Committee's views on the provision. The Committee also notes that, in any event, new subsection 49(2) requires that a person arrested without warrant pursuant to subsection (1) must 'as soon as practicable' be brought before the court which originally granted the person bail. As a result, the possibility of personal rights and liberties being adversely affected is minimised.



Barney Cooney
(Chairman)

Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

CLE89/6644

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

9 OCT 1990

Dear Senator Cooney

EXTRADITION AMENDMENT BILL 1990

I refer to your letter of 20 September 1990 concerning clause 10 of the Bill. Your Committee seeks the rationale for this provision which would allow police officers, in certain circumstances, to arrest without warrant a person released on bail under the Extradition Act 1988.

The amendment is designed to minimize the chances a person released on bail under the Extradition Act has of escaping the jurisdiction of the court. Currently police officers have to obtain warrants where they suspect the person has or is about to contravene a bail condition.

For example, presently a police officer cannot arrest a person without warrant even if the person is about to board a plane at an airport and the police officer knows that the person was released on bail under the Extradition Act and that by boarding the plane (or even being at the airport) the person would be breaching a condition of his or her bail. Of course, by the time the officer could obtain the warrant the person would no doubt have left Australia. The proposed amendment will enable arrest to occur in these circumstances.

You will, of course, be aware that the courts have held that State bail laws do not apply in extradition cases because the Commonwealth has evinced a legislative intention to cover this field. The proposed provision enacts a Commonwealth law which is consistent with State bail laws such as s.24(1) Bail Act 1977 (Vic); s.50(1) Bail Act 1978 (NSW); s.54(2)(a) Bail Act 1982 (WA); s.18(2) Bail Act 1985 (SA); s.35(6) Justice Act 1959 (Tas); s.29(1) Bail Act 1980 - 1982 (Qld); s.38(1) Bail Act 1982 (NT) and ss.347, 358AI and 352(2) Crimes Act 1900 (NSW) As amended in its application in the A.C.T by Laws of the Territory.

Yours sincerely

MICHAEL DUFFY

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

1990

7 NOVEMBER 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

1990

7 NOVEMBER 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator A. Vanstone (Deputy Chairman)
Senator V. Bourne
Senator R. Crowley
Senator I. Macdonald
Senator N. Sherry

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 1990

The Committee has the honour to present its Seventh Report of 1990 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 24:

Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1990

Excise Tariff Amendment Bill 1990

Petroleum Excise (Prices) Amendment Bill 1990

Taxation Laws Amendment (Foreign Income) Bill 1990

CRIMES (TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES) BILL 1990

This Bill was introduced into the House of Representatives on 22 August 1990 by the Attorney-General. It is identical in substance to a Bill of the same name which was introduced on 2 November 1989.

The Bill proposes to meet Government obligations under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as part of the process of ratifying the Convention. Most provisions of the Convention falling within Commonwealth responsibility are covered by existing legislation, with this Bill's main purpose being to extend Australia's extra-territorial jurisdiction in accordance with Article 4 of the Convention.

The Committee dealt with the Bill in Alert Digest No. 5 of 1990, in which it reiterated the concerns it originally expressed in Alert Digest No. 16 of 1989. The Attorney-General responded to those concerns by letter dated 3 October 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

What is `a reasonable time'? Clause 16

In Alert Digest No. 5 of 1990, the Committee noted that subclause 16(2) of the Bill provides that prosecutions under the Bill are only to be instituted with the consent of the Attorney-General. However, a person may still be charged, arrested, remanded in custody or on bail where the consent has not been given. The Committee noted that a similar provision exists in the Crimes (Hostages) Act 1988 and that the Explanatory Memorandum states that the subclause is

intended to allow 'preliminary steps' to be taken prior to the Attorney-General giving consent.

Subclause 16(3) of the Bill states that subclause 16(2) does not prevent the discharge of the accused if proceedings are not continued within 'a reasonable time'. However, as the Committee originally noted in Alert Digest No. 16 of 1989, what constitutes a reasonable time is not disclosed in the Bill. As that time, the Committee requested that the Bill be amended to provide some guidance on what constitutes 'a reasonable time'. As the Committee noted in Alert Digest No. 5, the Bill which is currently before the Parliament contains no such guidance.

Accordingly, the Committee drew Senators' attention to the provision as possibly trespassing unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Attorney-General's response indicates that, in his view, it would be unwise to provide statutory guidelines on what constitutes 'a reasonable time'. His letter gives two reasons:

> First, the reasonable time contemplated here does not necessarily mean the time during which a person is suffering loss of liberty and, therefore, the important issues that arise in the matter of detention before charge do not necessarily arise. The consent contemplated by clause 16 would usually be given at some stage after an accused has been charged and is on remand, either on bail or in custody, and it is highly probable that lack of consent by the Attorney-General would not be a factor when a magistrate or local justice was deciding on the question of bail.
>
> Secondly, Australian courts are very familiar with legislative expressions such as 'reasonable time' and are well able to decide what constitutes a reasonable time in the light of the particular circumstances of the case. What constitutes a reasonable time in one case will differ, sometimes markedly so, from that which constitutes a

> reasonable time in another and I believe that this is the sort of issue which is best left to the courts to interpret so that the necessary balance may be struck, taking into account the factors arising in each case.

To illustrate the second point, the Attorney-General noted that

> [t]here may, for example, be instances where an arrest has been made as a result of an overseas investigation and time may be needed to bring the evidence to Australia, thereby requiring a mutual assistance request from a foreign country. In such circumstances it would be unwise to attempt to place time constraints upon the prosecution as a result of statutorily imposed guidelines as to what constitutes a reasonable time.

The Committee thanks the Attorney-General for this response.

Reversal of onus of proof
Clause 17

The Committee noted in Alert Digest No. 5 that clause 17 contains a reversal of the onus of proof. It provides that a person who possesses or imports a trafficable quantity of drugs is presumed to have the drugs for 'the purpose of sale or supply'. Though the presumption is explicitly rebuttable, the clause reverses the onus of proof, as it would normally be incumbent on the prosecuting party to prove such a matter.

The Committee drew Senators' attention to the clause as possibly unduly trespassing on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Attorney-General's response emphasises the fact that the presumption in clause 17 is explicitly rebuttable. The Attorney-General notes that

> [s]uch rebuttal could be achieved by the leading of evidence in court of facts which are peculiarly within the knowledge of the accused. Evidence of the intended personal consumption of the drugs, for example, is the sort of evidence peculiarly within the knowledge of the accused which can be adduced by the accused to rebut the presumption.

The response goes on to state:

> In the absence of such a presumption, the prosecution would have to go to great lengths, involving perhaps difficult and expensive investigations, to adduce sufficient evidence to satisfy a jury beyond reasonable doubt that an accused's possession, importation or exportation of the drugs in question was for the purpose of sale or supply. Before a jury can convict an accused of possession for sale or supply, it must be satisfied beyond reasonable doubt that the accused had the intention, or *mens rea*, to do so and to discharge this burden the prosecution would, in the absence of the presumption, have to adduce evidence of, say, arrangements for the buying, selling and distribution of drugs and, in doing so, may well have to offer indemnities from prosecution to co-accused. It is clear, therefore, that the provision of the presumption in clause 17 operates to negate the need for difficult and expensive investigations to be undertaken by the prosecution in bringing an accused to justice on charges of sale or supply.

The Committee thanks the Attorney-General for this response and for his assistance with the concerns raised by the Committee in relation to the Bill.

EXCISE TARIFF AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Small Business and Customs.

The Bill proposes to:

- provide the facility for the determination of different VOLWARE prices for different oil producing regions;

- alter the duty on naturally occurring liquefied petroleum gas, effective from 1 April 1990; and

- effect a technical correction to the definition of 'new oil', to ensure that oil produced from two reservoirs in Bass Strait since 1 July 1980 and excisable at the 'old' oil rate, does not inadvertently become 'new oil' and subject to a free rate of duty.

In Alert Digest No. 8 of 1990, the Committee commented on certain provisions within the Bill. The Minister for Small Business and Customs has responded to those comments by letter dated 6 November 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclauses 2(2) - (5)

In Alert Digest No. 8, the Committee noted that subclauses 2(2) - (5) of the Bill would make the amendments proposed by various clauses retrospective to various specified dates,

some as far back as 1 July 1984. The Explanatory Memorandum to the Bill and the Minister's Second Reading speech acknowledge that the provisions are prejudicial to persons other than the Commonwealth. The Committee noted that the Second Reading speech states that the effect of the retrospective application of the amendments will be that

> [i]n effect, what has been paid will ... be the correct amount of duty payable.
>
> All producers had accepted the pre July 1983 classification arrangements and associated decisions and paid excise at the appropriate rate without protest from that time up until 1 March of this year. For that reason, the Government considers any changes made now to the 'new' oil definition that have the effect of ensuring that the oil classifications made prior to 1 July 1983 remain binding should be seen as 'declaratory' in nature - that is, the changes will only ratify what the industry and Government had always expected to have been the legal position.

Having referred to this explanation, the Committee made no further comment on the Bill. However, the Committee's attention was subsequently drawn to matters raised in the Second Reading debate in the House of Representatives (see House of Representatives, Hansard, 17 October 1990, pp 3013-42) and in the press which suggested a different situation to that described by the Second Reading speech.

In addition, on 2 November 1990, the Chairman of the Committee received a letter from BHP Petroleum who, with Esso, have a substantial interest in the matters dealt with by the Bill. For the information of Senators a copy of that letter is attached to this report. Briefly, the letter makes two relevant points. First, BHP Petroleum have told the Committee that they

> have always said, and believed, that the oil concerned should have been classified as 'new oil'. But we have been constrained by officials' determination, over the years, to accept their version.

Secondly, BHP Petroleum advise that they currently have a case before the Administrative Appeals Tribunal in which they are disputing their liability to pay excise at the higher rate, on the basis that (in their view) the oil in question is 'new' rather than 'old'. Bearing this in mind, BHP Petroleum suggest that the Bill

> is obviously intended to close off the legal argument we are putting to the Administrative Appeals Tribunal while the case is part heard.

They go on to say:

> It is the Government's attempt to dispose of our claims through legislation which causes us to protest. This legislation will retrospectively alter a basic element of the petroleum taxation regime under which we have operated since 1975.

The BHP Petroleum letter concludes by making three final points. They submit that:

- The proposed legislation is an unfair and unwise attempt to dispose of legitimate claims retrospectively. Such a precedent should be most unwelcome in the Statute Book.

- This legislation is not, as stated in the Second Reading Speech, a "technical correction to the definition of 'new oil'". Nor is it just 'declaratory' of an earlier position. It has much wider implications for all Australian businesses than that, because it is designed to correct earlier legislation, the ramifications of which were evidently inadequately appreciated by the Government. Those who correctly interpret the law can no longer be secure in the belief that they can prudently act on that interpretation - at least, that is, until a court determines otherwise.

- We therefore seek at least the opportunity to have our claims heard in the proper and relevant tribunal without them being quashed by legislation and thus never heard.

The Minister's response to the Committee's comments in Alert Digest No. 8 also addresses most of the points raised by BHP Petroleum. Briefly, the Minister states:

> It is clear that all parties, the Government and the producers, had accepted that from January 1980 the oil from the Tuna L and T 0.5 wells were excisable as old oil. No review, appeal or challenge to the excise liability of oil on this basis was made at the time of payment, which the parties apparently accepted was the correct and proper liability of the oil.
>
> It is now known that the legislation which purported to effect this status was defective. Accordingly the excise paid at the 'old oil' rate, while in accordance with the legislative intention and the producers understanding of their liability, in fact exceeded that payable under the law.

The Minister states:

> It is noteworthy, however, that no challenge was ever made to the validity of the legislation, or more importantly to the correctness of the demand of excise, even though the Act gives producers clear rights and mechanisms to do so where liability to excise is in dispute. The proposed amendment, therefore, while it is retrospective in its operation and as such removes rights that parties may have, may be properly characterised as curative, and merely effecting a correction of a technical defect in the 1984 legislation which has hitherto not been challenged by the producers.

The response goes on to state:

> In reality, however, the amendment does not expose the producers to any new liability other than that which they had understood they were subject to, and will not require any additional payments of excise from them. Accordingly, the proposed amendment, if carried, will not create any additional impost on the public, but would merely close a loophole which would otherwise lead to a substantial unearned windfall.

It is evident to the Committee that various issues canvassed above are matters of contention between the Minister, on the one hand, and BHP Petroleum, on the other. On the material before it, the Committee is unable to express a concluded view on these matters. Indeed, it is probably inappropriate that the Committee express such a view in this situation. However, as the Committee noted in Alert Digest No. 8, the proposed amendments are clearly retrospective in their operation and it is for this reason that the provisions are drawn to Senators' attention.

The Committee thanks the Minister for his response to the Committee's original comment and for providing further background information on the legislation. The Committee also thanks BHP Petroleum for their letter. Since both contributions to the Committee are published with this report, the Committee trusts that the Senate will be better informed when the time comes to debate this Bill and can reach such conclusions as are necessary with the benefit of this information.

PETROLEUM EXCISE (PRICES) AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the Petroleum Excise (Prices) Act 1987 to widen the definition of oil producer to include onshore producers. The Bill would also amend the Principal Act to enable the calculation of separate volume weighted average realised prices for excise purposes for the Bass Strait oil producing region and for the Jackson producing region. The Bill also provides for the description of each producing region to be prescribed in the Regulations to the Act. Other minor technical changes are also proposed.

The Committee commented on the Bill in Alert Digest No. 2 of 1990. The Minister for Resources responded to the Committee's comments by letter dated 3 July 1990. A copy of that letter is attached to this report. Relevant parts of the Minister's response are also discussed below.

Retrospectivity
Clause 2

The Committee noted in Alert Digest No. 2 that clause 2 of the Bill provides that the amendments proposed by the Bill are to be retrospective to 26 December 1987, the date of commencement of the Principal Act, the Petroleum Excise (Prices) Act 1987. The Explanatory Memorandum to the Bill states that this is to correct certain inequities in excise liabilities between offshore and onshore oil producers. The Committee observed that, in addressing this imbalance, the provisions would appear to impose retrospectively on those

oil producers who have been subject to excise at the lower rate an additional burden which they probably had not contemplated.

Accordingly, the Committee drew the clause to Senators' attention as possibly involving a breach of principle 1(a)(i) of the terms of reference and unduly trespass on personal rights and liberties.

The Minister has responded as follows:

> The amending Bill is a consequence of changes to the crude oil excise tax policy announced by the Government in June 1987. That policy included the removal of excise on the first 30 million barrels of cumulative crude oil production from onshore fields. The amending Bill gives a legal basis for procedures which will enable the collection of excise on crude from onshore oil fields, such as the Jackson field in south-west Queensland. It provides for the calculation of volume weighted average realised (VOLWARE) prices for the crude oil produced, (once the field exceeds the 30 million barrel limit) so that the necessary excise can be collected.

The Minister goes on to assure the Committee that the Bill

> does not involve a new tax, nor does it impose retrospectively any additional excise burden on the Bass Strait producers.

The Committee thanks the Minister for this assurance and for his response.

TAXATION LAWS AMENDMENT (FOREIGN INCOME) BILL 1990

This Bill was introduced into the House of Representatives on 13 September 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend the Income Tax Assessment Act 1936 to introduce an accruals system of taxing certain foreign source income derived in low-tax countries by Australian-controlled entities and accumulated off-shore, effective from he beginning of the 1990-91 income year.

In Alert Digest No.6 of 1990, the Committee raised several concerns in relation to the Bill. The Parliamentary Secretary to the Treasurer has responded to those concerns in a letter dated 6 November 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Reversal of the onus of proof
Clauses 18 and 49

In Alert Digest No. 6, the Committee noted that clause 18 of the Bill would insert into the Income Tax Assessment Act 1936 a new division 6AAA, with special provisions relating to non-resident trust estates. Proposed new section 102AAZG sets out certain requirements concerning the keeping of records in relation to trust estates. Proposed subsection 102AAZG(2) makes it an offence not to keep such records.

Proposed new subsection 102AAZG(4) provides a series of defences to the offence provision, based on the taxpayer having no reasonable grounds to suspect that the requirements of the section were applicable, not knowing that they were applicable (having made all reasonable

efforts to ascertain whether they applied) or having made reasonable efforts to obtain the information required. However, as the Committee observed in Alert Digest No. 6, the Explanatory Memorandum states that a person attempting to rely on the defences contained in subsection (4) will carry the onus of proving that reasonable grounds existed or that reasonable efforts had been made.

The Committee noted that clause 49 would insert a new Part X into the Income Tax Assessment Act 1936, to make certain amounts part of a taxpayer's assessable income. Proposed new section 464 requires that certain records be kept. Failure to keep such records is an offence pursuant to proposed new section 465. Proposed new section 467 contains some 'reasonable excuse' defences but, as with clause 18, the Explanatory Memorandum states that the onus of proving such reasonable excuse lies with the taxpayer.

The Committee also noted that clauses 18 and 49 contain similar provisions in relation to the keeping of records by partnerships. A defence to the relevant offence provision is provided in each case if the partner does not aid, abet, counsel or procure the act or omission constituting the offence and was not knowingly concerned in or party to the commission of the offence. However, the Explanatory Memorandum puts the onus of proof on the taxpayer in each case.

The Committee noted that all of the provisions referred to effectively reverse the onus of proof, requiring the taxpayer to prove matters which would normally be considered to be matters for the prosecuting party to prove. Accordingly, the Committee drew Senators' attention to the provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Parliamentary Secretary to the Treasurer has responded as follows:

> Proposed subsection 102AAZG(2) makes it an offence not to keep certain records. The onus of proving the offence is clearly on the Crown.
>
> Proposed new subsection 102AAZG(4) provides the taxpayer with certain statutory defences once the offence has been established by the Crown. The Explanatory Memorandum merely states the common law position that the taxpayer has to conduct his or her defence. Only the taxpayer will be aware of the matters relating to the defence.
>
> It is common for the onus of proof to be placed on the taxpayer to establish his or her defence in these cases - for example, subsection 8L(2) of the Taxation Administration Act 1953.
>
> The same comment as for the effect of clause 18 applies to clause 49.

The Parliamentary Secretary concludes by noting:

> In each case, the Crown must prove the commission of the offence. Once that has been established, the taxpayer is only required to establish that any one of the defences available is satisfied.

The Committee thanks the Parliamentary Secretary to the Treasurer for this response.

Retrospectivity
Clauses 51, 52 - 59, 60 and 61

In Alert Digest No. 6, the Committee noted that clause 51 of the Bill contains a series of provisions which give various proposed amendments a retrospective effect. Clauses 52-59 also involve retrospectivity. The retrospectivity involved, in each case, appears to have the potential to operate prejudicially on taxpayers.

Clause 60 of the Bill provides that the first regulations made for the purposes of a provision inserted into the Income Tax Assessment Act 1936 by the Bill may be expressed:

(a) to have been in effect at all relevant times before the date of notification of the regulations; or

(b) to apply in relation to a period any part of which occurred before the date of notification of the regulations; or

(c) to take effect from:

(i) a specified date; or
(ii) a specified time on a specified date;

before the date of notification of the regulations.

The power is expressly limited to the first regulations made for the purposes of a provision inserted into the Principal Act by the Bill. However, the Committee noted that this power to make such regulations could be exercised to make regulations going back for an unspecified period of time.

The Explanatory Memorandum to the Bill (at page 414) states that clause 60 is inserted to negate the effect of the operation of section 48 of the Acts Interpretation Act 1901, which provides that regulations take effect from the date of their notification in the Gazette or from a specified date. However, subsection 48(2) goes on to state that regulations expressed to take effect prior to notification and which (a) prejudicially affect or (b) impose liabilities on persons other than the Commonwealth or its agencies shall be void and of no effect. The Explanatory Memorandum acknowledges the content and effect of subsection 48(2) in asserting that the effect of clause 60 is to ensure that any regulations made may operate prior to the date of notification in the Gazette.

Clause 61 of the Bill provides that nothing contained in section 170 of the Income Tax Assessment Act 1936 (which sets out the conditions governing the amendment of assessments), will prevent the amendment of an assessment made before the commencement of the Bill, if made for the purpose of giving effect to the Bill. Inter alia (and subject to specified exceptions), section 170 limits the time within which the Commissioner of Taxation can issue an amended assessment.

The Committee noted that the retrospective provisions referred to above all involve the possibility of taxpayers' rights being prejudicially affected. In addition, the Committee indicated that the explicit over-riding of section 48 of the Acts Interpretation Act 1901 was a matter which caused it particular concern. Accordingly, the Committee drew Senators' attention to the provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

In relation to the Committee's comments on clauses 51 and 52 - 59, the Parliamentary Secretary to the Treasurer has responded as follows:

> The accruals tax measures contained in the Bill have been the product of a lengthy consultative process that commenced in May 1988. These measures have been designed primarily to counter the avoidance of Australian tax through the accumulation of income in foreign entities that are controlled by resident taxpayers.
>
> The Bill also incorporates measures to exempt from tax, with effect from the 1990-901 income year, non-portfolio dividends received by Australian companies from companies in listed countries.
>
> In introducing measures of this kind subject to a consultative process, it is necessary to ensure that the time taken up in the consultative process is not used by some taxpayers to put in place arrangements designed to avoid the intended impact of the proposed measures.

In the absence of anti-avoidance provisions that have effect from the date of announcement of the proposed exemption, it would be quite easy for taxpayers to avoid these measures by channelling all their income that was accumulated in tax haven entities to companies in listed countries. The income could then be distributed to Australian corporate shareholders free of Australian company tax.

Alternatively, the income accumulated in CFCs in low-tax countries could have been made available for the use of companies resident in listed countries or in Australia without being distributed in the form of dividends.

Having given this background, the Parliamentary Secretary goes on to say:

Clauses 52 and 54 to 59 and some of the provisions of clause 51 seek to close the tax avoidance avenues. Their retrospective application is the inevitable consequence of the lengthy consultative process and is essential to protect the integrity of the proposed measures. The Government has already moved the earliest date from which the anti-avoidance provisions operate from 12 April 1989 to 1 July 1989 to allow taxpayers extra time to become aware of their obligations.

The proposed measures for the taxation on an accruals basis of certain income of controlled foreign companies are to apply only to the profits of those companies that are derived in accounting periods commencing on or after 1 July 1990. The provisions relating to the attribution of income from non-resident trusts are to apply for the 1990-91 income year and for subsequent income years.

Clause 52 provides the rules for the computation of the pre 1990-91 losses that a taxpayer will be able to offset in calculating the attributable income of a CFC for the 1990-91 and subsequent years of income. Since it extends a concessional treatment to the taxpayer there is no trespass on the taxpayer's rights.

The Committee thanks the Parliamentary Secretary to the Treasurer for this response.

In relation to the Committee's concerns about clause 60, the Parliamentary Secretary to the Treasurer has made the following comments:

> Clause 60 provides that the first regulations made for the purpose of a provision contained in the Bill may be expressed to have effect from a date before the date of notification of the regulations. The dates from which the regulations are to take effect are set out in [the attachment to this response, a copy of which appears at the end of this report]. The current approach of using regulations was adopted as it would facilitate flexibility and timely amendments where considered necessary.
>
> The need for the retrospective operation of certain provisions of this Bill has been explained [above]. The regulations are essential for the operation of the proposals in the legislation as they provide particulars of the listed countries and designated concessions. Accordingly, to give effect to the proposals in the Bill, it is essential that the regulations should have effect from a date before the date of notification in the Gazette.
>
> A text of the draft regulations was included in the Explanatory Notes to the Draft Bill published in June 1990 so that taxpayers would be aware of the general thrust of the proposed regulations. In fact the countries that are listed in the draft regulations are the same as those that were proposed for listing as early as 12 April 1989.
>
> As an alternative drafting measure, the first set of regulations could have been included in the Bill with power to amend them by regulations.

The Committee thanks the Parliamentary Secretary to the Treasurer for this response, which provides useful background on the reasoning behind the proposed amendment and the need (in the Government's opinion) for retrospective operation. However, the response does not specifically address the Committee's in principle objection to the over-riding of section 48 of the Acts Interpretation Act which, as far as the Committee has been able to ascertain, appears to be an unusual step. The Committee, therefore, retains its concern about the provision and continues to draw the provision to the attention of Senators.

In relation to the Committee's comments on the amendments proposed by clause 61 of the Bill, the Parliamentary Secretary to the Treasurer has provided the following response:

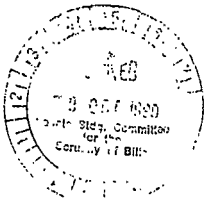
> The main effect of this provision will be to enable the amendment of an assessment to reduce the tax payable on certain non-resident trust distributions which, when the Bill is enacted, will be taxable at a concessional rate of tax of 10 per cent. Clause 61 will also enable the taxation of certain deemed dividends as an anti-avoidance measure.
>
> The Bill will otherwise apply only to assessments that relate to the income year 1990-91 and for subsequent income years.

The Committee thanks the Parliamentary Secretary to the Treasurer for this response.

In the past, the Committee has found it necessary to comment unfavourably on the fact that its concerns in relation to taxation bills and other legislation emanating from the Treasurer's portfolio have, with very few exceptions, gone unanswered. This has tended to result in the Committee continuing to draw Senators' attention to any provisions causing concern, as the Committee has been denied the possibility of having matters of concern clarified by the Minister responsible for the legislation. The Committee is, therefore, pleased to receive a response in relation to this Bill, as the Committee and, ultimately, the Senate can only benefit from having access to such additional information. Accordingly, the Committee again thanks the Parliamentary Secretary to the Treasurer for his response and looks forward to receiving further assistance of this type from the Treasury portfolio.

Barney Cooney
(Chairman)

Attorney-General



The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

- 3 OCT 1990

CLE89/18542

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

Dear Senator Cooney

I have been invited to respond to comments made by the Scrutiny of Bills Committee in Alert Digest No 5 of 1990 in relation to the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1990.

Clause 16 - What is a reasonable time ?

The first issue which the Committee raises is the meaning of the words "a reasonable time" in clause 16. The Committee notes that the bill does not disclose what constitutes a reasonable time between the charging of a person and the commencement of committal proceedings and requests that the bill be amended to provide some guidance on the matter.

In my view, it would be unwise to provide statutory guidelines on what constitutes "a reasonable time" for a number of reasons. First, the reasonable time contemplated here does not necessarily mean the time during which a person is suffering loss of liberty and, therefore, the important issues that arise in the matter of detention before charge do not necessarily arise. The consent contemplated by clause 16 would usually be given at some stage after an accused has been charged and is on remand, either on bail or in custody, and it is highly probable that lack of consent by the Attorney-General would not be a factor when a magistrate or local justice was deciding on the question of bail.

Secondly, Australian courts are very familiar with legislative expressions such as "reasonable time" and are well able to decide what constitutes a reasonable time in the light of the particular circumstances of the case. What constitutes a reasonable time in one case will differ, sometimes markedly so, from that which constitutes a reasonable time in another and I believe that this is the sort of issue which is best left to the

courts to interpret so that the necessary balance may be struck, taking into account the factors arising in each case
There may, for example, be instances where an arrest has been made as a result of an overseas investigation and time may be needed to bring the evidence to Australia, thereby requiring a mutual assistance request from a foreign country. In such circumstances it would be unwise to attempt to place time constraints upon the prosecution as a result of statutorily imposed guidelines as to what constitutes a reasonable time.

Clause 17 - Reversal of the onus of proof

The Committee's second comment relates to clause 17 of the Bill, which creates a statutory presumption that a person who possesses, imports or exports a traffickable quantity of drugs is presumed to have the drugs for the purpose of sale or supply.

Clause 17 provides that the presumption is rebuttable. Such rebuttal could be achieved by the leading of evidence in court of facts which are peculiarly within the knowledge of the accused. Evidence of the intended personal consumption of the drugs, for example, is the sort of evidence peculiarly within the knowledge of the accused which can be adduced by the accused to rebut the presumption.

In the absence of such a presumption, the prosecution would have to go to great lengths, involving perhaps difficult and expensive investigations, to adduce sufficient evidence to satisfy a jury beyond reasonable doubt that an accused's possession, importation or exportation of the drugs in question was for the purpose of sale or supply. Before a jury can convict an accused of possession for sale or supply, it must be satisfied beyond reasonable doubt that the accused had the intention, or *mens rea*, to do so and to discharge this burden the prosecution would, in the absence of the presumption, have to adduce evidence of, say, arrangements for the buying, selling and distribution of drugs and, in doing so, may well have to offer indemnities from prosecution to co-accused. It is clear, therefore, that the provision of the presumption in clause 17 operates to negate the need for difficult and expensive investigations to be undertaken by the prosecution in bringing an accused to justice on charges of sale or supply.

Yours sincerely

MICHAEL DUFFY

Minister for Small Business and Customs
The Hon. David Beddall, MP

6 NOV 1990

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

Dear Senator Cooney

I am writing in response to the Scrutiny of Bills Alert Digest No.8 of 1990, dated 17 October 1990, which contained comments by the Senate Standing Committee for the Scrutiny of Bills on amendments to the Excise Tariff Act, with particular reference to subclause 2(2) of the Excise Tariff Amendment Bill 1990. That subclause retrospectively amends the definition of 'new oil' to 1 July 1984. I take this opportunity to offer the following information for the Committee's consideration of the proposed amendments.

The background to the proposed amendment is as follows :

- In January 1980 Esso Australia Ltd on behalf of itself and Hematite Petroleum Pty Ltd (the producers) sought a declaration from Government that oil produced from a number of specified discrete zones in the Tuna field discovered during development drilling be classified as new oil. If so classified oil from such zones would have been eligible, in accordance with Excise By-law No. 78, for entry at a concessional rate of duty under item 17(A)(i) of the Schedule to the Excise Tariff Act (the Act) as stabilized crude petroleum oil as prescribed by Departmental by-laws;

- By correspondence dated 29 August 1980 the producers were advised that the then Minister for National Development and Energy had decided that since the zones were discovered during development drilling, they did not qualify for new oil pricing. The reasons for the decision was that By-law 78 applied to "discovery" and not "developmental" wells. The producers did not challenge this decision ;

Parliament House, Canberra, A.C.T 2600. Telephone: (06) 277 7080 Facsimile: (06) 273 4571

- On 1 July 1984 the Act was amended by Excise Tariff Amendment Act (No.2) of 1984 which, inter alia, introduced the following definition in section 3 of the Act:

  "new oil" *means stabilized crude petroleum oil (other than delayed entry oil or oil in respect of which paragraph 17(A)(1) in the Schedule applies) produced from a new area;*

- On 20 September 1984 the then Minister for Resources and Energy issued a press statement to the effect that under the 1 July 1984 definition of 'new oil' previous determinations as to the status of particular fields or areas would not be revisited ; and

- Therefore, in respect of the Tuna oil this would remain as old oil according to the previous unchallenged determinations of January 1980.

It is clear that all parties, the Government and the producers, had accepted that from January 1980 the oil from the Tuna L and T 0.5 wells were excisable as old oil. No review, appeal or challenge to the excise liability of oil on this basis was made at the time of payment, which the parties apparently accepted was the correct and proper liability of the oil.

It is now known that the legislation which purported to effect this status was defective. Accordingly the excise paid at the 'old oil' rate, while in accordance with the legislative intention and the producers understanding of their liability, in fact exceeded that payable under the law.

It is noteworthy, however, that no challenge was ever made to the validity of the legislation, or more importantly to the correctness of the demand of excise, even though the Act gives producers clear rights and mechanisms to do so where liability to excise is in dispute. The proposed amendment, therefore, while it is retrospective in its operation and as such removes rights that parties may have, may be properly characterised as curative, and merely effecting a correction of a technical defect in the 1984 legislation which has hitherto not been challenged by the producers. In reality, however, the amendment does not expose the producers to any new liability other than that which they had understood they were subject to, and will not require any additional payments of excise from them. Accordingly, the proposed amendment, if carried, will not create any additional impost on the public, but would merely close a loophole which would otherwise lead to a substantial unearned windfall.

In this respect I noted during the Second Reading Debate in the House on 17 October 1990, in response to statements made by the Leader of the National Party that :

> "The question quite clearly becomes, in making the correction proposed to restore the legal status quo, whether the

Government is unfairly removing a legitimate right, a legitimate expectation, of the two producers concerned. Contrary to what the Coalition would have us believe, Esso and BHP accepted the 1980 decision refusing its new oil application in respect of the Tuna reserves and the non-reviewable status of the pre-July 1983 classification arrangements - when the new oil amendments were announced in June 1983 - without legal protest, which was always open to them under the duty payment under protest provisions of the Excise Tariff Act.

In fact, Esso and BHP accepted the 1980 decision and paid excise on production from the Tuna reservoir at the old oil rate without protest until 1 March 1990. Presumably, all their production decisions were made on that assumption. For that reason, any changes made now to the new oil definition that have the effect of ensuring that the Tuna oil continues to be treated as old oil should be seen as declaratory in nature. That is, the changes will only put into law what the industry - I repeat, the industry - and the Government had always expected to have been applied. They will maintain the expected excise status quo in order to protect the revenue, in order to ratify what the industry and the Government - this Government and our predecessor - have always expected to have been the legal position, and in order not to provide an unintended and unexpected windfall to the two producers. This Government considers that the retrospective commencement proposed by the Bills is quite justifiable in the circumstances. The retrospectivity will not involve extra duty payments from the producers. The producers have made the payments. They have made those payments since 1980 to acquit their legal liabilities. They have done so without availing themselves of the facility in the legislation to protest that liability until March of this year.

I trust the above information will assist the Committee's consideration of the proposed amendments.

Yours sincerely

David Beddall

Collins Ho. 35 Collins Street
Melbourne, Victoria 3000
GPO Box 1911R
Melbourne Australia 3001
Telephone 03 6527222
Telex AA37958
Facsimile 03 6527325

BHP Petroleum

2 November, 1990

Senator B. Cooney
Chairman
Scrutiny of Bills Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

BHP Petroleum wishes to make the following submission to your Committee in relation to the Excise Tariff Amendment Bill 1990.

The speed with which the legislation has been afforded passage to date is of concern. It was before the House of Representatives for less than a week and the Opposition apparently had notice of the part which concerns us most for only a day.

The Bill deals with three matters. Our concern is with the third of these, the so-called "technical correction to the definition of 'new oil'". These are the Minister's words, but the Bill will do two things which we believe are both very bad in principle.

The first is that the Bill retrospectively applies excise duty on certain oil from the Tuna field in Bass Strait at the "old oil" rate. We have always said, and believed, that the oil concerned should have been classified as "new oil". But we have been constrained by officials' determination, over the years, to accept their version.

The second effect of the Bill is also objectionable. It is obviously intended to close off the legal argument we are putting to the Administrative Appeals Tribunal while the case is part heard.

We consider that the provisions of this Bill should concern your Committee because it will make rights, liberties or obligations unduly dependent upon non-reviewable administrative decisions, and that retrospectively for 10 years. In the very act of seeking the review open to us, the Government, by this legislation, proposes to take that right away from us.

We submit that the legislative principle is the same, whether it is a corporation like BHP or a private citizen. If the Government can persuade the Parliament that this is a legitimate action, it will be easier for the Government to do it again.

Our claim related to the Tuna L matter is due to come before the Administrative Appeals Tribunal in December. The attached account deals only with the legal and administrative history. We will not argue points of law because we believe that these should properly be considered by the Tribunal created by Parliament for the purpose.

It is the Government's attempt to dispose of our claims through legislation which causes us to protest. This legislation will retrospectively alter a basic element of the petroleum taxation regime under which we have operated since 1975.

We submit that:

- The proposed legislation is an unfair and unwise attempt to dispose of legitimate claims retrospectively. Such a precedent should be most unwelcome in the Statute Book.

- This legislation is not, as stated in the Second Reading Speech, a "technical correction to the definition of 'new oil'". Nor is it just "declaratory" of an earlier position. It has much wider implications for all Australian businesses than that, because it is designed to correct earlier legislation, the ramifications of which were evidently inadequately appreciated by the Government. Those who correctly interpret the law can no longer be secure in the belief that they can prudently act on that interpretation - at least, that is, until a court determines otherwise.

- We therefore seek at least the opportunity to have our claims heard in the proper and relevant tribunal without them being quashed by legislation and thus never heard.

We are now planning our investment post-July 1990 on the basis of the changes to the secondary taxation system as announced in the Treasurer's Budget Speech of August 21.

We believe that care should be taken in making changes which may undermine industry's confidence in the Government's ability to enact legislation consistent with its previously stated policy.

BHP Petroleum asks the Scrutiny of Bills Committee to consider this matter and to report to the Senate on the undesirable aspects of the Bill we have identified. If you and your officers would like to receive detailed technical or legal briefing on any aspect of this matter, we would be happy to do what we can to help.

Yours sincerely,

for R. W. Volk
GROUP GENERAL MANAGER AUSTRALIA

Our ref: 0083TPM

EXCISE TARIFF AMENDMENT BILL

This legislation seeks to validate a series of Government decisions made about the particular status of certain oil from Bass Strait for excise purposes. If oil is considered to be "old oil", a higher rate of excise is payable than if it is "new oil".

The Policy in 1975

In 1975, the Government of the day adopted a policy that crude oil from Bass Strait would be subject to excise at two rates:

- "old oil" was oil already discovered as at 17 September 1975 and subject to excise at the higher rate;
- "new oil" was to be oil not yet discovered - the excise being at a lower rate.

This distinction was given legislative effect by amendment to the Excise Tariff Act 1921 and by By-law 78, made in 1977 under that Act.

The Tuna Field

Development drilling in the Tuna Field in Bass Strait commenced in October, 1978. One of the wells encountered previously undiscovered discrete accumulations of crude oil identified as the Tuna L and T 0.5 reservoirs.

On 21 January 1980, Esso Australia Ltd as operator, sought on behalf of the joint venturers a declaration under the Federal Government Crude Oil Pricing Policy (as expressed in By-law 78) that oil produced from the reservoirs was "new oil" for purposes of excise.

A letter from the Department of National Development and Energy dated 29 August, 1980 advised the joint venturers that the Minister refused the application.

The Department's letter conveying the decision conceded that the Tuna L and T 0.5 reservoirs are "naturally occurring discrete accumulations" but refused the grant of "new oil" status on the basis that these reservoirs were discovered during development drilling. Thus the decision relied on the classification of the well which had discovered the new pools, rather than on the nature of the pools discovered by that well.

The 1983 decisions

On 30 June 1983, the Minister for Resources and Energy announced "some important changes in the crude oil pricing and excise arrangements." He said:

"The Government has decided to amend the guidelines applied in determining "new" oil applications by removing the distinction

between discoveries made by exploration and development drilling..

"In future, applications for "new" oil treatment would be assessed on the basis of whether the oil accumulation was discovered after 17 September 1975 and whether it was present as a naturally occurring discrete accumulation irrespective of the ultimate objective of the discovery well. "New" oil applications that had not yet been determined would also be considered against the amended guidelines but previous decisions would not be reviewed."

These decisions were given effect to in the Excise Tariff Amendment Act (No. 2) 1984 and By-law 78 was revoked. However, even though the Minister had said that previous decisions "would not be reviewed", the Act did not purport to validate any earlier decisions which might have been incorrect.

The 1984 legislation defined "new oil" in terms of a "naturally occurring discrete accumulation discovered after 17 September 1975". Any such "accumulation" must therefore be regarded as "new oil", notwithstanding any earlier determination of the Minister to the contrary.

It follows that, if the Minister's determination in 1980 was incorrect (and we contend it was), nothing done by the legislation in 1984, in the form it took, altered the position. Indeed, the new legislation confirmed that the oil should be classified as "new oil". The facts are that the oil concerned should have been classified as "new oil" all along. The difference between the excise paid at "old oil" and "new oil" rates should be refunded.

Legal advice obtained

We have recently received legal advice that excise duty charged on oil from the reservoirs has been incorrectly imposed and that we are entitled, under the Excise Act 1901, to a refund of duty overpaid. The advice concludes that:

- The Minister for National Development and Energy was incorrectly advised in ruling in August 1980 that the oil produced from the reservoirs was not "new oil" within the Prime Ministerial Statement of 14 September, 1975 and the explanatory material in relation thereto issued on 16 October, 1975 by the Department of Minerals and Energy.

- The Tuna L and T 0.5 oil entered for home consumption up to 30 June 1984 was oil discovered as a result of drilling a well which was a "shallower-pool" discovery within By-Law No. 78 made under the Excise Tariff Act 1921.

- No change in that respect occurred as a result of the policy statement issued during that period, namely on 30 June 1983.

- The Tuna L and T 0.5 oil entered for home consumption from 1 July 1984 was "new oil" within section 3 of the Excise Tariff Act as inserted therein as from that date by the Excise Tariff Amendment Act (No. 2) 1984 and has remained "new oil" under subsequent definitions.

- Excise duty has therefore not properly been payable on Tuna L and T 0.5 oil from the date it was first entered for home consumption.

At no stage has BHP Petroleum intended that its seeming "lack of protest" should be seen as more than de facto acceptance of the reality that Government officials were continuing to maintain the incorrect ruling of 1980, even after the matter was apparently re-structured in 1984.

The company has never agreed that the decision reached in August 1980 was based on correct advice. Continuing negotiations regarding the wider issue of secondary taxation reform occupied the company's resources throughout the period. Those reforms were long in arriving.

Recent legal action

Frustrated by the Government's seeming inaction on all matters related to Bass Strait oil excise, BHP Petroleum sought legal advice on the Tuna L matter. Arising from that advice, summarised above, we applied in March 1990 to the Collector of Customs for a refund of the excise duty paid on oil produced from the reservoirs for the maximum period specified in Regulation 53 (2) of the Excise Regulations. In support of the application we stated that:

(a) The information necessary for the Minister to form the view that oil produced from Tuna L and T 0.5 was "new oil" was provided on 21 January 1980 before production commenced.

(b) We have paid duty at "old oil" rates in reliance on the Minister's decision.

(c) We had only recently received legal advice that the Minister's decision was wrong in law.

In addition to our application for a refund, in March 1990 we commenced making payment of excise in relation to oil produced from these reservoirs by way of deposit pursuant to section 154 of the Excise Act 1901 and continue to do so.

The Collector of Customs refused the application for a refund of excise duty paid, and also refused a refund of duty for the maximum period specified in Regulation 53(2) of the Excise Regulations. Further, the Collector demanded that we pay excise duty at "old oil" rates in respect of oil produced from these reservoirs.

Faced with these decisions, BHP Petroleum and Esso commenced proceedings in the Administrative Appeals Tribunal for a review of these decisions. We believe that the Administrative Appeals Tribunal is the proper forum for reviewing our claims.

Present legislation

The proposed legislation seeking amendment of the Excise Tariff Act seeks to dispose of these claims retrospectively and before a judicial examination of the issue can be completed.

BHP Petroleum considers the use of retrospective legislation generally undesirable.

In his Second Reading Speech in the House of Representatives the Minister said that the proposed legislation will effect a "technical correction to the definition of 'new oil' to ensure that oil which has been produced from two reservoirs in Bass Strait since 1 July 1980 and which has been excisable at the 'old oil' rate, does not inadvertently become 'new oil', and thereby subject to a free rate of duty".

This assertion is fundamentally misleading. The oil which was produced from these reservoirs should have been classified as "new oil" under the original legislation, even though, in 1980, an incorrect interpretation was made. It is not a "technical" correction; it is retrospective validation of what was wrong at the time and remains wrong.

Thus there is no "inadvertence" to be corrected. We are merely seeking to have the law properly applied, fulfilling the intent of the legislation.

Nor could our claim be construed as "an unintended windfall". We maintain that the original legislation, correctly interpreted, has always provided for this oil to be classified as "new oil". Any "unintended windfall" has been to Consolidated Revenue, over the 10 year period of its wrongful collection.

Recommendation

That the Scrutiny of Bills Committee report that the Excise Tariff Amendment Bill 1990:

* seriously and adversely affects the rights of citizens to equal treatment before the law;

* contains provisions imposing taxation retrospectively, which the taxpayer has never accepted he has had a legal obligation to pay;

* would have the effect of preventing adjudication of the issue by the courts; and

* is therefore objectionable on several grounds of principle.

Our ref: 0085TPM

MINISTER FOR RESOURCES

-3 JUL 1990

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

Dear Senator Cooney

I am writing in response to the comments in the Scrutiny of Bills Alert Digest No. 2 1990 on Clause 2 of the Petroleum Excise (Prices) Amendment Bill 1990.

The comments in the Digest suggest that the effect of Clause 2 of the Bill is to impose retrospectively an additional excise tax burden on certain crude oil producers. This is not correct.

The amending Bill is a consequence of changes to the crude oil excise tax policy announced by the Government in June 1987. That policy included the removal of excise on the first 30 million barrels of cumulative crude oil production from onshore fields. The amending Bill gives a legal basis for procedures which will enable the collection of excise on crude from onshore oil fields, such as the Jackson field in south-west Queensland. It provides for the calculation of volume weighted average realised (VOLWARE) prices for the crude oil produced, (once the field exceeds the 30 million barrel limit) so that the necessary excise can be collected.

It does not involve a new tax, nor does it impose retrospectively any additional excise burden on the Bass Strait producers.

I think the misunderstanding has arisen because via Clause 2 of the Bill the date of commencement of the Principal Act, 26 December 1987, is now inserted in Regulations. This date is relevant to the excise which has been and continues to be payable from the Bass Strait producing region. A separate date will be required for the Jackson producing region later this year.

Yours sincerely

Alan Griffiths

COMMONWEALTH OF AUSTRALIA

SENATOR BOB McMULLAN
SENATOR FOR THE A.C.T.
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

PARLIAMENTARY SECRETARY TO
THE TREASURER
Fax (06) 277 3795
Fax (06) 277 3789

Senator B. Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills

6 November 1990

Senator Cooney

TAXATION LAWS AMENDMENT (FOREIGN INCOME) BILL 1990

In Scrutiny of Bills Alert Digest No. 6 of 1990, reference is made to a number of aspects of the above Bill which concerned the Committee.

I attach comments in response to those concerns.

I believe the responses deal with the concerns raised and would be happy to discuss them further if required.

Senator Bob McMullan
Parliamentary Secretary to the Treasurer

1. Reversal of the onus of proof (clauses 18 and 49)

Issue

- The comment has been made that the Explanatory Memorandum requires the taxpayer who relies on the defences contained in subsection 102AAZG(4) to carry the onus of proving that reasonable grounds existed for non-compliance with the provisions of section 120AAZG or that reasonable efforts had been made to comply. It is suggested that this is an undue trespass on the personal rights of the taxpayer.

Comment

- Proposed subsection 102AAZG(2) makes it an offence not to keep certain records. The onus of proving the offence is clearly on the Crown.

- Proposed new subsection 102AAZG(4) provides the taxpayer with certain statutory defences once the offence has been established by the Crown. The Explanatory Memorandum merely states the common law position that the taxpayer has to conduct his or her defence. Only the taxpayer will be aware of the matters relating to the defence.

- It is common for the onus of proof to be placed on the taxpayer to establish his or her defence in these cases - for example, subsection 8L(2) of the Taxation Administration Act 1953.

- The same comment as for the effect of clause 18 applies to clause 49.

- In each case, the Crown must prove the commission of the offence. Once that has been established, the taxpayer is only required to establish that any one of the defences available is satisfied.

2. Retrospectivity (clause 51, 52-59, 60 and 61)

Issue

- Certain areas of the Bill have an element of retrospectivity. It is suggested that this is an undue trespass on the personal rights of the taxpayer.

Comment

- The accruals tax measures contained in the Bill have been the product of a lengthy consultative process that commenced in May 1988. These measures have been designed primarily to counter the avoidance of Australian tax through the accumulation of income in foreign entities that are controlled by resident taxpayers.

- The Bill also incorporates measures to exempt from tax, with effect from the 1990-91 income year, non-portfolio dividends received by Australian companies from companies in listed countries.

- In introducing measures of this kind subject to a consultative process, it is necessary to ensure that the time taken up in the consultative process is not used by some taxpayers to put in place arrangements designed to avoid the intended impact of the proposed measures.

- In the absence of anti-avoidance provisions that have effect from the date of announcement of the proposed exemption, it would be quite easy for taxpayers to avoid these measures by channelling all their income that was accumulated in tax haven entities to companies in listed countries. The income could then be distributed to Australian corporate shareholders free of Australian company tax.

- Alternatively, the income accumulated in CFCs in low-tax countries could have been made available for the use of companies resident in listed countries or in Australia without being distributed in the form of dividends.

- Clauses 52 and 54 to 59 and some of the provisions of clause 51 seek to close the tax avoidance avenues. Their retrospective application is the inevitable consequence of the lengthy consultative process and is essential to protect the integrity of the proposed measures. The Government has already moved the earliest date from which the anti-avoidance provisions operate from 12 April 1989 to 1 July 1989 to allow taxpayers extra time to become aware of their obligations.

- The proposed measures for the taxation on an accruals basis of certain income of controlled foreign companies are to apply only to the profits of those companies that are derived in accounting periods commencing on or after 1 July 1990. The provisions relating to the attribution of income from non-resident trusts are to apply for the 1990-91 income year and for subsequent income years.

Clause 52 provides the rules for the computation of the pre 1990-91 losses that a taxpayer will be able to offset in calculating the attributable income of a CFC for the 1990-91 and subsequent years of income. Since it extends a concessional treatment to the taxpayer there is no trespass on the taxpayer's rights.

3. Regulations (clause 60)

Issue

- That the regulations may have retrospective application.

Comment

- Clause 60 provides that the first regulations made for the purpose of a provision contained in the Bill may be expressed to have effect from a date before the date of notification of the regulations. The dates from which the regulations are to take effect are set out in Atachment C. The current approach of using regulations was adopted as it would facilitate flexibility and timely amendments where considered necessary.

- The need for the retrospective operation of certain provisions of this Bill has been explained in item 2. The regulations are essential for the operation of the proposals in the legislation as they provide particulars of the listed countries and designated concessions. Accordingly, to give effect to the proposals in the Bill, it is essential that the regulations should have effect from a date before the date of notification in the Gazette.

- A text of the draft regulations was included in the Explanatory Notes to the Draft Bill published in June 1990 so that taxpayers would be aware of the general thrust of the proposed regulations. In fact the countries that are listed in the draft regulations are the same as those that were proposed for listing as early as 12 April 1989.

- As an alternative drafting measure, the first set of regulations could have been included in the Bill with power to amend them by regulations.

4. Amendments of assessments (clause 61)

Issue

- Clause 61 of the Bill provides that nothing contained in section 170 of the Income Tax Assessment Act 1936 will prevent the amendment of an assessment made before the commencement of the Bill, if made for the purpose of giving effect to the provisions of the Bill. It is pointed out that this may have retrospective operation.

Comment

The main effect of this provision will be to enable the amendment of an assessment to reduce the tax payable on certain non-resident trust distributions which, when the bill is enacted, will be taxable at a concessional rate of tax of 10 per cent. Clause 61 will also enable the taxation of certain deemed dividends as an anti-avoidance measure.

The Bill will otherwise apply only to assessments that relate to the income year 1990-91 and for subsequent income years.

APPLICATION OF REGULATIONS

The following notes provide an explanation of the proposed dates from which the first regulations would have effect on approval by the Parliament.

In broad, terms, the regulations are to have effect in the computation of the assessable income of a taxpayer for the 1990-91 income year. They are to operate from an earlier date only to provide a concessional treatment to the taxpayer or where specific anti-avoidance provisions require their application.

Under the accruals tax measures, the attributable income of a CFC is to be included in the assessable income of a resident taxpayer only for statutory accounting periods of the CFC commencing on or after 1 July 1990. The income of a non-resident trust estate would also be attributable only from the 1990-91 income year. The regulations would therefore apply generally to assessments to be made for the 1990-91 income year and for subsequent years.

In certain circumstances, the regulations are to take effect from an earlier date for the purposes of providing a concession to the taxpayer. For example, certain dividends received by a resident company for the 1990-91 income year and for subsequent years from companies resident in listed countries are to be exempt from tax. The 1990-91 income year of a company (called early-balancing company) can commence earlier than 1 July 1990. Accordingly, for the purposes of the exemption, the regulations are to have effect from 1 July 1989.

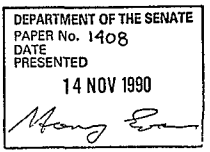
In terms of the Bill, a CFC is to be able to offset against its attributable income for the 1990-91 income year certain losses incurred during any of the preceding seven years. To give effect to this concession, the regulations are to apply from 1 July 1983.

As already explained, certain anti-avoidance provisions are to have effect from dates stipulated in those provisions (clauses 52-59 of the Bill). To give effect to these provisions, the regulations are to have effect from those dates, but not earlier than 1 July 1989.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS



EIGHTH REPORT

OF

1990

14 NOVEMBER 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF

1990

14 NOVEMBER 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator A. Vanstone (Deputy Chairman)
Senator V. Bourne
Senator R. Crowley
Senator I. Macdonald
Senator N. Sherry

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 1990

The Committee has the honour to present its Eighth Report of 1990 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 24:

Cattle and Beef Levy Collection Bill 1990

Live-stock Export Charge Amendment Bill 1990

Live-stock Slaughter Levy Amendment Bill 1990

CATTLE AND BEEF LEVY COLLECTION BILL 1990

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to provide collection mechanisms for levies and charges imposed under the Cattle Transaction Levy Bill 1990, the Beef Production Levy Bill 1990 and Cattle Export Charge Bill 1990, effective from 1 January 1991.

The Bill was dealt with by the Committee in Alert Digest No. 8 of 1990 in which the Committee commented on 2 clauses of the Bill. The Minister for Primary Industries and Energy has responded to those comments by letter dated 13 November 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Issue of search warrants by non-judicial officers Subclause 13(1)

In Alert Digest No. 8, the Committee noted that clause 13(1) of the Bill, if enacted, would allow magistrates to issue search warrants in certain circumstances. 'Magistrate' is defined in clause 3(1) of the Bill to include a Justice of the Peace. The Committee has consistently drawn attention to provisions which allow for the issue of search warrants by non-judicial officers. Accordingly, the Committee drew Senators' attention to this clause as possibly trespassing unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> The issue of the possible use of non-judicial officers was carefully considered prior to drafting of this Bill.
>
> All field officers are required to consult senior officials in the Canberra office before seeking the issue of a warrant. If it is decided that a search warrant is necessary the field officer must apply to a magistrate where one is available. Due to the remoteness of many locations, however, in some cases only a Justice of the Peace may be available. It is emphasised that Departmental Investigation Officers conduct routine auditing, advise and assist levy payers, and only rarely exercise their power to use search warrants in the conduct of investigations: search warrants have been sought on only three occasions during the last three years.

The Minister concludes by assuring the Committee that

> officers administering the Cattle and Beef Levy Collection arrangements will only approach a Justice of the Peace for the issue of a warrant where it is not possible to obtain a warrant from a magistrate.

The Committee thanks the Minister for this assurance and for his response.

Power to enter and search premises
Clause 12

In Alert Digest No. 8, the Committee noted that clause 12 of the Bill, if enacted, would allow an 'authorised person' to enter and search premises and to seize material either (a) with the consent of the occupier or (b) in accordance with a warrant issued pursuant to clause 13. The Committee noted that the provision relating to search by consent is, in this case, somewhat crude, providing no protection to a person giving such a consent.

The Committee also set out an example of a provision which it suggested might be more appropriate, namely section 236 of the ACT Credit Act 1985.

The provision cited, in the Committee's view, ensured that consent was properly obtained and also protected the person giving the consent. It was, therefore, preferable to the provision contained in the Bill.

The Committee drew Senators' attention to clause 12 of the Bill as possibly trespassing unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> There is a fundamental difference between officers acting in accordance with provisions of the Cattle and Beef Collection Act and those acting in pursuance of the ACT Credit Act. It is understood that the latter generally request entry to premises on the basis of evidence, or a presumption, of guilt. This is not the case with DPIE field officers who basically conduct an auditing function, help and assist levy payers, undertake a public relations role and verify the accuracy of information provided.

In relation to the Committee's preferred consent provision, the Minister has said:

> The suggested acknowledgments required in relation to consent would constitute a significant administrative burden which would outweigh the implied benefits in terms of possible trespass on personal rights and liberties.

The Minister concludes by saying:

> They would, moreover, be counter-productive in creating an atmosphere of duress that is neither desired or necessary.

The Committee thanks the Minister for this response and notes his observations and assurances concerning the functions and operations of field officers under the legislation.

LIVE-STOCK EXPORT CHARGE AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to set the rate of charge for cattle under the Live-stock Export Charge Act 1977 to zero, to facilitate the introduction of revised levy and charge arrangements. The Bill also provides that if the new arrangements do not work satisfactorily the Minister may make a declaration to reinstate the rates operative at 31 December 1990. This declaration power is valid until 30 June 1994.

The Bill was dealt with by the Committee in Alert Digest No. 8 of 1990, in which the Committee commented on a clause of the Bill. The Minister for Primary Industries and Energy has responded to those comments by letter dated 13 November 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Ministerial declaration - 'Henry VIII' clause
Clause 4

In Alert Digest No. 8, the Committee noted that clause 4 of the Bill proposes to insert a new section 7A into the Live-stock Export Charge Act. If enacted, this provision would allow the Minister, within a specified period and after consultation with the relevant industry body, to decide that the new scheme of charges proposed by this Bill is not operating 'in a satisfactory manner'. The Committee noted that, having done so, the Minister can make a declaration to this effect. The declaration would also have the effect of restoring the existing arrangements, as if these amendments had not been made. The Committee observed that in so doing, the Minister would also be able to, in effect, repeal the

provisions of this Bill. The provision is, therefore, what the Committee would ordinarily regard as a 'Henry VIII' clause, as it would allow the Minister to amend a piece of primary legislation by simply issuing a piece of delegated legislation.

The Committee indicated that it was also concerned that neither the Explanatory Memorandum nor the Second Reading speech offer any guidance as to the nature and the timing of the consultation procedures provided for by the Bill. Similarly, the Committee noted that the Bill gives no indication as to whether or not the people who will be affected by such a declaration will have any notice of a proposed declaration.

In this vein, the Committee noted that proposed new subsection 7A(2) would require the Minister to publish a copy of the declaration in the Gazette. However, there is no requirement to table such a declaration in the Parliament. Consequently, there is no scope for parliamentary scrutiny of the declaration. The Committee stated that these declarations should, at the very least, be tabled in the Parliament. Given the effect of the declarations, the Committee suggested that it may also be appropriate for them to be subject to disallowance.

The Committee drew Senators' attention to the provision as possibly constituting an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded to those comments as follows:

> The proposed levy arrangements are to a degree experimental and the industry has proposed that they be subject to a full review after three years of operation.

Having said this, the Minister says:

> The Clauses provide a mechanism whereby the current arrangements can be reinstated should the new arrangements prove incapable of providing adequate funding for the Australian Meat and Live-stock Corporation (AMLC) and Australian Meat and Live-stock Research and Development Corporation or prove to be inequitable between the different industry sectors. The Clauses would only be invoked in extreme circumstances and only on the advice of the industry through the AMLIPC, and only after all other options had been considered. The AMLC controls the export of meat and livestock from Australia and it is crucial that it continue to receive an adequate level of funding for its operations.

The response goes on:

> The Clauses therefore provide a means of last resort to ensure a continuing flow of funds to the Corporations in an emergency situation and to protect against serious inequities in levy imposition.
>
> To reflect the above, the power is exercisable only until the new arrangements have been bedded in and their functions fully reviewed.
>
> The Bills do not expand on the nature or timing of the consultation procedures as it is not possible to foresee the circumstances in which the Clauses may need to be invoked or the urgency of such action, but again any declaration would be subject to AMLIPC consideration.

However, the Minister goes on to say:

> I agree that any declaration made by the Minister pursuant to the Clauses should be tabled in the Parliament and I will be moving amendments to the Bills to that effect.

Indeed, the Committee notes that an amendment to this effect was moved by the Minister at the Committee stage of the Bill

on 7 November 1990. That amendment was passed. In relation to the issue of disallowance, however, the Minister said:

> I do not believe, however, that it would be appropriate for such a declaration to be subject to disallowance.
>
> To have a declaration made subject to disallowance could result in disruption of AMLC/AMLRDC finances. Serious industry discontent could be expected if rapid changes in levy collection mechanisms resulted in highly inflated collection costs, which the industry must pay., The provision for the Minister to consult with the AMLIPC provides a suitable avenue for industry views to be taken into account and it can be reasonably expected that Council members will give due consideration to safeguarding the stability of the statutory bodies and restraining increases in levy collection costs.

The Committee thanks the Minister for his response and for amending the Bill in the light of the Committee's concerns.

LIVE-STOCK SLAUGHTER LEVY AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to set the rate of levy on the slaughter of cattle, calves and bobby calves under the Live-stock Slaughter Levy Act 1964 to zero, to facilitate the introduction of revised levy and charge arrangements. The Bill also provides that if the new arrangements do not work satisfactorily the Minister may make a declaration to reinstate the rates operative at 31 December 1990. This declaration power is valid until 30 June 1994.

The Bill was dealt with by the Committee in Alert Digest No. 8 of 1990, in which the Committee commented on a clause of the Bill. The Minister for Primary Industries and Energy has responded to those comments by letter dated 13 November 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Ministerial declaration - 'Henry VIII' clause
Clause 6

In Alert Digest No. 8, the Committee noted that clause 6 of the Bill proposes to insert a new section 6G into the Live-stock Slaughter Levy Act. If enacted, this provision would allow the Minister, within a specified period and after consultation with the relevant industry body, to decide that the new scheme of charges proposed by this Bill is not operating 'in a satisfactory manner'. The Committee noted that, having done so, the Minister can then make a declaration to this effect. The declaration would also have the effect of restoring the existing arrangements, as if these amendments had not been made. The Committee observed

that in so doing, the Minister would also be able, in effect, to repeal the provisions of this Bill. The provision is, therefore, what the Committee would ordinarily regard as a 'Henry VIII' clause, as it would allow the Minister to amend a piece of primary legislation by simply issuing a piece of delegated legislation.

The Committee indicated that it was also concerned that neither the Explanatory Memorandum nor the Second Reading speech offer any guidance as to the nature and the timing of the consultation procedures provided for by the Bill. Similarly, the Committee noted that the Bill gives no indication as to whether or not the people who will be affected by such a declaration will have any notice of a proposed declaration.

In this vein, the Committee noted that proposed new subsection 6G(2) would require the Minister to publish a copy of the declaration in the Gazette. However, there is no requirement to table such a declaration in the Parliament. Consequently, there is no scope for parliamentary scrutiny of the declaration. The Committee stated that these declarations should, at the very least, be tabled in the Parliament. Given the effect of the declarations, the Committee suggested that it may also be appropriate for them to be subject to disallowance.

The Committee drew Senators' attention to the provision as possibly constituting an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded to those comments as follows:

> The proposed levy arrangements are to a degree experimental and the industry has proposed that they be subject to a full review after three years of operation.

Having said this, the Minister says:

> The Clauses provide a mechanism whereby the current arrangements can be reinstated should the new arrangements prove incapable of providing adequate funding for the Australian Meat and Live-stock Corporation (AMLC) and Australian Meat and Live-stock Research and Development Corporation or prove to be inequitable between the different industry sectors. The Clauses would only be invoked in extreme circumstances and only on the advice of the industry through the AMLIPC, and only after all other options had been considered. The AMLC controls the export of meat and livestock from Australia and it is crucial that it continue to receive an adequate level of funding for its operations.

The response goes on:

> The Clauses therefore provide a means of last resort to ensure a continuing flow of funds to the Corporations in an emergency situation and to protect against serious inequities in levy imposition.
>
> To reflect the above, the power is exercisable only until the new arrangements have been bedded in and their functions fully reviewed.
>
> The Bills do not expand on the nature or timing of the consultation procedures as it is not possible to foresee the circumstances in which the Clauses may need to be invoked or the urgency of such action, but again any declaration would be subject to AMLIPC consideration.

However, the Minister goes on to say:

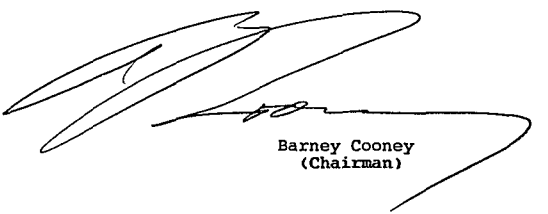
> I agree that any declaration made by the Minister pursuant to the Clauses should be tabled in the Parliament and I will be moving amendments to the Bills to that effect.

Indeed, the Committee notes that an amendment to this effect was moved by the Minister at the Committee stage of the Bill

on 7 November 1990. That amendment was passed. In relation to the issue of disallowance, however, the Minister said:

> I do not believe, however, that it would be appropriate for such a declaration to be subject to disallowance.
>
> To have a declaration made subject to disallowance could result in disruption of AMLC/AMLRDC finances. Serious industry discontent could be expected if rapid changes in levy collection mechanisms resulted in highly inflated collection costs, which the industry must pay., The provision for the Minister to consult with the AMLIPC provides a suitable avenue for industry views to be taken into account and it can be reasonably expected that Council members will give due consideration to safeguarding the stability of the statutory bodies and restraining increases in levy collection costs.

The Committee thanks the Minister for his response and for amending the Bill in the light of the Committee's concerns.

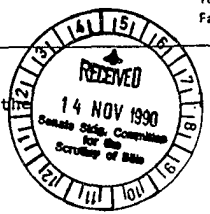


Barney Cooney
(Chairman)

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY

THE HON. JOHN KERIN, M.P.

Parliament House,
Canberra A.C.T. 2600
Telephone (062) 73 1711
Telex 62308
Facsimile (062) 73 2194



13 NOV 1990

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

Dear Senator Cooney

I refer to the Committee's comments in Scrutiny and Bills Alert Digest No 8 of 1990 concerning the Cattle and Beef Levy Collection Bill 1990, the Live-stock Export Charge Amendment Bill 1990 and the Live-stock Slaughter Levy Amendment Bill 1990. I make the following comments.

Cattle and Beef Levy Collection Bill 1990

Issue of search warrants by non-judicial officers - Subclause 13(1)

The issue of the possible use of non-judicial officers was carefully considered prior to drafting of this Bill.

All field officers are required to consult senior officials in the Canberra office before seeking the issue of a warrant. If it is decided that a search warrant is necessary the field officer must apply to a magistrate where one is available. Due to the remoteness of many locations, however, in some cases only a Justice of the Peace may be available. It is emphasised that Departmental Investigation Officers conduct routine auditing, advise and assist levy payers, and only rarely exercise their power to use search warrants in the conduct of investigations: search warrants have been sought on only three occasions during the last three years.

I emphasise that officers administering the Cattle and Beef Levy Collection arrangements will only approach a Justice of the Peace for the issue of a warrant where it is not possible to obtain a warrant from a magistrate.

Power to enter and search premises - Clause 12

There is a fundamental difference between officers acting in accordance with provisions of the Cattle and Beef Collection Act and those acting in pursuance of the ACT Credit Act. It is understood that the latter generally request entry to premises on the basis of evidence, or a presumption, of guilt. This is not the case with DPIE field officers who basically conduct an auditing

function, help and assist levy payers, undertake a public relations role and verify the accuracy of information provided.

The suggested acknowledgements required in relation to consent would constitute a significant administrative burden which would outweigh the implied benefits in terms of possible trespass on personal rights and liberties.

They would, moreover, be counter-productive in creating an atmosphere of duress that is neither desired or necessary.

Live-stock Export Charge Amendment Bill 1990 and Live-stock Slaughter Levy Amendment Bill 1990

The Committee has expressed concern about the provisions of Clause 4 of the Live-stock Export Charge Amendment Bill and Clause 6 of the Live-stock Slaughter Levy Amendment Bill which provide the Minister with the power to make a declaration, after consultation with the Australian Meat and Live-stock Industry Policy Council (AMLIPC), that the new arrangements are not working in a satisfactory manner. The effect of a declaration would be to set the rate of charge and levies under the new arrangements to zero and to restore the rate of charge under the Live-stock Slaughter Levy and Export Charge at the rate that was operative on 31 December 1990. Any such declaration must be made before 1 July 1994.

The proposed levy arrangements are to a degree experimental and the industry has proposed that they be subject to a full review after three years of operation.

The Clauses provide a mechanism whereby the current arrangements can be reinstated should the new arrangements prove incapable of providing adequate funding for the Australian Meat and Live-stock Corporation (AMLC) and Australian Meat and Live-stock Research and Development Corporation or prove to be inequitable between the different industry sectors. The Clauses would only be invoked in extreme circumstances and only on the advice of the industry through the AMLIPC, and only after all other options had been considered. The AMLC controls the export of meat and livestock from Australia and it is crucial that it continue to receive an adequate level of funding for its operations.

The Clauses therefore provide a means of last resort to ensure a continuing flow of funds to the Corporations in an emergency situation and to protect against serious inequities in levy imposition.

To reflect the above, the power is exerciseable only until the new arrangements have been bedded in and their functions fully reviewed.

The Bills do not expand on the nature or timing of the consultation procedures as it is not possible to foresee the circumstances in which the Clauses may need to be invoked or the urgency of such action, but again any declaration would be subject to AMLIPC consideration.

I agree that any declaration made by the Minister pursuant to the Clauses should be tabled in the Parliament and I will be moving amendments to the Bills to that effect. I do not believe, however, that it would be appropriate for such a declaration to be subject to disallowance.

To have a declaration made subject to disallowance could result in disruption of AMLC/AMLRDC finances. Serious industry discontent could be expected if rapid changes in levy collection mechanisms resulted in highly inflated collection costs, which the industry must pay. The provision for the Minister to consult with the AMLIPC provides a suitable avenue for industry views to be taken into account and it can be reasonably expected that Council members will give due consideration to safeguarding the stability of the statutory bodies and restraining increases in levy collection costs.

Yours fraternally

John Kerin

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINTH REPORT

OF

1990

28 NOVEMBER 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT

OF

1990

28 NOVEMBER 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator A. Vanstone (Deputy Chairman)
Senator V. Bourne
Senator R. Crowley
Senator I. Macdonald
Senator N. Sherry

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT OF 1990

The Committee has the honour to present its Ninth Report of 1990 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 24:

Higher Education Funding Amendment Bill 1990

Pipeline Authority (Charges) Bill 1990

Primary Industries and Energy Legislation Amendment Bill 1990

Sales Tax Laws Amendment Bill (No. 3) 1990

HIGHER EDUCATION FUNDING BILL 1990

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the Higher Education Funding Act 1988 to provide as a condition of payments under the Act that States will not take any action to prevent or hinder the imposition or collection of fees by higher education institutions for organisations representing the interests of students generally.

The Committee dealt with the Bill in Alert Digest No. 2 of 1990, in which it made certain comments. The Minister for Higher Education and Employment Services responded to these comments in a letter received by the Committee on 20 September 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Determination by the Minister
Clause 3

In Alert Digest No. 2, the Committee noted that this Bill is substantially similar to the Higher Education Funding Amendment Bill (No. 3) 1989, which the Committee originally dealt with in Alert Digest No. 16 of 1989. The Committee noted that clause 3 of the Bill proposed to insert new section 107A, which would prohibit a State either directly or indirectly preventing or hindering the imposition or collection of fees for student organisations by the governing body of an educational institution. In the event of a State failing to comply with these requirements, proposed subsection 107A(2) would allow the Minister to require that the State pay an amount of money to the

Commonwealth. Further, the Minister could then determine that an amount was payable by the Commonwealth to an organisation representing the interests generally of students at the institution in question.

As the Committee had noted in Alert Digest No. 16, the Minister's determinations would not be subject to tabling or disallowance. Accordingly, in Alert Digest No. 2, the Committee re-stated its view that determinations made by the Minister should be tabled in the Parliament and, in addition, be subject to disallowance.

The Minister has responded as follows:

> Following a review of the provisions of the Higher Education Funding Bill 1990, I am prepared to introduce amendments to the Bill, at the time of the debate in the House of Representatives, which will provide for determinations under the new section 107A to be tabled under section 119 of the Higher Education Funding Act 1988.

However, on the subject of disallowance, the Minister's response goes on to say:

> I consider that it is inappropriate for the section 107A determinations to be disallowable as this is quite unnecessary and would undermine the protection provided for student organisations.

The Minister gives two reasons for this view:

> Firstly, section 107A is budget neutral as the total payments to institutions by the Commonwealth are limited by the amounts to be recovered from the States under paragraph 107A(2)(b).
>
> Secondly, as you are aware, the primary source of funds for student organisations is the fees collected on their behalf by institutions. Most student organisations would have little in the way of reserves to carry them through a period in which they are denied their fee revenue creating considerable uncertainty for the organisations and their employees. The Government would not wish to

> have the level of uncertainty increased by section 107A determinations being disallowable. Indeed the very purpose of the Bill is to remove such uncertainty.

The Committee thanks the Minister for his response and for agreeing to amend the legislation in the light of the Committee's concerns. Indeed, the Committee notes that when the Bill was considered by the House of Representatives on 13 November 1990, an amendment of the kind foreshadowed by the Minister in his letter to the Committee was moved and passed. The Committee simply notes the Minister's views in relation to the disallowance question and makes no further comment on the Bill.

PIPELINE AUTHORITY (CHARGES) BILL 1990

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Finance.

The Bill proposes to increase the existing haulage tariff arrangements in place for the Pipeline Authority by 25 percent from 1 January 1991 and by a further 25 percent from 1 January 1992. This will constitute the first step in commercialising and, eventually, selling the Moomba-Sydney gas pipeline system.

The Committee dealt with the Bill in Alert Digest No. 10 of 1990, in which it made certain comments in relation to the Bill. The Minister for Finance responded to those comments by letter dated 22 November 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

General comment

In Alert Digest No. 10, the Committee indicated that it understood that a legal challenge was currently on foot in relation to the increased haulage charges and the process of privatisation of the pipeline which this Bill seeks to implement. This understanding was based on material brought to the Committee's attention which, due to the timing, the Committee was unable to verify.

In the light of the material available to it, the Committee indicated that it would be a matter of concern if a prime purpose of this legislation was to frustrate legal processes which were in train. Further, the Committee said that if such a purpose were evident on the face of the Bill, it would be a matter which the Committee would bring to

Senators' attention as possibly trespassing on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded to these comments as follows:

> Let me assure you categorically that there is no current legal challenge to the proposed haulage tariff increases to be authorised by this Bill.
>
> There have been proceedings in the Supreme Court of New South Wales recently, initiated by the Australian Gas Light Company (AGL), relating to the specific issue of whether or not that company has a right of first refusal to acquire the pipeline system in the event that it is sold. (As you may be aware, Chief Justice Gleeson delivered his judgement on that matter last Friday, 16 November 1990).
>
> However, I would emphasise that that litigation did not relate to the Pipeline Authority (Charges) Bill.

The Minister concludes by saying:

> As indicated in the Explanatory Memorandum to the Bill, its prime purpose is to put in place new haulage tariff arrangements which would allow The Pipeline Authority to achieve, over time, a fair and reasonable rate of return on the current worth of its total assets.

The Committee thanks the Minister for his response and for his assurance in relation to the Committee's concerns. The Committee makes no further comment on the Bill.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 18 October 1990 by the Minister for Primary Industries and Energy.

The Bill is an omnibus Bill. It proposes to amend 12 statutes administered within the Primary Industries and Energy portfolio.

The Committee dealt with the Bill in Alert Digest No. 9 of 1990, in which it commented on a provision of the Bill. The Minister for Primary Industries and Energy responded to those comments in a letter received by the Committee on 16 November 1990. A copy of that letter is attached to this report. Relevant parts of the letter are also discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 9, the Committee noted that Part 7 of the Bill proposes various amendments to the Primary Industries and Energy Research Development Act 1989. Pursuant to subclause 2(2), these amendments are to be retrospective to 1 October 1990. The Committee observed that neither the Explanatory Memorandum to the Bill nor the Second Reading speech provide any substantive justification for this retrospectivity.

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

The Minister has responded to those comments as follows:

> The amendments to the Act are intended to correct an anomaly concerning the attachment of the research component of the wheat industry fund levy to the Grains Research and Development Corporation.
>
> The levy which is paid on all sales of wheat comprises a research component and an industry fund component, both of which are determined each year by the growers' representative body, the Grains Council of Australia.
>
> The Corporation was established by the Grains Research and Development Corporation Regulations which commenced on 1 October 1990. These Regulations also purported to make provision for the research component of the wheat industry fund levy to be attached to the Corporation from that date. Prior to then the research component of the levy was paid to the Wheat Research Trust Fund which was abolished along with the Wheat Research Council and State Committees on establishment of the Corporation.

The Minister goes on to say:

> However, the Office of Parliamentary Counsel subsequently advised that the Act required amendment in order for suitable regulations to be made to achieve this purpose.

The Minister concludes:

> Since the Corporation commenced operation on 1 October 1990 the Committee will appreciate that it is necessary for the above amendments to the Act to be deemed to have operated from that date. Otherwise the research component of any levy paid by wheat growers between 1 October and the date of Royal Assent of the above Bill would not be available for payment to the Corporation but would remain in Consolidated Revenue.

The Committee thanks the Minister for his response and for informing it on the background to the amendments. The Committee trusts that Senators will be assisted by this additional information.

SALES TAX LAWS AMENDMENT BILL (NO. 3) 1990

This Bill was introduced into the House of Representatives on 18 October 1990 by the Minister Assisting the Treasurer.

The Bill proposes to exempt items of computer equipment from sales tax if they are used for:

- engineering or technical design of goods for manufacture;
- production-related activities, eg purchasing of materials;
- finalising text or artwork to be printed; or
- combinations of the above usages with use as aids to manufacture.

Exemptions will apply where 50 per cent or more of the computer use is for these activities.

The Committee commented on the Bill in Alert Digest No. 9 of 1990. The Parliamentary Secretary to the Treasurer has provided a response to those comments by letter dated 28 November 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclause 2(1)

In Alert Digest No. 9, the Committee noted that subclause 2(1) of the Bill provides that, except for paragraph 7(a) (which substitutes 'or' for 'and' in one of the Sales Tax

Regulations), the provisions in the Bill are to be retrospective to 19 October 1990. The Committee drew Senators' attention to the provision as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Parliamentary Secretary to the Treasurer has provided a detailed response to this comment, the essence of which is summed up in the following paragraph:

> The provisions will not trespass unduly on personal rights or liberties. With one technical exception discussed below, the provisions are concessionary in nature, and will enable registered manufacturers to purchase eligible computer equipment free of tax approximately 2 to 3 months (on present indications) earlier than would have been the case if the provisions had commenced to operate from the date of Royal Assent.

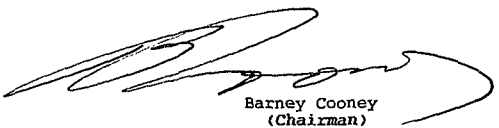
The Committee has invariably accepted retrospectivity which is either beneficial to individuals or, in any event, not prejudicial to any person or body other than the Commonwealth. The Committee therefore accepts the Parliamentary Secretary's explanation in relation to those provisions which he has identified as being concessionary.

In relation to the provision which is not concessionary in nature, the Parliamentary Secretary has said:

> The one technical exception referred to above concerns the exclusion from the aids to manufacture provisions of 'author/secretary computer equipment' - see clause 4(a) of the Bill. The effect of this exclusion will be that registered manufacturers will not be entitled to obtain exemption for such computer equipment as an aid to manufacture from 19 October 1990.
>
> 'Author/secretary computer equipment' is excluded from the definition of eligible computer equipment used for either technical design or print-finalisation activities (see clause 4(d) of the

Bill) and the exclusion from the aids to manufacture provisions is necessary for reasons of consistency. It is not considered that any manufacturers will be disadvantaged by this provision as such equipment is not presently treated by the ATO as falling within the aids to manufacture provisions.

The Committee thanks the Parliamentary Secretary to the Treasurer for this response and for his assistance on this matter. In the light of the response, the Committee makes no further comment on the Bill.



Barney Cooney
(Chairman)

Senator Cooney
Please sign report
before tabling.
Thankyou

The Hon. Peter Baldwin MP
Minister for Higher Education and Employment Services

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

Dear Senator ~~Cooney~~ Bernie

I refer to the Scrutiny of Bills Alert Digest No 2 of 1990 (23 May 1990) which provides comments on the Higher Education Funding Amendment Bill 1990.

Following a review of the provisions of the Higher Education Funding Bill 1990, I am prepared to introduce amendments to the Bill, at the time of the debate in the House of Representatives, which will provide for determinations under the new Section 107A to be tabled under Section 119 of the Higher Education Funding Act 1988.

I consider that it is inappropriate for the Section 107A determinations to be disallowable as this is quite unnecessary and would undermine the protection provided for student organisations.

Firstly, Section 107A is budget neutral as the total payments to institutions by the Commonwealth are limited by the amounts to be recovered from the States under paragraph 107A(2)(b).

Secondly, as you are aware, the primary source of funds for student organisations is the fees collected on their behalf by institutions. Most student organisations would have little in the way of reserves to carry them through a period in which they are denied their fee revenue creating considerable uncertainty for the organisations and their employees. The Government would not wish to have the level of uncertainty increased by Section 107A determinations being disallowable. Indeed the very purpose of the Bill is to remove such uncertainty.

Yours sincerely

Peter Baldwin

Parliament House Canberra ACT 2600 Telephone (06) 277 7540

Minister For Finance

Hon. Ralph Willis M.P

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

Dear Senator Cooney

I refer to the Scrutiny of Bills Alert Digest No. 10 of 1990, dated 14 November, an extract of which was provided to my office by Mr Argument, Secretary of your Committee.

That document raised two issues of possible concern relating to The Pipeline Authority (Charges) Bill 1990, to which I would like to refer.

As to the first concern relating to the so-called "Henry VIII" clause, I can confirm that sub-clause 13(2) of the Pipeline Authority (Charges) Bill 1990 was drafted specifically with the imminent replacement of the Companies Act in mind. I have noted that you propose to offer no further comment in regard to that particular matter and assume therefore that there is no problem with this sub-clause.

More importantly, I would like to respond to the second general comment which you made about the Bill, namely, that your Committee would be concerned "if the prime purpose of this legislation was to frustrate legal processes which are in train".

Let me assure you categorically that there is no current legal challenge to the proposed haulage tariff increases to be authorised by this Bill.

There have been proceedings in the Supreme Court of New South Wales recently, initiated by the Australian Gas Light Company (AGL), relating to the specific issue of

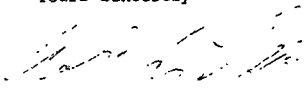
whether or not that company has a right of first refusal to acquire the pipeline system in the event that it is sold. (As you may be aware, Chief Justice Gleeson delivered his judgement on that matter last Friday, 16 November 1990).

However, I would emphasise that that litigation did not relate to the Pipeline Authority (Charges) Bill.

As indicated in the Explanatory Memorandum to the Bill, its prime purpose is to put in place new haulage tariff arrangements which would allow The Pipeline Authority to achieve, over time, a fair and reasonable rate of return on the current worth of its total assets.

I hope that these brief comments have clarified the intent of The Pipeline Authority (Charges) Bill 1990 to the satisfaction of your Committee.

Yours sincerely

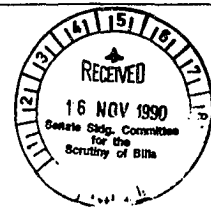


Ralph Willis

22 NOV 1990

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
THE HON. JOHN KERIN, M.P.

Parliament House,
Canberra ACT 2600
Telephone (062) 77 7520
Facsimile (062) 73 4120



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

Dear Senator Cooney

I refer to a letter of 8 November 1990 from the Secretary of your Committee concerning the Primary Industries and Energy Legislation Amendment Bill 1990.

The Committee has drawn attention to subclause 2(2) which provides that various amendments to the Primary Industries and Energy Research and Development Act 1989 (the Act), contained in Part 7 of the Bill, be made retrospective to 1 October 1990.

The amendments to the Act are intended to correct an anomaly concerning the attachment of the research component of the wheat industry fund levy to the Grains Research and Development Corporation.

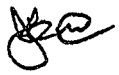
The levy which is paid on all sales of wheat comprises a research component and an industry fund component, both of which are determined each year by the growers' representative body, the Grains Council of Australia.

The Corporation was established by the Grains Research and Development Corporation Regulations which commenced on 1 October 1990. These Regulations also purported to make provision for the research component of the wheat industry fund levy to be attached to the Corporation from that date. Prior to then the research component of the levy was paid to the Wheat Research Trust Fund which was abolished along with the Wheat Research Council and State Committees on establishment of the Corporation.

However, the Office of Parliamentary Counsel subsequently advised that the Act required amendment in order for suitable regulations to be made to achieve this purpose.

Since the Corporation commenced operation on 1 October 1990 the Committee will appreciate that it is necessary for the above amendments to the Act to be deemed to have operated from that date. Otherwise the research component of any levy paid by wheat growers between 1 October and the date of Royal Assent of the above Bill would not be available for payment to the Corporation but would remain in Consolidated Revenue.

Yours fraternally



John Kerin

COMMONWEALTH OF AUSTRALIA

SENATOR BOB McMULLAN
SENATOR FOR THE A.C.T.
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

PARLIAMENTARY SECRETARY TO
THE TREASURER
Ph (06) 277 3795
Fax (06) 277 3789

CHAIRMAN
SCRUTINY OF BILLS COMMITTEE
PARLIAMENT HOUSE
CANBERRA

28 NOVEMBER 1990

Senator Cooney

SALES TAX LAWS AMENDMENT BILL (NO. 3) 1990

Attached is a response to the concern raised by your Committee in relation to the above Bill.

If you have any further questions please contact Michael Monaghan of my Office on 2773794.

SENATOR BOB MCMULLAN
PARLIAMENTARY SECRETARY TO THE TREASURER

SALES TAX LAWS AMENDMENT BILL (No.3) 1990 - RETROSPECTIVITY

Issue

Subclause 2(1) of the Bill provides that, except for paragraph 7(a) (which substitutes 'or' for 'and' in one of the Sales Tax Regulations), the provisions of the Bill will be retrospective to 19 October 1990.

Background

2. The Bill will amend the Sales Tax (Exemptions and Classifications) Act 1935 to exempt certain items of computer equipment (referred to as 'eligible computer equipment') where 50 per cent or more of the computer use is in any one of four broad activities. These concessions are to be available to manufacturers and other persons who process goods on behalf of manufacturers.

3. Under the sales tax law, manufacturers (other than small manufacturers) are required to register with the Australian Taxation Office (ATO) unless they deal only in goods exempt from sales tax. When registered manufacturers purchase raw materials or other goods for use as aids to manufacture, they are required by the Sales Tax Regulations to quote their sales tax registration certificate number. This quotation system enables them to acquire the materials or goods free of sales

tax, and is designed to defer payment of the tax until the last wholesale sale.

Comments

4. The provisions in the Bill are retrospective to 19 October 1990. Registered manufacturers will thus be able to purchase eligible computer equipment free of sales tax from 19 October 1990 by quoting their sales tax certificate number to the supplier. The Bill will retrospectively amend the Sales Tax Regulations to require quotation of certificate on such purchases from 19 October 1990.

5. The provisions will not trespass unduly on personal rights or liberties. With one technical exception discussed below, the provisions are concessionary in nature, and will enable registered manufacturers to purchase eligible computer equipment free of tax approximately 2 to 3 months (on present indications) earlier than would have been the case if the provisions had commenced to operate from the date of Royal Assent.

6. Pending the legislation receiving the Royal Assent, registered manufacturers cannot technically quote their sales tax certificates on the purchase of eligible computer equipment. However, quotation during this period is necessary to allow exemption to be available as intended, and the ATO will accept all such quotations pending the legislation receiving the Royal Assent.

7. One other reason for retrospective provisions in this case is to reduce as much as possible the period between the announcement of the proposed changes (i.e. the 1990-91 Budget) and the commencement of the new exemptions. The objective is to minimise any likely distortions in the patterns of computer purchases which might be caused by manufacturers deferring all purchases until the commencement of the legislation.

8. The one technical exception referred to above concerns the exclusion from the aids to manufacture provisions of 'author/secretary computer equipment' - see clause 4(a) of the Bill. The effect of this exclusion will be that registered manufacturers will not be entitled to obtain exemption for such computer equipment as an aid to manufacture from 19 October 1990.

9. 'Author\secretary computer equipment' is excluded from the definition of eligible computer equipment used for either technical design or print-finalisation activities (see clause 4(d) of the Bill) and the exclusion from the aids to manufacture provisions is necessary for reasons of consistency. It is not considered that any manufacturers will be disadvantaged by this provision as such equipment is not presently treated by the ATO as falling within the aids to manufacture provisions.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TENTH REPORT

OF

1990

5 DECEMBER 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF

1990

5 DECEMBER 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator A. Vanstone (Deputy Chairman)
Senator V. Bourne
Senator R. Crowley
Senator I. Macdonald
Senator N. Sherry

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT OF 1990

The Committee has the honour to present its Tenth Report of 1990 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 24:

Education Services (Export Regulation) Bill 1990

Social Security Legislation Amendment Bill 1990

Veterans' Affairs Legislation Amendment Bill 1990

EDUCATION SERVICES (EXPORT REGULATION) BILL 1990

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Employment, Education and Training.

The Bill proposes to regulate the marketing and provision of education services to overseas markets. To this end, a Commonwealth Register of Institutions and Courses for Overseas Students will be established under this legislation. Visas for study purposes will only be issued to students if they are accepted into registered courses at registered institutions.

The Committee considered the Bill in relation to Alert Digest No. 9 of 1990, at which stage the Committee did not comment on the Bill. However, in the light of matters which have subsequently been drawn to its attention, the Committee makes the following general comment.

General comment

The Bill proposes to regulate the provision of education services to overseas students. Clause 3 of the Bill defines 'approved provider' as

> an institution or other body or person to which or to whom the designated authority of the State has granted, under the law of the State, an approval to provide that course to overseas students in that State ...

Clause 3 defines 'registered provider' as

> an institution or other body or person that is registered in respect of the course in respect of that State.

The clause also defines 'provider' as

> an institution or other body or person in Australia that provides courses.

'Course' is defined as 'a course of education or training'.

Clause 4 provides that only a registered provider can provide courses to overseas students.

Clause 5 deals with the registration of approved providers.

Clause 6 requires a provider, among other things, to maintain a trust account.

Clause 7 requires a provider to take out insurance.

Clause 8 requires a provider to provide quarterly returns and such other information as may be required.

Clauses 9-15 deal with various matters related to the suspension and cancellation of registration of registered providers.

The suggested problem which has been drawn to the Committee's attention is that the onerous obligations to be imposed by clauses 6-8 apply to providers, ie any person or body providing a course of education or training. This might be considered an undue imposition on some providers, in the sense that they may have neither the intention nor the requisite authority to provide courses to overseas students, yet they are required to fulfil these onerous obligations. In that respect, this may be considered an undue trespass on the personal rights and liberties of such providers.

It might be argued, or course, that a Court interpreting the provisions would assume, in the light of the provisions

preceding clauses 6-8, that those clauses only apply to registered providers. However, this approach seems improbable. The interpretation clause clearly defines each of three types of provider. In addition, the definition of 'provider' would appear to have no application in the Bill other than in relation to clauses 6-8. This being the case, the reference to 'providers' in those clauses would, logically, attract (and, arguably, justify the insertion of) the definition set out in clause 3.

The Committee makes no further comment on the Bill.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 18 October 1990 by the Minister Representing the Minister for Social Security.

The Bill proposes to amend the following Acts:

- Social Security Act 1947;
- Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act 1988;
- First Home Owners Act 1983;
- Health Insurance Act 1973;
- National Health Act 1953;
- Income Tax Assessment Act 1936; and
- Taxation Administration Act 1953

to effect measures announced in the February 1990 Economic Statement and the 1990-91 Budget.

The Committee dealt with the Bill in Alert Digest No. 9 of 1990, in which it commented on various clauses of the Bill. The Minister for Social Security responded to those comments in a letter dated 27 November 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Clauses 4(4), (8), (9) and (12), 5(b), (d), (m), (r) and (s), 7(a), 8, 10, 12, 14(k), 21, 22, 47, 50, 56, 62-69, 70(1)(d) and (e), 72(a) and (b) and 87-91

In Alert Digest No. 9, the Committee noted that the Bill contains numerous clauses which are (or which will be, if and when they become law) retrospective in effect. The

Committee identified the relevant clauses and the particular dates. The Committee also noted that, in addition to these examples of (then) actual retrospectivity, several amendments are expressed to commence on 1 December 1990. These provisions, namely clauses 45, 46 and 51, subclause 69(c) and paragraph 10(1)(a), now also involve retrospective operation.

The Minister's Second Reading speech indicates that the Bill 'would amend [the] social security legislation to implement some of the measures announced in the Treasurer's February Statement and in the 1990 Budget'. The Committee observed that this, presumably, explains those amendments which are expressed to commence on 22 August 1990 (ie the day after the Budget). The Committee noted that it had previously indicated that, in relation to retrospectivity, budgetary measures are something of a special case, citing comments by the then Chairman of the Committee, Senator Tate, in a paper entitled The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-1985.

However, the Committee noted that in the present case, while the Budget explanation appears to cover many of the proposed amendments, the Minister's Second Reading speech and the Explanatory Memorandum to the Bill offer little guidance as to the need for retrospectivity in the remaining cases. Given the Committee's objection in principle to retrospective legislation, the Committee indicated that it and, indeed, the Senate would be greatly assisted if some explanation could be provided for the need for retrospectivity in each case.

The Committee drew Senators' attention to the clauses referred to as possibly unduly trespassing on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has provided a detailed response to this comment, indicating the reason for the retrospectivity in relation to various clauses identified by the Committee. As the response appears in full at the end of this report, the Committee does not propose to reproduce the detail of the response here. However, generally speaking, the retrospective operation of the proposed amendments is linked to the commencement of provisions in other legislation, for reasons which the Minister has, in each case, set out in his response.

The Committee thanks the Minister for his response and makes no further comment on the Bill.

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Veterans' Affairs.

The Bill proposes amendments to the following Acts:

- Veterans' Entitlements Act 1986;
- Defence Service Homes Act 1918;
- Seamen's War Pensions and Allowances Act 1940;
- Social Security and Veterans' Affairs Legislation Amendment Act (No. 4) 1989; and
- Public Service Act 1922.

The amendments proposed implement Government election promises, give effect to Budget decisions and make a range of other amendments to improve the provision of benefits to veterans.

The Committee dealt with the Bill in Alert Digest No. 10 of 1990, in which it made comments on various clauses. The Minister for Veterans' Affairs responded to those comments in a letter dated 4 December 1990. A copy of the letter is attached to this report. Relevant parts of the letter are also discussed below.

Retrospectivity
Various clauses

In Alert Digest No. 10, the Committee noted that the Bill contains a substantial number of proposed amendments with a retrospective operation. These amendments are to operate either from a nominated date or from the commencement of a

specified Act or provision. In each case, the relevant commencement date appears in italics in the text of the Bill. However, no guidance is offered in either the Explanatory Memorandum to the Bill or the Minister's Second Reading speech as to the relevance of the various dates nominated or the need for retrospectivity in each case.

The Minister for Veterans' Affairs has offered the following by way of additional information:

> While a significant number of clauses in the Bill have retrospective operation, the majority of these concern the adjustment of benefits and increases in the rates of benefits and allowances available to Veterans' and their dependants. In most cases this will involve backdating of increases and payment of arrears. For example, the changes to the provisions for the grant of war widows' pension, will allow for the automatic granting of pension to widows of veterans receiving extreme disablement adjustment at the time of their death to be backdated to 22 December 1988. That date was the date on which extreme disablement adjustment commenced.

The Committee has invariably accepted instances of retrospectivity which are beneficial to individuals or which, at least, are not prejudicial to a person or body other than the Commonwealth.

The Minister's response also notes that

> [i]n relation to the changes to the allotment provisions and the dates for operational service in Schedule 2 to the Veterans' Entitlements Act (the VEA), the retrospective operation is intended to restore certain eligibility provisions to what they were under the Repatriation legislation before the introduction of the VEA. The need for this arises from the Federal Court decisions in the cases of Doessel and Davis, which overturned a longstanding interpretation of the words 'allotted for duty' in the VEA and earlier Repatriation legislation. The result of this was to vest in persons, who had never before been

> regarded by the Department of Defence as having performed 'operational service', benefits which were never intended.

In effect, the amendments referred to are intended to override what would otherwise be the flow-on from some recent Federal Court decisions. This is a practice which the Committee has commented on several times recently and one which has caused the Committee some concern. In the present case, however, as the Minister points out,

> [s]avings provisions covering the changed allotment procedures, have been inserted in clause 93 of the Bill to preserve the benefits of those persons where these have already been granted as well as those whose claims are still to be decided. Claims or applications lodged on or before 8 November 1990 will be determined without regard to the amendments contained in the Bill. In respect of claims or applications lodged after that date, however, the amendments will ensure that the decisions are based on the application of the legislation in the way it was intended to operate. The result is not so much of people being disadvantaged as a result of these changes, as ensuring that entitlement to benefits is available only to those for whom the legislation is intended to reward for the performance of service which is truly 'operational' in the sense that it involved dangers over and above those associated with normal peacetime Defence service.

The Committee notes, therefore, that existing claims will not be affected by the proposed amendment.

In relation to the remaining provisions, the Minister has responded:

> Other retrospective operative dates in relation to 'operational service' are not directly linked with [the changes referred to above] but relate to the dates on which those areas commenced or ceased to be 'operational' for the purposes of the VEA. For example, clause 37(c) which relates to revised allotment procedures for service in Namibia is operative from 18 February 1989, that being the

> date on which Namibia commenced to be an 'operational area' for the purposes of the VEA. Similarly, clause 37(d) which relates to allotment for operational service in the Gulf, commences on 2 August 1990, that being the date from which the Gulf area is regarded as being 'operational'.
>
> In those cases in which amendments are consequential to those made to the Social Security legislation, the Department is bound to retain consistency with the Department of Social Security and to adopt similar operative dates. This applies to the provisions in clause 53 relating to the deeming of income on loans.

The Committee thanks the Minister for his response and for his assistance with these matters. One of the reasons for the Committee's initial concern was that no explanation was offered for the retrospectivity in the Bill. The Minister has now provided that and, importantly, has gone on to say:

> The need to provide more information and an explanation of the reason for retrospective operation in the explanatory memorandum has also been noted.

The Committee commends this approach to the Minister.

Ministerial guidelines
Subclause 9(q)

In Alert Digest No. 10, the Committee noted that clause 9 of the Bill proposes to amend section 18 of the Defence Service Homes Act 1918. Subclause 9(q) would require the Secretary of the Department of Veterans' Affairs, in deciding whether or not a person is suffering 'serious financial hardship' for the purposes of certain provisions of the Act, to have regard to any guidelines issued by the Minister pursuant to proposed new subsection 18(5c).

The Committee noted that clause 11 of the Bill proposes a similar amendment in relation to decisions under section 20 of the Defence Service Homes Act. Clauses 12 and 14 propose similar amendments in relation to sections 21 and 23 of the Act, respectively.

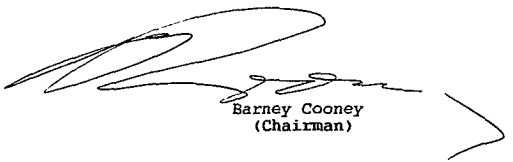
The Committee observed that, in each case, guidelines approved by the Minister must be laid before each House of the Parliament within 15 sitting days of that House after the guidelines have been approved. However, the Committee noted that there is no provision for the guidelines to be disallowed by either House.

In his response to the Committee, the Minister has said:

> I have noted also the Committee's comments on clause 9(q) which inserts provisions allowing for the tabling before the Parliament of guidelines for use by the Secretary in assessing the degree of financial hardship. In proceeding in this way it was decided that the guidelines should not be formally binding to allow flexibility to examine each case on its merits. This is consistent with general administrative discretion principles.
>
> The option of inserting definitions of 'financial hardship' into the Act was considered but for a number of reasons it was decided not do this. This followed discussions with the Office of Parliamentary Counsel and experts in the Defence Service Home Loans Branch of the Department. Factors taken into account in reaching this decision included concern that legislative changes to cover every situation would have been complex and difficult to devise, draft and administer; the small number of cases involved; the likelihood that a simple test would have acted against the interest of some persons and the fact that the tabling provisions are seen to offer a more flexible approach to sensitive situations.

The Committee thanks the Minister for his response and notes his views on the role of the guidelines. The Committee also notes that this matter was recently taken up in proceedings before the Senate Standing Committee on Community Affairs,

which had this Bill referred to it on the recommendation of the Selection of Bills Committee. In the course of its dealing with the Bill, the Community Affairs Committee agreed to an amendment which, if adopted by the Government, would make guidelines issued under clause 9 of the Bill disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901. The Committee notes with approval that the Minister representing the Minister for Veterans' Affairs before the Community Affairs Committee, Senator Tate, indicated that he thought the Government would accept the amendment.



Barney Cooney
(Chairman)

COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY SECRETARY TO
THE MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

27 NOV 1990

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

Dear Senator Cooney Barney

On 8 November 1990, your Committee's Secretary drew attention to the comments on the Social Security Legislation Amendment Bill 1990 (the Bill) made by the Committee in its Ninth Report of 1990.

Your Committee expressed concern about the retrospectivity of some clauses in the Bill.

Clauses 4(4), 5(b), 5(d), 5(r), 7(a), 8, 10, 50, 56, 68, 69(a), 69(b), 70(1)(e) and 72(b)

As indicated by the Committee, these clauses provide for the implementation of budgetary measures. Accordingly, these measures have been made retrospective to the date after their announcement in the Budget Speech on 21 August 1990.

Clauses 4(8), 37 and 55

These clauses would allow Chinese nationals who were in Australia at the time of the Tiananmen Square massacre (20 June 1989) and who have a Class 4 Temporary Entry Permit to have access to special benefit, family allowance and family allowance supplement. This would be achieved by relaxing the residence requirements relevant to those payments.

The retrospective commencement date of this measure coincides with the date the Department of Immigration and Ethnic Affairs introduced the Class 4 Temporary Entry Permit, that is, 1 August 1990.

This is a technical amendment arising as a result of the repeal and re-enactment of the Migration Regulations in December 1989. Although the substance of sub-regulation 22(1) did not change, it was renumbered 165(1) on 19 December 1989.

An amendment is therefore required to the definition of "assurance of support debt" with effect from 19 December 1989 to bring it into line with the Migration Regulations and to enable the definition to remain operational.

Clauses 5(s) and 87-91 inclusive

Clause 5(s) inserts a definition of "income support payment" into subsection 3(1) of the Act. The definition ties in with amendments made to the Health Insurance Act 1973 and the National Health Act 1953 (the Health Acts).

Clauses 87-91 amend provisions in the Health Acts. The amendments are beneficial in nature and allow certain health concessions to be retained by specified groups of social security recipients upon return to work or in the event of increased income.

These amendments correct oversights in Parts 2 and 3 of the Social Security and Veterans' Affairs Legislation Amendment Act 1989. The relevant provisions in those Parts commenced on 1 June 1990. It is therefore appropriate that these amendments also commence on that date.

Clause 12

Clause 12 amends section 12A of the Act to change the application of the current earnings credit provisions to a fortnightly period and to allow married pensioner couples to use the combined credit limit of $2,000. These measures are beneficial.

The selection of 1 October 1990 as the commencement date for this measure accords with administrative requirements.

Clause 14(k)

Clause 14(k) of the Bill amends subsection 12C(4) of the Social Security Act 1947 (the Act) by omitting the reference to "section 12C" and substituting "subsection 3(1)".

Section 21(r) of the Social Security and Veterans' Affairs Legislation Amendment Act (No 4) 1989 (No 164 of 1989) moved the definition of "accruing return investment" from section 12C to subsection 3(1) of the Act. This amendment came into effect on 19 December 1989.

Minister for Veterans' Affairs

Ben Humphreys, MP
Member for Griffith

- 4 DEC 1990

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

Dear Senator Cooney

On 15 November 1990 the Secretary to your Committee wrote to me drawing attention to the comments of the Committee contained in the Scrutiny of Bills Alert Digest No 10 of 14 November 1990 in relation to the Veterans' Affairs Legislation Amendment Bill 1990.

2. The issues which have been raised relate to the number of clauses in the Bill with retrospective operation and the non-disallowance of guidelines for determining hardship for the purposes of the Defence Service Homes Act 1918. The Committee has not made any specific comment on either of these matters other than to note, in the case of retrospectivity, the number of clauses involved and, in the case of the hardship guidelines, the fact that while they are not formally binding, they are not subject to disallowance. I understand that the Committee's concern with retrospectivity is not so much that it applies in so many instances, but with the lack of information in the explanatory memorandum about the reason why a particular date is relevant. It is on this understanding, therefore, that I offer the following comments in relation to these items, which I trust the Committee will find helpful.

3. While a significant number of clauses in the Bill have retrospective operation, the majority of these concern the adjustment of benefits and increases in the rates of benefits and allowances available to Veterans' and their dependants. In most cases this will involve backdating of increases and payment of arrears. For example, the changes to the provisions for the grant of war widows' pension, will allow for the automatic granting of pension to widows of veterans receiving extreme disablement adjustment at the time of their death

to be backdated to 22 December 1988. That date was the date on which extreme disablement adjustment commenced.

4. In relation to the changes to the allotment provisions and the dates for operational service in Schedule 2 to the Veterans' Entitlements Act (the VEA), the retrospective operation is intended to restore certain eligibility provisions to what they were under the Repatriation legislation before the introduction of the VEA. The need for this arises from the Federal Court decisions in the cases of Doessel and Davis, which overturned a longstanding interpretation of the words "allotted for duty" in the VEA and earlier Repatriation legislation. The result of this was to vest in persons, who had never before been regarded by the Department of Defence as having performed "operational service", benefits which were never intended.

5. Savings provisions covering the changed allotment procedures, have been inserted in Clause 93 of the Bill to preserve the benefits of those persons where these have already been granted as well as those whose claims are still to be decided. Claims or applications lodged on or before 8 November 1990 will be determined without regard to the amendments contained in the Bill. In respect of claims or applications lodged after that date, however, the amendments will ensure that the decisions are based on the application of the legislation in the way it was intended to operate. The result is not so much of people being disadvantaged as a result of these changes, as ensuring that entitlement to benefits is available only to those for whom the legislation is intended to reward for the performance of service which is truly "operational" in the sense that it involved dangers over and above those associated with normal peacetime Defence service.

6. Other retrospective operative dates in relation to "operational service" are not directly linked with these changes but relate to the dates on which those areas commenced or ceased to be "operational" for the purposes of the VEA. For example, clause 37(c) which relates to revised allotment procedures for service in Namibia is operative from 18 February 1989, that being the date on which Namibia commenced to be an "operational area" for the purposes of the VEA. Similarly, clause 37(d) which relates to allotment for operational service in the Gulf, commences on 2 August 1990, that being the date from which the Gulf area is regarded as being "operational".

7. In those cases in which amendments are consequential to those made to the Social Security legislation, the Department is bound to retain consistency with the Department of Social Security and to adopt similar operative dates. This applies to the provisions in clause 53 relating to the the deeming of income on loans.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

1990

12 DECEMBER 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

1990

12 DECEMBER 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator A. Vanstone (Deputy Chairman)
Senator V. Bourne
Senator R. Crowley
Senator I. Macdonald
Senator N. Sherry

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT OF 1990

The Committee has the honour to present its Eleventh Report of 1990 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 24:

Broadcasting (Foreign Ownership) Amendment Act 1990

Corporations Legislation Amendment Bill 1990

Governments and Government Instrumentalities (Application of Laws) Bill 1990

Occupational Health and Safety (Commonwealth Employment) Bill 1990

Overseas Students (Refunds) Bill 1990

Taxation Laws Amendment Bill (No. 5) 1990

BROADCASTING (FOREIGN OWNERSHIP) AMENDMENT ACT 1990

The Bill for this Act was introduced into the House of Representatives on 17 October 1990 by the Minister for Transport and Communications.

The Act:

- limits the aggregate foreign ownership of Australian commercial radio and television licensees to an absolute maximum of 50 per cent; and

- requires that at least 80 per cent of the directors of a commercial licensee be Australian citizens.

The Committee dealt with the Bill in Alert Digest No. 9 of 1990, in which it commented on provisions of the Bill. The Minister for Transport and Communications responded to those comments by letter dated 6 December 1990. Unfortunately, that letter was not received by the Committee until 11 December 1990. The Bill passed the Senate on that date. Though the legislation has now passed both Houses of the Parliament, for the information of Senators the Committee has attached a copy of that letter to this report. Relevant parts of the response are also discussed below.

Prospective commencement
Clause 2(2)

In Alert Digest No. 9, the Committee noted that clauses 3, 4, 5, 6 and 9 of the (then) Bill proposed various amendments to the Broadcasting Act 1942, to give effect to the new rule that at least 80 per cent of the directors of a commercial

licensee must be Australian citizens. Pursuant to what is now subsection 2(2) of the Act, these clauses all commence on 22 May 1991.

The Committee observed that, depending on if and when the Bill was actually passed by the Parliament and receives Royal Assent, there is a possibility that the Bill will infringe the so-called '6 month rule', which is set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. This drafting instruction states that, preferably, Acts or parts of Acts should not be expressed to commence more than 6 months from Royal Assent.

The drafting instruction also states that if a period in excess of 6 months is specified, then the reason for the longer period should be set out in the Explanatory Memorandum to the Bill. The Committee noted that, in the present case, the Explanatory Memorandum states:

> This date [ie 22 May 1991] gives licensees 12 months from the date of the Government's announcement of the new rule [22 May 1990] ... to comply with the rule.

As a result, the Committee made no further comment on the clause. However, the Minister has provided the following additional comment on the provision:

> [T]he Government feels that licensees should not be forced to take extraordinary steps to comply with the new rule [proposed by the Bill]. The period of twelve months after announcement of the new policy was chosen to ensure that licensee companies would have at least one annual general meeting at which to adjust their directorship without the necessity to call an extraordinary general meeting.

> The period referred to in subclause 2(2) is, therefore, more in the nature of a transitional provision. It is also a reasonable concession to companies which are being asked to vary legitimate arrangements in the national interest.

The Minister concludes by noting that

> if, as seems likely, the Bill does not receive Royal Assent before 22 November 1990, the six month period will be met.

The Committee thanks the Minister for this response.

Retrospectivity
Clause 12

In Alert Digest No. 9, the Committee noted that clause 12 of the (then) Bill, if enacted, would give licensees a period of time in which to comply with the new foreign ownership rules which are effected by what are now sections 7, 8, 10 and 11. These sections, inter alia, provide a 'more effective' method of calculating the aggregate foreign shareholding of a company.

What is now section 12 provides that, if a licensee was complying with the aggregate foreign ownership limit existing at 22 May 1990 but would not be complying if the amendments effected by sections 7, 8, 10 and 11 had been in force on that day, then those interests in excess of the allowable limit are to be disregarded until 22 May 1993. In effect, it gives those licensees a period of grace, within which they can put their ownership in order. Subsection 12(2) allows the Australian Broadcasting Tribunal to extend this transitional period.

In Alert Digest No. 9, the Committee indicated that, while this provision would appear to operate to the benefit of those persons affected by it, the Committee was unclear as to how the amendments would affect a licensee who was not complying with the foreign ownership limit existing at 22 May 1990. In particular, the Committee indicated that it was anxious to know whether any period of grace applies to such licensees. Accordingly, the Committee sought the Minister's advice on the way the amendments would operate in relation to such licensees.

The Minister has offered the following additional information:

> The foreign ownership limits of the Broadcasting Act are, and will continue to be, enforced as conditions of licence attaching to the licensee, not the owner of the interests.
>
> The 'period of grace', therefore, applies to the licensee. Its effect is to remove the obligation on the Australian Broadcasting Tribunal not to renew a licence where the licensee is in breach, but only where the breach arises from the restoration of tracing of indirect interests. If the licensee was aware of a breach of the current rules, it would be obliged, as it currently is, to rectify the situation before its licence can be renewed. Licensees have powers to rectify breaches of the condition under their articles of association.

The Minister goes on to say:

> Licensees breaching the new rules after announcement of the policy (22 May 1990) will be not breach their licence conditions until commencement of the Bill or of the breach, whichever is later. They will then be expected to rectify the situation before their licences can be renewed. They will not be covered by a period of grace because the situation will have arisen despite a clear statement of the Government's policy.

The Minister concluded by saying:

> The Government is not aware of any licensee which is in breach of the current rules or which would have breached the proposed rules since 22 May 1990.

The Committee thanks the Minister for his response, which has been both informative and helpful in relation to the matters raised. The Committee makes no further comment on the Act.

CORPORATIONS LEGISLATION AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 8 November 1990 by the Attorney-General.

The Bill proposes to give effect to the Heads of Agreement between Commonwealth, State and Northern Territory Ministers on future corporate regulation in Australia. Inter alia, the Bill converts the Corporations Act 1989 into a law (under section 122 of the Constitution) of the Australian Capital Territory, to be known as 'the Corporations Law of the Australian Capital Territory'.

The Committee dealt with the Bill in Alert Digest No. 10 of 1990, in which it gave some background to its previous consideration of the corporations legislation as well as making some substantive comments on the present Bill. The Attorney-General has responded to those comments in a letter dated 10 December 1990. A copy of the letter is attached to this report. Relevant parts of the Attorney-General's response are also discussed below.

Background

As the Committee noted in Alert Digest No. 10, the Committee initially dealt with the 16 bills making up what was described as the 'Corporations legislation' in Alert Digest No. 10 of 1988. In that Alert Digest, the Committee set out various and numerous concerns with the bills in the package.

The (then) Acting Attorney-General responded to the Committee's concerns by letter dated 20 January 1989. In that letter, the Acting Attorney-General also indicated that various amendments would be moved in response to the Committee's concerns. The Acting Attorney-General's response

and the foreshadowed amendments were duly noted in the Committee's Third Report of 1989.

However, in its Fourteenth Report of 1989, the Committee noted that a number of the foreshadowed amendments were not, in fact, passed. In Alert Digest No. 10 of 1990, the Committee observed that those amendments do not appear to have been taken up by this Bill either. While the Committee did not wish to, in effect, re-argue its concerns with the original package of legislation, the Committee referred Senators to what it had previously said in the earlier Alert Digest and Reports.

The Attorney-General has pointed out that, in fact, all but one of the amendments proposed by the (then) Acting Attorney-General in response to the Committee's original concerns are included in the current Bill. They, in fact, appear in Schedule 3 of the Bill. The proposed amendments are also set out in detail at pages 2 and 3 of the Attorney-General's response, which is attached to this report. The Committee thanks the Attorney-General for pointing this out and apologises for its earlier error.

In Alert Digest No. 10, the Committee also made some additional points in relation to the substantive provisions of the present Bill. Those comments and the Attorney-General's responses to them are set out below.

Commencement by Proclamation
Subclause 2(2)

The Committee noted that subclause 2(1) of the Bill provides that Parts 1 and 2 of the Bill (the 'Preliminary' part and the part converting the Corporations Act 1989 into a law for the government of the Australian Capital Territory, respectively) are to commence on Royal Assent. Subclause

2(2) provides that the remaining provisions of the Bill are to commence on a day or days to be fixed by Proclamation.

The Committee noted that, contrary to the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, there is no limit on the time within which this Proclamation must be made. The Committee also noted that the Explanatory Memorandum to the Bill offers no explanation for the provision. Accordingly, the Committee drew Senators' attention to the provision as possibly involving an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Attorney-General has responded as follows:

> The Government acknowledges that the Bill departs from the 'general rule' in not specifying any limit on the time within which Proclamation is to take effect. However, it is considered that the special circumstances of this legislation warrant the absence of such a limitation.

The Attorney-General goes on to say:

> As noted above, the Bill forms part of a matrix of complementary Commonwealth and State legislation. The Commonwealth legislation cannot effectively operate unless a sufficient number of the States pass their Application Legislation. While all Governments intend that the Commonwealth and State legislation be passed as soon as possible before the end of this year and that all legislation will come into effect at the same time, the absence of the fixed proclamation provision is intended to guard against the possibility that an unforeseen delay may otherwise require the Commonwealth legislation to be brought into operation at a time when the scheme cannot effectively operate in the event that an insufficient number of States have been able to pass their complementary legislation.

The Committee thanks the Attorney-General for this response.

Reversal of the onus of proof
Schedule 5 - Amendments relating to buy-backs - proposed new section 206BG

In Alert Digest No. 10, the Committee noted that Schedule 5 of the Bill proposes various amendments to the corporations law relating to share buy-backs. It proposes to insert a new section 206BG into the Corporations Act 1989. This new section would create a presumption that the directors were aware of a proposed or actual takeover bid in certain circumstances, with the result, according to the Explanatory Memorandum, 'that directors will not be able to avoid the notice requirements of proposed s.260BF and related provisions'. The Committee observed that, as a result, the provision reverses the onus of proof. However, as the matters requiring proof are (presumably) peculiarly within the knowledge of the defendant, the Committee made no further comment.

The Attorney-General has confirmed this in his response, where he says, in part:

> The justification is that the knowledge of the matters covered by the section would be extremely difficult for the prosecution to prove, whereas it would be relatively easy for a defendant to establish a justifiable lack of knowledge.

The Committee thanks the Attorney-General for this response.

Reversal of the onus of proof
Schedule 5 - Amendments relating to buy-backs - proposed new section 206SE

In Alert Digest No. 10, the Committee noted that Schedule 5 of the Bill proposes to insert new section 206SE, which deals with offences relating to compliance certificates, into the Corporations Act 1989. Pursuant to proposed

subsection 206SE(1), a person is taken to have contravened the subsection either by signing such a certificate or by passing it on. Proposed subsection (2) provides a defence to the offence provision if the defendant can prove that they believed, on reasonable grounds, that the proposed buy-back would not contravene the Act. Since the onus is placed on the defendant, the provision effectively reverses the onus of proof. However, as the Committee noted above, these are matters which are (presumably) peculiarly within the knowledge of the defendant. Accordingly, the Committee made no further comment.

The Attorney-General noted the Committee's comment in his response.

General comment

In Alert Digest No. 10 of 1990, the Committee noted that in Alert Digest No. 10 of 1988, it drew attention to subclause 112(3) of the (then) Corporations Bill 1988. In the earlier Alert Digest, the Committee noted that the provision was what it would ordinarily consider to be a 'Henry VIII' clause. The Committee subsequently noted that the clause nevertheless passed into law.

However, in Alert Digest No. 10 of 1990, the Committee noted with approval that this Bill seeks to repeal and replace the provision complained of with a provision of which the Committee would approve. The Committee also noted that this is not one of the provisions referred to above to which the (then) Acting Attorney-General foreshadowed amendment.

The Attorney-General has, in turn, responded to the Committee's comment as follows:

> The Committee's comments on s.112(3) as it is now to be amended in the Corporations Law are noted. However, the Government also notes that the effect of the present s.112(3) of the Corporations Act is preserved by the capacity of the Minister to specify by application order the maximum membership of unincorporated partnerships and associations that may be formed without breaching the prohibition on outsize partnerships. The reason for the change in drafting from s.112(3) of the *Corporations* Act, where the mechanism is a declaration made by a Minister, is to allow for the possibility that the maximum may be differently specified in respect of individual States. This procedure which enables an application order to be made in respect of a particular jurisdiction, subject to the approval of the relevant State Minister, gives effect to the Commonwealth agreement with State Ministers that the status quo should be preserved in respect of the present application of the Corporations Law to bodies other than companies.

The Attorney-General goes on to say:

> As was noted in the (then) Acting Attorney-General's response this provision is based on an existing and longstanding provision of company law, namely s.33(4) of the Companies Act. The purpose of the power is to provide for an appropriate degree of flexibility to respond quickly and effectively to recognise commercial developments in the size of professional firms and other such associations. The power of the Minister is subject to appropriate and adequate safeguards as a decision of the Minister under the provision is reviewable under the Administrative Decisions (Judicial Review) Act 1977 if, in exercising the power, the Minister failed to take into account a relevant consideration or if he or she took into account an irrelevant consideration.

The Committee thanks the Attorney-General for this further information and for his detailed response to the Committee's comments.

GOVERNMENTS AND GOVERNMENT INSTRUMENTALITIES (APPLICATION OF LAWS) BILL 1990

This Bill was introduced into the House of Representatives on 22 August 1990 by the Attorney-General. It is identical in substance to the Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989, which was introduced into the House of Representatives on 31 May 1989 and which was commented on by the Committee in Alert Digest No. 8 of 1989.

The Bill proposes to clarify what kind of State and Territory laws apply to the Commonwealth and Commonwealth instrumentalities and State governments. Further, it addresses problems created by long-standing uncertainties as to the extent of the Commonwealth's implied constitutional immunities from State law, as well as problems arising from section 64 of the Judiciary Act 1903, in light of the High Court's decision in The Commonwealth v Evans Deakin Industries Ltd ((1986) 161 CLR 254).

The Committee dealt with the present Bill in Alert Digest No. 5 of 1990, in which it commented on a provision in the Bill. The Attorney-General responded to those comments by letter dated 28 September 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement
Subclause 2(2)

In Alert Digest No. 5, the Committee noted that subclause 2(2) of the Bill provides that clause 9 is not to commence until 12 months after the Bill receives the Royal Assent.

The Committee noted that this is longer than the 6 month period now accepted as appropriate, referring to Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. That drafting instruction states, in part, that if a commencement date is nominated which is in excess of 6 months from Royal Assent, then the Explanatory Memorandum to the Bill should explain the reason for this.

In this case, the Explanatory Memorandum states:

> This deferral is needed in order to give time to decide what regulations should be made for the purposes of subsection 9(2), and to give time to make the regulations.

The Committee noted that the remaining provisions of the Bill are expressed to commence 3 months after the date of Royal Assent. According to the Explanatory Memorandum, this is necessary 'in order to give time for the making of regulations' (other than those for the purposes of subsection 9(2)). It would appear, therefore, that the length of the deferral required in relation to the making of regulations for the purposes of subsection 9(2) is connected to the need to decide what regulations need to be made.

The Committee noted that it did not believe that the Explanatory Memorandum to the Bill sufficiently explains why a deferral in excess of 6 months is required for the commencement of clause 9. Accordingly, the Committee drew the provision to Senators' attention as possibly constituting an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Attorney-General has responded to that comment as follows:

> ... I do not consider that this provision constitutes an inappropriate delegation of legislative power. Given the large number of State and self-governing Territory laws that need to be considered a period of twelve months is required to examine all relevant laws. Any decision to exempt a Commonwealth corporation from a particular State law would have important consequences on its activities. These consequences need to be identified and adequately considered before regulations are made. This is particularly so having regard to the fact that paragraph 14(3)(a) of the Bill provides that such regulations cannot be made after section 9 commences.

The Committee thanks the Attorney-General for this response.

OCCUPATIONAL HEALTH AND SAFETY (COMMONWEALTH EMPLOYMENT) BILL 1990

This Bill was introduced into the House of Representatives on 18 October 1990 by the Minister Representing the Minister for Industrial Relations.

The Bill proposes to provide for the protection of the health and safety of Commonwealth employees at work. In particular, the Bill imposes a general duty of care on employers, manufacturers and suppliers of plant and substances and installers of plant. A general duty of care is also imposed on employees.

The Committee dealt with the Bill in Alert Digest No. 9 of 1990, in which it commented on several clauses of the Bill. The Minister for Industrial Relations responded to those comments in a letter dated 5 December 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clauses
Subclauses 6(2), 7(2) and paragraph 9(2)(c)

In Alert Digest No. 9, the Committee noted that subclause 6(2) of the Bill would allow the Director-General of Security, after consulting the Minister, to declare that specified provisions of the Bill do not apply or that they apply subject to such modifications and adaptions as are set out. The Committee noted that this is what it would ordinarily regard as a 'Henry VIII' clause, as it would allow the Director-General to amend a piece of primary legislation by means of a piece of delegated legislation.

The Committee also noted that subclause 7(2) would allow the Chief of the Defence Force, after consulting the Minister, to declare that specified provisions of the Bill do not apply to the Defence Force (or specified members of it) or that they apply subject to such modifications or adaptions as are set out. For the same reason this is also a 'Henry VIII' clause.

Similarly, the Committee observed that paragraph 9(2) would allow the Minister to declare that the Bill does not or does apply to the holder of a particular office (subparagraphs 9(2)(c)(i) and (ii), respectively).

The Committee noted that, in each case, declarations made under these provisions are, explicitly, disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901. However, as these were 'Henry VIII' clauses, the Committee drew Senators' attention to the provisions as possibly constituting an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

In relation to subclause 6(2), the Minister has responded as follows:

> Subclause 6(2) is not to be regarded in isolation, but rather as part of the overall scheme disclosed by clause 6. The clause, as a whole, enables a balance to be struck between the imperative of preserving national security and the need for appropriate occupational health and safety provision for all Commonwealth employees. Under subclause 6(1), the Bill neither requires nor permits anything prejudicial to Australia's security. Consistent with this basic proposition, the other provisions of clause 6 set out a framework for arriving at an appropriate occupational health and safety regime to fit the varied, and sometimes difficult, circumstances of Commonwealth employees in the security field.

The Minister goes on to say:

> Subclause 6(2) ensures that, unless otherwise declared, the Bill is to apply in that field in its entirety. Thus it is presumed that, subject to the overriding and necessary rule in subclause 6(1), the Bill, once enacted, will provide the most appropriate applicable scheme. Where this presumption is not borne out, it may be necessary to vary the Bill's application at short notice, or in response to specific and perhaps complex circumstances. The infinite variety of possibilities together with their almost invariable sensitivity, led the Government to the view that a mechanism for varying the application of the Bill, more flexible than either amending legislation or regulations, was required. The declaration making power was therefore entrusted to the Director General, who has the appropriate day to day knowledge of security operations.

The Minister concludes by saying:

> It is to be noted, however, that the Director General's ability to make declarations to vary the operation of the Bill in this small field is subject to *significant constraints. Under subclause 6(2), it* is to be exercised only after consulting with the Minister for Industrial Relations, who has portfolio responsibility for occupational health and safety matters. Thus there is a specific linkage of *political responsibility. Under subclause 6(3),* the Director General is to have regard to the need to promote the objects of the Bill to the greatest extent that is consistent with the maintenance of Australia's national security. Finally, as the Committee has noted, a declaration under subclause 6(2) is explicitly a disallowable instrument under section 46A of the Acts Interpretation Act 1901, providing for Parliamentary scrutiny.

In relation to subclause 7(2), the Minister has responded:

> Subclause 7(2) of the Bill has, in relation to clause 7 of the Bill and to issues related to Australia's defence, the same role as subclause 6(2) in relation to clause 6 and issues related to national security. Clause 7, as a whole, enables a balance to be struck between the necessity for preserving Australia's defence and the need for

appropriate occupational health and safety provisions for members of the Defence Force. It is in similar terms to clause 6, with some necessary differences, and is subject to the same constraints. The power of declaration in this case is given to the Chief of the Defence Force who has the appropriate day to day knowledge of defence operations.

The Minister also notes:

It is also a slightly narrower power than that given to the Director General of Security. It extends only to the operation of the Bill in relation to members of the Defence Force. This means that the Chief of the Defence Force will not be able to make declarations in relation to premises or workplaces under Defence Force control so as to affect civilian workers as such premises.

In relation to paragraph 9(2)(c), the Minister has said:

Paragraph 9(2)(c) of the Bill, would allow the Minister, by notice in writing, to declare that:

- a person holding or acting in a specified Commonwealth office is not covered by the Bill; and
- a person holding or acting in a specified Territory office is covered by the Bill.

The Minister goes on to say:

This provision provides a measure of flexibility in the treatment of particular offices, which the Government regards as necessary, certainly in the early stages of the operation of the legislation. The power resides n the Minister, who is responsible in Parliament for the legislation and for the role of Government as employer. The notice is explicitly a disallowable instrument, thus allowing for Parliamentary scrutiny.

By way of a concluding comment in relation to all three clauses, the Minister states:

> In the light of the specific issues dealt with in these provisions and the checks and balances incorporated in them, especially the scope for Parliamentary scrutiny, I hope the Committee will regard them as appropriate.

The Committee objects in principle to 'Henry VIII' clauses and will always draw such clauses to the attention of the Senate. In the present case, however, given the context of the provisions and in light of the response from the Minister, the Committee does not press its initial objection. However, in doing so, the Committee wishes to make it clear that this is not meant to condone the practice of amending legislation in this way. The Committee will always examine each example of such a provision on its merits.

Codes of practice
Clause 70

In Alert Digest No. 9, the Committee noted that clause 70 of the Bill would allow the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees to prepare and also allow the Minister to approve, amend or revoke codes of practice '[f]or the purpose of providing practical guidance to employers'. Pursuant to subclause 70(5), where the Minister approves, amends or revokes a code of practice, the Minister must a) publish a notice to that effect in the Gazette and b) table in each House of the Parliament within 15 sitting days a document setting out the code of practice as approved, amended or revoked. However, the Committee observed that there is no scope for the Parliament to disallow such codes of practice.

The Committee noted that, pursuant to clause 71, approved codes of practice are admissible in evidence in court proceedings where it is alleged that a person has contravened a provision in the Bill or in regulations issued pursuant to it, if the code of practice was in effect and is relevant to the alleged contravention. The Committee observed that clause 71 also contemplates action being taken for 'failure to observe' a provision of a code of practice. If this is the case, then the code of practice appears to have an effect which approaches that of a piece of legislation. With this in mind, the Committee suggested that it might be appropriate for the codes of practice to be subject to disallowance by either House of the Parliament.

The Committee drew Senators' attention to the clause as possibly constituting an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister has responded as follows:

> The Government took the view that, on balance, it was not appropriate to make such codes disallowable. This is because they are essentially advisory in nature. As the Committee has noted, they are expressed to have the purpose of providing practical guidance to employers. In addition, they can be expected to deal in many cases with matters of operational detail, reflecting the implementation of expert input after lengthy consideration, making effective Parliamentary scrutiny difficult and time consuming.

The Minister goes on to say:

> The Committee has pointed out that codes may be relevant to, and may be used in, proceedings under the Act under clause 71. But, in my view, they are not to be regarded as laying down a strict rule to which adherence must be given and therefore as akin to legislation. This is because of a key proviso to clause 71 not noted by the Committee. Under the

> proviso, it is expressly open to a person to comply with the Bill, or relevant regulations, by means other than the observance of a code of practice.

While it did not refer to the proviso to clause 71 in its original comments, the Committee was, nevertheless, aware of the proviso. Indeed, the Committee considered whether the proviso might have, itself, raised another problem by, apparently, placing on the person concerned the onus of proving that the relevant standards had been complied with other than by observing the code of practice.

The Minister has stated that the codes are 'essentially advisory in nature' and 'are not to be regarded as laying down a strict rule'. The Committee accepts the Minister's view. However, the Committee is still concerned that the effect of clause 71 leaves open at least the possibility that the codes of practice will be applied and enforced as something close to law.

The Minister concludes by saying:

> In the light of these considerations, I ask the Committee to reconsider its conclusion that it may be appropriate for codes of practice to be subject to disallowance. Should the Committee, however, adhere to the original view, I will arrange to make the suggested amendment.

The Committee has reconsidered its original comments in the light of the Minister's response and remains of the view that the codes of practice should be disallowable, given the use to which they can be put in proceedings under clause 71. Accordingly, the Committee thanks the Minister for agreeing to make the necessary amendment to the Bill and for his considered response.

OVERSEAS STUDENTS (REFUNDS) BILL 1990

This Bill was introduced into the House of Representatives on 17 October 1990 by the Minister for Employment, Education and Training.

The Bill proposes to facilitate the refunding of payments by the Commonwealth to overseas students unable to undertake or complete courses of study in Australia for which money has been paid in advance.

The Committee dealt with the Bill in Alert Digest No. 9 of 1990, in which it commented on a clause of the Bill. The Minister for Employment, Education and Training responded to those comments by letter dated 5 December 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Power to obtain information and documents
Clause 5

In Alert Digest No. 9, the Committee noted that clause 5 of the Bill would empower the Secretary (or an officer authorised in writing) to issue notices to an educational institution (or its agent) requiring them to supply 'particulars' of overseas students enrolled at the institution. The Committee suggested that this may be considered to involve a breach of students' privacy, as there is no indication of the kinds of information covered by 'particulars' or the uses to which such information could be put. The Committee also noted that, though there is no formal requirement to do so, neither the Explanatory Memorandum to the Bill nor the Minister's Second Reading

speech refer to the Privacy Commissioner having been consulted on this matter.

The Committee drew Senators' attention to the clause as possibly trespassing unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> I appreciate the Committee's concern on privacy issues and I can assure you that, while no mention was made in the Explanatory Memorandum or Second Reading Speech, consultations were undertaken with the Privacy Commissioner's Office. This was at officer level and resulted in an undertaking being given to include in the Explanatory Memorandum an indication of the information about students that would be sought from institutions.

In relation to the Committee's concern about the meaning and use of 'particulars', the Minister has drawn the Committee's attention to the Notes on Clause 5 of the Explanatory Memorandum

> which does indicate the type of information to be sought, and that its use is to establish the amount of refund to which a student may be entitled.

The Committee thanks the Minister for pointing this out.

The Minister concludes by saying:

> I should add that students, when completing the Acceptance Advice Form prior to visa issue, specifically authorise Australian education institutions and other Commonwealth agencies to provide to my Department, on request, information contained in the application, enrolment details, attendance records, results, current address and information regarding their entry to and stay in Australia. This provision has been included for some

time and is in keeping with the Information Privacy Principles of the Privacy Act 1988.

The Committee thanks the Minister for his response and for his assistance with this Bill.

TAXATION LAWS AMENDMENT BILL (NO. 5) 1990

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend 5 Acts to:

- increase the level of tax deductions for personal superannuation contributions for people not receiving any superannuation support;

- introduce a tax rebate for certain superannuation payments;

- tax exempt the pay and allowances of Defence Force personnel on operational service in Kuwait;

- make amendments in relation to the gift provisions of income tax law, taxation of eligible termination payments and capital gains;

- apply a new penalty where a taxpayer overestimates the amount of tax deductions from salary or wages in a provisional tax variation application;

- exempt payments made by employers to commercial child care centres from fringe benefit tax;

- modify a number of tax laws to comply with the Sex Discrimination Act 1984; and

- correct a technical deficiency in the Occupational Superannuation Standards Act 1987 in respect of tax file numbers.

The Committee dealt with the Bill in Alert Digest No. 10 of 1990, in which it commented on several clauses of the Bill. The Parliamentary Secretary to the Treasurer responded to those comments in a letter dated 12 December 1990. A copy of the letter is attached to this report. The Committee has not had time to consider the response in the context of this report. However, as the Committee understands the Bill is due to be debated in the Senate shortly, the Committee reproduces for the information of Senators its original comments, together with a reference to the relevant part of the Parliamentary Secretary to the Treasurer's response, without making any further comment.

Prospective commencement
Subclause 2(3)

In Alert Digest No. 10, the Committee noted that subclause 2(3) of the Bill provides that the amendments proposed by subclauses 38(3) and 39(2) and by Part 3 of the Schedule to the Bill are to commence on 1 July 1993. These proposed amendments all relate to the Bill's intention to modify the operation of a number of taxation laws in accordance with the policy of the Sex Discrimination Act.

The Committee observed that the delayed commencement of these provisions is clearly in excess of the 6 months which would be regarded as the acceptable maximum pursuant to Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. In making this observation, the Committee indicated that it accepts that the Drafting Instruction explicitly addresses commencement by Proclamation only. However, as it said in that Alert Digest, the Committee believes that the general principles are equally applicable to instances such as this.

Drafting Instruction No. 2 of 1989 states that provisions involving prospective commencement in excess of 6 months from Royal Assent should be explained in the Explanatory Memorandum. In relation to the amendments proposed by Part 3, the Explanatory Memorandum to the Bill states:

> To ensure an equitable result, the removal of the marital status limitations in sections 102 and 102AC of the Assessment Act will not take effect for two years after the commencement of the amendment reducing the age limit (refer to Part 1 of the Schedule). Married women under 18 years of age would otherwise be disadvantaged by this amendment because the Marriage Act 1961 allows women to marry at age 16 while men cannot marry until they are 18 years of age. Accordingly, by subclause 38(3) of this Bill the amendments made by Part 3 of the Schedule apply to assessments in respect of the 1993-94 and subsequent income years.

The Committee indicated that it had some difficulty in understanding how this amendment would apply and why it needs to be retrospective. The Committee therefore requested some further clarification from the Treasurer on the need for retrospectivity in this case.

The Parliamentary Secretary to the Treasurer's response to this comment appears in paragraphs 2 - 8 of Attachment A to his letter of 12 December 1990, which is attached to this report.

The Committee also noted that, while subclause 39(2) is not expressed to commence until 1 July 1993, the subclause itself would operate to negate the effect of section 170 of the Income Tax Assessment Act 1936 (which limits the Taxation Commissioner's power to issue amended assessments) to prevent the amendment of an assessment made before the

commencement of the provision. In other words, while the provision is expressed to commence prospectively it can operate retrospective to its commencement. Though it was not the Committee's principal concern in relation to the provision, the Committee indicated that it would appreciate some guidance from the Treasurer on the rationale behind the provision.

The Parliamentary Secretary to the Treasurer's response to this comment appears in paragraphs 10 - 11 of Attachment A to his letter of 12 December 1990, which is attached to this report.

Retrospectivity
Clause 16, subclauses 28(7) and (8)

In Alert Digest No. 10, the Committee noted that various clauses of the Bill proposed to amend various provisions of the Income Tax Assessment Act retrospectively. In relation to all but 2 of the amendments the Committee was able to conclude that the amendments operated beneficially in relation to taxpayers.

The Committee noted that clause 16 proposes to make certain amendments to the Income Tax Assessment Act in relation to a person's principal residence where that person has been temporarily absent. Pursuant to subclause 28(6), these amendments are to operate from and including the income tax year which includes 20 September 1985.

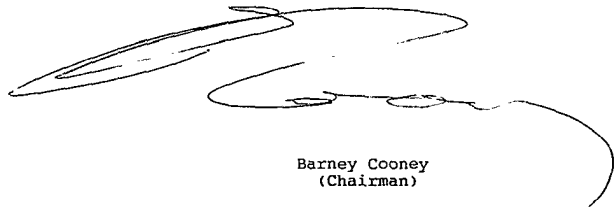
The Committee also noted that clauses 17-20 relate to Part IVA of the Income Tax Assessment Act, which contains the general anti-avoidance provisions of the income tax law. The amendments proposed would extend the meaning of a `tax benefit' for the purposes of section 177C of that Act. Pursuant to subclause 28(7), the amendments would apply to

any tax schemes entered into after the Bill was introduced (ie 8 November 1990).

The Committee drew subclauses 28(7) and (8), together with the substantive amendments to which they relate, to Senators' attention as possibly trespassing unduly on personal rights and liberties in breach of principle 1(a)(i) of the Committee's terms of reference. The Committee also sought from the Treasurer a clarification in relation to the effect of clause 16.

The Parliamentary Secretary to the Treasurer's detailed response in relation to each of these issues is contained in Attachments D, C and B to his letter of 12 December 1990, respectively. A copy of that letter is attached to this report.

The Committee thanks the Parliamentary Secretary to the Treasurer for his response.



Barney Cooney
(Chairman)

Minister for Transport and Communications

The Hon. Kim C Beazley
Minister for Transport and Communications
Leader of the House of Representatives
Vice President of the Executive Council
Federal Member for Swan

Electorate Office
2-4 Mint Street
East Victoria Park
Perth WA
Tel. (09) 362 6255

Parliament House
Canberra ACT 2600
Australia
Tel. (06) 277 7200
Fax. (06) 273 4106

16 DEC 1990

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

Dear Senator Cooney

I refer to *Scrutiny of Bills Alert Digest* No 9 (7 November 1990) in relation to comments on the Broadcasting (Foreign Ownership) Amendment Bill 1990.

The new rules proposed in the Bill, which will limit foreign directorships of broadcast licensees to 20%, could place the licensee in breach of its conditions of licence and threaten the renewal of that licence if implemented on commencement of the Bill. There is currently no limit on foreign directorships in broadcasters. The purpose of the amendments is to ensure that foreign attitudes and perceptions likely to influence the broadcasting activities of licensees are kept within reasonable bounds.

In those circumstances, the Government feels that licensees should not be forced to take extraordinary steps to comply with the new rule. The period of twelve months after announcement of the new policy was chosen to ensure that licensee companies would have at least one annual general meeting at which to adjust their directorship without the necessity to call an extraordinary general meeting.

The period referred to in subclause 2 (2) is, therefore, more in the nature of a transitional provision. It is also a reasonable concession to companies which are being asked to vary legitimate arrangements in the national interest.

I also note that if, as seems likely, the Bill does not receive Royal Assent before 22 November 1990, the six month period will be met.

The foreign ownership limits of the Broadcasting Act are, and will continue to be, enforced as conditions of licence attaching to the licensee, not the owner of the interests.

The "period of grace", therefore, applies to the licensee. Its effect is to remove the obligation on the Australian Broadcasting Tribunal not to renew a licence where the licensee is in breach, but only where the breach arises from the restoration of tracing of indirect interests. If the licensee was aware of a breach of the current rules, it would be obliged, as it currently is, to rectify the situation before its licence can be renewed. Licensees have powers to rectify breaches of the condition under their articles of association.

Licensees breaching the new rules after announcement of the policy (22 May 1990) will be not breach their licence conditions until commencement of the Bill or of the breach, whichever is later. They will then be expected to rectify the situation before their licences can be renewed. They will not be covered by a period of grace because the situation will have arisen despite a clear statement of the Government's policy.

The Government is not aware of any licensee which is in breach of the current rules or which would have breached the proposed rules since 22 May 1990.

I hope these comments will assist the Committee.

Yours sincerely

KIM C. BEAZLEY

Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

OGC90/11261

28 SEP 1990

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

Dear Senator Cooney

Thank you for the comments of the Senate Standing Committee for the Scrutiny of Bills on the Governments and Government Instrumentalities (Application of Laws) Bill 1990 contained in Scrutiny of Bills Alert Digest No.5 of 1990, which were forwarded to me in a letter dated 13 September 1990 from the Secretary to the Committee.

I have noted the Committee's comments on the Bill. In relation to subclause 2(2) of the Bill I do not consider that this provision constitutes an inappropriate delegation of legislative power. Given the large number of State and self-governing Territory laws that need to be considered a period of twelve months is required to examine all relevant laws. Any decision to exempt a Commonwealth corporation from a particular State law would have important consequences on its activities. These consequences need to be identified and adequately considered before regulations are made. This is particularly so having regard to the fact that paragraph 14(3)(a) of the Bill provides that such regulations cannot be made after section 9 commences.

I trust this will be of assistance.

Yours sincerely

Regards
Michael Duffy

MICHAEL DUFFY

MINISTER FOR INDUSTRIAL RELATIONS

PARLIAMENT HOUSE
CANBERRA, A C T 2600

Senator B Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Room S.G 49.5
Parliament House
CANBERRA ACT 2600

5 DEC 1990

Dear Senator Cooney

I refer to comments by the Senate Standing Committee on the Scrutiny of Bills concerning the Occupational Health and Safety (Commonwealth Employment) Bill 1990 (the Bill). I would be grateful if the Committee would consider the observations on its comments set out below.

The Committee has raised subclauses 6(2) and 7(2), and paragraph 9(2)(c) of the Bill, and commented that it would ordinarily regard such provisions as "Henry VIII" clauses, ie as allowing the amendment of an enactment by subordinate legislation.

Subclause 6(2) is not to be regarded in isolation, but rather as part of the overall scheme disclosed by clause 6. The clause, as a whole, enables a balance to be struck between the imperative of preserving national security and the need for appropriate occupational health and safety provision for all Commonwealth employees. Under subclause 6(1), the Bill neither requires nor permits anything prejudicial to Australia's security. Consistent with this basic proposition, the other provisions of clause 6 set out a framework for arriving at an appropriate occupational health and safety regime to fit the varied, and sometimes difficult, circumstances of Commonwealth employees in the security field.

Subclause 6(2) ensures that, unless otherwise declared, the Bill is to apply in that field in its entirety. Thus it is presumed that, subject to the overriding and necessary rule in subclause 6(1), the Bill, once enacted, will provide the most appropriate applicable scheme. Where this presumption is not borne out, it may be necessary to vary the Bill's application at short notice, or in response to specific and perhaps complex circumstances. The infinite variety of possibilities together with their almost invariable sensitivity, led the Government to the view that a mechanism for varying the application of the Bill, more flexible than either amending legislation or regulations, was required. The declaration making power was therefore entrusted to the Director General,

who has the appropriate day to day knowledge of security operations.

It is to be noted, however, that the Director General's ability to make declarations to vary the operation of the Bill in this small field is subject to significant constraints. Under subclause 6(2), it is to be exercised only after consulting with the Minister for Industrial Relations, who has portfolio responsibility for occupational health and safety matters. Thus there is a specific linkage of political responsibility. Under subclause 6(3), the Director General is to have regard to the need to promote the objects of the Bill to the greatest extent that is consistent with the maintenance of Australia's national security. Finally, as the Committee has noted, a declaration under subclause 6(2) is explicitly a disallowable instrument under section 46A of the Acts Interpretation Act 1901, providing for Parliamentary scrutiny.

Subclause 7(2) of the Bill has, in relation to clause 7 of the Bill and to issues related to Australia's defence, the same role as subclause 6(2) in relation to clause 6 and issues related to national security. Clause 7, as a whole, enables a balance to be struck between the necessity for preserving Australia's defence and the need for appropriate occupational health and safety provisions for members of the Defence Force. It is in similar terms to clause 6, with some necessary differences, and is subject to the same constraints. The power of declaration in this case is given to the Chief of the Defence Force who has the appropriate day to day knowledge of defence operations. It is also a slightly narrower power than that given to the Director General of Security. It extends only to the operation of the Bill in relation to members of the Defence Force. This means that the Chief of the Defence Force will not be able to make declarations in relation to premises or workplaces under Defence Force control so as to affect civilian workers at such premises.

Paragraph 9(2)(c) of the Bill, would allow the Minister, by notice in writing, to declare that:

- a person holding or acting in a specified Commonwealth office is not covered by the Bill; and

- a person holding or acting in a specified Territory office is covered by the Bill.

This provision provides a measure of flexibility in the treatment of particular offices, which the Government regards as necessary, certainly in the early stages of the operation of the legislation. The power resides in the Minister, who is responsible in Parliament for the legislation and for the role of Government as employer. The notice is explicitly a disallowable instrument, thus allowing for Parliamentary scrutiny.

In the light of the specific issues dealt with in these provisions and the checks and balances incorporated in them, especially the scope for Parliamentary scrutiny, I hope the Committee will regard them as appropriate.

Finally, the Committee noted that Codes of Practice under clause 70 of the Bill are not disallowable instruments. The Government took the view that, on balance, it was not appropriate to make such codes disallowable. This is because they are essentially advisory in nature. As the Committee has noted, they are expressed to have the purpose of providing practical guidance to employers. In addition, they can be expected to deal in many cases with matters of operational detail, reflecting the implementation of expert input after lengthy consideration, making effective Parliamentary scrutiny difficult and time consuming.

The Committee has pointed out that codes may be relevant to, and may be used in, proceedings under the Act under clause 71. But, in my view, they are not to be regarded as laying down a strict rule to which adherence must be given and therefore as akin to legislation. This is because of a key proviso to clause 71 not noted by the Committee. Under the proviso, it is expressly open to a person to comply with the Bill, or relevant regulations, by means other than the observance of a code of practice.

In the light of these considerations, I ask the Committee to reconsider its conclusion that it may be appropriate for codes of practice to be subject to disallowance. Should the Committee, however, adhere to the original view, I will arrange to make the suggested amendment.

Yours fraternally

Peter Cook

Minister for Employment, Education and Training
Parliament House, Canberra, ACT, 2600

5 DEC 1990

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

Dear Senator Cooney

I refer to your Committee's comments in Alert Digest No 9 of 7 November 1990 which drew Senators' attention to Clause 5 of the Overseas Students (Refunds) Bill 1990.

I appreciate the Committee's concern on privacy issues and I can assure you that, while no mention was made in the Explanatory Memorandum or Second Reading Speech, consultations were undertaken with the Privacy Commissioner's Office. This was at officer level and resulted in an undertaking being given to include in the Explanatory Memorandum an indication of the information about students that would be sought from institutions.

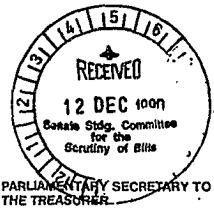
You question whether the "particulars" or the uses to which such information could be put are specified. I draw the Committee's attention to the Notes on Clause 5 of the Explanatory Memorandum which does indicate the type of information to be sought, and that its use is to establish the amount of refund to which a student may be entitled.

I should add that students, when completing the Acceptance Advice Form prior to visa issue, specifically authorise Australian education institutions and other Commonwealth agencies to provide to my Department, on request, information contained in the application, enrolment details, attendance records, results, current address and information regarding their entry to and stay in Australia. This provision has been included for some time and is in keeping with the Information Privacy Principles of the Privacy Act 1988.

Yours sincerely

John Dawkins

COMMONWEALTH OF AUSTRALIA



SENATOR BOB McMULLAN
SENATOR FOR THE A.C.T.
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

PARLIAMENTARY SECRETARY TO
THE TREASURER
Ph (06) 277 3795
Fax (06) 277 3789

SENATOR B COONEY 12 DECEMBER 1990
CHAIRMAN
SENATE SCRUTINY OF BILLS COMMITTEE

TAXATION LAWS AMENDMENT (No 5) 1990

Attached are responses to comments made by your Committee on the above Bill.

If you have any further queries please contact Michael Monaghan of my Office on ex3794

Senator Bob McMullan
Parliamentary Secretary to the Treasurer

ATTACHMENT A

Prospective commencement (subclauses 2(3), 38(3) and 39(2) and Part 3 of the Schedule)

ISSUE

The Committee has commented that certain amendments proposed by Part 3 of the Schedule to the Taxation Laws Amendment Bill (No.5) 1990, to comply with the policy of the Sex Discrimination Act 1984, are to commence on 1 July 1993 and that this start time is outside the guidelines contained in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. In addition the Committee mentions a difficulty in understanding the Explanatory Memorandum's discussion of the application of the amendments proposed by Part 3 of the Schedule.

COMMENT

2. As the Committee has noted, Office of Parliamentary Counsel Drafting Instruction No.2 of 1989 (copy attached) is directed to commencement by proclamation. While the Committee has expressed a belief that the Instruction embodies wider general principles, it appears that the Instruction was deemed necessary because commencement by proclamation can be deferred "for many years", if not indefinitely. This, of course, is not the case where the time of commencement is contained in the Bill itself.

3. Instruction No.2, having expressed a general rule that a time restriction should apply to any proclamation, goes on to draw a distinction between commencements which "fix a period" and commencements which "set a date". Only in the former case is a six month period required. In the latter case, in the words of the Instruction:

> "... if a date option is chosen, PM&C do not wish at this stage to restrict the discretion of the instructing Department to choose the date."

The amendments described above fall into the category of amendments commencing by date.

4. The object of the amendments proposed by Part 3 of the Schedule to the Bill is to remove discrimination based on marital status between married and unmarried minors from certain provisions of the Income Tax Assessment Act 1936 (the Act).

5. Until now certain trust income payable to married persons under the age of 21 has been taxed according to the normal rate scale, while such income payable to unmarried persons under 21 may be taxed at a special rate of tax under section 102 of the Act. Following amendments by Part 1 of the Schedule, section 102 will apply by the operation of subclause 38(1) for the 1991-1992 and subsequent income years to persons under the age of 18 rather than persons under the age of 21, that is to persons who are minors.

6. It is further proposed by Part 3 of the No.5 Bill to remove discrimination on the grounds of marital status, so that in respect of certain unearned income (section 102AC) and trust income (section 102) married minors will be taxed on the same basis as that applied for unmarried minors.

7. If the amendments to achieve this result were to commence from the 1991-92 income year, married female minors (who can marry at age 16, while men can marry only when they reach 18) would be disadvantaged in the sense that they may be the subject of arrangements or the beneficiaries of trusts which had been set up before the No.5 Bill becomes law in the belief that the existing provisions would apply to them. In other words, women may already be married minors entitled to the relevant types of income and will continue to be in that situation for two more years, after which they turn 18 and cease to be minors.

8. It was considered to be equitable to postpone the application of the changes in the law in respect of all presently married persons for the period before they reach the age of majority, after which the provisions will automatically cease to apply to them. The operation of the amendments is prospective.

ISSUE

9. The Committee commented that subclause 39(2) of the No.5 Bill negates the effect of section 170 of the Act to prevent the amendment of an assessment made before the commencement of the provision and that therefore, while the provision is expressed to commence prospectively it can operate retrospective to its commencement.

COMMENT

10. Clause 39 is a standard provision included in each taxation amendment Bill, giving the Commissioner of Taxation power to reopen assessments made before the amendments in the Bill become law for the purpose of giving effect to those amendments. Subclause 39(2), operates in conjunction with subclause 38(3), in such a way as to give effect to amendments of assessments of income for the 1993-94 and subsequent years of income only. That is, its substantive operation cannot precede its commencement, although its administrative operation may.

11. The clause is designed to apply to prevent injustices in the rare cases in which assessments in respect of a particular year of income may issue before the commencement of that year, particularly where those assessments do not take account of the soon-to-be-commencing amendments.

ATTACHMENT B

CLAUSE 16 : ABSENCES FROM SOLE OR PRINCIPAL RESIDENCE

The Committee has sought confirmation that clause 16 of the Taxation Laws Amendment Bill (No.5) 1990, which makes certain amendments to the Income Tax Assessment Act 1936 in relation to the capital gains tax exemption for a person's princpal residence, will have a beneficial effect on taxpayers.

2. Briefly, the amendments will enable taxpayers to retain the tax exempt status of their sole or principal residence for an unlimited period of absence (instead of the present four year maximum) provided the dwelling is not used to produce income. For periods of income-producing use during a taxpayer's absence, an exemption of up to six years will now be available. If, after six years of such income-producing use, the taxpayer's absence continues and income is derived from the dwelling, an exemption will no longer be available, but only in resect of the period of absence exceeding six years. It will also no longer be necessary for the taxpayer to reoccupy the dwelling prior to its disposal to be eligible for the exemption during an absence.

3. It is therefore confirmed that the changes proposed to be made by clause 16 are to the benefit of taxpayers.

4. The Committee has also sought confirmation that persons who have, since 20 September 1985, been denied an exemption from the Capital Gains Tax provisions as a result of a temporary absence from their principal residence, will be entitled to a refund of any tax paid.

5. The amendments proposed by clause 16 will be backdated to 20 September 1985 so that taxpayers previously ineligible for an exemption may benefit from the changes. Clause 39 of the Bill will authorise the Commissioner of Taxation to amend assessments made before the Bill becomes law, should this be necessary to give effect to the proposed amendments. It is therefore confirmed that taxpayers will be entitled to refunds of tax paid if they become eligible for an exemption as a result of the changes proposed by the Bill.

ATTACHMENT C

Retrospectivity (subclause 28(8) "Application of amendments" and related clauses)

ISSUE

Certain provisions of the Taxation Laws Amendment Bill (No.5) 1990 dealing with the payment of provisional tax on salary or wages have an element of retrospectivity. It is suggested that there is possibly an undue trespass on the personal rights and liberties of taxpayers.

COMMENTS

2. Following an announcement in the 1990-91 Budget the Income Tax Assessment Act 1936 (the Act) was amended by the Taxation Laws Amendment (Rates and Provisional Tax) Act 1990 (No.87 assented to on 6 November 1990) to authorise the collection of provisional tax on salary or wages income where certain conditions are met. The amendments apply for the ascertainment of provisional tax for the 1990-91 and subsequent income years.

Clauses 21, 22(1) and 23

3. Clauses 21 (definition of "section 221YAB taxpayer"), 22(1) and 23 of the No.5 Bill amend certain provisions of the Act, including a provision inserted by the Taxation Laws Amendment (Rates and Provisional Tax) Act, dealing with the payment of provisional tax on salary or wages. The amendments are of a drafting nature only, initiated by the Office of Parliamentary Counsel, and considered necessary in conjunction with another amendment made to the provisional tax provisions by clause 25 of the Bill. The amendments do not change materially the existing operation of the law as it applies to authorise the collection of provisional tax on salary or wages where the necessary conditions are met.

4. On the basis that the amendments are of a drafting nature and make no material change it is considered that there is no trespass on a person's rights. The application of the amendments by subclause 28(8) is consistent with the application of the earlier amendments to the relevant provisions of the Act by the Taxation Laws Amendment (Rate and Provisional Tax) Act.

5. In the practical operation of the law, the No. 5 Bill was introduced into the Parliament on 8 November 1990 - the Commissioner of Taxation did not start issuing assessment notices notifying taxpayers of provisional tax liability for the 1990-91 year of income, raised on salary or wages in the circumstances authorised by the Taxation Laws Amendment (Rates and Provisional Tax) Act, until 26 November 1990.

Clause 25

6. Clause 25 of the No.5 Bill proposes amendments of section 221YDB of the Income Tax Assessment Act 1936 (the Act) imposing additional tax by way of penalty on a taxpayer who substantially under-estimates his or her actual taxable income in an application to vary provisional tax.

7. The trigger for the application of section 221YDB imposing additional tax has been, broadly, that the taxpayer in an application to vary provisional tax under-estimated the actual taxable income, excluding salary or wages income, by 10% or more. The Taxation Laws Amendment (Rates and Provisional Tax) Act (assented to on 6 November 1990) amended the Act to change the basis of the section 221YDB trigger where certain conditions are met (i.e., where provisional tax is to be payable on salary or wages) so that additional tax applied where the taxpayer under-estimated the actual taxable income, including salary or wages income, by 10% or more.

8. The amendments by the Taxation Laws Amendment (Rates and Provisional Tax) Act were not to apply in respect of applications to vary 1990-91 provisional tax furnished before the day on which that Act received assent, i.e., 6 November 1990. In the practical operation of the income tax law the only 1990-91 provisional tax notified as payable before 6 November 1990 could only be in respect of provisional tax payable by instalments.

9. Clause 25 of the No. 5 Bill amends section 221YDB in two respects:

(a) to make changes of a drafting nature to the trigger referred to in paragraph 7 where a taxpayer under-estimates actual taxable income; and

(b) to introduce a new penalty that had been foreshadowed in the 1990-91 Budget, and the Second Reading Speech to the Taxation Laws Amendment (Rates and Provisional Tax) Act, to apply where a taxpayer over-estimates by more than 10% the tax instalment deductions included in an application to vary provisional tax.

10. At this point it is relevant to draw attention that clause 25, and subclause 28(8) applying the amendments by clause 25 to provisional tax payable (including instalments) for the 1990-91 and subsequent years, are subject to the operation of clause 32 of the Bill - "Transitional - penalties under section 221YDB of the amended Act". As a consequence it is considered that the amendments by clause 25 do not operate retrospectively.

11. In respect of the first matter (paragraph 9(a)), clause 25 proposes amendments of section 221YDB, and in particular by the inclusion in the Act of new subparagraphs 221YDB(1)(a)(i) and (1AA)(b)(i), dealing with the trigger where a taxpayer (i.e., a "section 221YAB taxpayer" as defined by clause 21) under-estimates actual taxable income in the situation where

provisional tax is payable on salary or wages. The amendments and the inclusion of the new subparagraphs are drafting measures only consequent upon the omission by subclause 22(1) of subsection 221YAB(2) of the Act.

12. There is no change of substance to the existing operation of the Act caused by the relevant amendments. Because of this it is considered that there is no trespass on a person's rights. The application of the amendments by subclause 32(2) so that they do not apply to estimates for 1990-91 provisional tax made before the day the Taxation Laws Amendment (Rates and Provisional Tax) Act received assent is consistent with the start of the original provisions (refer paragraph 8).

13. Clause 25 also introduces the new penalty foreshadowed in the 1990-91 Budget and the Second Reading Speech to the Taxation Laws Amendment (Rates and Provisional Tax) Act. The penalty operates where a taxpayer (who meets certain conditions) over-estimates tax instalment deductions by more than 10% in an application to vary provisional tax.

14. The application of the new penalty, contained in proposed new subsections 221YDB(1AAA) and (1ABA), is subject to the operation of subclause 32(3) which ensures that those provisions will not apply to impose additional tax by way of penalty in respect of 1990-91 provisional tax raised as a consequence of an estimate to vary provisional tax furnished before 9 November 1990 - the date of introduction of the No.5 Bill.

15. Because of the operation of clause 32 it is considered that the amendments are not retrospective and there is no trespass of a person's rights.

ATTACHMENT D

RETROSPECTIVITY - SUBCLAUSE 28(7)

Clauses 17-20 of the No.5 Bill extend the operation of the general anti-avoidance provisions in the income tax law, to cover schemes that would abuse the new tax rebate being inserted by clause 14.

2. Subclause 28(7) proposes that anti-avoidance provisions apply to schemes entered into after introduction of the Bill, rather than schemes entered into after Royal Assent. This is because there would otherwise have been a hiatus period, between the date of introduction and Royal Assent, when avoidance schemes could have been successfully carried out.

OFFICE OF PARLIAMENTARY COUNSEL

DRAFTING INSTRUCTION

NO. 2 OF 1989

Commencement of Legislation by Proclamation

Last year, Senators expressed strong disapproval of the fact that many pieces of legislation had been unproclaimed, in some cases for many years (eg Hansard 24 November 2772ff.).

2. In response to this criticism, the Department of the Prime Minister and Cabinet (PM&C) has instructed that a new policy should be adopted when providing for commencement of Acts by Proclamation. PM&C has issued a Legislation Circular and new paragraphs to be inserted in the Legislation Handbook, copies of which are attached. I have discussed the matter with PM&C, and what follows is my understanding of the new policy.

3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the "fixed time"). This is to be accompanied by either:

(a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, PM&C do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

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

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

7. In future therefore, commencement clauses providing for restricted Proclamation dates should be along the following lines, depending on which options are chosen.

1. "FORCED COMMENCEMENT"

A. Where only one day may be proclaimed

(X) Subject to subsection (Y), this Act commences on a day to be fixed by Proclamation.

AND EITHER

(Y) If this Act does not commence under subsection (X) before [specified day], it commences on that day.

OR

(Y) If this Act does not commence under subsection (X) within the period of [6 months] beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

[Note: This form can be adapted for the commencement of a single provision, 2 or more provisions or 'the remaining provisions'.]

B. Where different days may be proclaimed

(X) Subject to subsection (Y), sections x, y and z/the remaining provisions of this Act/commence on a day or days to be fixed by Proclamation.

AND EITHER

(Y) If a provision referred to in subsection (X) does not commence under that subsection before [specified day], it commences on that day.

OR

(Y) If a provision referred to in subsection (X) does not commence under that subsection within the period of [6 months] beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

2. "FORCED REPEAL"

A. Where only one day may be proclaimed

(X) Subject to subsection (Y), this Act commences on a day to be fixed by Proclamation.

AND EITHER

(Y) If the commencement of this Act is not fixed by a Proclamation published in the Gazette before [specified day], this Act is repealed on that day.

OR

(Y) If the commencement of this Act is not fixed by a Proclamation published in the Gazette within the period of [6 months] beginning on the day on which this Act receives the Royal Assent, this Act is repealed on the first day after the end of that period.

[Note: This form can be adapted for the commencement of a single provision, 2 or more provisions or 'the remaining provisions'.]

B. Where different days may be proclaimed

(X) Subject to subsection (Y), sections x, y and z/the remaining provisions of this Act/commence on a day or days to be fixed by Proclamation.

AND EITHER

(Y) If the commencement of a provision referred to in subsection (X) is not fixed by a Proclamation published in the Gazette before [specified day], the provision is repealed on that day.

OR

(Y) If the commencement of a provision referred to in subsection (X) is not fixed by a Proclamation published in the Gazette within the period of [6 months] beginning on the day on which this Act receives the Royal Assent, the provision is repealed on the first day after the end of that period.

IML Turnbull

(I M L Turnbull)
First Parliamentary Counsel
10 February 1989

THE DEPARTMENT OF
THE PRIME MINISTER AND CABINET

CANBERRA A.C.T. 2600

Telephone: (062) 71 5111
Facsimile: (062) 71 5474

Legislation Liaison Officers
Parliamentary Liaison Officers
ALL DEPARTMENTS

LEGISLATION CIRCULAR NO. 1/1989

NEW PROCEDURES FOR UNPROCLAIMED LEGISLATION - MACKLIN MOTION COMMENCEMENT PROVISIONS AND EXPLANATORY MEMORANDUMS

Macklin Motion

On 29 November 1988 the Senate agreed to a motion by Senator Macklin -

> "that there be laid on the table of the Senate, on or before 31 May and 30 November each year, details of all provisions of Acts which come into effect on proclamation and which have not been proclaimed, together with a statement of reasons for their non-proclamation and a timetable for their operation."

2. The timetable envisaged in the motion would require most of the work preparing the response to be completed during the busiest part of the Parliamentary sittings. This will create difficulties for co-ordination in this Department and for preparation of responses by other Departments. Accordingly, procedures will be put in place to enable the response to be tabled in March and August each year.

3. The Deputy Prime Minister will write soon to all portfolio Ministers attaching a list of Acts or parts of Act which fall within their portfolio and which appear not to have been proclaimed. Ministers will be asked to provide to the Prime Minister by 10 February 1989 detailed reasons for the failure to proclaim the commencement of those Acts or parts of Acts and a timetable for their proclamation.

4. Departments should maintain a register of all unproclaimed provisions and Acts in their portfolio and the reasons for their non-proclamation. The register should be regularly updated to ensure a complete, accurate and timely response to the Senate motion.

Commencement Provisions in Legislation

5. Attached are new paragraphs 5.8A and 7.15A to be inserted in the Legislation Handbook. Paragraph 5.8A makes it clear that as a general rule, Acts that commence on proclamation should provide a specific date, or a specific

period after royal assent (such as 6 months), at which time the Act commences if it has not already commenced by proclamation. Alternatively, the commencement provision can provide for the Act to be repealed if a proclamation has not been made by the specified date or specified period after royal assent.

6. Acts or provisions of Acts should commence on proclamation alone only in unusual circumstances where the commencement is contingent on other events with uncertain timing (such as enactment of complementary State legislation).

7. The response to the Macklin motion of 27 September 1988 concerning unproclaimed Acts was tabled in the Senate on 24 November 1988. The response indicated that a large number of provisions of Commonwealth Acts, some dating from the 1920's have not been proclaimed for a variety of reasons including administrative oversight, changed policy and lack of priority. Requiring commencement of legislation within a specific period of royal assent or by a specified date will give Departments more impetus to arrange the preparation of any necessary delegated legislation or introduce new administrative procedures required for the provisions to operate.

8. Departments should note the comments made by Senator Macklin in the Senate on 24 November 1988 (page 2773 - copy attached) concerning the Senate amending future legislation to substitute specific commencement dates where bills provide for commencement on proclamation.

Explanatory Memorandums

9. New paragraph 7.15A to be inserted in the Legislation Handbook makes it clear that where commencement on a date to be proclaimed is used, the notes on the commencement clause in the explanatory memorandum should set out the reasons why that commencement is necessary and a specific date for commencement could not be chosen. This explanation would usually provide the basis for the statement of reasons for non-proclamation to be included in the response to the Macklin motion.

10. This circular should be brought to the attention of all officers in your portfolio involved in the preparation of legislation.

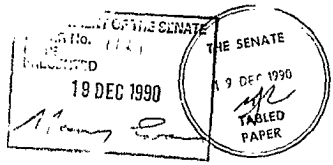
R.A. Jones
Senior Adviser
Parliamentary Branch

16 January 1989

NEW PARAGRAPHS TO BE INSERTED IN THE LEGISLATION HANDBOOK

5.8A As a general rule, the commencement clause for Acts which commence on proclamation should provide a specific date, or a specific period after royal assent (such as 6 months) at which time the Act commences if it has not already commenced by proclamation, or alternatively at which time the Act is deemed to be repealed if the proclamation has not been made. Where preparatory work is required before an Act commences, a realistic assessment should be made of the time required to complete the preparations and a specific date or a specific period after royal assent for commencement included in the drafting instructions. Provisions should commence on proclamation alone only in unusual circumstances where the commencement is contingent on other events with uncertain timing (such as enactment of complementary State legislation). Where provisions commence on proclamation (whether or not a specific date or specific period after royal assent for commencement has also been included), an explanation for choosing that commencement must be included in the notes on clauses in the explanatory memorandum (see paragraph 7.15A).

7.15A Where a bill or provisions of a bill commence on a date to be proclaimed, the notes on the commencement clause should set out the reasons why commencement on proclamation is necessary and why a specific date could not be chosen. The notes on the commencement clause should also note the time at which the Act will commence, or will be deemed to be repealed, if it has not earlier been proclaimed. Where an unusually long period of time for that commencement has been included (for example - longer than 6 months after royal assent), an explanation should be included of why this period has been chosen.



SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWELFTH REPORT

OF

1990

~~17~~ DECEMBER 1990

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF

1990

19 DECEMBER 1990

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)
Senator A. Vanstone (Deputy Chairman)
Senator V. Bourne
Senator R. Crowley
Senator I. Macdonald
Senator N. Sherry

TERMS OF REFERENCE

Extract

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT OF 1990

The Committee has the honour to present its Twelfth Report of 1990 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 24:

Commonwealth Banks Restructuring Bill 1990

COMMONWEALTH BANKS RESTRUCTURING BILL 1990

This Bill was introduced into the House of Representatives on 8 November 1990 by the Treasurer.

The Bill proposes to:

- provide for the Commonwealth Bank to acquire the rights, property, staff and liabilities of the State Bank of Victoria;

- restructure the statutory entities in the Bank's group and convert it to a public company; and

- establish special restrictions on foreign subscriptions to the Bank's first issue of shares to the public.

The Committee dealt with the Bill in Alert Digest No. 10 of 1990, in which it commented on various clauses of the Bill. The Treasurer responded to those comments in a letter dated 12 December 1990. Though the Committee notes that the Bill passed the Senate, with amendments, on 18 December 1990, a copy of the Treasurer's letter is attached to this report for the information of Senators. Relevant parts of the response are also discussed below.

Delayed commencement/commencement by Proclamation Subclauses 2(2) and (3)

In Alert Digest No. 10, the Committee noted that, pursuant to subclause 2(1), clauses 1 - 6 of the Bill are to commence on Royal Assent. The remaining provisions of the Bill all commence at some later date.

The Committee noted that subclause 2(2) provides that the amendments proposed by paragraphs 48(b) and (c) are to commence when the first guidelines issued pursuant to section 6 of the Superannuation Benefits (Supervisory Mechanisms) Act 1990 come into force. The effect of these paragraphs is to remove references to approval by the Minister for Finance in the amendments to section 110 of the Commonwealth Banks Act 1959 which are proposed by paragraph 48(a), presumably on the basis that when these `Supervisory Mechanisms Guidelines' are in force, such approval will no longer be necessary.

There is no limit on the time within which this proposed amendment will come into force, as there appears to be no requirement for the Supervisory Mechanisms Guidelines to be issued within a certain time. The Committee observed that, in the absence of any explanation, this would appear to be contrary to the intentions of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. Accordingly, the Committee indicated that it would appreciate some guidance from the Treasurer as to when the Supervisory Mechanisms Guidelines were likely to be promulgated.

The Treasurer has responded as follows:

> This is a straightforward matter, requiring only executive action by the Minister for Finance or under delegation by his department. It can be done as soon as the clauses of this Bill commence which will convert the Commonwealth Bank into a company. I currently expect that conversion to take place by March 1991.

The Committee thanks the Treasurer for this response and notes the Treasurer's expectation regarding the conversion. The Committee would, however, prefer that this was reflected in either the Bill or the explanatory material accompanying the Bill.

The Committee also noted that subclause 2(3) of the Bill provides that the remaining provisions of the Bill are to commence 'on a day, or at a time, fixed by Proclamation'. Drafting Instruction No. 2 of 1989 states that, as a general rule, a restriction should be placed on the time within which such Proclamations can be made. The Drafting Instruction suggests that either a date or a fixed period after Royal Assent should be used. If a period after Royal Assent is nominated, this should preferably not be in excess of 6 months. In the absence of such a restriction, an explanation should be given in the Explanatory Memorandum.

The Committee observed that, in the present case, the Explanatory Memorandum states that the provision for commencement by Proclamation

> is so that [commencement] can be made to coincide with other events, in particular the settlement of the agreement for the succession of the Commonwealth Bank to [the State Bank of Victoria].

While this explanation appears perfectly reasonable, the Committee indicated that it was unaware of the other 'events' to which the Explanatory Memorandum refers and the parts of the Bill to which they relate. Accordingly, the Committee sought some further information from the Treasurer on these events and their relevance to the Bill.

The Treasurer has provided the following information:

> As the Committee has noted, a set of the Bill's clauses is intended to commence at the time of the succession of the Commonwealth Bank to the State Bank of Victoria. That time will be determined through the terms of ... the contract between the Victorian Government and the Commonwealth Bank for the sale of the State Bank of Victoria.

> Almost all the other clauses of the Bill, effecting the Bank's conversion to a company or consequent on that conversion, are intended to commence around a later time - the 'conversion time' mentioned on pages 3 and 9 of the Bill - which has not yet been determined. The main factors governing the choice of a conversion time are legal or administrative matters within the Commonwealth Bank. As noted above, I currently expect the conversion time to be by March 1991.

The Treasurer goes on to note:

> One sub-clause only, 53(1) removing the Commonwealth Bank's exemption from State or Territory taxes and charges, is intended to commence after a substantial delay. The reason for that, as noted in the explanatory memorandum, is its relation to a proposed set of amendments to the Banking Act 1959 which has yet to be brought into the Parliament.

The Committee thanks the Treasurer for this response.

Reversal of the onus of proof/strict liability provision
Clause 22

The Committee noted that clause 22 of the Bill proposes to insert 2 new divisions into the Commonwealth Banks Act 1959, dealing with the conversion of the Commonwealth Bank into a public company and restrictions on the issue of shares in the Commonwealth Bank, respectively. In the latter division, proposed new section 27K would prohibit foreign persons from applying for the issue of shares in the Bank. The Committee observed that, pursuant to proposed subsection 27K(5), it would be an offence for a foreign person to apply, punishable on conviction by a fine not exceeding $50,000.

Proposed subsection 27K(8) provides that in proceedings for an offence against subsection (5)

> it is a defence if the defendant proves that, at all relevant times, the defendant was not aware, and could not have been reasonably expected to be aware, of a fact the existence of which was necessary to constitute the offence.

The Committee noted that, though this subclause effectively reverses the onus of proof, it could be argued that the facts necessary to prove the defence are peculiarly within the knowledge of the defendant. However, the Committee also noted that subclause (9) goes on to provide:

> For the purposes of subsection (8), a person is to be conclusively presumed to have been aware at a particular time of a fact of which a servant or agent of the person (being a servant or agent having duties or acting on behalf of the master or principal in relation to any matter relevant to this section) was aware at that time.

The Committee observed that the practical effect of this 'conclusive presumption' is to hold a person strictly liable in relation to facts known by their servants and agents which are constituent elements of an offence against the proposed section. The Committee drew Senators' attention to the provision as possibly trespassing unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

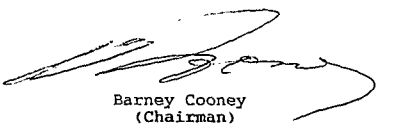
The Treasurer has provided the following response:

> Proposed subsection 17K(8) is based on the legal principle that inadvertence to a material fact would not normally provide a defence. The effect of the subsection is therefore to alter what would normally be the onus of proof **in favour** of a person accused of an offence under this section and able to prove inadvertence.

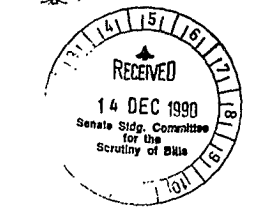
The Treasurer goes on to say:

> The effect of proposed subsection 27K(9) is to limit only in one respect what would otherwise be the effect of proposed subsection (8), by preventing a person from being able to use a servant or agent in order to establish a defence of inadvertence. Accordingly, the two subclauses taken together still represent an alteration of the normal onus of proof in favour of, and not against, an accused person in the circumstances to which they apply.

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



Barney Cooney
(Chairman)



TREASURER
PARLIAMENT HOUSE
CANBERRA 2600

12 DEC 1990

Senator B. Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House, Canberra

Dear Senator

COMMONWEALTH BANKS RESTRUCTURING BILL 1990

I am writing in reply to the comments about this Bill which you included in the 'Scrutiny of Bills Alert Digest No. 10' of 14 November 1990.

Commencement Times

(a) The Committee requested guidance as to the likely time of promulgation of the Supervisory Mechanisms guidelines referred to in subclause 2(2).

This is a straightforward matter, requiring only executive action by the Minister for Finance or under delegation by his department. It can be done as soon as the clauses of this Bill commence which will convert the Commonwealth Bank into a company. I currently expect that conversion to take place by March 1991.

(b) The Committee requested further information about the events with which the commencement of the Bill's provisions is to be related.

As the Committee has noted, a set of the Bill's clauses is intended to commence at the time of the succession of the Commonwealth Bank to the State Bank of Victoria. That time will be determined through the terms of in the contract between the Victorian Government and the Commonwealth Bank for the sale of the State Bank of Victoria.

Almost all the other clauses of the Bill, effecting the Bank's conversion to a company or consequent on that conversion, are intended to commence around a later time - the "conversion time" mentioned on pages 3 and 9 of the Bill

- which has not yet been determined. The main factors governing the choice of a conversion time are legal or administrative matters within the Commonwealth Bank. As noted above, I currently expect the conversion time to be by March 1991.

One sub-clause only, 53(1) removing the Commonwealth Bank's exemption from State or Territory taxes and charges, is intended to commence after a substantial delay. The reason for that, as noted in the explanatory memorandum, is its relation to a proposed set of amendments to the Banking Act 1959 which has yet to be brought into the Parliament.

Clause 22 - Defence of Inadvertence

The Committee has commented that proposed subsections 27K(8) and (9) effectively reverse the onus of proof and trespass unduly on personal rights and liberties.

Proposed subsection 27K(8) is based on the legal principle that inadvertence to a material fact would not normally provide a defence. The effect of the subsection is therefore to alter what would normally be the onus of proof **in favour** of a person accused of an offence under this section and able to prove inadvertence.

The effect of proposed subsection 27K(9) is to limit only in one respect what would otherwise be the effect of proposed subsection (8), by preventing a person from being able to use a servant or agent in order to establish a defence of inadvertence. Accordingly, the two subclauses taken together still represent an alteration of the the normal onus of proof in favour of, and not against, an accused person in the circumstances to which they apply.

Yours sincerely

P.J. KEATING